

ANALYSIS OF CURRENT PROBLEMS ON CUSTOMS VALUATION IN UKRAINE AND POSSIBLE MEASURES COMBAT FRAUD BY CUSTOMS VALUATION IN THE CONTEXT OF GATT AND WTO AGREEMENT ON CUSTOMS VALUATION

The **objectives** of this research is to analyze the main problematic issues arising in the field of customs valuation and assumed negative effects of their insufficiently proper solution as well as modern effective methods of combating fraudulent declaration of customs value of imported goods.

Economic and revenue collecting problems caused by the under – invoicing of the value of goods have been identified by the applied general scientific theoretical **methods** of research, such as analysis, generalization and classification. Conditions for the implementing of new methods of customs value control of imported goods, elaborated on the basis of the latest WCO strategy on customs development, are considered. Successful cases and practices of other countries on overcoming and stopping such fraudulent actions of importers and the possibility of introducing their individual elements into the practical activities of the customs authorities of Ukraine have been studied. Factors that complicate the process of implementing the recommendations of international organizations as well as practice of other countries have been identified.

Results. The most effective ways of problem solving have been defined, among them implementing of international provisions concerning customs valuation into the national law of Ukraine. The needs of elaboration of a national customs valuation database as an effective tool of the risk management system have been evidenced.

Conclusions. It is proposed to implement effective elements of more workable and efficient methods of targeted customs value control in the context of GATT and Customs Valuation WTO Agreements which should be used in Ukraine to simplify customs formalities for legal trade, as well as to prevent significant under-invoicing of imported goods and prevent misdeclaration. Priorities have been defined to enhance the efficiency of customs value control measures.

Key words: under-invoicing, financial fraud combatting, national customs valuation database, implementing provisions of WTO Customs Valuation Agreement.

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1. Introduction

Combating customs and financial fraud, money laundering, tax evasion when importing or exporting goods is an actual problem world-wide. Both developed and developing countries face numerous cases of fraud that destabilize the economic situation, national and global markets and reduce tax revenues, lead to significant budget losses, and significantly impede legitimate trade.

It's not disputable that Customs plays the essential role both in combating fraud and cross-border illicit trade and in the protection of national economies. Customs monitors all international cross-border movements and continues to ensure that all duties are paid. In the recent years it's getting more difficult for customs services to strike a balance between assisting the legal trade, trade procedures facilitating and carrying out customs controls.

Among the main critical areas of Customs enforcement are revenue risks, and commercial fraud activities such as under-valuation, misuse of origin and preferential duties, misclassification and drawback fraud (WCO, 2017).

2. Review of current situation and difficulties for customs and business

Importance of custom duties as a source of the budget financing could be hardly overestimated. In Ukraine, as well as in many other

countries, customs duties draw up not less than 35% of the state budget (Sytnyk, Burzak, 2017). Evasion of customs duties increases the customs gap, poses a significant trouble for national financial interests and complicate legitimate business while favoring unequal competition.

As a result of misdeclaration to evade taxes or reduce tax liabilities when importing goods, a significant “shadow” segment has formed in the Ukrainian trade system, which poses a serious threat to Ukraine’s economy, causes losses for legal traders and domestic producers.

However, today the so-called “fight” against these economic crimes, unfortunately, is actually taking place in the environment of legal small and medium-sized businesses through the usual administrative pressure by government agencies, including burdensome customs controls, which imperil the international trade operations. Cross-border traders are confronted with increased delays, uncertainty and higher trade costs. Facing with burdensome Customs processes, companies often avoid making new investments or expanding their presence in the respective country. Harmonized and predictable Customs valuation rules are essential to smooth trade flows and apparent deviations from international agreed upon rules and regulations would stifle international trade and economic growth (ICC, 2015).

Trade facilitation policy is recognized in today’s world as a necessary factor in the concept of sustainable development, as it provides the best opportunity, both for the country as a whole and for economic operators directly, to realize the potential benefits of expanded market access, reduced tariffs, reduced transport costs and improving communications. Customs administrations are an important component of this process, so they are considered “catalysts” of economic development. Well-designed programs aimed at improving the efficiency of customs administrations can bring significant benefits by facilitating the integration of developing countries into the world trade system.

To implement its main functions in the direction of facilitating legal trade operations, ensuring the trade process at the global level, the implementation of effective targeted control customs must respond to modern conditions and new requirements of the business community

The orders of the Cabinet of Ministers of Ukraine dated December 27, 2018 № 1101 “On approval of conceptual areas of reforming the system of bodies implementing state tax and customs policy” and May, 13 2020 № 569-r “Some issues concerning conceptual directions of reforming the system of bodies implementing state customs policy” stipulate that promoting the effective collection of customs payments involves, among other areas, modernization of customs valuation control system.

Enhancing customs valuation control is the relevant and consequent decision, as this allows to prevent both violations when providing of inaccurate information to customs as well as illegal cross-border money movement due to the during customs clearance of goods.

The most relevant measure is to restore the general principles of customs valuation, provided for in the General Agreement on Tariffs and Trade (hereafter – GATT) and, in the Agreement on the Application of Article VII of the GATT (hereafter – Customs Valuation Agreement), and implement them completely into national law. Customs valuation should be based on simple, fair and transparent criteria of commercial practice to enable the business to determine customs value on its own.

Restrictions set in the Agreements are aimed to build a uniform and clear mechanism which is focused on meeting the needs of international trade and enabling the customs to perform its relevant functions to prevent fraud.

Non-compliance with certain principles and concepts of GATT and Customs Valuation Agreement in the customs legislation of Ukraine as well as absence of some of them has led, as one of the main factors, to number of problems in trade activities and made so called additional trade barriers which is negatively affecting the current economic situation, investing and both economic and social development.

According to Article VII of the GATT (paragraph 1), the contracting parties *are obliged not only to* recognize the validity of the general principles of valuation *but also implement them* (as they undertake to give effect to such principles), in respect of all products subject to duties or other charges or restrictions on importation and exportation based upon or regulated in any manner by value. Moreover, they shall, upon a request by another contracting party review the operation of any of their laws or regulations relating to value for customs purposes in the light of these principles.

One of the fundamental principles of GATT’s approach is that customs value cannot be calculated using the selling price in the country of importation of goods produced in such country, the price of goods on the domestic market of the country of exportation as well as arbitrary or fictitious values. Otherwise it can cause use of “minimum”, “indicative” prices or “special value tables”, as the case was in Ukraine in

recent years, despite the application of reference pricing is prohibited by the Agreement provisions, as it can lead to the misuse of valuation system provided by WTO.

This approach was definitely condemned by the International Chamber of Commerce (hereafter – ICC) at the World Trade Organization’s (hereafter – WTO) informal workshop on valuation databases and reference pricing in Geneva in October, 2014 where ICC was the representative of the trade community. ICC’s Representative Mark Neville, a member of the ICC Commission on Customs and Trade Facilitation, raised concerns on the proliferating misuse of valuation databases. While acknowledging that national valuation databases can provide a useful tool for risk assessment, Mr. Neville recounted traders’ experience and provided a number of country examples in which WTO members were using valuation databases to set reference and minimum prices – a practice prohibited by Article 7 of the WTO Customs Valuation Agreement. “These practices are in violation of the positive basis of the price actually paid or payable which is the core principle of transaction value under the WTO Customs Valuation Agreement”, – was stated (ICC, 2015).

3. Outline of the most common difficulties causing impediments for the importers

Most of the complications arisen in the trade practice in Ukraine are connected with the insufficiency of the implementation of GATT’s approach in the national legislation which, unfortunately, has significantly contributed to considerable difficulties in the control functions performing by Customs authorities and undesirable procedure delays. This situation has been constantly dispraised by the business community.

Among the most significant inconsistencies with the internationally established provisions of WTO Agreements the following should be mentioned.

– According to item 2 of Article VII GATT the value of imported merchandise for customs purposes should be based on actual value, namely the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions.

An extremely negative factor influencing business is the fact that national legislation lacks certain provisions of this principle, which are set out in the Annex 1 “Notes and Supplementary Provisions” ad Article VII of the GATT.

First, when determining the actual value on the basis of an invoice price, with non-included charges for legitimate costs which are proper elements of “actual value”, an exclusive discount or other reduction of the normal competitive price must be taken into account.

Secondly, it is very important that the term “normal course of trade in fully competitive conditions” means a trade relationship exclusively between independent buyers and sellers. That is, for control purposes the customs value of goods in question must be compared not only with similar conditions of sale and import of goods. The main thing is that only the customs value should be taken into account for comparison which was determined under the provisions of article 1 of Customs Valuation Agreement, and no other.

Third, to ensure compliance with the standard of fully competitive conditions special discounts, for example for exclusive agents, should not be taken into account.

– The next provision is that customs value should not include the amounts of domestic taxes in the country of origin or export that are refunded upon import, for example VAT.

In order to comply with this principle, it is not possible to compare, as various supervising state authorities and sometimes customs houses do, the customs value declared by the declarant with the prices of such goods offered for free sale on the domestic market in the country of export or origin.

– The next principle states that customs valuation cannot be used to combat dumping.

Unfortunately, absence of this norm in the Ukrainian legislation allows consciously speculating on the concept of domestic producers’ protection or balance of payments deficit. In this case, the customs value of imported goods is considered to be one of the regulators and means of tariff regulation. This approach harms primarily domestic producers, who instead of creating high-quality goods, follow the path of unfair competition with imported goods. In addition, it pushes out cheaper imported goods, which are in great demand due to the low purchasing power of most Ukrainians as well as contributes to the increase of “shadow” segment in the domestic consumer market.

In the current situation, when, unfortunately, the basic principles of customs valuation and customs control are turned upside down, economic operators can never know in advance what awaits them during the declaration and customs clearance of goods, to reduce the risks and negative impact on business and reputation, which often causes direct losses. The non-transparency of legislation, as well as, unfortunately, misunderstanding, and often ignoring, of the basic principles of customs valuation has the effect of hindering

(instead of facilitating) of the world trade, leading to a decrease in imports of goods into the country. And in our case – to the collapse of small and medium-sized enterprises, due to the incorrect application and use of concepts and principles of international trade in domestic tax law and by tax authorities, in particular.

In 2014, a special Sea Port Study was undertaken by European Union Border Assistance Mission to Moldova and Ukraine (EUBAM, 2015). The detailed review of control procedures undertaken during the Port Study has produced a number of recommendations based upon the gaps identified, one of which was customs valuation control procedure. Each recommendation has been assigned an identifying letter to denote a level of priority: High (H), Medium (M) and Low (L). All the reports indicate that Customs in particular encounter and continue to face problems with obtaining and determining accurate values and definitive tariff classifications, despite the application of WTO valuation rules.

So the Recommendation on problem at issue stated that valuation procedures need to be developed further, kept under constant management review and administered in accordance with national provisions based primarily on transaction value and the WTO agreement. (H) In addition, procedures established by the State Fiscal Service must ensure that customs valuation is transparent, objective and verifiable. The importance of implementing the recommendations has been emphasized by the signing of the EU – Ukraine Association Agreement, and with establishment of a Deep and Comprehensive Free Trade Area (hereafter – DCFTA) which came into force in January 2016. German Advisory Group (Institute for Economic Research and Policy Consulting) also has studied progress achieved by DCFTA implementation in Ukraine (Policy Paper Series, Berlin, Kyiv, November 2016).

4. Priority actions to be taken towards intensifying the performance of customs valuation control and assisting business

The most needed changes and additions to the customs legislation of Ukraine should be proceeded in the context of providing clear definition of concepts related to customs value and customs valuation of traded merchandise.

Among them the following should be mentioned:

1. Unnecessary or inappropriate rules should be removed, such as the customs value of goods for customs regimes other than those involving the collection of customs duties.

It is fundamentally important to point out the certain difference exists between the uses of terms “import” and “export” which in the international agreement mean only the direction of movement of merchandise into the country or abroad, and in Ukraine denote the customs regime. It is also important to understand that customs valuation must be calculated only for taxable goods. Therefore, there is no reason to determine and, respectively, to control the customs value of goods in transit, including domestic (because in this case, the control of the correctness of determining the customs value of goods should be carried out by the customs office of destination). It is also incorrect to determine customs valuation in cases of export of goods for which no export duties or relevant restrictions are set. In most countries, as a rule, when commodities are declared for export in other countries the column “customs value” is not filled in customs declarations, so it is impractical to require submitting export declaration of the country of departure (origin) as a proof of customs value of goods imported into Ukraine.

2. Unambiguous, simple and transparent mechanisms (including schemes, procedures, instructions) are to be elaborated as well as uniform approach to determine customs value, valuation procedure and control of it (uniform approach for business and customs). Best way to introduce it is by involving businesses to discussion, public consultation, etc. to ensure the transparency and specify the well-defined criteria.

3. Specific rights and powers of business and customs must be define and managed appropriately. In particular, for business: determination, declaration, confirmation of customs value, etc., and for customs authority: control of value reliability, decision on acceptance or necessity of correction, powers to verify information and documents, right to doubt and obligation to justify and prove the objectivity of such doubts, as well as the need for correction or verification in certain cases when the customs value is determined by customs.

4. Measures to implement the indisputable right (which is now defined as limited) to release goods for free circulation in case of proved doubts of customs or necessity to determine the customs value, in particular to specify guarantors of customs payments, which can be approved not only by customs authorities but also by other state bodies, for instance, National Bank of Ukraine. There can be insurance companies or independent financial agents accredited in accordance with legislation in force. The next step is to specify mechanism to provide the free choice of form of guarantee.

5. Customs authority should specify the minimum required package of supporting documents (the same for all economic operators, without granting preferences) and define an exhaustive list of grounds and cases of possible doubts of customs authorities about the reliability of the declared customs value (or its components) or acceptability of a transaction value as well as the need to check the correctness of customs valuation.

6. Special access should be provided for economic operators for information available or obtained by customs concerning product markets, price trends, impersonal price information in the customs base for specific goods, including decisions on customs valuation, sources of price information.

7. The certain clear criteria (at least general) must be outlined which can be used to compare customs procedures and goods, the value of which is in doubt or adjusted.

8. The particular mechanism should be specified by the customs authority to allow the economic operators to adjust customs value because of their own decision made by the businesses in specific cases (possible errors or changes in the terms of the agreement on the goods, etc.).

9. An obligatory rule must be implemented in the appropriate section of the Customs Code on the priority application of direct rules of international law (GATT, Customs Valuation Agreement), in case of disputed or uncertain cases or situations.

The study of current situation in other countries has highlighted the fact that detecting customs value fraud, under- and over-invoicing is still of vital importance not only in developing countries, where customs revenue collection is a main source of national income.

Highlights of research conducted by Global Financial Integrity for the year 2015 using the Direction of Trade Statistics dataset from the International Monetary Fund (hereafter – IMF) show that, for example, the top quintile (30) of countries, ranked by dollar value of illicit outflows, includes not only resource rich countries such as South Africa (\$10,2 billion) and Nigeria (\$8,3), but also European countries including Turkey (\$8,4 billion), Hungary (\$6,5 billion) and Poland (\$3,1 billion) as well as Latin American nations Mexico (\$42,9 billion), Brazil (\$12,2 billion), Colombia (\$7,4 billion) and Chile (\$4,1 billion). Asian states in the top 30 countries of this category include Malaysia (\$33,7 billion), India (\$9,8 billion), Bangladesh (\$5,9 billion) and the Philippines (\$5,1 billion).

Trade misinvoicing is one of 4 known methods of moving money illicitly across borders, which involves the deliberate falsification of the value, volume or quality of an international commercial transaction of goods or services by at least one party to the transaction (such as commercial tax evaders, for example). According to IMF Trade Misinvoicing methodology, trade misinvoicing is a form of fraudulent manipulation made possible by the fact that trading partners write their own trade documents, or arrange to have the documents prepared in a third country (typically a tax haven) (Global Financial Integrity, 2019).

Evidently, under-invoicing occurs when invoice price of goods which should be accepted as transaction value by customs authorities is less than the price actually paid. It is aimed to evade customs duties (if ad valorem), reduce tax base for VAT, to avoid limitations or other regulatory requirements for imported merchandise depending on their value. It can also be connected with dumping to drive out producers in domestic market or smuggling goods into a country to avoid paying taxes and fees at all.

It can't be left out of focus, that overpriced and undervalued invoices pose difficulties for customs services, distort market and statistical data, violate normal trade and break rules of equal competition. Consequently, the correct determination of duties and taxes depends to a large extent on the fact that many customs administrations do not have access to relevant data and reliable resources to establish a fair price for many types of goods.

At the same time, most countries, including Ukraine, face certain obstacles, such as limited administrative, informational and technical resources. The availability of reliable sources of price information, the legal status of which is not in doubt, is an important element of the strategy of reforming the customs valuation control system.

The development and use of the valuation database should be in accordance with the risk assessment and management procedures set out in the WCO Risk Management System Guidelines. The risk assessment mechanism should ensure selectivity and targeting, i.e. the customs authority should selectively compare the declared value (prices of goods) either with individual prices for similar goods available in the database or with the average price calculated from a certain number of customs clearance of such goods (WCO, 2004).

International organizations, such as Global Financial Integrity, also recommend a number of steps that governments and other international regulators can take in a first line to develop greater financial transparency and curtail illicit outflows, including:

1. Deliberate trade misinvoicing for the purpose of evading or avoiding VAT taxes, customs duties, income taxes, excise taxes, or any other form of government revenues should be made illegal.

2. Customs agencies should treat trade transactions involving a tax haven with the highest level of scrutiny.

3. Governments should significantly boost their customs enforcement by equipping and training officers to better detect intentional misinvoicing of trade transactions, particularly through access to real-time world market pricing information at a detailed commodity level. (Global Financial Integrity, 2019).

So, it is one of real challenges for Ukrainian customs reforming, to establish a new system of customs valuation control as well as new fair prices database formed on national customs declarations database.

5. Conclusions

Therefore, summarizing the above, and based on successfully implemented cases it can be noted, that it is actually possible to achieve proper and complete taxation of imported goods by consequent solving the following interrelated tasks:

Task 1 – To determine groups of goods that provide the largest revenues to state budget, taking into account changes in the global and regional economies, market tendencies and elaborate national database on commodity prices and commodity markets reference. Its use should be enabled for customs purposes and in restricted area – for economic operators. Such database could be integrated into national customs risks management system as a tool for automated control, on the one hand, and, on the other hand, for customs formalities facilitation (WCO, 2004). It should contain automatically formed numerical values which are reliable estimates calculated of fairly and appropriately declared prices of the traded products. The said estimates are outlier – free statistically detected values from custom declarations and are to be used as indicators of risk management system for customs valuation control at the moment of the customs formalities or for post-audit procedures and as reliable evidence in case if declared price is in doubt.

Task 2 – To maintain new effective methods of customs control ensuring the proper VAT and customs duties collection provided that radical changes will be made in approaches to customs risks profiling, analysis and management in order to make them more functional and efficient. Customs post-audit control must be completely implemented into national customs legislation based on international norms and rules, including through the exchange of best practices on the development of WTO standards.

Task 3 – The basis and methods of determining the customs value must be stable and sufficiently publicized to enable businesses to determine customs value with sufficient confidence. In should be emphasized that priority application of direct rules of international law (GATT, Customs Valuation Agreement), in case of disputed or uncertain cases or situations, are beyond dispute.

Customs valuation should be based on simple and fair criteria of commercial practice, so that business has more stability and predictability in the customs procedures, and is sure that its operations are not dependent on changes in the customs regulation.

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АНАЛІЗ АКТУАЛЬНИХ ПРОБЛЕМ ІЗ МИТНОЇ ОЦІНКИ В УКРАЇНІ ТА ПЕРСПЕКТИВНІ ЗАХОДИ БОРОТЬБИ З НЕДОСТОВІРНИМ ДЕКЛАРУВАННЯМ МИТНОЇ ВАРТОСТІ ПІД ЧАС МИТНОГО ОФОРМЛЕННЯ ТОВАРІВ У КОНТЕКСТІ НОРМ І ПРИНЦИПІВ МІЖНАРОДНОГО МИТНОГО ЗАКОНОДАВСТВА

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Метою статті є аналіз основних проблемних питань, що виникають у сфері митної оцінки, та можливих негативних наслідків не досить ефективного їх вирішення, а також визначення сучасних ефективних методів боротьби з недостовірним декларуванням митної вартості під час митного оформлення товарів. Завдяки застосованим загальнонауковим теоретичним методам дослідження (наприклад, аналізу, узагальненню та класифікації) визначено основні елементи економічної небезпеки внаслідок недостовірного декларування вартості товарів. Розглянуто передумови запровадження нових методів контролю за визначенням митної вартості товарів в разі імпорту, розроблених на основі сучасної стратегії розвитку митної справи Всесвітньої митної організації. Досліджено успішні кейси та практики зарубіжних країн щодо подолання і припинення неправомірних дій імпортерів та можливості впровадження окремих їх елементів у практичну діяльність митних органів України. Виявлено чинники, які ускладнюють процес упровадження рекомендацій міжнародних організацій з огляду на практику окремих країн світу.

Результати. Визначено найбільш ефективні напрями врегулювання виявлених проблем, зокрема шляхом доповнення законодавства України відповідними нормами та його апроксимації у відповідній частині до міжнародних норм і правил у сфері митної оцінки. Аргументовано доцільність запровадження національної бази даних щодо митної вартості товарів як ефективного інструменту системи управління ризиками.

Висновки. Запропоновано впровадити сучасні елементи автоматизованого митного контролю з метою спрощення митних формальностей для легальної торгівлі, запобігання суттєвому заниженню вартості товарів та унеможливленню недостовірного декларування в разі їх імпорту, а також визначено першочергові завдання щодо підвищення ефективності здійснення контролю митної вартості.

Ключові слова: імпорт, боротьба з економічними злочинами, митна оцінка, національна база даних, автоматизований митний контроль.