

Right to be Heard and Right to Defence at Turkish Taxation Law

Memduh Aslan* & Raziye Karakilcik**

Abstract

Human rights are tried to be protected universally through national and international studies. In this sense, the right to defence and the right to be heard as a human right; It emerges as an assurance in the execution of justice for individuals whose legal status may be affected as a result of the trial. Because, ultimately, the purpose of a trial is to reveal the material truth and to make fair decisions. These rights are rights that must be fully and equally recognized and fulfilled to the parties, whether in a lawsuit filed against civil rights and obligations, in a criminal case or in the tax proceedings, which are administrative proceedings. In this study, first of all, general information about the right to defence and the right to be heard will be discussed based on the European Convention on Human Rights. Secondly, how the right to defence and legal hearing in tax proceedings manifests as the rights of the taxpayer and in what situations and how it appears, as well as the deficiencies and improvements made in this regard will be discussed.

Key Words: Equality of Arms, Right to Defence, Right to be heard, Taxation Law, Taxpayer Rights.

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* Assoc. Prof. Dr. Hasan Kalyoncu University, Faculty of Law, Gaziantep, TURKEY, memduhaslan@gmail.com ORCID ID: [0000-0002-9512-3876](https://orcid.org/0000-0002-9512-3876)

** Postgraduate of Public Law Programme, Hasan Kalyoncu University, Institute of Social Science , Gaziantep, TURKEY, raziyekarakilcik@hotmail.com ORCID ID: [0000-0002-5814-5806](https://orcid.org/0000-0002-5814-5806)

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Introduction

Humankind, created in the most beautiful way in its essence, deserves to live an honourable life. Therefore, based on human dignity, human rights have been determined by legal studies and tried to be taken under protection. The right to a fair trial, which appears as a basic human right from the present to the past, first showed itself with the Magna Carta Convention, which was held in 1215. Then, the clearest studies on human rights were carried out in the 1900s, considering that the concept of slavery was abolished recently. Following the Universal Declaration of Human Rights on 10 December 1948, the European Convention on Human Rights was adopted on 4 November 1950. In this century, where we have a modern understanding of the state, human rights have found a place on the basis of the principle of legality with these regulations. The fulfilment of the judicial power, which is the result of the separation of powers, by independent and impartial courts, has also created a guarantee at this point. We know that every human being has the freedom to seek rights. While performing this, it makes use of the indispensable elements of the rule of law. Because the foundation of the state is justice. For this reason, the trial to be made in any dispute should be conducted in a system based on equality and the individual who has rights such as the right to a fair trial, the right to defence and legal hearing should benefit from these rights. For example, the right to a fair trial, which is one of the basic human rights, enables the trial to be carried out without violating any rights of the parties.

It is also necessary to benefit from these institutions, which we can make use of in judgments on civil rights and obligations and in criminal proceedings, in the tax proceedings in which disputes arising from the tax regulations in which the public aspect predominates and there is a public credit-debt relationship. In practice, the fact that there are some openness and deficiencies in the tax judgment may cause some discussions and loss of rights. The second paragraph of Article 1 of Protocol No. 1 of the European convention on human rights gives states the right to take the necessary measures to ensure the payment of taxes,

finances and other contributions.¹ Our study is not about questioning the taxation authority, but about whether the taxpayer can exercise his right to defend himself effectively against allegations that the taxpayer's declaration is not correct.

1. Rights to Defence and to be Heard, in General

1.1. Right to Defence

The basis of the right to defence is that man is essentially innocent; The person has the opportunity to defend himself against the allegations that he has committed an injustice and thus victimizing others² The right to defence is a fundamental human right that a person can apply in order to protect his innocence by opposing an accusation against him. emerges as a right that he can benefit from.

While explaining this right in legal terms, the definitions made in general are similar and basically the individual's need to protect himself is included. A person is obliged to take advantage of the right of defence in order to respond and seek his right to stand against the actions against him or the allegations made and to protect himself against the possibility of being punished.³ The right to defence is part of the right to a fair trial, the person should be able to defend fairly against the accusations against him. Because it is among the duties of the just state to ensure justice, preventing the public from being harmed by crime, ensuring social peace and ultimately protecting the dignity of the individual.⁴ Providing legal aid to persons who may have difficulty in

¹ ŞİMŞEK, Suat, "Vergi Politikaları, Mülkiyet Hakkı ve Avrupa İnsan Hakları Mahkemesi", Maliye Dergisi, S. 159, 2010, s. 325.

² ÖZGENÇ, İzzet / ŞAHİN, Cumhuriyet, "İddia ve Savunma Hakkı", Gazi Üniversitesi Hukuk Fakültesi Dergisi, C.V, S. 1-2, 2001, s. 89.

³ KAPLAN, Yakup, "Ceza Muhakemesinde Savunma Hakkı ve Savunma Hakkının Sınırlandırılmasına Bağlı Hukuki Sonuçlar", (Bahçeşehir Üniversitesi Sosyal Bilimler Enstitüsü Kamu Hukuku Anabilim Dalı Yayınlanmamış Yüksek Lisans Tezi), İstanbul, 2020, s.4.

⁴ ÖZTÜRK, Müberra, "Hukuka Kesin Aykırılık Hali Olarak Savunma Hakkının Kısıtlanması", (İstanbul Üniversitesi Sosyal Bilimler Enstitüsü Kamu Hukuku Anabilim Dalı Yayınlanmamış Yüksek Lisans Tezi), İstanbul, 2019, s. 5.

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exercising their right to defence effectively, benefiting from legal aid, expressing themselves through their defence counsel or legal representative should be in line with a rule of law. Although it is deemed reasonable for the state to impose sanctions on people who do not comply with the rules or to force them to fulfil incomplete obligations people should also be given the opportunity to prove their actions suits to the rules and to avoid being subjected to the punishment.

Legal regulations that grants right of defence in Turkish legislation are as follows: Constitution of Republic of Turkey, European Convention on Human Rights (ECHR) that largely benefited the in the preparation and amendment of the Constitution⁵ and the proceeding legislation like Code of Criminal Procedure (Ceza Muhakemeleri Kanunu, CMK). Article 36 of the Turkish Constitution states that individuals can make their claims and defences before judicial bodies under the heading Freedom to Seize Rights. Likewise, in Article 6 of the ECHR, the Right to Fair Trial and its elements are regulated in detail. Again, in CMK, the possibility of defence against the claims on the basis of the Principle of Rule of Law is ruled. As can be seen, efforts have been made to protect the right to defence at national and international level. Because the right to defence directly and indirectly defines the other rights of the individual, such as the right to legal aid, the right to apply to court, the right to privacy, the prohibition of torture, the right to seek rights, the right to a fair trial, etc.⁶

1.2. The Right to Defence in the Framework of the Right to a Fair Trial and the Principle of Equality of Arms

One of the minimum requirements for a fair trial is to prepare an environment that will have the necessary time and convenience for the person or his / her defender (lawyer) to follow the legal and criminal

⁵ ŞAHBAZ, İbrahim, “Avrupa İnsan Hakları Sözleşmesi’nin Türk Yargı Sistemindeki Yeri”, TBB Dergisi, S. 54, 2004, s.184.

⁶ ÖZTÜRK, Hukuka Kesin Aykırılık Hali Olarak Savunma Hakkının Kısıtlanması, s. 7.

case or legal resolution on this issue.⁷ It is important for the execution of a fair trial that the right to defence, which is mandatory for the protection of innocence, is taken into account by the authorities having jurisdiction that will make decisions affecting the rights of the individual. The reason for not making a definition of this right, which is also called with expressions such as correct judgment and honest judgment, is to prevent the narrowing of its scope.⁸ However, in general, it means that the individual is given the opportunity to make his defence at every stage of the trial in an impartial and independent judicial body, and the trial is carried out with legal evidence.⁹ As can be seen, what is meant is ensuring the full use of the right to defence and passing this process fairly and correctly.

The scope of the right to a fair trial is specified in Article 6 of the ECHR. The proceedings to be made within the framework of this article should be held before an independent and impartial court established by law, within a reasonable time, in a public manner and in accordance with fairness.¹⁰ This situation enables us to conclude that the regulations in domestic law are effective in determining the scope of the right to a Fair Trial, for example, the characterization of the crime and the purpose of the penalty.¹¹ Apart from this, as can be understood from the ECHR, the independence and impartiality of the judiciary, the openness of the judgment, the conclusion of the trial in a reasonable time, the right of

⁷ ALTIPARMAK, Cüneyd, ‘‘Avrupa İnsan Hakları Sözleşmesi Altıncı Maddesi Kapsamında Adil Yargılanma Hakkının Esasları’’, TBB Dergisi, S. 63, 2006, s:267.

⁸ UÇAN, Emine, ‘‘A.İ.H.S. Çerçevesinde Türk Vergi Yargılaması Hukukunda Adil Yargılanma Hakkı’’, (Dokuz Eylül Üniversitesi Sosyal Bilimler Enstitüsü Yayınlanmamış Yüksek Lisans Tezi), İzmir, 2013, s. 9.

⁹ KAPLAN, Ceza Muhakemesinde Savunma Hakkı ve Savunma Hakkının Sınırlandırılmasına Bağlı Hukuki Sonuçlar, s. 41.

¹⁰ GÜZEL, Kenan, ‘‘Adil Yargılanma Hakkı Bakımından Anayasa Mahkemesine Bireysel Başvuru’’, Avrasya Sosyal ve Ekonomi Araştırmaları Dergisi (ASEAD)-Eurasian Journal of Researches in Social and Economics (EJRSE), C. 5, S. 8, 2018, s. 57.

¹¹ İNCEOĞLU, Sibel, ‘‘Adil Yargılanma Hakkı: Anayasa Mahkemesine Bireysel Başvuru’’, El Kitapları Serisi 4, Anayasa Mahkemesi, Ankara, 2018, s. 10.

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individuals to apply to the court, legal aid requests, presumption of innocence, reasoned decision, presence at the hearing are the elements of a fair trial as can be understood from the ECHR. When we examine the Article 6 of the ECHR, in which these elements are stated, we see that the nature and reason of the accusation is regulated by the right to be notified to the individual as soon as possible and the right to have the time and facilities necessary to prepare his defence. All of these regulations serve for the preparation and proper use of the defence. The right to defend the defendant in person and to benefit from the help of a defence counsel, equality of rights to hear witnesses and the right to question the witness and the right to use free interpreter are the guarantees of the individual within the scope of the right to a fair trial. This right became more evident in Turkish Law, when the expression of the right to a fair trial was added to Article 36 of the Constitution in 2001 and it was clearly secured as an independent fundamental right.¹²

A fair trial refers to equality in the rights and obligations of the parties in a trial. Its application in all types of cases and throughout the entire judicial process is necessary to ensure justice and a fair trial. The defence of the defence authority will only be able to maintain a balance between the claims and the defence at the trial stage, in other words, by the existence of procedural equality.¹³ The right to a fair trial is not a single right, but the principle of equality of arms as a set of fundamental rights, which requires full equality between the parties and the protection of procedural fairness throughout the trial.¹⁴ If we mention the apparent forms of the principle of equality of arms: the right to access the file, to present and discuss the evidence, to have witnesses

¹² ÇIRAK, İsmail, Çağlayan, “Temel Bir İnsan Hakkı Olarak Adil Yargılanma Hakkı”, (Çanakkale Onsekiz Mart Üniversitesi Sosyal Bilimler Enstitüsü Kamu Yönetimi Anabilim Dalı Yayınlanmamış Yüksek Lisans Tezi), Çanakkale, 2010, s.17.

¹³ ŞAHİN, Cumhur., “Anayasa Mahkemesi Kararları Çerçevesinde Ceza Muhakemesinde Silahların Eşitliği İlkesi ve Çelişmeli Yargılama ilkeleri”, D.E.Ü. Hukuk Fakültesi Dergisi, Özel S., 2019, s.3051.

¹⁴ YEŞİLOVA, Bilgehan, “Yargılama Diyalektiği ve Silahların Eşitliği”, TBB Dergisi, S. 86, 2009 s. 95.

heard, and to apply to the expert witness institution based on this right, the right to benefit from the interpreter due to not being able to speak, the legal aid institution that is used for the freedom to seek rights¹⁵, the examination of requests or objections outside the hearing or outside the hearing, and receiving opinions from the parties, notifying the opinion of one party to the other, and equal periods given to the parties.

1.3 Right to be Heard Legally

The right to be heard legally is a requirement of respect for human dignity and gives the right to defend in a material and legal sense at the end of an activity that has severe consequences such as judgment.¹⁶ The right to legal hearing is a fundamental human right, as it is an extension of the right to a fair trial regulated in Article 6 of the ECHR. In addition, Article 36 of the Constitution makes use of the right to claims and defend under the heading Freedom to Search Rights. The trial should not be terminated in a hurry, even if it is just for trial within a reasonable time, it is important to ensure that the defence can be made in a reasonable manner in order to achieve the goal of a fair trial. Contents of the right to be heard legally are parties' being informed about a lawsuit that has been filed and is being pending, being able to express the opinion of the person concerned about the trial, presenting evidence, and evaluating the allegations and defences put forward.¹⁷

2. Rights to Defence and to be Heard in Turkish Taxation Law

Article 73 of the Constitution of the Republic of Turkey, tax has been defined as an obligation. In the Code of Tax Procedure (Code number 213, Vergi Usul Kanunu- VUK) the duties of taxpayers are defined. In Turkish taxation system, the principle of declaration has been introduced in principle, but it is also regulated that if the tax

¹⁵ UÇAN, A.İ.H.S. Çerçevesinde Türk Vergi Yargılaması Hukukunda Adil Yargılanma Hakkı, s. 98.

¹⁶ PEKCANITEZ, Hakan, "Hukuki Dinlenilme Hakkı", Prof. Dr. Seyfullah Edis'e Armağan, Dokuz Eylül Üniversitesi Yayını, İzmir, 2000, s.756.

¹⁷ UÇAN, A.İ.H.S. Çerçevesinde Türk Vergi Yargılaması Hukukunda Adil Yargılanma Hakkı, s. 106.

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administration determines that a different tax should be paid than the taxpayer's declaration, it can be made additional assessments against the taxpayer. There is no equality between the taxpayer and the tax administration in tax transactions. In cases where the tax administration does not accept the taxpayer's statement, it may cause consequences that will affect the law of the taxpayers with the transactions it will perform as an administrative act.

Previously, tax disputes were investigated by appeal commissions, which were included in the administrative jurisdiction and did not have the characteristics of a court.¹⁸ Tax courts were established in 1982 instead of the tax objection commissions that can be applied against the transactions made by the tax administration. But, all the objection against tax transactions or the differences of opinion between the administration and taxpayers are not resolved in the tax court. Although the tax proceedings are subject to the Code of Administrative Trial Procedure (Code number 2577, Idari Yargılama Usulu Kanunu, İYUK) the tax case is defined in VUK.

When the tax authority finds a contrary to the taxpayer's current statements or has doubts in this direction, it can apply to the taxpayer's statement and the taxpayer is allowed to explain the situation. However, since there is no mechanism to assume the role of arbitrator between the parties during this notification, these methods, which are included in Code of Tax Procedure and that block the taxpayer's demand for judge intervention, cannot be called an alternative solution method. Although these methods are referred to as resolution methods at the administrative stage in the Turkish literature, it is possible to define these methods as methods that prevent the lawsuit but end the dispute, since there is no mechanism to check that the dispute is resolved fairly. In this study, the cases ending the dispute with the taxpayer will be discussed together.

¹⁸ BOSTAN, Kemal / YILDIZ, Seyfi, "Tarihsel Süreç İçerisinde Türk Vergi Yargısının Gelişimi", Muhasebe ve Vergi Uygulamaları Dergisi, S.10(7), 2017, s.111.

2.1. General Information on Tax Disputes

The rule of law is a state model based on the rule of law, having independent judicial organs whose main purpose is to provide justice and protect individual rights and freedoms¹⁹, restricting itself with legal rules, subject to equality and supervision.²⁰ As can be understood from here, all actions and transactions of the administration are subject to control in the state of law. When we examine the taxation process, it is seen that it is a transaction made by the administration for the property right of the individual²¹ due to the public liability, and this transaction is also subject to inspection.

If the dispute between the tax administration and the taxpayer cannot be mutually resolved, the taxpayer may apply to the tax court and request the cancellation of the tax transaction affecting the law. In the Turkish tax jurisdiction, the taxpayer can only file a lawsuit against the absolute and necessary transactions that affect their law.

The tax judgment is between the state exercising its sovereign power and the taxpayer who must comply with the rules set. The main objective of the tax judgment is not to reach a consensus between the parties, but whether the tax duty defined as the constitutional duty is fully fulfilled. Because the taxes that should be collected can only be defined by laws, and the elimination of tax receivables can only be achieved by law. Tax duty is not an issue that can be negotiated between the administration and the taxpayer. The tax authority cannot accept for less than it should collect, nor can the taxpayer be forced to pay more than they have to pay. Even if administrative transactions are carried out within the state organization, these transactions are carried out by authorized public officials, so there may be errors in taxation

¹⁹ İKİNCİOĞULLARI, Füzulan, ‘‘Hukuk Devleti’’, Gazi Üniversitesi Hukuk Fakültesi Dergisi, S.1-1, Haziran-1997, s. 29.

²⁰ UÇAN, A.İ.H.S. Çerçevesinde Türk Vergi Yargılaması Hukukunda Adil Yargılanma Hakkı, s. 1.

²¹ BAYRAKLI, Hasan / SARISOY, Taner, ‘‘Vergi İncelemede Dinlenme Talebinde Bulunma Hakkı’’, Vergi Raporu Dergisi, S. 257, 2021, s. 14.

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transactions made on behalf of the administration. The taxpayer may also have faced a less or more tax burden different from his actual liability. The benefit expected from the Turkish tax judgment is to check whether the tax codes are fully and completely implemented. The tax administration can definitely affect the law of the taxpayer through unilateral transactions, so there is no need for the tax administration to apply to the judiciary due to a transaction that may have legal consequences. The taxpayer, on the other hand, can only defend against the transaction and object to the transaction in the tax court. Therefore, in tax cases, the taxpayers are the plaintiff and the tax administration is the defendant.

Although the dispute seems to be between the taxpayer and the tax administration in the tax trial, it is basically investigated whether the tax codes and the taxpayer's behavior are compatible. In this respect, it can be said that the tax disputes arise from the accusation that the tax administration does not act in accordance with the tax codes. In this case, the taxpayer must also have the right to prove that he is innocent against the transactions of the tax administration that affect the law, that is, he has acted in accordance with the law. Since it has been alleged that the taxpayer violates the tax codes with the act of the tax administration, there is a possibility of administrative sanctions with financial consequences and / or the risk of losing a certain amount of the assets unnecessarily, and the property right may be damaged. In addition, taxation is accepted within the scope of the ECHR article 6 because it is directly related to the taxpayer right, which is one of the civil rights of the person, and the Council of State agrees with this view²². Therefore, the ability of a taxpayer to defend that his situation in tax proceedings is in accordance with the law should be handled within the framework of the Right to Fair Trial.

As the court of first instance, the tax court is a special competent administrative jurisdiction, although the dispute issues that the tax court

²² UÇAN, A.İ.H.S. Çerçevesinde Türk Vergi Yargılaması Hukukunda Adil Yargılanma Hakkı s. 34.

is tasked to resolve are not counted individually as in the Council of State, their boundaries are drawn by the legislator.²³ Appeals and legal resolutions are also recognized against tax court decisions.

Written judgment procedure is adopted in Turkish tax proceedings. However, the Code of Administrative Trial Procedures is applied in tax disputes. This situation causes some problems in practice. However, it should be noted that the provisions of Code of Legal Proceedings (Hukuk Muhakemeleri Kanunu - HMK) and VUK are also taken into consideration in addition to the IYUK. In Article 3, Code of Tax Procedure, the freedom for evidence, excluding oath, was introduced and it was determined that the main purpose was to reveal the real situation. No determination or limitation has been made in the law regarding the evidence, and it is accepted that the dispute can be proven with any kind of evidence suitable for its nature.²⁴

The taxation authority gives the state the opportunity to reciprocate the public services it must perform; In other words, taxation authority has a financial function.²⁵ Since the tax is the most important source of income for state, tax affects the use and enjoyment of many rights and freedoms.²⁶

Generally, tax disputes in Turkey arise from the frequent changes made in accordance with tax legislation changes due to the fast-changing economic conditions and not fully understood the text of the regulation. This situation causes differences in interpretation in terms of administration and taxpayer and consequently a dispute may arise. The

²³ ERASLAN, Yunus / ÜSTÜN, Ümit, Süleyman, “İdare Ve Vergi Mahkemeleri Arasında Çıkan Görev Uyuşmazlıkları Ve Çözümünde Esas Alınan Ölçütler”, Selçuk Üniversitesi Hukuk Fakültesi Dergisi, C.26, S.2, 2018, s.153.

²⁴ KARATAŞ, D., Neslihan, “Vergi Hukukunda İspat ve Delil”, Gazi Üniversitesi Hukuk Fakültesi Dergisi C. XVIII, Y. 2014, S. 3-4, 2014, s. 518

²⁵ ERKİN, Gözde, “Vergilendirme Yetkisinin Tabi Olduğu Anayasal İlkeler”, Ankara Barosu Dergisi, 2012/3, s. 246.

²⁶ KARAKOÇ, Yusuf, “Anayasal Vergilendirme İlkeleri Üzerine Bir Değerlendirme”, Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi C. 15, Özel S., 2014, s.1264.

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taxpayer is not in a weak position against the state using its sovereign power in the dispute in question. Since the transaction carried out by the administration will have a definite legal result, the taxpayer has nothing to do but defend himself.

Since the main purpose of taxation is determined to reveal the real situation, taxpayers are given the right to apply to all kinds of evidence in order to defend themselves in Turkish Taxation law. In Article 134 of the Code of Tax Procedure, a limitation has been imposed on persons authorized for tax examination and the purpose is determined as revealing the real situation. Undoubtedly, the state cannot tax the taxpayer contrary to the rules laid down by law, based on its sovereign power. The main purpose of taxation is determined in Article 73 of the Constitution as financing public expenditures. For this reason, tax revenues should be collected regularly in order to maintain the public service in a sustainable manner. Conflicts about taxation will also affect the collection negatively. For this reason, the Code of Tax Procedure contains regulations that will end the tax dispute. These regulations also include the right to express themselves.

2.2. Defence and Right to be heard in the Report Evaluation Commission

In addition to the regulations for the protection of the rights and rights of the taxpayer, one of the regulations made is the establishment of Report Evaluation Commissions. As a result of the examination, the evaluation of the reports written by the Inspector in terms of meeting the Tax Inspection Board (VDKB) standards is made by the Report Evaluation Commissions.²⁷ The determinations made against the taxpayer are checked through a commission formed by more experienced examiners whether they are in place or not, without taking any action against the taxpayer as a basis. The Regulation on the Establishment of Report Evaluation Commissions and Working Procedures and Principles, rather than making changes on the basis of

²⁷ YUNT, Ali, "Vergi İncelemesinin Yasal Dayanakları, Süreçleri Ve Sonuçları", İSMMMO Mali Çözüm 2016 Mayıs-Haziran, s. 199.

tax inspections, it brings new procedures addition to VUK article 140, 141 and other related items.²⁸

When the inspector deems necessary, he can record the events and account situations related to taxation to the minutes as evidence. He can also note the declaration of the taxpayer to them when necessary. The reports issued as a result of the examinations are evaluated by the commission. At this stage, the taxpayer may request a hearing from the commission before the assessment is made orally or in writing with a petition. Pursuant to the regulation in Article 14 of the Regulation on the Report Evaluation Commission, the commission may listen *ex officio* to the taxpayer or the inspector if it deems necessary. The members of the commission may make such a request if they need additional information and documents regarding the issues that they consider unclear or incomplete in the report.²⁹ In the regulation, the right to be heard is not clearly regulated, and the commission has been given the power to listen. However, with the Regulation on the Procedure and Principles to be Applied in Tax Inspections, enacted in 2016, it is clearly accepted that it is a right to be heard by requiring a statement about whether there is a request to be heard in the Report Evaluation Commission in the examination minutes of the taxpayers.

Since the main purpose of the tax examination is to reveal the real situation, the absence of a mechanism that will determine whether the evidence presented by the taxpayer at the report evaluation stage has been taken into account or not, makes the eligibility of this mechanism to exercise the right of defence sufficiently into doubt.

Although it is not explicitly included in the tax codes, it is important that the right to be heard has been recognized during the examination phase with sub-regulations. Although there is no need to repeat it in every regulation in order to use the right to defence, trying to eliminate

²⁸ GÖREN, Ömer, “Vergi İncelemesi Hukukundaki Yenilikler”, Ankara Barosu Dergisi, S.3, 2012, s.422.

²⁹ BAYRAKLI / SARISOY, Vergi İncelemesinde Dinlenme Talebinde Bulunma Hakkı, s. 20.

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the problems that arise in practice shows that the right to defence is important.

People have certain behaviours about the functioning of their social life and the state order, as well as certain behaviours about the tax system and the tax payments they are obliged to fulfil.³⁰ Although taxpayers' behaviour is against the tax codes, they have a justification in their inner world.

In criminal law, it is a logical requirement for the suspect and the defendant not to remain silent and to speak, both for the purpose of achieving the goal of the entire criminal trial and for these persons not to be punished more or less than they deserve.³¹ However, the taxpayer, who is faced with the claim that he has not fulfilled his tax duties in the tax code, has no right to remain silent. In accordance with the Code of Tax Procedure, the taxpayer has to document that he / she has fulfilled his tax duties completely and in time. Therefore, when the taxpayer is silent, he must be allowed to explain why he has not fulfilled his tax duties, or at least why he is doing what is criticized, and to get rid of the allegations about him, since he is vulnerable to claims about him. Since the purpose of tax auditing is to find the truth determined by tax codes, the defence and self-explanation of the taxpayer will ensure that the balance between the taxpayer and the state is established in the right place.

The right of the accused to have the necessary (sufficient) time and facilities to prepare his defence is expressed in Article 6/3-b of the European Convention on Human Rights.³² In order to use the right of defence, the taxpayer must also know the claims about him. In 2016, it

³⁰ ÇİÇEK, Serdar / ÇİÇEK, Hüseyin / ŞAHİN- İPEK, Elif, "Vergiye Uyum Sürecinde Davranışsal Yaklaşım: Mükellef Davranışları ve Tipolojileri". *Sosyoekonomi*, 27(39), 2019, s.226.

³¹ KOCAOĞLU, Serhat, Sinan, "Susma Hakkı", *Ankara Barosu Dergisi*, S. 2011/1, s. 52.

³² ŞAHİN, Cumhur, "Sanığın Savunmasını Hazırlamak İçin Gerekli Zamana ve Kolaylıklara Sahip Olma Hakkı (İHAS 6/3-b) ", *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi*, 8 (2), 2004, s.47.

was also included in the regulation that the report summaries containing the issues criticized in the report should be sent before the requesting taxpayer was heard by the commission. In these report summaries, the situations in the minutes and criticism issues are included during the examination. This paved the way for taxpayers to express themselves, to know the issues they face and to make defence preparations. At some point, the wiretapping at the Report Evaluation Commissions is like a last right given to taxpayers to express themselves without any action against them. For this reason, all taxpayers who are subject to tax inspection can apply to this method.³³

2.3. Right to Defence and to be Heard in the Stage of Resolving Tax Disputes

The concept we call dispute is a conflict situation that occurs as a result of different thoughts of the parties on an issue and the parties insist on these thoughts. In the legal dictionary, it is explained as dispute, dispute, lawsuit and fight.³⁴ Based on these expressions, tax dispute; It means the dispute arising from the taxation relationship between the administration on one side and the taxpayer on the other. In other words, the incident that causes the tax between the tax debtor and the tax creditor is called the situation that arises from the implementations such as taxpayer, imposition, notification, accrual, penalty, collection transactions and such practices.³⁵ It should be noted that a tax does not necessarily have to be present for a tax dispute to arise. There may also

³³ BAYRAKLI / SARISOY, Vergi İncelemede Dinlenme Talebinde Bulunma Hakkı, s. 21.

³⁴ YILMAZ, Ejder, ‘Hukuk Sözlüğü’, 4. bs., Ankara, Beta Yayıncılık, 2011, s.781.

³⁵ HEPAKSAZ, Engin / AVCI, Orçun, ‘Vergi Uyuşmazlıklarında Alternatif Çözüm Yolları (İzaha Davet Müessesesi ve Mükellef Hakları Bağlamında Değerlendirmeler)’, Süleyman Demirel Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi, Geybulla Ramazanoğlu Özel Sayısı, 2018, s.761.

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be tax disputes after the procedures regarding the determination of the tax base are completed.³⁶

At the administrative stage, it is necessary to understand the resolution of disputes as ending the tax dispute, not as a solution. Because legal solution means reaching an equitable conclusion. However, at the administrative stage, there is no mechanism that can evaluate whether an equitable result has been achieved in resolving disputes. Although he objected to the concept of administrative solution in this respect, this concept is used in the Turkish Taxation law doctrine for all means based on a certain agreement without resorting to litigation. For this reason, we will use the same concept in terms of uniformity of expression. In the current Turkish Taxation law system, when there is a tax dispute, there are two ways to resolve this dispute. These are administrative resolution and judicial resolution.

Administrative resolution means resolving the dispute without resorting to judicial resolutions through dialogue between the parties of tax disputes. Reconciliation, the correction of errors, reduction in punishment, repentance / breeding, invited to explain, give up the path of law and forms to apply administrative resolutions to the ombudsman and the existing resolutions in Turkey this way.³⁷ Apart from this, Alternative Dispute Resolution, which has been used in many countries, especially in countries such as the USA and the UK, and has a structure of Anglo Saxon origin, has also emerged in the resolution of disputes.³⁸ Alternative resolution methods appear as Negotiation, Mediation and

³⁶ KÜTÜKÇÜ, Mehmet / YARDIMCIOĞLU, Mahmut, ‘‘Vergi Uyuşmazlıklarında İdari ve Adli Çözüm Yolları’’, Akademik Araştırmalar ve Çalışmalar Dergisi, 6(11), 2014, s. 4.

³⁷ KELEŞ, Dilşad, ‘‘Alternatif Çözüm Yöntemleri ve Vergi Uyuşmazlıklarında Uygulanabilirliği’’, (Bursa Uludağ Üniversitesi Sosyal Bilimler EnstitüsüYayınlanmamış Yüksek Lisans Tezi), Uludağ Üniversitesi, Bursa, 2020, s. 107.

³⁸ BİLGİN, Hikmet, ‘‘Anglo Sakson Hukuk Sistemlerinde Arabuluculuk’’, Hukuk Gündemi, 2009, <http://www.ankarabarusu.org.tr/site/ankarabarusu/hgdmakale/2009-1/8.pdf>, (Erişim Tarihi:16.03.2021), s. 18.

Arbitration, as well as other ADR methods such as Early Impartial Pre-Assessment, Identification of Cases and Short Trial. It can be understood from here that the administrative and alternative solution methods are different institutions. Despite ADR is based on private law, it is important for taxation law in the world from the points of parties being in dialogue and in an equal position, protecting taxpayer rights and taxpayers' defending themselves. But in Turkey ADR is not applicable, tax disputes are tried to be solved with administrative and/or judicial methods. On the other hand, as the taxes that taxpayers have to pay are laid down by law, it is not possible for them to negotiate between the taxpayer and the tax administration over the taxation criteria determined by law.

3.The Right to Defence and to be heard in Termination of Tax Disputes by the Administrative Resolutions

In disputes arising from tax practices, disputes can be resolved peacefully at the administrative stage, either by the administration itself or by the taxpayer's application to the administration. As regulated in Articles 10 and 11 of the IYUK, the taxpayer has the right to request from the administration to cancel, withdraw, change or make a new transaction before the lawsuit is filed against the proceedings and actions that may be subject to an administrative lawsuit. The generally accepted neutrality element of ADR requires the intervention of a third person.³⁹ However, as in ADR, there are no independent, impartial and objective third parties, the parties are not in an equal position, they are not acting in line with their interests, only focusing on the problem to achieve a binding solution. The administrative resolution also terminate the dispute between the taxpayer and the tax administration by reaching a binding conclusion.

3.1. Rights to be heard and defence in invitation of explanation

³⁹ BİNİŞ, Mine, ‘‘Vergi Uyuşmazlıklarında Alternatif Çözüm Yolları ve Türkiye’de Uygulanabilirliği’’. Hukuk ve İktisat Araştırmaları Dergisi, 5 (2), 2013, s.18.

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Invitation for explanation is a new administrative solution to the Turkish tax legislation in order to ensure voluntary tax compliance of the taxpayer and to resolve tax disputes at the administrative stage without resorting to judicial resolution.⁴⁰ This institution was regulated by the Code numbered 6728, Amending Certain Codes for the Improvement of the Investment Environment in 2016, also enacted. It was ruled in Article 370 of VUK. Invitation of explanation is a call for the taxpayer to make an explanation in order to determine the accuracy of the information obtained as a result of various pre-indicators about the taxpayers.⁴¹

The taxpayer can be invited to an explanation when the suspicion of losing the tax arises with the preliminary determinations about the taxpayer with the invitation of explanation, which has recently been included in the Turkish taxation law. However, since the text of the law was arranged as if a discretion was given to the administration in the invitation of explanation, it is controversial whether this is a taxpayer right or an authority that the administration can use at any time.

If, as a result of preliminary determinations, there is a presumption that tax loss has arisen, the taxpayer is given the right to speak in order to evaluate this information before starting a tax examination and referring to the discretion commission. (VUK 370) At this stage, the taxpayer was given the opportunity to express himself and the right to be heard and defended was provided by the regulation in the Code of Tax Procedure. In this way, the way has been opened to eliminate misunderstandings and deficiencies. When the commission does not accept the explanation of the taxpayer, when the taxpayer removes the deficiencies, it protects itself from receiving a heavier penalty with reduced penalty. However, if the explanation is found to be sufficient, the taxpayer will not be referred to the tax examination and discretion

⁴⁰ SARILI, Özgül, ‘‘Türkiye’de Vergi Uyuşmazlıklarında İdari Çözüm Yolu Olarak İzaha Davet Uygulaması’’, *Gümrük Ticaret Dergisi*, 7(22), 2020, s. 74.

⁴¹ BOZDOĞAN, Doğan / ÇATALOLUK, Cuma, ‘‘Vergi Usul Kanununda Yer Alan ‘İzaha Davet’ Kurumunun Değerlendirilmesi ve Öneriler’’, *Journal of International Management, Educational and Economics Perspectives*, 6 (1), 2018, s. 43.

commission, and therefore they will not be subject to a penalty and tax audit.⁴² If the taxpayer thinks that his explanation is valid, he will have the right to file a lawsuit against the transaction to be made. However, since the taxpayer will be under pressure to face a heavier punishment here, he will hesitate to file a lawsuit even if he thinks he is right rather than enduring the severe consequences that may arise. As a rule, taxpayers cannot file a lawsuit against their statements. Since the taxpayers will have to correct their declarations themselves in order to benefit from the reduced penalty after the invitation for submission, they will not be able to file a lawsuit against the declarations within the scope of this invitation of explanation.

3.2. Rights to be heard and defence in the Conciliation Institution

Reconciliation, in Turkish taxation law; It is one of the administrative resolutions that enable the dispute to be resolved without resorting to a judicial resolution in disputes arising due to taxation procedures. Although the definition is not made in the legal regulations, the reconciliation means that the tax administration and the tax administration come together before or after the tax calculation process that determines the tax liability as the amount and reach an agreement on the tax and tax loss penalties that to be paid by the taxpayer.⁴³ The tax administration thus waives some of the tax and penalties, ensuring the voluntary compliance of the taxpayer with respect to tax, and also saves time and ensures the transfer of the necessary resources to the treasury. At the same time by providing dialogues, the taxpayer can present his claims and objections regarding the taxation process and have the opportunity to negotiate with the administration.⁴⁴ When we examine the scope of the reconciliation institution, we see that it

⁴² HEPAKSAZ / AVCI, Vergi Uyuşmazlıklarında Alternatif Çözüm Yolları, s.767.

⁴³ YILMAZ, Elif, “Uzlaşma Müessesinin Hukuki Niteliği ve Temel Vergilendirme İlkeleri Açısından Değerlendirilmesi”, Gazi Üniversitesi Hukuk Fakültesi Dergisi, XIII, S.1-2, 2009, s. 322.

⁴⁴ KIZILTOPRAK, Özgür, “Türkiye ve Çeşitli Ülkeler Vergi Sistemlerinde Vergi Uzlaşması”, Marmara Üniversitesi İktisadi ve İdari Bilimler Dergisi, 42 (1), 2020, s. 107.

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constitutes the scope of the taxes, duties, fees and tax loss penalties in the general budget.⁴⁵ In this context, the reconciliation institution appears in our law in the form of pre-assessment settlement and post-assessment settlement. Pre-assessment settlement allows the taxpayer and the administration to reconcile without imposing the tax and tax loss penalties that will be imposed as a result of tax inspections.⁴⁶ Post-assessment settlement, on the other hand, allows for a reconciliation between the administration and the taxpayer on all taxes, duties and fees that are imposed by the Ministry tax offices and imposed by the administration, and tax loss penalties to be imposed on them.⁴⁷ However, except for tax errors, other reasons accept that the taxpayer has fulfilled its obligations incompletely, so the tax is actually not possible to negotiate. On the other hand, since the tax error is an issue that needs to be corrected, it is not possible to negotiate on it.

Reconciliation commissions can come together with taxpayers if they meet the application conditions according to the stage before and after the assessment. The interviews are recorded in the minutes and the contents of these minutes are important as they include the declarations and objections of the taxpayers to exercise their rights when necessary. First of all, applying to the reconciliation is not compulsory in Turkish taxation law. The taxpayer either sues, pays or requests a settlement. However, when an application is made to the conciliation body, the result of the meeting is binding.

When considered within the framework of the taxpayer's right of defence and hearing, the settlement institution ensures that the commission authorized on behalf of the administration and the taxpayer meet face to face, hear the objections of the taxpayer and provide the opportunity to defend himself by expressing himself, determining the tax to be paid by the administration and the taxpayer. This situation is

⁴⁵ ŞİN, Sevil, ‘‘Vergi Hukukunda Uzlaşma Kurumu ve Komisyonları’’, Karabük Üniversitesi Sosyal Bilimler Enstitüsü Dergisi, 9(1), 2019, s. 306.

⁴⁶ TEKİN, Ahmet / CAN AVŞAR, Gülnihal, ‘‘Türk Vergi Hukukunda Uzlaşma Müessesesi’’, Avrasya Sosyal ve Ekonomi Araştırmaları Dergisi, 6(5), 2019, s. 508.

⁴⁷ ŞİN, Vergi Hukukunda Uzlaşma Kurumu ve Komisyonları, s. 306.

beneficial for both parties. Because the unilateral taxation of the states based on their sovereign power ended with the adoption of the nation-state understanding. Since the transition to the declaration basis restricts the taxation authority of the administration within the framework of the legislation, it has been beneficial in terms of negotiation and the formation of voluntary compliance principles for taxpayers.⁴⁸ In this way, with the reconciliation, the way for the taxpayer to claim his justification was opened and the taxpayers gained the opportunity to put forward their objections against the determination of unfair and unlawful taxes. The administration, on the other hand, prevents the delay in revenues by resolving contentious issues through negotiation.

4. Rights to be heard and defence in Judicial Resolution of Tax Disputes

When tax disputes cannot be resolved through administrative solutions, or when the taxpayer does not resort to this method at all, a judicial solution is applied for the settlement of the dispute. At this point, the witness statement, which is one of the evidence that the taxpayer uses in the trial and justification, regarding the exercise of his right to defence and to be heard, will be discussed below.

4.1 Hearing in Tax Trial

Written trial procedure is adopted as a rule in the Code of Administrative Trial Procedure . Accordingly, in tax proceedings, examinations and trials are carried out over the file, and hearings are not held as a rule. However, based on this basic rule, a hearing can be held in line with the wishes of the parties. The court may decide to hold a hearing at the request of the parties or ex officio. When taxpayers request a hearing in cases whose value exceeds a certain amount, the court has to hold a hearing.

In Article 6 of the ECHR, it is regulated that everyone has the right to demand a fair and open case before an impartial and independent court

⁴⁸ KIZILTOPRAK, Türkiye ve Çeşitli Ülkeler Vergi Sistemlerinde Vergi Uzlaşması, s. 107.

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against the accusations against them. The thought that holding the hearing is a requirement at the point of a fair trial of the decisions made on the merits of the case prevails in the ECtHR decisions.⁴⁹ Because everyone has the right to a correct and safe trial. For this reason, holding the hearing allows the parties to make oral defence and thus the individuals to express themselves more clearly.

Taxation process is seen as a transaction made by the state towards the property right of its citizens.⁵⁰ Although taxation derives from the sovereign right, there is no hesitation that the taxpayer has the right to access the judiciary and to a fair trial during the trial. Failure to record the claims and defences of the parties during the hearings in tax cases makes it impossible to control whether this right is exercised effectively or not.

4.2. Hearing Witnesses in Tax Trials

Witness statement, which is one of the important evidence tools of civil and criminal procedure laws, is within the scope of the right to a fair trial, which gives the person a number of assurances.⁵¹ In general, there are evidences that people refer to in order to defend themselves during the trial process, which also helps the judge to form an opinion. In the Code of Tax Procedure, the event that causes tax is defined as the realization of the event that the tax codes are binding on or the completion of its legal status. Physical evidence alone is not sufficient to detect taxation-related events. As a matter of fact, there is no hesitation in the Code of Tax Procedure that the tax administration can also use the witness to prove an incident, with the regulation that the people who want information cannot be hesitated to provide

⁴⁹ TOSUN, Ayşe Nil, "Avrupa İnsan Hakları Mahkemesi'nin Kararlarından Pakozdi Davası: İdari Vergi Cezası Davalarında Duruşmasız Yargılama", Hacettepe HFD, 7(2), 2017, s.86.

⁵⁰ UÇAN, A.İ.H.S. Çerçevesinde Türk Vergi Yargılaması Hukukunda Adil Yargılanma Hakkı, s. 34.

⁵¹ UZUN, Mine, "Bir Adil Yargılanma Hakkı Olarak Tanığı Sorgulama ve Tanık Dinletme Hakkının Türk Vergi Yargılamasındaki Yeri". Ankara Üniversitesi Hukuk Fakültesi Dergisi, 63 (1), 2014, s.240.

information. However, the tax administration does not have a mechanism to control, question or correct the statement of the witness from whom the information has been obtained against the taxpayer. Witness testimony is a sensitive and important issue because it is a factor that is taken into account in the provision of rights and justice in criminal proceedings.⁵² In the civil trial, the evaluation of whether a witness is telling the truth is entirely at the discretion of the court in practice, the witness statement does not bind the judge.⁵³ The judge can decide whether he will respect the witness evidence only by listening to the witness. Effective use of witness evidence depends on the fact that the statements of the witness can be questioned before the court.

Since the main purpose in taxation law is determined as revealing the real situation, it is necessary to accept the principle of freedom of evidence for this. It is acknowledged in taxation law that the witness evidence can be used to reveal the truth. However, there is a limitation in the capacity of a witness, and it is required that the witness has a clear and natural connection in the event that caused the tax.

While applying for the witness statement in the tax trial depends on certain conditions, it has not been determined whether or how the witness will be heard. That is to say, the person we call a witness is a person who witnessed the occurrence of an event, that is, he is not a party to the event. Considering that the parties will not be witnesses, in this case, the person who is against the liable of the tax incident will gain the characteristic of being subject here and will be able to be heard as a witness.⁵⁴

⁵² KÜÇÜKAY, Alper, ‘‘Tanık İfadesi Ve Çapraz Sorgu Psikolojik Bir Bakış’’. Türkiye Adalet Akademisi Dergisi, (32), 2017, s.459.

⁵³ KARAMERCAN, Fatih, ‘‘Medenî Usûl Hukukunda Tanık ve Tanıklık’’, Ankara Barosu Dergisi, S. 2018/3, s. 182.

⁵⁴ KARAKOÇ, Yusuf, ‘‘Türk Vergi Yargılaması Hukukunda Delil Sistemi’’2. bs. İzmir: Dokuz Eylül Üniversitesi Hukuk Fakültesi Döner Sermaye İşletmesi Yayınları. (1997-I olarak gösterilmiştir). s.465.

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The fact that the Turkish tax jurisdiction is based on the principle of writing, the hearing is opened exceptionally, and the procedure for hearing the witness has not been determined brings along practical problems. Although the Code of Administrative Trial Procedure makes reference to the HMK in many issues related to the evidence, there is no reference to the witness evidence. The Code of Tax Procedure does not include any procedures for how to listen to the witness. In order to reveal a situation, the tax administration can obtain written or verbal information from the people involved in the event. However, in practice, because of not being any provision in Code of Tax Procedure regarding the hearing of witnesses during the trial and also IYUK's not referring to HMK provisions about witness evidence in Article 31, the Council of State does not accept the listening of witnesses during the tax trials.⁵⁵ But; In order for the oral trial procedure applied together with the written trial procedure in IYUK to provide the expected benefit, it is necessary to hear witnesses.⁵⁶

While it is unclear how to listen to the witness, it is stipulated in the Code of Tax Procedure that the tax administration and the taxpayer, who are the parties to the case, can have the inspector and the financial advisor or accountant if they are present at the hearing. The witness should be directly involved in the incident and not be a party to the case. It was accepted in order to strengthen the claims and defences of the parties in technical matters to be able to listen to the tax inspector and the financial advisor, who are not a legal party in the tax case, but are also not witnesses of the subject matter event. The fact that the regulations on how the courts conducting tax trials will hear the witness are incomplete brings with it the problem of not being able to use the witness evidence, which is one of the most important evidence in the tax trial, by the taxpayer. In tax disputes in general, it is difficult for the

⁵⁵ ORAL, Hasan, ‘Vergi Yargılaması Hukukunda Tanık Beyanı’ (Türkiye Uygulamasının Avrupa Yaklaşımı Işığında Değerlendirilmesi), Türkiye Barolar Birliği Dergisi, S. 147, 2018, s. 105.

⁵⁶ KAPUCU, Gizem / KOCATEPE, Metin, ‘Vergi Yargılamasında Tanık’. Anadolu Üniversitesi Hukuk Fakültesi Dergisi, 7 (1), 2021, s.158.

tax administration to defend that the taxpayer should not pay more tax in the face of the claim that the taxpayer is acting against the rules, and that the taxpayer should not pay more tax, and the deprivation of witness evidence violates the right to a fair trial.

Conclusion and Discussion

In the Turkish tax system, the declaration basis has been generally accepted in taxation. The tax administration, on the other hand, inspects the taxpayers' declaration and makes an additional assessment when it detects a situation different from what it should be.

Tax disputes may arise from the taxpayer deliberately or by mistake to make incomplete tax declarations as well as disagreeing with the tax administration. In order to collect tax revenues quickly for financing public expenditures, it also includes solution methods at the administrative stage that will end disputes in taxation law.

The main purpose of taxation is the complete and timely collection of the taxes stipulated by laws, and the purpose in tax auditing and tax proceedings is to make correct taxation. The taxpayer and the tax administration do not have the authority to negotiate a different tax amount instead of the taxes stipulated by law.

The tax administration cannot demand more tax than it should be, and the taxpayer cannot request to pay less tax. The tax jurisdiction is focused on the legal rules of taxation, not an equitable solution between the parties. But since the tax jurisdiction cannot use the discretion right instead of the administration, even if the court determines the extra missing tax, it will not be able to decide against the taxpayer.

Since the tax dispute is based on the claim that the taxpayer's statement does not reflect the truth, the taxpayer has the right to defend against the claims. Since there is no impartial intermediary between the parties in the administrative solution stages, it is not possible to evaluate these regulations as an alternative solution method.

During the examination phase, preliminary determinations or after the examination, the taxpayer is given the opportunity to conclude the

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dispute by peacefully reconciling with the administration. However, there is no mechanism to determine whether the conclusion reached is fair or not, as the low penalty application in return for ending the dispute is tied to waiving the right to litigation.

Although the parties are given the right to apply for witness evidence in the taxation law, the procedural rules to be used in the tax judiciary do not specify how to apply to witness evidence and how to listen to the witness. In practice, the taxpayer is unable to hear his witness in the tax case, and does not have the opportunity to ask the witness of the administration that made the statement against him and to find out whether he is telling the truth.

Although the hearing in tax proceedings is arranged exceptionally, it is obligatory in cases where the value of the case exceeds a certain amount, if the taxpayer requests it. Since no minutes are kept for the statements of the parties in the hearings, it is not possible to control whether the right to be heard at the hearings is exercised effectively.

Although there is progress on taxpayer rights, there is a need to complete new regulations and missing regulations for the development of taxpayers' rights to defence and to be heard.

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