IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE ON CONFORMITY OF ARTICLE 23 OF THE RA LAW ON TAXES AND ARTICLE 1703 OF THE RA CODE ON ADMINISTRATIVE OFFENCES WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE RA HUMAN RIGHTS DEFENDER

Yerevan **18 February 2014**

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

with the participation (involved in the framework of the written procedure) of the Applicant: Head of Department of Legal Analysis of the Staff of the RA Human Right Defender A. Vardevanyan, specialist of the same department S. Terzikyan,

Respondent: official representative of the RA National Assembly, Adviser of Expertise Department of the Staff of the RA National Assembly, S. Tevanyan,

pursuant to Article 100, Point 1, Article 101, Part 1, Point 8 of the Constitution of the Republic of Armenia, Articles 25, 38 and 68 of the Law on the Constitutional Court of the Republic of Armenia,

examined in a public hearing by a written procedure the Case on conformity of Article 23 of the RA Law on Taxes and Article 1703 of the RA Code on Administrative Offences with the Constitution of

the Republic of Armenia on the basis of the application of the RA Human Rights Defender.

The case was initiated on the basis of application of the RA Human Rights Defender submitted to the RA Constitutional Court on 07.10.2013.

Having examined the report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, as well as having studied the RA Law on Taxes and the RA Code on Administrative Offences, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The Law on Taxes was adopted by the RA National Assembly on 14 April, 1997, signed by the RA President on 12 May, 1997 and came into force on 30 May 1997.

Article 23 of the above-mentioned Code prescribes, "In case of a delay in paying taxes in excess of the set terms, taxpayers (in cases designed by law – tax agents) shall pay fine equal to 0,15 percent of the amount of the tax not paid in time, for each overdue day.

Fines by the day shall be applied at the mentioned rates, unless a lower rate is set by the tax legislation.

The above-mentioned fine shall be applied to the amounts of tax not paid in time (including those not paid by the tax agent - in cases specified by the tax legislation), the amounts of advance payments of taxes, the amount of a tax (reduced) on the object of taxation revealed as a result of a check - for the whole period passed after the payment, but not to exceed 365 days."

The above-mentioned Article in the wording in force has been stipulated in accordance with the Laws ՀՕ-153 of 21.10.1997, ՀՕ-273 of 28.12.1998 and ՀՕ-129 of 26.12.2000.

Article 1703 of the RA Code on Administrative Offences titled "Not payment of the taxes in time" prescribes " Not payment of the taxes in the set terms leads to imposition of a fine in the amount of 10 to 20 minimum salaries."

The above-mentioned Article in the wording in force has been stipulated in accordance with the Laws of ՀՕ-79 of 11.05.1992, 02.09.1993, ՀՕ-133 of 23.06.1997, ՀՕ-499-Ն of 26.12.2002, ՀՕ-241-Ն of 24.10.2007, as well as ՀՕ-264-Ն of 22.12.2010.

2. The Applicant finds that the above mentioned provisions of Article 23 of the RA Law "On Taxes" and Article 1703 of the RA Code on Administrative Offences are not in conformity with the RA Constitution on the following rationale:

"In the domain of tax payment liabilities the legislator, as an act causing liability, considered non-payment of taxes by payers in a timely manner. Analysis of the challenged articles suggests that in both cases prescribed liability is of punitive character rather than preventive or remedial and does not substantially complement each other, but repeat. "

Referring to Article 22 of the RA Constitution, as well as international legal documents and practice of the European Court of Human Rights related to the legal principle of the prohibition of dual punishment in criminal proceedings or dual conviction, the Applicant concludes that the challenged norms provide the legal basis for "subjecting the individuals dual liability for one and the same act "that is" in practice there are many such cases, when the tax authorities, guided by the provisions of the Code and the Law, for the same deed simultaneously apply two separate penalties towards the persons.That is, as a result of regulations envisaged by the RA legislation and established practices, there is a real risk of violation of the right enshrined in Article 22 of the RA Constitution. "In addition, the Applicant also expresses the view that in such cases, in the Republic of Armenia, differentiation of subject wrongdoers is not prescribed legislatively. It is not specified in respect of which subject the tax liability is implemented and in respect of which subject the administrative liability is implemented. Absence of such a regulatory act may serve as a ground for various interpretations, as a result of which the persons may be subjected to double liability.That is, according to the Applicant, "for one offence administrative liability may be applied and for the other - tax liability, the dimensions of which are different, and as a result the principles of equality before the law and the rule of law are violated."

3. The Respondent finds that the presence of the challenged norm in the RA legislation does not refer to the constitutional principle of the prohibition of dual conviction for one and the same act, and is designed to ensure proportionate liability for economic entities attempting to gain illegal profit out of the funds payable to the budget. According to the

Respondent, the principle of non re-prosecution, in the formal aspect, cannot be considered completely applicable when determining measures and types of liability for any offence. Moreover, the principle of non-reconviction is more typical in the field of criminal responsibility and is based on the idea that the person shall not be subjected to physical hardships for the same offence, meanwhile, the challenged provisions, stipulating material responsibility for failure to fulfill the liabilities in the financial domain, pursue an aim to ensure the effectiveness and mission of the punishment, to exclude the situation "when the financial hardships caused to the offender as a result of the violation and incurring liability will be less than the illegal profit, which the offender may receive as a result of deviation from the performance of this duty." Thus, as the Respondent concludes, "taking into consideration the difference of priorities underlying the legal institutions of punishment and responsibility, the principle of prohibition of reconviction can be applied to a wider range of relationships."It is also concluded that "the principle of banning of non re-prosecution for the same offence, in the formal aspect, can not be considered completely applicable when determining measures and types of responsibility provided for any offence."

4. The RA Constitutional Court first considers it necessary to assess the constitutionality of the challenged norms:

- from the perspective of guaranteeing proportionate legal responsibility ensuring constitutionally prescribed provisions and their implementation for the rule of law and democratic state,
- from the perspective of defining their comparability with the constitutional and international principle of the prohibition of dual conviction for the same act.

Based on the issues and conclusions of the Applicant, the Constitutional Court considers it important to reveal the constitutional-legal content provided by the disputed norms of the legal regulations as a result of a comparative analysis of the norms interconnected in a systemic aspect with the norms of the RA Law "On Taxes" and RA Code on Administrative Offences, and norms enshrined in other legislative acts.

5. Pursuant to Part 2 of Article 8 of the RA Constitution, freedom of economic activity and free economic competition is guaranteed in the Republic of Armenia. It guarantees the persons (economic entities)

legally guaranteed freedom to use their capacities and property for economic activities not prohibited by law. At the same time, this principle of freedom is not absolute, and puts specific obligations both on the state and on economic entities. Thus, the main function of the state is to provide the necessary legal and economic conditions to ensure that freedom. It also derives directly from the content of the above mentioned constitutional and legal norms that if necessary in the Republic of Armenia more favorable conditions for the life of the entire economic system based on the principles of freedom of organization and activities of economic entities, with mostly possible clarified role of the state in this process in a free market economy shall be created. On the other hand, the business entities carry a liability to perform their activities in accordance with the manner and the framework prescribed by legislation including payment of the of taxes, duties and other mandatory payments in the size and the manner prescribed by the law.

This is a constitutional and legal obligation (Article 45 of the Constitution), which is conditioned by its vital importance and signification for the society and the state. The tax legislation of the Republic of Armenia, in particular the RA Law "On Taxes", the subject of which is also to establish liability for the violations of legal acts regulating tax relations is aimed to ensure proper performance of that duty. In particular, Articles 21 and 22 of the mentioned Law envisage that violation of the tax law (i.e. the wrong calculation of taxes, non-payment of taxes in time and failure to comply with other requirements of the tax law) implies liability for the tax payers and the officials of companies, institutions and organizations prescribed by the RA legislation.

Due to gravity of adverse effects caused for the society and the state for its and damage caused to the public relations the norms establishing the tax offences are prescribed not only in the tax laws, but also in the RA Code on Administrative Offences and the Criminal Code. In addition to administrative liability prescribed in the challenged norms of the RA Code on Administrative Offences, Articles 189, 205 and 328 of the Criminal Code prescribe liability for specific offences and appropriate penalties in case of evasion of taxes and duties. So, with the purpose to guarantee the fulfillment of the constitutional duties of persons in the payment of taxes and duties, the legislator prescribed specific types of legal liability (tax, administrative, criminal), the severity, the legal effects of implementation which are directly determined by the degree of

public danger of non-performance (improper performance) of a tax liability. In particular, if by the RA Law "On Taxes" or the RA Code on Administrative Offences, non-fulfillment (improper fulfillment) of tax obligations involves financial liability (correspondingly tax and administrative responsibility), the same action, by the subjective grounds, is criminally punishable in cases of intent or other aggravating circumstances.Consequently, by its essence and contents, evading tax liability is in non-conformity with not only the principles of the legal, democratic state, enshrined not only in Article 45 of the Constitution, but, above all, in Articles 1, 3 and other articles of the Constitution, therefore, the punishment for this offence prescribed by law pursues a legitimate goal.

6. Referring to the issue of assessment of the constitutional and legal content of the challenged provisions, the Constitutional Court considers it necessary, first, to consider the issue from the perspective of necessity of the choice of appropriate type of description of the normative act and legal liability. It is necessary to determine to what extent the presence of different legal characteristics of qualifying the deed which contains attributes of non-performance (improper performance) of the tax liability prescribed in the RA Law "On Taxes" and the RA Code on Administrative Offences is justified, as well as the fact, by legal-descriptive sense, to what extent they are identical from the aspect of combination with the constitutional and legal content of Part 7 of Article 22 of the RA Constitution.

As a result of the comparative analysis of both the challenged provisions of the aforementioned acts of legislation and norms, interrelated with them in the systemic aspect, the Constitutional Court states:

a/ in the issue of qualifications and legal assessment of the actions (if there are no signs of composition of a crime), containing signs of failure (improper completion) of the tax liability, the legislator, by merits, separated the kinds of administrative and fiscal liabilities, bearing in mind that:

- The RA Law "On Taxes", among others, prescribes liability for violation of the RA tax legislation and other rules regulating tax relations (Article 1 of the Law). Article 2 of the aforementioned Law, The tax relations in the Republic of Armenia shall be regulated by RA Law on Taxes, as well as by the decisions

of tax inspectorate and other bodies of the state governance, i.e. issues of regulation of all relations by the Law connected with the tax liability, are exclusively decided by the abovementioned normative acts;

- The RA Code on Administrative Offences (in accordance with Article 9 of the latter) regulates the relations connected with the involvement of the persons called to accountability "in the case of the wrongful, guilty (deliberate or careless) action or inaction, which infringes on the state and public order... property, rights and freedoms of citizens, established order of governance", for which the law prescribes administrative responsibility, and" if these violations by their nature do not entail criminal liability;"
- The purpose of the administrative responsibility is not to restore the violated rights, but "to nurture the person who committed an administrative offence in the spirit of observance of the laws... respect towards the rules of human cohabitation and to prevent committing offences by both the offender and other persons" (Article 22 of the Code);
- The purpose of tax liability is the compensation of damage caused to the state and public property; it is the legal responsibility of property (financial) nature, which is conditioned by the nature of property relations (tax relations) existing between the taxpayer and state. In addition, the person who did not perform (performed improperly) tax liability may voluntarily restore the damage subsequently caused by his actions (inaction) till ensuring its enforced (in a judicial manner) performance. This damage shall be fully refunded, regardless the circumstances, whether the taxpayer is subject to administrative or criminal liability or not (Articles 20, 26, 29 and 30 of the RA Law "On Taxes"), furthermore, bringing to liability does not relieve the taxpayer from fulfillment of the tax obligations prescribed by law (Article 28 of the RA Law "On Taxes");
- In the area of administrative liability, relations related to property damage, as a rule, are resolved in the order of civil procedure (Article 39 of the Code);
- In the area of administrative liability, such legal institutions are envisaged, as mitigating and aggravating circumstances, the

limitation period of imposition of administrative fines, extreme necessity, necessary self-defense and insanity (Articles 33, 34 and 38 of the Code);

b/ the legislator **separated also coercive measures (liability):** the penalty and fine, taking into consideration that:

- The administrative penalties are applicable in the case of an administrative offence (misdemeanor) (Articles 9 and 22 of the Code) and by its legal content are a set of administrative measures listed in Chapter 3 of the Code of the Republic of Armenia on Administrative Offences, meanwhile, "fine" is a concrete measure of administrative liability (Articles 23, 40.1, 40.2, 40.3, 40.4, 40.6, 40.7 and others of the Code), which is applicable in cases of particular administrative violations;
- In the sphere of fiscal responsibility, legal content of "fine" " and "penalty" is different, they are concrete and cohesive types of liability provided for the cases of infringement of certain tax obligations, they are included in the unified tax liability as a part of them, they are expressed in specific amounts to be paid to budget (Articles 13, 16, 16.1, 16.2, 17, 23, 24, 25, 25.1, 25.2, 26 and others of the RA Law "On Taxes");

c/ **the structure of the subjects of tax and administrative liability is differentiated,** taking into consideration that:

- Persons subject to administrative liability, are both physical persons and legal entities, meanwhile, some features of administrative liability are conditioned by administrative legal capacity of physical persons. Regarding legal entities, limited liability measures may be applied. **Besides, the comprehensive list of administrative liability measures applicable exclusively to legal entities, is not precise.**

Peculiarities of liability of physical persons and their separate groups are prescribed in Articles 12-16 of the RA Code on Administrative Offences (minors, officials, military personnel and others), thus, the means of administrative liability applicable towards a particular group of people is differentiated. In the sense of the challenged norm of the Code persons of the age of eighteen and public officials are subject to administrative responsibility,

- The scope of the persons subject to tax liability is prescribed in Articles 3, 5, 6, 6.1 of the RA Law "On Taxes". Moreover,

within the meaning of the challenged norm, both physical persons and legal entities, a tax agent (in the cases when acting as an individual entrepreneur or a notary), manager of an investment fund, the manager of joint ventures, the person entitled to a written form by the members of the joint venture are subject to tax liability.

Thus, by the RA Law "On Taxes", the participants of public - financial (tax) relations are separated from the subjects of administrative relations, which carry special constitutional and legal responsibilities towards the state and society, therefore, are liable not on general grounds, but in cases of committing offences of strictly specified character.

Based on the above, the Constitutional Court of the Republic of Armenia states that the legislator, guided by its discretionary powers, has separated fiscal and administrative liability, bearing in mind the special constitutional and legal importance and the need for regulation of tax relations, in the context of adherence to the constitutional order and rule of law. This separation itself pursues a specific legal purpose and does not raise the issue of constitutionality.

As for the comparative assessment of the features of the objective side of the actions ("non-payment of taxes in time" and "delay in the payment of tax in excess of the time") prescribed by the challenged legal regulations, then, in spite of the fact that,formally, they can be interpreted as homogeneous, however, these actions as well as the prescribed measures of liability, in accordance with the existing legal regulations legally differ both in goal and feature aspects. If Article 1703 of the Code on Administrative Offences prescribes liability for non-payment of taxes by the due date, due to the power of fact, considering it as the completed misconduct, in the narrative of the challenged provision of the RA Law "On taxes" the fact of the delay of payment of the tax is taken into account, which is of continuous nature, prescribing payment of the fine for each day of delay until the end of the full implementation of tax liability. An attempt is made to solve legislatively the following issues of legal regulation; first, to prevent such offences, to ensure compensation for material damage caused to the state budget as a result of delayed payment of taxes, as well as to oblige the wrongdoer to undertake measures to comply with the tax obligations.

7. Referring to the issue of comparability of the challenged norm with the constitutional norms and international legal principle of "not be convicted twice for the same act" (non bis in idem), the Constitutional Court considers it necessary, first:

a/ to disclose the legal content of the principle and the permissible scope of its applicability in the tax law and the law on administrative offences;

b/ to assess the comparability of the challenged norms and systemically interrelated other norms with the provisions of Part 7 of Article 22 of the RA Constitution.

The requirement (principle) of impermissibility of dual conviction that provided for in Part 7 of Article 22 of the Constitution, prescribed in a number of international agreements, including Paragraph 7 of Article 14 of the International Covenant on Civil and Political Rights, Article 4 of Protocol 7 to the European Convention on Human Rights. By its content (interpretation), this principle implies the obligation of the state to eliminate the person's re-sentence and conviction and criminal prosecution for the same action. According to its constitutional and legal content,the notion that no one can be tried twice for the same offense lies in the basis of this principle (in the sense of criminal law).This principle also excludes the qualification of the same offence by more than one article of the Code, also prohibits taking into account the same circumstance in the qualification of the crime, as well as choosing the type and size of the penalties (Articles 10, 63, 104 of RA Criminal Code). Thus, the fact of commitment of the crime in the past, if a person has already been convicted shall not serve as a ground for the criminal legal assessment of his/her subsequent behaviour, "unless," as the European Court of Human Rights decided, " where a case is reopened following the emergence of new evidence or the discovery of a fundamental defect in the previous proceedings" (Paragraph 45 of the Decision of 20 July 2004 on the CASE OF NIKITIN v. RUSSIA (Application no. 50178/99).

Comparative analysis of the legal content of the above-mentioned principle and the challenged norms and the Applicant's questions state that, nevertheless, the relevant regulations of the Code on Administrative Offences in the field of tax liabilities do not conclusively (at least theoretically) exclude the possibility of dual conviction for the same ac-

tion in the sphere of fiscal obligations (fiscal and administrative), (especially by the example of the subject who acts as a private entrepreneur), despite the fact that the Applicant has not submitted any fact of dual responsibility according to the criteria laid down in the above mentioned legal acts and judicial practice, and has substantiated his arguments in the framework of the possible "risks". The argument presented in the application, according to which, the issue of separation of the subjects due to responsibility is **"not clarified both in the RA Law "On Taxes" and the RA Code on Administrative Offences**, deriving from the notions that the entire legal concept of the Code does not meet the general logic of the social, economic and legislative developments of the Republic of Armenia, which also stated by the Decision DCC-1059 of the Constitutional Court of the Republic of Armenia. It should be taken into consideration that, although, by the subject of legal regulation, the domains of fiscal and administrative liability are not objectively differentiated by the law (both in the sense of methods of goal and legal regulations), from the perspective of prevention of fiscal violations (establishment of budget order) and legal consequences of the remedies of applied liability are tightly correlated.

The Constitutional Court finds that in the tax and administrative legal relationship, competent entities, based on the content and features of the relationship, necessarily (objectively) may act in several legal statuses, at the same time acting as subjects of tax and administrative legal relationships, and in respect of which, application of simultaneous measures of tax and administrative liability may be interpreted as a dual liability for one and the same act. In particular, if an individual entrepreneur delegated his/her obligation to calculate the taxes deriving from his/her activity by the order prescribed by law to another liable person, then that entrepreneur may carry administrative liability only as a subject to rights equaled to legal entity, meanwhile, other legal regulation is prescribed for the cases when an individual entrepreneur simultaneously undertakes responsibility to calculate the taxes due to his/her activity and to pay the taxes. According to Article 1703 of the RA Code on Administrative Offences, person subject to liability can only be the individual entrepreneur, who, in accordance with the law, in person carries the responsibility for the calculation and payment of taxes, otherwise, when this duty provided to another person, shall be liable on the basis of Article 23 of the RA Law "On Taxes".

At the same time, the Constitutional Court finds that, although the challenged norms do not directly cause the issue of constitutionality, however, the Applicant's position is justified according to which in the challenged legal acts while prescribing remedies of liability, the legislator **should provide more precise legal regulation for any subject of law subject to fiscal and administrative liability to eliminate the possibility of dual liability conditioned by his/her legal status.**

In the framework of these legal regulations also such an approach should be in the basis of the law enforcement practice.

Based on the results of consideration of the Case and being governed by Point 1 of Article 100 and Point 8, Part 1 of Article 101 and Article 102 of the Constitution of the Republic of Armenia, Points 1 and 2 of Article 32, Point 1 o Article 60 and Articles 63, 64 and 68 of the RA Law on Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS**:

1. Article 23 of the RA Law on Taxes is in conformity with the Constitution of the Republic of Armenia.

2. Article 1703 of the RA Code on Administrative Offences is in conformity with the Constitution of the Republic of Armenia in the framework of the legal positions expressed in this Decision.

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**

18 February 2014
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