

Discussion in terms of interest rate to be applied for the refund of taxes collected excessively or improperly: What does statutory interest refer to?

I. Introduction

In our tax law, excessive or improperly paid taxes are refunded with interest. However, in this practice, which can be considered relatively new, there are discussions about the rate to be used for such process while calculating interest on the amount to be refunded.

The decision, numbered E. 2021/1 and K. 2021/3, of General Assembly of Tax Chambers (GATC) of Counsel of State has been published on Official Gazette dated September 9, 2021. The aforementioned GATC decision is regarding the request to eliminate the contradiction between the decisions of the regional administrative court regarding the interest rate to be applied in the refund of the excessive or improperly collected tax. The contradiction subjected to the decision is between 2nd and 3rd Tax Chambers of Istanbul Regional Administrative Court: While 2nd Judicial Chamber decides to refund with statutory interest, 3rd Judicial Chamber rules that statutory interest shall be understood as deferment interest rate.

II. A brief summary of process regarding interest in terms of refund of excessive or improper tax within Turkish tax legislation

While it is foreseen to compensate the loss arisen due to the late accrual of the tax with the delay interest stipulated in Article 112 of the Tax Procedure Law No. 213, no interest calculation had been made in the refund of the taxes paid by the taxpayers excessively or improperly on the grounds that there was no clear regulation requiring the calculation of interest. Today, this approach has been completely abandoned.

First of all, it should be stated that as a result of the rule of law principle and as it is clearly stated in Article 125 of the Constitution, "The administration is obliged to pay the damage arising from its own actions and transactions." Therefore, there is no need for any regulation other than the aforementioned provision of the Constitution in order to calculate interest in the refund of the improperly collected tax. Indeed, there are various decisions of the Council of State in this direction.

Moreover, with the provision added as the fourth paragraph to Article 112 of the TPL with the Law No. 4369 and entered into force on 01.01.1999, the clear regulation on the subject has been introduced to our tax legislation. In the legislative intention of the aforementioned regulation, it has been revealed that calculating interest for the tax that should be refunded is a taxpayer's right and that the relevant regulation is aimed at not causing any other damage to the taxpayer in terms of inflation.

The abovementioned regulation has been annulled by the decision of Constitutional Court, dated 10.02.2011 and numbered E: 2008/58 and K: 2011/37, due to constituting a contradiction with constitution. In the aforementioned decision, there are explanations that the tax has become a debt owed to the taxpayers with the excessive or improper tax payment, the taxpayer has been unfairly deprived of the relevant amount until the refund, there is no legitimate reason for the late payment of the interest until 3 months after the application, and this situation does not comply with the right to property.

The regulation, which was annulled by the aforementioned decision of the Constitutional Court, was rearranged with the 14th article of the Law No. 6322, which was subsequently published in the Official Gazette dated 30.06.2012. In the legislative intention of the regulation, it is emphasized that after the reasoning of the relevant decision of the Constitutional Court is mentioned, the interest calculation will be started from the collection date with the regulation.

As summarized above, in our tax law, the refund of excess or improper taxes with interest was first accepted by case law and later regulated at the law level. Various differences have emerged in the practice of this relatively new concept. Here, the interest rate to be taken into account in the calculation of the interest in terms of the taxes to be refunded is one of the issues where application differences are frequently encountered.

III. Judicial approach regarding interest rate in terms of refund of excessive or improper tax

As explained above, there have been differences in practice regarding the rate of interest in the refund of excess or improper tax and it is possible to evaluate these differences as two approaches in particular.

The first approach is that the interest in the refund of the excess or improper tax arises from the general compensatory liability of the administration, therefore, interest should be calculated in order to eliminate the loss arising from the money deprived in this framework, and this interest will be calculated as statutory interest. In other words, the compensation of the taxpayer who is deprived of the relevant amount due to excessive or improper tax collection according to this approach is only possible by calculating an interest at the legal interest rate according to the Law No. 3095 on Statutory Interest and Default Interest.

According to the other approach, the only interest that can be taken into account in the refund of the excess or improper tax in terms of the clear provision of Article 112 of the TPL is the deferment interest regulated by the Law No. 6183 on the Collection Procedure of Public Receivables. This approach is essentially a continuation of the approach that claiming interest is only possible in the presence of a law or contractual provision. In this context, while the deferment interest is indicated in the fourth paragraph of Article 112 of the TPL, which constitutes the legal basis, the tax refunds should be processed according to this interest.

It should be stated that decisions in accordance with two approaches could be observed in tax jurisdiction. On the other hand, it is understood that there is a tendency to decide on deferment interest for disputes after 15.06.2012, which is the effective date of the fourth paragraph of Article 112 of the TPL, as the details will be given below.

IV. In lieu of conclusion: Up-to-date decision of GATC

Approach of Council of State related to interest rate discussion towards interest rate to be applied for the refund of excessive and improper tax has been clearly explained within the decision of GATC, numbered E.2021/1 and K/2021/3, which were published on Official Gazette dated September 9, 2021. The grounds of the decision can be summarized as follows:

- There is a general provision – special provision relationship between Article 1 of the Law No. 3095 on Statutory Interest and Default Interest and the fourth paragraph of Article 112 of the TPL.
- Therefore, in the refund of taxes collected before the effective date of the fourth paragraph of Article 112 of the TPL, which is 15.06.2012, statutory interest will be applied in accordance with the general provision, since there is no special provision.
- On the other hand, in the refund of taxes collected after 15.06.2012, a deferment interest rate should be applied in accordance with the special provision.

As it can be seen, the Council of State did not hesitate to decide whether interest will be calculated in the refund of the excessive or improperly paid tax and it has decided that the tax to be refunded will be refunded with interest in accordance with the relevant decisions of the European Court of Human Rights and the Constitutional Court. However, while determining the interest rate to be applied in the aforementioned decision, the effective date of the current version of the fourth paragraph of Article 112 of the TPL has been taken as a basis. In this context, the interest rate on the refund of the excessive or improper tax will be determined according to whether the tax in question was collected before 15.06.2012 or not: If the collection is made before the said date, it will be refunded with statutory interest and deferment interest will be applied to the refund of taxes collected after the said date.

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