**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On Interpretation of Articles 49.3 and 49.6 of the Taxation Code*

*of the Republic of Azerbaijan*

**6 August, 2002 Baku city**

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

joined in the proceedings by: the Court Clerk V.Zeynalov;

the legal representatives of the subjects interested in special constitutional proceedings: N.Gasimov, Deputy Minister of Taxation of the Republic of Azerbaijan and R.Agayev, employee of the Legal Department of the Ministry of Taxation of the Republic of Azerbaijan;

experts: R. Maharramov, candidate of economic sciences, senior lecturer of “Taxes and Taxation” Board of Economic University of the Republic of Azerbaijan and I.Rafibeyli, Deputy Chief of the Economic Legislation Department of Administration of Milli Majlis of the Republic of Azerbaijan;

in accordance with Article 130.4 of the Constitution of the Republic of Azerbaijan has examined via special constitutional proceedings in open court session the constitutional case connected with the petition of the Cabinet of Ministries of the Republic of Azerbaijan of June 12, 2002, N 18/15-80 to get the interpretation regarding Articles 49.3 and 49.6 of the Taxation Code of the Republic of Azerbaijan.

Having heard the report of Judge E. Mamedov, the statement of the lawful representative of the subject interested in special constitutional proceedings: Mr. N.Gasimov and Mr. R.Agayev and the opinion of experts, R.Maharramov and I. Rafibeyli, the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

In the petition lodged by the Cabinet of Ministries of the Republic of Azerbaijan it is noted that according to Article 53.1 of the Taxation Code taxpayers, tax agents and their representatives, and tax officers as defined by this Code shall be liable for tax law violations in accordance with the procedure set forth by this Code, Code on Administrative Delinquencies of the Republic of Azerbaijan and other laws of the Republic of Azerbaijan.

At the same time according to Article 49.3 of the Taxation Code a decision to charge a taxpayer with a tax law violation shall constitute grounds for issuance of a demand notice to be send to the taxpayer specifying the amount of tax arrears, interests accrued, financial penalties and requiring the remedy of the detected breaches.

Article 49.6 of the same Code stipulates that if as a result of tax law violations discovered by the tax authority, a taxpayer becomes subject to administrative liability, as authorized officer from the tax authority, which conducted the tax, audit shall prepare a separate protocol concerning such administrative delinquency.

Cabinet of Ministries asks to give interpretation of the provisions concerning articles 49.3 and 49.6 where sequence of application of the financial sanctions and penalties by taxation bodies against taxpayers, which perpetrated tax delinquencies, are not defined.

In connection with petition the official texts of Articles 49, 53, 57-60 of the Taxation Code and Articles 9, 244-247, 249 and 250 of Code on Administrative Delinquencies certified by Administration of Milli Majlis have been enclosed to materials of case.

In connection with the petition, the Constitutional Court notes as follows:

Article 49 of the Taxation Code reflects the provisions concerning taking a decision based on review of the audit materials. According to Article 49.1 within 10 days of reviewing the materials of a tax audit, the head (or deputy head) of the tax authority shall take one of the following decisions: charge the taxpayer with violation of the tax legislation; refuse to charge the taxpayer with violation of the tax legislation; undertake further measures for the tax audit.

According to Article 49.2 a decision to charge a taxpayer with a violation of the tax legislation shall indicate the circumstances of such violation as determined by the tax audit, documents and other information confirming such circumstances, evidence used by the taxpayer in its/his defence and the results of examining such evidence; shall refer to articles from relevant laws setting out violations of tax legislation and prescribing penalties, and explain to the taxpayer for what specific violations of tax legislation he is liable.

According to provisions of Articles 49.3 and 49.6 of the Taxation Code in case of disclosing the violation of the tax legislation during holding the check-ups the head (or deputy head) of the tax authority by his decision can require, alongside with the repayment of tax arrears, the payment of interests accrued, financial penalties and administrative penalties; in case of administrative liability of taxpayer competent authority shall prepare a separate protocol on legal violation (delinquency).

But in provisions of the Taxation Code the legislator did not touch upon rules and circumstances of different kinds of liability measures when the violation of tax legislation is to be discovered.

As a result, unclearness that emerges when applying the relevant provisions of the Taxation Code can bring to the situation where the tax payer, alongside with the repayment of tax arrears, can at the same time be the subject to payment of interests accrued and financial penalties and administrative penalty, prescribed by Code on Administrative Delinquencies.

This can bring to the situation where the taxpayer, should it be the physical or legal person, would be deprived not only of the incomes that were (illegally) hidden but also of other property possessed by them lawfully. And this is inadmissible from the point of view of restriction of the right to property as the one of the fundamental rights among other human rights and freedoms and also for free development of enterprises.

Taking into account the above-mentioned the Constitutional Court considers necessary to touch upon the several legal aspects.

According to Article 15. 2 of the Constitution of the Republic of Azerbaijan based on market relationships the state shall create the conditions for development of economy, ensure free business activity, and prevent monopoly and unfair competition in economic relations. Article 29 of the Constitution stipulates that everyone has the right to own property. Neither kind of property has priority. Also right to property is protected by law. Nobody shall be deprived of his/her property without decision of law court.

Right to property has significant place in a number of international legal acts.

Article 17 of the Universal Declaration of Human Rights notes 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.

In Article 1 of the additional protocol N1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms it is noted that every physical 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. Above-mentioned provisions corresponding to common interests of the state do not restrict right for implementation of laws, which are necessary for supervision on using of property or for guaranteeing of payment of the taxes or another duties and tax arrears.

At the same time when discussing the right to property relating to the basic rights and freedoms, from the legal point of view the following aspects should be taken into consideration that would facilitate the resolution of the above-mentioned problem.

As it was mentioned in the decision of the Constitutional Court of 8 April 2002 “On Interpretation of Article 56.1 of the Taxation Code and Articles 75 and 213 of the Criminal Code”, the taxes have specific place among another sources for the formation of state and municipal budgets. And exactly due to the financial resources (including the collection of taxes), the State can fund economic, social and ecological and other fields.

Article 73.1 of the Constitution of the Republic of Azerbaijan stipulates that every person shall have a duty to pay taxes, imposed by the law and other state dues in full volume and without delay.

Even if the amount of money, that is payable to the state budget, is within the private property of the taxpayer, he/she cannot dispose of this money at his/her discretion and this amount should be paid to the state. Otherwise the interests of other persons as well as the interests and rights of the state, protected by the legislation, would be violated.

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.

As it was mentioned above the constitutional duty to pay taxes is not of personal legal nature but of common legal one. As a result of non-implementation of this common duty the legislator, based on the requirements of legislation, shall have the right to take measures to refund the damage caused to budget.

The implementation or undue implementation of duties connected with payment of taxes via the procedure specified by legislation can bring to some types of legal liability.

According to Article 53.1 of the Taxation Code, the taxpayers, tax agents and their representatives, and tax officers as defined by Taxation Code shall be liable for tax law violations in accordance with the procedure set forth by Taxation Code, Code on Administrative Delinquencies and other laws of the Republic of Azerbaijan.

As it is specified in the Taxation Code for various violations of tax legislation, the head (deputy head) of taxation bodies by his/her decision can apply the financial sanctions and interests as the form of reproof. Financial sanctions and interest, provided for in the tax legislation, are the imCovenant measures applied with respect to guilty taxpayers to make them carry out the necessary duties related to the due implementation of compulsory payments to the budget and off-budget funds. Being the independent measures of legal liability these measures are carried out by state through tax bodies by means of compulsory application and have both the form of the legal restoration of the guarantee of implementation by taxpayers of their constitutional duty and the form punishment.

And in case of commission of the administrative delinquency connected with violation of tax legislation and in accordance with Code on Administrative Delinquencies on the cases on administrative delinquency launched by drawing up the separate protocol the persons recognized as guilty on the basis of decision of the competent official of tax bodies are subject to administrative penalties.

Thus, the financial sanctions and interests for the violation of tax legislation, as specified by the Taxation Code (Articles 57-60) and administrative penalties, as specified by the Administrative Delinquencies Code (Articles 244-247, 249-251) can be applied with respect to the taxpayers and tax agents.

However, as it mentioned in Article 53.2 of the Taxation Code no person shall be held liable twice for the same act or omission, which constitutes a tax law violation. In accordance with Article 9.2 of the Code on Administrative Delinquencies, no person shall be held liable twice for the same administrative delinquency.

Certainly, in case where it is possible, to differ clearly, based on the signs inherent thereto, the violation of one concrete tax legislation from another tax legislation, there is no problem for application of this rule. According to Taxation Code (for example Article 59) or Code on Administrative Delinquencies (for example Articles 245 or 246), which specify a concrete action, the relevant type of liability can be applied without repetition. In this situation when applying the provisions of Articles 49.3 and 49.6 of the Taxation Code without confusing them there rises up no question regarding the sequence of their application.

However, according to those parts of Articles 57, 58 and 60 of the Taxation Code, which specify what the tax law violations consist of, there emerges the question as to the existence of similarity of the dispositions of administrative delinquencies, provided for in Articles 244, 247 and 250 of the Code on Administrative Delinquencies.

Taking into consideration the real situation of legislation, one should analyze not theoretical but practical situation in the field of types of legal liability in Azerbaijan Republic after adoption of the Taxation Code.

It should be noted that the place of special type of liability that is the tax liability within the system of legal liability for violation of tax legislation (tax delinquencies) is not determined in the legal theory. As a rule, it is considered that there is no basis for consideration tax liability separately like civil, disciplinary, financial, administrative and criminal liabilities: it is covered by administrative liability.

However, the analysis of the provisions of the Taxation Code and Code on Administrative Delinquencies gives rise to conclude that the legislator is different opinion and considers the tax liability as a separate type of legal liability.

As it is evident from Article 53 of the Taxation Code, the legislator separates the tax liability from other types of legal liability including the administrative one. According to Article 53.1, the financial sanctions and interests specified by this Code and which are not peculiar to legal administrative liability by their nature are applicable to taxpayers and tax agents who violate the tax law.

At the same time, in present legislation there are two principal aspects, which distinguish the tax liability from administrative one.

Firstly, the nature of taxes and dues are regulated by legislation. Despite the fact that by their nature the tax legal relations have management peculiarities taking into account their economic contents they cannot be ensured by general administrative coercive measures.

Secondly, the peculiarity of the tax legal relations conditions for the special procedure of bringing to responsibility for the tax violations. On the one hand, proceeding from tax management peculiarities of tax bodies, there is adopted a decision on bringing to responsibility for the tax violations. On the other hand, proceeding from the necessity of additional protection of the subject of legal relations, where the financial penalties are not paid voluntarily, the tax bodies can apply to the court claiming the payment of financial sanctions by individuals (Article 53 of the Taxation Code).

In accordance with this, when resolving the issues of putting the distinction between the tax and other types of liabilities of physical persons, one should proceed from the principle that one legal relation can not be covered at the same time both by tax and non-tax relations, as well as the taxpayer cannot at the same time be subject for the committed action to the tax and another liability. Therefore, if the action, that was revealed by the tax body, was committed in the framework of tax delinquencies provided for in Articles 57, 58, and 60 of the Taxation Code, the recognition of this action as tax law delinquency in connection with violation of tax legislation (despite its similarity with administrative delinquency) should be settled in accordance with the provisions of the Taxation Code and in case of commission of administrative delinquencies connected violation of tax legislation as specified in Articles 244, 247 and 250 of the Code on Administrative Delinquencies this should be settled in accordance with provisions of the this Code.

During examination of this case, the Constitutional Court took note to the reflection in Tax Code of wide possibilities of application by tax bodies of coercive measures via indisputable (extra-judicial) procedure.

Obviously, the non-payment of a tax in time should be remedied by the payment of duty on tax obligation and the damage caused to the state as a result of non-payment of taxes in time should be remedied by full reimbursement. Therefore, the legislator can add supplementary compensation of damage caused to the state treasury by non-payment of the taxes in due time to the amount of tax (the tax rests) in case if the payment of taxes is delayed.

However, other types of measures, in particular such as the detention of the hidden or reduced income and also various types of penalties by their essence exceed the frames of the tax obligations.

These measures have not restoring but punishable character and are applied in case of tax law violation, i.e. if there was committed unlawful act on intentional or careless basis as it is specified in the legislation. Therefore, in the proceedings on violation of tax law there should be proved both its commission and the extent of the taxpayer’s guilt. In such cases, the legal protection of the human rights and freedoms fixed in the Constitution should be ensured (Article 60 of the Constitution).

The obviousness of the tax reproof for tax violation proceeds from the lack of the disputes concerning the violation of tax legislation. In case of dispute the legislation requires to settle it by means of court. Thus, if there is no a dispute between parties, the reproof can be imposed without the court decision. The analysis of the articles of Taxation Code shows that in case of absence of the court decision the taxpayer can fulfill the penalty sanctions only voluntarily. The aforesaid also complies with Article 29 of the Constitution.

At the same time, the Constitutional Court notes especially that the financial sanctions (which are the penalties by their essence) fixed in the Taxation Code should also correspond to the principle of equilibrium.

The principle of equilibrium that expresses the requirements of justice includes only the culpable action and its gravity, the volume and character of the damage, level of the guiltiness of the delinquent and other important aspects, which condition for differentiation as to determination of individual application of tax reproof depending on legal liability. The indicated principle of the bringing to responsibility relates both to physical and legal persons equally.

Application of non-balanced financial sanctions by tax bodies can deprive the owners not only of income but also from another property and this can create real danger for owners concerning as to their commitments undertaken before other persons and can in general create danger for their further activity or even break this activity.

In connection with this it should be taken into account that according to Article 59 of the Constitution everyone may, using his/her possibilities, abilities and property, according to existing legislation, individually or together with other citizens, carry out business activity or other kinds of economic activity not prohibited by the law. According to Article 71.2, which determines guarantees for fulfillment of the human rights and freedoms, no one may restrict implementation of rights and freedoms of a human being and citizen.

Determination of the non-balanced large amount of sanctions for violation of the tax legislation does not increase the tax discipline or give opportunity for normal activity of owners but can only be the reason of emerging of shadow economics.

The study of the provisions of the Taxation Code in force, which determine the violations of tax legislation and penalties for this, by the Constitutional Court requires to touch upon the issues of distinctness of these provisions.

The character of actions, which are regarded by tax legislation as the violation of legislation, the frontiers between punishable and non-punishable actions are to be defined so this issue would not be subject to the subjective discretion of those who apply the law. Indefiniteness of corpus delicti of the tax violations contradicts to the principle of lawfulness as one of the basic principle of the legal liability.

Distinctness, clarity and non-duality of the legal norm as a legal precondition proceed from the constitutional principle of equality before law and court (Article 25 of the Constitution). Such equality can be ensured by those, who apply the law, only on the basis of assumption of the uniform interpretation and understanding of the norm. And the uncertainty of content of the legal norm contrary can bring to unrestricted understanding and arbitrariness when applying the law, violation of equality before law and court as well as the violation of the principle of supremacy of law.

Being guided by Article 130.4, 130.6 of the Constitution of the Republic of Azerbaijan, Articles 75, 76, 78, 80, 81, 83 and 85 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Constitutional Court of the Republic of Azerbaijan

**D E C I D E D:**

1. To allow to bring to liability, that is provided either in Taxation Code or in the Administrative Delinquencies Code, for the same act (activity or inactivity) only once in connection with violation of the tax legislation when applying the provisions of Articles 49.3 and 49.6 of the Taxation Code.

Provisions of Article 49.6 shall be applied in cases of bringing to liability on tax violations.

2. Taking into account the need to apply the extra-judicial or judicial measures for violation of the tax legislation as well to establish the distinctness, clarity, exactness and to avoid the duality of a legal norm to recommend to the Milli Majlis of the Republic of Azerbaijan to improve the provisions of the Taxation Code and the Code on Administrative Delinquencies.

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

4. The decision is subject to publication in the "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.