



CURRENT ISSUES OF GLOBAL TRADE AND CUSTOMS REGULATION

DEVELOPMENT OF LAW ENFORCEMENT AND JUDICIAL PRACTICE ON THE INCLUSION IN THE CUSTOMS VALUE OF ROYALTIES ON PRODUCTION KNOW-HOW AND OTHER INTELLECTUAL PROPERTY OBJECTS FROM INDUSTRIAL COMPANIES

Today, many manufacturing companies are faced with the fact that customs authorities check the inclusion in the customs value of raw materials of royalties paid for such intellectual property objects as: production know-how, trademark (applied to finished products manufactured in Russia), software and databases, patents and many others.

The uniqueness of such inspections lies in the fact that customs authorities often check unbranded raw materials and components supplied both from the group's companies and from independent suppliers, establishing a correspondence between the payment of royalties and imports.

Moreover, such inspections are characterized by a very high efficiency: 98% in 2023.

Most customs authorities use the approach of including royalties in the customs value by proving compliance with two conditions for their inclusion: royalties are related to imported goods, and their payment is a condition for the delivery of goods. However, some customs authorities include royalties in the customs value as part of the revenue (income) received from the sale or other way of using imported goods. The difference in approaches is due to the lack of a clear methodology.

In the course of verification activities, the customs authorities request the share of imported raw materials in the cost structure (sometimes — the sale price of the goods). If companies fail to provide such information, the customs authorities include the full amounts of royalties.

It is important for companies to assess the risks of current or potential customs inspections. In addition to additional charges of customs duties and penalties, potential risks are bringing to responsibility and changing the category of the risk level of the company.

Along with the development of law enforcement, trends in judicial practice are also changing. The year 2023 is characterized by a reversal of court decisions to a greater extent in favour of the customs authorities.

With the current trends in the development of law enforcement and judicial practice on the issue discussed above, we believe that companies need to assess the risks of the licensing structure used in advance with the involvement of internal and specialized external lawyers, adapt it if they are identified and form a protective legal position on past periods before the start of control measures.

THE PROBLEM OF INCLUDING DIVIDENDS IN THE CUSTOMS VALUE OF GOODS

As a result of the change in the position of the Supreme Court of the Russian Federation (RF Supreme Court) in 2022 on the inclusion of dividends in the structure of the customs value of imported goods and the subsequent negative judicial practice for companies, in the last few months, foreign trade actors faced an unprecedented number of customs control measures on this issue, resulting in the assessment of large additional customs payments and the imposition of penalties in some cases.

As a legal basis, customs authorities use the provisions of Article 40(1)(3) of the EAEU Customs Code, which provides for the possibility of additionally adding to the cost of imported goods a part of the income (revenue) from their subsequent sale, which is directly or indirectly due to the seller.



Following the RF Supreme Court, the courts indicate that if the founders decide to pay the net profit received in connection with the sale of goods supplied by the founders of a Russian entity, and the declarant does not provide evidence confirming that the value of the transaction with imported goods corresponds to their actual value, including documents and information on export pricing, such net profit can be included in the customs value of imported goods.

All judicial acts made after the publication of the Russian Supreme Court's position have been adopted in favour of customs authorities. That said, the courts disregarded, or deemed to be insufficient, the evidence presented confirming that the parties' affiliation does not affect the transaction value.

In view of the current negative practice for declarants, in 2024 the trend of strengthening control over all importing companies that have paid dividends to foreign founders over the past 3 years, including manufacturing companies, is expected to continue.

Taking into account the above, companies need to conduct an early analysis of the risks of including dividends in the customs value of goods, in view of all types of activities of the company from which it receives profit, the possibility of confirming the absence of influence of the relationship of the parties on the value of the transaction, etc.

INTRODUCTIONS OF "FLEXIBLE" EXPORT CUSTOMS DUTIES

Starting October 1, 2023, export customs duties were introduced on a wide range of goods in accordance with the list¹ approved by Decree of the Government of the Russian Federation dated September 21, 2023 No. 15382. Duty rates depend on the exchange rate of the US dollar to the rouble and can range from 7% (at an exchange rate of more than 95 roubles per US dollar) to 0% (at an exchange rate of less than 80 roubles per US dollar).

The duty rate for the next calendar month is determined by the Ministry of Economic Development and is posted on the official website (<https://www.economy.gov.ru>).

Since its entry into force on October 1, 2023, Decree No. 1538 has raised a lot of questions among exporters, and therefore members of the AEB Customs and Transport Committee have prepared an appeal to the Government of the Russian Federation with a request to amend, clarify, cancel and/or correct some provisions of Decree No. 1538.

On January 5, 2024, Government Decree No. 2338 came into force, according to which changes were made to the Decrees establishing export duties on various types of goods (No. 2068, No. 276 and No. 1538). Thus, the list of goods that are subject to export customs duties has been significantly adjusted; position 2611 00 000 0 ("Tungsten ores and

concentrates") has been excluded; goods worth less than 200 euros are exempt from export duties.

We note that other amendments to Decree No. 1538 are expected. Thus, public discussion procedures have been completed as part of assessing the regulatory impact of the draft changes, which are expected to introduce an exemption from export customs duties on fish and fishery products exported in accordance with quotas.

ON USING NAVIGATION SEALS IN THE EAEU

The Agreement on using navigation seals for monitoring transport operations in the EAEU came into effect on April 3, 2023.

Transport and logistics companies express their concerns about the plans of the EAEU member states to apply navigation seals to all categories of goods, placed under the customs procedure of customs transit, including those transported in sealed compartments of road vehicles and containers in accordance with the TIR Convention, 1975, which goes against its fundamental provisions of mutual recognition of customs controls and exemption from examination at customs offices en route, as a general rule.

This initiative is perceived by businesses as a redundant additional control instrument, excessive administrative and financial burden, leading to increased costs of transported goods. According to the published tariffs, the cost of freight when using a navigation seal can go up to 20%.

Moreover, the use of navigation seals does not exempt from customs, transport, or any other types of control, nor improves road safety.

Meanwhile, the existing level of information exchange, forms and methods of control, international instruments provided by UN conventions and agreements on trade and transport facilitation allow EAEU member states for effective monitoring of the movement of goods and vehicles, including those in transit.

Proposed actions:

- › To include in the list of exemptions, i.e. goods and cases when tracking with the use of navigation seals is not applied, goods transported under TIR.
- › To establish a uniform minimum tariff for the services provided by operators of navigation seals for the entire itinerary across the territory of the EAEU.
- › To limit the set of data in the navigation seal to the minimum required by the Agreement and ensure that data is transmitted into the navigation seal directly from the information systems of customs authorities.

¹ The list of goods includes products of animal origin, cereals, some prepared foods, alcoholic and non-alcoholic drinks, mineral products, chemical products, textile materials, base metal products and many other goods.

JOINT OBLIGATION OF CUSTOMS REPRESENTATIVES

Since 2022, under the conditions of external sanctions restrictions, a trend has emerged towards the massive closure and leaving the Russian Federation of large foreign trade companies with foreign capital, which causes a number of problems. Customs representatives who carried out customs declaring on their behalf remain in a one-on-one situation with customs authorities as part of post-control. At the same time, they are limited in obtaining and using means of proof, as well as in the possibility of subsequent recovery of damages from declarants.

The current situation leads to a tendency to reduce the number of customs representatives. For the period from December 2021 to December 2022, 103 organizations were excluded from the register of customs representatives, and for the same period of 2022-2023 – already 122.

In connection with the emerging frightening trend, there is a growing need to liberalize customs legislation in terms of joint liability of the customs representative in accordance with current realities, for example, by amending paragraph 7 of Article 346 of Federal Law No. 289. The mentioned norm itself in 2018 became the first attempt to liberalize the customs legislation, but in its current version it creates a situation of legal uncertainty in which bona fide customs representatives formally have the right to obtain exemption from joint and several obligations, but in fact this possibility is

minimized due to the lack of clear legislative or enforcement criteria, which is confirmed by negative judicial practice.

It is worth noting that various “indulgences” of the joint liability of a customs representative are provided for by the customs legislation of the EAEU member states. For example, paragraph 2 of Article 313 of the Law of January 10, 2014 No. 129-Z “On Customs Regulation in the Republic of Belarus” allows the customs representative not to fulfill the joint obligation to pay customs duties after the liquidation (termination of activities) of the declarant. Paragraph 5 of Article 494 of the Law dated December 26, 2017 No. 123-VI “On customs regulation in the Republic of Kazakhstan” stipulates that the joint obligation of the customs representative is not fulfilled, in particular, in cases of revision of the customs value or code of goods previously confirmed by a customs official, as well as in the case of using knowingly false information or forged documents received from the declarant, on the basis of which the customs declaration was submitted, the fact of receipt of which, as well as the absence of guilt of the customs representative, is confirmed by a court decision.

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