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Valuation Rules of the Customs Union

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The establishment of the customs union between Russia, Belarus and Kazakhstan has substantially complicated the system of customs valuation. According to Clause 1, Article 64 of the customs code of that union, the customs value of goods imported to the customs union's customs territory is determined in accordance with an international agreement concluded between the member states governing the determination of the customs value of goods transferred across the customs border. In this case, this international agreement stipulating the methodology for determining the customs value of imported goods is the customs valuation agreement for goods transferred across the customs union's customs border, dated Jan. 25, 2008. The code governs only procedural issues in determining customs value; in other words, it governs in which cases and which circumstances the customs value of imported goods may be determined, and by whom. Decision No. 376 of the customs union's commission, dated Sept. 20, specifies the rules for declaring, controlling and adjusting the customs value of goods. Article 112 of the federal law on customs regulation in the Russian Federation clarifies cases when customs authorities may make decisions to adjust customs value without conducting an additional audit.

For example, taking Clause 4, Article 64 of the code into consideration, the methodology of customs value determination stipulated by the above agreement may be applied only to commercial deliveries of goods. The rules on determining the customs value of goods imported by individuals for personal purposes are specified in Article 361 of the code.

According to Clause 2, Article 64 of the code, the customs value of goods imported to the customs union's customs territory is determined if the goods have actually crossed the customs union's customs border. Such goods are subjected to a customs procedure, excluding

the customs transit procedure, for the first time after crossing the border. In the event of a change in customs procedure, the customs value of goods means the customs value of goods determined on the day when the customs authority accepted the customs declaration when the goods were first placed under the customs procedure after crossing the customs border. According to this provision in the code, any exceptions to the above rule may only be stipulated by the customs legislation of the customs union, the contents of which are specified in Clause 1, Article 3 of the code, in other words, the code itself, international agreements of the member states of the customs union and decisions of the customs union's commission. As in the Russian Customs Code, the exclusions include the determination of the customs value of illegally imported goods (Clause 6 of Article 81, Clause 4 of Article 161, Clause 4 of Article 166 and Clause 4 of Article 172 of the code); when, after storage at a customs warehouse, goods are placed under the customs procedure of release for domestic consumption (Article 238 of the code); and in respect of waste products created as a result of processing foreign-made goods (Clause 2 of Article 246 and Clause 2 of Article 271 of the code). The possibility, as stipulated in Clause 2, Article 214 of the Russian Customs Code, for decreasing the customs value of temporarily imported goods in connection with normal wear and tear or natural loss in the normal conditions of transportation, storage and use, as well as in connection with the deterioration of goods due to a failure or a force majeure event is not, however, reflected in either the code or other regulations. At the same time, it is worth noting that, according to the last sentence of Clause 2, Article 1 of the customs valuation agreement for goods transferred across the customs union's customs border, dated Jan. 25, 2008, such exceptions may also be stipulated by the legislation of a member state of the customs union.

We should mention that the provisions of Clause 5, Article 64 of the code represent a procedural novelty in determining the customs value of imported goods. According to this rule, if, when clearing goods through customs, it is impossible to determine their precise customs value because documents supporting accurate data required for its calculation are lacking, for example, royalties calculated as a specific percentage of sales, renting or other use of the imported goods, determining the exact customs value of the goods may be postponed. In this case, it is acceptable to declare the customs value on the basis of documents and data available to the applicant, and to calculate and pay customs duties and taxes on the basis of the declared customs value. A decision of the customs union's commission should be adopted stipulating in which cases this rule may be used; the procedure for declaring and controlling the customs value; and the specifics of calculating and paying customs duties and taxes in such cases. As of the date of preparing this commentary, no such decision has been published. Moreover, according to Clause 3, Article 151 of the federal law on customs regulation in the Russian Federation, if the determination of a precise customs value was postponed, no penalties are to be calculated or paid.

If we look at the changes that have affected the methodology of determining customs value, we should mention, first and foremost, that unlike Article 12 of the Russian law on customs tariffs, Clause 3, Article 1 of the customs valuation agreement for goods transferred across the customs union's customs border, dated Jan. 25, 2008, contains an express reference to the use of the principles and provisions pertaining to the valuation of goods for customs purposes stipulated in the 1994 General Agreement on Tariffs and Trade of the World Trade Organization, of which Russia is not yet a member. This makes it possible to specify the international standards in even more detail not only in Russia's legislative regulation but also its law enforcement practice, making them both closer to what is accepted internationally.

Bringing the Russian rules of customs valuation in line with the agreement on the implementation of Article 7 of GATT/WTO, including notes to its articles, has become the theme line of virtually all the amendments introduced to the rules on the determination of the customs value of imported goods. For this purpose, the customs valuation agreement for goods transferred across the customs union's customs border, dated Jan. 25, 2008, clarifies, in particular, the wording of the definition of a "transaction value"; the interrelationship between parties to a transaction and the influence of that on the transaction value; the inclusion of intermediaries' remuneration, insurance expenses and royalties in the customs value and other issues.

At the same time, it is impossible to agree with all the amendments introduced. For example, according to Clause 1, Article 4 of the above agreement, it is possible to take the transaction value as a basis for determining the customs value of imported goods when simply some and not all of the criteria listed in this rule are met. This means that the observance of only one of the criteria suffices for Method 1 to apply (for example, there are no restrictions in respect of the buyer's rights to use and dispose of the goods), while other criteria may be disregarded. This approach seems to be at odds not only with the spirit but also with the letter of GATT/WTO.

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