

Provisions of the customs and tax legislation as a basis of criminal and legal characteristics of evasion of the customs payments bound up with smuggling of the goods

Abstract: It is considered a correlation of provisions of the customs, tax and criminal legislation under characteristic of evasion of customs payments bound up with smuggling of the goods.

Object, subject, objective and subjective sides of considered crime are researched; it is analyzed the point of views of scientists in respect of this issue; author's suggestions are given.

Keywords: evasion of the customs payments; smuggling of the goods; criminal responsibility; object; subject; subjective side; objective side.

Criminal and legal characteristic is a description of the features of crime, the formal elements of which, in compliance with criminal law, are caused a punishment. This is an important basis of investigative method as it is impossible to solve issues on institution of criminal case, bringing somebody as accused individual, qualification of a deed in indictment bill [1, p. 3-4].

Criminal responsibility for evasion of customs payments have entered by the Law of Azerbaijan Republic on 26 May, 2000 and 1 September, 2000 became effective in new Criminal Code (further, the CC).

Article 209 of the CC of Azerbaijan Republic "Evasion of the customs payments" consists from the two parts. The first part of the article, an evasion of the customs payments in considerable size is punished with penalty range from one thousand up to two thousands manat or correctional works in terms up to one year [19, p. 121].

The part two of the article 209 of the CC stipulates responsibility for recidivate

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or an evasion of the customs payments in considerable amount is punished with penalty in range of two thousands up to five thousands manat or imprisonment at the same term.

The footnotes of this article determines that under considerable size (amount) is recognized a sum of unpaid customs payments exceeding two thousands manat, and under big size – a sum exceeding four thousands manat.

According to the part two of the footnote, in course of full compensation for the damage caused by the offence an individual, who committed at first time an offence stipulated in articles 209.1 and 209.2 of the CC, is released from criminal responsibility [19, p. 122].

According to article 108 of the Customs Code of Azerbaijan Republic, the customs payments are:

- 1) Customs duty;
- 2) Value added tax;
- 3) Excise taxes;
- 4) Road charges;
- 5) Licenses fees
- 6) Fees for issuing qualification certificates to the specialists on customs clearance;
- 7) Customs fees for customs clearance;
- 8) Customs fees for storage of the goods;
- 9) Customs fees for customs accompanying of the goods;
- 10) Payments for information and consultations;
- 11) Payments for acceptance of preliminary decisions;
- 12) Payments for participation in customs auctions
- 13) Other customs payments [16, p. 36].

In compliance with the Law of Azerbaijan Republic “On the customs tariff”, the goods conveyed through the customs boarder of Azerbaijan Republic are subject of imposing of the customs duties.

Exporting and importing goods are subject to application of VAT and excise duties in compliance with the Tax Code of Azerbaijan Republic.

In accordance with the Customs Code and tax legislation the road charges are carried out from the transports of foreign states when transports entering in the customs territory of Azerbaijan Republic [9, p. 2].

According to Azerbaijani legislation, customs clearance is a subject of collection of the customs duties for the goods, including the transports, conveyed through customs boarder of Azerbaijan Republic, and also the goods as the commercial and non-commercial purposes, which are conveyed with unaccompanied luggage, international post [15, p. 4].

Customs clearance of the goods and transports are a subject of collection of the customs duties in double size if it is fulfilled out of business hours of the customs offices of Azerbaijan Republic and out of the places that established for these purposes.

Customs duties are charged for storage of the goods and transport means in the bonded warehouses and temporary storage areas, which are belonged to the customs authorities of Azerbaijan Republic, based on the average cost of services rendered [16, p. 51-54].

Customs convoy of the goods is subject of the customs charges in an amount established by the customs authorities in agreement with appropriate body of executive powers of Azerbaijan Republic.

According to article 115 of the Customs Code, the customs cost of the goods and transport means determining in compliance with the Law of Azerbaijan Republic “On customs tariff” is a base for calculation of the customs duties, excise taxes and customs fees [16, p. 53-54].

Sum of the customs cost of the goods and customs duty (and on subexcise goods – also excise tax) is a base for VAT calculation.

In compliance with the Customs Code, the customs payments are directly paid by a declarant or other person. Any interested individual has the right to pay the customs fees if the Customs Code does not provide other. The customs duties are paid before or at time of clearance of customs declaration.

The customs fees for noncommercial goods, which conveying through the customs boarder of Azerbaijan Republic, are paid at time of acceptance of the customs declaration.

Terms of payment of customs fees shall be calculated from a day of expire of customs declaration presentation terms if the customs declaration is not presented at established time.

The customs fees (except a road charges) are paid to the customs authorities of Azerbaijan Republic and for the goods, which are sent with international post services are paid to the customs through the state post offices in order established by a body of executive powers [16, p. 54].

The road charges are paid to the customs office during one banking day when transport means of foreign states enter into the customs territory of Azerbaijan Republic.

According to article 119 of the Customs Code, in exceptional cases a payer may be permitted postponement of customs fees payment or pay by instalment.

Decision about postponement of customs fees payment or pay by instalment is made by the customs body of Azerbaijan Republic, which fulfills customs clearance. Postponement of customs fees payment or pay by instalment may not exceed two months from a day of acceptance of customs declaration.

Payment of the customs fees is provided in an order stipulated by the Customs Code if postponement of customs fees payment or pay by instalment is allowed [16, p. 54-55].

Interest rates are paid to National Bank of Azerbaijan for postponement of customs fees payment or pay by instalment. The indicated interests transferred to the state budget.

Postponement of customs fees payment or pay by instalment is not provided the individuals who are trying to evade from payment of the customs fees.

Payments of the customs fees may be provided with deposit of the goods and transport means, warrantee of the third individual or depositing amount.

When a bond is used, pledged goods and transport means remain to a depositor if the customs authorities of Azerbaijan do not make other decision. The depositor

does not have the right to govern with pledged subject without consent of the customs body of Azerbaijan Republic.

In accordance with legislation of Azerbaijan Republic on a bond, registration of a bond and levy of execution on the collateral is carried out [14, p. 3].

Guarantee of a bank or other credit institution, which have a license of the National bank of Azerbaijan, may be used as a security of payment of the customs duties. According their statements, they are included in a registry of the customs authorities of Azerbaijan Republic.

A rule of the statements consideration of banks and other credit institutions about including in the registry is established by the customs authorities of Azerbaijan Republic.

Bank or other credit institution should pay fees for including in the registry, an amount of which is determined by an appropriate body of executive power.

Non-observance of guarantee terms and requirements of the Customs Code may be caused their exclusion from the registry. No any refunds for excluded from registry banks and other credit institutions are provided.

On deposit is kept an amount of the customs payments, which should be paid if the goods are released for free turnover or exported. No any interests are charged for deposit keeping time.

The rules of depositing of the amounts and their refund are determined by the customs authorities of Azerbaijan Republic.

Customs duties are paid in national currency of Azerbaijan Republic. Payments in foreign currency may be accepted in exceptional order. Exchange of currency is made according to a rate of the National bank of Azerbaijan on a date of the customs declaration acceptance

According to article 122 of the Customs Code, non-paid customs duties are exacted by the customs bodies of Azerbaijan Republic independently on a time of nonpayment fact discovering.

0.3 per cent of a sum of arrears is paid for each day of delaying including a payment day.

In compliance with legislation of Azerbaijan Republic, arrears are paid from sold property of a payer if funds are absence.

Attempt of evasion for payment of the customs duties is caused suspension of billing operations of a payer by all banks until the payment is done. This decision should be executed with banks and credit institutions.

In accordance with legislation of Azerbaijan, for non-fulfillment of indisputable recovering or unfounded delaying these decisions of the customs authorities of Azerbaijan Republic by the banks and credit institutions the guilty officials are brought to responsibility [16, p. 57].

Repeated non-fulfillments or delaying of execution with the banks and credit institutions these decisions are caused of license rejection by the National bank of Azerbaijan in doing of bank operations.

If an individual conveying the goods and transport means through customs boarder of Azerbaijan is not a declarant, he bears united liability with declarant for nonpayment of the customs duties.

According to the Customs Code, individuals bear united responsibility in the following cases: a person illegally conveying the goods and transport means cross the customs boarder of Azerbaijan Republic; an individual, who knew or should has known about illegal conveying of these goods and transport means and participated in these actions; under export - a person, who knew or should has known about illegality of exporting; an individual who purchased illegally exported goods and transport means in property or his disposal.

There are various views in legal science on definition of an object of the crime considered. Ones of them believe that financial interests of a state in tax collection are the object of this crime. The first who expressed his opinion on this issue were L.D. Gaukhman and S.V. Maximov. Evasion from payment of the customs duties was classified by them as crime encroaching to budget forming from collection of the customs duties [5, p. 199]. Other researchers have the similar position on this issue but unfortunately, they do not specify on what object they are talking [18, p. 332].

The supporters of other point of view call an order established by a state as the object of considered crime. V.G. Draganov believes that established order of tax

collection as a component part of financial system is recognized an object of this crime [13, p. 521]. S. Dushkin considers that the object of this crime is financial interests of a state [7, p. 44-47]. A.A. Malinovsky believes that this crime infringes on established by the law rules of payment of the customs duties [10, p. 375]. V.E. Melnikova says about this crime: “Direct object is public relations, which are formed in a sphere of the customs regulation” [17, p. 225].

Based on the structure of the Criminal Code, generic object of the crime should be considered the interests of society in economic, which are protected by Azerbaijan, and typical object is a system of public relations in a sphere of economical activity of society that protected by the state; direct – financial relations in the tax system and a system of non-tax income of the state on forming of a budget through collection of the customs payments.

V.E. Melnikova and N.A. Lopashenko consider the corpus delicti is a formal [17, p. 266; 11, p. 100]. I.V. Shishko, G.N. Khlopina, A.S. Gorelik, P.S. Yani, and I. Zverchakovsky recognize that this crime with material corpus delicti [6, p.122; 20, p. 40-41; 8, p. 41-42].

The sums of the customs payments in cash and noncash forms are a subject of the crime. They are enumerated in article 109 of the Customs Code as a close list.

Objective side of the crime is a multiform. According to V.E. Melnikova, inaction characterizes of it; obligation to pay of a specific customs fees and real opportunity its payment is necessity point of appearance of it [17, p. 226]. In addition, it should be noted that evasion from customs payments is not always committed with only inaction. For example, under presentation of wrong information about engine volume of a car or manufacturing date of it in order not to pay excise or aggregate customs payment, is executed not inaction, and action – written statement of false information, forgery of documents and their presentation to the customs body. But, it is also wrong to consider that this crime is committed only with way of action commission. The ways of evasion from the customs payments are set forth by scientists in differ ways. In the main, they reproduce the text of the Customs Code of their states. Fraudulent actions, inclusion wrong information in the customs declaration, using of forged documents are among the ways. Reduction of the

customs cost of the goods, presentation of various forged documents to obtain some tariff advantages are one of the ways [18, p. 332].

A moment of crimes completion associated with evasion from mandatory payments has a few forms. Any crime is recognized completed when all signs of *corpus delicti* that stipulated in the law are done by the actions of a person. Evasion from the customs payments may be crime completed in the next cases:

1) from expire date of payment of the customs duties by legal entity or physical person;

2) from the time of nonpayment of the customs duties established in the Customs Code;

3) from time of acceptance of wrong decision of an official of the customs body about payment of the customs duties in reduced cost or refund, including on the base of stated wrong information.

There are no unified opinions in science and among practitioners on this issue, whether evasion from payment of the customs duties is a lasting crime or not. P.S. Yani believes that this is a lasting crime, quoting the resolution of 23 Plenum of the Supreme Court of the USSR from 4 March 1929 (in edition of the resolution from 14 March 1963), where is said that the lasting crime may be determined as action or inaction, which associated with criminal prosecution. P.S. Yani believes that "...non-fulfillment of obligation in established time (determined by the law) to transfer funds to a bank account, pay a tax, customs fees, repay accounts payable is not mean disappearing of appropriate obligation. After this date when crime has been committing, an individual is being obliged to implement a certain actions, and therefore this deed is a lasting one" [20, p. 40-42]. A.N. Akhundov, N.A. Lopashenko and A.S. Gorelik have other point of view [2, p. 525-526; 6, p.117; 11, p.166].

It is an important to delimit under qualification an evasion from payment of the customs duties from smuggling. There are a number of theoretical views on this issue, which are understood differently in practice. The problem is to assessment of influence on decision of the customs body in respect of releasing of the goods those or that information, which is declared under crossing the customs boarder.

V.G. Bayakhichev considers: “A causal relationship between non-declaring or wrong declaring and an opportunity of an official conveying the goods through the customs boarder is a mandatory sign of smuggling. If wrong information might not influence on acceptance decision by the customs body about releasing of the goods then *corpus delicti* is absent” [3, p. 57]. Consequently, in these courses under presence of a big sum of unpaid customs fees and direct intent we have a case of evasion from payment of the customs duties. We believe that V.G. Bayakhichev loses an important sign of smuggling – fraudulent using of the documents. From above said thesis are made different conclusions in practice.

It seems that if fraudulent using of documents or inclusion any unauthentic data in these documents have impacted into decision of the customs body to release the goods trough boarder, and also in a size of the customs duties withheld, then it should be qualified as smuggling and evasion from payment of the customs duties (articles 206 and 209 of the Customs Code of Azerbaijan).

In order to delimit an evasion from payment of the customs fees from smuggling we should understand what a notion declaring is, as smuggling is also a conveying of the goods, which is associated with non-declaring or unauthentic declaring. Declaring is a statement in established form (written, verbal, through electronic transmission or other one) accurate information about the goods and transport means, their customs regime and other data, which is necessary for the customs purposes. Consequently, if data about conveying through boarder goods declared in unauthentic way (is contained in one of the columns of declaration form, which should be filled when goods conveying through boarder), this deed should be qualified as smuggling. If the data, which is being unauthentic, is not established by a form of declaring and is not influenced in decision about conveying the goods through boarder under presence of other mandatory signs of *corpus delicti* (direct intent, sum of unpaid payments), the deed should be qualified as evasion from payment of the customs duties, and a statement of unauthentic information should be considered as a way of crime concealment.

We believe that the point of view of A.N. Soshnikova, V.V. Yegizarova and S.Y. Turchina in respect of essence and correlation of a notion of non-declaring is

considered to be right. Under unauthentic declaring they understand a statement not corresponding actuality the data about qualitative and quantitative characteristics of the goods and transport means, ex., about their name, form, weight or indication about their absence. Non-declaring is recognized inaction expressing in non-statement of information about presence of the goods and transport means [4, p. 184-185]. The same opinion is kept B.M. Mustafayev [12, p. 75-79].

Subject of this crime can be sane citizens of Azerbaijan Republic, foreign state or individuals without citizenship, which reached 16 year age. On opinion of V.E. Melnikova, to bring to responsibility to someone, he should be obliged to pay concrete customs duties and to have an opportunity to pay it [17, p. 226].

Subjective side of the crime is guilt only in form of direct intent. All listed authors have the same opinion in respect of this issue. A person realizes that in result of his actions, he evades from payment of the customs and wishes to do it. Scientists call the motive of this crime as “mercenary”, which is not influenced in qualification, but they have important criminalistical significance.

Recidivate presupposes repeated committing of the crime, which described in part 1 of article 209 of Criminal Code, i.e. evasion from payment of the customs duties.

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