

## Is additional tax compliant with the Constitution?

“Additional tax” (also known as “earthquake tax”) has been created in order to generate required sources to eliminate the impact of earthquake and development of the region covering Kahramanmaraş and nearby provinces according to Law numbered 7440 entered into force through being published on Official Gazette dated March 12, 2023.

A portion of entities subject to corporate tax has been covered by the additional tax liability according to above regulation. Additional tax has been legalized with two different rates as follows depending upon being “domestic” and “foreign” based on “deductions and exemptions in corporate tax and other laws” demonstrated on 2022 Corporate Tax return.

### a. Domestic source exemptions and deductions:

- 10% without being associated with income of the period based on amounts subject to Reduced Corporate Tax and exemption and deduction amounts subject to deduction from corporate income on corporate tax return,
- 5% based on exempted income (including participation shares)

### b. Foreign source exemptions and deductions:

Pursuant to subparagraph (b) of paragraph one of article 5 of the Corporate Tax Law, 5% based on exempted income which are certified to have at least 15% of tax burden and gained from overseas.

## Additional tax and contradiction to Constitution claims

Existence of certain exemptions and deductions under Corporate Tax Law (such as participation income exemption, emission premium exemption) in scope of “additional tax” has been criticized in terms of tax technique and some of the taxpayers declared their respective corporate tax returns for 2022 with mental reservation and filed lawsuits on tax courts subsequently. Court of first instance, which deemed such contradiction to constitution claim considerable for the lawsuit filed by a taxpayer making corporate tax declaration with reservation for avoiding additional tax accrued and forwarded additional tax regulation to Constitutional Court. Constitutional Court has rejected the claim through finding the regulation in question appropriate according to article 2,3, 13, 35 and 73 of the Constitution on March 14, 2024. Decision numbered 2024/82 of Constitutional Court has been published on Official Gazette dated March 19, 2023.

## What are the justifications for such claim?

The justification for the application made to Constitutional Court is explained as follows in the petition for lawsuit: “The additional tax envisaged by the contested rule covers some of the taxpayers of the corporate tax, and the rule regarding the additional tax violates the principle of generality and equality in taxation by covering some taxpayers without taking into account all exemption and deduction elements, taxation directly based on exemptions and deductions in the declaration is contrary to the principle of taxation according to financial strength, even if the taxpayers who will be subject to additional tax are not registered taxpayers in the provinces where the earthquake occurred, some or all of their activities are not considered to

be in these regions, the rule creating an additional tax comes into force on a date after the event giving rise to the tax and is retroactive.”

### **What is the meaning of this decision?**

The impact of decision of Constitutional Court shall be negative in terms of on-going lawsuits on tax courts (including “participation income exemption and emission premium exemption”). However, the situation is especially different in terms of “participation income exemption and emission premium exemption”. In essence, participation income and emission premium is not “deduction and exemption”.

Participation income exemption is for avoiding duplicate taxation o double taxation for income which has already been subject to corporate tax. Emission premium, on the other hand, is a legal reserve and in nature of capital according to both Turkish Code of Commerce and Turkish Accounting Standards. Emission premium is not subject to taxation since it is not an income but a component of capital.

In the light of above explanations, we are of the opinion that it is a breach of “right of ownership” to apply additional tax for participation income and emission premium.

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