**Summary to the Decision of the First Senate of the Constitutional Court dated September 6, 2023 No. 6-r (І)/2023 in the case upon the constitutional complaint of Van Kolk Frederik Johannes regarding the compliance of paragraph 2 of Article 481.6 of the Customs Code with the Constitution (constitutionality).**

Van Kolk Frederik Johannes appealed to the Constitutional Court to verify the compliance of paragraph 2 of Article 481.6 of the Customs Code (hereinafter referred to as “the Code”) with Articles 41.1, 41.4, 48, 61.2 of the Constitution (constitutionality).

The subject of constitutional review in this case is the sanction of Article 481.6 of the Code, namely “... imposition of a fine in the amount of ten thousand non-taxable minimum incomes of citizens or confiscation of such vehicles”.

In order to ensure the effective implementation of the state customs policy, the Verkhovna Rada is authorised not only to impose obligations on the participants of relations regulated by customs legislation, but also to determine actions that are a violation of customs rules and liability for them. It is state coercion that is one of the factors capable of ensuring the effectiveness of the regulation of customs affairs, the appropriate level of protection of customs interests and customs security of Ukraine. Moreover, the sanction for the committed administrative offense must be reasonable and at the same time sufficient to prevent the commission of new offenses both by the offender himself/herself (special prevention) and by other persons (general prevention).

Violation of customs rules is a specific type of administrative offense, it is unlawful, culpable (intentional or negligent) actions or inactions that encroach on the procedure established by the Code and other acts of the legislation of Ukraine for the movement of goods, commercial means of transport across the customs border of Ukraine, presentation of them to customs authorities for carrying out customs control and customs clearance, as well as carrying out operations with goods that are under customs control or the control of which is entrusted to customs authorities by the Code or other laws of Ukraine, and for which the Code establishes administrative liability (Article 458.1 of the Code). Therefore, the issue of administrative liability for violation of customs rules should be regulated in the Code, taking into account the specifics of the principles of conducting customs affairs and in accordance with the Constitution.

The constitutional principle of equality of citizens before the law in the field of customs matters is manifested not only in the uniform procedure of movement of goods and means of transport across the customs border of Ukraine, but also in the equal degree of liability for violations of customs rules.

At the same time, the equal measure of administrative liability does not have an absolute nature, and therefore, in the case when it is objectively justified, the body (official), considering the case of violation of customs rules, should (must) have discretion regarding the type and/or amount of administrative fine, which ensures the individualisation of such liability depending on the circumstances of the case within the limits of the legally defined sanction. In addition, the measure of administrative liability established by the Code must be aimed at achieving a legitimate goal - the protection of customs interests and ensuring the customs security of Ukraine - and be proportional to the committed administrative offense, ensuring the achievement of the goal of administrative punishment at the expense of minimal interference with the constitutionally guaranteed human and citizen’s rights , in particular the right to property.

Exceeding the term of temporary importation of vehicles for personal use and vehicles for commercial purpose into the customs territory of Ukraine, as well as the loss of these vehicles, including their disassembly, are actually criminal in nature, and the sanction is the imposition of a fine in the amount of ten thousand tax-free minimum incomes of citizens or confiscation of a vehicle commensurate with a criminal penalty.

Therefore, in proceedings in cases of violation of customs rules, defined by Article 481.6 of the Code, the guarantees of the Convention, inherent in criminal proceedings, should apply to the person, and the approaches to understanding the principle of individualisation of legal liability when imposing a criminal penalty and its adequacy to the crime committed, outlined in the decisions of the Constitutional Court, taking into account the specifics of the implementation of the customs case, are applicable within the limits of this constitutional proceeding.

Fines and confiscation are types of administrative penalties of a property nature, which the Verkhovna Rada, within the limits of its constitutional powers, determined as the most effective measures to protect customs interests and ensure customs security of Ukraine, which is related to the specifics of customs affairs, in particular, the combat against violations of customs rules. The possibility of applying a property sanction should make it economically unprofitable to violate customs rules compared to their compliance and, accordingly, contribute to the achievement of the goal of administrative liability. At the same time, the state based on the rule of law, considering the administrative punishment primarily as a corrective and preventive measure, should not use excessive measures, but only measures necessary and determined by the specified goal.

The Verkhovna Rada based the differentiation of the degree of administrative liability, in particular, on the criterion of the number of days for which it was allowed to exceed the terms of temporary importation of vehicles for personal use and vehicles for commercial purpose into the customs territory of Ukraine by the subject of an administrative offense.

The longer the period for which the temporary importation of vehicles for personal use and vehicles for commercial purpose into the customs territory of Ukraine is exceeded, the more damage is caused to the customs interests of Ukraine and, accordingly, a stricter measure of administrative liability in the form of a larger fine should be applied to the violator of customs rules .

The Parliament equated the degree of social harmfulness of an act in the form of exceeding the term of temporary importation of vehicles for personal use and vehicles for commercial purpose into the customs territory of Ukraine by more than thirty days and the loss of these vehicles, including their disassembly, which have the main unifying feature , namely the purpose – evasion of customs payments.

In Article 481 of the Code, objects of temporary import/export, which were designated by the generalised term “goods” before the amendments to the Code, are divided into the following categories: goods; vehicles for personal use; vehicles for commercial purpose. That is, the legislator identified vehicles for personal use and vehicles for commercial purposes as qualifying features of the composition of administrative offenses provided for in Articles Parts 481.5 and 481.6 of the Code, and, accordingly, established a stricter measure of administrative liability for exceeding the term of temporary importation of such vehicles into the customs territory of Ukraine.

Establishing in the sanction of Article 481.6 of the Code a fine in the amount of ten thousand non-taxable minimum incomes of citizens, taking into account the specifics of the implementation of customs affairs in terms of combating violations of customs rules, is the embodiment of the constitutional principle of equality during the legislative regulation of differentiated administrative liability for exceeding the term of temporary importation of vehicles for personal use and vehicles for commercial purpose to the customs territory of Ukraine, as well as when determining the extent of administrative liability for the loss of these vehicles, including their disassembly.

At the same time, the establishment in the sanction of Article 481.6 of the Code of fines in an absolutely defined amount is balanced with the granting of discretion to the court regarding the determination of the type of penalty, taking into account the nature of the committed illegal act, the form of guilt, the characteristics of the person guilty of committing the offense, the possibility of compensation for the damage caused, the presence of circumstances that mitigate or aggravate liability.

The establishment of alternative types of basic administrative fines by contested provision of the Code - a fine in the amount of ten thousand tax-free minimum incomes of citizens or confiscation of a vehicle - enables the court to individualise the administrative fine taking into account the totality of circumstances of the case within the limits of the legally defined sanction and, as a result, implementation of the principle of individualisation of legal liability when bringing a person to administrative liability under Article 481.6 of the Code.

Since the sanction of Article 481.6 of the Code establishes the application to the offender of measures of a property nature - the imposition of a fine in the amount of ten thousand tax-free minimum incomes of citizens or the confiscation of a vehicle - it is a normative basis for interfering with the right to property guaranteed by Article 41.1 of the Constitution.

The sanction of Article 481.6 of the Code does not contradict the requirement of legal certainty and ensures a legal interference with the property rights of a person in the understanding of the practice of interpretation of Article 1 of the First Protocol to the Convention by the European Court of Human Rights.

Strengthening by the Verkhovna Rada within its constitutional powers of the measure of administrative liability for exceeding the terms of temporary importation of vehicles for personal use and vehicles for commercial purpose into the customs territory of Ukraine, as well as establishing in Article 481.6 of the Code administrative liability for the loss of these vehicles, including their disassembly, is part of the comprehensive reform of the mechanism for importing vehicles into the customs territory of Ukraine and is justified by the need to achieve a deterrent effect against the commission of such offenses. Administrative penalty in the form of imposing a fine in the amount of ten thousand non-taxable minimum income of citizens or confiscation of the vehicle is aimed at preventing evasion of customs payments, ensuring effective control over the movement and targeted use of temporarily imported vehicles, road safety and environmental protection from the harmful effects of transport, and therefore, aimed at achieving the legitimate goal of protecting customs interests and ensuring customs security of Ukraine.

Since the state suffers material damage (damages) as a result of the fact that persons commit the acts specified in Article 481.6 of the Code, an administrative penalty in the form of a fine in the amount of ten thousand non-taxable minimum incomes of citizens or confiscation of a vehicle is not only deterrent and punitive, but also aims at compensation for material damage. At the same time, the social benefit of the sanction of Article 481.6 of the Code is not measured in property equivalent, but consists in achieving a sustainable effect of protecting customs interests and ensuring customs security of Ukraine due to the introduction by the legislator of a measure of administrative liability proportional to the gravity of the offense committed.

The proportionality of administrative liability for exceeding the term of temporary importation of vehicles for personal use and vehicles for commercial purpose into the customs territory of Ukraine by more than thirty days, as well as for the loss of these vehicles, including their disassembly, is sufficient to achieve the desired deterrent and punitive effect and prevention of future violations of Article 481.6 of the Code.

It follows from the content of paragraph 2 of Article 481.6 of the Code that the legislator determined a fair measure of administrative liability to achieve a legitimate goal, because of which the courts can ensure the individualisation of such liability depending on the circumstances of the case, without imposing an individual and excessive burden on the person. Therefore, the sanction of Article 481.6 of the Code establishes an appropriate regulatory basis for achieving a “fair balance” between the general interest and the protection of property rights and corresponds to the principle of the rule of law, in particular its requirement such as the principle of proportionality.

The Constitutional Court of Ukraine held to declare paragraph 2 of Article 481.6 of the Customs Code as conforming to the Constitution (constitutional).

***References:***

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