**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE PLENUM OF CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Articles 78.3, 85.4, 90.3 and 93.1.1 of the Tax Code of the Republic of Azerbaijan*

# 12 January, 2011 Baku city

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of FarhadAbdullayev (Chairman), SonaSalmanova, FikretBabayev, SudabaHasanova, RovshanIsmaylov, JeyhunGarajayev, Rafael Gvaladze(Reporter-Judge), Isa Najafov and Kamran Shafiyev;

attended by the Court Clerk Ismail Ismaylov,

the legal representatives of the subjects interested in special constitutional proceedings: SahirMamedhanov, Deputy Minister of Tax of the Republic of Azerbaijan, EldarAliyev, deputy head of department of the organization of work on compulsory collecting of tax debts of the Ministry of Tax,RovshanSuleymanov, senior adviser of Department of the Administrative Legislation of the Staff of MilliMejlis of the Republic of Azerbaijan, TahiraAsadova, Judge of Local Economical Court N1 of Baku city;

experts: PhD. AfatMirzoyeva, Docent of Chair of Civil Procedure, Labour and Environmental Law of the BakuStateUniversity;

specialists: Jamil Alizadeh, Head of Department of Tax Policy and Incomes, Ministry of Finance of the Republic of Azerbaijan, Anar Aliyev, Head of Legal Department of the Ministry of Economic Development of the Republic of Azerbaijan;

in accordance with parts IV and VI of the Article 130 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on request of the Cabinet of Ministers of the Republic of Azerbaijan and inquiry of the Local Economical Court N1 of Baku city.

having heard the report of Judge Rafael Gvaladze, the reports of the legal representatives of the subjects interested in special constitutional proceedings, specialists and experts, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

In the request received by the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) the Cabinet of Ministers of the Republic of Azerbaijan (hereinafter referred to as the Cabinet of Ministers) asks:

- to give interpretation ofArticles 78.3 and 90.3 of Tax Code of the Republic of Azerbaijan (hereinafter referred to as the Tax Code) according to requirements of the Code of Criminal Procedure of the Republic of Azerbaijan (hereinafter referred to as the CPC), concerning possibility of their application concerning the decisions made in connection with securing of civil suit;

- to give interpretation of possibility of application according to requirements of the Code of Civil Procedure of the Republic of Azerbaijan (hereinafter referred to as the CCP) and the CPC of Article 2.2 of the Law of the Republic of Azerbaijan “Onfinancial insolvency and bankruptcy” (hereinafter referred to as theLaw “On financial insolvency and bankruptcy”) in connection with not executed decisions (sentences) according to Article 23.1.3 of the Law of the Republic of Azerbaijan “On execution” (hereinafter referred to as the Law “On Execution”) adopted in connection with the satisfaction of civil suit, the added interest and the applied financial sanctions to the sum provided by the court sentence.

In request in connection with Articles 78.3 and 90.3 of the Tax Code, it was noted that on the criminal cases commenced on the basis of Article 213 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as the CC) according to chapter XIX of the CPC as the civil claimant the tax authorities are involved. In the sentences of courtsadopted on cases of such category,along with imposing of punishment prescribed in the criminal legislationalso specified the payment of the principal tax debt to the state budget. However, to the sum of a principal debt did not included the penalties and financial sanctions added (established) by tax authorities and actually these payments remain without execution.

At the same time, one of the difficulties arising during execution of sentences is linked with application concerning the accused persons of means evaded of taxation. Thus, absence at these persons of sufficient property for returning of these means, serves as reason for calling back of executionwrit issued according to the Article 23.1.3of the Law “On Execution”.

In that case it is specified in inquiry the possibility of application as a whole of Articles 78.3 and 90.3 of the Tax Code, for the purpose of implementation of execution of court sentences and for compensation of damage caused to the state budget because of evasion from payment of taxes. In request it is specified that execution of tax obligations is provided in Article 78.3 of the Tax Code not as a duty of direction of the legal entity but in general as an obligation of legal entity who is a taxpayer. In theArticle 90.3 of the Code, in connection with non-execution of this obligation, the order of inventory of property of the taxpayer and sale of the described property at open auction on the basis of the judgment made as civil procedure are established. Along with a principal debtapplication of this order creates a condition for collecting the added penalties and financial sanctions.

The second question brought up in request is also connected with execution of sentences and the decisions made under criminal and civil legal procedures. There is also the ask to clarify the possibility of implementation of execution of such judicial acts as a result of process of financial insolvency“bankruptcy” of the legal entity provided by the Law OnFinancial insolvency and Bankruptcy”.

At the same time, the Local Economical Court N1 of Baku city in connection with the civil case on Affiliated Open Joint Stock Company “TecrubaSınagZavodu” against tax authority concerning write-off of debts on taxes with the lost right of reclamation, appealed to the Constitutional Court and ask to give interpretation from the point of view of provisions of Article 85.4 of the Tax Code concerning the possibility of write-off of debts on taxes with the passed terms of reclamation.

Plenum of the Constitutional Court in connection with request considers important to note the following.

According to Article 73 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution) everyone must pay taxes and other state duties in-time and in full volume as required. This constitutional duty according to sense of Articles 7, 12 and 16 of the Constitution possesses not special-legal (civil) character conditioned by the public and legal nature of the state and the government, but namely by public and legal character.

The duty to pay taxes, fixed in Article 73 of the Constitution, concerns to all taxpayers, as the unconditional requirement of the state. The taxpayer, cannot dispose at discretion of a certain part of property which has to be brought in the state treasury in the form of a certain sum of money as it should be provided by the law and has to grant constantly this sum in favor of the state, otherwise the rights and interests of the state protected by the law, including other persons are violated.

In the given duty of the taxpayer the public interests of all members of society are reflected. Therefore, the state for the purpose of protection of the rights and legitimate interests not only taxpayers but also the other members of society has rights and duties of taking of lawful measures in the field of regulation of tax-legal relations.

Tax-legal relations are based on submission of one party of the power of other party. These relations provide subordination of the parties, whichis based on the one hand at the tax authority acting on behalf of the state on existence of powers of the power, and at other hand – the taxpayer on subordination. It should be especially noted that requirements of tax authority and a duty of the taxpayer follow not from the contract but from the law.

The Tax Code, based on the provision of the Constitution, regulates issues of tax control and bringing to justice in connection with violation of the tax law.

According to Article 53.1 of the Tax Code taxpayers, tax agents and their representatives as well as tax authority officials are responsible for violation of tax legislation in accordance with the procedures set by this Code, Code of the Republic of Azerbaijan for Administrative Offences, Criminal Code of the Republic of Azerbaijan and other legislation of the Republic of Azerbaijan.

As evident, violation of the tax law can become also the reason of bringing of person to criminal liability in the cases provided by the legislation. Such responsibility is enshrined in Article 213 of CC. According to a disposition of this article evasion from payment of a tax is considered as a crime.

Due to the issue which is brought up in request the establishment of what means thenotion of material damage (harm) caused as a result of tax crimes, from whom this damage (harm) has to be collected, the definition of possibility of collecting financial sanctions (application) and establishment of rules for their collecting has the great importance.

First of all it should be noted that the Constitutional Court in decisions as of April 8 and on August 6, 2002 on interpretation of Article 56.1, 49.3 and 49.6 of the Tax Code comprehensively revealed the rules of application concerning the taxpayer of measures of different types of responsibility.

In these decisions the Constitutional Court indicates that in accordance with Articles 51 and 52 of Tax Code application of financial sanctions for infringement of tax legislation, shall be implemented by taxation bodies or, on the basis of the claim lodged, by the court.The infringement of tax legislation is also a reason for bringing the person to criminal responsibility. However, it should be taken into account, that in connection with infringement of tax legislation the corpus delicti and respective responsibility for this should be determined by Criminal Code rather than by Tax Code.

Plenum of the Constitutional Court considers important once again to specify that at the solution of a question of distinction of tax and other types of responsibility of the person it is necessary to consider that are inadmissible qualification of the same legal offence as tax and non-tax, and also bringing of taxpayer for committed act to tax and other responsibility.Therefore, the act of commission revealed by tax authority and made by the taxpayer within established by Articles 57, 58 and 60 of the Tax Code, and its qualification as the tax offense connected with violation of the tax law has to be decided according to provisions of the Tax Code, and at commission of crime connected with violation of the tax law provided byArticle 213 of CC has to be decided according to provisions of this Code.

It is necessary to consider that for violation of the tax law as respects to taxpayers and tax agents the financial sanctions and rates established to the Tax Code are applied.

Plenum of the Constitutional Court in above-stated decisions explored an essence of the financial sanctions applied for violation of the tax law and noted that the purpose of application of the financial sanctions provided in the Tax Code is restoration of inventory losses to which the state budget as a result of not execution of tax duties was subjected. In other words, such sanctions applied by tax authorities, have recovery character.

However other types of measures, in particular a measure as collection of the skim money or reduced profit, and also various kinds of penalties in essence are beyond the tax obligation. Their purpose not restoration, but punishment and they are applied for tax and legal violation, that is for the illegal act provided by the law committed deliberately or negligently.

According to the requirement of Article 53 of the Tax Code responsibility for tax offenses is born by the taxpayer who is the legal entity and individual. Drawing of the taxpayer or tax agent to liability for violation of tax legislation does not release them from execution of responsibilities on taxes and legal requirements of executives of tax authorities (Article 53.7 of the Tax Code). At the same time, in case of deliberate evasion of taxes the taxpayer can be brought to tax responsibility and the corresponding official to criminal liability provided byArticle 213 of CC. In each specified case, depending on the sphere of the nature, found the place the offenses which are independently differing from each other and in which the subjects of offenses are various. Therefore, on the one handthe qualification of these acts it is indisputable, and on the other hand repeated bringing to any type of responsibility (criminal, administrative, tax) of any person isnot allowed and collection of a debt at the same time both from the organization and from its head isnot allowed. This conclusion proceeds from requirements of Article 53.1 Tax Code.

It is necessary to consider that according to Article 52.2 of Tax Code claims on acceptance of financial sanctions by tax authorities are considered in accordance with the Civil Procedure Code of the Republic of Azerbaijan. It means that tax authorities in fixed dates can submit claims concerning judicially collection from the taxpayer of the interest added for a tax debt and financial sanctions.

Within criminal case, the damage caused directly as a result of a crime is indemnified. So, bringing against the person of charges in compliance withArticle 213 of CC for evasion of taxes, has to be qualified not as evasion from all caused damage (harm) but as evasion from payment of a concrete tax and charges, which sum is determined on the basis of the relevant acts of tax authorities or the expert opinion issued as a result of tax audits. Such conclusion follows from a disposition of Article 213 of CC. Therefore, from the accused the sum of the rest of tax concerning of any kind of an unpaid tax and total amount on them can be collected.

According to mentioned the Plenum of the Constitutional Court comes to a conclusion that only the damage caused as a result of a crime has to be collected from the person condemned for tax crimes and collection of financial sanctions and interest from this person is not allowed. Because of the fact that the part of sentence, concerning the civil suit, adopted on tax crimes doesnot make the same subject with financial sanctions and interest, thenaccording to Article 52 of the Tax Code the collection of these percent and financial sanctions is carried out in accordancewithArticle 65 of the given Code or by court on the claim which is put forward against the taxpayer according to CPC.

It should be noted that the similar issue was a subject of discussion of the Supreme and Constitutional Courts of the Russian Federation and they adopted resolutions that are similar to a legal position specified in this decision.

Due to the raised question of possibility of application of Article 2.2 of the Law “OnFinancial insolvency and Bankruptcy” in the decision adopted in connection with providing the civil suit and not executed on the basis of Article 23.1.3 of the Law “On Execution”, Plenum of the Constitutional Court considers important to note the following.

According to Article 73 of the Constitution one of types of the financial obligation are obligatory contributions (taxes, collecting, off-budget state contributions to social funds, penalties).

Due to the question of possibility of representation of the state interests by tax authorities,first of all, it is required the determination of these interests. Plenum of the Constitutional Court considers that the state interests make compliance with interests of other creditors and owners from the point of view of conceptuality and consist of the following:

First, the state as any creditor is interested in execution of demands by the debtor. It gives the chance for ensuring of budget replenishment and creation of strong incentive for timely execution of the constitutional obligations on payment by taxpayers of taxes and other debts.

Secondly, the state when performing procedures of financial insolvency is interested in development of business and preservation of workplaces as a resource in the sphere of elimination of unemployment and formation of the income in a budgetary financial system for reduction of the budgetary expenses connected with the social help. This duty also coincides with interests of other creditors interested in preservation of business of the debtor as the producer of goods, works, and services of the creditor or the manufacturer of production of whom it needs.

Thirdly, the state as the owner of a number of debtors and as the guarantor (guarantee) of protection of constitutional rights of the citizen is interested in implementation of procedure of financial insolvency taking into consideration the maximum preservation of the property, without causing damage to national interests in the economic and social sphere.

In view of the above and the enforcement practice the Plenum of the Constitutional Court comes to a conclusion that tax authorities representing state interests, in the cases specified in request have to have rights of implementation of process of financial insolvency (bankruptcy). However, legal status of these bodies in the course of financial insolvency, features of implementation of this right isnot settled in the Law “On Financial insolvency and Bankruptcy”.

According to Article 94.1.6 of the Constitution establishment of the general rules concerning legal proceedings is referred to powers ofMilliMejlis of the Republic of Azerbaijan. In this regard, specification in the Law “OnFinancial insolvency and Bankruptcy” of legal status of tax authorities in the course of bankruptcy, settlement of features of implementation of this right has to be recommended to MilliMejlis of the Republic of Azerbaijan.

Due to the question which is brought up in the request the explanation of measures which are carried out by tax authorities in connection with execution by taxpayers of obligations on tax payment, the terms established by the legislation on taxes for implementation of these measures and arisen debts on taxeshavethe great importance.

At nonfeasance by taxpayers of obligations on taxes in the terms established by the Tax Code, as means for ensuring of payment of the relevant debts and also percent of the financial sanctions added on a debt on taxes and applied in connection with execution of these obligations in the Tax Code, a number of the rights were given to the tax authorities.

To these rights are referred the following:to provide in accordance with procedure established by the legislation, payment to the state budget, interests, financial sanctions and administrative penalties that are not paid in due time;to issue to banks and other credit organizations the instruction, which shall be an executive (payment) document, to arrange for execution of administrative penalties for collection of arrears and tax interests, applied financial sanctions, calculated in accordance with legislation, to the state budget from the settlement, foreign currency and other accounts of taxpayers; to file claim in the court of law on arresting the payment, current and other accounts of the taxpayer in cases and in accordance with procedure established by the legislation, to take measures on taxpayer’s property inventory in accordance with this Code (Articles 23.1.6-23.1.8 of Tax Code).

Procedures of these rights are fixed in Articles 65, 89 and 90 of the Tax Code. Among them such powers as imposing of the order on accounts of taxpayers in banks and other credit organizations, adoption of decisions on inventory of property, the resort to the court concerning realization at open specialized auctions of the inventoried property in sufficient and necessary volumes forensuring of execution of the obligation are provided.

However, the legislation on taxes limited by a certain term the implementation of these rights of tax authorities.

Thus, according to Article 85.4 of Tax Code tax authorities are entitled to calculate, recalculate taxes, penalties and financial sanctions of the taxpayer within 3years after termination of taxable reporting period, to impose calculated (recalculated)sums of taxes, penalties and financial sanctions within 5 years after termination of taxable reporting period.

Tax authorities during 5 years term specified in Article 85.4 of the Tax Code, using the rights provided in the Tax Code have to provide execution by taxpayers of tax obligations. After the expiration of this term, any coercive measure cannot be applied to the taxpayer.

Plenum of the Constitutional Court notes that application of certain restrictions including restrictive terms in implementation of the state coercive measures directed on protection of such constitutional values as stability and definiteness of public legal relations, ensuring stability of conditions of management, equilibration between interests of the state and personal interests of subjects of legal relations. Proceeding from it, determination of term of payment of taxes and obligation of tax-legal relations for each of the parties as one elements of taxation sets as the purpose the ensuring of fair balance of the state and personal interests.

5 years term provided by Article 85.4 of the Tax Code also, by the creating conditions for stability of the economic environment, bythe increase of trust to economic activity of participants of economic activity finally serves for providing the mechanism of legal safety of these subjects.

This is why, after the expiration of this term the application of coercive measures by tax authorities concerning the taxpayeris not allowed.

Plenum of the Constitutional Court notes also that 5 years term provided in Article 85.4 of the Tax Code has to extend as well on the circumstances specified in Article 89.15 of the Tax Code.

Thus, according to Article 89.15 of Tax Code inventory of state property, privatization of which is prohibited by the legislation of the Azerbaijan Republic, as well as the property of the taxpayers, privatization of which is conducted with resolution of the executive authority, but the decision on privatization of which is not taken or privatization is not completed, shall be conducted based on the permit of the relevant executive authority. The tax authority, within 15 days from the date of issuance of the resolution on collection by banks and other credit organization to the state budget of debts, interests an applied financial sanctions on taxes, shall officially apply to the relevant executive authority with the purpose of notification of consent for inventory of property specified in this Article. In the event of issuance of permit for inventory of property within one month, the inventory is performed by the tax authority in accordance with procedures stipulated under this Code.

Thus, in this article in case of receiving refusal on inventory of property of taxpayers of appropriate authority of executive power, tax authorities cannot inventory their property. In the specified cases the tax authorities are also deprived of the right of an appeal to the court.

Thus, according to Article 90.1 of Tax Code the tax authority for ensuring of execution of the obligation of the taxpayer has the right of an appeal to the court. However, for ensuring of the specified right the property of the taxpayer has to be inventory according to requirements of Article 89.1 of the Tax Code.

Besides it should be noted that any exception to the term of the reclamation established in Article 85.4 of the Tax Code is not provided.

In spite of the fact that in Article 93 of the Tax Code the termination of term of the taxation as the basis for recognition of debts on taxes as desperate, isnot provided in the above cases, due to the lack of real opportunities for collection of the tax remains as it should be by the established law the debt is subject to write-off.

In this regard the Plenum of the Constitutional Court considers that taking into consideration the collection of the estimated taxes, percent and the applied financial sanctions, and the termination of term of the Tax Code as the termination of a date of execution of the tax obligation established by Article 85.4 according to Article 93.1.1 of this Code, debts on taxes, percent and financial sanctions with expired collection term, have to be written off, as desperate debts.

According to the above mentioned Plenum of the Constitutional Court comes to conclusion that:

– because of the fact that at the person condemned for tax crimes only the damage caused as a result of a crime has to be collected the collection of financial sanctions and percent, from this person isnot allowed. The part of the sentence pronounced on tax crimes, concerning the civil suit doesnot make the same subject with financial sanctions and percent according to Article 52 of the Tax Code and collection of these percent and financial sanctions is carried out as it established according to Article 65 of this Code or by the court on claim which is put forward against the taxpayer according to CPC;

– considering that the tax authorities have the right to represent the state interests in the course of financial insolvency, to MilliMejlis of the Republic of Azerbaijan has to be recommended specification in the Law “OnFinancial insolvency and Bankruptcy” of legal status of the given bodies in the course of financial insolvency and settlement of features of implementation of such right;

– the termination of term of collection of the estimated taxes, percent and the applied financial sanctions, and the termination of term of the Tax Code as the termination of a date of execution of the tax obligation established by Article 85.4 according to Article 93.1.1 of this Code, debts on taxes, percent and financial sanctions with expired collection term, have to be written off, as desperate debts.

Being guided by parts IV and VI of Article 130 of the Constitution of the Republic of Azerbaijan and Articles 60, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. Because of the fact that from the person condemned for tax crimes only the damage caused as a result of a crime has to be collected, the collection of financial sanctions and interests from this person is not allowed. The part of the sentence pronounced on tax crimes, concerning the civil suit does not make the same subject with financial sanctions and percent according to Article 52 of the Tax Code and collection of these interest and financial sanctions is carried out as it established according to Article 65 of this Code or by the court on claim which is put forward against the taxpayer according to CPC.

2. Considering that the tax authorities have the right to represent the state interests in the course of financial insolvency, MilliMejlis of the Republic of Azerbaijan has to be provided with recommendation on specification in the Law “On Financial insolvency and Bankruptcy” of legal status of the given bodies in the course of financial insolvency and settlement of implementation of such right.

3. The termination of term of collection of the estimated taxes, interest and the applied financial sanctions, and the termination of term of the Tax Code as the termination of a date of execution of the tax obligation established by Article 85.4 according to Article 93.1.1 of this Code, debts on taxes, interest and financial sanctions with expired collection term, have to be written off, as desperate debts.

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

5. The decision shall be published in “Azerbaijan”, “Respublika”, “XalqQazeti” and “BakinskiyRabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

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