**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of paragraph 7 of Article 21.1 of the Law of the Republic of Azerbaijan “On Social Insurance”*

# 29 October, 2010 Baku city

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

attended by the Court Clerk I.Ismayilov,

the legal representatives of the subjects interested in special constitutional proceedings: Gurban Abbasov, Judge of Local Economic Court of Baku city, Etibar Mammadov, head advisor of the Department of Social Legislation of Milli Majlis of the Republic of Azerbaijan;

the expert: Alish Gasimov, Head of the Department for Civil Litigation, Labor and Environmental Law of Baku State University, Doctor of Law;

based on Article 130.6 of the Constitution of the Republic of Azerbaijan has examined in open court session via procedure of special constitutional proceeding the constitutional case on request of Local Economic Court N1of Baku city concerning interpretation of paragraph 7 of Article 21.1 of the Law of the Republic of Azerbaijan “On Social Insurance”;

having heard the report of Judge J.Garajayev, the reports of legal representatives of the interested subjects and opinions of expert, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The “Aksessuar Ticaret ve Sanayi LTD” enterprise having applied with the statement of claim to the Local Economic Court N1of Baku city against Department on work with legal entities of Baku city of the State Fund of Social Protection asked to recognize acts (except for the financial sanction specified in the act for use in other purposes of obligatory state social contributions) and penal protocols as invalid.

By consideration in court of dispute the disagreement connected with application of the paragraph 7 of Article 21.1 of the Law of the Republic of Azerbaijan “On Social Insurance” (hereinafter referred to as Law “On Social Insurance”) was revealed. In this provision application of the financial sanction for concealment of number of workers (in the presence of the workers who do not have the employment contract, or their concealment from the report in the presence of such contract) in independence of property and an organizational and legal form of the enterprises, institutions and the organizations, their branches and representations with the status of the legal entity created according to the legislation of the Republic of Azerbaijan or the foreign state, for each worker – fifty five AZN for every month of the period of activity of the insurer is provided.

In the request of the Local Economic Court N1it is specified that application as a whole for every month of the entire period of activity of the subject who has made violation, the financial sanction specified in the text “for each worker – 55 AZN for every month of the period of activity of the insurer”, violates the rights of the insurer. Based on it, the court asks Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) to give interpretation of this provision.

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

According to Article 38.3 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution) everyone has the right to social security upon attaining the age provided by law in case of sickness, disability, loss of bread-winner, loss of work capacity, unemployment, or in other cases provided by law. The guarantee of this right is connected with insurance by all means of employers of each person during labor activity and payment of the corresponding obligatory insurance fees (a form of obligatory state social insurance).

The relations arising in the field of social insurance, its legal, economic and organizational bases are regulated by the Law “On Social Insurance”. According to this Law obligatory state social insurance is implemented by employees with respect to all employees working under individual labour agreements (contracts Parties in social insurance are insurers, insuring persons and insured persons (insurants). Insurers are operating in the Republic of Azerbaijan, irrespective of property and an organizational and legal form of the enterprise, institution and the organization, their branches and representations with the status of the legal entity created according to the legislation of the Republic of Azerbaijan or the foreign state, electoral bodies, and also other persons which are carrying out the own social insurance or social insurance of other persons. Insured persons (insurants) are those persons in whose favour insurance is implemented. Participants of insurance on obligatory state social insurance have to be registered in insurance company and pay a fee for obligatory social insurance. The payment for obligatory state social insurance is a sum of money paid to the company-insurer for insurance. Sum of insurance fee in obligatory state social insurance is established in percents against the amount of wages fund (income) and is paid at the expense of finances of insurant (insured person) (Articles 2, 8, 13 and 14 of the Law "On Social Insurance").

According to Article 304.2 of the Labour Code of the Republic of Azerbaijan, when entering into an employment agreement, in accordance with the rules established by law, the employer must provide compulsory insurance for every employee.

As evident, the legislator, having established ensuring of obligatory insurance of the worker as the duty of the employer in the future first of all gives to the worker a guarantee on a right of use of the social security fixed in the Constitution, and in particular, being a component of this right – the right to pension.

The financial sanction provided by paragraph 7 of Article 21.1 of the Law “On Social Insurance” is applied in case of concealment by the insurer the number of employees that means the presence of employees who do not have the employment contract or their concealment from the report in the presence of such contract. The financial sanctions provided in mentioned Article are applied by the executive authorities controlling the sphere of obligatory state social insurance.

It is necessary to take into account that in primary edition of the Law “On Social Insurance” the financial sanction for concealment of number of workers was not provided. As a result of the amendments brought in this Law on 24 October 2000, concealment by the insurer of number of workers in the paragraph 8 of Article 21.1 is regarded by the legislator as violation. In the new edition of this paragraph the penalty “for every worker – of 50 percent of an average monthly salary of previous year all over the country for every month of the period of activity of the insurer” is provided.

The amendments made to the Law “On Social Insurance” on 28 November 2006, established a concrete circle of subjects which covers the concept “insurers”. In the paragraph 7 of Article 21.1 of the Law the word “insurers” it was replaced with the words “irrespective of property and an organizational and legal form of the enterprise, institution and the organization, their branches and representations with the status of the legal entity created according to the legislation of the Republic of Azerbaijan or the foreign state”.

According to amendments of 6 November 2007, the sanction provided in the paragraph 7 of Article 21.1 of the Law, was established “at a rate of fifty standard financial units”. According to amendments made on 2 June 2008 in noted paragraph, to requirements of edition of this article acting at present the financial sanction “for each worker – of 55 AZN for every month of the period of activity of the insurer” is provided.

In law-enforcement practice there was an uncertainty in connection with determining of responsibility of the insurer, whether he has to bear responsibility, according to the paragraph 7 of Article 21.1 of the Law “On Social Insurance”, since the moment of foundation, for every month of the entire period of activity or during commission of legal violation.

Plenum of the Constitutional Court considers that for the correct interpretation of this legislative norm, first of all, it is necessary to consider fixed in the Constitution the right to equality and the right to property, including the principle of proportionality which found reflection in the Constitution Preamble and which is a component part of rule of law.

Norms of different areas of the right have to be based on the principles reflecting in the Constitution the nature and an essence of the democratic and constitutional state, the principles providing guarantees of the rights and freedoms of the individual and the citizen.

The principle the equalities proclaimed in Article 25 of the Constitution, provides implementation of the rights and freedoms of the person on the basis of identical legal opportunities in the order of justice without any discrimination. In point V of this article it is provided that everyone shall be guaranteed equal rights in any proceedings before state authorities and bearers of public authority that decide upon his rights and duties. Telling, “bearers of public authority”, generally are understood officials of government bodies and municipalities. They have to make identical decisions in the cases possessing identical actual circumstances, and at adoption of this decision against any person (natural or legal) have to approach only being guided by the right of equality.

From this point of view each subject concerning whom the decision in connection with the rights and duties is made, possesses identical opportunities of equality before the law. The principle of equality before the law has to treat in the same order that to the relations which have arisen in the field of social insurance.

Proceeding from it, the legislator in Article 3 of the Law “On Social Insurance” defined equality of legal subjects of social insurance as one of the basic principles of social insurance.

In the Republic of Azerbaijan the property is inviolable and is protected by the state. The right to property, including the right to private property is protected by law (Article 13.1 and Article 29.2 of the Constitution). Proceeding from these Constitutional norms, unreasonable restriction of the property right and its guarantee in legislative acts is inadmissible.

The basic law along with the rights and freedoms also establishes duties following from them and does not exclude possible lawful and reasonable interventions to implementation of the rights. However lawful intervention to any right, including to the property right, has to be proportional, be carried out at achievement of fair balance between common interests of society or the state and protection of constitutional laws of an individual.

According to the principle of proportionality the measures providing any interventions to legal status of the natural or legal person, have to be proportional to the lawful purposes which the administrative bodies adhered, and for achievement of this purpose from the point of view of the contents, places, time and a circle of people whom covers, have to be necessary and suitable.

The principle of proportionality has to satisfy a requirement of compliance, need and suitability. According to criterion of the compliance, any measure limiting the rights and freedoms of an individual or the legal person has to correspond to achievement of the purpose provided by administrative body. According to criterion of need, the restrictive measures applied by administrative body in the absence of more smaller restrictive lawful means, have to be the softest and necessary for achievement of purposes. The criterion of suitability provides non-use, an equilibration of public interests of the administrative measures exceeding any limits, proportional to purposes.

According to the formed case law of the European Court connected with protection of the property right from such interventions, the part 2 of Article 1 of the Protocol No. 1 of the Convention has to be interpreted from the point of view of the principle reflected in the first sentence. Proceeding from it, intervention has to reach “fair balance” between common interests of society and requirements for protection of the fundamental rights of the individual person. The obligation on achievement of this balance is reflected both as a whole in structure of Article 1 of the Protocol No. 1 and regarding part 2: there has to be a causal relationship of proportionality between the used means and purposes. Concerning establishment of observance of this requirement the Court adopted that at a validity assessment from the point of view of common interests both in a choice of obligatory means, and for achievement of the objectives of the mentioned law by consequences of application of obligatory measures the participating state possesses freedom of width of discretion. The person, with the interests infringed by the appropriate measure, in case of individual and bigger extent of encumbrance won't be able to reach demanded balance. European Court of Human Rights in the case of Depalle v. France of 29 March 2010 specified that an interference must achieve a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (§ 83). The Court in another case of Zwierzyński v. Poland of 19 June 2001 in the decision specified that the requisite balance will be upset if the person concerned bears an individual and excessive burden – (§71).

At discussion of the principle of proportionality at the 6th meeting of Joint Council on Constitutional Justice of the Venice Commission it was noted that proportionality – a factor which is formed in a certain degree between the concepts “in a greater” and “in a lesser”. Main objective of the principle of proportionality is a creation of a uniform denominator between the right and a duty, the obligation and property, the purpose and means. Therefore the volume of the measures taken by administrative body it has to be estimated by the requirement and need requirement and such controversial issues can be resolved by means of the constitutional case law.

Thus, from the point of view of inviolability of the property right and protection of the principle of proportionality the balance of a causal relationship between the caused damage and the applied sanction has to be provided. The financial sanction provided in the paragraph 7 of Article 21.1 of the Law “On Social Insurance”, in fact – the intervention provided by the law in the property right of the insurer. This intervention is directed on protection of social security of the population and on protection of the rights and interests of participants of the labor relations. However collecting and calculation of the financial sanction provided in this norm from the entire period of activity of the insurer can be regarded as disproportion. So, it finally can become the reason of deprivation, along with the means received for the account of concealment by the insurer of number of workers, as well to the profit got on the lawful bases, during the activity which has not been connected with violation.

And this circumstance at all does not satisfy the purpose of institute of the financial sanction. The administrative penalty which purpose is lesson to the person who has made administrative offense, in the spirit of observance of laws, and also prevention of commission of new administrative offense – unlike a responsibility measure, consists of purpose of the financial sanction on restoration of property losses to which the state budget as a result of non-execution or improper execution of obligatory state contributions was subject. The similar legal position is also expressed in the decision of the Constitutional Court of 8 April 2002.

It is necessary to consider that in other legislative provisions regulating similar legal relations, measures of punishment (penalty) or restore (the financial sanction) character against the employer, as a rule are established in proportion to the period of activity connected with the concrete sums or violations (Article 58.10 of the Tax Code of the Republic of Azerbaijan, Article 53.1 of the Code “On Administrative Offenses of the Republic of Azerbaijan”).

At consideration of experience of the different countries for the purpose of the comparative analysis in connection with a discussed matter it was established that in the legislation of a number of foreign countries (Germany, Croatia, Slovakia, the Republic of South Africa), the financial sanction at a rate of the concrete sum is administratively applied for concealment of workers against the insurer.

In the same time, in the legislation of a number of the Post-Soviet states (Ukraine, Latvia, Kazakhstan, Moldova), which is more closer to legal system of the Republic of Azerbaijan, having unambiguously established responsibility for nonpayment of obligatory insurance premiums, was established in proportion to fault of the insurer during offense commission.

According to the above stated the Plenum of Constitutional Court comes to conclusion that provided in the paragraph 7 of Article 21.1 of the Law of the Republic of Azerbaijan “On Social Insurance” the period of activity of the insurer does not cover the entire period of activity of the insurer but the period at which the violation specified in this paragraph was committed.

Being guided by 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 Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. Provided in paragraph 7 of Article 21.1 of the Law of the Republic of Azerbaijan “On Social Insurance” the period of activity of the insurer does not cover the entire period of activity of the insurer but the period at which the violation specified in this paragraph was committed.

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.