Kuzey YMM ve Bağımsız Denetim A.Ş.
Eski Büyükdere Cad.
Orjin Maslak No:27
Maslak, Sarıyer 34398
İstanbul - Turkey

Tel: +90 212 315 3000
Fax: +90 212 234 1067
ey.com
Ticaret Sicil No : 479919
Mersis No: 0-6010-2772-0400010

English translation

Special consumption tax (SCT) no longer refundable

All taxpayers manufacturing goods not in the list no. (I) should receive SCT refund.

The lawmaker first makes an arrangement regarding a matter in the laws and then generally authorizes the relevant Authority to make sub-arrangements regarding certain issues, through an another article in the same law. However, these issues should naturally not go beyond the principles determined under the laws by the lawmaker. It is also stated in the 7th article of the Constitution that legislative power is vested in the Grand National Assembly of Turkey on behalf of Turkish Nation and this power shall not be delegated. Therefore, it is essential that the issues to be arranged by the Authority do not go beyond the will of the lawmaker. This is also one of the fundamentals of being a state of law.

The Tax Authority exercises this given authority to establish general regulatory practices by publishing general communiqués. Actually, it should also be noted at this point that not all communiqués published by the Fiscal Authority can be considered within this framework. The ones we mention here are the application communiqués that constitute a regulatory administrative practice; not the interpretative communiqués (while it is still being argued that interpretative communiqués also constitute regulatory practice in terms of their consequences). In other words, the general communiqués published by the Fiscal Authority based on the authority granted to itself under an article of the law constitute regulatory administrative practices.

Application communiqués are limited by the discretion authority granted by the article of the law on which the communiqué is based. It should be accepted that the authority granted by the article of the law relates to secondary aspects of tax rather than principal aspects and is very limited. This is also a requirement of the principle of legality of taxes.[1] Otherwise, communiqués which change the fundamental aspects of tax or expand the scope although not prescribed in the law would conflict with the article 7 of the Constitution. This situation can be encountered in general communiqués, while similar cases may exist even in circulars, which reflect only the opinions of the Authority. By way of explanation, it is frequently observed that the opinion explained in a circular is taken into consideration as if it is a general regulatory practice.

In respect of this matter, there has been an issue under our consideration for a long time: a circular of the SCT Law. Since we have had the chance to examine different applications of this Law, we have written many articles about certain problematic aspects that we have observed to date. However, this time we will discuss how the Authority has narrowed down the scope of the deferment-cancellation practice described in the article of the law and introduced the tax refund practice in its place, while publishing the circular regarding the issue. Therefore, we have mentioned administrative law in the introduction given above. In our country, the general problem in the area of law is that articles of the laws are overinterpreted based on wording. On the other hand, approaching the articles based on an interpretation taking the purpose of articles into account rather than just based on wording in case of uncertain matters would be beneficial in terms of understanding the ultimate purpose of the lawmaker.

There are many industrialists who use the goods specified in the schedule (B) of the list no. (I) attached to the SCT Law in the manufacturing process. However, the unit tax amount applied for these products is very high; as a matter of fact, it is equal to the tax amount applied for fuel. Given this situation, taxpayers who use the goods in manufacturing of products not included in the list no. (I) in the manufacturing process cannot

[1] Bekir Baykara, Ekim 2001, Vergi Kanunları İle İlgili Genel Tebliğler Ve İç Genelgelerin Hukuki Anlamı ve Değeri, Vergi Dünyası Dergisi

recover this tax through deduction mechanism, consequently bearing the whole tax burden. This situation was also initially foreseen by the lawmaker, who established the deferment-cancellation system in the Law in this regard. Thus, a significant part of the tax would be deferred based on the commitment of taxpayers who used these goods in the manufacturing process of goods not included to the no. (I) list, and then the tax not collected would be cancelled provided that the conditions are fulfilled. In conclusion, industrialists could relieve themselves of this tax burden through dealing with some procedures.

However, according to the view expressed by the Authority in a Circular published in 2006 (circular no. 3), not all taxpayers may benefit from this right and only taxpayers involved in a process that is based on a complex rationale can. However, this restriction entirely conflicts with the purpose of introducing the article of the Law.

Furthermore, the deferment amount was set to zero in the deferment-cancellation practice, as per a Council of Ministers Decision in October 2012, which introduced the refund system. In summary, this system also aims to relieve industrialists who use the said goods in manufacturing from high tax exposures. However, this time the whole tax amount is paid in advance and then the tax levied excessively is refunded to taxpayers upon proving the fulfilment of the conditions.

As a result, these two systems substitute each other and therefore the Authority did not change its view regarding the scope and continued to respond to the tax ruling applications with the same expressions as the ones in the circular published with respect to the deferment-cancellation practice.

In our opinion on the other hand, considering both the wording of the article and the statement of justification of the article with respect to the deferment-cancellation practice, materials used in manufacturing activities should benefit from this practice without any distinction.

We support this view with a few points. The first one is the statement of justification of the deferment-cancellation article. In this statement, it is noted that the taxes of goods in the schedule (B) are imposed at high amounts for the particular purpose of preventing tax evasion; however, this could present difficulties for industrialists and therefore industrialists who use these goods in manufacturing activities and who cannot recover them through deduction (by cancelling the deferred tax afterwards) pay lower amounts of tax. Therefore, considering this purpose, those who use these goods in any way in the manufacturing process should have been allowed to do so.

As our second point, the elements included in the cost of goods during the manufacturing process are listed in the article 275 of the Tax Procedures Law. Accordingly, since the auxiliary materials used and similar items consumed in the production of goods, as well as similar items, are also a part of the manufacturing process in addition to the raw materials physically contained in the said goods, they must be included in the cost price of the goods.

Another point is that, the Tax Authority may not make a distinction as the one made in the Circular, based on the wording of the article either. The Authority only states its opinion with the Circular issued and in this respect, did not establish an administrative practice creating legal consequences, since it has no such authority granted by Law. However, this situation has been perceived as a general regulatory practice by taxpayers. The condition in the article of the Law is definitive: these goods must be used in manufacturing goods other than those specified in the list no. (I).

There is a reason why we so much emphasize the wording and statement of justification of the article regarding the deferment-cancellation practice which is no longer applied: the refund system introduced in place of the said practice under the CMD must be applied due to the same reasons. While ceasing a practice, the Council of Ministers, which is authorized by the lawmaker, could introduce another practice based on the same grounds in place of the former. Of course, the ultimate purpose of the lawmaker should also be taken into account at this point. In other words, the area covered by the deferment-cancellation practice would have to be taken into account here as well. It is observed that this issue was also taken into account in the Decision attached to the Council of Ministers Decision, and expressions same as the ones used in the article of the Law stipulating deferment-cancellation practice are used. Therefore, it should be possible for all industrialists who use the said goods in manufacturing to benefit from this opportunity in the refund practice as well.

Finally, we would like to add that industrialists who use the products in the list no. (I) in the manufacturing activities in some way and who therefore bear SCT exposure should benefit from the current refund system. This is a measure of protection. However, the fact that the Authority does not allow its application for certain taxpayers based on criteria not specified in the Law means the finalization of the practice without taking into account the burden that the tax would create.

Retirement as per social security contracts

I. Introduction

In the November issue of our journal, we had discussed the retirement in Turkey of Turkish citizens with employment activities abroad and we had particularly mentioned the “crediting foreign services” practice, which can be benefitted by Turkish citizens with employment activities in any country in the world, regardless of whether the country has signed a bilateral social security agreement with Turkey.

In this article, we will discuss the retirement of those employed in countries that have signed bilateral social security agreements with Turkey.

II. Status of employees working in countries party to social security agreements

25 of the bilateral social security agreements signed by Turkey with 28 countries are in force. 9 of these agreements cover arrangements regarding long term (disability, old age and death) insurance branches, while 16 of them contain arrangements regarding both long and short term (illness, maternity, work accidents and professional diseases) insurance branches.

Although Turkey signed agreements with Montenegro, Italy and South Korea, these agreements have not come into effect as of the date we have prepared our article. On the other hand, our country continues its contacts for signing social security agreements with Ukraine, Morocco, Belarus, Algeria, Ireland, Poland and Bulgaria.

Below is the list of bilateral social security agreements that are currently in force:

Name of the country	Date of signing	Effective date	Scope (insurance branch)	
			Long term	Short term
England	09.09.1959	01.06.1961	Yes	-
Germany	30.04.1964	01.11.1965	Yes	Yes
Netherlands	05.04.1966	01.02.1968	Yes	Yes
Belgium	04.07.1966	01.05.1968	Yes	Yes
Austria	12.10.1966	01.10.1969	Yes	Yes
Switzerland	01.05.1969	01.01.1972	Yes	-
France	20.01.1972	01.08.1973	Yes	Yes
Denmark	22.01.1976	01.02.1978	Yes	-
Sweden	30.06.1978	01.05.1981	Yes	-
Norway	20.07.1978	01.06.1981	Yes	-
Libya	13.09.1984	01.09.1985	Yes	-
Turkish Republic of Northern Cyprus	09.03.1987	01.12.1988	Yes	Yes
Macedonia	06.07.1998	01.07.2000	Yes	Yes
Azerbaijan	17.07.1998	09.08.2001	Yes	Yes
Romania	06.07.1999	01.03.2003	Yes	Yes
Georgia	11.12.1998	20.11.2003	Yes	-
Bosnia-Herzegovina	27.05.2003	01.09.2004	Yes	Yes
Canada	19.06.1998	01.01.2005	Yes	-
Quebec	15.10.1998	01.01.2005	Yes	-
Czech Republic	28.06.2001	01.01.2005	Yes	Yes
Albania	15.07.1998	01.02.2005	Yes	Yes
Luxembourg	08.12.2004	01.06.2006	Yes	Yes
Croatia	12.06.2006	01.06.2012	Yes	Yes
Slovakia	25.01.2007	01.07.2013	Yes	Yes
Serbia	26.10.2009	01.12.2013	Yes	Yes

The first advantage of working in a country which is party to a bilateral social security agreement with Turkey, which is also the common provision of agreements, is equal treatment of the citizens of both contracting parties, in terms of rights and benefits. In this respect, the Turkish citizens working in countries party to bilateral social security agreements signed by Turkey and the family members under their guardianship may benefit from the social security rights, just as the citizens of the country they work in.

A. Aggregation of coverage periods

From the retirement aspect, another advantage of working in a country party to a bilateral social security agreement signed by Turkey is that the services performed in the aforementioned country are recognized by Turkey.

According to the bilateral social security agreements signed by our country, periods of insurance accepted as per the legislations of contracting states are considered to be consecutive and in the determination of eligibility for the pension, the periods of insurance in both countries can be combined, on the condition that these periods do not overlap each other.

When the individual becomes eligible for pension through aggregation of his coverage periods, the pension is calculated by taking into account the services performed in both countries together. The contracting states pay the part of the pension calculated in this way, which corresponds to the number of work days spent in their countries, as contract pension (partial pension).

In this context, the contract pension, also known as partial pension, is the pension that is calculated according to total services performed in contracting states and paid on the amount corresponding to the period of services in the relevant country.

For example, with respect to the pension eligibility of an insuree who has worked for 2000 days in Turkey and 4000 days in Germany, the sum total of these periods shall be taken into account. The eligibility for pension shall be decided by accepting the number of work days of the individual as 6000 days. If the person is eligible for pension with 6000 days of work, then the pension is proportionally calculated in both contracting states.

If the insurance periods spent in Turkey and the other contracting state are sufficient for payment of full pension according to the local legislations of the contracting states, full pension can be paid by both states, without merging the services.

B. Premium refund in Germany

The social security agreement between Turkey and Germany prescribes that the premiums deposited at the German social security institution for Turkish citizens working in Germany shall be refunded to the insurees (to the beneficiaries in case of their death), if the certain conditions are met.

The premium refund practice is arranged only in the social security agreement between Turkey and Germany. The conditions for refunding the premiums to an insuree who is a Turkish citizen are the

expiration of the two-year waiting period, departing Germany and cease of the employment related supports from Germany, including unemployment supports. The two-year waiting period starts from the date when the obligatory insurance ends.

The premium refund covers only the employee share and the employer's share is not to be refunded. Upon the refund of the premium, the German pension insurance is cancelled and the rights gained due to the German insurance periods no longer apply.

C. Premium transfer in Switzerland

Among the social security agreements signed by Turkey, only the social security agreement signed between Turkey and Switzerland contains arrangements regarding the transfer of premiums collected in the contracting states.

The social security agreement between Turkey and Switzerland contains an arrangement which allows the transfer of the whole amount of the employee and employer share of the premiums collected for long-term insurance branches (old age and death; except disability) during the period of service in Switzerland by the Turkish citizens working in Switzerland, to the social security institution in Turkey.

According to the agreement, Turkish citizens working in Switzerland may claim premium transfer, on the condition that they have not benefited from Swiss pension insurance (old age, disability and death pensions) and that they have departed Switzerland definitively, in order to settle in Turkey or a third country.

In case the premium amount that is deposited in the Swiss social security institution and transferred to Turkey exceeds the amount credited for the works abroad as per the "Law no. 3201 on the Evaluation of the Period Spent Abroad by Turkish Citizens Abroad in Terms of Social Security", mentioned in the November issue of our journal, the exceeding part is refunded to the relevant parties.

Principles and procedures regarding the crediting of foreign services pertaining to the premiums collected in Switzerland and transferred to Turkey are explained in the Social Security Institution Circular no. 2011/48 published regarding the procedures of crediting and allocation of foreign services. Accordingly, it is stipulated that the premiums transferred to Turkey as a result of premium transfer shall be deducted from the amount accrued for crediting foreign services; in case the whole periods pertaining to the transferred premium have been credited and the whole amount of the accrued debt has been paid, the whole amount of the transferred premiums will be refunded by the Social Security Institution to the insuree, beneficiaries or his inheritors; whereas the part of the transferred premiums corresponding to the number of credited days shall be refunded in case a part of the periods pertaining to the transferred premiums has been indebted and the whole amount of the debt accrued has been paid.

The insurees whose premiums are transferred to Turkey may not claim any rights from the Swiss social security institution due to the transferred premiums in question.

III. Overlap of premium payment periods in contracting states

Building a better working world

According to the arrangement in the Circular no. 2013/39 published with respect to social security agreements, the premium payment periods in Turkey that overlap with the insurance periods in countries party to social security agreements signed with Turkey shall not be cancelled except for the findings determined as per reports drawn up by the Institution officers authorized to inspect and control. The periods of work in the foreign country, which overlap with the periods in question, shall not be credited as per the "Law no. 3201 on the Evaluation of the Period Spent Abroad by Turkish Citizens Abroad in Terms of Social Security".

IV. Conclusion

Bilateral social security agreements are signed to guarantee the social security rights of Turkish citizens working abroad, pertaining to their employment in Turkey and other countries where they work.

The social security agreements not only ensure that Turkish citizens are treated equally with the citizens of the country they work in, in terms of social security rights and liabilities, but also allow them to receive partial pensions from both countries by allowing the aggregation of coverage periods spent in both contracting states.

If the individual is eligible for the pension as per the legislation of one of the contracting states, only by aggregating the periods of coverage, then the social security institution of the relevant country shall begin to pay a contractual pension proportionally with the period of service in the aforementioned country only. This pension is also known as "partial pension".

If the insuree is eligible for a whole pension as per the legislation of one of the contracting state, the aforementioned country shall begin to pay whole pension, regardless of the services performed in the other contracting state.