**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**THE DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of conformity of Article 65.2 of the Tax Code of the Republic of Azerbaijan with parts I and II of Article 13, Article 29 and Article 73.2 of the Constitution of the Republic of Azerbaijan*

**17 March 2016                                                                        Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Sona Salmanova, Sudaba Hasanova, Jeyhun Garajayev, Rafael Gvaladze (Reporting Judge), Mahir Muradov and Kamran Shafiyev;

attended by the Court Clerk – Faraid Aliyev,

the representative of the applicant body – Mahir Mammadov, Head of the Science-Analytical Department of the Commissioner for the Human Rights (Ombudsman) of the Republic of Azerbaijan,

the representatives of the respondent body – Rovshan Muradov, Head of Sector of Economical Legislation Department of Milli Majlis of the Republic of Azerbaijan,

the specialists – Azer Huseynov, Judge of Administrative Economical Board of the Supreme Court of the Republic of Azerbaijan, Nuraddin Mustafayev,  Judge of Administrative Economical Board of Court of the Appeal of Baku city, Ramiz Gasimzade, Head of Department for Organization of Lawsuits of Head Office of the Ministry of Taxes of the Republic of Azerbaijan;

in accordance with the Article 130.7 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on request of the Commissioner for the Human Rights (Ombudsman) of the Republic of Azerbaijan on the verification of the conformity of Article 65.2 of the Tax Code of the Republic of Azerbaijan with parts I and II of Article 13, Article 29 and Article 73.2 of the Constitution of the Republic of Azerbaijan.

Having heard the report of Judge Rafael Gvaladze, the arguments of representatives of applicant and the respondent, the specialists opinion and having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

The Commissioner for the Human Rights (Ombudsman) of the Republic of Azerbaijan having appealed to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asked the Constitutional Court for verification of conformity of Article 65.2 of the Tax Code of the Republic of Azerbaijan (hereinafter referred to as the Tax Code) with parts I and II of Article 13, Article 29 and Article 73.2 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution).

In the request it was specified that according to Article 52.1 of the Tax Code, upon the decision on attraction of the taxpayer to liability for violation of the tax legislation, the relevant tax authority, in accordance with procedures established by Article 65 of this Code, or via the court collect from liable party all financial sanctions in accordance with this Code.

According to Article 65.1 of the Tax Code if a taxpayer did not implement his/her tax obligation within timeframe specified by this Code, the tax authority shall send to the taxpayer the notification on payment within 5 days of taxes, interests and applied financial sanctions, calculated or re-calculated in accordance with this Code.

The Article 65.2 of the given Code provide that in other cases on the charged or overcharged taxes, interests and applied financial sanctions, tax authority gives to the credit organization or person engaged in banking operations, the order, being the executive (payment) document to freeze the funds at the current or other accounts of the taxpayer in national or foreign currency in the amount of 105% of the debt and covering debit operations.

According to the applicant, provisions of Article 65.2 of the Tax Code contradicting with requirements of parts I and II of the Article 13, Article 29 of the Constitution, Article 152 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the Civil Code), violating the property right of the taxpayer, limits his right of free disposal of property without the judgment.

The applicant also considers that according to the specified article, the taxpayer on the accrued taxes and the applied financial sanctions is forced to pay a tax, over 100 percent, and in addition 5 percent, and it, making a contradiction with Article 73.2 of the Constitution, interferes with development of free business.

In connection with the request, the Plenum of the Constitutional Court considers necessary to note the following.

According to parts I and II of Article 13 of the Constitution the property in the Republic of Azerbaijan is inviolable and is protected by state. The property may be state, private and municipal. According to Article 155.3 of the Civil Code, funds of the state budget are property of the Republic of Azerbaijan.

In Article 9.1.1 of the Law of the Republic of Azerbaijan “On Budgetary System” it is shown that the income of the state budget consists of the state taxes. According to Article 8 of this Law, the purpose of the state budget of the Republic of Azerbaijan consists in ensuring of collecting and use in the order established by the legislation of financial means for the solution of economic, social and other strategic programs and problems of the country, implementation of functions of the state. And also according to Article 9.2 of this Law, collecting of income of the state budget is carried out according to the Tax Code and other acts.

In Article 11 of the Tax Code it is established that taxes are a compulsory, individual and non-refundable payment made to the state or local budget in the form of collection of monetary means from taxpayers with the purpose of providing the financial basis to the state and municipal activities.

Apparently from requirements of the law, necessity, identity and gratuitousness of payments of natural and legal entities is the main sign of taxes that differentiate them from other obligatory payments.

Payment of taxes established by law as well as interests rates added according to the Code, the applied financial sanctions and other obligatory payments are defined as a duty of taxpayer (Article 16.1.1 of the Tax Code).

According to Article 23.1.6 of the Tax Code providing in accordance with procedure established by the legislation, payments to the state budget, interests, financial sanctions and administrative penalties that are not paid in due time refers to the rights of tax authorities. According to Article 24.0.1 of this Code, tax authorities are obliged to ensure that taxes are correctly calculated and paid in full and on time, to follow completely the tax legislation.

According to Article 63.2 of the Tax Code when taxpayer does not agree with amount of tax calculated that he has to pay he may without stopping the tax payment submit the complaint to the relevant executive authority performing the tax control or the court.

As it is stated above, according to Article 65.1 of the Tax Code if the taxpayer did not implement the tax obligation within timeframe specified by this Code, the tax authority shall send to the taxpayer the notification on payment within 5 days of taxes, interests and applied financial sanctions, calculated or re-calculated in accordance with this Code.

Under Article 65.2 of this Code, in case of not payment of taxes in time, established by the Tax Code, tax authority as a way of deduction of debts on taxes, gives concerning the current or other accounts in national or foreign currency of the taxpayer one of the following orders:

- on deduction of a debt on taxes with current or other accounts in national or foreign currency of the taxpayer in the state budget;

- on freezing on debit transactions on the current or other accounts of the taxpayer in national or foreign currency of money of 105 percent from the debt sum.

Upon the demand of the specified article, orders of tax authority are considered as the executive document, obligatory for the credit institutions or persons that are carrying out the bank operations. Choosing of any of these orders depends also on charge by tax authority or the taxpayer.

Thus, the order for collecting to the state budget from the current or other accounts of the taxpayer in national or foreign currency of debts on taxes, percent and financial sanctions, is given in the following cases:

- in case of taxpayer's failure to effect payment of calculated and declared tax by the due date taking into account Article 65.1 of this Code;

- if after receipt of the notice indicated in Article 65.1 of this Code, the taxpayer within 30 calendar days shall not apply to the court with complaint as per the taxes, interests and financial sanctions applied by the tax authority;

- according to the relevant court judgment;

- in case of availability of the written consent of the taxpayer., concerning the taxes added by tax authority, percent and a debt according to the applied financial sanctions (Article 65.2.1 of the Tax Code).

In case of not payment of taxes in time, the tax authority as a way of deduction of the debts on taxes consisting of the accrued taxes, percent and the applied financial sanctions gives the order about freezing of debit transactions on the current or other accounts of the taxpayer in national or foreign currency of money of 105 percent from the debt sum.

Due to arguments of request for violation of the property right affirmed by the Constitution when giving by tax authority without the judgment of the order for collecting of unilaterally money from the current or other accounts of the taxpayer, the Plenum of the Constitutional Court considers necessary once again to consider the legal status created under the position of the Constitution and this question.

According to parts I, II and IV of Article 29 of the Constitution everyone has the right to own property. Everyone might possess movable and real property. Right of ownership envisages the right of owner to possess, use and dispose of the property himself/herself or jointly with others. Nobody shall be deprived of his/her property without decision of law court. Total confiscation of the property is not permitted. Alienation of the property for state needs is permitted only after preliminary fair reimbursement of its cost.

In Article 73 of the Constitution it is indicated that everyone must pay taxes and other state duties in-time and in full volume as required. Nobody may be forced to pay taxes and other state duties if they are not envisaged in the law and in excess of amount specified therein.

The Constitution, along with rights and freedoms, defines also other duties following from them and does not exclude possible lawful and thorough intervention at implementation of the rights. However lawful intervention in any right including in the property right, has to be proportional, has to be carried out with achievement of fair balance between the general interest of society or state and protection of constitutional rights of an individual.

In the decision of the Plenum of the Constitutional Court dated August 6, 2002 “On interpretation of the Articles 49.3 and 49.6 of the Tax Code” it is specified that despite of fact that financial means intended for payment to state budget are in personal property of a taxpayer, he/she has no right to dispose of them at discretion, and these means regularly have to be transferred into the state budget. Otherwise rights and interests of other persons protected by law as well as the state’s ones can be violated.

Duty to pay taxes reflects common interests of society. State has a responsibility to take measures as to regulation of tax relations with a view of protection of lawful rights and interests with respect to not only taxpayers but also other members of society.

Therefore tax withholding should be regarded not as the groundless deprivation of taxpayer of his/her property, but as a lawful taking of fixed part of property, that is the constitutional duty.

It should be noted that this legal provision of the Plenum of the Constitutional Court coincides with norms of the section LII of the Civil Code governing the relations connected with the bank account.

Thus, according to Article 964.2 of the Civil Code establishing the base of deduction of monetary funds from account, without order of a client, deduction of his/her monetary funds from his/her account is allowed in presence of one of the following bases:

- judgment concerning deduction of monetary funds;

- cases established by law;

- cases provided by contract between bank and client.

As evident from sense of this article, one of the bases of deduction of monetary funds from account is existence of cases established by legislation.

Such cases are specified also in Article 14 of the Law of the Republic of Azerbaijan “On Social Insurance”, in Article 5.1 of the Law of the Republic of Azerbaijan “On Execution”.

According to Article 82.2 of the Law of the Republic of Azerbaijan “On Administrative Proceeding”, the administrative body that has adopted the administrative act, makes the determination on the direction of the requirement of execution. In this case, adjudication for the direction of the requirement of execution is not required. In case of the direction of the requirement of execution, the determination for execution and the last goes to directly executive official who, without the judgment, carries out executive actions.

As it has been noted, payment of the taxes established by the law and also added according to the present Code of percent, the applied financial sanctions and other obligatory payments, is established as a duty of the taxpayer. For the purpose of compensation of damage caused to the budget as a result of not execution of this duty, the legislation defines coercive measures and means in the Tax Code.

Thus, according to requirements of Articles 23.1.7 and 65.2 of the Tax Code, tax authorities have the right to give to banks or other credit institutions the order which is the executive (payment) document to organize collection of administrative penalties for collecting in the state budget from settlement, currency or other accounts of taxpayers of shortages and percent, the applied financial sanctions on taxes.

At the same time there is a freezing of money on debit transactions on the current or other accounts of the taxpayer in national or foreign currency, of 105 percent from the debt sum.

The Plenum of the Constitutional Court considers that such freezing cannot be estimated as violation of the property rights of the taxpayer. Leaning on the legal position formed in the mentioned decision, the Plenum of the Constitutional Court once again accents that in spite of the fact that the sum of money transferred into the state budget is in personal property of the taxpayer, he/she has no rights to dispose of this money at his/her own discretion.

And it shows that the property, in the form of a certain sum of money of the taxpayer which he has to pay to the state budget and for this reason has no rights to dispose of it, and the property which is in personal property and provided by the Article 29 of the Constitution differ from each other.

Here it is also necessary to consider that Article 60 of the Constitution and Article 62 of the Tax Code, provide the right of the taxpayer of appeal in court of the decision and action (or inaction) of tax authorities and their officials.

Existence of subsequent judicial supervision as security measure with respect to rights of taxpayer, proves not a contradiction to requirements of the Constitution concerning an order of indisputable deduction of tax payments.

Obligatory deduction of taxes, in itself does not violate a property right, and measures specified in Article 65.2 of the Tax Code, directed to deduction by tax authorities, cannot be estimated as property right violation.

In connection with the request the arguments connected with freezing of money on debit transactions on the current or other accounts of the taxpayer in national or foreign currency of 105 percent from the debt sum, the Plenum of the Constitutional Court notes that according to point 15 of part 1 of Article 94 of the Constitution, the general rules on bases of financial activity, taxes, duties and collecting are established by the legislation.

This Code establishes the tax system of the Republic of Azerbaijan, general principles of taxation in the Republic of Azerbaijan, rules for determining, payment and collection of taxes, the rights and responsibilities of taxpayers and state tax authorities, as well as other parties with respect to taxation procedures, tax control forms and methods, liability for tax law violations and the procedures for lodging complaints against unlawful actions (inactions) committed by tax agencies and officials thereof (Article 1.1 of the Tax Code).

According to Article 59.1 of the Tax Code for failure to pay the tax or current tax payment in period stipulated by the present Code, the interest at rate 0,1% of the amount of tax or current tax payment shall be withheld from the taxpayer or tax agent for each day of delay.

According to Article 59.1 of the Tax Code the interest rates established by the Article 59.1. of this Code shall be applied with respect to payments for whole period of delay but not more than for one year.

Apparently from an essence of the specified article, as a result of charge of percent, the sum of the challenged tax debt can change every day. Also the percent added on any amount of a tax which is not paid within one year can increase up to 36,5 – 36,6%. Only for this reason, for the purpose of protection of possibility of restoration of losses (on an equal basis with unpaid percent, and the added percent) to which the state budget can be subject, freezing of the money which is on current or other accounts of the taxpayer of more than 5 percent from the debt sum is considered as expedient.

Such sum of percent is provided also in other norms of the Tax Code. Thus, according to paragraph 2 of Article 60.1.2 of the Tax Code in the case of undoubted deduction of funds from the taxpayer’s currency account the bank freezes on the currency account the funds at the value of 105 percent of the amount specified in the instructions at the rates established by the Central Bank at the date of payment. The instruction shall be fulfilled upon converting the currency funds of the taxpayer into manats.

Apparently, in different articles of the Tax Code, a share of compensation of losses that can arise for various reasons, freezing of a debt or the sum, over 5 percent from the sum specified is provided. It creates a contradiction with Article 73.2 of the Constitution. According to this article, nobody may be forced to pay taxes and other state duties if they are not envisaged in the law and are in excess of amount specified therein.

The principle of establishment by law of taxes and other state payments enshrined in Article 73 of the Constitution specifies that taxes and other payments are accepted according to legislation and have to be established by law that has come into force. Thus freezing of money on debit transactions on current or other accounts of the taxpayer, of 105 percent from the debt sum, is provided in national or foreign currency by the Article 65.2 of the Tax Code and completely conforms with requirement of Article 73 of the Constitution.

Proceeding from the aforementioned, the Plenum of the Constitutional Court has come to conclusion that Article 65.2 of the Tax Code providing for issuance by credit institution or by a person carrying out bank operations, the order being an executive document about freezing of moneys on debit transactions on the current or other accounts of a taxpayer in national or foreign currency of 105% from the debt sum has to be considered as corresponding to parts I and II of Article 13, Article 29 and part II of Article 73 of the Constitution of the Republic of Azerbaijan.

Being guided by parts VII and IX of Article 130 of the Constitution of the Republic of Azerbaijan and Articles 52, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On the Constitutional Court”, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. To consider Article 65.2 of the Tax Code of the Republic of Azerbaijan providing for issuance by credit institution or by person carrying out bank operations of the order being an executive document for freezing of money on debit transactions on current or other accounts of a taxpayer in national or foreign currency of 105 percent from the debt sum as corresponding to parts I and II of Articles 13 and 29 as well as part II of the Article 73 of the Constitution of the Republic of Azerbaijan.

2. The decision shall come into force from the date of its publication.

3. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

4. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.