

# CHALLENGING ISSUES OF PENALTY ACCRUAL IN NATURAL GAS EXPORT

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*The legal regulation of the grounds and the procedure for penalty accrual by customs authorities in connection with the export of energy resources produces a significant impact on the terms and conditions of such supplies. This issue is especially relevant for the export supplies of natural gas. Natural gas export agreements contain provisions regulating the procedure for the revision of the natural gas price. The price revision period usually covers the supplies that have already taken place. In cases when the supply price increases following a retroactive revision by the parties to an agreement, the declarant pays an additional customs duty to the federal budget in view of the revision. In such situations, the customs authority accrues a penalty on the amount of the additional payment of the customs duty for the entire period starting from the customs declaration filing date to the penalty accrual notification issue date. This article reviews the legal grounds for the penalty accrual and brings forward proposals aimed at improving the legal regulation of the penalty accrual procedure, terms and conditions.*

**Keywords:** energy law, legal regulation of gas export, customs regulation.

**B**uilding of a balanced legal regulation of the penalty accrual procedure in the context of export of energy resources in general, and natural gas in particular, is an important element of compliance with the fundamental principle of energy law on ensuring a balance of interests of parties to public law relations that develop between export suppliers of energy resources and customs authorities.

In this regard, one should agree with V.V. Romanova that the fundamental energy law principles can be implemented only if there is adequate legal support and the possibility of the effective protection of violated rights and property interests of subjects of private and public law relations in the energy industry [1].

The key step in the customs clearance of natural gas export is the payment of a customs duty.

For the goods to be released by the customs authority, a declarant must pay the customs duty in the established amount and within the deadlines provided for by the laws on customs.

In accordance with Art. 72 of the Federal Law On the Customs Regulation, penalties are cash that a declarant has to pay to the budget in case of non-fulfillment or improper fulfillment of the obligation to make customs payments within the deadlines provided for by the laws on customs.

The cases when the customs authority makes a decision on the classification of goods after the release of the goods resulting in the increase in the customs duty to be paid may serve as an example of a situation where the grounds for penalty accrual may arise (Part 2 Art. 15 of the Federal Law On the Customs Regulation).

Speaking of natural gas export, the most common situation of penalty accrual by the customs authority is the retroactive customs value adjustment. The corresponding adjustment is a consequence of an arrangement reached by the parties to a foreign trade agreement for the supply of natural gas on the revision of the natural gas price in respect of the supplies that have already taken place. In this case, the customs authorities accrue a penalty on the amount of increase in the customs duty.

Due to the fact that natural gas supplies are carried out on a monthly and continuous basis, revision of the natural gas price under one agreement entails the need to amend a lot of declarations filed within the framework of the customs declaring of export of natural gas.

These features result in a significant number of disputes between a declarant and

the customs authority as to the presence or absence of penalty accrual grounds in respect of each individual supply.

The legal nature of penalties is of substantial significance for the evaluation of the penalty accrual grounds.

### **The legal nature of penalties**

An analysis of the applicable customs laws and the judicial practice shows that penalties are defined in the relations arising during the customs clearance of export of natural gas not as a punishment or a fine but as a remedial measure aimed at compensating for budget losses resulting from the declarant's untimely fulfillment of the obligation to make customs payments.

In accordance with Part 9 Article 72 of the Federal Law On the Customs Regulation, it is not allowed to reduce the penalty amount to be paid. This wording is consistent with the understanding of the legal nature of penalties as a compensatory measure.

The degree of guilt and the social danger of the act resulting in the failure to make customs payments to the budget are of no legal importance in the determination of the amount of penalties subject to collection, which could indicate that penalties are classified as a type of sanction.

There has also now been established a position in the judicial practice where penalties are understood as a remedial measure of a compensatory nature. The judicial practice has used an analogy with the provisions of tax laws to disclose the legal nature of penalties accrued for the untimely making of customs payments.

The penalty accrual ground in both tax and customs law is the untimely

tax / customs duty payment by a taxpayer/ declarant (Clause 1 Article 8 of the Tax Code of the Russian Federation, Subclause 33 Clause 1 Article 2 of the Customs Code of the EAEU).

There has been established an approach in the judicial practice on the possibility of applying the legal position worded in Clause 5 of Ruling of the Constitutional Court of the Russian Federation No. 20-П of December 17, 1996 [2] to the determination of the legal nature of penalties accrued for the untimely making of customs payments.

The essence of the abovementioned legal position of the Constitutional Court of the Russian Federation is that **penalties are a compensation for losses of the state treasury incurred as a result of non-receipt of tax amounts in due time in case of a tax payment delay.**

The position that the obligation to pay penalties is supplementary to the obligation to make customs payments and arises in cases where a failure to make customs payments has resulted in budget losses, was also reflected in Order of the Supreme Court of the Russian Federation No. 305-ES19-7439 of July 25, 2019.[3]

The mentioned legal positions of the Constitutional Court of the Russian Federation and the Supreme Court of the Russian Federation have become the basis for the establishment of massive judicial practice that views penalties as a payment aimed at compensating for budget losses resulting from the untimely making of customs payments, and not as a sanction [4].

The determination of the legal nature of penalties is of great practical importance. Due to the recognition of the compensatory

nature of penalties, it is necessary to determine the presence or absence of damage to the budget of the Russian Federation in order to establish the legality of the penalty accrual notification made by the customs authority.

### **No damage to the budget as a ground for non-accrual of penalties**

One should analyze the provisions of Ruling of the Plenum of the Supreme Court of the Russian Federation No. 49 [5] when searching for an answer to the question about the presence or absence of damage to the budget in view of the untimely making of customs payments by a declarant.

In Clause 29 of Ruling of the Plenum of the Supreme Court of the Russian Federation No. 49 the Supreme Court of the Russian Federation has worded a position that the customs authority needs to take into account whether there are any advance payments, overpaid or collected customs payments of a declarant to the federal budget in the determination of the presence or absence of penalty accrual grounds.

The availability of advance payments, overpaid or excessively collected customs payments in the budget exceeding the amount of customs payments not made in due time by the declarant, are an independent ground for the non-accrual of penalties by the customs authority.

This conclusion is fully consistent with the understanding of the legal nature of penalties as a remedial measure as there is no damage to the budgetary system of the Russian Federation when there are advance payments, overpaid or excessively collected customs payments in the budget.

The legal position set out in Clause 29 of the Ruling of the Plenum of the Supreme Court of the Russian Federation could become an additional ground for the establishment of a uniform law enforcement practice aimed at reducing the number of disputes between the customs authority and declarants on the penalty accrual issues.

At the same time, the existing law enforcement practice shows that at the moment the **customs authorities have no developed mechanism for the accounting of advance and/or overpaid customs payments in order to make a decision on the presence or absence of penalty accrual grounds.**

With regard to the export of natural gas, an adjustment of the customs declaration with an additional customs duty payment in respect of a supply that has already taken place leads to the penalty accrual and the notification issue by the customs authority **in all cases.**

#### **Proposals for the improvement of the legal regulation of the procedure and terms and conditions of penalty accrual**

In view of the establishment of the uniform approach to the understanding of the legal nature of penalties in the judicial practice, it makes sense to introduce appropriate supplements to Part 19 Article 72 of the Federal Law On the Customs Regulation, which determines grounds when penalties are not subject to accrual. It should be established that penalties are not subject to accrual *“if there are any advance payments, overpaid or excessively collected customs payments of a declarant in the federal budget that exceed the amount of additional accruals made to the declarant”*.

In addition, it is advisable to develop a mechanism for the accounting of advance, overpaid or excessively collected customs payments by customs authorities in order to prevent customs authorities from issuing notifications requiring payment of penalties in the absence of legal grounds.

The improvement of the legal regulation of the use of the system of Uniform Personal Accounts by the customs authorities could solve this problem.

Since August 2018, the Federal Customs Service of Russia has been conducting an experiment, where customs duties and taxes have been paid through the payer’s uniform personal account (UPA), opened at the level of the Federal Customs Service of Russia in accordance with Order of the Federal Customs Service of Russia No. 1329 of August 24, 2018 On Testing the Administration of the Uniform Resource of Payers’ Personal Accounts Opened at the Level of the Federal Customs Service of Russia Using the Personal Accounts — UPA Software Package.

The UPA reflects in due sequence all credit and debit operations in respect of customs payment made by a declarant.

The Federal Customs Service of Russia is able to determine the real-time status of settlements between a declarant and the budget (Clauses 5.1.2., 5.28 of the Regulation on the Federal Customs Service approved by Resolution of the Government of the Russian Federation No. 636 of April 23, 2021) being the chief administrator of the federal budget revenues in terms of customs payments (Federal Law No. 385-FZ of December 8, 2020 On the Federal Budget for 2021 and the Target Period of 2022 and 2023), exercising control over the correctness of calculation and time-

liness of customs payments and control over the refund of overpaid customs and advance payments.

As part of the UPA administration, the customs authority making a decision on the presence or absence of penalty accrual grounds could take into account the cash balances credited by a declarant to the UPA or refunded by the customs authority to a

declarant in the event of illegal collection of customs payments.

If a declarant's cash balances on the UPA exceed the amount of the customs duty additionally paid by the declarant, the customs authority could make an independent decision not to accrue penalties in the absence of damage to the budget of the Russian Federation in this case. ■

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