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Subject Matter:

GENERAL COMMUNIQUÉ SERIAL NO. 4 ON DOUBLE-TAX TREATIES

General Communiqué Serial No. 4 on Double-Tax Treaties, which was published in the Official Gazette issued on 26.09.2017 under No. 30192, explains the taxation of income that an individual or entity residing in the country forming the other party to the Treaty generates from their independent personal services or similar activities in Turkey under the double-tax treaty (DTT) signed by our country. The communiqué came into force upon its publication.

General Communiqué Serial No. 4 supersedes and annuls General Communiqué Serial No. 3 on Double Tax Treaties.

1. WHAT DOES "INDEPENDENT PERSONAL SERVICE" MEAN UNDER A DTT?

In the majority of DTTs, an independent personal service is defined in Article 14, and in this respect, these professional activities include the activities of doctors, lawyers, engineers, architects, dentists and accountants, as well as scientific, literary, artistic, educational or training activities carried out independently. In this respect, the definition is similar to the definition of independent personal services found in local legislation.

However, in a treaty that does not offer this kind of definition, "independent personal service" will refer to that defined in local legislation in the second paragraph of Article 3 (General Definitions) of this kind of treaty, which prescribes that any term not defined in the treaty shall have such meaning assigned to it in the State's legislation on that date with respect to and for the purposes of taxes subject to this treaty, unless the text stipulates otherwise.

Notwithstanding the foregoing, as taxation of gains generated by artists and athletes from their activities is governed in a different article of the treaty, their income from these activities shall be taxed as per the relevant article of the treaties.

2. HOW INCOME FROM INDEPENDENT PERSONAL SERVICES IS GOVERNED UNDER DTTS RATIFIED BY TURKEY

Instead of a standard definition or text, different texts and definitions have been worked out to strike a balance between the treaty itself and economic and commercial relations with the other state under DTTs ratified by Turkey in connection with taxation of earnings from independent personal or other similar services.

Basic provisions applicable to taxation of income from independent personal services usually appear in Article 14 of a DTT. However, as Article 14 occasionally refers to "a resident individual" in such a way as to give explanations only with respect to individuals (real persons), sometimes rules may be defined for the taxation of income from independent personal services performed by both individuals and entities under the "**resident**" term. If the text of said article refers to individuals only, provisions in Article 7 governing commercial earnings will be invoked to share taxation power between the earnings from independent personal service and similar activities performed by companies, subject to the presence of a service performance/business place as referred to in Article 5.

Article 3.1 of the Communiqué states that independent personal services may be addressed in five different ways in treaties for individuals and natural persons, and detailed explanations and illustrative Agreements are given in detail.

From this point of view, we should note that we must first check whether there is a DTT between our country and the state in which the individual or legal person offering independent personal services resides, and we must check its provisions in this respect. Here, the objective is to determine the reference point taxation power and to which country it belongs.

3. FACTORS ESTABLISHING THE TAXATION POWER OF TURKEY UNDER DTTS

Among the most important factors in determining the tax jurisdiction of income generated by a resident of the country that is the other party to a DTT, from its independent personal services offered to purchasers in Turkey, is the place where the activity is carried out. In case the resident of the other country carries out his activities in Turkey, the following factors play a significant role in the distribution of taxation power under the treaty as between the parties:

Workplace or Permanent Place: Performance of activities in a workplace or permanent place in Turkey;

- **Stay Time:** The other country's resident should remain in Turkey for a period exceeding 6 months in 183 days or longer in total either on a consecutive basis or at various times in a calendar year/financial year, or any time period of 12 consecutive months for the performance of its activities;

- **Effect of Payment in Turkey:** Where payment is made by or on behalf of a person residing in Turkey or from a workplace or permanent place owned in Turkey.

Accordingly, for the purpose of taxation of revenues generated by individuals or legal persons from their independent personal services under a DTT ratified by Turkey, there is no single factor among all DTTs for determining the tax-raising powers of Turkey. Rather, they cover various different factors (such as permanent place/workplace, length of stay and payment by residents in Turkey)

In this context, in some of our treaties, while the performance of the activity **in a workplace or a permanent place** in Turkey is regarded as the sole determinant factor for both individuals and legal persons in connection with the division of tax-raising powers, the stay time (length of stay) may also be a significant factor in certain treaties. While **this length of stay** is regarded as a factor only for individuals in some of our treaties, it may also be regarded as a factor for legal persons in some other treaties. Moreover, a number of treaties stipulate that **payment** should be made by or on behalf of residents in Turkey, or the payment should be made from a workplace/permanent place in Turkey for the determination of the tax-raising power of Turkey.

For this reason, for the purposes of taxation of earnings from independent personal or other similar services, **provisions of the relevant tax treaty** should be checked to see in which jurisdiction the tax-raising power lies, and action should be taken accordingly.

The General Communiqué provides detailed explanations on how to handle this subject matter in practice in light of the general explanations above. Notwithstanding the foregoing, since the most common criterion we encounter in practice regarding the taxation of independent personal service income in Turkey is the **"calculation of length of stay,"** provisions specifically addressing this criterion are further discussed below.

4. CALCULATION OF STAY TIME

4.1. General Rule of Thumb

The length of stay time examined to determine whether tax-raising power rests with Turkey, as the source country, for taxation of earnings from independent personal or similar services is based on the time period(s) during which the services or activities are carried out. In this respect, a tax-raising power will be applicable in Turkey only if the total length of time during **which service or activities are performed exceeds a specific limit.** This time period or an aggregate of these time periods, which shall serve as the basis for this tax-raising power, is expressed in different forms and subject to different thresholds in the DTTs to which our country is a party. When we look at these provisions, we see that a tax-raising power will arise in Turkey in the event that this time period or an aggregate of these time periods should:

- be longer than 183 days;
- be equal to or longer than 183 days;
- last 183 days or longer;
- take 183 days or longer; or
- exceed 6 months

consecutively or at different times in any consecutive 12-month period/calendar year/fiscal year.

From the perspective of the DTTs that stipulate the first option from those listed above, the length of stay/total length of stays consecutively or at different times in any consecutive 12-month period/calendar year/fiscal year should exceed 183 days, meaning that it should last at least 184 days. In the other three options, it will suffice that the length of stay should be 183 days for a tax-raising power to arise.

For the calculation of length of stay, in our treaties stipulating that any activity in Turkey should continue for a time period exceeding 6 months in total in a consecutive 12-month period/calendar year/financial year, if the service is provided at intervals, each single month is taken into account as 30 days in calculating a 6-month period. Accordingly, taxation will be charged in Turkey for services that last longer than (6x30=180) days. In case the service is provided consecutively (without any interruption), the day in the sixth month that corresponds to the commencement day of the service shall be taken into account as the day on which the 6-month term is completed. Where the day on which the services are launched does not have a corresponding day in the month during which the 6-month period expires, then the length of time shall expire on the last day of that month. Services that last longer than 6 months will be taxed in Turkey.

Example: In order to determine whether a resident of the other country who has been continuously providing his services in Turkey since 31 March 2016 has exceeded the 6-month period, the day in the sixth month following March that falls on the day on which the services commence shall be checked. Considering the fact that September has no thirty-first day, the last day of the six-month period shall be 30 September 2016. Accordingly, if the service is completed after 30 September 2016, the service will have been performed for a time longer than six months.

4.2. Collective performance of multiple independent personal services in Turkey in a given time period

Another matter that is important for calculating the time period is whether multiple independent personal services performed in Turkey are carried out collectively in a single time period. In such a case, for the calculation of days on which the resident of the other country is physically in Turkey, days that overlap should be taken into account once as a full day in order to avoid the double-counting of one single day.

Example: A non-resident taxpayer arrives in Turkey on 01.08.2016 in order to carry out two different independent personal services in Turkey and leaves the country on 31.12.2016. The duration of his activities in Turkey is as follows:

Operating Period	Length of stay in Turkey
1st business: 01.08.2016-31.12.2016	153 days
2nd business: 01.09.2016-30.11.2016	91 days

While the number of days spent by the non-resident professional in performing two different independent personal services in Turkey is (153+91=) 244, considering the fact that overlapping days (91 days) will be taken into account only once, the number of days spent in Turkey for the performance of independent personal services shall equal (244-91=) 153 days. In this case, the Turkish state has no right to tax these independent personal services in Turkey as the income-originating country.

4.3. Calculation of length of stay for enterprises

Independent personal services to be undertaken by enterprises in Turkey mean those independent personal services in Turkey that the enterprises can handle through their personnel.

In calculating the time period necessary for the Turkish state to levy tax in case of legal persons or enterprises, well-established policy based on opinions and beliefs used to argue that the number of personnel sent for the performance of the service should be taken into account together with the number of days during which the service was performed. For example, a foreign resident that performed independent personal services in Turkey for 20 days accompanied by ten staff members was considered to have rendered its independent personal services for 200 days in Turkey. For this reason, the period of time that each and every single person spent in Turkey was separately calculated and added together to calculate the time period that the enterprise had ultimately used to carry out its activities in Turkey.

However, according to a new regulation in the communiqué, for the purpose of calculating the time period for legal persons and enterprises, the number of days spent in Turkey for independent personal services shall now be taken into account without regard to the number of staff members. In this respect, the time period calculated as 200 days will now be re-calculated and will amount to only 20 days in light of the explanations above. For this reason, we can say that the Revenues Administration has significantly altered its interpretation for the calculation of the time period for independent personal services performed in Turkey for legal persons and enterprises.

Example: Best Co., residing in England, sends its staff members in such number below to supply consultancy services to Birden A.Ş. in Turkey:

a) seven staff members on 01/03/2018 for ninety days;
b) nine staff members on 25/07/2018 for eighty days; and
c) three staff members on 15/12/2018 for twenty-five days.

Best Co. has no permanent workplace in Turkey.

The first paragraph of Article 14 of the DTT between Turkey and United Kingdom governs residents of the other contracting state, while the second paragraph thereof features a regulation in terms of enterprises and legal persons residing in the other contract state. Considering the fact that Best Co. is a legal person, the provisions of the second paragraph concerning independent personal services will be taken into account.

According to the second paragraph of Article 14 of the Treaty, tax-raising power may be exercised in Turkey on the condition that either (a) Best Co. has a workplace in Turkey in which to perform its independent personal services in Turkey, or (b) the time period(s) during which independent personal services are carried out in Turkey exceed(s) 183 days in total in any consecutive 12-month period.

Considering the fact that it has no workplace in Turkey, the evaluation should be made with reference to the second factor, the length of the time period, for Best Co. For the calculation of the time period, the commencement and completion dates of the 12-month period shall be taken into account first. The commencement date of any uninterrupted 12-month period is the first day on which staff members arrive in Turkey to perform their independent personal services. The commencement date in our case is 01/03/2018. The expiration date shall be calculated by adding 12 months to the commencement date. The completion date is 01/03/2019 in our case.

After the commencement and expiration dates are determined, the total number of days during which independent personal services are carried out in an uninterrupted 12-month period as of the commencement date shall be calculated **without regard to the number of staff members who perform the services in Turkey.** Accordingly the calculated time period shall be as follows:

90 + 80 +25 = 195 days.

In our case, as the time period during which Best Co.'s independent personal services are performed in Turkey exceeds 183 days in any uninterrupted 12-month period, Turkey has the right to tax the income that Best Co. raises from its activities.

4.4. Calculation of length of stay under the same or related project

For the purposes of taxation of independent personal services under the DTTs, calculation of length of stay is rather particular in the case of independent personal services under the same or related project as set out in Article 5 of certain DDTs governing the workplace.

Only similar or related projects shall be taken into account for the purposes of calculating the length of stay in order to determine the tax-raising power of the source country in independent personal services performed by enterprises in terms of these treaties, and in other circumstances, each project shall be assessed on its own merits alone.

For the purpose of performance of the agreement, the "same project" should be the same project with respect to the enterprise that performs the independent personal service, i.e., that provides the service. In this respect, the service may be rendered to a single individual or entity or it may be rendered to more than one person for the same project.

"Related project," on the other hand, shall be taken into account for services supplied by the enterprise under different projects with commercial integrity. While the issue of whether or not projects are related is resolved, an assessment should be made based on the merits of the case. In this respect, the following factors may be taken into account to identify a related project:

- Whether the projects are handled under a single main agreement;

- In circumstances where projects are handled under different agreements, whether or not these different agreements have been concluded with the same or related persons and whether or not it is possible to reasonably envisage the conclusion of any additional agreement at the time when the first agreement is concluded;

- Whether or not the nature of work covered by different projects is the same for all projects;

- Whether or not the same individuals carry out services under different projects.

For calculation of the length of stay in connection with activities under the same or related **project, services performed under the same or related project should be assessed together, whereas this length of stay should be individually assessed for each project in the case of different projects.**

Section 3.3.1.3 of the Communiqué defines the way the concepts of "same project" and "related projects" should be handled in terms of implementation and lays down detailed examples for calculating the length of stay in this respect.

5. VALIDITY TERM OF CERTIFICATES OF RESIDENCE

Residents of other countries need to obtain a certificate of residence from the relevant authorities of the jurisdiction in which they reside and to submit the original copy of this certificate along with its Turkish translation, which should be notarized and certified by the Turkish Consulate in that jurisdiction, to the relevant tax office or withholding agent, as the case may be, so that the earnings or revenues that they generate in Turkey will be taxed under the relevant DTT. A withholding agent shall keep such certificates of residence submitted to them for presentation to the competent authorities if and where necessary. Unless the certificate of residence is submitted, local legislation shall be applied instead of the provisions of the relevant treaty. A certificate of residence for a calendar year shall remain valid up to the fourth month of the following year.

The validity term of a certificate of residence is addressed only by General Communiqués No. 257 and 258 on Income Tax Law under the application of Provisional Article 67 of the ITL in our legislation. Section (10) of Communiqué No. 257 prescribes that "a certificate of residence issued for a calendar year shall remain valid until the fourth month of the ensuing year, and the said certificate should be renewed every year." Communiqué No. 258 stipulates that "on the other hand, section (10) of the said communiqué prescribes that a certificate of residence issued for one calendar year shall remain valid until the fourth month of the ensuing year, and the said certificate needs to be renewed every year. This certificate shall be renewed by non-resident taxpayer individuals every year, and for non-resident legal body taxpayers, it shall be renewed every three years.

Ultimately, a general rule of thumb has been defined in the General Communiqué on Double-Tax Treaties attached hereto for the validity term of certificates of residence, and it has been prescribed that a certificate of residence for a calendar year shall be valid and applicable until the fourth month of the ensuing year.

6. WITHHOLDING OBLIGATION UNDER DTT PROVISIONS

6.1. Performance of Independent Personal Services Without Any Physical Visit to Turkey

As a general rule of thumb, in case the resident of the other country (whether individual or legal person) generates income from the independent personal services that he performs without visiting Turkey but that are supplied in Turkey, the right to tax such income is only vested with the country where he resides pursuant to the DTT. As no taxation may be charged in Turkey on such income generated from the said independent personal services, it shall not be possible to withhold any tax from the payments made in this respect. **In such a case, there shall be no need to complete either form no. 1 or form no. 2, attached hereto.**

6.2. Performance of independent personal services through a workplace or permanent place in Turkey

As to the income generated from the performance by a resident of the other country of his independent personal services or other similar activities through a workplace or permanent place in Turkey, if the right to tax this income is vested with Turkey under the DTT, tax should be withheld over the payments made in return for these independent personal services in line with the provisions of local legislation unless a special limit has been agreed in the treaty as for the tax withholding.

6.3. Where the service or independent personal services take longer than a specified period of time

Where the resident of the other country performs his independent personal services or other similar activities without any workplace or permanent place in Turkey, and the term of services or activities exceeds the length of stay as stipulated in the DTT, it is possible that Turkey will have the right to tax income derived from these services or activities. In such a case, tax should be withheld over the payments made in return for these activities in line with the provisions of local legislation unless a special limit has been agreed in the treaty as for the tax withholding.

According to Section 4.2.2.3 of the Communiqué, in case it is clearly determined during the supply of the services or performance of the activities that pursuant to the independent personal services contract:

- **the service shall not be performed in Turkey;**

- the subject matter of the service does not constitute an intangible right; or

- the service is performed in Turkey but the right to tax is not vested in Turkey pursuant to the DTT,

then the recipient of the service shall not withhold taxes. However, form no. 1 attached to the communiqué should be completed in full and then delivered to the withholding agent within 30 days following the first receipt of the service. Moreover, withholding agents are required to complete form no. 2 and should deliver it to the tax offices/revenue directorate prior to payment along with form no. 1, which has been submitted by the service provider to them in the first place along with a copy of the written contract relating to the service, if any.

Although Section 4.2.2.1 of the Communiqué prescribes that there shall be no tax withholding over payments made on account of independent personal services performed by a resident of the other country (an individual or an entity) without visiting Turkey, and there shall be no need to complete forms no. 1 and 2 attached to the Communiqué, as far as Section 4.2.2.3 of the Communiqué stipulates, even if the service is not performed in Turkey, it is mandatory that forms no. 1 and 2 as attached to the Communiqué are completed and submitted to the relevant authorities. This demonstrates that the explanations therein are somewhat self-contradictory. For this reason, it is understood that it is unclear whether said forms must be submitted in case the service is not performed in Turkey. We are of the opinion that these self-contradictory statements in the Communiqué should be urgently revised and corrected by the Revenue Administration by means of new regulation, given the fact that this Communiqué is currently in force and observed.

In the event that the withholding agent makes payments in parts, it will suffice to submit form no. 1 and form no. 2 to the relevant tax office/revenue directorate prior to the first payment. In case of receipt of multiple services for which there should be no tax withholding, in any given period the withholding agent shall complete form no. 2 only, and this form may be submitted to the tax office/revenue directorate by attaching the list of the names of service providers that complete form no. 1, which is associated with form no. 2 in the first place.

6.4. Where a transaction which is initially exempt from tax withholding subsequently becomes subject to tax deduction.

- In case the length of service term or the term during which independent personal services is performed becomes longer; or

- In case a workplace or permanent place is opened and it becomes possible to attribute the service to that place;

or in case of any other subsequent change, if the right to charge a tax becomes vested in Turkey, the service recipient, in its capacity as the withholding agent, shall be required to fulfil tax withholding liability in a manner covering past periods retroactively.

The Communiqué neither offers greater clarification nor gives any examples to back up or support its statement: "...**shall be required to fulfil tax withholding liability in a manner covering past periods retroactively..."** There is no additional explanation in the communiqué to clarify whether or not this liability shall be in the form of filing a corrective return subject to the provisions of repentance/remorse law retroactively or whether tax deductions for past-period payments will be declared by means of a current-period return (without any fine) regularly in the month in which the change becomes effective.

If, in particular, the approach that pervades the Communiqué and that we will discuss in the next paragraph is taken into account, considering general tax practices, our opinion with respect to the above is that a correction return should be submitted in line with the provisions of voluntary disclosure for the periods in which a cash payment or payment on account was made in the past.

On the other hand, the communiqué stipulates that if it is not clearly known at the time of the execution of the contract or effect of payment for any independent personal services or activities in Turkey that the service provider individual or legal person will stay in Turkey for periods greater than the length of stay time prescribed in the DTT, or if it is not possible to clearly determine whether the right to charge tax is vested in Turkey, the withholding agent should apply tax withholding to the payments for the independent personal services.

6.5. Payment effected in Turkey

In a limited number of DTTs, such as the DTT with Sweden, whether or not the income generated by the resident of the other country from his independent personal services or other independent activities in Turkey shall be taxed in Turkey is subject to certain circumstances where at least one of the following conditions is met: payment is made by or on behalf of a resident in Turkey; or the payment is made from a workplace or place of temporary residence of the payor in Turkey.

In such case, a tax withholding should be applied over the payments made in return for said services or activities in line with the provisions of local legislation, without regard to the duration of the activities or the workplace and the place or permanent residence.

7. APPLICATIONS FOR REFUNDS

A person who is subject to tax withholding on the payments made to them may apply to the relevant tax office/revenue directorate either personally or via their attorneys for the refund of withheld taxes in circumstances where these payments should not have been taxed in Turkey according to the provisions of the relevant DTT treaty unless otherwise is specifically governed in the said treaty. This application should be made within the limitation period for corrective actions.

Refund applications to be made by submitting a certificate of residence as well as form no. 3 attached hereto shall be finalized in accordance with our national legislation.

Truly yours,

DENGE İSTANBUL YEMİNLİ
MALİ MÜŞAVİRLİK A.Ş.

ANNEX:
General Communiqué Serial No. 4 on Double-Tax Treaties

(*) Explanations in our circular are for information purposes only. In case of doubt, we recommend that you consult an expert consultant before taking final action. Please note that we shall be in no event liable for any loss that may arise from transactions carried out solely in reliance on the statements in our circulars.

(**) You may send your opinions, criticisms and questions about our circulars to our experts below.

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