

**ON BEHALF OF THE REPUBLIC OF ARMENIA
DECISION OF THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF ARMENIA**

**THE CASE ON CONFORMITY OF ARTICLE 78, PART 2 AND PART 3, PARAGRAPH 3 OF
THE LAW OF THE REPUBLIC OF ARMENIA ON LEGAL ACTS WITH THE
CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION
OF THE ADMINISTRATIVE COURT OF APPEAL OF THE REPUBLIC OF ARMENIA**

Yerevan

29 November 2011

The Constitutional Court of the Republic of Armenia composed of the Chairman G. Harutyunyan, Justices K. Balayan, F. Tokhyan, M. Topuzyan, A. Khachatryan (Rapporteur), V. Hovhannisyan, H. Nazaryan, A. Petrosyan, V. Poghosyan,

with the participation of the representative of the Respondent: A. Mkhitarian, the Senior Expert of the Legal Expertise Division of the Legal Department of the National Assembly Staff,

pursuant to Article 100, Point 1, Article 101, Part 1, Point 7 of the Constitution of the Republic of Armenia, Articles 19, 25 and 71 of the RA Law on the Constitutional Court,

examined in a public hearing by a written procedure the Case on conformity of Article 78, Part 2 and Part 3, Paragraph 3 of the Law of the Republic of Armenia on Legal Acts with the Constitution of the Republic of Armenia on the basis of the application of the Administrative Court of Appeal of the Republic of Armenia.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by the Administrative Court of Appeal of the Republic of Armenia on 08.09.2011.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, having studied the Law of the Republic of Armenia on Legal Acts and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The RA Law on Legal Acts was adopted by the National Assembly of the Republic of Armenia on 3 April 2002, signed by the President of the Republic of Armenia on 29 April 2002 and came into force on 31 May 2002.

The challenged Part 2 of Article 78 of the RA Law on Legal Acts states:

“The legal act, eliminating or mitigating the liability for offence or otherwise improving the conditions of the legal and physical entities violated the law, applies to the relations emerged before the legal act came into force, that is, it has retroactive effect, unless otherwise prescribed by the law or that legal act.”

The challenged Paragraph 3 of Part 3 of Article 78 of the RA Law on Legal Acts states:

“The effect of the invalidated legal act extends to the relations emerged before the day of its invalidation, unless otherwise prescribed by the current law or by the invalidating legal act.”

2. The procedural background of the Case under consideration is the following: on the basis of the Order No. 1001171 of the Chairman of the RA State Revenue Committee adjunct to the Government dated 28.06.2010 an accuracy inspection on the budget interrelations and the fulfillment of the particular legislative requirements supervised by tax authorities was conducted at “H.A.T.A.K” LLC. As an outcome of the inspection, the act of inspection No. 1001171 was drawn up on 04.10.2010, upon which the violation of requirement of Article 4, Point 2 of the RA Law on Simplified Tax was established, as such. The RA Law 2O-61 of 5 June 2000 on Simplified Tax was annulled by Article 1 of the RA Law

(21.08.2008, ՀՕ-149-Ն) on the invalidation of the Law of the Republic of Armenia on Simplified Tax, which entered into force on 1 January 2009.

"H.A.T.A.K" LLC lodged a claim to the RA Administrative Court against the State Revenue Committee adjunct to the RA Government, Ashtarak Territorial Tax Department of the State Revenue Committee adjunct to the RA Government, with a demand to declare the act of inspection No. 1001171 of the Tax Department dated 04.10.2010 as partially null and void. Ashtarak Territorial Tax Department of State Revenue Committee adjunct to the RA Government submitted a counter-claim with the demand of the exaction of 12.045.100 AMD from "H.A.T.A.K" LLC in favor of the state budget. By the judgment of 01.04.2011 the RA Administrative Court fully satisfied the claim and the counter-claim partially. Ashtarak Territorial Tax Department of State Revenue Committee adjunct to the RA Government appealed the judgment of the court. The RA Administrative Court of Appeal took over the case, under the Decision of 04.05.2011. On 06.09.2011 the RA Administrative Court of Appeal made a decision to terminate the proceeding of the Case and apply to the RA Constitutional Court.

3. According to the Applicant, the provisions stipulated in Article 78, Part 2, and Part 3, Paragraph 3 of the RA Law on Legal Acts, applicable within the case under its consideration; contradict the requirements of Article 42, Part 4 of the RA Constitution. According to the Applicant, the contradiction of Article 78, Part 2 of the RA Law on Legal Acts to the requirements of Article 42, Part 4 of the RA Constitution is in the stipulation in the challenged norm the procedure differing from the one prescribed by Article 42, Part 4 of the RA Constitution, which concerns the retroactivity of the legal acts, eliminating, mitigating the liability for the breach of law, otherwise improving the legal status of an individual. Particularly, according to the challenged norm, the legal acts improving the legal status of an individual shall be retroactive in all cases, unless otherwise is prescribed by law or by the legal act in question, meanwhile Article 42, Part 4 of the RA Constitution stipulates that the abovementioned acts shall be retroactive if so prescribed by those acts.

In regard to the norms determined in Article 78, Part 3, Paragraph 3 of the RA Law on Legal Acts, the Applicant finds that its contradiction with the Constitution is conditional on the certain connection with the challenged Part 2 of this Article, as it makes applicable the rule under Article 78, Part 2 of the RA Law on Legal Acts via the stipulation of the notion "to this Law".

4. The Respondent, in essence, does not object to the arguments of the Applicant, accepting the discrepancy between Article 78, Part 2 of the RA Law on Legal Acts and Article 42, Part 4 of the RA Constitution. The Respondent explains this discrepancy by the fact that this Norm of the RA Law on Legal Acts was adopted prior to the constitutional amendments adopted by the referendum on 27 November 2005, before which the RA Constitution did not stipulate a legal regulation with regard to the retroactivity of the legal acts improving the legal status of an individual. At the same time, the Respondent argues the incompliance of the challenged norm with Article 42, Part 4 of the RA Constitution by the fact that the supreme legal effect of the Constitution allows to ensure the direct effect of the mentioned constitutional norm.

Regarding Article 78, Part 3, Paragraph 3 of the RA Law on Legal Acts, the Respondent finds that the contradiction of the norm to the Constitution directly derives from the legal regulation of Part 2 of the same Article. Consequently, in the case of ensuring the compliance of the latter with the Constitution this problem will be eliminated.

5. The RA Constitutional Court firstly states the absence of the dispute on the constitutionality of the legal provisions under consideration between the Applicant and the Respondent, as such, who state the incompliance of the mentioned legislative provisions with the Constitution using almost the same arguments. Simultaneously, the Constitutional Court finds that consideration of this Case will not only have essential significance in the perspective of detection of the constitutional-legal content of the operation of the legal act in time and the assurance of the legal certainty, but also make the essence of the institute of direct application of the constitutional norms more understandable for the judicial practice.

The comparative analysis of Article 22, Parts 3-6, as well as Article 42, Parts 3 and 4 of the RA Constitution indicates that the constitutional regulation on the operation of legal act in time is based on the logics, concerning to which the denial of the retroactive effect of the legal acts is a **general rule**, and the possibility of retroactive effect of those acts is **an exception to the general rule**. This approach derives from the considerations concerning the assurance of the legal certainty, legitimate expectations of the legislation, human rights and prevention of arbitrariness by the law enforcement bodies. In accordance with the mentioned general rule, Article 22, Parts 3 and 4 of the RA Constitution prohibit the retroactive effect of the Law making the offence punishable and aggravating the punishment. The Part 6 of concerned Article prohibits the retroactive effect of the law instituting or aggravating the liability. According to Article 42, Part 3 of the Constitution, the laws and other legal acts exacerbating the legal status of an individual shall not be retroactive as well.

The norms stipulated in Article 22, Part 5 and Article 42, Part 4 of the Constitution are the exception to this general rule. Article 22, Part 5 of the Constitution, according to which the law eliminating or mitigating the punishment for an offence shall be retroactive, in the scopes of the logic and the subject of legal regulation of the given Article, concerns only the laws prescribing liability for an offence, and it is a deviation from the general rule.

The constitutional norms, regulating the relations in regard to elimination or mitigation of the punishment for an offence and the approaches set forth by them, are in concordance with the provisions stipulated in the international legal instruments. Thus, Article 11, Part 2 of the Universal Declaration of Human Rights states that "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed." Simultaneously, the International Covenant on Civil and Political Rights (Article 15), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 7, Part 1) and other international legal instruments also touched upon the regulation of concerned issues, stipulating that the **Criminal Law**, eliminating or mitigating the punishment for an offence, shall be retroactive.

The Constitutional Court states that retroactive effect of the law eliminating or mitigating the punishment for an offence is conditioned by the virtue of constitutional law, as well as by international obligations of the Republic of Armenia, and it does not assume any legislative discretion.

As for the exception, stipulated in Article 42, Point 4 of the RA Constitution, the Constitutional Court finds that it is rather a general rule; it is not appropriate with the legal regulation of Article 22, Part 5 of the Constitution and depends on to the discretion of the legislator. The latter, in its turn, may be manifested in the framework of the legal relations, regulated exceptionally by the Act concerned.

Resulting from of the examination of the international experience of the constitutional justice, the Constitutional Court also necessitates emphasizing the coherency of the abovementioned approach with the international practice. According to the latter, as a rule, the practice of giving retroactive effect to the legal act improving the legal status of an individual by the competent body, except for the cases regarding the subject matter of legal regulation of Article 22, Part 5 of the Constitution, is permissible in exceptional cases, and the decision on retroactivity of the Act of the body adopted the Act concerned, shall be based on the comprehensive analysis and evaluation of the possible legal consequences of such a decision for the society and the state.

6. The Constitutional Court finds that Article 78, Part 2 of the RA Law on Legal Acts correlates not with Article 22, Part 5 of the RA Constitution but with Article 42, Part 4, for the following reasons:

a/ Article 42, Part 4 of the Constitution and Article 78, Part 2 of the RA Law on Legal Acts assume the discretion of the law-maker, which is excluded in Article 22, Part 5 of the Constitution,

b/ Article 22, Part 5 of the Constitution refers only the **Law**, though Article 78, Part 2 of the RA Law on Legal Acts and Article 42, Part 4 of the Constitution refer **all legal acts**,

c/ if Article 22, Part 5 of the Constitution concerns elimination of «punishability» or mitigation of “**punishment**”, then Article 42, Part 4 and Article 78, Part 2 of the RA Law on Legal Acts concern the **legal status (position) and liability** of the person.

Consequently, Article 78, Part 2 of the RA Law on Legal Acts shall be in concordance and harmony with the legal logic of Article 42, Part 4 of the RA Constitution.

Simultaneously, the norm stipulated in Article 42, Part 4 of the RA Constitution which improves the legal status of an individual, regulates the effect of the legal acts eliminating and mitigating his/her liability in time, has a direct effect and, thus, if the branch legislation does not prescribe a corresponding norm, defining the rules on the effect of this legislation in time or contains the norms contradicting the concerned constitutional norm, then in accordance with Article 6, Parts 1 and 2 of the RA Constitution **the mentioned constitutional norm is applied by the virtue of its direct legal effect.**

The norm stipulated in Article 42, Part 4 of the RA Constitution constitutionally regulates the effect of the legal acts, improving the legal status of an individual, the laws eliminating or mitigating his/her liability, as well as other legal acts in time, and, thus, this provision is addressed to the legislator and **other law making bodies** likewise. The legal content of that norm leads to the following: giving retroactive effect to the legal act improving the legal status of an individual or eliminating and mitigating the liability, is left to the **discretion of the body adopting the legal act** (for sure, taking into consideration the requirements of Article 83.5 of the Constitution). Simultaneously, this norm defines the procedure for the implementation of that discretion, i.e. in each particular case the body adopted the act stipulates the provision on its retroactiveness, if appropriate, exercising its discretionary power provided for by the Constitution. This procedure for the implementation of the mentioned discretion is not end in itself and logically proceeds from the general logic of regulation on the effect of the legal acts in time, under the Constitution.

Resulting from of the comparative analysis of the constitutional norm and the challenged legislative norm, regulating the same legal relation, the Constitutional Court finds that the norm, stipulated in Article 78, Part 2 of the RA Law on Legal Acts diverging from the **presumption of absence of the retroactive effect** of the challenged legal acts, stipulated in Article 42, Part 4 of the RA Constitution, has stipulated **the presumption of existence of retroactive force** of these legal acts, **transforming the exception into a general rule.**

Simultaneously, the Constitutional Court finds that, until overcoming the contradiction legislatively, the law enforcement practice shall be governed by the requirement prescribed in Article 42, Part 4 of the Constitution, as a norm with direct effect under Article 6, Part 1 of the Constitution.

7. The challenged legal regulation on the effect of the legal acts, improving the legal status of an individual, eliminating or mitigating his/her liability, in time, prescribed by Article 78, Part 2 in the RA Law on Legal Acts was adopted before the constitutional amendments of 2005, when as opposed to the current Constitution, no constitutional provision was envisaged for regulating the action of the legal acts in time. In the conditions of the absence of the concerned legal regulations by the Constitution, the legislator was free to regulate that legal relation independently, and the choice between the presumptions of existence or absence of the retroactive effect of the mentioned acts was left to the discretion of the legislator.

The operation of the legal acts eliminating or mitigating the legal status of an individual in time was regulated constitutionally only as a result of the constitutional amendments in 2005. Article 42 of the

RA Constitution, unlike the challenged norm, has stipulated the rule of exclusion of the retroactive effect of the legal acts improving the legal status of an individual, eliminating and mitigating his/her liability. In the conditions of similar constitutional regulation under Article 117, Point 1 of the RA Constitution the necessary amendment should have been made to the challenged Part 2 of Article 78 of the RA Law on Legal Acts within a two-year period, which has not been implemented yet.

8. The content of the provision stipulated in Article 78, Part 3, Paragraph 3 of the RA Law on Legal Acts means, that according to the general rule, this invalidated Act applied to the relations arisen prior to its invalidation, unless otherwise prescribed by the RA Law on Legal Acts or the legal act making the act invalid.

The Constitutional Court finds that this Provision may not be automatically compared with Article 78, Part 2 of the same law, as the subject matter of their legal regulation differs. While evaluating the constitutionality of Article 78, Part 3, Paragraph 3 of RA Law on Legal Acts, first it is necessary to consider the general constitutional principle that after the invalidation the effect of the legal act is terminated completely. However, there is also another circumstance. As providing the legal act with retroactivity is under the discretionary legal regulation in the scopes of Article 42, Part 4 of the Constitution, then such situations may remain uncovered, when this legal act has not envisaged retroactivity, the previous legal act has been invalidated and, at the same time, a particular problem regarding legal responsibility has arisen for previously committed act. In this case, the legislator envisages a provision, according to which “The invalidated legal act applies to the relations prior to the day of its invalidation, unless otherwise prescribed by the current law or the legal act invalidating the act”. It also derives from the said wording that the retroactive norm will apply, if the retroactivity of the norm of the legal act was concerned under Article 42, Part 4 of the RA Constitution. Such legal regulation is lawful, without which a serious legislative gap may arise.

Proceeding from the results of the case consideration and being ruled by Article 100, Point 1, Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64, 68 and 71 of the RA Law on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS**:

1. To declare Article 78, Part 2 of the RA Law on Legal Acts as contradicting to the requirements of Article 42, Part 4 of the Constitution of the Republic of Armenia and void.

2. Based on this decision, Article 78, Part 3, Paragraph 3 of the RA Law on Legal Acts is in conformity with the Constitution of the Republic of Armenia in terms of invalidation of Article 78, Part 2 of the RA Law on Legal Acts.

3. Pursuant to Article 102, Part 2 of the RA Constitution this Decision is final and enters into force from the moment of its announcement.

Chairman

G. Harutyunyan

29 November 2011

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