

Law Bulletin

General Corporate | Turkey | September 2019

SHAREHOLDERS AND LEGAL REPRESENTATIVES' LIABILITIES REGARDING UNCOLLECTIBLE PUBLIC DEBTS IN CAPITAL COMPANIES

"Shareholders' liability vis-à-vis the company being limited in proportion to their capital contribution" is an essential principle of the capital companies under the Turkish Commercial Code ("**TCC**") numbered 6102. Thus, as a reflection of this principle, the TCC clearly stipulates that the partners of limited liability companies ("**LLC**") are only liable for their capital contributions and their additional and side payment obligations set forth under the articles of association, and that partners are not responsible for the company' debts. Accordingly, partners of an LLC are only liable vis-à-vis the company, in proportion to the capital shares they undertook. Likewise, according to the TCC, shareholders of joint-stock companies ("**JSC**") are only liable vis-à-vis the company, in proportion to their capital contribution.

The Law on the Procedure of the Collection of Public Receivables ("**LPCPR**") numbered 6183 sets forth an exception to this principle. According to Article 35/1, *"Partner(s) of a limited liability company are directly liable for the uncollectible and deemed-to-be uncollectible public receivables in proportion to their shareholding amount and they may be pursued in accordance with the provisions of this Law."* In this respect, if there is an uncollectible or deemed-to-be uncollectible public debt of an LLC, then the partner(s) of such LLC may be held directly liable with respect to such public debt, in proportion to their shareholding amount in the company.

Procedural Tax Law ("**PTL**") numbered 213 sets forth a special provision for legal entities, pertaining to the tax receivables – which is a public receivable within the scope of the LPCPR. According to Article 10 of the PTL *"The obligations of the tax-payer legal entities, minors, wards (...) must be performed by their legal representatives (...). The tax-payables and contingent receivables, which cannot be collected from the assets of the taxpayers due to the [legal*

KOLCUOĞLU DEMİRKAN KOÇAKLI

representative's] failure to perform such obligations, partially or fully, shall be collected from the assets of the non-performing party. This article is also applicable to non-Turkish tax-payers' legal representatives in Turkey".

When reviewed together, foregoing two provisions make it unclear whether legal representatives of the legal entities should be pursued at first place, before pursuing the shareholders for a tax-receivable, which cannot be collected from the LLC's assets, completely or partially. As a result of the State Council and the Chamber of Tax Courts rendering contradicting decisions, the State Council's General Assembly on the Unification of Judgments ("**GAUJ**") rendered a decision which is published in the Official Gazette dated 20 June 2019 and numbered 30807.

The GAUJ has examined the conflicting decisions. One part of the decisions reviewed by the GAUJ stipulates that the public receivable, which cannot be collected from the LLC, should first be collected from the legal representatives -*managers*- of such LLC, who served within the relevant period (which the full receivable is related to). If the receivable cannot be collected from the legal representatives, only then the shareholder(s), who had a shareholding within the relevant period (which the full receivable is related to) can be held liable for such receivable, in proportion to their shareholding. In these court decisions, it has been considered as a violation of the limited liability principle to claim a public receivable directly from the shareholder of an LLC without pursuing the LLC's legal representative(s) -*managers*-. These decisions assert that the sequence to be followed for the collection of an uncollectible public receivable is pursuing the legal representatives of the LLCs at first place, and then the shareholder(s) as indicated in LPCPR.

Other part of the decisions referred in the GAUJ stipulate that there is no sequence for pursuing the legal representatives and shareholders of an LLC with respect to uncollectible public receivables. In these decisions, the emphasize was given on debt-collection variances between the legal representatives and the shareholders; under the relevant provisions of law, the legal representatives are held liable for the full amount of the public receivable, whereas the shareholders are held liable only in proportion to their shareholding.

In light of the differences between the court decisions, and the controversy in practice, the GAUJ adopted the second approach. Accordingly, there is no sequence among the legal representatives and shareholders of an LLC with respect to the collection of public receivables.

Recently, the Constitutional Court has rendered a decision on a similar issue. The Constitutional Court's decision dated 19 June 2019 ("**CCD**") may also be considered as a guide to comprehend the recent approach of the Turkish judicial system, to collection of public debts from capital companies. The CCD is based on an application regarding the social security debt that cannot be collected from a JSC.

A board member of this JSC having a social security premium debt, applied to the Constitutional Court and asserted that he did not hold any representation powers to act on behalf of the JSC, during the time when this debt occurred and that he cannot be liable for this public debt.

KOLCUOĞLU DEMİRKAN KOÇAKLI

The Constitutional Court has reviewed the relevant article of the Law on the Social Security and General Health Insurance and stipulated that the relevant provisions do not require a board of directors' member to have representation powers in order to be liable with respect to the company's social security premium debt. The Constitutional Court also reviewed the LPCPR which states in its Article 35 that *"uncollectible and deemed-to-be uncollectible public receivables from the legal entities or unincorporated associations may be collected from the personal assets of the legal representatives and managers of such unincorporated associations in accordance with the provisions of this Law."*

Further to the foregoing provisions, the Constitutional Court decided that the applicant is liable for the uncollectible social security premium debts of the JSC, which occurred before the term of office of the applicant *-the board member-*. In the CCD, the Constitutional Court also referred to the non-assignable supervision duties of the board of directors' members, stipulated under the TCC. With a broad interpretation, the Constitutional Court set forth that the current board members have a supervision duty over the former board members and managers' activities, and therefore, concluded that the members of the board of directors are liable for the uncollectible public receivables which occurred before these board members' terms of office.

It is clear that, with the GAUJ's decision and the CCD, the courts' approach aims to ensure that the fastest method and process for collection of uncollectible public receivables is applied.

CONTACT



Aslıhan Balci



Özge Gizem Yerlikaya

abalci@kolcuoglu.av.tr

ogyerlikaya@kolcuoglu.av.tr