CUSTOMS BROKER’S RESPONSIBILITY FOR COMMITTING OFFENSES RELATED TO BROKERAGE ACTIVITIES

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Summary. The article reveals the content and essence of the concept of a customs broker and the conflict in bringing him to justice in accordance with the customs legislation of Ukraine. The article establishes which actions of the customs broker are qualified by the Customs Code of Ukraine as a violation of customs rules. The author investigates the main problematic aspects that arise in the process of administrative cases, a party to which is a customs broker. The author concludes that solving the problematic aspects of bringing a customs broker to justice in today’s conditions is possible provided the unification of court decisions and the development of a unified approach to the application of customs legislation in terms of qualifying an administrative offense committed by a customs broker.

Key words: customs broker, customs authorities, the declarant, custom law, responsibility.

The Customs Law is a approximately new branch of Ukrainian law since its creation started with the Declaration of Independence of Ukraine. Subsequently, there exist various legal collisions, which should be resolved. Ukraine’s strategic course towards the European Union raises the issue of improving the mechanisms that can ensure the successful implementation of state customs policy. Customs policy is aimed at creating favorable conditions for the growth of foreign economic activity and increase its efficiency, as well as simplification of customs procedures and customs formalities related to customs control of goods and vehicles crossing the customs border of our country. In order to ensure favorable conditions for Ukraine’s integration into the European Union, it is necessary to avoid conflicts in the procedure of bringing a customs broker to responsibility.

Irrespective of the fact that the researches and studies of customs brokers’ responsibility were carried out by a branched group of scientists and practitioners of the customs domain: Ye.V. Dodin, O. P. Fedotov, O.O. Zotenko, S.V. Kivalov, B.A. Kormych, N.N. Kotsan, P.V. Pashko, D.V. Prymaichenko, I.G. Smyrnov, D.V. Stakhanov, V.M. Stakhanov, V.V. Chentsov and others. The studied matter and essence of the customs broker’s responsibility in Ukraine are characterized with a high scientific novelty level.

The purpose of this article was to examine the definition of term - customs broker and his responsibility according to the Customs law of Ukraine.

The paper is structured as follows. The first section presents an analysis of the current legislation, focusing on the determination of term - customs broker. The
second part examines the types and possibilities of liability of the customs broker. As well as collisions arising during legal proceedings. The final part gives an assessment of all of the above, as well as the conclusions of the researcher.

Currently, in accordance with the Customs Code of Ukraine (hereinafter - CCU), a customs broker - is an enterprise that provides services for the declaration of goods, commercial vehicles moving across the customs border of Ukraine [1]. Thus, it is any legal entity or citizen-entrepreneur, which provides services for customs clearance of cargo shipments, both export, import, and transit, as well as provide advice on foreign economic activity and legislation of Ukraine on customs matters. Moreover, the legal status of the customs broker is regulated CCU [1], granting permission for customs brokerage and control over it, is regulated by the order of the Ministry of Finance of Ukraine [2], technological cards of administrative services for granting, re-issuance, suspension, and revocation of a permit for customs brokerage, approved by the order of the State Customs Service of Ukraine [3].

Here are the provisions of the articles CCU governing the liability of the customs broker: and the commission of offenses related to customs brokerage, the customs broker is liable under this Code and other laws of Ukraine [Part 3 of Article 416; 1]; the person authorized to declare goods, commercial vehicles on behalf of the declarant, has the same duties, rights and bears the same responsibility as the declarant [Part 5 of Article 266; 1].

The above provisions of Part 3 of Article 416 and Part 5 of Article 266 CCU are contradictory. Besides based on these contradictory legal norms of CCU, the customs authority forms its further behavior in the relationship with the customs broker. Thus, Part 3 of Article 416 of the CCU indicates that the customs broker has a general responsibility, which is established by the CCU [9].

As an illustration, if a customs broker in the customs clearance of goods using a customs declaration, incorrectly determine the qualification code of the goods according to the Ukrainian classification of foreign economic activity (further - UCG FEA) [5]. While in column 44 of the customs declaration were indicated and subsequently attached documents with technical characteristics of the goods (state standards, specifications, drawings, etc.), based on which, the customs broker had to correctly determine the product code according to UCG FEA. However, the customs broker made a mistake and indicated a completely incorrect qualification code of the product according to UCG FEA.

Hence, declaration and further customs clearance of goods require impeccable preparation of shipping documentation. The consequences of negligent preparation and completion of shipping documentation may be detention or downtime of goods and/or penalties defined by the ICU [9].

That is, based on the above, the customs official checking this customs declaration, looking at the documents listed in column 44 of the customs declaration, can usually bring the broker to administrative responsibility in violation of customs rules (Part 1 of Article 472 "Non-declaration of goods, commercial vehicles" CCU), as all the information and documents required for customs clearance of goods at the customs broker were available to qualification code goods according to UCG FEA is quite correct to define. This is exactly the case in Part 3 of Article 416 of the CCU. That is, the customs broker, as a representative of the declarant by his actions in the
interests of the person he represents, committed an administrative offense, which is determined by the CCU, and for which administrative liability is provided [6].

However, if we are talking about the fact that the customs broker, as a representative of the declarant, is charged penalties applied for violation of tax legislation of Ukraine on customs declarations [Article 120.1; 4] or a customs broker is charged penalties determined by the Tax Code of Ukraine for self-determination by the customs authority of Ukraine of the amount of tax and/or other obligations, control over the payment of which is entrusted to the customs authorities of Ukraine, reduction of the customs clearance agent reimbursement or detection of facts of use of tax benefits by a customs broker for other purposes [Article 123.1; 4].

For example, let's look at the case law, where you can see the lack of a unified approach to resolving cases on the responsibility of the customs broker. Thus, in case № 490/2376/18 of June 8, 2018, the Court of Appeal of Mykolaiv Oblast, based on the results of court proceedings and examination of all evidence, upheld the decision of the first instance and found the customs broker not guilty of violating customs rules. As in the course of the trial sufficient evidence was not established, the judge of the first instance came to the correct conclusion that the actions of the customs broker did not constitute an offense under Part 1 of Art. 483 of the CCU [7].

However, in case № 461/9468/19 of January 29, 2020, the Halych District Court of Lviv, a different decision was made. The court came to the conclusion that the claims are unfounded, instead, the Galician customs of the State Customs Service correctly qualified the plaintiff's actions on the grounds of an offense under Art. 485 of the CCU, and therefore the administrative claim was denied [8].

In case № 344/10011/18 of September 9, 2018 the Ivano-Frankivsk City Court of Ivano-Frankivsk Oblast decided to prosecute the customs broker for committing an offense under Article 472 of the Customs Code of Ukraine and taking into account the person and public danger of the offense, impose an administrative penalty in the form of a fine of 100 percent of the value of goods - direct objects of violation of customs regulations, as well as confiscation of goods [6].

All courts motivated their decisions by current legislation, specifically art. 266, 416, 461, 465, 472, 483, 522, of the CCU. As a result, in these identified specific cases, a customs broker will be liable under other laws in Ukraine, which is quite different from the legislation of Ukraine on customs matters.

Otherwise, Part 3 of Article 416 of the CCU, does not give any specifics, but only emphasizes that the customs broker is obliged to bear the responsibility, which is generally provided by the legislation of Ukraine. Also, Part 5 of Article 266 of the CCU, tells us that the customs broker is responsible for the goods, just as the importer or exporter. In fact, this contradicts Part 3 of Article 416 of the CCU, because we see that the customs broker is responsible for the goods, only when his responsibility is established by the CCU. That is, we see the contradiction between Part 3 of Article 416 and between Part 5 of Article 266 of the CCU.

In practice, a customs official in cases where he wants to estimate that the customs broker is guilty of violating customs rules applies Part 5 of Article 266 of the CCU. But in cases where the guilt of the customs broker is not seen, the customs official brings to administrative responsibility the declarant, not the broker, because Part 3 of Article 416 of the CCU says just that. In any case, this conflict introduces some uncertainty into the work of customs brokers [9].
All things considered, we can affirm that today the customs authorities are behaving quite incorrectly in the above issue. Cases, where a report on a violation of customs regulations is drawn up by a customs broker instead of an importer or exporter, are quite common in practice. All the above-mentioned lead to the transformation processes, which are taking place in the customs system of Ukraine, the issue of responsibility of the customs broker is a crucial subject to reform.

References: