**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

DECISION

OF THE CONSTITUTIONAL COURT

OF THE REPUBLIC OF AZERBAIJAN

*On Interpretation of Article 5.3 of the Law “On Grant”*

# 26 October, 1999 Baku city

The Constitutional Court of the Republic of Azerbaijan composed of Kh. Hajiyev (Chairman), Judges: F.Babayev, B.Garibov, R.Gvaladze, S.Salmanova (Reporter Judge), A.Sultanov, E. Mamedov;

joined in the proceedings by: the Court Clerk I. Ismayilov;

the legal representatives of the subjects interested in special constitutional proceedings: N. Allahverdiyev, Deputy Prosecutor General of the Republic of Azerbaijan; I. Rafibeyli, Deputy Chief of Economic Legislation Department of the Milli Majlis of the Republic of Azerbaijan;

specialists: I. Akberli, Chief of International Relations Department of the State Tax Inspection; F.Aliyev, Chief of Social Policy and Welfare of Ministry of Labour and Social Defence of Population; J. Mamedov, Chief of Finance Department of State Fund of Social Defence of the Republic of Azerbaijan;

in accordance with Article 130.3.1 of the Constitution of the Republic of Azerbaijan has examined in open judicial session via procedure of special constitutional proceedings the case submitted by the petition of the Prosecutor’s Office of the Republic of Azerbaijan of 26 August, 1999, N 05GK99 concerning interpretation of Article 5.3 of the Law of the Republic of Azerbaijan “On the Grant”, Articles 3 and 73 of the Law of the Republic of Azerbaijan “On Pension Maintenance” of Citizens and Article 12 of the Law of the Republic of Azerbaijan “On Social Insurance”.

Having heard and discussed the report of Judge B. Garibov, the statements of N. Allahverdiyev and I. Rafibeyli, the legal representatives of the subjects interested in special constitutional proceedings, the opinions of I. Akberli, F. Aliyev and J. Mamedov Abdoulazizov, the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Prosecutor’s Office of the Republic of Azerbaijan in its petition asks for interpretation of Article 5.3 of the Law of the Republic of Azerbaijan “On the Grant”, Articles 3 and 73 of the Law of Azerbaijan Republic “On Pension Maintenance” of Citizens, Article 12 of the Law of Azerbaijan Republic “On Social Insurance”.

In connection with the petition, the copies of official texts of Article 5.3 of the Law of the Republic of Azerbaijan “On the Grant”, Articles 3 and 73 of the Law of the Republic of Azerbaijan “On Pension Maintenance” of Citizens, Article 12 of the Law of the Republic of Azerbaijan “On Social Insurance”, Article 7 of the Law of the Republic of Azerbaijan “On Normative and Legal Acts” certified by the Parliament of the Azerbaijan Republic as well as the Decrees N 111 of 16 August 1996 and N 58 of 9 June 1997 of the Cabinet of Ministers of the Republic of Azerbaijan certified by the same body are enclosed to case.

According to Article 5.3 of the Law of the Republic of Azerbaijan “On the Grant” the physical persons who take part in realization of projects and programs in case of using the grants shall pay the tax from the income for gratuity obtained from the recipient, according to the current legislation. The recipient is free from compulsory payments for gratuity paid to the physical persons.

Article 3 of the Law of the Republic of Azerbaijan “On Pension Maintenance of Citizens” fixes the circle of persons engaged in public and useful work who have the right for the labour pension, at observance of conditions stipulated by the Law. Para I, items a, b, c and d of the same Article provide for occurrence of the right for obtaining the labour pension under condition of payment of insurance fees to the State Fund of Social Protection of the Republic of Azerbaijan.

According to Article 73.1 and 73.4 of the above stated Law the total sum of income, from which the pension is calculated, includes all kinds of salary and gratuities for work, on which, according to existing rules, the insurance fees, including the fees for combination, work in day offs and holidays, overtime work and gratuity obtained on the basis of the civil and legal contracts. The payments of onetime character (compensation for the unused holiday, lump-sums for day-offs and others) are not taken into account. The persons engaged in individual labour and enterprise activity, including on conditions of individual (group) rent or in the peasant (farmer) economy, and working on the basis of hiring, as well as members of cooperative societies and working in cooperative societies upon the contracts the pension are calculated from the actual income, from which the insurance fees were being paid.

In Article 12 of the Law of the Republic of Azerbaijan “On Social Insurance” it is underlined that the compulsory state social insurance covers the persons nominated to the post by virtue of the resolutions of the Milli Majlis of the Republic of Azerbaijan, decrees and orders of the President of the Republic of Azerbaijan, citizens of the Republic of Azerbaijan and stateless persons working by the individual labour contracts in all offices, enterprises and organizations carrying out activity in Azerbaijan Republics or belonging to Azerbaijan Republic, but situated in the foreign states; the persons working on electable paid posts; the prosecutors, deputy prosecutors and assistants to prosecutors, investigators of Prosecutor’s Office; the members of Bar; the persons engaged in competitive and labour activity in the individual order, foreign citizens according to the interstate agreements.

It is necessary to note, that according to Article 1 of the Law of Azerbaijan Republic “On the Grant” the grant is an aid rendered via the procedure stipulated by the Law, for preparation and realization of the humanitarian, social and ecological projects, works on restoration of the destroyed objects both infrastructure of industrial and social assignment in territories suffered in the result of war and act of nature, programs in fields of education, public health, culture, consulting, information, publishing and sports, scientific, research and projecting programs to be of importance for state and society. The material aid, allocated as the grant, cannot be used for direct extraction of the income but only be spent for preparation and realization of social projects and programs. This rule is reflected in Article 3 of the Law of Azerbaijan Republic “On the Grant”. According to that rule, the material aid used for direct extraction of the profit cannot be recognized as grant.

With the view to accelerate the social development and stimulate the interest to the given field not connected with obtaining the profits by foreign donors (grant givers) and recipients, the legislator by means of liberating money and any other material aid obtained as the grant from all kinds of the taxes, duties and compulsory payments in the state budget, creates favorable conditions for expansion of their activity. So, according to item 1 of Article 5 Of the Law of the Republic of Azerbaijan “On Grant”, money and (or) any other aid obtained as a grant on the basis of the contract or the decision on grant, shall liberated from any taxes, duties and compulsory payments to the state budget. From the point of view of orientation and special taxation the activity connected to the grant, differs by quality from other kinds of investment activity.

In this regard item 2 of same Article provides that the legal persons taking part in realization of projects and programs when using the grant shall pay the taxes from gratuity obtained from the recipient, and item 3 states that the physical persons taking part in realization of the projects and the programs when using the grant shall pay the tax from gratuity obtained from the recipient, according to the legislation in force.

From the contents of the given item it is obvious that the physical persons are not obliged to carry out compulsory payments “On Social Insurance” from the income obtained from the recipient for realization of projects and programs.

Article 14 of the Law of the Republic of Azerbaijan “On Social Insurance” determines various fees “On Social Insurance” depending on categories of the legal persons, employers and workers.

According to Article of 10 of same Law it is a duty of the employer and persons who are carrying out social insurance of others to pass the registration in insurance organization and to implement social and insurance fees.

In this regard, from the analysis of the Law of the Azerbaijan Republic “On Social Insurance” one may conclude that the persons engaged in individual labour and enterprise activity, members of Bar, tenants for the persons working on a hire basis on transport, physical persons carrying out activity according to the Law of the Azerbaijan Republic On Surtax from the Physical Persons of Azerbaijan Republic as well as physical persons paying author's fees, are the payers of social and insurance fees, and the same persons according to Article 11 of the above-stated law shall pass the registration in insurance organization, carrying out compulsory state insurance, and pay fees “On Social Insurance” in time.

The compulsory state insurance established by the Law of the Republic of Azerbaijan “On Social Insurance”, is naturally aimed at development of social well-being of population to make the maintenance to cover all social groups completely and comprehensively. It is necessary to note that the taxes determined by the legislation (the land taxes, the property taxes), the compulsory payments, including social and insurance payments, are the expenses those are included in the cost price of the goods (work, services), and this situation influences on its formation.

Thus, according to item 1.6, sub-item 34 of the Regulation “On the Structure of Expenses Included into the Cost Price of Production (of Work, Services)” , authorized by the Decree N 111 of Cabinet of Ministers of the Republic of Azerbaijan of 16 August, 1996, the acts of the current legislation of the Republic of Azerbaijan related to the cost of a good (work, service), all kinds of the taxes, duties, payments to out-of-budgetary funds and other payments shall be included into the cost price of a good (work, service).

From this point of view, one of the purposes of the Law of Azerbaijan Republic “On the Grant” which gives the tax privileges, is the creation of conditions for non-increase of the cost price of a good (work, service).

On the other hand, it is fixed in Article 15 of the Law of Azerbaijan Republic “On Social Insurance” that the indemnifications, benefits and incomes, from which the fees “On Social Insurance” are not calculated, shall be determined by appropriate body of the executive authority. In connection with implementation of this Article the Cabinet of Ministers of the Republic of Azerbaijan issued the Decree of 9 June, 1997 “On the List of Indemnifications, Benefits and Incomes, Which Are Not Subject to the Compulsory State Social Insurance”. According to that list, the social and insurance fees shall not be calculated from 18 (eighteen) categories of indemnifications, benefits and incomes.

The Law of the Republic of Azerbaijan “On Grants” was adopted on 17 April, 1998, the Law of the Republic of Azerbaijan “On Social Insurance” - on 18 February, 1997, the Law of the Azerbaijan Republic On Pension Maintenance of the Citizens - on 23 September, 1992. In accordance with Article 7 of the Law of the Republic of Azerbaijan “On Normative and Legal Acts” in case of non-conformity between laws the one which has entered into force later in time shall prevail.

Article 73.1 of the Constitution of the Republic of Azerbaijan states: “Everyone must pay taxes and other state duties in-time and in full volume as required”. According to para II of the same Article, 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.

Therefore it is necessary to note, that the duty to pay the taxes and other state payments which is one of the basic social obligations of citizens arises only in the cases provided by law and is regulated by law. As it is visible, Article 5.3 of the Law of the Republic of Azerbaijan “On the Grant” determines that the physical persons participating in realization of the projects and the programs during use of the grant shall pay the tax from the income for gratuity obtained, according to the current legislation, from the recipient. The collection of other taxes and compulsory payments from them is not reflected in Law.

Taking into account the above-stated, it is necessary to note that since, with the purposes of economic development of social areas, Article 5.3 of the Law of the Republic of Azerbaijan “On the Grant” does not provide for deduction of compulsory payments from the physical persons, then according to the current legislation they should pay only surtax. On order to eliminate of non-conformity between item 3 of this Article and Article 12 of the Law of the Republic of Azerbaijan “On Social Maintenance” as well as between Articles 3 and 73 Of the Law of the Republic of Azerbaijan “On Pension Maintenance” of Citizens while applying them one should accept Article 5.3 of the Law of the Republic of Azerbaijan “On the Grant” for a basis.

According to Article 25.1 of the Universal Declaration of Human Rights everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The right for social maintenance is among of fundamental human and citizen’s rights and freedoms envisaged in the Constitution of the Republic of Azerbaijan.

So, according to Article 38.1 of the Constitution of Azerbaijan Republic everyone has the right for social protection. And para III of the same Article provides that everyone has the right for social protection on reaching specific age according to legislation, in case of illness, disability, loss of bread-winner in the family, due to unemployment and in other cases envisaged by legislation.

As it is shown, the right of physical persons for social protection stipulated in Article 5 of the Law of the Republic of Azerbaijan “On the Grant” may not be restricted.

Taking in account Articles 38, 73.1 and 73.3 and being guided by Article 130.4 and 130.6 of the Constitution of Azerbaijan Republic and Articles 75, 76, 78, 80 - 83 and 85 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. The physical persons provided by Article 5.3 of the Law of the Republic of Azerbaijan “On the Grant” who take part in realization of the projects and programs, while using the grant shall be liberated from compulsory state payments of social insurance from gratuity obtained from the recipient.

2. To recommend to Milli Majlis of the Republic of Azerbaijan to determine in legislation the implementation procedure of the rights of the physical persons for social protection envisaged in Article 5.3 of the Law of the Republic of Azerbaijan “On the Grant”.

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

4. The decision is subject to publication in "Azerbaijan" newspaper and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

5. The decision is final and cannot be cancelled, changed or interpreted by any body or official.