

## RETROACTIVE ADJUSTMENT OF CUSTOMS VALUE IN THE EXPORT SUPPLIES OF NATURAL GAS

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*Legal regulation of state control in the energy sector is rightly referred to the main elements of legal regulation in the energy sector which forms the energy order, and, therefore, the tasks of the science of energy law include conducting research on the state control system in the energy sector [1]. One of the main activities of the customs authorities is customs control. Based on the results of inspections in 2018, the customs authorities additionally charged customs payments (customs duties, penalties, fines) for a total amount of 11.9 billion rubles, 4,645 administrative cases and 203 criminal cases were initiated [2].*

*Control of customs value (CV) is one of the most common types of customs control. In the exercise of this type of customs control, the customs authority checks the correctness of the chosen method for determining the CV, the correctness of calculation by the declarant of the CV, the presence of documentary evidence of information on the customs value specified in the customs declaration.*

*As a result of verification of correctness of declaration of the CV by the declarant, disputes often arise between the customs authority and the customs applicant regarding the correct determination of the customs value. Therefore, following the results of 2018, the customs authorities performed about 168 thousand adjustments to the CV of the goods [3]. As a rule, the result of adjustment of the customs value is additional charge of the amount of the customs duty payable to the budget as well as a penalty.*

*This article examines the legal grounds and conditions for adjustment of the customs value after release of the goods for export of natural gas, considers the procedure for the declarant and the customs authority in the adjustment of the customs value, makes proposals for improvement of the existing mechanism for the CV adjustment.*

**Keywords:** energy law, energy law order, state regulation in the energy sector, state control in the energy sector, legal regulation for export of gas.

### **Calculation of Customs Value and Payment of Customs Duty in the Export Supplies of Natural Gas**

In the export supply of natural gas, with a view to releasing the goods by the customs authority, when submitting the customs declaration, the declarant shall calculate the customs value of the exported goods and calculate, based on the

declared customs value, and pay the customs duty to the budget. The customs duty is a mandatory payment levied by the customs authorities in connection with the goods crossing the customs border of the Eurasian Economic Union (EAEU). The customs duty on exported natural gas is currently ad valorem, that is, it is calculated

as a percentage of the declared customs value and amounts to 30% of the customs value of the goods [4].

The economic basis of the customs duty is the customs value, the determination of which leads to a significant number of disputes [5]. At the stage of filing the customs declaration, the customs authority checks correctness of calculation of the customs value as well as availability of the necessary funds of the declarant to pay the customs duty. Based on the results of the check, the customs authority adopts a decision on release of the goods. Such decision is made by the customs authority subject to compliance by the declarant with the conditions of the declared customs procedure, the correct calculation of the customs duty, and also payment of the customs duty to the budget. If the customs authority decides to ban the release of the goods, the declarant may not dispose of the goods in accordance with the declared customs procedure until the deficiencies identified by the customs authority are eliminated.

In the export supply of natural gas, temporary periodic declarations are used. General rules of this declaration procedure are provided for in Article 102 of the Federal Law *On Customs Regulation*. Peculiarities of use of this procedure in relation to natural gas are set forth in Article 204 of the Federal Law *On Customs Declaration*.

In case of temporary periodic declaring, the declarant shall submit a temporary customs declaration (TCD) prior to the delivery and calculate and pay the customs duty in the amount of not less than 50% based on tentative information on the expected delivery of the goods declared in TCD on or before the 20<sup>th</sup> day of the month preceding the month of delivery.

Based on the results of the delivery, on or before the 20<sup>th</sup> day of the month following the month of delivery, the declarant shall submit a full customs declaration (FCD) and provide the final information in it based on the actual delivery of the goods. The declarant shall also pay the remaining amount of the customs duty.

Thus, in the export delivery of natural gas, the customs authority shall check correctness of the

application and calculation of the customs duty both in the filing of both the TCD and the FCD.

The customs value, in the filing of both the TCD and the FCD, shall be calculated by the declarant based on the civil relations with the buyer of the goods existing at the time of customs declaration. In the vast majority of cases, in the declaration of natural gas supplies, the transaction value in relation to declared goods is used as of the time of declaration to determine the customs value of the goods.

At the same time, for various reasons, the transaction value may change after delivery, export of the goods from the territory of the EAEU and, accordingly, after release of the goods by the customs authority. In this case, the customs value declared in the declaration is subject to adjustment. Herewith, adjustment of the customs value after release of the goods is a decision of the customs authority to amend the customs declaration. The grounds, and the terms and conditions of such an adjustment should be considered separately.

#### ***The Declarant's Right to Adjust the Customs Value after Release of Goods in the Export of Natural Gas***

The customs value is adjusted by the declarant when the customs value of the exported goods specified in the customs declaration no longer corresponds to the value as of the time when the customs declaration was submitted.

The declarant's right to adjust the customs value after release of the goods is set forth in Article 112 of the CC of the EAEU. This norm provides that the customs value after release of the goods shall be adjusted by decision of the customs authority or with the permission of the customs authority and only in cases stipulated by the code and/or determined by the Commission.

It should be concluded from this norm that:

- the customs law essentially allows for the declarant's right to adjust the customs value after release of the goods;

- to exercise this right, the declarant shall contact the customs authority indicating the reasons that served as the basis for adjustment of the customs value, and

- the customs authority shall make a decision on adjustment of the customs value, which is an administrative action of the public authority on adjustment of the customs value.

Therefore, the legal consequences with regard to the adjustment of the customs value arise only after adoption by the customs authority of the decision on the adjustment of the customs value.

It should be noted that in the case of a negative decision on the adjustment of the customs value, the declarant has the right to file a statement declaring the relevant refusal of the customs authority to adjust the customs value illegal according to the rules of Chapter 24 of the Arbitration Procedure Code of the Russian Federation. The decision of the customs authority to refuse to adjust the customs value will be considered by the court as a non-regulatory legal act. The declarant will need to prove that the appealed decision of the customs authority, firstly, violates the rights and legitimate interests of the declarant and, secondly, conflicts with the law and other regulatory legal acts.

In connection with the exercise of the declarant's right to adjust the customs value after release of the goods in practice there were many disputes due to refusal of the customs authorities to amend the customs declaration [6]. First of all, the disputes arose when amendments to the declaration led to a decrease in the customs value and, as a result, to return of excessively paid customs duty from the budget.

As a result of the consideration of a series of cases, a position has been developed in judicial practice, according to which the declarant recognizes the right to adjust the customs value of the goods after release of the goods [7]. Moreover, in practice, an approach has been formed, according to which the burden of proving the unreasonableness of amendments to the customs value rests with the customs authority [8].

Considering the above, it should be concluded that the declarant has the right to adjust the customs value after release of the goods. Moreover, it is necessary to dwell in more detail on the terms and conditions of and grounds for such amendments.

***Grounds for, and Terms and Conditions of the Exercise of the Declarant's Right to Adjust the Customs Value of the Goods after Release of the Goods in the Export of Natural Gas***

To analyze the grounds for, and the terms and conditions of amendments to the customs

declaration, one should refer to Decision No. 289 of the Board of the Eurasian Economic Commission dated December 10, 2013 [9]. This normative document is fundamental in the matter of amendments and/or additions to the information specified in the customs declaration since it establishes:

- entities that may initiate amendments/additions to the customs declaration. Such entities are the declarant and the customs authority.

- cases of amendments to the customs declaration on the initiative of the declarant/customs authority.

- the procedure for consideration of applications for amendments/additions to the customs declaration.

- the grounds for refusal to introduce amendments/additions to the customs declaration.

To adjust the customs value, the declarant must send a request, a duly filled in, revised goods declaration (RGD) as well as documents confirming the need to amend the customs declaration to the customs authority.

It should be noted that the above request and relevant documents must be received by the customs authority within 3 years from the moment the goods come under customs control after release of the goods. When the export procedure is declared, this period shall be counted from the moment of the actual export of the goods from the customs territory of the EAEU.

After the request and the relevant documents are received, within 30 days, the customs authority shall consider the received documents and, based on the results of their consideration, make a decision on introduction of amendments to the customs declaration or on refusal to make these amendments. In fact, the customs authority makes a decision on the presence or absence of the grounds for amendments to the customs declaration.

In the export supply of natural gas, the declarant usually uses the first method to determine the customs value of goods, that is, the method of the transaction cost. The customs value in relation to the goods exported from the Russian Federation is currently determined in accordance with Decree No. 191 of the Government of the Russian Federation dated March 6, 2012, which

approved the Rules for Determination of the Customs Value of the Goods Exported from the Russian Federation. According to these Rules, the customs value of the goods being assessed (exported) should be, as much as possible, determined on the basis of the value of the transaction with these goods. Therefore, in the changes in the value of the transaction, the declarant shall submit to the customs authority documents confirming the change in the value of the transaction.

Export supplies of natural gas are carried out on the basis of foreign trade contracts concluded with foreign buyers. The customs value of the delivery of goods is declared by the declarant based on the terms and conditions of the foreign trade contract being effective at the time of delivery. To confirm the declared customs value, in addition to the foreign trade contract, the declarant shall also submit documents accompanying delivery of the goods, including the constituent documents of the person transporting the goods, certificates of delivery and acceptance of the goods, payment documents (invoice for payment for the goods, debit and/or credit notes), etc. [10] To introduce amendments to the customs declaration, the declarant shall submit to the customs authority documents confirming changes in the terms and conditions of the contract on determination of the transaction value between the seller and the buyer in relation to the delivery specified in the declaration.

In particular, such documents include the decision of the international commercial arbitration, in accordance with which the transaction value is reviewed in relation to the delivery periods preceding the arbitration award. The parties may also conclude an addendum to the contract with extension of the new terms and conditions on the transaction price to the delivery periods preceding conclusion of this addendum.

Since in the above examples the transaction price is revised by the parties to the transaction with respect to already completed deliveries, we can define such a price revision as retroactive price revision. Therefore, in this case, retroactive adjustment of the customs value will also take place in customs relations.

The above examples of cases of retroactive adjustment of the customs value show that a change

in the value of the transaction occurs as a result of normal business activities by the parties to such a transaction.

In this regard, the approach of the customs authorities, according to which return of the customs duty is not allowed only on the basis that the customs value changed after delivery and release of the goods, is unreasonable. The arguments of the customs authorities for refusing to adjust the customs value due to the fact that the reasons for adjustment of the customs value did not exist at the time of release of the goods, for example, due to the fact that the addendum changing the customs value was signed by the parties and came into force after delivery and release of the goods, shall also be deemed invalid. The occurred changes in the terms and conditions of the transaction related to the value of such a transaction should accordingly entail changes in the declared customs value if the terms and conditions of the transaction provide for a retroactive recalculation of the value of the completed deliveries. In case of disagreement with the customs value declared by the declarant in the RGD, the customs authority shall provide valid evidence refuting the declarant's information.

Application of sanctions by the customs authorities in the form of penalties in the event of an increase in the customs duty as a result of a review of the transaction price after delivery of the goods shall be equally unreasonable. The change in price in this case occurs after delivery of the goods and, therefore, the change in the declarant's obligation to pay a greater customs duty to the budget cannot be associated with the moment of submission of the goods declaration.

Therefore, the current energy laws provide the declarant with the right to retroactive adjustment of the customs value in the export supplies of natural gas. In this case, the declarant has the right to apply to the customs authority with the request and documents justifying the change in the customs value, and the customs authority shall make a decision based on the results of consideration of the documents submitted by the declarant. In the event the documents submitted by the declarant confirm the change in the transaction value with respect to the already completed delivery, the customs authority shall retroactively adjust the customs value declared in the customs

declaration and return the excessively paid customs duty or accept additional payment of the customs duty from the declarant.

Given the foregoing, retroactive adjustment of the customs value should be defined as

a change in the customs value up or down made after delivery and release of the goods, which results in a change in the declarant's obligation to pay the customs duty in relation to the completed delivery of the goods. ■

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