



IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION

OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

**ON THE CASE CONCERNING DETERMINATION
OF THE ISSUE OF CONFORMITY OF THE PROVISION
“IRRESPECTIVE OF THE OWNERSHIP” OF ARTICLE 224
OF THE CUSTOMS CODE OF THE REPUBLIC OF ARMENIA
WITH THE CONSTITUTION OF THE REPUBLIC
OF ARMENIA ON THE BASIS OF THE APPLICATION
OF THE ADMINISTRATIVE COURT OF APPEAL
OF THE REPUBLIC OF ARMENIA**

Yerevan

3 June 2014

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), Justices K. Balayan, F. Tokhyan, M. Topuzyan (Rapporteur), A. Khachatryan, V. Hovhanissyan, H. Nazaryan A. Petrosyan, V. Poghosyan,

with the participation (involved in the framework of the written procedure) of the respondent:

official representative of the RA National Assembly, advisor to the Department of Expertise of the RA National Assembly Staff: S. Tevanyan,

pursuant to Article 100, Point 1, Article 101, Part 1, Point 7 of the Constitution of the Republic of Armenia, Articles 25, 68 and 71 of the Law on the Constitutional Court of the Republic of Armenia,

examined in a public hearing by a written procedure the Case on the conformity of the provision “irrespective of the ownership” prescribed in Article 224 of RA Customs Code with the Constitution of the Republic of Armenia on the basis of the application of the Administrative Court of Appeal of the Republic of Armenia.

The examination of the case was initiated on the basis of the application of the RA Administrative Court of Appeal submitted to the RA Constitutional Court on 27.12.2013.

Having examined the report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, as well as having studied the Customs Code of the Republic of Armenia and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The Customs Code was adopted by the RA National Assembly on 06.07.2000, signed by the RA President on 09.08.2000 and came into force on 01.01.2001. Article 224 of the RA Customs Code was amended by the Law ՀՕ-25-Ն on Making Amendments and Additions in the RA Customs Code which was adopted by the RA National assembly on 22.12.2010, signed by the RA President on 15.01.2011 and entered into force on 05.02.2011 and the Law ՀՕ-125- Ն on Making Amendments and Additions in the RA Customs Code which was adopted by the RA National assembly on 11.12.2013, signed by the RA President 27.12.2013 and entered into force on 07.01.2014.

Article 224 of the RA Customs Code (hereinafter Customs Code) is challenged by the Applicant at the RA Constitutional Court by edition adopted by the National Assembly on 22.12.2010 by the Law ՀՕ-25-Ն on Making Amendments and Additions in the RA Customs Code.

The challenged edition of Article 224 of the Customs Code prescribes: “The person from whom goods were taken by the order prescribed by Article 212 of the Code or to ensure payment of the fine and customs payments irrespective of the ownership, may receive them within 15 days after payment of the fine, custom payments and performance of obligations.”

2. The background of the considered case is the following: The goods supplied to “Dino Gold Mining Company” LLC were examined in the customs storehouse on June 1, 2010 and it was revealed that Kamo Petrosyan, the authorized representative of “Dino Gold Mining Company” LLC had made a wrong declaration of the goods. Pursuant to Article 203 of the RA Customs Code a protocol was filed against Kamo Petrosyan on violation of the customs rules and the imported goods were seized and stored in “Trans Alliance” LLC customs store-

house. On 12.08.2010 by decision of the Head of the Investigation Department of the State Income Committee of the Republic of Armenia Adjunct to the Government was found guilty in violating the customs rules prescribed by Article 203 of the RA Customs Code and was fined.

“Dino Gold Mining Company” LLC applied to the RA State Income Committee Adjunct to the Government on 09.02.2012 with the request to release the seized goods. The latter replied to the Applicant's application stating that “...in accordance with Article 224 of the RA Customs Code irrespective of the ownership the goods seized for ensuring the payment of the fine may be returned within 15 days after payment of the fine.”

“Dino Gold Mining Company” LLC applied to the RA State Income Committee Adjunct to the Government with the demand to recognize the abovementioned administrative act as invalid and release the goods. The Appeal Commission of the State Income Committee Adjunct to the Government left the complaint without examination and the challenged administrative act was left without changes.

The Administrative Court rejected the submitted claim based on Article 224 of the Customs Code.

At present the Administrative Court of Appeal carries out the administrative case No. AC/6421/05/12 on the basis of “Dandy Precious Metals Kapan” CSC (at the moment of submitting the claim “Dino Gold Mining Company”) against the Administrative Act No.13-2/1350-12 of 17.02.2012 of the RA State Income Committee Adjunct to the Government on recognizing the part “Simultaneously, it is declared that for ensuring the recovery of the fine irrespective of the ownership the seized goods, pursuant to Article 224 of the RA Customs Code they may be returned after the payment of the fine within 15 days” as invalid and changing the demands of the part “To permit “Dino Gold Mining Company” CSC to release the air conditioning pipes produced by the FLEXADUX PLASTICS British company with total weight of 854 kg and imported to the RA from the Great Britain “.

On 23.12.2013 the Administrative Court of Appeal held a decision to terminate the proceeding of the case and apply to the RA Constitutional Court to decide the conformity of the provision of “irrespective of the ownership” of Article 224 of the RA Customs Code with the RA Constitution.

3. The Applicant states that the challenged provision “irrespective of the ownership” contradicts Articles 8 and 33 of the RA Constitution as it deprives the owner of the property in constitutional legal meaning by hampering the possibility of the owner, carrying no obligations, to use the property without the possibility to achieve the goals of the customs policy of the Republic of Armenia defined by law. The Applicant also finds that the challenged provision causes legal uncertainty. To the Applicant, according to the principles of responsibility in accordance with guilt and personal responsibility, as well as in the context of the goal of administrative fine, the fine shall be paid exclusively on the expense of property of the wrongdoer meanwhile, by the force of the challenged provision, for ensuring payment of fine, customs payments and obligations the release of those goods is restricted which are seized according to the order subscribed by Article 212 of the Customs Code from the subjects who do not have any obligations.

The Applicant also mentions that in this case the interference with the right to property cannot be considered as an effective and necessary mean for achieving the goals pursued by the RA customs policy as by interference with the right to property not any behavior is required from the owner for achieving those goals. Payment of the fine by the third party who is considered as an independent subject is defined as a prerequisite for elimination of restriction to this right.

4. The Respondent, objected the Applicant's arguments and finds that the discussed regulation “is the mean which ensures implementation of the sanction by the power of which besides calling the offender to *personal liability*, the company, by which this subject is authorized, becomes the subject to the negative consequences of the illegal actions of the latter.” According to the Respondent, “...in the condition, when due to the illegal actions of the person authorized by the company, fine is imposed by the competent bodies which, the person, who committed the violation, shall pay in person, and the company, by making the appropriate formulations, shall be authorized to implement its right to property without any hindrance and the latter will not only assist the payment of the fine by the representative and not undertake means for ensuring the performance of the sanction but also later not to undertake means for evading these situations. Meanwhile, in the case of the current legal regulations, the importing company, as an owner, is inter-

ested in ensuring the payment of the fine for restoring the right to dispose completely the good which it possesses by the right to property.”

Touching upon the Applicant’s arguments on depriving the right to property, the Respondent mentioned that “...restrictions of the implementation of the owner’s powers, meanwhile, shall be differentiated from legal depriving of the right to property, and take into consideration the differences of the legal consequences deriving from them...”

5. For resolving the issue of constitutionality of the challenged provision, the Constitutional Court finds it necessary to consider the challenged regulation in the light of combination with the relevant provisions of the RA Customs Code, which are systemically correlated with the challenged provision, in order to find out:

- to what extent the completeness of the legislative mechanisms of exercise of the challenged regulation is ensured;
- what is the constitutional legal content of the notion “deprivation of the right to property”;
- to what extent the challenged legal regulation prescribed by the challenged provision is included in the contextual scopes of the institute of “depriving the right to property” prescribed by Article 31 of the RA Constitution;
- does the challenged provision cause restriction to the right to property? Does it pursue legitimate goal? Is it proportionate and necessary for achieving the legitimate goal in the democratic society?
- does the RA legislation prescribe necessary and sufficient guarantees in the framework of ensuring effective defense of human rights?

6. As a result of the combined analysis of the challenged regulation and the relevant provisions of the Customs Code systemically correlated with the challenged provision, the RA Constitutional Court states that the institute of seizure of the goods during the customs proceedings is stipulated in Chapter 38 of Customs Code. Part 1 of Article 212 prescribes that the goods which are considered as direct object of violation of the customs rules, the means of transportation used for shipment of the goods across the customs boarder, caches constructed for the shipment of the goods across the RA customs boarder, as well as documents

necessary for the examination of the proceeding of the case on violation of the customs rules are subject to seizure.

It derives from the mentioned regulation that the legislator authorizes the customs body to seize exclusively the following subjects:

- goods considered as direct object of violation of the customs rules,
- means of transportation used for shipment of the goods across the customs boarder;
- caches constructed for the shipment of goods across the RA customs boarder;
- documents necessary for the examination of the proceeding of the case on violation of the customs rules.

In the same article the legislator prescribes the procedure of seizure of the goods which, in this case, ensures the right of effective means of legal defense of the physical person or legal entity before the state body. As a result of the observation of the Customs Code, the Constitutional Court states that the mentioned article is the only one in the Customs Code, which defines the list of the goods which can be seized by the customs body and the order of their seizure. No other norm is prescribed according to which other goods can be seized by the same or other procedure.

Simultaneously, the Constitutional Court states that the institute of seizure of the goods is called to ensure the effectiveness of the proceeding of the cases on violation of the customs rules which provides the customs body with the possibility to find and prevent customs violations. The latter is public interest which justifies the necessity of restriction of the rights of the persons who transfer goods. The Constitutional Court, taking into consideration the circumstance that the article, titled "Time limit of returning the seized goods" prescribes that alleged goal of this article shall be directed towards ensuring the logical development of exercise of the institute of seizure of the goods prescribed by the Customs Code by the means of prescribing the time limits for returning the goods. Such a conclusion derives from the compared analysis of the norms concerned and requirement of the regulation prescribed by Part I, Article 41 of the RA Law on Legal Acts, according to which "...Headings of articles must conform to the content of the articles..." This implies that in the framework of the challenged article not only the time limits for returning the goods in case of implementation of the regulation prescribed by Article 212 of the Customs Code are defined, but also another institution is stipulated,

i.e. institution of seizure of the goods for ensuring the fees and customs payments, though no any norm of the Customs Code regulates the relevant authority of the customs body or the procedure of performance of that authority. As a result, an article including a procedural norm dedicated to the regulation of a certain concrete legal regulation stipulates a procedural norm regulating another legal relation in case of absence of the material legal regulation of that relation. As a result, on one hand, the situation of interference with the right to property of a person occurs without the relevant authority of the customs body, and on the other hand, it is exercised in the terms of absence of the necessary structures. The Constitutional Court states that in such terms the person, in the process of interference with his/her right to property, is deprived of the possibility of effective defense of his/her right.

7. Pursuant to Article 8 of the RA Constitution, “The right to property is recognized and protected in the Republic of Armenia.” Pursuant to Article 31 of the RA Constitution, “ Everyone shall have the right to freely own, use, dispose of and bequeath the property belonging to him. The right to property shall not be exercised to cause damage to the environment or infringe on the rights and legitimate interests of other persons, the society and the state.

No one shall be deprived of property except for cases prescribed by law in conformity with judicial procedure.

Private property may be alienated for the needs of the society and the state only in exceptional cases of prevailing public interests, in the manner prescribed by the law and with prior equivalent compensation.”

The RA Constitutional Court in its decision DCC-903 stated that “Article 31 of the RA Constitution prescribes four circumstances of differentiation of restriction exercising the right to property:

- a) restriction of exercise of the right to property, by causing damage to the environment or infringe on the rights and legitimate interests of other persons, the society and the state (Second sentence of Part 1 of Article 31);
- b) deprivation of property (Part 2 of Article 31);
- c) alienation of private property for the needs of society and the state (Part 3 of Article 31);
- d) restriction of the right to land ownership for the foreign citizens and stateless persons ...”

In its decisions, the RA Constitutional Court expressed also legal positions on the institution of “deprivation of the property” (DCC-903, DCC-1073, DCC-1142). In particular, in its decision DCC-903 of 13 July 2010, the Constitutional Court touched upon characteristic elements of “deprivation of the property” and, in particular, stated that “...the Constitutional Court states that the following obligatory elements are distinctive/typical for the institution of deprivation of the property:

- in case of deprivation of property suspension of right to property towards certain goods is being executed beyond the will of the owner and without any compensation;
- deprivation of the property is implemented as a means of responsibility;
- in case of deprivation of property simultaneous and complete termination of owner’s authorities of possession, disposal and maintenance of the given property takes place without guaranteeing their continuity.”

For assessment of the challenged provision from the perspective of deprivation of the property the Constitutional Court considers it necessary to examine it in systemic correlation with other provisions, as well as to reveal the goal pursued by the legal norm which involves the challenged provision. Thus, the challenged edition of Article 224 of the Customs Code prescribes, that, in accordance with the procedure prescribed by Article 212 of the Code or for ensuring payment of customs fees and customs payments, a person, from whom the goods have been seized, regardless the ownership of property, may get them back within a period of fifteen days after payment of fee, customs payments and performance of obligations. In the context of the challenged regulation, the aim of seizure of goods directly derives from the same regulation; in particular, the goods are seized for ensuring the levy of fee and customs payments. It is obvious from the definition that it is not a means of responsibility though it is performed beyond the person’s will as an obligatory action (i.e. means of coercion implemented by the state) as the goals of deprivation of property and the challenged institution differ. Deprivation of property is considered as a means of responsibility which causes undesirable consequences to the owner in case if he/she does not behave in accordance with the requirements of the law. The challenged legal regulation is not a means of responsibility. It is intended to ensure the performance of the person’s obligations prescribed by law.

Besides, the circumstance that seizure of goods is performed for ensuring the fulfillment of the obligation, states that as a result of it the restrictions of right to property will be abolished, i.e. in case of seizure of goods restoration of the right to property is ensured, meanwhile, deprivation of property is unconditional/definitive. The provision prescribed in Article 224 also states it, according to which, "... it can be received within a period of fifteen days after payment of fees and customs payments and performance of obligations."

On the basis of the above mentioned, the Constitutional Court states that the discussed interference with the right to property by its essence is not a deprivation of property in the sense of Article 31 of the RA Constitution.

8. By its decision DCC-1073, the RA Constitutional Court examined the issue of restriction of the right to property of a person and mentioned that Article I of the Protocol I Of the European Convention for the Protection of Human Rights and Fundamental Freedoms envisages that every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. It is also highlighted that the preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The European Court, in its turn, in *Case of Sporrong and Linnroth v. Sweden*, (CASE OF SPORRONG AND LINNROTH V. SWEDEN, Application no. 7151/75; 7152/75) has envisaged that "Article (P1-I) comprises three distinct rules. The first rule, which is of a general nature, stipulates the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions. The third rule recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purposes stated in the second paragraph."

The RA Constitutional Court states that although the challenged provision does not lead to deprivation of property, absence of possibilities

to enjoy the authorities which comprise the content of the right to property occurs as it is obvious that the seized goods, as an object of property, in a certain time limit cannot be disposed, used or administered by the owner. The Constitutional Court finds it necessary to consider the challenged regulation in the light of logics of the constitutional legal principle of the harmonious exercise of right to property of protection of environment, rights of other persons, society and state and their legitimate interests. As it is mentioned, the challenged regulation pursues an aim to ensure payment of fine and customs payment within customs legal relations, i.e. it is called to ensure performance of payment of fine and customs payment by the person responsible for the payment of fine and customs payments. By examining the institution of arrest applied within tax relations, which is called to ensure fulfillment of tax obligations in the decision DCC-1073 the RA Constitutional Court considered restriction of right to property as legitimate in certain circumstances pursuant to fulfillment of obligations prescribed in Article 45 of the RA Constitution.. Although, the challenged provision prescribes restriction to right to property without the legal terms mentioned in the above mentioned decision and simultaneously does not differentiate the property of the wrongdoer and other persons. The challenged restriction to right to property considered by the decision DCC-1073 is realized for ensuring fulfillment of the duties by the person on the account of his own property in size of not performed obligation while the regulation prescribed by Article 224 of the Customs Code not always ensures the restriction of the right to property of the wrongdoer as a a guarantee for performance of duties prescribed by Article 45 of the RA Constitution. In the terms of the challenged regulation two situations are possible: in first case, when the person transfers the goods which belong to him/her, in second case, the goods which belong to another person or persons. In particular, such a situation occurs when the transporter of goods enjoys the service of the customs broker in the framework of the civil-legal obligations. If in first case the interference with right to property may be considered as legitimate as the person due to the fault committed by him/her is subjected to administrative fine and as guarantee of its implementation his/her right to property is restricted, in the second case it carries negative consequences regardless his/her fault due to improper behavior (action, inaction) of another person, i.e. as a result of improper performance of the civil-legal responsibilities taken over by the latter.

In the decision DCC-920 of October 12, 2010 the Constitutional Court stated that “The combined research of Articles 9, 32 and 279 of the RA Code on Administrative Offences proves that “responsibility for the fault” is one of the principles of administrative responsibility which means that administrative penalty (responsibility) may be implemented only towards a person who committed an administrative offence. This principle lies also at the basis of the responsibility for infringement of customs rules. In particular, pursuant to Article 189, Part 2 of the RA Customs Code any natural or official person shall incur liability for deliberate or imprudent violation of customs regulations. Consequently, fault as an obligatory element of the subjective side of the composition of administrative infringement is the only precondition and prerequisite of the administrative responsibility. The mentioned principle is tightly linked with another principle of administrative responsibility – the principle of personal responsibility pursuant to which the person is subject to liability only for the infringement committed by himself.”

Developing the legal positions expressed in the Decision DCC-920, the RA Constitutional Court finds that as the person, who committed infringement, is considered as the subject of responsibility, consequently, the means for ensuring performance of obligations shall be implemented exclusively on the expense of the person’s property who committed infringement and is subjected to responsibility. The Constitutional Court also finds that if the seizure of goods follows the goal of ensuring the performance of obligations to pay the fine and customs payments, it may not be implemented regardless ownership of the good subject to seizure as the offender will be interested in performing consequent obligation properly in the case of the prospective of abolishment of the restriction of his/her right and evading carrying the negative consequences towards his/her personal property; meanwhile the challenged regulation does not ensure logical inter-agreement of the correlation between interest in fulfillment of the obligation and the restriction of the right to property as a correlation between a goal and a remedy. Moreover, due to this legal regulation, in reality the public-legal principles (individualization, presence of guilt, etc) of realization of the institution of legal responsibility are violated and as a result it cannot effectively serve the aims pursued by them.

Based on the aforementioned the Constitutional Court finds that the restriction of the person's right to property conditioned by another person's illegitimate behavior (action or inaction) to ensure the performance of the obligation by the offender is an illegitimate interference with the right to property of the person who has not committed an offence and has no relevance to necessity to ensure the due/normal process of the preceding on the violations of custom rules.

9 Considering the issue of legislative guarantees necessary for application of the challenged regulation, the Constitutional Court states that the guarantees, in the light of which the RA Constitutional Court recognized the restriction of possibility of performance of the right to property to be in conformity with the RA Constitution as a form of the constitutional-legal principle of performance of the right to property prescribed by Article 31 of the RA Constitution directed to guarantee the fulfillment of the obligation stipulated by Article 45 of the Constitution are absent from the Customs Code. The guarantees pointed out in the Decision DCC-1073 mainly mean that arrest/seizure of goods for guaranteeing the performance of obligations could be implemented after exhausting all possibilities to ensure the fulfillment of obligation by other means. Meanwhile, in the examined case the property is seized immediately regardless ownership of the property, consequently, by illegitimate manner. Besides, alternative structures of seizure of property are absent from the Customs Code, although in the framework of the tax legal regulations, while discussing the issue of constitutionality of the institution of arrest, the Constitutional Court considered the availability of the latter as a productive structure in ensuring protection of human rights. The list of the property, the arrest of which is banned, is also absent from the Customs Code. Meanwhile, the availability of such a regulation in the RA Law on Taxes is also recognized as a significant guarantee of performance of arrest by the RA Constitutional Court in the Decision DCC-1073.

The Constitutional Court considers it necessary to mention that the challenged provision of the Customs Code does not clarify whether in case of imposing fine the owner of the property can pay the fine instead of the subject who committed violation or not. The Constitutional Court states that in case of absence of such possibility the risk of violation of human rights increases as abolishment of the restriction of the person's right to property is conditioned with the other person's behavior and

in case of non-payment of the fine for a long-lasting time period by the subject who committed offence, the owner of property may bear financial and other losses.

The Constitutional Court finds that, although enjoyment of the right to property may be temporarily suspended for ensuring payment of fines and customs payments but on this grounds the legislative regulations of interference with the right to property shall endow the person with possibility to protect his/her rights. Interference with the right to property shall derive from the necessity of ensuring payment of the fine and customs payment, must be sufficient and necessary for achieving the goal; the competent body's authority and procedure of this authority must be envisaged legislatively taking into account the necessity of envisaging guarantees for the protection of the right to property stated in this decision.

The Constitutional Court concludes:

First, the challenged legal regulation is not in conformity with the requirements of the RA Law on Legal Acts (particularly, Article 41, Part 1, Article 36, Part 4),

Second, The Customs Code does not prescribe procedure of seizure of the goods for performance of the customs fines and obligations and the term "seizure" in Article 224, opposed to action concerning the direct objects of violation of customs rules prescribed by Article 212, refers not to revealing and preventing the customs legal violations but to ensuring performance of the payment of fines and customs payments and obligations,

Third, in case of implementation of the challenged legal provision, such a situation may occur when the seized goods will later not become the subject of confiscation in case of which seizure of the goods may not follow the goal to ensure the obligation of the customs fines and payments,

Fourth, the challenged provision, as far as it does not differentiate the property of different owners and causes adverse consequences for those subjects, whose behaviour does not cause the fact of legal violation brings to illegitimate interference with their right to property.

Based on the results of consideration of the case and being governed by Article 100(1), Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64, 68 and 71 of the RA Law on Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To recognize the provision “irrespective of the ownership” of Article 224 of the RA Customs Code contradicting Articles 8 and 31 of the RA Constitution and void.

2. In accordance with Article 102(2) of RA Constitution this decision is final and enters into force from the moment of its announcement.

Chairman

G. Harutyunyan

3 June 2014

DCC-1153