

**IN THE NAME OF THE REPUBLIC OF ARMENIA
DECISION OF THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF ARMENIA**

**ON THE CASE OF CONFORMITY OF ARTICLE 44 OF THE LAW HO-338-N OF JUNE
26, 2018 ON MAKING AMENDMENTS AND SUPPLEMENTS TO THE LAW HO-266-N
ON MAKING AMENDMENTS AND SUPPLEMENTS TO THE TAX CODE OF THE
REPUBLIC OF ARMENIA WITH THE CONSTITUTION ON THE BASIS OF THE
APPLICATION OF THE DEPUTIES OF THE NATIONAL ASSEMBLY OF THE
REPUBLIC OF ARMENIA**

Yerevan

December 14, 2018

The Constitutional Court composed of H. Tovmasyan (Chairman), A. Gyulumyan, A. Dilanyan, F. Tokhyan, A. Tunyan, A. Khachatryan, H. Nazaryan (Rapporteur), A. Petrosyan,

with the participation (in the framework of the written procedure)

the applicant: representatives of the deputies of the National Assembly V. Harutyunyan, G. Mughnetsyan,

representative of the respondent: representatives of the National Assembly G. Meloyan, Chief of the Legal Support Division of the Legal Expertise Department of the National Assembly Staff, and A. Kocharyan, Chief of the Legal Expertise Division of the same Department,

pursuant to Clause 1 of Article 168, Clause 2 of Part 1 of Article 169 of the Constitution, as well as Articles 22 and 68 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case on conformity of Article 44 of the Law HO-338-N of June 26, 2018 on Making Amendments and Supplements to the Law HO-266-N on Making Amendments and Supplements to the Tax Code of the Republic of Armenia with the Constitution on the basis of the application of the Deputies of the National Assembly of the Republic of Armenia.

The Law HO-338-N of June 26, 2018 (hereinafter referred to as the Law) on Making Amendments and Supplements to the Law HO-266-N on Making Amendments and Supplements to the Tax Code of the Republic of Armenia was signed by the President of the Republic on 26 June 2018, and entered into force on 1 July 2018.

According to the challenged Part 44 of the Law, the challenged Clause 5 of Part 1, and Part 2 of Article 255 of the Tax Code (hereinafter referred to as the Code) prescribe:

“Article 255. Cessation of being considered a turnover taxpayer

1. A turnover taxpayer shall cease to be considered as such, where:

...

5) the fact referred to in Clause 6 of Part 3 of Article 254 of the Code has occurred - from the beginning of the tax year including the day of the occurrence of that fact, and if the taxpayer was granted state registration or was record-registered, or appointed as a notary later - from the date of the state registration or record-registration, or appointment as a notary. In the case of entry into force of the court judgment referred to in Clause 6 of Part 3 of Article 254 of the Code, the organisations, individual entrepreneurs and notaries recognized as related are again considered turnover taxpayers from the day of ceasing to be considered as such.

2. From the day of the occurrence of any of the facts prescribed in Clauses 2, 3 and 5 of Part 1 of this Article until the 20th day inclusive, the commercial organisation, individual entrepreneur or notary shall submit a statement to the tax authority, indicating the relevant ground and date of ceasing to be considered a turnover taxpayer”.

The case was initiated on the basis of the application of the Deputies of the National Assembly submitted to the Constitutional Court on 18 October 2018.

Having examined the application, the written explanation of the respondent, as well as having analyzed the relevant provisions of the Code and the Law, and other documents of the case, the Constitutional Court **ESTABLISHES:**

1. Positions of the applicant

The applicant considers that due to the amendments to Clause 5 of Part 1 of Article 255 of the Code, the legislator prescribed that “... in case the head of the tax authority renders a decision in accordance with the tax legislation, the economic entity ceases to be considered a turnover taxpayer and from the beginning of the tax year acquires other legal status prescribed by the tax legislation with all legal consequences followed therefrom”. According to the applicant, consequently, in case the head of the tax authority on any day from July 1, 2018 to December 31, 2018 renders a decision on recognizing some individuals as related in accordance with Part 2 of Article 30 of the Code, then all economic entities included in this group of persons /or at least those who were considered turnover taxpayers prior to the adoption of the said decision/ cease to be considered turnover taxpayers from January 1, 2018, which means that the latter are obliged to pay value added tax from all marketed products incurred during this period, to pay the income tax for the full tax year, as well as, in accordance with the manner prescribed by the tax legislation, to document their acquisitions with all legal consequences followed therefrom. As a result, the applicant concludes that in case a person ceases to be considered a turnover taxpayer, the terms of legal regulation change for him, “in tax legal relations the person moves from one legal status to another, where the

regulatory terms completely differ”, “the practical application of changes deteriorates the person’s situation”, since “it turns out that starting from January 1, 2018, the person must also pay value added tax from the entire turnover incurred from his operations, being deprived of the possibility of offsetting amounts of VAT during acquisitions”, which, according to the applicant, “... will be constitutioned with the circumstance that the person was not obliged to keep records on his acquisitions /including documents on VAT acquisitions/ and subject them to accounting and /or/ tax record-registration”. The applicant, in fact, raises the issue of conformity of the challenged provision with Part 1 of Article 73 of the Constitution.

2. Positions of the respondent

The respondent finds that as a result of the amendments made by the challenged norms, the legal provision prescribed in Clause 5 of Part 1 of Article 255 of the Code may only apply to the legal relations arising after July 1, 2018, and the previous legal norm shall apply to the legal relations that arose from January 1 to July 1, 2018, under which it was established “... the fact of the occurrence of a stricter legal effect, stipulating that the latter shall be directed and applicable exclusively to those legal relations that arose after the entry into force of the Law, i.e. after July 1, 2018, and in such conditions the subjects of legal relations shall have a sensible opportunity for the formation of appropriate behavior”.

In support of his statement and referring to the legal positions expressed in the decisions of the Constitutional Court and the decisions of the European Court of Human Rights, the respondent concludes that as a result of the amendments, Clause 5 of Part 1 of Article 255 of the Code should be applied in the following interpretation:

“1) if the fact indicated in Clause 6 of Part 3 of Article 254 of the RA Tax Code arose from July 1, 2018 to December 31, 2018, then the turnover taxpayer may cease to be considered as such exclusively for the period from July 1, 2018 to December 31, 2018;

2) if the taxpayer has been granted state registration or record-registered, or appointed as a notary in the period from January 1, 2018 to July 1, 2018, and the fact indicated in Clause 6 of Part 3 of Article 254 of the RA Tax Code arose in the period from July 1, 2018 to December 31, 2018, then the person who has been registered as a taxpayer or record-registered, or appointed as a notary must cease to be considered as such exclusively for the period from July 1, 2018 to December 31, 2018;

3) if the taxpayer has been granted state registration or record-registered, or appointed as a notary in the period from July 1, 2018 to December 31, 2018, and the fact indicated in Clause 6 of Part 3 of Article 254 of the RA Tax Code arose in the period from July 1, 2018 to December 31, 2018, then the person who has been registered as a taxpayer or record-registered, or appointed as a notary must cease to be considered as such exclusively from the date of his registration as a taxpayer, record-registration, or appointment as a notary until December 31, 2018”.

In the context of the aforementioned, the respondent considers that the legal entities had a reasonable opportunity to change their behavior by necessity and overestimate their “risks, bearing in mind the occurrence of a stricter legal effect as a result of the adoption of the challenged legal

norm”. Therefore, the respondent considers that the challenged norms are in conformity with the requirements of Article 73 of the Constitution.

3. Circumstances to be clarified within the framework of the case

When determining the constitutionality of the norms challenged in the present case, the Constitutional Court considers it necessary, in particular, to address the following questions:

- Do the challenged norms of the Law change the nature and content of the liabilities of the taxpayer stipulated by the Code?
- Do the legislative amendments aggravate a person’s legal situation?
- Is it possible to apply the challenged norms of the Code with retroactive effect, and what are their legal consequences in the context of the legal regulations of Article 73 of the Constitution?

Based on the circumstance that the subject matter of the application in the present case directly concerns both the general legal terms for the payment of turnover tax and the legal terms determined by certain facts, as well as the legal regulations in connection with their possible changes, the Constitutional Court considers it necessary to examine the constitutionality of the challenged norms both in the context of Part 1 of Article 73, and Part 8 of Article 60 of the Constitution.

4. Legal positions of the Constitutional Court

4.1. According to Part 8 of Article 60 of the Constitution, everyone shall be obliged to pay taxes prescribed in accordance with law, which means that the content of this constitutional obligation, the range of legal entities bearing such obligation, the types of taxes, the procedure and terms for the performance of tax liabilities must be stipulated exclusively by law.

In particular, according to Article 1 of the Code, this legal act regulates the relations related to the taxes applied in the Republic of Armenia, prescribes the principles of the tax system, the concept of tax, the types thereof, the scope of taxpayers, tax rates, the procedure and timeframes of tax calculation, payment, and, in cases prescribed by the Code, the fulfillment of tax liabilities (levying), which has an objective constitutional legal justification, since it is intended primarily to implement the legal perspective of establishing the procedure for defining taxes and the payment

thereof, as well as to guarantee those basic legal conditions for the fulfillment of tax liabilities of persons, which directly derive from the legal content of the above-mentioned Article of the Constitution.

4.2. The norms challenged in the present case subjected to legal regulation the relations in connection with the status of the legal entity as a turnover taxpayer and the fulfillment of his rights and obligations arising from this status. In particular, the analysis of the amended norms of Part 1 of Article 255 of the Code shows that the turnover taxpayer shall cease to be considered as such, that is, he shall be exempt from the performance of the subjective liabilities caused by this type of tax if:

- he submitted to the tax authority a statement in which he indicated that he is a payer of value added tax (hereinafter referred to as VAT) and is registered as a VAT payer from the day specified in the statement (but not earlier than the twentieth day preceding the submission of the statement) to the end of the tax year specified in the statement, that is, in the cases and procedures prescribed by the Code, he assumed the obligations of a VAT payer;
- the threshold of the amount of AMD 58.35 million of sales turnover exceeded with respect to all types of activities in the given tax year, starting from the moment it was exceeded until the end of the given tax year;
- one of the facts mentioned in Clauses 2, 3, 5 or 7 of Part 3 of Article 254 of the Code occurred (in the cases related to excise taxpayers, banks, credit organizations and other financial and credit organizations; with some exceptions, in the cases related to the organisations, individual entrepreneurs and notaries considered to be related; in the cases related to organisations, individual entrepreneurs and notaries acting as a party to a contract on joint activity, as well as to a commission contract for supply of goods or an agency contract for supply of goods envisaging a condition of acting on behalf of the agent) - from the day when this fact occurred until the end of the given tax year;
- the fact specified in Clause 4 of Part 3 of Article 254 of the Code occurred (that is, the violation of the operational rules of cash register machine for the third time during the tax year - from the day of recording the violation until the end of the tax year following the one including that day) - from the day when this fact occurred until the end of the tax year following the one including that day;

- the fact specified in Clause 6 of Part 3 of Article 254 of the Code occurred (that is, if during the preceding or current tax year the entirety of the sums total of the sales turnover of all types of activities and other incomes of the commercial organisations recognized as related, individual entrepreneurs and notaries declared as related upon the decision of the head of the tax authority exceeds AMD 58,35 million) - from the beginning of the tax year including the day of the occurrence of that fact, and if the taxpayer has been granted state registration or record-registered, or appointed as a notary later - from the day of the state registration or record-registration, or appointment as a notary; moreover, in the case of entry into force of the court judgment referred to in Clause 6 of Part 3 of Article 254 of the Code, the commercial organisations, individual entrepreneurs and notaries recognized as related are again considered turnover taxpayers from the day of ceasing to be considered as such.

At the same time, from the day when one of the facts prescribed in Clauses 2, 3 and 5 of Part 1 of the above-mentioned Article of the Code occurred until the twentieth day following this day (inclusive), the commercial organisation, individual entrepreneur or notary shall submit a statement to the tax authority, indicating the relevant ground and day of ceasing to be considered a turnover taxpayer.

It follows from the general content of the mentioned legal regulations, that the legislator has implemented his constitutional function following from Part 8 of Article 60 of the Constitution, by establishing the procedure and timeframes for fulfilling the liabilities of the legal entities due to certain legal facts and their status as taxpayers, in one case - causing it with the increase in the entirety of the sums total of the sales turnover, and in some other cases – with the types and composition of entities, the violation of specific requirements of tax legislation and other circumstances, and this is due to the legal necessity to maximally take into account and regulate in the scopes of fulfillment of tax obligations the objective changes in the situations and terms to be assessed in the framework of economic activity, which in itself does not raise the issue of constitutionality.

4.3. Referring to the legal consequences of the amended legal regulation of Part 1 of Article 255 of the Code, in particular, the argumentations of the applicant on the aggravation of the legal situation of taxpayer entities and giving retroactive effect to the norms that prescribe aggravation, the Constitutional Court deems it necessary to consider the issue in the context of both the legal content of the challenged legal regulation and the legal positions expressed in the decisions of the Constitutional Court, the law-enforcement practice of the European Court of Human Rights, of

other states, identifying those general and fundamental principles that are comparable to the scope of the subject matter of the application in the present case.

Referring to the constitutional legal issue of prohibition of retroactivity of laws and other legal acts that aggravate the person's legal situation, in a number of decisions (DCC-649, DCC-723, DCC-758, DCC-881, DCC-1000, DCC-1061, DCC-1142, DCC-1224, DCC-1326), the Constitutional Court expressed legal positions, according to which: the principle of prohibition of retroactivity of laws and other legal acts that aggravate a person's legal situation:

- is one of the key elements of the principles of confidence in the public authority and the rule of law;
- along with the principle of legal security, it is intended to ensure respect for legitimate expectations;
- is a general rule, and the possibility of retroactive effect of legal acts is an exception to the general rule, which follows from considerations of guaranteeing human rights, preventing arbitrariness by the law enforcement bodies;
- is an important guarantee of ensuring the principle of legal certainty; at the same time, the prohibition follows from this principle, according to which: it is unacceptable to restrict or abolish those rights that were defined on the basis of previously existing norms, which would also contradict the commitments undertaken by the Republic of Armenia by a number of international treaties.

Reaffirming the aforementioned legal positions, the Constitutional Court considers that from the perspective of the prohibition prescribed in Part 1 of Article 73 of the Constitution, they are also applicable when assessing the constitutionality of the challenged legal regulation in this case.

4.4. The study of the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR) shows that Article 1 of Protocol No. 1 to the European Convention on Human Rights (hereinafter referred to as the Convention) is of fundamental importance in the framework of the present case. As the ECtHR considered, retrospective tax legislation is not as such prohibited by Article 1 of Protocol No. 1 to the Convention¹. It is necessary to answer the question of whether “the retroactive application of the law establishes an unreasonable burden ... and thus does not observe a fair balance between different interests” and also is connected with the reasons for giving

¹ ECtHR no. 27793/95, 10 June 2003, (M.A. and 34 others against Finland).

retroactive effect, and, secondly, “is connected with the influence of the law having retroactive effect on the status of applicants”².

The Constitutional Court considers it necessary to state that, according to the position of the ECtHR, “a Contracting State, when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation”, and the legislature’s assessment is respected unless “it is devoid of reasonable foundation”³.

The Constitutional Court also states that the principles of legal certainty and legitimate expectations in the law-enforcement practice, formed within the framework of the European Union, are criteria for assessing the retroactive effect of the law, and they are considered to be general principles of the European Union law. As for the criteria for assessing the tax legislation having retroactive effect, the retroactivity is considered acceptable where “... the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected” (EC, C-376/02, 26 April 2005, Stichting Goed Wonen II <https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:62002CJ0376&from=SV>, ECJ C-381/97, 3 December 1998, Belgocodex, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61997CJ0381&from=EN>, ECJ C-396/98, 8 June 2000, Schloßstraße, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?Uri=CELEX:61998CJ0396&from=EN>, ECJ C-62/00, 11 July 2002, Marks & Spencer, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?Uri=CELEX:62000CJ0062&from=EN>).

As criteria for assessing the legitimacy of the retroactive effect of the law, the aforementioned principles of legal regulation are also enshrined in the law enforcement practice of European states (for example, in Austria, Belgium, Germany, Italy, the Netherlands, Spain⁴), according to which:

- Retroactivity of tax legislation is prohibited, unless it is justified by extraordinary reasons of public interest;
- Retroactivity of tax laws can be considered legitimate by the verification of the “reasonableness”, and cannot contradict “constitutional values and principles”.

² Ibid.

³ ECtHR nos. 21319/93, 21449/93 and 21675/93, 23 October 1997, National & Provincial Building Society c.s. and ECtHR no. 27793/95 10 June 2003, (M.A. and others v, Finland)

⁴ Source: Retroactivity of tax legislation, Hans Gribnau and Melvin Pauwels, 2010 EATLP Congress, Leuven 27-29 May 2010, pages 59-66,

https://pure.uvt.nl/ws/portalfiles/portal/9197496/2013_EATLP_book_definitief.pdf

4.5. The comparative analysis of the amended provisions of Part 1 of Article 255 of the Code and other norms of the Code linked with the latter, as well as the previous legal regulation stipulated by the above-mentioned Article shows that while providing for the amended procedure and timeframes for the application of tax liabilities due to the situation of taxpayer legal entities, and by force of certain legal facts, in contrast to previous legal regulations (as amended on October 4, 2016), the legislator was guided by different rules for enacting them in time and with respect to persons, and particularly, in certain cases by establishing the fulfillment of amended tax liabilities in the framework of relations following the emergence of this fact, and in other cases also in relations preceding this fact.

The provisions stipulated in Clauses 1, 2, 3 and 4, as well as in the second sentence of Clause 5 of Part 1 of Article 255 of the Code, are enacted in time with respect to the legal relations following the emergence of the relevant fact, which allows persons with corresponding tax liabilities to manifest legitimate expectations commensurate with legislative amendments and form appropriate behavior. Moreover, the Constitutional Court does not address, per se, the issue of “toughening” the said regulations, since according to Part 8 of Article 60 of the Constitution, the task of the legislator is, in particular, to establish at its discretion the grounds and procedure for establishing, amending or terminating tax liabilities.

Within the framework of the present case, the Constitutional Court notes the importance of observing such a rule for enacting it in time and with respect to persons, according to which, the effect of a normative legal act applies to relations existing after its enactment, unless otherwise provided for by the Constitution, the Law or the given normative legal act (Part 1 of Article 28 of the Law of the Republic of Armenia on normative legal acts), observing the requirements especially of Article 73 of the Constitution. The legal content of the latter assumes the fact that giving a retroactive effect to a legal act improving the person’s legal situation (Part 2 of Article 73 of the Constitution) is at the discretion of the body adopting the legal act (laws and other legal acts). At the same time, it assumes the procedure for exercising this discretion, namely, that in each case the body adopting the legal act and exercising the discretionary power reserved for it by the Constitution, in case of expediency of giving a retroactive effect to the legal act, establishes a provision about that. Such a procedure for the exercise of this discretion is not an end in itself and follows logically from the common logic of the regulation by the Constitution of the enactment of legal acts in time.

The Constitutional Court considers that such changes in the conditions for the implementation of the law - when specific conditions are established for the termination of tax liabilities and the

establishment of new duties, and such an order of their enactment in time, the application of which is foreseeable in the aspect of possible legal consequences - fundamentally pursue legitimate goals. From this perspective, the aforementioned provisions of Article 255 of the Code, as amended by the challenged norms of the Law, cannot per se raise an issue of constitutionality.

As for the legal regulation of Clause 5 of Part 1 of Article 255 of the Code prescribed by the Law, according to which, a turnover taxpayer shall cease to be considered as such, where the fact referred to in Clause 6 of Part 3 of Article 254 of the Code has occurred (that is, if during the preceding or current tax year the entirety of the sums total of the sales turnover of all types of activities and other incomes of the commercial organisations, individual entrepreneurs and notaries declared as related upon the decision of the head of the tax authority exceeds AMD 58,35 million) - from the beginning of the tax year including the day of the occurrence of that fact, the Constitutional Court considers that when regulating the relations in connection with the establishment, amendment and termination of liabilities of the taxpayer legal entities, the legislator is obliged to be guided by the guaranteed and comprehensive implementation of the rights and freedoms stipulated by the Constitution as an important prerequisite for the rule of law, the establishment and development of a state of law. In particular, the choice of one or another form and means of legal regulation, and the consequent pursuit of the legitimate goal of creating the most effective guarantees for exercising the rights of individuals, cannot be implemented by ignoring any constitutional legal norm and principle. The analysis of the legal content of the aforementioned Part 5 of Article 255 of the Code amended by the Law shows that the legitimate goal of regulating tax relations arising due to the facts caused by changes in the situation of a taxpayer legal entity or the size of the entirety of the sums total of the sales turnover cannot be implemented by disproportionate measures. In particular, prior to the occurrence of the mentioned facts, the turnover taxpayer legal entity, in accordance with the legal situation prescribed in Article 254 of the Code, beard the liabilities stipulated in Chapter 55 of the same Code, and the liability prescribed by the norms of Chapter 77 of the Code is envisaged in the case of non-fulfillment or improper performance of the latter. The regulation of social relations by such a general principle is foreseeable and legitimate, since the subjects of legal relations, being endowed with mutual rights and duties and the power to implement them in time, are able to manifest legitimate expectations commensurate with the normative requirements and form appropriate behavior, which usually follows the emergence (appearance) of a predetermined fact. The content of legal relations is different in those cases where, due to the facts that have appeared for objective reasons, the content of the norms regulating them changes so that a person, acting within the framework of a relationship already regulated by law, and having certain rights and duties, finds himself in a relatively worse legal situation due to the changes in the law (norm), and in this case, losing the rights resulting from the previous legal situation of taxpayers, or by virtue of these legal relations, the realization of his right is limited, which is mentioned in the scopes of the amended legal regulation of Part 5 of Article 255 of the Code mentioned above, when by virtue of the emergence of the fact referred to in Clause 6 of Part 3 of Article 254 of the Code, retroactively (from the beginning of the tax year including the day of the occurrence of that fact) new tax liabilities in content arise for the person parallel to the tax liability performed for the past period (preceding the

emergence of the fact of legal significance). As a result, the legal situation of the person, as the subject of such legal relations, may aggravate.

The Constitutional Court considers that in this case, based on the principle of the rule of law, it is necessary to observe such rules for enactment in time and with respect to persons of new legal regulations due to amendment or addenda to the legal act, the implementation of which would guarantee the legitimate conditions for the realization of their rights. In the context of Part 1 of Article 73 of the Constitution, this fact is more important especially in cases where the issue concerns the aggravation (tightening) of the conditions for the realization of the rights of a person due to possible amendments. Within the framework of the matter at issue, the Constitutional Court considers that the application of such amendments in the Law should be accompanied by the establishment of such legal conditions that, in particular, guarantee the foreseeability of tax liabilities and, accordingly, an equivalent opportunity for subjective conduct, excluding any aggravation by retroactivity of the legal situation of legal entities.

Based on the review of the case and governed by Clause 1 of Article 168, and Article 170 of the Constitution, as well as Articles 63, 64 and 68 of the Constitutional Law on the Constitutional Court, the Constitutional Court **HOLDS:**

1. To declare Part 1 of Article 44 of the Law HO-338-N of June 26, 2018 on Making Amendments and Supplements to the Law HO-266-N on Making Amendments and Supplements to the Tax Code of the Republic of Armenia contradicting Part 1 of Article 73 of the Constitution and void, in part of application of the phrase “from the beginning of the tax year including the day of the occurrence of that fact” on the legal relations that arose before the enactment of the Law.
2. Pursuant to Part 2 of Article 170 of the Constitution this Decision shall be final and shall enter into force upon its promulgation.

Chairman

H. Tovmasyan

December 14, 2018

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