

On some issues of applying customs legislation by courts

Unofficial translation

Regulatory Resolution No. 7 of the Supreme Court of the Republic of Kazakhstan dated November 29, 2019

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For the purpose of establishing a uniform practice in the application of customs legislation by courts, the plenary session of the Supreme Court of the Republic of Kazakhstan hereby resolves to provide the following clarifications:

1. Customs regulation in the Republic of Kazakhstan is carried out in accordance with the Constitution of the Republic of Kazakhstan (hereinafter - the Constitution), international treaties that are part of its current law in accordance with paragraph 1 of Article 4 of the Constitution, and the legislation of the Republic of Kazakhstan in the field of customs.

By virtue of paragraph 3 of Article 4 of the Constitution, international treaties ratified by the Republic have priority over its laws.

International treaties governing customs legal relations include:

The Agreement on the Eurasian Economic Union (hereinafter - the EAEU) dated May 29, 2014 (ratified by the Law of the Republic of Kazakhstan of October 14, 2014 No. 240-V, enforced on January 1, 2015);

The Customs Code of the EAEU (Appendix No. 1 to the Agreement on the Customs Code of the EAEU of April 11, 2017, ratified by the Law of the Republic of Kazakhstan of December 13, 2017 No. 115-VI, enforced on January 1, 2018, hereinafter - the Customs Code of the EAEU);

International Convention on the Harmonized Commodity Description and Coding System of June 14, 1983 (hereinafter - the International Convention) and the Protocol on Amendments to the International Convention of June 24, 1986, to which the Republic of Kazakhstan acceded by the Law of the Republic of Kazakhstan of February 3, 2004 No. 525;

Agreement on functioning of the Customs Union within the multilateral trade system framework of May 19, 2011 (ratified by the Law of the Republic of Kazakhstan of November 21, 2011 No. 494-IV, enforced on August 22, 2012);

Protocol on some issues of import and circulation of goods in the Eurasian Economic Union customs territory of October 16, 2015 (ratified by the Law of the Republic of Kazakhstan dated December 9, 2015 No. 439-V, enforced on January 11, 2016);

other international agreements concluded by the Republic of Kazakhstan with the EAEU member states, other states, international organizations and entities.

2. The Code of the Republic of Kazakhstan "On customs regulation in the Republic of Kazakhstan" (hereinafter - the CC RK), being an act of national legislation, extends its effect to legal relations related to the import of goods into the Republic of Kazakhstan and their export from the Republic of Kazakhstan as part of a single customs territory of the EAEU.

3. The courts shall bear in mind that the decisions of the permanent regulatory body of the EAEU - the Eurasian Economic Commission (hereinafter -the Commission), adopted within its powers, are subject to the provisions of Article 4 of the Constitution on the priority of international treaties ratified by the Republic of Kazakhstan over its laws.

The decisions of the Commission infringing on the constitutional rights and freedoms of man and citizen shall not have priority over the regulatory legal acts of the Republic of Kazakhstan.

4. According to clause 99 of the Statute of the EAEU Court (Annex No. 2 to the Agreement on the EAEU dated May 29, 2014), the acts of the EAEU Court, issued in accordance with its competence, shall be binding on the parties to the dispute under which they were issued. In this regard, the acts of the EAEU Court shall be taken into account by the courts when resolving disputes related to the application of the EAEU legal norms, the compliance of which with the Agreement on the EAEU was the subject of consideration by the EAEU Court.

5. In accordance with part two of Article 72 of the Civil Procedural Code of the Republic of Kazakhstan (hereinafter - CPC), the burden of proof in the cases specified in Chapter 29 of the CPC shall be imposed on state authorities, local governments, public associations, organizations, officials and civil servants, whose acts, actions (inaction) are appealed.

In this regard, when assessing the compliance of the declarant, the customs representative with the customs legislation provisions, one shall proceed from the presumption of reliability of the information provided by him, the burden of refutation of which rests with the state revenue authority.

When considering disputes, all uncertainties and unresolved issues of the customs legislation of the EAEU and (or) the Republic of Kazakhstan shall be taken in favor of the declarant, customs representative.

6. In accordance with paragraph 1 of Article 38 of the EAEU CC, the provisions governing determination of the customs value of imported goods shall be based on the general principles and rules established by Article VII of the General Agreement on Tariffs and Trade 1994 (hereinafter - GATT 1994) and the Agreement on Application of Article VII of the General Agreement on Tariffs and Trade 1994.

The customs value of goods and information related to its determination must be based on reliable, quantifiable and documented information (paragraph 10 of Article 38 of the Customs Code of the EAEU).

When considering a dispute in court, the customs authority may present evidence that refutes the accuracy of the information provided by the declarant.

The courts should correctly determine the range of circumstances to be proved in this category of disputes, including the following:

- the presence of signs of unreliability in determination of the customs value;
- relevancy of the decision on inadmissibility of the declarant's application of the first method for determining the customs value - on the price of a transaction with imported goods, taking into account the requirements of Article 39 of the EAEU CC;
- application of a certain method of customs value with justification of the impossibility of consistently applying all the previous methods;
- relevancy of applying the backup method.

7. According to the rule set out in clause 15 of Article 38 of the EAEU CC, the rule of consistent application of methods for determining the customs value, if it is impossible to use the first method (on the cost of transaction with imported goods), each subsequent method shall be applied if the customs value cannot be determined using the previous method.

The courts shall take into account that if it is impossible to apply the first method, consultations can be held between the state revenue authority and the declarant in order to make a reasonable choice of the cost basis for the customs valuation - the value of transactions with identical or similar goods.

The procedure and timing of consultations between the state revenue authority and the declarant is provided by order of the Minister of Finance of the Republic of Kazakhstan dated February 23, 2018 No. 264 "On approval of the Rules and timing of consultations."

When considering disputes on correct choice of the method for determining the customs value, the state revenue body shall have the right to refer to its lack of price information to use the appropriate method if it is confirmed that it is impossible to obtain such information or if the declarant refuses to provide the necessary information within the framework of consultations with him.

8. When assessing the feasibility of using the first method for determining the customs value of imported goods, courts must be guided by the provisions of Articles 38, 39 and 40 of the EAEU CC, bearing in mind that the value of a transaction with imported goods cannot be considered documented, quantitatively determined and reliable if the declarant did not present evidence of conclusion of the transaction, on the basis of which the goods were purchased, in any form that does not contradict the law, or information on the price contained in such a transaction does not correlate with the quantitative characteristics of the goods, or there is no information on the terms of delivery and payment for the goods, or there is evidence of its unreliability, and if there is no other information related to determining the value of the transaction in the sense of the given norms of the EAEU CC.

Identification of individual shortcomings in the execution of documents submitted by the declarant (contracts, specifications, invoices on payment for imported goods and others) that

do not affect the essential terms of the transaction and do not refute the fact of concluding the transaction under certain conditions shall not entail unlawful application of the first method by the declarant.

9. By virtue of Articles 325, 326 of the Customs Code of the EAEU, the customs authority shall have the right to request, both before and after the release of goods, the documents necessary to establish reliability and completeness of the verified information declared in the customs declaration and (or) information contained in other documents.

When checking documents and information before the release of goods, the courts shall take into account that, according to clause 4 of Article 325 of the EAEU CC, a request may take place in the following cases if:

- documents submitted when filing a customs declaration or submitted at the request of the state revenue authority do not contain the necessary information or do not properly confirm the declared information;

- the state revenue authority revealed signs of non-compliance with the provisions of the EAEU CC and other international treaties and acts in the field of customs regulation and (or) the legislation of the Member States, including inaccuracy of the information contained in such documents.

10. Control of the customs value of goods shall be performed by state revenue authorities in accordance with the Regulation on the specifics of customs control of the customs value of goods imported into the EAEU customs territory, approved by the Commission's resolution of March 27, 2018 No. 42 (hereinafter- the Regulation).

The fact that clause 5 of the Regulation contains a list of circumstances that are signs of inaccurate determination of the customs value of goods shall be brought to notice by the courts.

By virtue of clause 5 of Article 325 of the Customs Code of the EAEU and clause 7 of the Regulations, the request for documents and (or) information, including written explanations, must be justified and contain:

- a list of signs indicating that the information declared in the declaration for goods and (or) the information contained in other documents is not properly confirmed or may be inaccurate;

- list of requested documents and (or) information;

- terms for the submission of such documents and (or) information, including written explanations.

When controlling the customs value of goods, the list of documents and (or) information, including written explanations, requested by the customs authority from the declarant is provided for by clause 4 of Article 325 and clause 1 of Article 326 of the EAEU CC.

The list of documents and information provided for by clause 8 of the Regulations that may be requested by the state revenue authority during control of the customs value of goods is not exhaustive.

The final list of documents and information, including written explanations, shall be determined by the customs authority, taking into account the revealed signs of inaccurate determination of the customs value of imported goods, as well as taking into account the conditions and circumstances of the transaction, physical characteristics, quality and reputation of imported goods (clause 7 of the Regulation).

11. When resolving disputes on determination of the customs value of goods, the courts shall establish what signs of an inaccurate declaration of the customs value were identified by the state revenue authority and were confirmed during customs control, also taking into account the documents (information) collected by the customs body and additionally submitted by the declarant.

Failure to submit by the declarant of additional documents (information) substantiating the declared customs value of the goods, shall not entail adoption by the customs authority of a decision on amending (supplementing) the information stated in the customs declaration, if the declarant had objective obstacles to providing the requested documents (information) and the corresponding explanations were given to the customs authority.

In accordance with Articles 325, 326 of the Customs Code of the EAEU, based on the customs value control results, upon establishing the facts of unreliable declaration of the customs value, the customs authority shall make a decision on amending (supplementing) the information stated in the customs declaration.

In view of the fact that the court proceedings must not substitute for the exercise of customs control in the relevant administrative procedure, new evidence shall be recognized as relevant and can be accepted (requested) by the court, if the applicant for this substantiated the existence of objective obstacles to obtaining this evidence before the impugned decision of the state revenue authority is issued.

New evidence can be accepted by the court if the declarant was not provided with the opportunity to eliminate doubts about reliability of the declared customs value by the state revenue authority.

12. In the absence of provisions in the customs regulation acts on certain issues of valuation of goods for customs purposes, lack of their completeness or certainty, the courts may also take into account the advisory opinions, information and recommendations of the World Customs Organization adopted in accordance with paragraph 2 of Article 18 of the Agreement on the Application of Article VII of GATT 1994.

13. The issues of classification of goods according to the unified Commodity Nomenclature of Foreign Economic Activity of the EAEU (hereinafter FEACN) are regulated by Chapter 3 of the EAEU CC.

In the event of incorrect classification of goods during their customs declaration, the customs authority shall have the right to make decisions on the classification of goods (clause 2 of Article 20 of the EAEU CC).

The court shall verify validity of the classification decision by assessing the evidence presented by the customs authority and the declarant confirming information about the signs (properties, characteristics) of the declared commodity, which are important for its correct classification, according to the FEACN. In this case, the court shall be guided by the Basic rules of interpretation of the FEACN, notes to sections, groups, commodity items that have legal force, and the decisions and clarifications of the Commission relating to the disputed product, adopted in accordance with clauses 1, 2, 6 of Article 22 of the EAEU CC, and also decisions and explanations of the national authorized body on the classification of certain types of goods, adopted on the basis of Article 42 of the Labor Code of the Republic of Kazakhstan.

When checking the arguments of the parties to the dispute on correct classification of goods the courts may take into account the Explanations to the FEACN, recommended by the Commission as auxiliary working materials, designed to establish a uniform FEACN interpretation and application, and also recommendations and explanations on the classification of goods given by the World Customs Organization in accordance with article 7 of the International Convention.

Wrong classification of the goods by the customs authority shall be the ground for the conclusion on illegality of the contested classification decision. A judicial act, if there is sufficient evidence, may also contain a conclusion on correctness of the classification made by the declarant, and on absence of the customs authority's grounds for making a decision on a different classification of goods.

14. In accordance with subparagraph 1) of paragraph 3 of Article 40 of the Labor Code of the Republic of Kazakhstan, the decision on the classification of goods shall be mandatory, in connection with which the decision on the classification of goods, on which the notification of the inspection results and (or) notification of the elimination of violations is based, shall be subject to mandatory appeal.

15. In accordance with Article 475 of the Labor Code of the Republic of Kazakhstan, the notification of the inspection results and (or) the notification of elimination of violations (hereinafter - notification) can be appealed in the authorized body by the person in respect of whom the notification was issued, or his proxy.

The authorized body's decision, adopted on the examined complaint against the notification, shall not be subject to judicial challenge, since it does not entail legal consequences provided for in the first part of Article 293 of the CPC. If the notification is dismissed, the said notification may be challenged in judicial proceedings, and if it is canceled in part - a notification of the examination results of the complaint against the notification.

In this regard, the judge shall reject an application for challenging the decision of the authorized body, adopted on the examination results of the complaint against the notification pursuant to subparagraph 1) of part one of Article 151 of the CPC, and if a civil case is

initiated, the court shall terminate the proceedings on it in accordance with subparagraph 1) of Article 277 of the CPC.

16. The judicial procedure for considering applications for challenging the customs inspection results and actions (inaction) of the state revenue bodies' officials shall be regulated by Chapter 29 of the CPC.

The time for filing an application with the court established by part one of Article 294 of the CPC shall be: on challenging notifications directly in court - from the date of its delivery as prescribed by paragraph 10 of Article 417, paragraph 4 of Article 419 of the Labor Code of the Republic of Kazakhstan, and in the event of a preliminary appeal to the authorized body - from the day when the declarant, the customs representative became aware of this body's decision to dismiss his complaint in full or in part. If, on complaint examination results, a new notification is issued to the declarant or customs representative, the appeal term shall be calculated from the date of its delivery in accordance with the established procedure.

17. The customs inspection (office, on-site) report, upon which a notification was issued, shall not be subject to appeal in court.

Legality of the notification made shall be checked proceeding from the conclusions set out in the customs inspection report.

The customs inspection report can be appealed if the declarant disagrees with its conclusions, which did not entail the issuance of a notification, but nevertheless affect his rights and obligations. An appeal against an inspection report shall be regarded as an appeal against the customs officials' actions.

18. In accordance with Article 4 of the Constitution of the Republic of Kazakhstan, this regulatory resolution is included in the current law, is generally binding and shall take effect from the date of the first official publication.

*Chairman of the Supreme Court
of the Republic of Kazakhstan*

Zh. Asanov

*Judge of the Supreme Court of the Republic of Kazakhstan,
Secretary of the plenary session*

G. Almagambetova