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PROTECTION OF TAX PAYER'S COMMERCIAL DATA WITHIN THE SCOPE OF TURKISH TAX LAW*

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ABSTRACT

While the protection of personal data has recently become an actual issue in Turkey, it is actually an issue that has been regulated under the procedural law applicable to the tax law. The statutory regulations which are specific to the tax law stipulate the principle that the taxpayer data acquired by the tax administration for taxation purposes must be protected.

In this paper, we will try to explicate the provisions in the tax legislation that forbid the disclosure and use of the commercial information of the taxpayers. First of all, a brief describe how the legal basis on the protection of personal data has developed historically and just after that extensive statements regarding the protection of commercial data of taxpayers will be stated from the point of tax law. In final part, certain drawbacks of the relevant regulations and generally positive outcomes will be considered and shared about the issue.

Keywords: Data Protection, Commercial Data, Tax Privacy, Tax Secret, Disclosure and Use, Legality of Disclosure

1. INTRODUCTION

The initial foundational studies on the protection of personal data were started by the European Council. These studies led to the coming of the 'Convention on the Protection of Individuals with Regard to Automatic Processing of Personal Data' into effect on October 1, 1985. The said Convention No. 108 aims to protect the privacy of the natural persons within the member countries, regardless of their nationality and domicile, against the automatic processing of their personal data. We would also like to mention here as it concerns the subject-matter of this paper that the OECD, too, has an international publication titled 'Guidelines on the Protection of Privacy and Transborder Flow of Personal Data', dated September 23, 1980, regarding the protection of personal data.

In the wake of all these studies, the European Parliament and the European Council adopted the 'Directive on the Protection of Individuals with Regard to the Processing of Personal Data and On the Free Movement of Such Data' in 1995 and the member countries of the European Union as well as Turkey have begun to introduce internal regulations on the protection of personal data in line with the said Directive. Finally, the General Data Protection Regulation (GDPR) became enforceable across the EU beginning 25 May 2018. While the aforesaid international regulations are in place, we would also like to point out here that article 8

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of the European Convention on Human Rights, titled 'Respect for Private and Family Life', can be recognised as an international norm that ensures legal protection of personal data indirectly.

Along with the member countries of the European Union, Turkey, too, joined the process regarding the protection of personal data and signed the Convention No. 108 on January 28, 1981. However, the completion of the preparations for the internal regulations was waited before putting the Convention into effect. For the reason, the Convention No. 108 could be promulgated in the Official Gazette and come into effect only on March 17, 2016.

After the emergence of the need for the protection of personal data, Turkey has introduced its own internal regulations by taking into account the international regulations as well. In the first instance, a paragraph was added with the Law No. 5982 to article 20, captioned 'right of privacy', which grants every person the right to demand the protection of their personal data. The fundamental internal regulation on the subject-matter, on the other hand, is the 'Law No. 6698 on the Protection of Personal Data' which come into effect on April 7, 2016. Article 2 of the Law which sets out the scope of the Law provides that the provisions of the Law apply to the natural persons whose personal data are processed as well as to the natural and legal persons who process such data with an automatic system or a non-automatic system, providing that it is a part of a data recording system, in whole or in part. In this context, the personal data protected by the Law No. 6698 is the personal data of natural persons only. The data of legal persons are not under the protection of the Law.

Sub-paragraph (ç) of paragraph 1 of article 28 of the Law on the Protection of Personal Data provides that the personal data can be processed by public authorities and organisations within the scope of their preventive, protective and intelligence activities for reasons of 'public order' and 'economic security'. At this point, we must say that the personal data of the taxpayers are linked with the concepts of 'public order' and 'economic security'. Sub-paragraph (ç) of paragraph 2 of the same article provides that some basic provisions of the law shall not be applied "*in the cases that the processing of personal data is necessary for the protection of economic and financial interests of the State in relation with budget, taxation and fiscal matters.*" When these two provisions are considered together, we can conclude that the data of the taxpayers are excluded from the scope of the Law on the Protection of Personal Data.

We see that the Revenue administration records and processes the commercial information of the taxpayers through the 'Intelligence Archive' (Tax Procedure Law -VUK- No. 213, art. 152) and the 'Risk Management System'¹. Under these circumstances, it is suggested that the conditions for collection, storage and processing of the taxpayer information by the administration are not dealt with any law other than the Law on the Protection of Personal Data and that the provisions of the tax laws concerning the tax privacy which are mentioned below actually protect the data itself rather than the data owners (Karaçoban Güneş, 2016, p. 801-824).

An analysis of the issue of protection of personal data in terms of the Tax Law shows that the provisions concerning the protection of personal data of the taxpayers have been incorporated into the Tax Procedure Code from 1950 on and into the Law No. 6183 on the Procedure for Collection of Public Receivables (AATUHK) from 1954 on before the introduction of both the international regulations and the Law on the Protection of Personal Data. The said provisions require that after a number of data of the taxpayer, including their commercial information, have been learnt by the public authorities in the course of the taxation process, such data and information must be protected. In this context, for the purpose of protecting the taxpayer information, penalty of imprisonment has been introduced for the crime of disclosure of such data to others.

As it is known, the tax administration has a broad audit authority. In this context, the taxpayers are obliged to present a number of documents which include the confidential information as well to the public official who is examining their books and records. We see that the tax administration has access to a lot of pieces of commercial information of the taxpayers in the course of investigating the accuracy of the tax payable. Especially in the course of inspection of the books, accounts, records and tax returns through audit tools

¹The Ministry of Finance can establish procedures and principles regarding the collection, storage and processing of the taxpayer information for the purposes of prevention of tax loss and evasion. Indeed, the Ministry has been vested with the authority to make a regulation regarding the transfer, storage and processing of the taxpayer information to and in an electronic system as well as the assessment and using of them (Tax Procedure Law, the repeated article 257, para. 1, sub-para. 4). In this context, Communiqués have been introduced regarding the transfer of such information obtained by the tax administration through the electronic tax returns and other documentation to an electronic format. In accordance with these regulations, an electronic recording system to which the taxpayer information is transferred by the Revenue administration has been created by the fiscal administration.

such as examination, search and tax auditing or in the course of execution of any taxation transactions like collection, the tax administration acquires the commercial information of the taxpayers in many areas such as deals, transactions, account balances, enterprises, customers, prices or discounts, payment terms, etc. of the taxpayers. Such pieces of information other than the ones disclosed or announced to public with the permission of the taxpayer can be designated as ‘trade secret’.

Using of any commercial information acquired by the tax administration for a purpose other than the purpose of taxation is against the law. Indeed, learning of such trade secrets by others may inflict harm to the competitive and economic power or the reputation of the taxpayer. For this reason, any commercial information of the taxpayer which has been acquired for taxation purposes is qualified as a ‘tax secret’ at the same time and the sharing of such secret with others is treated as a special crime (Tax Procedure Law No. 213, art. 5, and Law on the Procedure for Collection of Public Receivables, art. 107). This type of crime, which is called as the ‘crime of violation of the tax privacy’, intends to discourage a person, mainly the employees of the tax administration, to refrain from disclosing and using such trade secrets of the taxpayers registered with the tax administration. In addition, this ban is applicable not only to the officials who are engaged in tax transactions and inspections. Those who take part in taxation commissions and tax crime trials, expert witnesses appointed to taxation disputes, and any persons to whom trade secrets of taxpayers are disclosed pursuant to any statutory provisions are obliged to protect the trade secrets learned by them.

In the event that a person violates any provisions of the Turkish Tax Law concerning the protection of trade secrets of taxpayers, the perpetrator is punished in accordance with the rules of penal code. This requires that the provisions that protect the trade secrets of taxpayers should be dealt with systematically in accordance with a number of statutory regulations. In this context, it will be useful to explicate the main provisions of the Turkish Tax Law concerning the protection of trade secrets of taxpayers and then the legal and penal consequences of the violation of such provisions in the first instance so that the issue can be understood better.

2. TAX REGULATIONS PROTECTING THE COMMERCIAL INFORMATION

Tax returns, books and records of taxpayers contain various pieces of information. Many of such pieces of information are trade secrets of both the taxpayer and the persons with whom they have entered into a relationship and concern directly the property right under article 35 of the Constitution. In the event that the trade secrets of a taxpayer are learned by others and especially by those who are engaged in the same business with that of the taxpayer, the taxpayer’s competitive and economic power or reputation are compromised at present or in the future. Therefore, protection of the taxpayer’s information ensures in effect protection of the property right of the taxpayer at the same time. Protection of the information of the taxpayer and the public debtor concerns the protection of the ‘right to privacy’ under article 35 of the Constitution as well (Güneş, 2014, p. 1858; Yaltı, 2006, p. 175; Küzeci, 2018, p. 480). Indeed, pursuant to this right, the privacy of an individual and their family may not be touched. From this point of view, it must be recognised that an individual’s trade secrets which are not in public domain are a part of the individual’s private life, and therefore they must be protected.

As it is seen, the Government should introduce statutory regulations that forbid disclosure of trade secrets of taxpayers to third persons in order to protect their ‘property right’ and the ‘right to privacy’. In this context, disclosure of any secrets of taxpayers and any persons related with them about themselves and their transactions, accounts, businesses, enterprises, fortunes or occupations by any persons who have acquired such secrets by virtue of their official duty and using of such secrets by such persons for their own benefit or for the benefit of third persons are forbidden (VUK, art. 5 and AATUHK, art. 107). Thus, employees of any institutions to which any trade secrets are disclosed, primarily those who take part in the taxation process or the tax crime trials, are obliged to keep such trade secrets that have come to their knowledge confidential. Any acts contrary to this obligation are subject to penal sanctions (VUK, art. 362).² On the other hand, we see that divulging of trade secrets of taxpayers to others is permitted in accordance with legal reasons for the purposes of protection of public interests.

²Article 362 of VUK provides that those who disclose and use any information they have learnt by virtue of their official duty for their own benefit -who violates the rule of tax privacy- are to be punished in accordance with article 239 of the Turkish Penal Code, subtitled “disclosure of information or documents in nature of trade secret, banking secret or customer secret.” This entails that those who violate the tax privacy must be subject to the provisions in the general criminal law.

Furthermore, the employees of any creditor public administration which has the duty to enforce the Law No. 6183 on the Procedure for Collection of Public Receivables are obliged to disclose the secrets and other information that must be kept confidential which they have learnt about the persons, occupations, business deals, transactions and account balances of a public debtor and any persons related with them (AATUHK, art. 107). Accordingly, the presidents and members of any assessment and public sale commissions which take part in the process of forceful collection of public receivables, the officers of execution and bankruptcy departments, the receivers, the persons carrying out the services and orders of the collection departments, and the expert witnesses who perform a duty in the process of collection (Candan, 2011, p. 614-615) must protect the commercial information of confidential nature of the public debtors and any third persons related with them which they have learnt by virtue of their duty.

The obligation of the tax administration to protect the taxpayer information and the exceptions to this obligation exist in the legislation of other countries as well. For instance, the U.S. law protects taxpayer's tax return information from disclosure to third parties by the Internal Revenue Service. As a general rule, IRC Section 6103 prohibits the release of tax information by an IRS employee even though there are important exceptions (U.S. Internal Revenue Code, 1986)³ regarding this issue. Also, U.K. Revenue and Customs authority protect taxpayers' privacy and is obliged to comply with the Data Protection Act 1998. In this context, Section 18 - *titled as Confidentiality*- of "Commissioners for Revenue and Customs Act 2005" regulates that Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs. On the other hand, if the law allows, the said authority may give information about taxpayers to other government departments and similar bodies, the police and law enforcement agencies, the courts *-on condition that a valid court order-* and foreign tax and customs authorities (HM Revenue & Customs. Retrieved on April 24th, 2018 from <https://www.gov.uk/government/organisations/hm-revenue-customs>.)

3. COMMERCIAL INFORMATION REQUIRED TO BE PROTECTED UNDER TAX PRIVACY

Article 5 of the Tax Procedure Law specifically enumerates the transactions, account status, business and operational information of a merchant as trade secrets which must be protected. However, for the reason that the provision contains the phrase of other facts which must be kept confidential, it is obvious that the concept of trade secret must be interpreted broadly (Uğur&Elibol, 2016, p. 555). Any commercial information of a taxpayer which is in possession of the tax administration which, if known by others, may inflict harm to the commercial reputation or financial strength of the taxpayer must be protected and not disseminated (Çakır, 2013, p. 353; Ürel, 2016, p.75).

For instance, information of the taxpayer about prices, discounts, payment terms or debt-credit status is included in the tax privacy. Since such secrets are owned by the parties of a commercial transaction, they must be protected for both of the parties. Again, such information about the fact that the property of a taxpayer has been attached due to non-payment of a tax debt or any other obligation arising from the private law or that the attachment failed to cover the debt is a trade secret and must not be disclosed (Erman, 1988, p. 100). Meanwhile, such information of an enterprise about its employees and salaries paid to them and production formula and recipes must be considered in the same manner. Information of any company about its capital, founders, shareholders, principal office address, members of board of directors and their office terms, legal representative, etc., which are stated in its articles of association, and information about the resolutions of the board of directors is information in public domain. Although such pieces of information are of commercial nature, they are not required to be protected under the tax privacy for the reason that protection of any information which is known by all does not involve the rightful interest of the owner of the information (Şenyüz, 2017, p. 430; Arslan, 2013, p. 21).

³IRC 6103(d) provides that return information may be shared with state agencies responsible for tax administration. The state agency must request this information in writing and the request must be signed by an official designated to request tax information.

IRC 6103(l-1) provides that pursuant to court order, return information may be shared with law enforcement agencies for investigation and prosecution of non-tax criminal laws.

IRC 6103 (k-6) allows the IRS to make limited disclosures of return information in the course of official tax administration investigations to third parties if necessary to obtain information that is not otherwise reasonably available.

IRC 6103 (l-1) provides that return information related to taxes, imposed under chapters 2, 21 and 24 may be disclosed to the Social Security Administration (SSA) as needed to carry out its responsibilities under the Social Security Act. Chapter 2 relates to self-employment income and does not normally concern employers. Chapter 21 concerns social security and Medicare (FICA) tax, and chapter 24 deals with income tax withholding. The IRC may therefore share information with SSA about social security and Medicare tax liability if necessary to establish the taxpayer's liability. This provision does not allow the IRS to disclose your tax information to SSA for any other reason. SSA employees who receive this information are bound by the same confidentiality rules as IRS employees. Therefore, they generally cannot disclose the information to a state social security administration (SSSA), state officials or other Federal agencies.

IRC 6103(e)(6) and (c) provide for disclosures to powers of attorney and other designees."

Not only the disclosure of any commercial information of a taxpayer has been forbidden. Indeed, it is possible to glean trade secrets from the records of a taxpayer about a number of natural and legal persons or their spouse, children, blood and in-law relatives with whom they are related (Sonsuzoğlu, 2000, p. 125). Any persons who have entered into a debt-credit relationship with a taxpayer through any deal such as purchase and sale of goods or services, leasing, borrowing, manufacturing, construction, etc., too, are the persons related with the taxpayer, and any trade secrets of such persons can be learnt through the taxpayer (Erman, 1988, p. 100). On the other hand, we have the opinion that the rule of protection of the secrets of a taxpayer must be interpreted broadly in a manner to include the commercial information of a party who is responsible for the tax or any other persons with whom that party is related as in the case of the taxpayer (Arslan, 2013, p. 21; Güneş, 2014, p. 1853; Ünsal, 2003, p. 40).

4. PERSONS OBLIGATED TO PROTECT THE COMMERCIAL INFORMATION OF TAXPAYERS

Those who are in a position to disclose or use a trade secret of a taxpayer in contradiction with article 5 of the Tax Procedure Law are mostly public officials. Indeed, as we noted previously, the crime of violation of tax privacy is a specific crime that can be perpetrated by public officials with some exceptions. The Law does not enumerate one by one the persons who are obliged to comply with the tax privacy. Therefore, any person not enumerated in the law cannot be the perpetrator of the crime, it is possible to identify any persons who can be the perpetrator by making a broader interpretation (Güneş, 2014, p. 1855, 1862; Sonsuzoğlu, 2000, p. 121). Accordingly, the persons specified below must protect the commercial information of the taxpayers.

a) Persons taking part in taxation transactions and audits: The tax administration has many employees who perform a task at various stages of the taxation process. Some of them follow up the transactions at the assessment stage and the others make tax audit. In addition, there are other persons who are not employed by the tax administration but assigned to execute any transactions related with tax or conduct tax audit for various reasons, such as a postman who serves notices of actions taken at the stage of tax assessment or police officers (Kocahanoğlu, 1983, p. 344; Arslan, 2013, p.20; Erman, 1988, p. 98; Karakoç, 2016, p. 309; Ünsal, 2003, p. 27) who are assigned to search tasks, and judges of civil law (Güneş, 2014) who issue the search warrant. Such persons must be considered as involved with the tax transaction. The aforesaid persons can take part jointly or severally in a tax transaction or audit as part of a public duty and by this means can acquire any commercial information of the taxpayers.

b) Employees of Tax Jurisdiction: Employees of tax courts, regional administrative courts and the Supreme State Council must conform to the rule of tax privacy. This obligation applies not only to the judges, prosecutors and reporters of the said courts, but also to the managers and employees of the secretariat, the administrative staff in various positions like chief, and any other officers in any other classes of these courts who may have access to the information of the taxpayers (Erman, 1988, p. 99; Oktar, 2017, p. 381-382).

c) Persons taking part in tax commissions: There are various commissions formed pursuant to the tax laws which are: valuation commission (VUK, art. 72-76), conciliation commission (VAK, additional art. 1), provincial and central commissions for agricultural earnings (VUK, art. 83-86), and amendment commission (VUK, art. 80-82). The members and secretaries assigned to these commissions can have access to many trade secrets of the taxpayers under consideration.

d) Expert witnesses: The persons whose special knowledge and expertness in various technical matters are used by the judicial bodies are obliged to keep confidential the information of the taxpayers they have become aware of in the course of examination of the cases of dispute assigned to them. An expert witness is appointed by a public authority or a court to solve a tax dispute or a tax-related judicial claim. Since an official assignment is made here, the expert witness can be deemed a 'public official' as per the provision of article 6/1-c of the Turkish Penal Code, even though they are a freelance professional.

Again, the valuation commissions can appoint expert witnesses for value appraisals and valuation procedures in particular. Such expert witnesses, too, must be considered as persons who are obliged to comply with the tax privacy (Güneş, 2014, p. 1865).

e) Those who acquire the information of taxpayers through judicial and administrative investigations as well as under the Private Laws of any Public Institutions and Organisations: Some special circumstances necessitate the divulging of the commercial information of the taxpayers to others. Such

circumstances as cited in paragraphs 4 and 6 of the Tax Procedure Law and mentioned below are the grounds for compliance with laws applicable to the tax privacy. When any commercial information is acquired by virtue of such legal grounds, the persons who have acquired such information become obligated to protect the secrecy of such information.

Public officials can demand any commercial information and documentation of taxpayers which are related with judicial and administrative investigations conducted by them (VUK, art. 5/4.f). Pursuant to this provision, which serves to the purpose of illuminating the investigation, it is not possible for the person who possesses such trade secret to seek refuge from the rule of privacy against such demand of information and documentation.

A taxpayer's tax information is in the nature of commercial information, and therefore its disclosure is subject to the tax privacy. However, the law sets out some exceptional cases under which the tax information can be divulged to third persons. As it is known, the banks are authorized to collect tax. When the banks request information about the tax they will collect from the respective authority, such information has to be given to them (VUK, art. 5/4.f.).

When a taxpayer has submitted a fake document or misleading information to the tax administration, there is an obligation to report such criminal acts leading to tax evasion to the association or the chamber of occupation or profession where the taxpayer is a member (VUK, art. 5/4.f.). This obligation is performed by the department where the persons who have written the tax examination report are employed.

Finally, there is paragraph 6 which was added by article 8 of the Law No. 7103 to article 5 of the Tax Procedure Law to come into effect on 21.03.2018. This paragraph provides that primarily public institutions and organisations can demand information from taxpayers by virtue of the private laws of such institutions and organisations. In this context, the taxpayer is obliged to submit such information to the respective public institution or organisation if the information is directly related with the duty of such institution or organisation and required ad hoc or on an ongoing basis for the performance of such duty. Those who possess taxpayer information, such as tax administrations, are obliged to divulge such information to the respective public institution or organisation.

It is seen that all the aforesaid statutory provisions provide that any commercial information which in essence falls within the sphere of tax privacy can be divulged to any public officials who carry out judicial and administrative investigations, to the banks, to such associations and chambers which are informed about the perpetration of tax crime by their members, and to such public institutions and organisations which are authorised to receive any taxpayer information as they deem necessary in accordance with the provisions of their private laws. Therefore, such commercial information which has been acquired by virtue of the said provisions must not be disclosed and used by the employees of the respective institutions and organisations.

f) Employees of the taxpayer who has access to the information contained in the books and documents of the taxpayer

The Finance Ministry is authorized to establish such procedures and principles applicable to the creation, recording, transmission, storage and presentation of electronic books, documents and records as well as the practice of maintaining and executing of books and documents in electronic medium. In this context, the Finance Ministry is authorized to introduce the obligation to transfer the information contained in electronic books and documents to a company in legal entity status regulated by a private law, which will be determined by a regulation to be issued by the Council of Ministers (VUK, art. 242/final). When these regulations are introduced, the employees of the company authorized to record the taxpayer information transmitted to it in an electronic medium will be obligated to comply with the rule of tax privacy.

As it is seen, the provisions of the tax law regulate the protection of any commercial information learnt in the course of performance of a duty (Erman, 1988, p. 99; Çakır, 2013, p. 358; Saban, 2017, p. 530). Here, any commercial information learnt by the officer by exceeding their authority and even by abusing their duty must be kept safe. Therefore, a person who discloses any information learnt by them by performing their duty in contradiction with the law will have perpetrated the crime of violation of the tax privacy. For instance, disclosure by an officer who carried out a tax examination or a search of any commercial information contained in a document of evidence obtained by them by exceeding their authority will lead to the crime of violation of the tax privacy (Erman, 1988, p. 101; Çakır, 2013, p. 358) Meanwhile, some people can learn any commercial information by virtue of their capacity or profession. In such a case, any

piece of commercial information so learned will not qualify as commercial information learnt in the course of performance of an official duty. However, a disclosure of any information so learnt may constitute an act of crime under article 239 of the Turkish Penal Code, subtitled ‘disclosure of information and documents in the nature of trade secret, banking secret or customer secret’ if the required conditions are in place (Donay, 2008, p. 167-168).

If the persons referred to above learn the trade secrets of a taxpayer by any means other than the performance of their official duty and then disseminate them, they will not be deemed to have perpetrated the crime of violation of tax privacy (Erman, 1988, p. 100-101; Oktar, 2003, p. 21). However, if a trade secret is learnt as a result of acquisition of the content of a communication and that secret is disclosed, it must be deemed that article 132 of the Turkish Penal Code, subtitled “violation of confidentiality of communication” has been violated. Here, if the perpetrator has violated the confidentiality of communication between others, paragraph 2 of article 132 of the Turkish Penal Code (*imprisonment for a term of two to five years*) will be applied. If the perpetrator has violated the confidentiality of a communication with them, paragraph 3 of article 132 of the Turkish Penal Code (*imprisonment for a term of one to three years*) will be applied. A person who has acquired any commercial data by recording a non-public communication between others and disclosed such data will have perpetrated the crime provided in paragraph 3 of article 133 of the Turkish Penal Code, subtitled ‘intercepting and recording of conversations between individuals’, which is punishable with *imprisonment for a term of two to five years and judicial fine up to four thousand days*. A person who has acquired a commercial data which is a personal data illegally by any means other than the performance of their duty or divulged it to others or disseminated it to public illegally must be punished with *imprisonment for a term of two to four years* pursuant to article 133 of the Turkish Penal Code, even if this act does not fall within any of the criminal acts cited in the law.

5. ACTS WHICH VIOLATE THE PROTECTION OF TRADE SECRETS: ‘DISCLOSURE’ AND ‘USE’

If those who have learnt any trade secrets of the taxpayers and any persons related with the taxpayers in the course of performance of their official duty disclose such secrets or use them for their own benefit or for the benefit of third persons, they will have perpetrated the crime of ‘violation of tax privacy’ (VUK, art. 5). If those who have acquired any trade secrets in the course of performance of their duty involving prosecution and forceful collection of a public receivable disclose such secrets, they will have perpetrated the crime of ‘disclosure of a secret’ (AATUHK, art. 107). These regulations in the tax law show that the commercial information of the taxpayers is tried to be protected by two ways. The first way is to forbid the disclosure of the information. The other way is to forbid the use of the confidential information to gain a benefit.

Disclosure of a trade secret can be made through an action such as disseminating any document or record containing the secret or a negligence such as avoiding from preventing an attempt to access to a tax file containing the secret (Taş, 2008, p. 101-102). At this point, divulgence or dissemination of a trade secret to a person or a group of persons is enough for the existence of an act of disclosure (Donay, 2008, p. 168-169; Duman, 2016, p. 1588). On the other hand, a disclosure made to a person who has right or is authorised to learn any commercial information does not constitute a violation of the law (Erman, 1988, p. 101).

The second regulation aiming the protection of any commercial information is about the non-use of such information. As we noted above, the ban of disclosure applies regardless of whether the person who has disclosed the information of a taxpayer has gained any benefit from this or not. Regarding the ban of use, on the other hand, the violation occurs when the person has used the commercial information for their own benefit or for the benefit of others. In this context, the crime of violation of the tax privacy is deemed to have been perpetrated when the perpetrator has gained a benefit from the trade secrets of a taxpayer, even though such secrets have not been disclosed. For example, if a person does not disclose a trade secret to another person, but they gain a benefit for themselves or others by promising that person to disclose the secret, the crime of violation of the tax privacy will have been perpetrated. On the other hand, if a trade secret is used to gain a benefit, but if no benefit has been gained, the perpetration of the crime will not have been consummated. In such a case, however, it must be said that the act of the person who intended to gain a benefit from the commercial information of another person has turned into an attempt of the crime (Erman, 1988, p. 103). In the event of existence of an attempt to perpetrate a crime, the punishment for the crime is reduced by one fourth to three fourth pursuant to paragraph 2 of article 35 of the Turkish Penal Code.

6. EXCEPTIONS TO THE BAN OF DISCLOSURE OF TRADE SECRETS UNDER TAX PRIVACY

Divulgence of information to others about the trade secrets of taxpayers has been permitted through various statutory provisions, primarily the tax laws. Such statutory regulations constitute the grounds for compliance with law regarding the tax privacy. The regulations starting from paragraph 3 of article 5 of the Tax Procedure Law as well as paragraph 2 of article 107 of the Law on the Procedure for Collection of Public Receivables set out such grounds for compliance with law. In addition, some basic principles of the criminal law that eliminate the crime as well as the provisions arising from the international law make the act of disclosure of trade secrets comply with the law. Such special conditions under which any commercial information of taxpayers in the nature of trade secret can be disseminated are explicated systematically under the following captions:

a) Disclosure of the information in the tax returns

The tax base stated in the income tax return and, in the case of capital companies, in the corporation tax return shows the annual taxable commercial earnings of the respective taxpayer. In this context, one may think at first glance that the confidentiality of the tax base and the amount of tax assessed on the tax base as declared by the taxpayer on the tax return must be protected. And yet we see that the respective tax offices are permitted to announce to public all kinds of revenue information, including any losses, as shown by the taxpayers in their tax returns (VUK, art. 5/3.f.).

If an inaccurate declaration made by a taxpayer about their income is announced to public by the tax administration, such information may inflict harm to the commercial reputation of the taxpayer. So, if the taxpayers do not want to face such an adverse event, they would choose to declare their income accurately by knowing that this information will be disclosed to public by the tax administration (Yiğit, 2004, p. 197; Çakır, 2013, p. 363). Therefore, by means of this provision, the legislator in effect intends to urge the taxpayers to declare their tax base and tax details accurately. On the other hand, we see that this provision is serving to a different practice than the intended purpose. Indeed, we see that the lists of taxpayers who have declared the highest amount of tax and who have the highest tax debt under income and corporation tax returns by province are announced to public. Moreover, if any taxpayers who have paid the highest taxes want to remain anonymous in the list, the announcement contains only the tax base declared by those taxpayers.

At this point, after the public announcement made as per 3rd paragraph of the law, we see that the persons in these lists are called as the tax champions and the tax shameless in the press. Under these circumstances, the criticism that the provision does not actually aim the disclosure of the tax base of certain taxpayers and that disclosure by the tax offices of the names of some of the taxpayers only is not lawful is voiced (Çakır, 2013, p. 364; Açar, 2012, p. 372; Ürel, 2016, p. 76).

We partly agree with such criticism. Indeed, when the list of persons who have tax debt is announced to public, the commercial reputation and business of the listed taxpayers are adversely affected from this. When the names of the persons who have tax debt are announced to public, the taxpayers in the list are actually punished with an administrative sanction apart from the late payment interest. To which taxpayers this sanction will be applied, on the other hand, has been left to the choice of the administration. Moreover, it happens that the names of those who have the highest tax debt are not announced to public in some of the provinces. The fact that the application of penalty has been left to the discretion of the tax administration in this manner is against the principle of 'legality of penalties'.

In our opinion, it is not rightful to advertise the lists of tax champions in every province by relying on paragraph 3 of the law. Indeed, the incomes declared as shown in these lists are disclosed for the reason that they are higher than the income declared by the other taxpayers. Whereas, tax is a constitutional duty and everybody is obliged to pay tax in any amount depending on their financial power. In this context, disclosure of the tax amount to be paid by those who have higher financial power than the others and thus making them more reputable in the eye of the community constitute a violation of the principle of equality.

Finally, as we will note under the following caption, we must say that all declarations made by the taxpayers as the basis of the tax assessment, including the ones pertaining to the income, can be disclosed by the Finance Ministry (VUK, art. 5/4.f.). In our opinion, this provision in effect includes the state of complying with law under 3rd paragraph as well. Indeed, for the reason that the tax return information of

the taxpayers pertaining to all types of taxes can be disclosed to public as per 4th paragraph, we can say that 3rd paragraph is rendered dysfunctional.

b) Disclosure of the amounts of tax and fine payable by taxpayers

Declarations of the taxpayers as the basis of tax assessment of all types of taxes, finalized amounts of taxes and fines, and amounts of any tax and fine unpaid at the date for payment can be disclosed by the Finance Ministry (VUK, art. 5/4.f.). Here, it is stated that with the exception of any taxes unpaid at the date for payment, any finalized taxes and their fines can be disclosed. The said provision provides the disclosure of the information of such taxes that have been finalized for the reason that no litigation was filed against the tax assessment or the litigation was filed and lost and have been paid at the date for payment.

c) Divulgence of trade secrets to a public official who carries out a judicial and administrative investigation

Such commercial information and documentation which normally must remain confidential must be submitted to public officials who are carrying out a judicial and administrative investigation upon their request (VUK, art. 5/4.f.). Therefore, one cannot say that any commercial information demanded for the purposes of a public investigation may not be submitted on the grounds of tax privacy. With this provision, which ensures that those who carry out judicial and administrative investigations can perform their duty more efficiently, the disciplinary and judicial penalties established for the public officials become more deterrent on the one hand and by preventing the concealment of any commercial information on the grounds of tax privacy, corruptions can be prevented on the other.

On the other hand, the provision of 4th paragraph should be addressed under the provisions of articles 148, 149 and 151 of the Tax Procedure Law which regulate the 'obligation to give information'. Indeed, even when these regulations are analysed independently of 4th paragraph, it is understood that they give the officer who carries out a tax audit the right and authority to demand and receive information from the taxpayer about the events that have given rise to the tax. When all these provisions are considered together, we conclude that such private law regulations which provide that commercial information must be kept confidential may not be claimed in the course of a tax audit (Şenyüz,2017, p. 437).

d) Divulging of trade secrets to some public institutions and organisations

Public institutions and organisations can demand information from other public institutions about the taxpayers by relying on the regulations in the laws introduced specially for them (VUK, art. 5/6.f.). If, however, the respective public institution or organisation needs any information about a taxpayer absolutely and continuously in order to be able to perform its duty, the divulgence of such information becomes mandatory. In our opinion, the provision of 6th paragraph is important for such public institutions and organisations which are authorized to regulate and audit, in particular such as the Capital Markets Board, the Information Technologies and Communication Authority, the Radio and Television Supervision Council, the Banking Regulation and Supervision Authority, the Energy Market Regulation Authority, the State Tenders Authority, the Competition Authority, etc. Indeed, thanks to the said provision, the aforesaid institutions and organisations can obtain any commercial information about the taxpayers from the concerned departments of the authorities and institutions which possess such information, such as the Finance Ministry and the Social Security Institution. In this case, rejection of any public department to divulge any tax and commercial information of the taxpayers demanded as per 6th paragraph on the grounds of tax privacy would be against the law.

e) Divulgence of information to banks and some other public institutions about tax and other public receivables

Such information can be given to the banks for the purpose of collection of taxes and other public receivables (VUK, art. 5/4.f. and AATUHK, art. 107/2.f.). In this context, a bank officer may choose not to divulge a trade secret of a customer of the bank if it is not related with the tax payable by designating that secret as 'banking secret' or 'customer secret'.

Again, divulgence of information to any institution and organisation such as land registry office, motor vehicle registration office, notary public, etc., which can execute a transaction against a no-debt letter, about the public debt of the person who is the party of the payment and the transaction in question will not be considered as a disclosure of a secret (AATUHK, art. 107/2.1.).

f) Divulgence of the information that the taxpayer has perpetrated a tax crime to occupational organisations

A notice about the taxpayers who have perpetrated the tax evasion crime by using and submitting a fake or misleading document under article 359 of the Tax Procedure Law as established by a tax inspection report can be given to the occupational and professional organisations (such as Bar Associations, Chamber of Doctors, Chamber of Commerce) where the taxpayers are members as well as to associations and professional chambers established by the Law No. 3568 (such as Chamber of Freelance Accountants and Fiscal Consultants, Chamber of Chartered Public Accountants, and the Association of Chambers of Freelance Accountants and Fiscal Consultants and Chartered Public Accountants of Turkey) (VUK, art. 5/4.f.).

At this point, we have the opinion that the notice stating that the taxpayer has perpetrated a tax evasion crime is a trade secret of the respective taxpayer. On the other hand, the fact that permission has been given for serving of this notice about a crime in the absence a court judgment about the taxpayer is criticised for the reason that it constitutes a violation of the presumption of innocence (Donay, 2008, p. 171; Çakır, 2013, p. 368).

g) Taxpayer's permission

The fact that the disclosure of the taxpayer information has been banned is a right given to the taxpayers by the tax law. On the other hand, the taxpayers can waive this right by their own will and permit disclose of their trade secrets to others. In such a case, disclosure of the trade secrets will not constitute an illegal and criminal act. Indeed, since the taxpayer has given consent to the violation of their right which is protected by the law, the ground for compliance with law as provided in paragraph 2 of article 26 of the Turkish Penal Code will exist.

h) Disclosure of information based on international treaties on exchange of information

With the aim of preventing tax loss and evasion and combating harmful tax competition, treaties named as 'Treaty on Exchange of Information on Tax Issues' have been executed between Turkey and some countries such as; Turkey-Exchange of Information Treaty came into effect on 11/09/2013, Turkey-Bermuda Exchange of Information Treaty on 18/09/2013 and Turkey-Guernsey Exchange of Information Treaty on 06/10/2017. The 'Agreement for Augmentation of Tax Harmonisation through Extended Exchange of Information between the Governments of the Republic of Turkey and the United States of America' was signed between the Republic of Turkey and the United States of America based on the principle of reciprocity on July 29, 2015. The Law on the ratification of the said agreement for exchange of information was promulgated on the Official Gazette dated March 16, 2016. By the decree of the Council of Ministers which was promulgated in the Official Gazette dated October 5, 2016, the agreement and the memorandum of agreement annexed to the agreement were ratified.

However, it is understood that the said agreement for exchange of information has not yet come into effect as the process of reporting with the USA has not commenced. Indeed, Turkey is indicated as one of the parties signing the agreement but not as one of the parties which would put the agreement into effect (Retrieved on April 24th, 2018 from <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx>).

Again, there is the 'Mutual Administrative Co-operation Agreement on Taxation Issues' drafted under the leadership of the OECD and the European Council which envisages exchange of information between the contracting countries. Signed by many countries, the agreement was ratified by the Law No. 7018, dated 03.05.2017 in the first instance and then by the decree no. 2017/10969 of the Council of Ministers, dated 30.10.2017 pursuant to the rules of procedure. Upon the promulgation of the Decree of the Council of Ministers in the Official Gazette on 26.11.2017, the agreement has come into effect. The said agreement imposes on Turkey the duty of divulging of any information requested by the contracting States on the one hand and of some information automatically on the other. Looking at the articles 2 and 4 of the agreement, it is understood that such taxpayer information envisaged to be related with the other taxes than the customs duty is exchangeable.

As it is seen, the aforesaid agreements which provide that a contracting country can obtain the tax information of the persons who are taxpayers in another contracting country bring significant exceptions to the rule of tax privacy.

7. THE SANCTION FOR FAILURE TO PROTECT THE TRADE SECRETS OF TAXPAYERS AND THE PROCEDURE FOR PROSECUTION OF THE CRIME

If those who are obligated to protect the commercial information of the taxpayers under the tax laws violate this obligation, they are deemed to have perpetrated a crime and must be punished pursuant to the provisions of article 239 of the Turkish Penal Code (VUK, art. 362 and AATUHK, art. 107). In article 239 of the Turkish Penal Code, subtitled 'Disclosure of any information or document being in nature of a trade secret, a banking secret or a customer secret', the punishment provided for this crime is 'imprisonment for a term of one to three years and judicial fine up to five thousand days.'

If a taxpayer secret is disclosed to a foreigner who is not residing in Turkey or their officers, the punishment to be imposed on the perpetrator is increased by one third (Turkish Penal Code, art. 239/3.f.). On the other hand, it is envisaged that the person who has procured the disclosure of such commercial information or document by using force or threat is punished with imprisonment for a term of three to seven years (Turkish Penal Code, art. 239/4.f.).

In our opinion, investigation or prosecution of persons who have perpetrated the crime of tax privacy is subject to the filing of a complaint (Özbancı, 2012, p. 886; Duman, 2016, p. 1583; Başaran Yavaşlar, 2008, p. 2855; Şenyüz, 2017, p. 431; Kocahanoğlu, 1983, p. 346-347). By using the phrase of '... punished in accordance with the provisions of article 239 of the Turkish Penal Code,' article 362 of the Tax Procedure Law specifically provides that the crime be prosecuted as per the procedure in article 239 of the Turkish Penal Code, that is, filing of a complaint is required for institution of prosecution. Although there are opposite opinions on the subject-matter, (Özen, 2014, p. 70; Taş, 2008, p. 189; Uğur&Elibol, 2016, p. 557; Arslan, 2013, p. 26; Yiğit, 2004, p. 205; Erman, 1988, p. 106) it is possible that the taxpayer may not incur any harm from the sharing of their trade secret with others or that they may give consent to the act subsequently. In our opinion, if the victim has given consent to the disclosure of their trade secrets, it would not be proper to prosecute the act *ex officio*.

On the other hand, if a supervisor or a fellow officer of an officer becomes aware that the officer has disclosed or used for their own benefit any trade secret learnt by them in the course of the performance of their duty, we have the opinion that the victim as the owner of the secret must be informed of this act of that officer which constitutes a crime. Indeed, the sharing of any trade secrets of the taxpayers by persons such as tax inspectors with others must not be settled merely with internal investigation and disciplinary penalties. In this context, especially the authorized persons of the respective institution must give information to the victim about the violation of tax privacy once they have become aware of it.

8. CONCLUSION

Turkey has become a party to and subsequently put in effect the foundational international conventions on the protection of personal data which have been drafted by the European Parliament and the European Council and signed by many member countries. In this context, through the adding of a paragraph to article 20 of the Constitution, subtitled 'right to privacy' on the one hand and the introducing of the 'Law No. 6698 on the Protection of Personal Data' on April 7, 2016, the works aiming the correction of deficiencies in the internal law on the subject-matter have been done.

On the other hand, it is seen that the information of the taxpayers is not protected by the Law No. 6698. Indeed, pursuant to sub-paragraphs (ç) of paragraphs 1 and 2 of article 28 of the Law on the Protection of Personal Data, the provisions of the law are not applied to the protection of the data of the taxpayers. Under these circumstances, it can be said that the special provisions in the tax laws being in effect for a long time which provide the protection of taxpayer information will continue to be applied. The said provisions impose the ban on the employees of such public authorities which possess many commercial information, primarily tax information, of the taxpayers for the purposes of taxation to share such information with others. Therefore, the tax law contains such provisions which protect not only the tax information but also all commercial information of the taxpayers in the possession of the administration. In this context, if a public official discloses any commercial information of the taxpayers to others, they are deemed to have perpetrated one of the special tax crimes provided in article 5 of the Tax Procedure Law or article 107 of the Law on the Procedure for Collection of Public Receivables.

Those who learn any trade secrets of a public debtor and any third persons related with them about their deals, transactions and account status by virtue of their official duty are obligated to not disclose such information and use them for their own benefit or for the benefit of third persons. Therefore, the crime of

violation of tax privacy can be perpetrated by certain persons only. The perpetrators of the crime are those who have access to the taxpayer information in the course of performance of their official duty involving taxation. Accordingly, the officers of the authorities to whom the commercial information of the taxpayers is given pursuant to the statutory regulations, primarily the persons who take part in the taxation process or the tax jurisdiction, can be the perpetrators of the crime of violation of tax privacy. Obtaining of any commercial information by illegal ways does not affect the rule of non-disclosure of such information. What is important is the fact that such information has been obtained by the persons enumerated in article 5 of the Tax Procedure Law in the course of performance of their duties. Those who have disclosed a trade secret of a taxpayer which they have become aware of in any manner other than by virtue of their duty must be punished in accordance with the provisions of article 132, subtitled 'violation of secrecy of communication', and article 133, subtitled 'interception and recording of conversation between persons', of the Turkish Penal Code.

If the use of any information by others inflicts harm to the competitive power, the financial position or the commercial reputation of the taxpayer, that information has to be protected. At this point, any information of the taxpayer about a transaction must be protected under the rule of privacy for the benefit of the other party of the transaction as well. On the other hand, any information contained in the articles of association or the registered resolutions of the general meeting of companies is not in the nature of a trade secret and can be disclosed as it is in public domain.

When any information of a taxpayer obtained for purposes of taxation is disclosed or used, the provisions of the tax law which protect such information will have been violated. If a person employed at a tax office disseminates any documentation or records contained any commercial information of a taxpayer or fails to prevent access to any secrets in the tax file of a taxpayer, they will have perpetrated the crime of violation of tax privacy. Again, if a public officer uses any commercial information of a taxpayer for their own benefit or for the benefit of a third person, they will have perpetrated a tax crime. In theory, the crime of violation of tax privacy can be perpetrated through deriving a benefit from any trade secrets of a taxpayer even without disclosing them. Here, the tax privacy as well as the rule of protection of commercial information are in effect not violated. Therefore, we do not find it rightful to punish a person who has gained a benefit by using such commercial information under article 5 of the Tax Procedure Law. In this regard, it would be appropriate to punish the perpetrator under a different criminal provision or under the Turkish Penal Code.

It is forbidden to divulge any commercial information of a taxpayer to a person who does not have the right and authority to learn such information. Indeed, the taxpayer information can be shared with other public institutions and organisations or third persons in accordance with certain public objectives. Such cases which have a legal basis are the grounds for compliance with law in respect of the crime of violation of tax privacy. We can list our determinations regarding such grounds under article 5 of the Tax Procedure Law which are the exceptions to the rule of tax privacy as follows:

Paragraph 3 which gives permission for announcement to public by the relevant tax offices of all income information, including any loss, stated by the taxpayers on their tax returns must be applied carefully. Indeed, by virtue of this paragraph, we see that the lists containing the names of taxpayers who have declared the highest income and corporation taxes as well as the names of taxpayers who have the highest tax debt are published separately for each province. At this point, the fact that this provision is used merely for the purpose of rewarding the tax champions and punishing those who have high tax debt is disputable.

The announcement to public of the income declared by the tax champions only can be criticised. Here, there is the case that one of the two taxpayers who have been paying their taxes in full becomes known by the public for the reason that he or she has declared a higher amount of tax. Therefore, it can be argued that such a practice is contrary to the principle of equality. Meanwhile, the practice of announcing to public of those who have the highest amounts of tax debt is contrary to the principle of legality of punishment. Indeed, we must state that such announcements are an administrative sanction because of the fact that they adversely affect the commercial life of the respective taxpayers and that the decision as to who will be announced to the public has been left to the discretion of the administration.

The declarations of the taxpayers which are the basis of the tax assessment for all types of taxes, the finalised taxes and their penalties, and the taxes not paid at the date for payment and the amounts of fines can be disclosed by the Finance Ministry (VUK, art. 5/4.f.). Since the details of the tax returns for all types

of taxes of the taxpayers can be disclosed to public by relying on paragraph 4, we believe that paragraph 3 which is specific to the income and corporation taxes only has been rendered dysfunction.

Trade secrets have to be divulged to the public officials who are carrying out judicial and administrative investigations (VUK, art. 5/4.f.). Pursuant to this provision and the provisions of the Tax Procedure Law concerning the control of the 'Information Gathering' (VUK, art. 148 149 and 151), an officer who is carrying out a tax inspection can readily demand any commercial information of the taxpayer.

Pursuant to paragraph 6, public institutions and organisations can demand any commercial information from the taxpayers by relying on the statutory regulations introduced specially for them. We think that this provision will have a field of application for such public institutions and organisations which are authorized to regulate and audit, such as the Capital Markets Board, the Information Technologies and Communication Authority, the Supervision Council of Radio and Television, the Banking Regulation and Supervision Authority, the Energy Market Regulation Authority, the Public Tenders Authority, the Competition Authority, etc. By virtue of the said provision, it is possible for such institutions and organisations to obtain any commercial information they would need for any matters they are researching and perhaps investigating from any authorities and institutions such as the Finance Ministry and the Social Security Institution.

We think that the notice provided under paragraph 4 which is sent to the occupational chambers and associations to inform them that the respective taxpayer has perpetrated a tax crime violates the rights of the taxpayer. Indeed, making a notification about a crime without a court judgment entered into about the taxpayer is contrary to the presumption of innocence.

When a taxpayer has given consent to the disclosure of their trade secrets, there is no legal benefit protected by criminal punishment. Therefore, the ground for compliance with law as provided in paragraph 2 of article 26 of the Turkish Penal Code has been satisfied.

Finally, we think that the investigation or the prosecution of those who have perpetrated the crime of violation of tax privacy is subject to the filing of a complaint. This results from the wording of the provision of article 362 of the Tax Procedure Law. In addition, disclosure of a trade secret may not inflict a harm to the taxpayer at all times. In our opinion, if the sharing of a trade secret with others will not inflict a harm to the taxpayer or, in the case that it inflicts a harm, if the victim has already given consent to the disclosure of trade secrets, the prosecution of the act ex officio would not be proper. On the other hand, we have the opinion that an officer who has become aware that the information of any taxpayer has been disclosed by an employee of the authority where they do a job must report the act which constitutes the crime of violation of tax privacy to their next line manager and, if necessary, to the victim in the first instance.

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