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The Principle of Good Governance concerning Tax Law

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Abstract

Good governance does not have a general definition or a specific content. This concept is interpreted by different disciplines, different institutions on international and national platforms. From a legal perspective, the concept of governance has a close connection with the basic principles of the democratic state of law and human rights. However, the "good governance principle" or "the right to good governance" has not found a place in universal legal documents. In this regard, this principle is not regulated in the European Convention on Human Rights and its additional protocols. On the other hand, the European Court of Human Rights and Turkish Constitutional Court apply this principle concerning the individual application reviews. In these related judgments, the tax administration's passive attitude and failure to act in a timely and consistent manner were found to be contrary to the principle of good governance. In its judgment regarding the individual application of Reis Automotive Company, published in the Official Gazette, dated 07.03.2018 and numbered 30353, Turkish Constitutional Court clearly stated that the tax administration should act in accordance with the principle of good governance. In this context, it is important to reveal the meaning, scope, and legal basis of the principle of governance in terms of tax law. In the aforementioned judgment, it was decided that the tax administration should take the necessary measures to prevent different treatments among the taxpayers, which are subject to limited tax audits as in the present case of the individual application. In this study, after examining the meaning and applicability of the good governance principle in the field of tax law, the legal amendments regarding the procedure and principles in tax audits are reviewed from the perspective of the good governance principle.

Keywords

Good Governance, Governance, Good Administration, Tax Administration, Tax Audit, The Principle of Proportionality

Vergi Hukuku Bakımından İyi Yönetişim İlkesi

Öz

İyi yönetişim kavramının genel kabul görmüş bir tanımı ya da sınırları belirli bir içeriği bulunmamakta; bu kavram farklı disiplinlerce, farklı kuruluşlarca ve uluslararası/ulusal düzlemlerde yorumlanmaktadır. Hukuki perspektiften bakıldığında; yönetişim kavramının demokratik hukuk devletinin temel ilkeleri ve insan hakları ile yakın bağlantısının bulunduğu söylenebilecektir. Öte yandan "iyi yönetişim ilkesi" ya da bireyler açısından bakıldığında "iyi yönetişim hakkı", evrensel belgelerde yer bulamamıştır. Bu kapsamda, İnsan Hakları Avrupa Sözleşmesi ve ek protokollerinde de bu ilke düzenlenmemiştir. Öte yandan İnsan Hakları Avrupa Mahkemesi'nin ve T.C. Anayasa Mahkemesi'nin bireysel başvuru denetiminde iyi yönetişim ilkesinden yararlandığı görülmektedir. Söz konusu kararlarda; vergi idaresinin kendi hatasından kaynaklanan bir aykırılık ortaya çıktıktan sonra hatanın düzeltilmesi ya da zararın giderilmesi bakımından edilgen bir tutum takınması, zamanında ve tutarlı hareket etmemesi iyi yönetişim ilkesine aykırı bulunmuştur. T.C. Anayasa Mahkemesi'nin, 07.03.2018 tarih ve 30353 sayılı Resmî Gazete'de yayımlanan 2015/6728 Başvuru Numaralı Reis Otomotiv Ticaret ve Sanayi A.Ş. tarafından yapılan bireysel başvuruya ilişkin kararında da vergi idaresinin iyi yönetişim ilkesine uygun hareket etmesi gerektiği açıkça belirtilmiştir. Bu itibarla, iyi yönetişim ilkesinin anlamının, kapsamının ve hukuksal dayanaklarının vergi hukuku bakımından tartışılarak ortaya konulması önem taşımaktadır. Anayasa Mahkemesi'nin söz konusu kararında; vergi idaresinin iyi yönetişim

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ilkesine uygun olarak, bireysel başvuruya konu olan olaydaki gibi konu, kapsam, amaç bakımından sınırlı vergi incelemelerinde incelemeye tabi tutulan vergi yükümlüleri arasında farklı muamelede bulunmasını önlemek için gerekli tedbirleri alması gerektiğine hükmedilmiştir. Çalışmada, vergi hukukunda iyi yönetişim ilkesinin anlamı ve uygulanabilirliği irdelendikten sonra, vergi incelemesine ilişkin usul ve esaslara yönelik güncel yasal değişiklikler iyi yönetişim ilkesi açısından değerlendirilmektedir.

Anahtar Kelimeler
İyi Yönetişim, Yönetişim, İyi Yönetim, Vergi İdaresi, Vergi İncelemesi, Ölçülülük Ilkesi

Extended Summary

The concept of governance has reflections in the field of law and even specifically in the field of tax law. In its individual application review, Turkish Constitutional Court clearly states that the tax administration should act in accordance with the principle of good governance. In line with the European Court of Human Rights' case law, the Constitutional Court evaluates this principle in the context of "proportionality" principle. In this regard, it is important to reveal the meaning, scope, and legal basis of the principle of governance in terms of tax law.

In this study, first of all, the concept of governance and the principle of good governance are discussed in general. Subsequently, it is questioned whether the principle of good governance is applicable in terms of tax law. In this context, it is concluded that acting in accordance with the principle of good governance in the taxation process is appropriate for the purposes of the rule of law and accordingly, democracy in the taxation process. On the other hand, it should be considered that this principle has no clear legal basis, its content is still somewhat vague. In addition, it is sometimes impossible, difficult or nonfunctional for the tax administration to interact with the taxpayer in accordance with good governance. In this regard, it is believed that it is not possible to apply this principle strictly and in all cases in tax law. However as a principle, the tax administration's responsibility to provide information in case of a measure that affects or has the potential to affect the taxpayers' rights and to provide the opportunity to express their opinions and objections against this measure will be in line with both the principle of good governance and the right of the taxpayer to be heard. In terms of the "active and participatory administration" dimension of the good governance principle, the administration's passive attitude and failure to act in a timely and consistent manner would be contrary to the principle of good governance.

In addition, the study also focuses on the steps taken and/or should be taken with regards to tax audits in the direction of Reis Automotive judgment of the Constitutional Court. In the aforementioned judgment, it was ruled that the tax administration should take the necessary measures to prevent different treatments among those subject to tax audit that are limited in terms of subject, scope and purpose. One of the steps

taken is the "Tax Inspection Board Advisory Commission Regulation" published in the Official Gazette, dated 7 April 2021 and numbered 31447. The purpose of the regulation is to establish an Advisory Commission to provide an opinion to the Presidency and to determine the working procedures and principles of this Commission in order to ensure unity concerning the tax audit duties and to resolve the unclear aspects that arise regarding the implementation of the provisions of the related legislation. Whether the Tax Inspection Board Advisory Commission will serve these purposes remains to be seen.

However, the latest amendments made with Act No. 7338[1] concerning tax audits are in the opposite direction of what is expected. Because the obligation to prepare a document that indicates the beginning of the audit (*vergi inceleme tutanağı)* and to be signed by both the administration and the taxpayer in the current system is abolished by the aforementioned amendments. Instead, it is deemed sufficient to notify the taxpayer of a letter stating that the audit has started (Article 18 of the Act no. 7338). Again, within the scope of the same act, the obligation to carry out the tax audit at the workplace of the taxpayer is abolished, and on the contrary, the rule that the audit should be carried out at the tax office was introduced (Article 17).

[1] Official Gazette 26.10.2021/31640 (Vergi Usul Kanunu ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun, Kanun Numarası: 7338, Kabul Tarihi: 14.10.2021, RG 26.10.2021/31640).

I. Introduction

The concept of "good governance" can be qualified as a new style or perceptive of management. It has emerged as a principle in western countries concerning the disciplines of business and public administration. In today's world, this concept is discussed by many disciplines, from law to politics, from international relations to economics. Good governance does not have a general definition or a specific content; thus this concept is interpreted by different national and international institutions on national and international platforms.

Even with a general analysis, it is possible to observe that different disciplines approach this concept from different angles. The aim of this study is to approach the concept from a legal perspective as it is seen that the concept of governance has reflections in the field of law and even specifically in the field of tax law.

In its judgement concerning the individual application of Reis Automotive Company[1], Turkish Constitutional Court has clearly stated that the tax administration has an obligation to act in accordance with the principle of good governance especially in the tax audit process.

In that case, some questions should be replied: What is the meaning and scope of good governance principle concerning tax law? Is the good governance principle followed in the taxation process especially regarding the tax audit (*vergi incelemesi*)?

Considering these questions, it is believed that after determining the content of the good governance principle, it is necessary to examine whether it is valid in terms of tax law, and if so, its legal bases and limits.

In the next stage, the necessary conditions for the tax administration to act in accordance with the principle of good governance in tax audit process are analyzed. Especially the steps taken in this direction after the above-mentioned "Reis Automotive Company" judgment are reviewed.

II. The Concept of Governance and its Elements

The concept of governance (*"yönetişim"*) is defined as "*the joint use of administrative, economic and political authority in public and private institutions*"[2]. Another definition of this concept is "*the process of governing a country or organization.*[3]*"* Essentially, governance describes the relationships between people,

[1] Turkish Constitutional Court, 2015/6728, 01.02.2018 (Anayasa Mahkemesi, 2015/6728, 01.02.2018).

[2] Dictionary of the Turkish Language Institution, <https://sozluk.gov.tr/> Date of Access 12 December 2021.

[3] Macmillan Dictionary, <https://www.macmillandictionary.com/dictionary/british/governance> Date of Access 12 December 2021.

the ways that they interact with each other in the context of their environment, and the principles, rules, and norms that are set up to guide these interactions[4].

This concept has emerged from the need for active roles for the rule makers, leaving the one-sided management style of a state or organization. It has been developed as a business management technique; and after corporate governance, the concept of "public governance" has come into existence as a development model.

When analyzed through an international perspective, it is observed that this term has been defined through determining the standards of good governance. There are studies of international organizations such as the World Bank, International Monetary Fund ("IMF"), United Nations, and OECD regarding the definition and development of this concept. The World Bank's report on Governance and Development published in 1992 has been influential in the emergence of the concept. Afterwards, the OECD has published a related report titled "Promoting Good Governance: Principles, Practices and Perspectives" in 2000[5].

One can find many types of governance, such as ecosystem governance[6], global governance[7], corporate governance[8] etc. depending on the related area. The rigid, hierarchical and bureaucratic organizational structures of the traditional public administration that dominated the 20th century have been replaced by the new public management approach, the governance approach. Governance is based on participation and flexibility, which are originally the management techniques, applied by the private sector[9]. It also reflects the civilianization of the public administration and the understanding that the private sector and non-governmental organizations are indispensable actors of the administration[10].

The concept of governance (*yönetişim*), unlike the concept of government or administration (*yönetim*), which is based on a hierarchical bureaucratic structure highlights the interaction and cooperation between the actors and organizations playing a role in the administration process and the effective involvement of non-

4 Anthony R. Turton, Hanlie J.Hattingh, Marius Claassen, Dirk J. Roux, Peter J.Ashton, 'Towards a Model for Ecosystem Governance: An Integrated Water Resource Management Example', in Anthony R. Turton, Hanlie J.Hattingh, Gillian A. Maree, Dirk J.Roux, Marius Classen, Wilma F. Strydom (eds), *Governance as a Trialogue: Government- Society-Science in Transition* (Springer 2007) 1, 7.

5 Sam Agere, 'Promoting Good Governance: Principles, Practices and Perspectives' (OECD Library, 2000), <https://read.oecd-ilibrary.org/commonwealth/governance/promoting-good-governance_9781848597129-en#page1> Date of Access 12 December 2021.

6 Turton et al. (n 5) 1.

7 Alan W. Hall, 'Global Experience on Governance', in Anthony R. Turton, Hanlie J.Hattingh, Gillian A. Maree, Dirk J.Roux, Marius Classen, Wilma F. Strydom (eds), *Governance as a Trialogue: Government- Society-Science in Transition* (Springer 2007) 29, 32.

8 Turton et al, ibid 8.

9 Süleyman Karaçor, Arif Oltulu, 'Demokrasi ve Yönetişim Boyutu ile Yeni Kamu Yönetimi Anlayışı' (2011) 22, SÜ İİBF Sosyal ve Ekonomik Araştırmalar Dergisi, 403, 403.

10 Ümit Şahin, 'İyi Yönetişimin Türk Kamu Yönetiminde Uygulanması ve Kamu Denetçiliği Kurumu' (2018) 1, Ombudsman Akademik Dergisi, 99, 102.

governmental actors in administrative activities[11]. How the power held by the public authority is used, how decisions are taken, and how citizens participate in the administrative process are issues related to the concept of governance[12].

Governance, unlike traditional administration, is more comprehensive because it includes non-governmental organizations and the process of harmonizing various views and interests in the society. Governance requires cooperation and includes horizontal relations. It emphasizes the "active" citizen, who undertakes active responsibilities, duties and rights, rather than the "administered" citizen[13].

This change of management style has been expressed as the transition from government/administration to governance[14]. As opposed to bureaucratic "hierarchy", the form of relationship advocated by the concept of governance is "heterarchy"[15]. The concept of "governance" is based on a mutual interaction and cooperation in which a participatory public administration and the governed are both included in the decision-making processes. In our opinion, the mutual interaction and cooperation element is the prominent and separative element of the concept of governance. As a matter of fact the term governance is derived from the words "government" and "communication"[16].

III. The Principle of Good Governance: Distinguishing the Principle of Good Governance from the Principle of Good Administration

The concept of governance focuses on the process of decision-making and the process in which decisions are implemented. Hence, the analysis of governance focuses on the actors involved in decision-making and implementing the decisions made.

Good governance has a series of major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable, and inclusive and follows the rule of law[17].

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11 Mehmet Yüksel, 'Yönetişim (Governance) Kavramı Üzerine' (2000), Ankara Barosu Dergisi, 145, 145.

12 Çağlar Özbek, 'Bir Yönetim Biçimi Olarak Demokrasi ve Yönetişim Üzerine Bir Değerlendirme' in Tuğba Uçma Uysal and Ganite Kurt (eds), *Disiplinlerarası Bakış Açısı ile Yönetişim* (Gazi 2018) 1, 16.

13 T.C. Başbakanlık Devlet Planlama Teşkilatı, *Kamuda İyi Yönetişim Özel İhtisas Komisyonu Raporu Dokuzuncu Kalkınma Planı 2007-2013* (Devlet Planlama Teşkilatı, 2007), 5.

14 Yahya Fidan, 'Yönetimden Yönetişime: Kavramsal Bir Bakış' (2010-2011) 1, Yalova Sosyal Bilimler Dergisi, 5, 9.

15 Özbek, (n 13) 17.

16 Fidan, (n 15) 6.

17 United Nations Economic and Social Commission for Asia and the Pasific, 'What is Good Governance?' <https://www.unescap.org/sites/default/files/good-governance.pdf> Date of Access 12 December 2021.

In 2008, the Council of Europe has adopted the Strategy for Innovation and Good Governance at Local Level, including also the twelve principles of Good Democratic Governance. There are twelve principles of "good democratic governance", which were approved by the Decision of the Committee of Ministers of the Council of Europe are "Participation, Representation, Fair Conduct of Elections, Responsiveness, Efficiency and Effectiveness, Openness and Transparency, Rule of Law, Ethical Conduct, Competence and Capacity, Innovation and Openness to Change, Sustainability and Long-Term Orientation, Sound Financial Management, Human Rights, Cultural Diversity and Social Cohesion and Accountability"[18].

It should be noted that this principle has distinctive aspects from a similar principle, which is the principle of good administration. First, unlike good governance, there are legal documents that expressly regulate good administration as a right.

One of these regulations is the Article 41 of the European Union Charter of Fundamental Rights. This regulation interprets the right to good administration as a citizen right[19]. According to this regulation, every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices, and agencies of the Union.

This right includes:

- The right of every person to be heard, before any individual measure which would affect him or adversely is taken;
- The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- The obligation of the administration to give reasons for its decision.

In addition, on 20.06.2007, the Committee of Ministers has recommended the member states to ensure good administration. The principles of good administration under this Recommendation are; principle of lawfulness, principle of equality, principle of impartiality, principle of legal certainty, principle of taking action within a reasonable time limit, principle of participation, principle of respect for privacy, and principle of transparency.

[18] Council of Europe, '12 Principles of Good Democratic Governance'<https://rm.coe.int/brochure-12-principles-of-good-governance-and-current-tools-on-good-go/16808b1687>. Date of Access 18 December 2021.

[19] European Parliament, 'Charter of Fundamental Rights of the European Union' (2000), 2000/C 364/01, <https://www.europarl.europa.eu/charter/pdf/text_en.pdf> Date of Access 12 December 2021.

The report of the Venice Commission dated 9 March 2011 on "good governance" and "good administration"[20] concludes that the principle of good governance includes the principle of good administration.

It also states that:

- The concept of governance is not included in the constitution of any state in Europe,
- It is not a legal concept, on the other hand, "good administration" is recognised as a legal principle and even as a right in many contexts,
- It contains a multitude of elements; including accountability, transparency, responsiveness to the people's needs, efficiency, effectiveness, openness, participation, predictability, rule of law, coherence, equity, ethical behaviour, combating corruption, termination of proceedings within a reasonable time, protection of human rights, and simplification of procedures,
- The most frequently mentioned elements of the concept of governance are accountability, transparency, and participation.

Considering their differences in nature, good governance is a different principle from the principle of good administration.

From a legal perspective, the principle of good governance has a close connection with the basic principles of the democratic state of law and human rights. On the other hand, the "good governance principle" or the "right to good governance" are not regulated in universal legal documents as far as we can determine. In this context, this right is not regulated in the European Convention on Human Rights and its additional protocols as a human right.

On the other hand, the European Court of Human Rights ("ECHR") applies the good governance principle in its supervision of individual applications. According to the ECHR, "*The principle of good governance requires the public authorities to act at the appropriate time, by the appropriate method and above all consistently, where the public interest is at stake*"[21]. In this regard, the Court interprets this principle under the principle of proportionality.

According to the principle of proportionality, an instance of interference, including one resulting from a measure to secure payment of taxes, must strike a "fair balance"

[20] European Commission for Democracy Through Law (Venice Commission), 'Stocktaking on the Notions of "Good Governance" and "Good Administration"' On the Basis of Comments by Oliver Kask, CDL (2011) 006*, <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2011)006-e> Date of Access 12 December 2021.

[21] Krstić v Serbia App no 45394/06 (ECHR, 10 May 2014), para.78; Beyeler v Italy App no 33202/96 (ECHR, 5 January 2000), para.10; Srl v Moldova App no 21151/04 (ECHR, 8 April 2008), para.72.

between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, including the second paragraph: there must be a reasonable relationship of proportionality between the means employed and the aims pursued[22]

The ECHR states that State authorities, which fail to put in place or adhere to their own procedures, should not be allowed to profit from their wrongdoing or to escape from their obligations[23]. The risk of any mistake made by the State authority must be borne by the State itself and the errors must not be remedied at the expense of the individuals concerned. The need to correct an old "wrong" should not disproportionately interfere with a new right, which has been acquired by an individual relying on the legitimacy of the public authority's action in good faith[24].

IV. The Concept of Governance in Tax Law: Good Governance Principle and Tax Administration

A. The Applicability of the Concept

The concept of governance and the principle of good governance have reflections also in terms of tax law. Most recently, on 15 July 2020, the European Commission published a communication on Tax Good Governance in the European Union and beyond. The Communication aims to strengthen how the EU can promote "Transparency" to address what it defines as "Unfair Tax Competition" and to promote the application of internationally agreed standards.

As stated above, the mutual interaction between the public authority and individuals, which is the separative element of the good governance, refers to a dynamic interaction in which individuals take part in the processes of determining, supervising, and implementing public policies. It is also necessary to ensure the mechanisms that will provide these issues under legal guarantee[25].

In the light of above-mentioned statements, the tax administration which acts in good governance can be defined simply as an administration which pursues the standards of good governance and especially communicates and interacts with the taxpayers as well as the related third persons like non-governmental organizations. In addition, taxpayers should act an active role in the decision-making process according

[22] Bulves AD v. Bulgaria, App no 3991/03 (ECHR, 22.01.2009), para. 62

[23] Lelas v Crotia App no 55555/08 (ECHR, 20 May 2010), para.74.

[24] Bogdel v Lithuania App no 41248/06 (ECHR, 26 November 2013), para.66; Pincová and Pinc v The Czech Republic App no 36548/97 (ECHR, 5 November 2002), para.58.

[25] Haluk Alkan, 'Karar Alma Süreçlerine Katılım Sistemleri Açısından Türkiye Ekonomik ve Sosyal Konseyi' (2000) 33 (2) TODAİE Amme İdaresi Dergisi, 57, 58.

to this principle. As stated above, the principle of good governance includes the principle of good administration, but it is not limited with this principle.

According to the explanations above, is this principle applicable in tax law?

This question is open to discussion. As mentioned before, the form of the relationship which the concept of governance aims to pursue is "heterarchy" instead of "hierarchy". However, tax law is more familiar with the concept of hierarchy. The traditional relationship between the tax administration and taxpayers is rather a hierarchic one. In our opinion, it is not possible to apply the concept of good governance – which is still vague and does not have a clear legal basis- in tax law with a strict approach. In some cases, which are urgent cases, it is not possible and appropriate for the tax administration to interact and cooperate with the taxpayer. For example, in some cases it is possible and necessary to conduct tax audits without informing the person concerned beforehand (See, Turkish Tax Procedure Act Art. 130, 138).

On the other hand, as a rule, practices such as informing the taxpayers of any individual measure that would affect or has a potential to affect them, giving the taxpayers the right to express their opinions and state their objections and the right to have access to their files are in line with the principle of good governance.

Another aspect/dimension of this principle is the "active citizenship". The "active citizen requirement" of good governance emerges as "active taxpayer requirement" in the field of tax law. In this context, the traditional expressions such as the taxpayer is on the passive side of the taxation relationship need to be re-evaluated in the light of the principle of good governance. However, the fact remains that a strong civil society and/or active citizenship can be present only in countries that have reached a certain cultural and economic level[26]. This applies to tax law as well.

B. The Concept of Governance concerning Turkish Tax Law and Turkish Constitutional Court's Review

Good governance principle is not included in the 1982 Turkish Constitution or legislative regulations[27]. On the other hand, Turkish Constitutional Court has included this principle in its individual application review, in line with the ECHR's case law. The Constitutional Court carries out its review of this principle in the context of the "proportionality" principle/criterion. In these cases, there is an interference with the

[26] Özbek, ibid, 20.

[27] One of the exceptional regulations in which the concept of «governance» is included is the «City Council Regulation» published in the Official Gazette dated 08.10.2006 and numbered 26313. In the fourth article of the abovementioned Regulation, titled «Definitions», it is stated that the concept of governance refers to a management approach based on multi-actor and social partnerships such as transparency, accountability, participation, working harmony, locality, and effectiveness.

fundamental rights and freedoms of taxpayer arising from an unlawful act of the tax administration. While determining whether this interference is proportional or not, the attitude of the administration towards the unlawful act, the time it has taken to determine the illegality, the method chosen to correct the mistake, and the weight of the burden on the applicant are reviewed by the Court[28]. It is stated that in cases where the administration itself has a fault in the constitution of the illegitimate administrative act, it is necessary to be more sensitive about the burden on the taxpayer[29]. It is concluded that if the administration has not emended the consequences caused by its faulty action in a reasonable time without a justified reason, it can be said that the administration did not act in accordance with the good governance principle, and the interference is disproportionate[30]. The administration's passive attitude and failure to act in a timely and consistent manner are contrary to the principle of good governance[31]. Again, in accordance with the principle of good governance, in the process of correcting a mistake of the public authority, a disproportionate interference shall not be made on a right acquired by the individual in good faith[32].

After these general statements, some examples can be given to the supervision of good governance principle in individual applications regarding tax disputes. Regarding tax disputes, a violation of the good governance principle was found in the individual application of *Enbakır Electronics Company.* The applicant company has brought an action against the additional value added tax assessment and "the tax part" of the assessment has been annulled. On the other hand, the part of the case regarding the default interest has been rejected on the grounds that although it is a separate administrative decision, the necessary administrative remedies have not been exhausted against it. Hence, the tax administration continued to the taxation process in order to collect the default interest.

The Constitutional Court has stated that the administration's collection of the default interest from the applicant taxpayer constitutes an unfair transfer of income since the main tax was annulled by the tax court[33].

The Constitutional Court has noted that the default interest, which was depending on the main tax, was not withdrawn *ex officio* by the tax administration. The Court has concluded that this attitude is against the principle of good governance[34].

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28 For the review in terms of the right to education, see para.55; For the review in terms of the right to property, see. Turkish Constitutional Court, 2013/8074, 09.03.2016, para.71 (Anayasa Mahkemesi, 2013/8074, 09.03.2016, para.71).

29 Turkish Constitutional Court, 2015/1685, 23.05.2018, para.46 (Anayasa Mahkemesi, 2015/1685, 23.05.2018, para.46).

30 Turkish Constitutional Court, 2017/38317, 13.01.2021, para.66-67 (Anayasa Mahkemesi, 2017/38317, 13.01.2021, para.66-67).

31 Turkish Constitutional Court, 2017/17930, 03.06.2020, para.53 (Anayasa Mahkemesi, 2017/17930, 03.06.2020, para.53).

32 Bogdel v Litvanya App no 41248/06 (ECHR, 26 November 2013), para.66.

33 Turkish Constitutional Court, 2015/3930, 23.10.2019, para.59 (Anayasa Mahkemesi, 2015/3930, 23.10.2019, para.59).

34 Turkish Constitutional Court, 2015/3930, 23.10.2019, para.60 (Anayasa Mahkemesi, 2015/3930, 23.10.2019, para.60).

Another individual application that the Constitutional Court has reviewed the tax administration's good governance requirement is the Case of *Reis Automotive Company*[35]. The applicant company is a company engaged in the trade of automobiles and auto spare parts. In the present case, a limited tax audit (*vergi incelemesi*) was carried out on the automotive sector with the aim of examining the sales of the companies in the related sector for the limited period when a Special Consumption Tax ("SCT") discount accepted for the said sector.

The tax inspectors determined that these companies made their sales on behalf of the employees of the company and on their own behalf, and when the discount period ended, they transferred the vehicles to third parties through a notary public. As a result of the audit, tax assessments were made against twelve companies, including the applicant company, on the grounds that the related sales were factitious and made to benefit from the reduced special consumption rate, resulting in loss of the tax and tax evasion crime according to the related provisions of the Tax Procedure Act[36]. Hence, a criminal complaint was filed against their legal representatives.

On the other hand, the remaining 280-taxpayer companies of those who were criticized in the same audit were subjected to a tax assessment with a single tax penalty in the amount of the main tax.

Upon complaints that different practices for the companies were caused in the result of the tax audit, the Tax Inspection Board carried out an investigation on the issue. In the report prepared as a result of this investigation, it was concluded that different evaluations were reasonable on the grounds that the tax inspectors who conducted the audit were different as well as the report evaluation commissions.

In its judgement, The Constitutional Court concluded that the treatment of the tax administration to the applicant company was different from the other taxpayer companies subjected to the same limited tax audit. Hence, the tax treatment was found to be discriminatory in terms of property rights and against the principle of good governance. In the aforementioned judgment, it is clearly stated that the tax administration has an obligation to act in accordance with the principle of good governance.

The Court ruled that the tax administration should take the necessary measures to prevent different treatments among the taxpayers in the similar legal status, which are subject to tax audit, especially concerning the tax audits that are limited in terms of subject, scope, and purpose, as in the present case. In addition, the Court concluded that if the tax authorities detect a difference in practice that may lead to a prohibition

[35] Turkish Constitutional Court 2015/6728, 01.02.2018 (Anayasa Mahkemesi, 2015/6728, 01.02.2018).

[36] Tax Procedure Act, no.213, 04.01.1961, Official Gazette 10.01.1961/10703, 11.01.1961/10704, 12.01.1961/10705.

of discrimination, they should promptly resolve it. This means according to the Constitutional Court, the tax administration, which should act in good governance, has the responsibility to ensure the unity of practice for taxpayers subject to tax audits and to correct the contradiction in case of different treatments. In this context, it is at the discretion of the tax authority which measures will be taken and how they will be implemented.

Although there are some determinations regarding the requirements of good governance in the above-mentioned judgments, there is no clarity regarding the concept of good governance, its scope, and the good governance right that can be claimed by the taxpayers.

According to an opinion in the literature, it can be said that the equivalent of the good governance principle in administrative law is "good administration principle"[37]. Parallel to this view, in tax law, it can be stated that the equivalent of good governance is "good tax administration". However, this determination is far from revealing what legitimate expectations might be from a good tax administration. As it is understood that the principle of good governance is used as a legal review criterion; it is important that the scope of this principle is clearly stated[38].

When considered on the basis of the rule of law, it can be said that a tax administration that respects the rule of law and human rights, that taxpayers can trust, that acts in accordance with ethical codes of conduct, that operates effectively, that carries out a fair and transparent taxation process can basically be described as a "good tax administration". On the other hand, it should not be forgotten that the "good governance principle" adopts a different and broader understanding from the "good administration principle". In this context, the concept of "governance" is based on a mutual interaction in which a participatory public administration and the governed are included both in the decision-making processes.

Therefore, the principle of good governance in tax law has mainly three basic features:

1- Active, accountable, transparent, and participatory tax administration ("good tax administration"),

2- Active and participatory taxpayer,

3- Active mutual interaction and communication between the tax administration and the taxpayer.

[37] Selman Sacit Boz, Cihat Yurdaer, Yunus Eraslan, 'İdare Hukuku Boyutuyla İyi Yönetişim İlkesi: İyi İdare' (2019), 27 (3) Selçuk Üniversitesi Hukuk Fakültesi Dergisi, 497, 497.

[38] Selman Karakul, 'Hukuki ve İdari Denetim Ölçütü Olarak İyi Yönetim İlkeleri' (2015), 2 (3) Ombudsman Akademik Dergisi, 61, 98.

Turkish Constitutional Court has reviewed this principle while determining the proportionality of the interference by the tax authorities. It has implemented the first basic feature of the principle, which is the good tax administration[39]. According to the Court, tax administration's passive attitude and failure to act in a timely and consistent manner are contrary to the principle of good governance[40]. If the tax administration detects an illegality, error or inequality during the taxation process, and if it does not emend the consequences caused by its faulty action in a reasonable time without a justified reason, it can be said that the administration did not act in accordance with the good governance principle, and the interference is disproportionate[41].

C. The Concept of Governance in Turkish Tax Law and Turkish Ombudsman Institution's Review

Another institution that reviews the good governance principle is the Turkish Ombudsman Institution. Concerning the applications made to the Turkish Ombudsman Institution; the Article 22 of the Regulation on the Procedures and Principles regarding the Implementation of the Turkish Ombudsman Institution Act states that all kinds of actions and transactions, attitudes, and behaviors of the administration will be examined and investigated in terms of compliance with the law and fairness and good administration principles, within the understanding of justice based on human rights.

The good administration principles are regulated in the Article 6 of this Regulation. These principles are compliance with the law, prevention of discrimination, proportionality, non-abuse of power, equality, impartiality, honesty, courtesy, transparency, accountability, compliance with legitimate expectations, protection of vested rights, right to be heard, right to defense, right to information, decision making within a reasonable time, reasoned decisions to show the remedies against the decision, to notify the decision without delay, the personal data protection etc. Although good governance principle is not specifically included among these criteria, they are also the features of the good governance principle as mentioned above.

D. Good Governance in Tax Audits

The purpose of the tax audit is to investigate, determine, and ensure the accuracy of the taxes to be paid (Tax Procedure Act, Article 134). The tax audit should be conducted according to the law and should not violate the taxpayer's fundamental rights

[39] Nuray Aşcı Akıncı, 'The Right to Good Administration in Tax Inspection Process', in Salim Ateş Oktar, Yasemin Taşkın (eds) *34. International Public Finance Conference Proceedings Book* (Istanbul University Press, 2019), 582, 585

[40] Turkish Constitutional Court, 2017/17930, 03.06.2020, para.53 (Anayasa Mahkemesi, 2017/17930, 03.06.2020, para.53).

[41] Turkish Constitutional Court, 2017/38317, 13.01.2021, para.66-67 (Anayasa Mahkemesi, 2017/38317, 13.01.2021, para.66-67).

and freedoms. As stated above, in its judgment related to the individual application of Reis Automotive Company[42], Turkish Constitutional Court emphasized that tax audits[43] should be in accordance with the principle of governance. The Court ruled that tax administration's different treatment without legitimate reason and its failure to withdraw this discriminatory action were against the principle of governance.

The steps towards achieving unity in practice in terms of tax audits were essentially taken with the Act no. 6009[44], which came into force in 2010. With the aforementioned Act, it was stipulated that the tax audit reports will be rejected by the report evaluation commissions *(rapor değerlendirme komisyonları*) if they are contrary to the tax legislation as well as the advance tax rulings. As a matter of fact, the opinion in the advance tax ruling is accepted as the central opinion of the tax administration. Although this situation is positive in terms of the integrity of the tax administration, it is also subject to criticism that it interferes in the independence of the tax inspector[45].

After this judgment, the regulations concerning the tax audits have been amended. As a current development, the regulations regarding the "Tax Inspection Board Advisory Commission" brought by the "Tax Inspection Board Advisory Commission Regulation" published in the Official Gazette dated 7 April 2021 and numbered 31447 came into force. According to the first article of this Regulation, the purpose of the Regulation is "to establish an Advisory Commission to provide opinions to the Presidency and to determine the working procedures and principles of this Commission in order to ensure unity of practice in the execution of tax audit duties and to resolve the unclear issues that arise regarding the implementation of the provisions of the legislation."

On the other hand, there are other features of the good governance principle as stated above: Ensuring the mutual interaction and cooperation between the tax administration and the taxpayer and taxpayer's active role in the decision-making process.

As far as can be detected, no progress has been made on these issues. On the contrary, the latest amendments made with Act no. 7338[46] are in the opposite direction of what is expected. Because the obligation to prepare a document that indicates

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42 Turkish Constitutional Court, 2015/6728, 01.02.2018 (Anayasa Mahkemesi, 2015/6728, 01.02.2018).

43 In Turkish legal system, tax audits are classified as full audit and limited audit. Limited audits shall be completed in six months, while full audits shall be completed in one year. However, the audit officer can demand extension. (Tax Procedure Act, no.213, 04.01.1961, Official Gazette 10.01.1961/10703, 11.01.1961/10704, 12.01.1961/10705, Article. 140/6).

44 Act no. 6009 /23.07.2010, Official Gazette 01.08.2010/27659.

45 For more information, see Gamze Gümüşkaya, *Hukuk Devleti Perspektifinden Vergi Hukukunda Özelgeler* (1st, On İki Levha 2021).

46 Official Gazette 26.10.2021/31640 (Vergi Usul Kanunu İle Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun, Kanun Numarası: 7338, Kabul Tarihi: 14.10.2021, RG 26.10.2021/31640).

the beginning of the audit (*vergi inceleme tutanağı)* and to be signed by both the administration and the taxpayer in the current system has been abolished within the scope of the aforementioned amendments. Instead, it has been deemed sufficient to notify the taxpayer of a letter stating that the audit has started (Article 18 of the Act no. 7338). Again, within the scope of the same act, the obligation to carry out the tax audit at the workplace was abolished, and on the contrary, the rule that the audit should be carried out at the tax office was introduced (Article 17)[47]. If the taxpayer requests that the audit be carried out at the workplace, the tax administration has a discretion power in order to accept this request. In our opinion, the obligation of the taxpayer to take the books and documents to the administration has brought the rules of audit back to the traditional administration approach rather than governance in this respect.

In this respect, it is concluded that the aforementioned amendments made with the Act No. 7338 regarding the tax audit do not comply with the good governance principle.

Finally, yet importantly, one of the issues to be evaluated in terms of tax audit from the perspective of good governance principle is whether the taxpayer is given a sufficient and an effective opportunity to express opinions and objections during the audit process. In this context, it would be appropriate in the context of good governance principle to submit the reports of the report evaluation commissions to the taxpayer before they are processed and to notify the taxpayer of all reports related to the audit, such as tax technique reports *(vergi tekniği raporu).* There is no consensus in the judicial decisions on whether the tax technique reports, which are the basis for the tax audit reports, should be notified to taxpayers after the tax audit[48]. In these decisions, the issue is generally discussed within the scope of the related tax legislation provisions and the right to a fair trial. In our opinion, one of the

[47] Article 17 and Article 18 of the Act no. 7338 enter into force in 01.07.2022 (Article 62 of Act no.7338).

[48] For example, there are judgments of the third and seventh Chambers of the Council of State that they have found the failure of notification of the tax technique report lawful. (See, Turkish Council of State, 3rd, 2015/10015, 2017/7995, 20.11.2017; Selim Kaneti, Esra Ekmekci, Gülsen Güneş, Mahmut Kaşıkcı, Vergi Hukuku (2nd, Filiz 2022), 247; Turkish Council of State, 7th, 2011/7651, 2015/3983, 12.06.2015; https://www.lexpera.com.tr Date of Access 12 June 2022).
On the other hand, the 4th and 9th Chambers have decided that the audit report and the tax technique report should be notified at the administrative stage as a requirement of taxpayer's right to legal remedies (See,Turkish Council of State, 4th, 2013/1182, 2013/6242, 24.09.2013 [Kaneti et al, ibid 247]; Turkish Council of State, 9th, 2015/6077, 2015/10015, 30.09.2015 [Kaneti et al, ibid 247]). In its former judgments, the Plenary Session of Tax Law Chamber of the Council of State has ruled that the failure of notification of the tax technique report after the audit phase is unlawful (See, Turkish Council of State Plenary Session of the Tax Law Chamber, 2014/508, 2014/761, 17.09.2014; https://www.lexpera.com.tr Date of Access 12 June 2022.). However, in its later judgments, the Court ruled that it is sufficient to notify the report at the litigation stage: "*... In practice, it is observed that the tax audit reports, which are usually prepared with reference to the tax technique reports, are notified to the taxpayer, but the tax technique report, which demonstrates the reason for the assessment, the method of determining the tax base, the information and documents on the basis of the assessment, are not notified. Although the main rule is the notification of the tax technique report in the annex of the notice, it is possible to remedy this deficiency at the trial stage by allowing the plaintiff to examine and present the evidence to prove her/his claims, upon the request of the said report with an interim decision by the court or its submission to the case file by the administration ex officio."* (Turkish Council of State Plenary Session of the Tax Law Chamber, 2016/91, 2016/91, 10.02.2016) https://www.lexpera.com.tr Date of Access 12 June 2022).

reasons why the tax administration should notify the tax technique reports by acting in accordance with the tax privacy principle is the principle of good governance.

V. Conclusion

The well-known argument that "the only thing that does not change is the change itself" is also valid concerning the understanding of management/administration. The hierarchical, traditional administration approach, in which decision processes are unilateral, has entered a process of change in many areas. Instead, the concept of governance adopts a heterarchical structure and democratic understanding in which the governed and thirds parties, such as non-governmental organizations are included in the decision-making processes.

Even though its content and scope are still cannot be clearly defined, there are fundamental standards/elements of the principle of good governance. Participation, accountability, and transparency are determined to be prominent among them.

This principle is not included in universal legal documents or constitutions. However, it is reflected in the disciplines of law and specifically in the discipline of tax law. Actually, the European Court of Human Rights applies this principle in its individual application review. In some cases, it has found the actions of the complained state administration contrary to the principle of good governance in the context of the principle of proportionality.

Turkish Constitutional Court also states that the tax administration should act in accordance with the principle of good governance. In this regard, it was found that if the administration has not emended the consequences caused by its faulty action in a reasonable time without a justified reason, it can be said that the administration did not act in accordance with the good governance principle, and the interference is disproportionate. Hence, The Constitutional Court reviews this principle on its dimension of active, participatory, accountable, "good" tax administration, which is one of the dimensions of the good governance principle. On the other hand, the principle of good governance is more comprehensive and includes the dimensions of interaction between the taxpayer and the tax administration in terms of decision-making processes. As a matter of fact, the concept of governance *(yönetişim)* consists of the terms of "government/management" *(yönetim)* and "communication" *(iletişim)* in Turkish.

In this regard, it is considered that in tax law, it is not always possible to expect the tax administration to strictly communicate and interact with the taxpayer in any case. On the other hand, as a rule, practices such as informing the taxpayers before implementing a measure that will affect them and giving them the opportunity to

put forward their opinions and objections will be in accordance with the principle of good governance and democracy in the taxation process.

Considering the legal amendments in terms of tax audit after the relevant Constitutional Court judgments, it can be mentioned that some regulations have brought the rules of tax audit back to the traditional administration approach rather than the governance approach. It is concluded that to regulate a new rule that tax audits shall be carried out at the tax office instead of the taxpayer's workplace, and to eliminate the requirement that both the auditor and the taxpayer at the beginning of the audit sign the audit report are not in accordance with the principle of good governance.

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