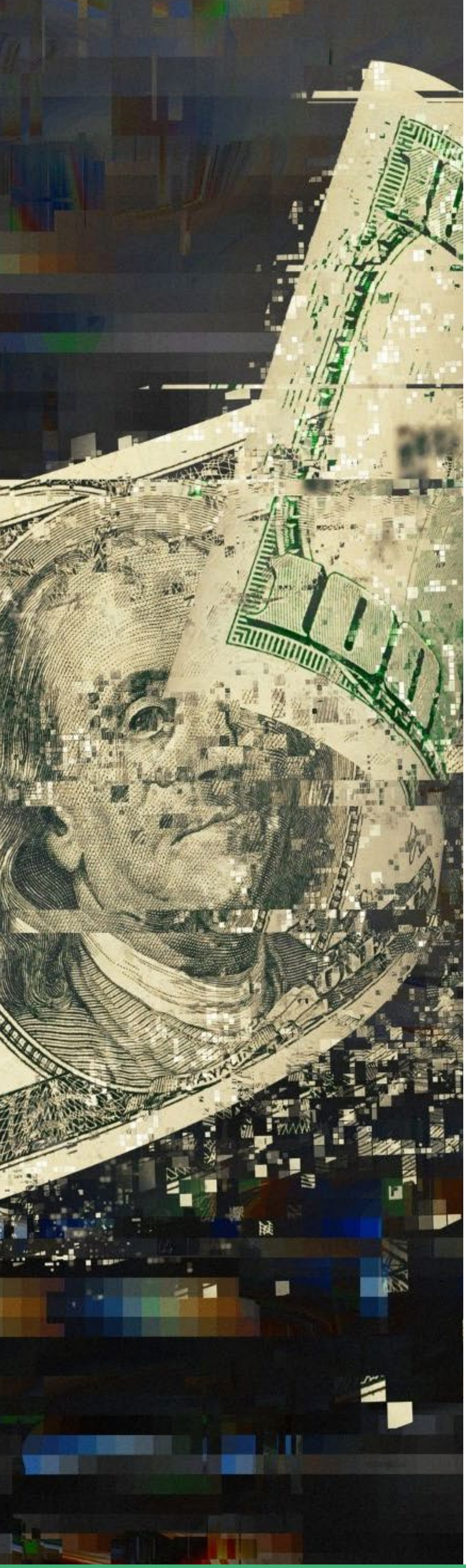

Annual Tax Law Bulletin on Taxation of the Digital Economy

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1. Two Pillar Approach to Tax Problems Arising from the Digitization of the Economy

With the increasing digitalization in the economy, the Organization for Economic Cooperation and Development ("OECD") and G20 had commenced working on the Inclusive Framework on Base Erosion and Profit Shifting ("BEPS") on the grounds that the current international tax rules are not sufficient for the taxation of multinational enterprises ("MNEs") and are not suitable for changed business models.

As a result of lengthy negotiations to revise international tax rules and adapt them to the digital economy, under the leadership of OECD and G20, international taxation rules including the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy adopted by consensus of the 140 members of the Inclusive Framework on BEPS in October 2021. The abovementioned new system consists of Pillar 1 and Pillar 2. The rules set in the context of Pillar 1 and Pillar 2, will lead to significant changes in current international taxation standards.

A) Pillar 1

Pillar 1 establishes a new international taxation ground for a more equitable distribution of profits and taxation rights of MNEs with global revenues exceeding EUR 20 billion and profitability exceeding 10%. In the context of Pillar 1, 25% of the residual profits of companies whose profitability exceeds 10% are distributed among the market countries in accordance with the revenue-based distribution key, and these profits are taxed in the relevant countries. The profits of the companies that meet certain conditions are reallocated to the countries where the sales take place, regardless of their physical presence in these jurisdictions. Accordingly, the countries to which taxation rights are to be allocated will be entitled to levy tax on two sources of income classified as "Amount A" and "Amount B" from the MSEs falling within the scope of Pillar 1. Pillar 1 is estimated to result in a reallocation of profits of USD 125 billion globally.

In October 2023, the OECD published the Multilateral Agreement on the Application of Pillar 1 - Amount A. In a statement issued by the OECD on 18 December 2023, the OECD confirmed that it aims to (i) finalize the text of the Multilateral Agreement by reaching a consensual solution by end-March 2024 and (ii) hold a signing ceremony by end-June 2024.

Another important component of Pillar 1 is Amount B. While Pillar 1 - Amount A updates the international taxation framework for MNEs, Pillar 1 - Amount B simplifies the existing transfer pricing rules for all taxpayers and focuses on the application of transfer pricing rules to the core marketing and distribution activities of MNEs in the jurisdictions where they operate. In addition, Pillar 1 - Amount B aims to increase tax certainty and reduce administrative and compliance costs. The public consultation collected by the OECD for the Pillar 1 - B Amount between July 2023 and September 2023 was published on September 26, 2023. The OECD's work on Pillar 1 - Amount B is expected to be completed by the end of 2023 and the final report for Amount B is expected to be approved and included in the OECD Transfer Pricing Guidelines by January 2024.

B) Pillar 2

Pillar 2 introduces that in case the revenue of MNEs with an annual income exceeding 750 million Euros in another country is taxed less than 15%, a global minimum corporate tax is applied on the income arising in each jurisdiction where they operate. Within this scope, the country of the ultimate parent business of MNE will have the taxation right where the effective tax burden of the market country is below 15%.

The two key components of Pillar 2 are the Global Anti-Base Erosion Rules ("GloBE Rules") and the Subject to Tax Rule ("STTR"). In addition, countries may also adopt the Qualified Domestic Minimum Top-up Tax ("QDMTT") as part of the implementation of Pillar 2.

a. GloBE Rules

On December 20, 2021, the OECD published the "Global Anti-Base Erosion Model Rules (Pillar Two)" on the second step of the two-step approach approved under the OECD/G20 BEPS. The above-mentioned Model Rules include (i) the Income Inclusion Rule (IIR) and (ii) the Undertaxed Payment Rule (UTPR); these two rules are collectively referred to as the GloBE Rules.

The global minimum corporate income tax of 15% within the scope of GloBE rules is applied to MNEs that have annual revenue of EUR 750 million or more in the Consolidated Financial Statements of the Ultimate Parent Entity in at least two of the four Fiscal Years immediately preceding the tested Fiscal Year.

The GloBE Rules consist of two rules:

i. The Income Inclusion Rule (IIR) allows for additional tax to be collected by the jurisdiction of the ultimate parent of a company whose income is taxed at a rate below the 15% minimum. This ensures that the effective tax rate is at least 15%. In this context, the IIR, which is the main mechanism for taxing "untaxed" profits, is primarily applied.

ii. The Undertaxed Payments Rule (UTPR) is the denial of deductions or an adjustment equivalent to undertaxation within the group company in cases where the effective tax rate is below the minimum rate of 15% by the jurisdiction where the company's ultimate parent is located under the IIR. The UTPR is applied on a secondary basis in cases where the IIR rule cannot be fully applied. The UTPR is envisaged to be implemented by 2025.

Furthermore, in December 2022, the European Union ("EU") adopted the EU Minimum Corporate Tax Directive ("EU Directive"). This EU Directive provides a mechanism for EU Member States to implement the Pillar 2 GloBE Rules. The EU Directive enters into force for EU Member States as of 01.01.2024.

Finally, on December 18, 2023, the OECD Secretariat published the third set of Administrative Guidelines to clarify the operation of the Pillar 2 GloBE rules, following the guidelines published in February and July 2023. Further guidance is expected to be issued by the OECD in 2024.

b. Subject to Tax Rule (STTR)

Besides the GloBE Rules, the other important component of Pillar 2 is the Subject to Tax Rule (STTR). The STTR, which is complementary to the GloBE Rules, is to be included in certain double taxation treaties with developing countries and allows to source country to recapture some of the taxation rights on intra-group payments of an MNE where the income is taxed at a rate lower than 9% in the resident country. In other words, the minimum tax rate for the STTR is set at 9% and where the nominal tax rate is less than 9%, the source country may also impose additional withholding tax on foreign payments between related parties.

Subject to Tax Rule Multilateral Instrument ("STTR MLI") has been prepared and the STTR MLI was opened for signature on October 2, 2023.

c. Qualified Domestic Minimum Top-up Tax (QDMTT)

Another element included in the set of GloBE rules is the Qualified Domestic Minimum Top-up Tax (QDMTT). This domestic minimum tax aims to give countries priority to tax low-taxed profits earned in their jurisdiction. The QDMTT may be adopted by jurisdictions to preserve source countries' right of first taxation. To the extent that a jurisdiction prefers to apply the QDMTT, this tax is offset against the amount of tax payable in another jurisdiction under the GloBE rules. Thus, the application of QDMTT under the GloBE preserves the primary taxation right for the country where the income is derived.

C) Developments in Türkiye

The bill on the ratification of the "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting" signed on behalf of Türkiye on 07.06.2017 was first submitted to the Presidency of the Grand National Assembly of Türkiye on 02.06.2020. However, the said bill was deemed null and void as it was not finalized during the relevant legislative period. The said bill was renewed and submitted to the Presidency of the Grand National Assembly of Türkiye again on 03.10.2023.

The Multilateral Convention prepared within the framework of the 15th action of the OECD's Base Erosion and Profit Shifting (BEPS) project titled "Multilateral Instrument", is aimed to reflect BEPS in the prevention of double taxation agreements that are in force or have been signed but are in the process of enforcement.

In addition, the Turkish Tax Administration continues to prepare domestic legislation to implement the Pillar 2 rules in Turkish law. The Turkish Tax Administration is known to be working on different implementation possibilities and combinations of the Income Inclusion Rule, the Undertaxed Payments Rule, and the Qualified Domestic Minimum Top-up Tax. In this context, it is considered that some tax incentives applied in Turkish tax legislation are also examined about Pillar 2.

In addition, to ensure full compliance with International Financial Reporting Standards, the decision numbered 75935942-050.01.04 - (01/19078) dated 13/09/2023 and titled "International Tax Reform-Pillar Two Model Rules-Amendments to TMS12" issued by the Public Oversight, Accounting and Auditing Standards Authority was published in the Official Gazette dated 19.09.2023 and numbered 32314.

D) Digital Service Tax

The inability to produce a globally accepted solution for the taxation of the digital economy has led many countries, including the UK, France, Austria, Italy, Spain, and India, to implement the digital service tax regarding taxing various services offered in the digital environment. In this context, the "digital service tax" in Türkiye, which aims to tax the services offered in the digital environment, came into effect on March 1, 2020.

The same legislation also stipulated that if the obligations regarding the digital service tax were not fulfilled within the time limit, the relevant persons would be notified by all means of communication and this matter would be announced on the website of the Turkish Tax Administration. In the event that these obligations were still not fulfilled within thirty days following the announcement, an access ban would be imposed on the service provided by the service providers within twenty-four hours until these obligations were fulfilled. With its decision dated 18.05.2023 and numbered E.2020/11, K.2023/98, the Turkish Constitutional Court unanimously annulled the provision providing for the sanction of access blocking on the grounds that (i) the sanction was in the nature of an indefinite business closure penalty, (ii) the application of the sanction only for digital service taxpayers was contrary to the principle of equality, (iii) blocking access violated the freedom of communication, and (iv) the restriction imposed on the freedom of undertaking was disproportionate and out of proportion.

In the statement made by the United States of America ("USA") Trade Representative Office on June 2, 2020, it was stated that a competition investigation will be launched against some countries that apply digital services tax, including Türkiye.

On October 21, 2021, the USA, Austria, France, Italy, Spain, and the United Kingdom reached a consensus to adopt the existing Unilateral Measures ("Unilateral Measures Consensus") regarding the implementation of Pillar I. The Unilateral Measures Consensus was signed by the six mentioned countries and a joint statement (the "21 October Joint Statement") was published.

Accordingly, it was stated that the digital service taxes accrued in the period between January 1, 2022, and December 31, 2023 (in case the application enters into force earlier) -during the transition period- can be deducted from the corporate taxes calculated within the scope of Pillar I in the following years. It has been regulated that digital service tax payments above the said amount can be deducted from the corporate taxes to be paid in the following years by the companies included in the scope. In return, the USA reached an agreement to remove the additional customs duties that it had applied and suspended as a result of the trade investigation it initiated against the said countries, including the investigations that took place before 8 October.

In the announcement dated November 22, 2021, published by the Ministry of Treasury and Finance, it was stated that Türkiye and the United States agreed that the conditions applicable under the Unilateral Measures Consensus regarding the digital service tax will also be valid between Türkiye and the USA. As a result, Türkiye was included in the USA compromise with 5 countries implementing Digital Services Tax.

In July 2023, the OECD issued a statement in which the member states of the Inclusive Framework agreed to refrain from imposing a new digital services tax or similar unilateral imposition on any taxpayer between January 1, 2024, and December 31, 2024, or until a Multilateral Agreement is signed.

2. Withholding Tax in Digital Advertising Services

The withholding tax applied to the advertising services provided on the internet is another regulation that has been introduced in Türkiye to tax digital companies.

With the Presidential Decree No. 476 published in the Official Gazette dated 19.12.2018 and numbered 30630, the online advertising services provided on the internet were included in the scope of tax withholding, and it is stipulated that payments made to the providers of such services or those who act as an intermediary for the provision of such services will be subject to tax withholding regardless of the recipients of the payments are taxpayers or not.

Accordingly, regarding the online advertising services provided on the internet, it has been regulated that the below withholding tax rates are applied to the above-mentioned payments depending on the status of the service provider, as of 01.01.2019.

- 15% over the payments made within the scope of Article 94 of the Income Tax Law No. 193 (ITL) (payments made to natural persons, associations and foundations, and other persons or enterprises within the scope of Article 94),
- 0% over the payments made within the scope of Article 15 of the Corporate Tax Law No. 5520 ("CTL") (payments made to taxpayers subject to full tax liability),
- 15% over the payments made within the scope of Article 30 of CTL (payments to taxpayers subject to limited tax liability).

Nevertheless, on the grounds that the said withholding tax is taxation on the commercial income of taxpayers subject to limited tax liability, and therefore, the above-mentioned taxation constitutes a violation of the Prevention of Double Taxation Agreements concluded between the Republic of Türkiye and the other related countries; lawsuits are filed by the taxpayers who pay these taxes as a tax responsible to cancel and refund the taxes paid. Although these cases are in favor of the taxpayer within the scope of the decisions of the courts of first instance and courts of appeal, it is known that the cases continue against the taxpayer due to the approach of the Council of State that "websites constitute a workplace".

3. Taxation of Crypto Assets

Crypto assets appear as one of the applications of distributed ledger technologies that allow records to be kept in a distributed and decentralized manner. Considering the different application aims of crypto assets, it is seen that their legal characteristic is determined differently in different legal systems.

The Regulation on the Non-Use of Crypto Assets in Payments (“Regulation”), which is the only regulation in Türkiye regarding crypto assets, published by the Central Bank of the Republic of Türkiye entered into force on 30.04.2021.

In this context, pursuant to Article 3 of Regulation, crypto assets are defined as *intangible assets* that are virtually created with the use of distributed ledger technology or similar technology and distributed over digital networks but cannot be considered as money, electronic money, payment instruments, securities or capital market instruments. In that regard, Regulation is not a general regulation on crypto assets, but a limited legislation only for the purpose of “determining the methods and tools to be used for payments”. Also, it is seen that the same definition is made in the Guide on “Basic Principles Regarding the Obligations for the Prevention of Laundering Proceeds of Crime and Financing of Terrorism for Crypto Asset Service Providers” published by the Financial Crimes Investigation Board. However, there is no definition made within the scope of tax legislation as of November 2022, and the definition within the scope of Article 3 of the Regulation is not a definition in terms of tax.

Also, in a statement made by the Minister of Treasury and Finance on 10.01.2024, some information regarding the expected cryptocurrency regulations was shared. Accordingly, cryptocurrencies are still defined as *intangible assets* in the draft law; however, it is stated that the tax issue will not be regulated yet and will be handled in a separate regulation.

In addition, another definition of crypto assets is made by the Istanbul 24th Enforcement Law Court within the decision dated 19.4.2021 and numbered E.2021/586, K.2021/675. In the decision, the crypto assets are considered within the scope of commodities or securities, and they are accepted as a kind of digital currency or virtual currency, therefore they could be sequestrated.

At the current stage, there is no special regulation in Türkiye regarding the tax legislation on how to tax income from crypto assets. Therefore, these gains can only be examined within the scope of general tax legislation. Expectations for the definition of crypto-assets are generally whether cryptocurrencies will be defined as “money”, “securities” or “commodities”. It is thought that the definition to be made will form the basis of the taxation of cryptocurrencies. Pursuant to the principle of legality of taxation, it is not a legally correct approach to subject cryptocurrencies to a tax type as a result of the expansionary interpretation, unless the legal nature of cryptocurrencies is clearly determined. Within the scope of this principle, crypto assets should be defined as separate economic assets in the tax legislation and tax provisions should be regulated by considering the unique characteristics of crypto assets.

In this context, within the scope of the current tax legislation, the subject can be evaluated as follows:

The fact that the cryptocurrency activity is (i) based on capital and labor, (ii) continuous, and (iii) carried out within an organization as a commercial activity causes the income to be qualified as commercial income. In this context, income gained within the scope of commercial activities related to the buying and selling of cryptocurrencies by natural persons is also commercial income.

The income gained as a result of activities related to cryptocurrencies by the capital companies listed in Article 1 of Corporate Tax Law No. 5520 is subject to corporate income tax. In this context, the commission income gained by the companies that act as an intermediary in the buying and selling of cryptocurrencies may be considered corporate income and subject to corporate income tax.

Various evaluations can be made regarding the nature of cryptocurrencies to tax the profits, which are earned as casual by natural persons and do not meet the conditions of commercial gain. These evaluations are summarized as follows:

Evaluation as an Intangible Asset

Cryptocurrencies can be considered as intangible rights under both Article 3 of Regulation and Article 70/2-5 of Income Tax Law No. 193 ("ITL") which regulates real property income including *"the right to use or the privilege of use over a secret formula or a manufacturing method with knowledge of an experience gained in the fields of industry, trade, and science".* However, crypto assets have almost no resemblance to the rights listed above. Therefore, although the definition of intangible assets is given for the crypto assets in the Regulation, this statement cannot constitute a justification for classifying crypto assets within the rights outlined in Article 70/2-5 of ITL.

Binance
Search
BTC/USDT
ETH/USDT
DOGE/USDT
ADA/USDT
XLM/USDT
Stellar Lumens
0.68102
Wallet
Trade
Markets
Futures
Spot
Chart by TradingView
Volume (20)

If cryptocurrencies are included in the scope of intangible assets in the tax legislation, the gains arising from the disposal of crypto assets are taxed as a capital gain by article 80/1-2 of ITL.

Evaluation as Security

Under Article 3 of Capital Markets Law No. 6362 securities are listed including *"Except money, cheques, bills and bonds; 1) Shares, other securities similar to shares and depository receipts for the said shares, 2) Debt instruments or securitized assets and income, and depository receipts for the said securities".* Crypto assets are not included in this article. In case cryptocurrencies are included in the scope of securities, under bis Article 67 of ITL, cryptocurrencies are subject to income tax as capital gains.

Evaluation as Commodity

Assuming that the cryptocurrency trading activity is carried out only once as a non-continuous activity and profit is gained as a result of this single transaction, in terms of crypto assets that are considered commodities, these would be taxed as casual income under Article 82 of ITL.

Evaluation as Money

There is a consensus in Turkish law that cryptocurrencies cannot be described as money since they must be accepted as a means of payment by the legal order in order to be able to accepted as money in the legal sense. As a matter of fact, Article 3 of the Regulation and in the press release of the Banking Regulation and Supervision Agency No. 2013/32, it is clearly stated that cryptocurrencies are not considered foreign currency, electronic money, or money. However, if cryptocurrencies are accepted as money/currency, there will be no income tax burden on natural persons, since "money" is not listed in the ITL as an income element.

In addition, in the Turkish Tax Administration's ruling dated 23.09.2020 and numbered 60938891-120.01.02.09[GVK: 3-1]-33826, the administration's opinion was presented on whether there is an Inheritance and Transfer Tax in the transfer of the Bitcoin asset in the account of the deceased to the heirs. In the above-mentioned ruling, it is defined that the goods subject to Inheritance and Transfer Tax, express all the rights and receivables of movable and real estate that may be the subject of ownership. It is stated that the total value of the Bitcoin asset transferred to the heirs should be declared by the heirs with the Inheritance and Transfer Tax declaration. Another opinion of the Turkish Tax Administration on cryptocurrencies has not been published yet.

As a result, it is thought that instead of including crypto assets in traditional structures, an independent taxation regime should be introduced according to their unique characteristics.

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