

Assessment on the prosecutability of amended returns submitted with reservation on the request of the administration in the light of judicial decisions

I. Introduction

In cases where a tax return submitted within the legal term is incomplete and / or inaccurate, the new return to be submitted for correcting those errors and / or deficiencies within the legal period or following its expiry, is called the “amended return”.

In the circumstances that an ex officio assessment by the Administration is required as per the paragraph (2) within Article 30 of the Tax Procedures Law no.213, it is indicated that the taxpayers are required to correct their statements in accordance with the request of the Administration.

Taxpayers are submitting their amended returns through imposing a reservation over it if they do not have the same opinion with the Administration and to reserve their rights for filing a lawsuit concerning the tax base or part of it that they declared with a reservation.

State Council's recent practices contained provision indicating that the reservation could be imposed on the amended returns that are submitted within the periods permitted in tax laws otherwise taxes accrued with a reservation on amended returns submitted after the legal term cannot be a subject for an administrative proceeding on the grounds that the reservation has no impact on the accrual.

However, through the Constitutional Court (AYM) decision dated 27.02.2019 no.2015/15100 published in the Official Gazette dated 3 April 2019 no.30734, that the property right has been violated since the cases filed against tax assessments and penalties conducted over the amended returns submitted after the legal term with a reservation as demanded by the Administration are rejected without investigating the merits of the cases.

II. Filing lawsuit against assessment based on declaration

Taxpayers have the opportunity to resort to the jurisdiction for the taxes imposed on themselves upon the tax returns submitted by them with a reservation while making declarations on subjects legally open to comment or on controversial matters. Thus, the taxpayer both makes declaration in line with the Administration's opinion and commentary and also has got the opportunity of presenting that disagreed opinion and commentary to judicial review.

The tax laws do not contain any definition on reservation imposed upon amended returns. The definition on it indicated in paragraph (3) of Article 39 within the Tax Office Operating Instructions is as follows: *“The note on a tax return regarding their rights for filing a lawsuit concerning the tax base or part of it that they declared shall be preserved is called reservation”*. The aforementioned Instruction's paragraph (4) within Article 46 contains a wording as *“The accrual will be finalised if any lawsuit is not filed for the taxes accrued*

upon returns submitted with a reservation. The lawsuits filed concerning the transactions handled for the tax returns submitted with reservation will not be ending collection”.

Also the paragraph (4) within Article 27 of the Administrative Jurisdiction Procedures Law (İYUK) says that, “...the lawsuits filed concerning the transactions handled for the tax returns submitted with reservation will not be ending collection. Suspension of the execution may be demanded concerning them”.

III. Practice concerning the implementation of reservation upon amended tax returns

In practice, the taxpayers meet their formal liabilities even they are of the opinion that they shouldn't be taxed so as not to experience controversy with the tax office later but to preserve their right for filing a lawsuit and they submit their returns with a reservation upon it.

It's seen that the submission of amended returns after the legal term mostly results from the Administration's demand in that way and it is observed that the judicial authorities made different decisions in cases against tax and penalties imposed upon the returns.

However, through the AYM decision dated 27.02.2019 no.2015/15100 published in the Official Gazette dated 3 April 2019 no.30734 which is the topic of this article as well; it was unanimously decided that the allegations that the property right guaranteed under Article 35 of the Constitution has been violated and a retrial will be made by the relevant Tax Court to eliminate the consequences of the violation on the grounds that:

- *As long as there is no legal dispute, there should be no error in the taxpayer's own declaration as a matter of course,*
- *However, in some cases, taxpayers may be in doubt about whether their income is taxable due to exceptions and exemptions, even if the taxpayers themselves are the best to calculate their tax base,*
- *In this respect, the taxpayers are given the right to file a lawsuit on the controversial matters through putting reservations on tax returns submitted by them,*
- ***Otherwise, the owner of the right for property will be given an excessive burden since an effective objection allowing to claim that the interference with the right to property is arbitrary and illegitimate was not granted,***
- *So as not to cause any violation of the law against taxpayers and to make some of the elements of the law legally negotiable, the instrument of reservations is firstly developed through judicial practices and then has been subject to legal arrangement, an exception to the rule indicating that assessment based on that kind of declaration (calculation of the tax and making the taxpayer indebted) cannot be a subject of a lawsuit has been introduced.*
- *Submission of amended returns are based on the Administration's demand,*
- *In accordance with the second paragraph of Article 30 of the Law no.213, without resorting to the way of an ex officio assessment, requesting from the applicants that they should correct their declarations by picking out these deduction items on the grounds that certain deduction items existing in VAT returns did not refer to actual deliveries or service execution,*
- *On the other side, the situation of applicants intending to file a lawsuit by imposing a reservation upon the amended returns submitted after the expiration of legal*

term is different than the taxpayers intending to file lawsuit upon a tax return submitted upon penitence after the legal term,

- *In this context, the intention of a taxpayer imposing a reservation upon the amended tax return submitted after legal term to file a lawsuit without showing a will to benefit from provisions of penitence should be legally protected,*
- *Due to lack of procedural safeguards proposed by property right, the interference puts a heavy burden on the applicants, the fair balance between the protection of those rights and the requirement of a public benefit for interference has deteriorated against applicants,*
- *The interference with the property rights of the applicants was immoderate.*

IV. Conclusion

The Council of State did not have any stable practice on this matter until the AYM decision dated 27.02.2019 no.2015/15100 indicating that the property right has been violated since the cases filed against tax assessments and penalties conducted over the amended returns with a reservation are rejected without investigating the merits of the cases.

Various decisions that imposing a reservation upon the amended return submitted after the end of legal term would not give the right to file a lawsuit were causing the violation of the right of the taxpayers to access the court and the administrative proceedings carried out in accordance with the aforementioned tax returns led to the lack of legal control.

Regarding the similar controversies, the relevant AYM decision will be in the nature of a precedent in terms of the tax courts' deciding upon the outcomes of investigations instead of rejecting the lawsuits filed by the taxpayers without examining. A contrary understanding may result in with the violation of the property right of the taxpayer guaranteed by the Constitution.

The protection of property rights stands as one of the State's positive obligations and when the State Council's various practices and the relevant AYM decision are evaluated together, there is no legal obstacle in filing a lawsuit against the process handled upon the concerning tax returns submitted with a reservation since the amended return submitted after legal term with the request of the Administration does not reflect the taxpayers' free will.

Thus, resolving this uncertainty which may lead to unfair treatment in practice through legal arrangement will be more useful in terms of preventing disputes instead of leaving them to the judicial practices.

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