**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Article 213.1 of the Criminal Code of the Republic of Azerbaijan and Articles 78.3 and 78.4 of the Tax Code of the Republic of Azerbaijan*

**9 September 2013                                                                           Baku city**

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

attended by the Court Clerk Faraid Aliyev,

representatives of interested parties – Teyub Muhtarov, Judge of Goranboy District Court; Fuad Mamedov, Senior Advisor of the Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan;

expert – Simran Hasanov, lecturer of the Board of Civil Procedure and Commercial Law of the Law Faculty of the Baku State University,

specialists – Adil Beylarov, Deputy Head of Department of Prosecutor's Office of the Republic of Azerbaijan on supervision of implementation of laws by Ministry of Justice and Ministry of Taxes, by State Customs Committee in investigative and operational search activities and Tural Guliyev, Head of Department of Legal Coverage of Legal Board of the Ministry of Taxes of the Republic of Azerbaijan;

in accordance with the Article 130.6 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on inquiry of Goranboy District Court on interpretation of Article 213.1 of the Criminal Code of the Republic of Azerbaijan and Articles 78.3 and 78.4 of the Tax Code of the Republic of Azerbaijan.

having considered the report of Judge Kamran Shafiyev, the reports of legal representatives of the interested parties in special constitutional proceedings, expert and specialist, and examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Goranboy District Court having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) in connection with consideration, being in its procedure of criminal case on a charge of Mushvig Sariyev under the Article 213.2.2 of the Criminal Code asked to give an interpretation of Article 213.1 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as the Criminal Code) and Articles 78.3 and 78.4 of the Tax Code of the Republic of Azerbaijan (hereinafter referred to as the Tax Code) from the point of view of Articles 25, 57, 60 and 71 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution), and also Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In the inquiry it is specified that M. Saryev actually fulfilling the management of Limited Liability Company “Fərid İnşaat Kot” (hereinafter referred to as the LLC), having assigned to himself an obligation on accounting of financial and economic activities of property of LLC as the person who bears responsibility for activities of the taxpayer and it is responsible for ensuring payment of the corresponding taxes, having violated requirements of a number of articles of the Tax Code, having provided the false information in tax authority where registered LLC, evaded from payment to the government budget in a large size of the income tax of the legal entity.

At the same time in the inquiry it is noted that M. Sariyev did not hold an official position while the head of the legal entity was other person, he was made responsible for the actual management of LLC.

In this connection, the Goranboy District Court asked to interpret bringing to responsibility under the Article 213.1 of the Criminal Code of the person fulfilling the actual management of the legal entity in the relation of Articles 78.3 and 78.4 of the Tax Code.

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

Obligation to pay taxes, enshrined in Article 73 of the Constitution as the unconditional requirement of the state concerns to all taxpayers. To pay taxes (including in appropriate time and in the amount established by the legislation) is one of the constitutional obligations of everyone. The taxpayer cannot dispose at discretion of a certain part of the property that in the order provided by the law shall be listed in the state treasury in the form of a certain sum of money and is regularly obliged to transfer this amount of advantage of the state. Otherwise, the rights and interests of the state protected by the law and other persons can be violated.

Public concerns of all members of society are reflected in this obligation of the taxpayer. Therefore, the state with the purpose of protection of the rights and legitimate interests not only taxpayers, but also other members of society has rights and an obligation to take legal measures in the field of regulation of tax legal relations.

The Tax Code based on the specified constitutional provisions establish the tax system of the Republic of Azerbaijan, general principles of taxation, 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 (inactions) committed by tax agencies and officials thereof (Article 1.1 of the Tax Code).

The Tax Code also regulates the issues of tax control and accountability in connection with violation of the tax legislation.

It should be noted that taxes being from the moment of creation of each state, the integral component of the economic relations in society are at the present stage the one of the main forms of the income of the state. With respect thereto evasion of taxes and other mandatory fees is considered rather dangerous act doing harm to financial interests of the state and can become the basis for attraction to the corresponding type of responsibility. Public danger of this act is expressed in non-execution of the constitutional obligations of everyone to pay the taxes and other state charges established by the law.

According to Article 53.1 of the Tax Code taxpayers, tax agents and their representatives as well as tax authority officials shall be 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.

Any person for commitment of a tax offense depending on feature of act bears only one type of legal responsibility. In the cases provided in the legislation, violation of the tax legislation can become the reason of bringing of the person to criminal liability. Such responsibility is established in Article 213 of the Criminal Code and according to a disposition of this article, evasion of taxes is considered as a crime.

In this regard, the Plenum of the Constitutional Court according to the legal positions created in the previous decisions considers that 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 by Article 213 of the Criminal Code has to be decided according to provisions of this Code (decisions of the Plenum of the Constitutional Court of April 8, 2002, August 6, 2002 and January 12, 2011).

In spite of the fact that the subject of a crime provided in Article 213 of the Criminal Code is an individual, in this article the specific subject (individual or legal entity, other persons) of criminal act is not specified. Therefore it is inevitable the addressing other regulations for establishment of persons on which the obligation on tax payment or fees on compulsory national social insurance is assigned.

First of all, it is necessary to consider that one of the main conditions of emergence of the tax liabilities along with establishment of the taxpayer is establishment of the taxation object and other elements of the taxation (Articles 12.1.1 and 12.3 of the Tax Code). According to the legislation on taxes the taxpayer is any person who is obliged to pay taxes from the taxation objects determined according to the Tax Code (Article 13.2.4 of the Tax Code).

According to the Article 78.3 of the Tax Code the fulfillment of tax obligations realized directly by the taxpayer, unless otherwise provided for in this Code. According to Article 78.4 fulfillment of tax obligations shall not be assigned to other persons.

According to Article 53 of the Tax Code, the responsibility for tax offenses is born by the taxpayer who can be as 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 authorized person – to the criminal liability provided by the Article 213 of the Criminal Code.

In this connection it should be noted what the person which is evading of paying taxes can be as well the subject to whom the legislation assigned an obligation on tax payment, that is individual, determination of which is given in the tax legislation, or the person who is actually fulfilling the tax liabilities of the legal entity. It is possible to regard to number of subjects of this crime the individuals who pay taxes or fees on compulsory national social insurance, and also executive officials of legal entities, that is the head, the chief accountant, including other persons to whom the legislation or the employment contract charged an obligation on creation and official execution of accounting documents, accounting of property and financial and economic activities of the entity.

At that the main criterion is responsibility of authorized workers for accounting of financial and economic activities, the income (expenses) and the taxation objects of the legal entity, in the order provided in the legislation, payment of the taxes established by the law, and also the added percent, the applied financial sanctions and other mandatory fees, providing of tax reports to tax authorities in cases and the order established in the legislation, the actual implementation of business activity on behalf of the taxpayer with assignment on himself of other obligations, activities of the taxpayer with conducting tax transactions and ensuring of accomplishment of the tax liabilities.

Due to specified, the person who got profit from the taxation object actually is recognized as the taxpayer, and according to a sense of the Article 78.3 of the Tax Code, accomplishment of the tax liabilities is assigned to the actual head of the legal entity. A person who gets the actual profit as a result of business activity fulfilled by legal entity actually disposing of assets, money and property, shall bear responsibility for calculation and payment of taxes established by law regarding taxation objects.

In foreign case-law the possibility of criminal prosecution of actual head of the legal entity for a crime of evasion of taxes is also provided. Thus, in the decision of the Plenum of the Supreme Court of the Russian Federation of December 28, 2006 No. 64 “On Practice of Application by Courts of the Penal Legislation on Responsibility for Tax Offences” is noted that the person who is actually fulfill the business activity through the man of straw (for example, the unemployed who was formally registered as the individual entrepreneur), evaded at the same time of paying taxes, his actions should be qualified under the Articles 198 and 199 of the Criminal Code as executor of this crime, and actions of the other person in force as his helper under a condition if he understood that participates in evasion of taxes and his intention making of this crime was covered.

According to the above, the Plenum of the Constitutional Court considers that also the person fulfilling the actual management of the legal entity (the actual head) who is a taxpayer shall be carried to number of subjects of a crime of evasion of taxes.

Along with noted, it is necessary to consider that the usage of provision “evasion” of the criminal act specifying a particular purpose provided in a disposition of Article 213.1 of the Criminal Code that is on evasion from payment of taxes established by the law, demonstrates that the structure of this crime provides availability in actions of the charged intention directly directed to evasion of taxes in the specified case. “Corpus delicti” provided in this article arises in case when act is made intentionally and is directed to evasion of taxes with violation of the orders established by the tax legislation.

It can be expressed in intentional not reflection in tax reports of gained income and taxation objects, reduction of the valid size of the income, inflate the expenses which are considered in case of calculation of taxes (for example, the expenses subtracted in case of determination of aggregate income of the subject of taxation). The untrue data on time of the incurred expenses and the gained income, misstatement in calculations of the physical indicators characterizing a certain type of activity in case of payment of a unified imputed income tax, etc. can be also carried to obviously false data.

Thus, involvement of the actual head of the legal entity to criminal liability under Article 213 of the Criminal Code is possible if this person did not submit within the terms established by the law the declaration on the income subject of taxation, provided or disposed to provide to tax authorities the declaration with entering into it of obviously distorted data (for the purpose of concealment, reduction of a tax or release from it) about the income or expenses which shall be considered in case of calculation of taxes. The official head of the legal entity cannot be brought to trial in cases when he deceived by the actual head did not know about tax avoidance and participated a straight line in activities of the legal entity.

On the other hand, the official head of the legal entity can be brought to trial if realizes that he evades from taxes, or having entered criminal communication with the actual head, together with him participates in tax avoidance. In such cases the official head is considered as abettor of a crime.

Purpose the criminal procedure law of the Republic of Azerbaijan is to define the legal procedures for criminal prosecution and defend of a suspect or accused person. Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the Criminal Procedure Code), defining these procedures ensures that a person who has committed a crime shall possess equal (balanced) opportunities in the process of bringing to criminal responsibility (decision of the Plenum of the Constitutional Court of July 15, 2011 “On interpretation of Articles 26 and 96 of the Criminal Procedure Code of the Republic of Azerbaijan”).

Due to the above, the Plenum of the Constitutional Court notes that the correct establishment and the correct classification of structure of each criminal action in case of its investigation are directed to establishment of that whether are a crime the act reflecting criminal elements, whether accused of crime execution is guilty, and also on imposing of fair punishment to accused of this crime. The opposite case can become the reason of accountability of the innocent person, or evasion from responsibility of the person guilty in commitment of crime, the wrong application of punishment.

At the same time, it is necessary to consider that in the Article 139 of the Criminal Procedure Code the circumstances that are subject to proof during procedure of criminal prosecution are specified. In a row of these circumstances the fact and circumstances of criminal incident, connection of the suspect or defendant with criminal incident, essential elements of offense in the act provided by the penal statute, guilt of the person in commitment of act, etc. are included.

The proofs collected on criminal prosecution for full, comprehensive and objective verification are analyzed and at comparing with each other, their reliability is established (Articles 138.1 and 144 of the Criminal Procedure Code). From the point of view of requirements of criminal procedure legislation, only set of admissible proofs allowing to draw reliable total conclusion on criminal prosecution is understood as sufficiency of proofs (Article 146 of the Criminal Procedure Code).

Thus, the question of criminal prosecution of the actual head, and also official head and other ranking officers of the legal entity shall be solved in cumulative proofs collected during pretrial investigation on each case separately. Considering the above, the Plenum of the Constitutional Court comes to such conclusion:

- According to a sense of Article 78.3 of the Tax Code the person that gained the actual income in result of the business activity fulfilled by the legal entity, which is actually disposing of his money property is recognized as the person fulfilling the tax liabilities as the taxpayer. This person according to Article 78.4 of the Tax Code cannot assign execution of the tax liabilities to other person and in case of crime execution of tax avoidance can be brought to trial under Article 213 of the Criminal Code.

- The person that officially directs of activities of the legal entity with participation in a crime of tax avoidance can be brought to trial under Article 213 of the Criminal Code.

Being guided by the Article 130.6 of the Constitution of the Republic of Azerbaijan and Articles 60, 62, 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. According to a sense of the Article 78.3 of the Tax Code of the Republic of Azerbaijan the person who gained actual income from business activity fulfilled by a legal entity actually disposing of his/her money and property is recognized as the person fulfilling tax liabilities as a taxpayer. This person according to the Article 78.4 of the Tax Code of the Republic of Azerbaijan cannot assign execution of tax liabilities to other person and in case of crime execution of tax avoidance can be brought to trial under the Article 213 of the Criminal Code of the Republic of Azerbaijan.

2. The person that officially directs of activities of the legal entity with participation in crime of tax avoidance can be brought to trial under the Article 213 of the Criminal Code of the Republic of Azerbaijan.

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

4. 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”.

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