



Customs Alert

Kazakhstan Supreme Court Regulatory Resolution No. 7 dated 29 November 2019 On Certain Issues of the Application of Customs Law by Courts

Important customs law changes that may impact your business

On 19 December 2019, the "Kazhstanskaya Pravda" newspaper published Kazakhstan Supreme Court ("Supreme Court") Regulatory Resolution No. 7 dated 29 November 2019.

We would like to comment on several points of the resolution, which, in our opinion, are of particular interest.

1. Application of Eurasian Economic Union ("EAEU") international treaties regulating customs relations

The Supreme Court noted that customs regulation in Kazakhstan is carried out in accordance with the Constitution, international treaties, which according to point 1 of article 4 of the Constitution, are a part of current law, and Kazakhstan law governing customs regulation.

The Kazakhstan Customs Code, as an act of national legislature, applies to legal relations associated with the import of goods into Kazakhstan and their export from the same as part of the single customs territory of the EAEU.

The Supreme Court instructed the courts to remember that decisions of the permanent EAEU regulatory body – the Eurasian Economic Commission ("Commission"), are subject to article 4 of the Constitution, and as such take priority over domestic law.

Commission decision that infringe on constitutional rights and freedoms do not have priority over Kazakhstan legal acts.

When resolving disputes related to the application of EAEU law, courts should take into account EAEU court acts issued in accordance with point 99 of the Statute of EAEU Courts (Appendix No. 2 to the EAEU Treaty of 29 May 2014).

2. On the burden of proof

The Supreme Court drew court attention to the fact that in accordance with part two of article 72 of the Kazakhstan Civil Procedural Code, the burden of proof in cases referred to in chapter 29 of the same is assigned to the state authorities, local self-government, public associations, organisations, officials and civil servants whose acts, actions (inaction) are being appealed.

In this regard, an assessment of a declarant or customs representative's compliance with customs law demands the presumption that information provided by them is liable, and the burden of refuting it lies with the state revenue authorities.

Any ambiguities and unsettled issues in EAEU and/or Kazakhstan customs law disputes are resolved in favour of declarants or customs representatives.

3. Application of World Customs Organisations recommendations and clarifications

The Supreme Court noted that if customs regulations lack provisions on specific issues for valuing goods for customs purposes, or are incomplete or are ambiguous, the courts can also consider World Customs Organisation advice, information and recommendations adopted in accordance with point 2 of article 18 of the Agreement on the Application of article VII of GATT 1994.

The courts were told that they may consider clarifications to the Integrated Commodity Nomenclature of Foreign Economic Activity, as well as World Customs Organisation recommendations and explanations on the same, issued in accordance with article 7 of the International Convention on the Harmonised Commodity Description and Coding System of 14 June 1983, to review disputes on the classification of goods.

Previously, the courts had been critical of World Customs Organisation documents, as they had been of an advisory and non-binding nature.

4. Approaches to customs value issues

It was pointed out to the courts that a number of factors had to be identified correctly to determine the customs value of imported goods, such as:

- indications of inaccuracies in customs value;
- justification for a decision not to allow a declarant to use the first method for determining customs value;
- the application of a specific customs value method with justification of the inadmissibility of applying all previous methods in their correct sequence;
- justification for the use of the reserve method.

The Supreme Court pointed out that to assess the justification for applying the first method for determining the customs value of imported goods, courts should follow articles 38, 39 and 40 of the EAEU Customs Code, bearing in mind that the value of a transaction with imported goods cannot be confirmed, specifically identified and reliable, if:

- the declarant did not provide proof of the transaction in any acceptable form;
- price information is not related to the quantitative characteristics of the product;
- there is no information about the terms of delivery and payment for the goods;
- there is evidence of the unreliability of the price;
- there is no other transaction value information in the sense of the EAEU Customs Code standards.

At the same time, it was pointed out that the customs authorities' identification of specific issues with the format of documents submitted by the declarant (contracts, specifications, invoices for payment for imported goods and others) that do not affect significant transaction terms and do not refute that a transaction has been concluded under specific conditions, should not mean that the declarant's use of the first method is unlawful.

The Supreme Court also noted that a declarant's failure to submit additional documents (information) justifying the declared customs value of goods does not entail a decision by the customs authorities to amend (add to) the information in a customs declaration, if the declarant faced objective obstacles to providing the

requested documents (information) and appropriate explanations were given to the customs authorities.

Accordingly, this approach will change the situation with the submission of documents when objective circumstances exist that do not allow the declarant to submit specific documents.

5. Product classification issues

The Supreme Court made the next an important point that would be crucial for legal disputes around the classification of goods in accordance with the Integrated Commodity Nomenclature of Foreign Economic Activity.

It also mentioned that under subpoint 1) of point 3 of article 40 of the Customs Code, a classification of goods is binding, meaning a decision on the same and included in a notice of audit results and/or notice of the elimination of violations, should be appealed.

Thus, when appealing customs authority rulings from on-site and off-site customs audits on the classification of goods, the a declarant may appeal not only the notice of audit results or notice of the elimination of violations, but also customs authority rulings on the classification of goods made during customs audits.

6. Judicial recourse

The Supreme Court pointed out that an act of customs audit (on-site and off-site) that was the basis of notice of audit results or notice of the elimination of violations, may not be appealed in court. The legality of any such notice is verified taking into account the conclusions set out in an act of customs audit.

An act of customs audit may be appealed if a declarant does not agree with its conclusions that did not bring about notice, but that affect its rights and obligations. The appeal of an act of customs audit is treated as an appeal against the actions of customs officials.

How Deloitte can help

The Deloitte team can provide you with advice on customs law.

We will be pleased to discuss any questions you may have related to the issues highlighted in this Alert. The contact details of our key tax and legal team members are provided below.

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