**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

# OF THE PLENUM OF THE CONSTITUTIONAL COURT

**OF THE REPUBLIC OF AZERBAIJAN**

# *On interpretation of Article 82 of the Law of the Republic of Azerbaijan “On Administrative Procedure” and Articles 52 and 90.1 of the Tax Code*

# *of the Republic of Azerbaijan*

**13 September, 2011 Baku city**

Plenum of Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Sona Salmanova, Fikret Babayev (Reporter-Judge), Sudaba Hasanova, Rovshan Ismaylov, Jeyhun Garajayev, Rafael Gvaladze, Isa Najafov and Kamran Shafiyev;

attended by the Court Clerk I.Ismayilov,

the legal representative of the subject interested in special constitutional proceedings: Eldar Askerov, senior adviser of Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan, Chingiz Bashirov, Chairman of the Administrative-Economical Court of Sumqayit city and Zaur Pirverdiyev, Judge,

expert – Afet Mirzoyeva, associate professor of Chair of Labour and Ecological Law of Baku State University,

# has examined in open session via special constitutional proceedings in accordance with Article 130.VI of the Constitution of the Republic of Azerbaijan the constitutional case on the basis of request of the Administrative-Economical Court of Sumqayit city concerning interpretation of Article 82 of the Law of the Republic of Azerbaijan “On Administrative Procedure” and Articles 52 and 90.1 of the Tax Code

of the Republic of Azerbaijan.

Having heard the report of Judge F.Babayev and statements of the representatives of the parties and opinion of expert, studied materials and examined the case, Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

As evident from the request, in proceeding of Administrative-Economical Court of Sumqayit city there is a civil case against “Umid-92” small business concerning sale from specialized open auction of the described property for the sum of 10.000 manatss with the purpose of ensuring of acquaintance at the rate of 1.802.87 manats in the state budget from an amount of debt revealed of 3 December 2010 by Territorial Tax Administration N 2.

The applicant considers that in connection with the specified case, between the legal institutes regulating such relations in the legislation, there are disagreements and uncertainty. So, according to Article 52.1 of the Tax Code of the Republic of Azerbaijan (hereinafter referred to as Tax Code), upon the decision on attraction of the taxpayer to liability for violation of the tax legislation, relevant tax authority, in accordance with procedures established by the Article 65 of this Code, or via the court accept from liable party all financial sanctions in accordance with this Code*.*

According to Articles 65.1 and 65.2 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. Should the taxpayer fail to pay calculated and re-calculated taxes, interests and applied financial sanctions within the period indicated in the notification, the tax authority shall give an instruction, being the executive (payment) document to the bank or other crediting entity to deduct from taxpayer current or other accounts in national or foreign currency tax debts and interests, applied financial sanctions to the state budget.

In Article 90.1 of the Tax Code also it is noted that if the taxpayer fails to fulfill his tax obligations within 30 days upon the seizure of property, the tax authority in order to provide the execution of tax obligation may appeal to the court for approval on selling the seized property in necessary quantities on the special auction. If working life of the seized property expires before the expiration of the period, specified in the present article, the tax authority will be entitled to apply to court.

However, according to Article 82.2 of the Law of the Republic of Azerbaijan “On Administrative Procedure” (hereinafter referred to as Law on Administrative Procedure) which entered into force on 1 January 2011, the administrative body which has adopted the administrative act, makes the decision on the direction of the claim of execution. In that case it is not required the judgment for the direction of the claim of execution.

According to the conclusion of Administrative-Economical Court of Sumqayit city the claim in a judicial order tax authority of financial sanctions from the person attracted to responsibility for violation of the tax legislation and consideration of the claim of tax authority concerning sale at open specialized auction of described property for ensuring execution of the tax obligation or executions of the made decision of tax authority in connection with the this case, recognized by Article 8 of the Law “On Administrative Procedure” as administrative act, found clear reflection in the legislation.

Plenum of the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) in connection with the question raised in the request considers necessary to note the following.

According to Article 16.1 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitutions) the State of Azerbaijan shall take care of the

improvement of the well-being of the people and every citizen, their social protection and proper standard of living. Ensuring of implementation of these functions is created the legal obligations defined by the law for the individuals and legal entities, connected with payments of taxes.

According to Article 73 of the Constitution every person shall have the duty to pay taxes and other state duties in a timely manner and in the full amount as provided by law.

Plenum of the Constitutional Court considers that in connection with the request of court, first of all, bases of definition of responsibility for violation of the tax legislation should clear up.

Under violation of the tax legislation is mean the perfect illegal act which has entailed responsibility via procedure provided by the Tax Code; this act is shown as action and inaction of guilty person. In addition, it should be noted that involvement of the person for violation of the tax legislation has to be carried out as it should be provided by the law and should not violate his rights and freedoms established in the Constitution and other laws.

In the Decision of Plenum of the Constitutional Court of 6 August 2002 “On Interpretation of Articles 49.3 and 49.6 of the Taxation Code of the Republic of Azerbaijan” it is noted that the duty to pay the taxes reflects the common interests of society. State has the responsibility to take measures as to regulation of tax relations with a view of protection of the lawful rights and interests with respect to not only taxpayers but also other members of society.

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

# The taxpayer cannot dispose at discretion of a certain part of the property which has to be paid in the state treasury in a certain monetary form as it provided by law, and he is obliged to transfer this amount constantly in favor of the state, otherwise, the rights and interests of the state protected by the law and other persons will be violated. Not execution by persons of the obligations connected with payment of taxes in an order provided by the law is the basis for attraction them to responsibility.

Besides, for involvement of the taxpayer to legal responsibility for violation of the tax legislation, restriction of any right of the person has to be carried out in an order provided by the legislation and should not go beyond the bounds.

Plenum of the Constitutional Court having defined in a number of the decisions tax responsibility as an independent kind of legal responsibility distinguished it from the administrative. On the basis of the legal position created in these decisions at the solution of a question on distinction of tax responsibility of the person and other its types it is necessary to take into account that qualification of one legal relations both tax and non-tax at the same time and also involvement of the taxpayer for perfect act to tax and other responsibility are inadmissible (decision of Plenum of the Constitutional Court of 12 January 2011 “On interpretation of Articles 78.3, 85.4, 90.3 and 93.1.1 of the Tax Code of the Republic of Azerbaijan”).

According to Article 49.3 of the Tax Code, on the basis of decision on calling the taxpayer to account for violation of tax legislation no later than 10 daysthe taxpayer shall be sent the request on payment underpaid taxes, interests, amounts of financial sanctions, administrative penalties as well as the remedial of indicated violations. According to Article 49.6 of the same Code on tax violations determined for which the taxpayer to be called to administrative account the authorized tax official, who conducts the inspection shall create a separate protocol on administrative violation. The revision of cases on such violations and application of administrative sanctions to taxpayer officials and individual entrepreneurs shall be conducted by tax authorities pursuant with the Code of the Republic of Azerbaijan for Administrative Offences (hereinafter referred to as Code “On Administrative Offenses”).

On the other hand, in the Tax Code for separate cases of violation of the tax legislation by the resolution of the head of tax authority applies financial sanctions and the percent acting as types of disciplinary measures (Articles 57 – 60 of the Tax Code). And in cases of commission of the administrative offense connected with violation of the tax legislation, according to provisions of the Code “On Administrative Offenses”, on cases raised by the separate protocol on an administrative offense, on the basis of decisions of the tax authorities adopted by the authorized official against the accused persons administrative penalties are applied (Articles 246-247, 249 of the Code “On Administrative Offenses”).

Plenum of the Constitutional Court opening essence of the financial sanctions applied for violation of the tax legislation noted that application of the financial sanctions provided in the Tax Code bears a problem of recovery of the budget subject to property losses subsequently of non-execution of tax obligations. In other words, such sanctions applied by tax authorities, bear restoring character (decision of Plenum of the Constitutional Court of 12 January 2011).

In view of the fact that calling to account for violation of the tax legislation and non-execution of the tax obligation is created the various legal consequences, the different forms of carrying out in life of their application are provided by the Tax Code.

So, a taxpayer’s obligation to pay tax (including current tax payments) stipulated under circumstances and via procedure of this Code is deemed as its tax obligation. Bases for the emergence, alteration and annulment of a tax obligation, as well as rules and conditions for the fulfillment of a tax obligation shall be determined exclusively under this Code (Articles 77.1 and 77.2 of the Tax Code).

The financial sanctions bearing restoring character, the taxes accrued and accrued in this regard, percent for non-execution of the tax obligation are raised at the taxpayer only as it should be defined in the Tax Code.

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*.*

And according to Article 89.1 of the Tax Code in the event that a tax- payer did not fulfill his/her tax obligation within the term provided by this Code, his/ her property may be recorded as a method to ensure the payment of his/her tax burden, interests calculated on the tax burden in connection with the non-fulfillment of the same obligation, and of applicable financial sanctions.

According to Article 13.1 of the Constitution the property in the Republic of Azerbaijan is inviolable and protected by the state. According to Article 29 of the Constitution everyone has the right to property. Everyone may have movable and immovable property. The right to property is include the right to possess, use, and dispose of property individually or jointly with others. Also in the IV part of the same Article in an imperative order it is noted that no one may be deprived of his property without a court decision.

Protection of property also found the reflection in a number of the international acts. In Article 17 of the Universal Declaration of Human Rights it is noted that everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.

According to Article 1 of the Protocol No. 1 of the Convention “On Human Rights” it is specified: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.

In this regard it has to be especially noted that in view of the fact that the inventory and sale from the specialized organization of the property being in property of the taxpayer as a way of ensuring of payment of the added percent on a tax debt and the applied financial sanctions affect the rights of the owner reflected in the Constitution to possession of the property being in his property using and the dispose of it, in the tax legislation the rule of withdrawal of this property is specially provided. In view of the fact that at application of administrative penalties such procedure is not provided there is no property right restriction.

Just for this reason, Plenum of the Constitutional Court, acting from Constitution requirements, considers that only on the basis of a judgment the sale of the property being in property of the taxpayer who did not fulfilled tax obligation can be carried out.

In this sense especially it is necessary to pay attention that the Tax Code entering into system of the legislation of the Republic of Azerbaijan is the special law regulating tax legal relationship. In Article 1.1 of the Tax Code it is specified that the Tax Code of the Republic of Azerbaijan establish the tax system of the Republic of Azerbaijan, general principles of taxation in the Azerbaijan Republic, rules for determining, payment and collection of taxes, the rights and responsibilities of taxpayers and State tax authorities, as well as other parties to taxation procedures, tax control forms and methods, liability for tax law violations and the procedures for lodging complaints against unlawful actions (failure to take actions) committed by tax agencies and officials thereof.

The Law “On Administrative Procedure” is the general law defining the general rules of production. So, in Article 3.3 of the Law “On Administrative Procedure” it is noted that by special laws of the Republic of Azerbaijan the provisions supplementing already existing or special rules connected with administrative production can be defined.

As for the question of the administrative body which adopted the administrative act provided in Article 82.2 of the Law “On Administrative Procedure” concerning decision-making on the direction of the claim of execution and that for this purpose is not required the judgment, it should be noted that the administrative body can make decisions only within the powers. In the same way and the tax authority within the powers can make the decision and direct it on execution without the judgment. However, according to procedure provided by Article 90.1 of the Tax Code, putting up of the described property of the taxpayer to auction for non-execution of the tax obligation belongs to powers of court and is carried out on the basis of its decision. The procedure provided in Article 82.2 of the Law “On Administrative Procedure” for violation of the tax legislation does not belong to putting up to auction of property of the person.

According to above mentioned Plenum of the Constitutional Court in connection with the request of Administrative-Economical Court of Sumqayit city comes to the following conclusion:

- the sale from open auction in the necessary and sufficient volume of the described property of the taxpayer in connection with non-execution of the tax obligation shall be resolved via judicial order provided by Article 90.1 of the Tax Code.

Being guided by Article 130.6 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. The sale from open auction in the necessary and sufficient volume of the described property of the taxpayer in connection with non-execution of the tax obligation shall be resolved via judicial order provided by Article 90.1 of the Tax Code.

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 can not be cancelled, changed or officially interpreted by any body or official.