

Albania | Issue 04/10

To keep you up-to-date with the latest economic and financial developments, this bulletin prepared by our Tax Team provides information that may affect the operation of your business in Albania.

Constitutional Court finds incompatible with the Constitution the provision of the Customs Code requiring payment of total penalty as a condition precedent to the filing of a claim with the court against customs authorities acts

On 23 April 2010, the Constitutional Court issued its decision abrogating the requirement stipulated in the Albanian Customs Code for payment of 60% of the penalty imposed by the customs authorities, before initiation of the judiciary proceedings. The decision enters into force upon its publication with the Official Gazette, which is still to come.

This decision represents a significant change to the existing right of appeal against customs obligations, in the name of the right to a fair trial sanctioned by article 6/1 of the Human Rights Convention and article 42 of Albanian Constitution.

It is in line with the recent trends in other decisions of Constitutional Court regarding the question of constitutionality of similar provisions (*decision no. 16, dated 26 July 2008 of the Constitutional Court found in breach of the Albanian Constitution the provision of Law no. 8560, dated 22.12.1999 "On Tax Procedures" requiring payment of 15% of the penalty amount as a condition for following the judiciary proceedings*).

Below you will find details of this decision and how it affects the conditions for judiciary appeal against acts of customs authorities.

Facts: The Customs Office of Pogradec issued on 16.10.2008 an administrative act (“the Act”) imposing to two individuals (“the Claimants”) the obligation to pay customs obligation (principal and penalty) due to alleged illegal importation of goods in Albania.

The Claimants appealed against the said Act near the General Customs Directorate, and in accordance with article 289/3 of the Customs Code, they paid the principal obligation plus 40% of the penalty amount. The said Directorate rejected the appeal and reconfirmed the Act.

Following the decision of the Directorate, the Claimants addressed to the District Court their appeal, claiming the invalidity of the Act. While filing such judiciary appeal, the Claimants failed to pay the remaining 60% of the penalty amount as required by article 289/5 of the Customs Code. According to such article “*in case of rejection of the [administrative] appeal, the claimant shall pay the remaining 60% of the penalty and may appeal against the decision of the General Director near the court within 30 days from the date of receipt of decision from the General Director*”.

The District Court decided to suspend the court proceedings and forward the case to the Constitutional Court by raising the question whether article 289/5 of the Customs Code contravenes the Constitution in respect to the payment of 60% of the penalty as a condition for having access to the court for the said claim.

Decision of the Constitutional Court: The Constitutional Court decided to abrogate the said condition by stating that it is not in compliance with article 17 of the Constitution of the Republic of Albania, since it constitutes a non-proportional and non-justified restriction of the constitutional right to a fair trial provided in article 42 of the Constitution.

The Court analyzed the question if the collection of customs obligations may be achieved without imposing restrictions, which may affect the core of the right of the citizens to approach the court.

In fact, the court argued that the Albanian administrative legislation provides for the possibility to effectively collect customs obligations,

without restricting the right of access to the court (*see article 130 and article 138 of the Administrative Procedural Code and article 245 of the Customs Code*). Same treatment is provided also in the Council Regulation EEC no. 2913/92 establishing the Community Customs Code.

In light of the mentioned provisions, and as previously decided in the case of tax penalties, the Constitutional Court came to the conclusion that the customs authorities are provided with the legal tools to enforce and collect obligations from their debtors, who even in case of appeal, do not automatically benefit of the right to suspend such enforcement and seizure of their assets as a result of an ongoing administrative or court appeal procedure.

Conclusion. As a consequence of this decision, the following will constitute hereafter the appeal procedure against acts issued from customs authorities:

- the concerned person should appeal against any customs obligations/penalties within 5 days from the notification of the act imposing such obligations and pay the entire principal of the customs obligations and 40% of the respective penalty (such provision remains the same and it is not affected by the abovementioned decision of Constitutional Court). To be noted that the amount of 40% of the penalty must not exceed the principal amount of the customs obligations;
- if the administrative appeal outcome is not in favor to the concerned person, the latest may file a judiciary appeal with the court within 30 days from the date of receipt of the notification on rejection of the appeal. Such person is no longer obliged to pay the remaining part of 60% of the amount of penalty (in order its appeal be heard by the court), but it faces the risk that the customs authorities may initiate the enforcement collection procedures of customs obligations (in accordance with the provisions of article 245 of the Customs Code), although the judiciary proceedings are still in process.

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