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REPAIR OF A VESSEL ABROAD – CUSTOMS CLEARANCE

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1. Legal regulation

Legal regulation of movement of vehicles across the border before and after performing repairs, depending on a specific situation, is regulated by chapter 22 of the Customs Code of the Russian Federation (Movement of vehicles), or by paragraph 3 of chapter 19 of the Customs Code of the Russian Federation (Handling outside the customs territory).

A necessity to clear the movement of a vehicle and its repair in accordance with the treatment "Handling outside the customs territory" arises when the vessel engages on a voyage with the only goal to take a passage and to undergo repairs. In the event if the vessel with the closed border carries out usual commercial activity (transportation of cargoes, fishing) and in the course of such activities calls at a foreign port where repair operations are carried out, then the relations with customs authorities will be arranged within the treatment "Temporary export", which in accordance with chapter 22 of the Customs Code of the Russian Federation is opened in respect to any Russian vessel sailing for foreign voyage.

The customs treatments "Handling outside the customs territory" and "Temporary export" provide various regulation of relations concerning the movement of vehicles across the border and to their repair outside the customs territory of the Russian Federation:

First, the procedure of clearance essentially differs. The treatment "Handling outside the customs territory" is executed by way of submission of a separate customs declaration, in addition, it is necessary to obtain a permit from the customs authority for handling and to produce a plenty of documents and information related to the object of handling (vessel), so that the customs authority can clearly understand in what condition the vessel is placed under the said customs treatment and can determine sizes (results) of handling. If the vessel moves across the customs border within the treatment "Temporary export" which is executed as simplified procedure by means of submission of a general outwards declaration, then upon arrival at the Russian port after repair operations the shipowner submits to the customs authority a notice on the performed repairs in accordance with the established form.

Second, there are significant differences in the procedure of collecting customs payments. The treatment "Handling outside the customs territory" does not provide a possibility of exemption from collection of customs dues and taxes. Whereas when moving the vessel within the treatment "Temporary export", in accordance with article 276 of the Customs Code, in return import of a vehicle to the customs territory of the Russian Federation customs dues and taxes are not paid, if repairs on the vessel consisted in maintenance and other operations necessary for ensuring of its safety and operation, as well as for maintenance of the vessel in condition in which it was at the date of its placement under the customs treatment "Temporary export". This circumstance does not permit to apply the treatment "Handling outside the customs territory" for execution of repair of the vessel abroad.

The basic problem in performing repairs on the vessel abroad is determination of a nature of repair operations. As it follows from article 276 of the Customs Code of the Russian Federation, in order to be exempted from payment of customs dues and taxes the shipowner should prove that repair operation performed on the vessel were limited to maintenance of technical and operational characteristics of the vessel. If it is impossible to prove, the repair operations will be regarded as handling operations and, accordingly, customs dues at 5 % and value-added tax at 18 % will be charged on the amount of repair.

1. Practice of application of article 276 of the Customs Code of the Russian Federation by customs authorities

Unfortunately, for the last several months customs departments of all federal areas recommend subsidiary customs to toughen control over the vessels in their return import after performing repair operations at ports of foreign states. In these recommendations the customs departments specify criteria, the presence of which enable the shipowner not to pay customs dues and taxes. Criteria are the following: actually any repair performed at the foreign port is liable to taxation by customs dues and taxes.

Far-Eastern Customs Department is not exception. Below there are conditions which as directed by the Far-Eastern Customs Department should be observed for exemption from customs payments and taxes concerning the vehicles which are temporarily brought out and subjected to repair operations outside the customs territory of the Russian Federation:

1. A necessity of performing repair operations arises suddenly during a specific international transportation and does not depend on the shipowner's will, and the fact of their non-performance prevents the return of the vehicle to the customs territory of the Russian Federation for relevant repair or excludes a possibility of the further safe operation of the vessel (is a danger to the crew of the vehicle, its passengers, cargo or the vehicle), i.e. repair operations were not planned before temporary export of the vehicle;
2. Repair operations are not defined as modernization of a sea vehicle, i.e. are not intended for improvement of its seaworthy or other properties in comparison with the technical condition of the vessel at the date of the beginning of relevant international transportation.

In addition, in accordance with the said opinion of the Far-Eastern Customs Department, exemption from payment of customs dues and taxes may be granted in the event of carrying out of emergency repairs (it is carried out for elimination of damages caused by an accident); complete renovation (it is carried out for elimination of damages caused by natural calamity); repair for technical condition (scope and time of the commencement of repair are determined by the technical condition of the vessel), current and maintenance repair (within the technical condition of the vessel in which it was at the date of placement of the vessel under the customs treatment "Temporary export"). In the event of carrying out of capital, minor, regulated, planned or inter-voyage repairs (which should be planned in advance), as well as carrying out of repairs in respect to technical condition, or current or maintenance repairs (provided that after the repairs, the technical condition of the vessel was improved in comparison with the technical condition as of the date of placement under the customs treatment "Temporary export", customs privileges are not granted.

Also it is specially specified, the customs privileges may not be granted in the event of carrying out of the following kinds of maintenance: periodic maintenance service (is carried out within values of operating time established in operating documentation or time spans); seasonal maintenance (is carried out for preparation of the vessel for the within autumn-winter or spring-summer conditions); regulated maintenance (i.e. stipulated by technical documentation and carried out within intervals and in the scope established in the documentation, irrespective of the technical condition of the object); planned maintenance subject to continuous control (is carried out by results of continuous control over the technical condition of the sea vehicle).

Summarizing the above-stated, it can be said that if the described position is perceived as guide to action that has already taken place, any repair of the vessel carried out outside the customs territory of the Russian Federation, except for emergency one, will be regarded as handling operation, subject to charge of dues and taxes.

The initiator of the above said policy of customs authorities is the customs of Kamchatka, which beginning in 2004 consistently has made demands for payment of customs dues and taxes in respect to shipowners carried out repairs on the vessels at the foreign port. That is the reason why Kamchatka Arbitration Court and Far East Federal Court are the basic source of judicial practice on the case in point.

At present, the judicial practice is formed in favor of shipowners' position and comes to the following basic provisions:

1. Repairs aimed at bringing the vessel elements in the condition meeting the regulatory requirements (requirements of the Register of Shipping, Provisions "Basic requirements to the vessel and shipboard technical facilities and their technical condition") are operations which provide safety and operation of the vessel in accordance with article 276 of the Customs Code of the Russian Federation;
2. A time of the origination of necessity to carry out repair is of no importance (before or after execution of the treatment "Temporary export"), since article 276 of the Customs Code of the Russian Federation does not associate a possibility of exemption of the shipowner from customs payments with this circumstance;
3. Exemption from customs payments in accordance with article 276 of the Customs Code of the Russian Federation is not a privilege granted by the customs authority but the shipowner's right to which a certain obligation of the customs authority corresponds;
4. The basic criterion for exemption from customs payments is a necessity of guarantee of safety and operation of the vessel;
5. Fulfillment of repairs in the volume exceeding the maintenance of its in the condition in which the vessel was at the time of temporary export is not a ground for deprivation of the shipowner of the right to be exempted from customs payments;
6. The basic criterion for determination of the vessel's condition at the date of its placement under the treatment "Temporary export" and its return import is serviceable condition of the vessel provided its safe operation.
7. Obligation to prove is imposed on the customs authority;
8. Article 276 of the Customs Code of the Russian Federation does not specify as obligatory conditions for exemption from customs payments such criteria as kinds and scope of repair or maintenance of the vessel (its elements);
9. Article 276 of the Customs Code of the Russian Federation in respect to the norms which regulate handling outside the customs territory of the Russian Federation is a special legal rule, which excludes repair, maintenance and other similar operations necessary for safety and operation of the vessel from handling operations;
10. As it follows from article 276 of the Customs Code of the Russian Federation, modernization of the vessel, provision of the vessel with new equipment etc. may be referred to operations liable to taxation.

At present, all Chinese and South-Korean ship-repair yards are engaged in repair of Russian vessels, all the repairs, taking into account the position of the Federal Customs Service and Far-Eastern Customs Department, after returning the vessels to Russian ports will be liable to customs dues and taxes, hence, one might expect abundant legal actions from shipowners to Arbitration Court in Primorski region for appeal against actions of acts of the customs.