



**REPUBLIC OF TURKEY
CONSTITUTIONAL COURT**

FIRST SECTION

DECISION

Application Number: 2013/5660

Date of Decision: 20/3/2014

FIRST SECTION

DECISION

President	: Serruh KALELİ
Members	: Burhan ÜSTÜN Nuri NECİPOĞLU Hicabi DURSUN Erdal TERCAN
Rapporteur	: Abdullah TEKBAŞ
Applicant	: Selçuk EMİROĞLU
Counsel	: Att. Öztürk TÜRKOĞAN

I. SUBJECT OF APPLICATION

1. The applicant asserted that the right to property and the right to an effective legal remedy were violated by stating that income tax was deducted more than necessary from his wage income between the years of 2006 and 2009 during which he worked as a wage earner.

II. APPLICATION PROCESS

2. The application was directly lodged to the Constitutional Court on 30/7/2013. The deficiencies detected as a result of the preliminary administrative examination of the petition and its annexes were made to be completed and it was determined that no deficiency preventing their submission to the Commission existed.

3. It was decided by the Second Commission of the First Section that the examination of admissibility be conducted by the Section and the file be sent to the Section as it was deemed necessary that a Section decision be delivered by the Section in order for the application to be concluded.

III. FACTS AND CASES

A. Facts

4. As expressed in the application form and the annexes thereof, the relevant facts are summarized as follows:

5. With an amendment made in the Income Tax Code dated 30/3/2006 and numbered 5479, the Code on the Collection Procedure of Public Receivables, the

Special Consumption Tax Code and article 1 of the Code on the Amendment of the Tax Procedure Code and article 103 of the Income Tax Code dated 31/12/1960 and numbered 193, the application of a different tax tariff for wage revenues and in favor of wage revenues in terms of other revenues was abandoned and the application of subjecting all revenues to the same tariff was implemented as of 1/1/2006 and it was stated in subparagraph (1) of paragraph one of article 15 of the Code that this amended provision would enter into force as of 1/1/2006.

6. Upon an application filed for the partial annulment of article 103 of the Code numbered 193, the Constitutional Court decided through its decision dated 15/10/2009 and numbered M.2006/95, D.2009/144 that the phrase "... *the excess amount at a rate of 35% ...*" that came after the expression "... 9190 YTL for 40.000 YTL of the amount exceeding 40.000 YTL ..." stipulated in article 103 of the Code numbered 193 was contrary to the Constitution and be annulled, that the annulled provision enter into force 6 months after the publication of the decision in the Official Gazette. The decision was published in the Official Gazette on 8/1/2010.

7. Upon this decision, the Grand National Assembly of Turkey (GNAT) ratified a different tariff in favor of wage revenues by amending article 3 of the Code on the Amendment of the Income Tax Code dated 23/7/2010 and numbered 6009 and Some Codes and Some Decrees in the Force of Code and article 103 of the Code numbered 193, it was stated in subparagraph (b) of paragraph one of article 62 of the Code that this amended provision would enter into force as of the date of 1/1/2010.

8. The applicant who worked as a wage earner during this process, upon these developments, requested for the return of the income tax which was excessively deducted from his wage between the years of 2007 and 2009 through the performance of a correction action by filing a petition of error correction to the Presidency of BüyükMükellefler Tax Office of Istanbul on 30/12/2011.

9. The applicant applied to the Ministry of Finance with his complaint petition dated 22/2/2012 upon the implicit dismissal of his petition without a response being provided within due time, this application was also implicitly dismissed without a response being provided within due time.

10. The case that the applicant filed against the decision of implicit dismissal was dismissed in the decision of the 4th Tax Court of Istanbul dated 22/10/2012 and numbered M.2012/1141, D.2012/2734 on the grounds that there needed to be a tax error of the type defined in the Tax Procedure Code in order to resort to the remedy of correction and complaint, that the dispute occurred as a problem which required the evaluation and examination of material incidents other than the tax error and required interpretation, that the claims as regards the case had a quality of being examined in a case to be filed before the tax court [within due time] upon the payment through which [the taxpayer] found out the performed deduction.

11. This decision which was appealed by the applicant was approved through the decision of the 4th Chamber of the Supreme Court of Appeals dated 11/4/2013 and numbered M.2013/822, D.2013/2265:

12. This decision was notified to the applicant on 8/7/2013.

B. Relevant Law

13. Paragraphs two and four of article 153 of the Constitution are as follows:

"...

A code, decree in the power of law and the Standing Orders of the Grand National Assembly of Turkey or their provisions cease to have effect on the date the decision on their annulment is published in the Official Gazette. When necessary, the Constitutional Court may separately decide about the date when the judgment of annulment will take effect. This date cannot be later than one year from the day the decision is published in the Official Gazette.

...

Decisions of annulment cannot be retrospective."

14. Article 103 of the Code numbered 193 which was in force until the date of 31/12/2005 is as follows:

"Revenues subject to income tax shall be taxed;

at a rate of 20% up to 5,000,000,000 liras

at 1,000,000,000 liras for 5,000,000,000 liras of 12,000,000,000 liras, the excess amount shall be taxed at a rate of 25%

at 2,750,000,000 liras for 12,000,000,000 liras of 24,000,000,000 liras, the excess amount shall be taxed at a rate of 30%

at 6,350,000,000 liras for 24,000,000,000 liras of 60,000,000,000 liras, the excess amount shall be taxed at a rate of 35%

at 18,950,000,000 liras for 60,000,000,000 liras of 120,000,000,000 liras, the excess amount shall be taxed at a rate of 40%

at 42,950,000,000 liras for the amount exceeding 120,000,000,000 liras of 120,000,000,000 liras, the excess amount shall be taxed at a rate of 45%.

In the taxation of wage revenues, the tax rates stipulated in the above tariff shall be applied by reducing five points.

15. Article 103 of the Code numbered 193 which was amended by article 1 of the Code numbered 5479 and was in force between the dates of 1/1/2006 and 31/12/2009 is as follows:

"Revenues subject to income tax shall be taxed;

at a rate of 15% up to 7,000 YTL,

at 1,050 YTL for 7,000 YTL of 18,000 YTL, the excess amount shall be taxed at a rate of 20%

at 3,250 YTL for 18,000 YTL of 40,000 YTL, the excess amount shall be taxed at a rate of 27%

at 9,190 YTL for 40,000 YTL of the amount exceeding 40,000 YTL, the excess amount shall be taxed at a rate of 35%.

16. Article 103 of the Code numbered 193 which was amended by article 3 of the Code numbered 6009 and entered into force as of 1/1/2010 and is still in force is as follows:

"Revenues subject to income tax shall be taxed

at a rate of 15% up to 8,800 TL

at 1,320 TL for 8,800 TL of 22,000 TL, the excess amount shall be taxed at a rate of 20%

at 3,960 TL for 22,000 TL of 50,000 TL (for wage revenues, 3.960 TL for 22.000 TL of 76.200 TL), the excess amount shall be taxed at a rate of 27%

at 11,520 TL for 50,000 TL of the amount exceeding 50,000 TL (for wage revenues, 18.594 TL for 76.200 TL of the amount exceeding 76.200 TL), the excess amount shall be taxed at a rate of 35%."

IV. EXAMINATION AND JUSTIFICATION

17. The individual application of the applicant dated 30/7/2013 and numbered 2012/5660 was examined during the session held by the court on 20/3/2014 and the following were ordered and adjudged:

A. Claims of the applicant

18. The applicant asserted that the principle of the state of law stipulated in article 2, the freedom to claim rights defined in article 36, the obligation of the state to indicate remedies against its actions and their periods stipulated in article 40, the principle as to the effect that the tax burden should be fair as stipulated in article 73 and the right to property defined in article 35 of the Constitution were violated in terms of his claims as to the effect that he could not achieve the tax return receivable although he was entitled to it by stating that he worked as a wage earner between the years of 2006 and 2009, that while a different tariff was previously applied in the taxation of wage revenues and other revenues in the application of income tax, the same tariff was implemented as of the date of 1/1/2006, that it became evident that excessive tax had been collected from him due to the fact that the same tariff application was found to be contrary to the Constitution by the Constitutional Court and the highest rate of the tariff was annulled in terms of the taxation of wage revenues in 2009, that upon this he resorted to the remedy of error correction - complaint which was the only way for the return of the tax which was excessively collected, that the case he filed upon the decisions of implicit dismissal without a response being provided was dismissed, that he could not achieve the tax return receivable arising out of the tax he paid excessively due to the fact that an

effective remedy was not indicated for him by either administrative or judicial bodies, requested that the contrariety with the Constitution and the European Convention on Human Rights (ECHR) in the court decisions be determined, that the amount that he calculated as the tax receivable be paid together with its interest, that moral compensation and trial expenses be adjudged.

B. Evaluation

19. Although it is seen from the examination of the application form that the applicant claims that excessive tax was collected from his wage revenue between the years of 2006 and 2009, it is understood that it created a dispute in other remedies in terms of the years of 2007 to 2009. However, as it is understood that it will not be effective on the conclusions drawn, no separate evaluation will be carried out in terms of the year of 2006.

20. Moreover, although the applicant claimed in the application form that articles 2, 35, 36, 40 and 73 of the Constitution were violated, the Constitutional Court is not bound by the legal qualification of the facts made by the applicant (App. No: 2013/1586, 18/9/2013, § 17). The essence of the claims of the applicant as regards the administrative application and the trial process has a quality of a claim of the violation of the right to an effective legal remedy. The essence of his claims as to the effect that he could not achieve the tax return receivable has a quality of a claim of the violation of the right to property although it is not explicitly stated and the application has been examined in terms of these two rights.

1. In Terms of the Right to Property

21. Paragraph three of article 148 of the Constitution is as follows:

"Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public force."

22. Paragraph (1) of article 45 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/3/2011 and numbered 6216 with the side heading of "*Individual application right*" is as follows:

"(1) Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto, to which Turkey is a party, which are guaranteed by the Constitution has been violated by public force."

23. In accordance with the specified provisions, in order for a claim of the violation of a constitutional right to be under the venue of the Constitutional Court in terms of subject, it is necessary that the right relied upon by the applicant be one of the fundamental rights and freedoms secured in the Constitution and be covered by the European Convention on Human Rights and its additional protocols to which Turkey is a party and that the applicant have an interest which is worth protecting as covered by the right that is taken as the basis for the claim of violation (App. No: 2013/3351, 18/9/2013, § 31).

24. Article 35 of the Constitution is as follows:

"Everyone has the right to property and inheritance.

These rights may be restricted by law only for the purposes of public interest.

The exercise of the right to property cannot be contrary to public interest."

25. An applicant who asserts that the right to property covered by article 35 of the Constitution has been violated has to prove that such a right exists (App. No: 2013/382, 16/4/2013, § 26). For this reason, it is primarily necessary to evaluate the issue of whether the applicant has an interest within the scope of the right to property that needs to be protected in accordance with article 35 of the Constitution or not.

26. In order for a claim of the violation of the right to property to be put forth in the remedy of individual application, an intervention which will result in the violation of "*a possessed property*" which is the subject of property needs to be present (For the decisions of the European Court of Human Rights (ECtHR) in the same vein, see *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom*, App. No: 44302/02, 30/8/2007, § 61; *Von Maltzan and Others v. Germany* (s.d.), App. No: 71916/01, 71917/01, 10260/02, 2/3/2005, § 74(c); *Kopecký v. Slovakia*, App. No: 44/912/98, 28/9/2004, § 35(c)).

27. The concept of the possessed is handled and evaluated as an autonomous concept in terms of the regulations in the ECHR and the Constitution. Therefore, the evaluations on this subject are evaluated by both the ECtHR and the Constitutional Court independently from the legislation (For the decisions of the ECtHR in the same vein, see *Depalle v. France*, App. No: 34044/02, 29/3/2010, § 62; *Anheuser-Busch Inc. v. Portugal*, App. No: 73049/01, 11/1/2007, § 63; *Öneryıldız v. Turkey*, App. No: 48939/99, 30/11/2004, § 124; *Beyeler v. Italy*, App. No: 33202/96, 5/1/2000, § 100).

28. As the thing which is possessed within the scope of the right to property can be "*an existing thing*", so can it be "*values pertinent to assets*". In this context, claims will also be evaluated within the scope of the right to property. However, in order for claims to be protected within the scope of the right to property, they need to "*be made to be enforceable at a sufficient degree*" through an action such as a court judgment, arbitrator decision or administrative decision (For the decisions of the ECtHR in the same vein, see *Burdov v. Russia*, App. No: 59498/00, 7/5/2002, § 28; *Moskal v. Poland*, App. No: 10373/05, 15/9/2009, § 45) or at least there needs to be "*a legitimate expectation*" in relation to them. A legitimate expectation is not an expectation away from an objective basis and is an expectation based on a legal provision, an established judicial case-law or a legal action related to an interest in kind (For the decisions of the ECtHR in the same

vein, see. *Kopecký v. Slovakia*, App. No: 44/912/98, 28/9/2004, §§ 45-52; *Saghinadze and Others v. Georgia*, App. No: 18768/05, 27/5/2010, § 103).

29. In accordance with the aforementioned Court case-law, an applicant who asserts that the right to property has been violated primarily needs to prove that s/he has such a right, that at least s/he has a legitimate expectation.

30. In the concrete incident, the applicant claimed that the tariff applied on his wage revenues between the years of 2006 and 2009 was revealed to be contrary to the law and that the right to property was violated as excessive tax was collected from him due to the fact that the application of the same tariff in the taxation of wage revenues and other revenues between the years of 2006 and 2009 was found to be contrary to the Constitution by the Constitutional Court and that the phrase "... *the excess amount at a rate of 35% ...*" that came after the expression "... *9190 YTL for 40.000 YTL of the amount exceeding 40.000 YTL ...*" of the tariff was annulled in terms of wage revenues.

31. It is understood that the claims of the applicant are to the effect that the right to property was violated as excessive tax was collected from him, that the amount which was excessively collected needs to be returned, that therefore he has a claim. In this case, in order for a claim of the violation of the right to property to be evaluated, it is primarily necessary to discuss the existence of a claim which can be evaluated within the scope of the right to property.

32. Article 1 of the Code numbered 5479 which amended article 103 of the Code numbered 193 and introduced the application of subjecting wage revenues and other revenues to the same tariff entered into force on 1/1/2006, was annulled by the Constitutional Court on 15/10/2009, the decision of annulment was published in the Official Gazette on 8/1/2010 and entered into force on 8/7/2010. Article 103 of the Code numbered 193 was amended by article 3 of the Code numbered 6009 enacted by the GNAT upon the annulment and a different tariff was implemented in the taxation of wage revenues, the amount of tax base bracket was increased in terms of the fees which were subject to the rate of 35% which was the highest rate. Although the date of entry into force of the decision of annulment of the Constitutional Court is 8/7/2010, the date of entry into force of the regulation introduced by article 3 of the Code numbered 6009 was determined as 1/1/2010 in accordance with "*the principle of taxable income being annual*" and thus, the issue of contrariety with the Constitution was eliminated as of the beginning of the year of 2010.

33. In accordance with paragraph two of article 153 of the Constitution, a legal provision annulled by the Constitutional Court will be abolished on the date on which the decision of annulment is published in the Official Gazette or on a further date, if any, which is determined by the Constitutional Court. In accordance

with paragraph four of the same article, the decisions of annulment of the Constitutional Court cannot be retrospective. Therefore, a legal provision which is annulled by the Constitutional Court will be abolished as of the date on which the decision of annulment enters into force and as the decisions of annulment cannot be retrospective, the actions which are established according to this legal provision will sustain their validity. As a matter of fact, the ECtHR also stated that the decisions of annulment of the Constitutional Court would not establish retrospective rights as per the principle of legal certainty (For the decisions of the ECtHR in the same vein, see. *H.R. v. Germany*, App. No: 17750/91, 30/6/1992; *J.R. v. Germany*, App. No: 22651/93, 18/10/1995; *Mika v. Austria*, App. No: 26560/95, 26/6/1996).

34. In this case, the decision of annulment of the Constitutional Court that the applicant asserted as a basis for his claims as to the effect that excessive tax was collected from him between the years of 2006 and 2009 and that they need to be returned does not have any effect which can create a retrospective claim in the form of a tax return and is not suitable for the creation of a legitimate expectation in this subject either. Therefore, as there is no legal provision or established case-law which will lead the applicant towards a legitimate expectation on the acquisition of the right that he claimed, it is not possible to make the applicant benefit from the protection as regards the right to property regulated in article 35 of the Constitution.

35. Due to the reasons explained, as it is understood that the applicant does not have any interest which is worth protecting as covered by article 35 of the Constitution, it should be decided that this part of the application is inadmissible due to "*lack of venue in terms of subject*" without it being examined in terms of the other conditions of admissibility.

2. In Terms of the Right to an Effective Legal Remedy

36. In order for the right to an effective legal remedy secured in the ECHR and the Constitution to be protected, there needs to be "*an arguable claim*" as to the effect that one of the rights protected within the scope of individual application has been violated (For the decisions of the ECtHR in the same vein, see. *Lithgow and Others v. the United Kingdom*, App. No: 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/8, 8/7/1986, § 205; *Leander v. Sweden*, App. No: 9248/81, 26/3/1987, § 77).

37. In the concrete incident, it is clear that the applicant does not have any interest which can benefit from the protection as regards the right to property (§ 34), that therefore he does not have any arguable claim as regards the right to property was violated. In this case, it is not possible to make the applicant benefit from the protection in relation to the right to an effective legal remedy regulated in article 40 of the Constitution either.

38. Due to the reasons explained, as it is understood that the applicant does not have any arguable claim as to the effect that one of his rights protected within the scope of individual application was violated, it should be decided that this part of the application is inadmissible due to "*lack of venue in terms of subject*" without examining the other conditions of admissibility.

V. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** decided on 20/3/2014 that the claims of the applicant as to the effect that the right to property and the right to an effective legal remedy were **INADMISSIBLE** due to "*lack of venue in terms of subject*", that the trial expenses be charged on the applicant.

President
Serruh KALELİ

Member
Burhan ÜSTÜN

Member
Nuri NECİPOĞLU

Member
Hicabi DURSUN

Member
Erdal TERCAN