

Including dividends in the customs value of goods: New Risks for importers



Russian version

In this newsletter we would like to draw your attention to the Russian customs authorities' approach to including dividends obtained from profits from the activities involved in the sale of goods in circulation in the Eurasian Economic Union ("**EaEU**") in the customs value of goods. The current court practice of Russian courts supports this approach by the customs authorities.

Court practice in 2023 was not unanimous in its approach, but it can be said with confidence that for importers that have paid out dividends **in the past three years**, the risks that dividends will be included in the structure of the customs value of imported goods have grown substantially.

Customs audits may result in importers being charged additional customs duties, penalties, and administrative fines for submitting inaccurate information on the customs value of goods. In addition, if these additional charges exceed two million roubles, the importer's employees may face criminal liability for failing to comply with customs legislation.

Background

For a long time judicial practice took a fairly uniform approach, under which it was not permissible to include dividends in the customs value of goods.

Let us give an example^[1]:

- The seller of goods is the sole shareholder of the purchaser and makes the decision to distribute the net profits of the purchasing company.

- Position of the customs authorities: the dividends paid out by the company are linked to the goods being imported and should be added to the price actually paid or payable for these goods.

- Position of the courts: the custom authorities' position is unfounded. The concept of "transaction price" has a special nature and relates only to these payments that constitute consideration for the goods. This concept is not equivalent to the aggregate of all monetary obligations.

Current approach in court practice

The opposite approach has been seen recently in many court decisions on disputes between importers and the customs authority. In one case^[2] the Russian Supreme Court indicated that dividends remitted by the purchaser to a seller should be included in the customs value of goods if the dividends are linked to the goods being imported, which can be confirmed by the following circumstances:

- in essence these payments ensure that the seller receives part of the income (revenues) due to it from the sale of the imported goods, and they perform this function in relations between the parties to the foreign-trade contract;

- goods are imported on the basis of transactions between participants in a single corporate group, and the income (revenues) of the Russian company - purchaser are primarily the result of the sale of the imported goods;

- the decision to pay dividends is exclusively at the discretion of the foreign supplier and/or participants in the corporate group that are related to it (in the absence of statutory restrictions), which creates a substantial risk of manipulation of the elements of the cost of goods that shape its customs value;

- the declarant has not proven that the price actually paid or payable for the goods was established on an arm's length basis, unaffected by the relations between the parties;

- dividends do not prevent the use of the first method for determining customs value, and should be considered as a component part, being an additional surcharge on the price of the goods.

Similar arguments are made in another court order of the Russian Supreme Court^[3]:

- The dividends received by a participant (shareholder) in a company as a result of the distribution of net profits are not included in the customs value of goods on import, since by their economic nature they constitute income from investments made by the participant (shareholder) in the creation or acquisition of an enterprise (so-called “direct investments”) and are not related to the import of goods *per se*.

- However, payments that are called dividends but are only dividends *prima facie* are recognised as being related to the imported goods and are included in their customs value on the basis of Sub-Clause 3 of Clause 1 of Article 40 of the EAEU Customs Code, if these payments essentially ensure that the seller receives part of the income (revenue) due to it from the sale of the imported goods and perform this function in relations between the parties to the foreign-trade contract.

- Thus, if the founders of a company make the decision to pay income (net profits) generated in connection with the sale of goods imported under foreign-trade contracts concluded with suppliers that are simultaneously the founders (participants) of the Russian company, and the declarant has not provided proof confirming that the price of the transaction with the imported goods corresponds to their actual value, then this income (net profit) may be included in the customs value of the imported goods.

Based on these interpretations by the Supreme Court, in 2023 the customs authorities increased the number of audits of the customs value of goods, citing the need to include dividends in the customs value of goods.

Recommendations

- We recommend performing an internal review and risk assessment. A legal position prepared in advance will allow you to make thorough advance preparations for customs audits, which as a rule are performed on very tight deadlines. A competent assessment of risks will also make it possible to develop the proper approach to setting the customs value of goods for future shipments.

- During the customs audit, we recommend taking a proactive stance based on a detailed exposition of arguments and evidence in response to questions from the customs authorities.

- If goods are purchased from foreign participants or related-party suppliers, we recommend that you collect the necessary pricing documents from your foreign counterparties in advance.

- If a court dispute arises, we recommend a proactive approach through the submission to the court of the largest possible quantity of evidence to justify the position that there is no link between the dividends and the value goods being imported.

[1]. Judgement No. 307-ES21-2873 of the Russian Supreme Court dated 07.04.2021.

[2]. Judgment No. 305-ES22-11464 of the Russian Supreme Court dated 01.12.2022

[3]. Judgment No. 310-ES22-9639 of the Russian Supreme Court dated 01.12.2022.

Kind regards,

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