

# CUSTOMS BINDING INFORMATION DECISIONS ACCORDING TO THE LAW OF CANADA: PECULIARITIES AND LESSONS FOR EUROPEAN COUNTRIES

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**Annotation.** *The purpose of this research is to determine the peculiarities of the legal framework for scope of subject matter and rules for issuing, modification or revocation of customs advance rulings (customs binding information decisions) from the point of view of prospects of their implementation by European countries to further improve the effectiveness of this mean of customs administration within their jurisdictions. The methodological basis of the study comprises of comparative review methods as well as systematic review methods and standard techniques of text analysis with their due adjustment to legislative material. Results: the author studied Canadian legislation making provision for the scope of matters for national customs ruling (customs binding information decisions), the grounds and legal consequences of their modification and revocation or cancellation, including their ultra-active use through postponement of the effective date of the modification or revocation, as well as the procedure for publishing of national customs rulings for ensuring the uniformity of the conclusions of customs authorities expressed in them. The particular attention is attached to those rules and regulations that could serve as a comparative legal basis for the improvement of parts of customs legislation of European countries, which concern customs binding information decisions. Conclusions: in light of the purpose of this research of particular interest are the Canadian legislative solutions concerning: 1) establishing the need for the applicant to indicate in his application for the issuance of a national customs ruling, whether to the best of their knowledge the respective issue was the subject of another/separate request for a national customs ruling, administrative or judicial appeal, which are as grounds for suspending (postponing) consideration of the request for the issuance of a national customs ruling; 2) the grounds for the occurrence of retrospective legal consequences of the modification or revocation of a national customs ruling in relation to goods imported into the customs territory before its modification or revocation; 3) determination for the purposes of ultra-active use (postponement of the effective date of the modification or revocation) of the national customs ruling, which exactly is considered to be the evidence of reliance on the national customs ruling in good faith; 4) formation of a publicly available online repository of national customs rulings to promote the uniformity and transparency of customs administration, as well as the introduction of information and telecommunication tools for submission of requests for national customs rulings, their further implementation, as well as for notification of interested parties regarding changes in their status and other issues, relating to the circulation of national customs rulings.*

**Key words:** *binding information decisions, customs advance rulings, customs law of Canada, delay of the effective date of the modification or revocation of customs ruling, publishing customs rulings.*

## 1. Introduction.

According to the unanimous recognition of the international community, customs binding information decisions (advance rulings on the application of certain provisions of customs legislation) are the most dynamic and promising tools of customs administration from the point of view of providing balanced facilitation to the interests of participants in customs relations. At the same time, despite the establishment by international trade organizations of the principles and basic rules of issuance, modification and revocation

of validity of customs binding information decisions, foreign experience of making rules and regulations on the relevant issues shows that there are fundamental differences between the provisions of the domestic customs legislation of many countries on these matters. In particular, of tremendous scientific and practical interest for European countries, especially those ones representing the civil law tradition, are the peculiarities and the best practices embodied in legal sources of Canada as a common law country.

## **2. Analysis of scientific publications.**

A considerable number of members of European scientific community has addressed and acquired profound knowledge of Canadian legislation making provision for the scope of matters for national customs rulings (customs binding information decisions), the grounds and legal consequences of their modification and revocation (cancellation), including their ultra-active use through postponement of the effective date of the modification or revocation, as well as the procedure for publishing of national customs rulings for ensuring the uniformity of the conclusions of customs authorities expressed in them. However, the dynamics and trends of the development of the European Union customs law indicated that the pace of its approximation to the best practices of the Canadian customs legislation regarding customs binding information decisions is insufficient, which, in particular, indicates the need for a more thorough study of them at the scientific level.

## **3. The purpose of the work.**

The purpose of this study is to determine the peculiarities of the legal framework for scope of subject matter and rules for issuing, modification or revocation of customs advance rulings (binding information decisions) from the point of view of prospects of their implementation by European countries to further improve the effectiveness of this mean of customs administration within their jurisdictions.

## **4. Review and discussion.**

Having looked into the relevant legal instruments, it could be noted that the Canada Border Services Agency (CBSA) issues two types of rulings to assist importers and exporters or producers outside of Canada, for the importation of commercial goods, as well as other members of the trade community:

1) advance rulings for tariff classification – assign a 10-digit tariff classification number to imported commercial goods and include a rationale to explain why that number is the correct one to use (help to determine whether imported commercial goods qualify as originating goods and are entitled to the benefits of preferential tariff treatment under a free trade agreement);

2) national customs rulings – describe which existing customs laws should apply to goods imported into Canada and how to apply them; could be requested on:

– the origin of your goods (non-free trade agreement preferential tariff treatment or Most-Favoured-Nation tariff treatment);

– country of origin marking of your goods;

– valuation, or how to determine the value of goods [1].

Moreover, importers are strongly encouraged to request a ruling if they have any doubt as to the correct value for duty of goods, particularly when considering discarding the transaction value method and applying an alternate valuation method (Canada Border Services Agency Customs valuation handbook) [2].

Conversely, Canada Border Services Agency Memorandum D11-11-1 “National Customs Rulings” sets out circumstances in which it is not appropriate for the customs authority to issue a national customs ruling. The respective request must be denied if, for instance:

- it is hypothetical in nature;

- it pertains to multiple goods such as the contents of commercial catalogues (except, in the case of a valuation national customs ruling, to different goods imported in identical circumstances);
- it is not possible to determine all the material facts (e.g., information required to determine the origin of the goods);
- where it does not meet the requirements listed within this memorandum [3].

Setting down the fundamental substantial and procedural aspects of issuance, modification and revocation of national customs rulings, Canada Border Services Agency Memorandum D11-11-1, first and foremost defines them as “a written statement by the Canada Border Services Agency, outlining how the provisions of existing customs legislation would apply to goods to be imported into Canada”. National customs rulings are provided as an administrative service for the convenience and guidance of importers, foreign exporters, and foreign producers [3]. Moreover, in addition to national customs rulings issued at request of importers, the Canada Border Services Agency may initiate and publish a national customs ruling of general application for tariff classification, valuation, origin or marking to ensure consistency in the interpretation of legislation and trade program requirements (e.g., in response to a request by industry or to reflect the findings of a general policy review, verification activity, or court decision) [1].

The Canada Border Services Agency has set a standard for issuing a national customs ruling within 120 days of receiving complete information. A request must include a statement that indicates that, to the applicant’s knowledge, the issue in the request is not currently the subject of another/separate request for a national customs ruling, a re-determination, a verification, an administrative review or appeal, a judicial or quasi-judicial review, and if so, a brief statement setting forth the status or disposition of the matter (Canada Border Services Agency Memorandum D11-11-1 § 17). Where the request relates to an issue that is currently under a review by the Canada Border Services Agency, the Canadian International Trade Tribunal or the courts, as well as if the request involves an issue that is subject to legislative or regulatory amendment national customs ruling will be postponed (Canada Border Services Agency Memorandum D11-11-1 § 28) [3].

A national customs decision, depending on its subject, should include the following determinations:

- 1) an origin marking national customs ruling – will identify whether a good qualifies under a specific tariff treatment, aside from those established pursuant to Canada’s free trade agreements (Canada Border Services Agency Memorandum D11-11-1 § 20);
- 2) a marking national customs ruling – will indicate whether a good imported to Canada is required to be marked or not, the appropriate country to be indicated if marking is required, and the acceptable method and manner of marking the goods (Canada Border Services Agency Memorandum D11-11-1 § 21);
- 3) a valuation national customs ruling – provides instruction on the specific element(s) of the valuation legislation [3].

The requirements for the information that must be contained in a valuation national customs ruling request, as well as for the documents with which it must be accompanied, are set out in Appendix A (Content of a valuation National Customs Ruling (NCR) requests) to the Canada Border Services Agency Memorandum D11-11-1. It, in particular, determines that a valuation national customs ruling request must adduce information, including, in particular, a narrative explaining the commercial circumstances in respect of the legislated valuation element(s) at issue. Documents identified in the following list may be required to be submitted in support of a valuation national customs ruling request

- (a) commercial invoices
- (b) purchase order confirmations
- (c) sale agreements, contracts or bills of sale
- (d) royalty agreements
- (e) evidence of freight costs



- (f) information relating to the proposed point of direct shipment
- (g) information which substantiates the value of identical/similar goods and
- (h) detailed calculations indicating the applicability of the transaction value of identical goods method, transaction value of similar goods method, deductive, computed, or residual value methods, as appropriate [4].

Furthermore, at any time during the course of reviewing and processing a national customs ruling request, the Canada Border Services Agency may solicit additional information from the applicant. The applicant will be given a period of 30 calendar days from the date of the letter (or such longer period as the letter may provide) to supply any additional information that is requested. If no response to the letter or through the Canada Assessment and Revenue Management Client Portal is received within the time allotted, the national customs ruling request will be closed administratively and considered withdrawn. If submitting through Canada Assessment and Revenue Management, refer to the information on how to provide supplementary information in the Canada Assessment and Revenue Management Client Portal. However, in circumstances where the Canada Border Services Agency deems it unreasonable to require an applicant to gather and submit the information normally included with a national customs ruling request (for example, requests for non-commercial “one-time only” importations), the Canada Border Services Agency will alternatively provide written instructions to the applicant in lieu of a national customs ruling (Canada Border Services Agency Memorandum D11-11-1 § 23) [3].

As regards the possibility of applying national customs rulings by third parties, Canadian customs legislation establishes that, although an importer may quote on their import declaration the number of a national customs ruling that was issued to another specific importer, foreign exporter or foreign producer, the Canada Border Services Agency is not bound to recognize or adhere to the ruling's content with regards to that importation. Quoting the national customs ruling number on the import declaration will however, make the Canada Border Services Agency aware that there is a national customs ruling which may relate to the goods or, in the case of valuation matters, the import scenario in question (Canada Border Services Agency Memorandum D11-11-1 § 64). In view of the foregoing provisions, only the applicant to whom the national customs ruling is issued may request a review or any revocation or modification of the national customs ruling, and only the applicant will be notified if the national customs ruling is revoked or modified by the Canada Border Services Agency. Additionally, only the applicant may request a postponement of the effective date of the revocation or modification of that national customs ruling by up to 90 days. For these reasons, it is recommended that persons request their own national customs ruling rather than rely on a ruling issued to another person (Canada Border Services Agency Memorandum D11-11-1 § 65) [3].

In this context, it should be observed that the opportunity for interested persons to be aware of current viewpoint of customs authorities represented in national customs rulings is ensured by the possibility of their publication according to the following rules. First of all, let us emphasize that the publication of any customs decisions in the public registers of Canada is allowed only with the consent of the applicant. It is, nevertheless, acknowledged that publishing national customs rulings benefits the trade community by establishing an easily accessible online repository of national customs rulings, providing a valuable resource to assist importers in properly reporting and accounting for goods, and contributing to a uniform and transparent administration of the corresponding trade programs. Although these rulings are binding only between the Canada Border Services Agency and the applicant to whom the national customs ruling is issued. While published national customs rulings are for reference purposes only, they provide meaningful guidance to the trade community, including foreign exporters and foreign producers in complying with Canada's trade legislation. For these reasons, although there is no obligation for the applicant to do so, the Canada Border Services Agency encourages applicants to consent to the publication of their national customs ruling. The consent statement must be signed by the importer, foreign exporter, foreign producer, or an authorized person thereof. Failure to provide either consent statement will result in the request for a national customs ruling to be considered incomplete and declined (Appendix D “Publication of the National Customs Ruling” to Canada Border Services Agency Memorandum D11-11-1) [5].

National customs rulings are valid from the date they are issued provided that all of the following conditions are met:

- the material facts and circumstances remain as originally presented
- the conditions or valuation scenario set out in the ruling have been met
- the ruling has not been modified or revoked
- the applicable legislation has not changed [1].

Considering the system of legal grounds and procedural ways of modifying, revoking and canceling national customs rulings, first of all, we should have regard to the fact that at any time, the Canada Border Services Agency may review a national customs ruling to confirm its continued validity. As a result of the review, the Canada Border Services Agency may retroactively modify or revoke an invalid or incorrect national customs ruling (Canada Border Services Agency Memorandum D11-11-1 § 35). In such instances, the Canada Border Services Agency will consider and treat the original incorrect national customs ruling as being valid from the effective date of the original national customs ruling, to the day before the effective date of the modified national customs ruling or revocation letter (Canada Border Services Agency Memorandum D11-11-1 § 41) [3].

In contrast to the legal consequences of the termination of the national customs ruling following from its withdrawal by the Canadian customs service and the inviolability of its impact on relations that ended at the time of the withdrawal of the national customs ruling, a modification or revocation of a national customs ruling, issued may be applied retroactively to goods imported before the modification or revocation is issued in the following circumstances:

(a) there was a failure to act in accordance with the terms and conditions of the ruling, which might include, inter alia

- a request for a national customs ruling, containing a misstatement or omission of material facts
- the ruling, although correct when issued, ceased to be correct at a later date because there was a change in the material facts or circumstances upon which the ruling was based and the Canada Border Services Agency was not notified;

(b) the modification or revocation being to the benefit of the applicant who requested the ruling (Canada Border Services Agency Memorandum D11-11-1 § 39) [3].

If a Canada Border Services Agency, Canadian International Trade Tribunal, or court decision that conflicts with an national customs ruling is reported to the Canada Border Services Agency in a request for a re-determination or further re-determination, and the subsequent decision supports the Canada Border Services Agency, Canadian International Trade Tribunal or court decision and not the national customs ruling, a modified national customs ruling will be issued that reflects the subsequent decision (Canada Border Services Agency Memorandum D11-11-1 § 44) [3].

Along with the above-mentioned peculiarities of the Canadian legislative framework for issuing and further transformation of national customs rulings, the prerequisites and ways of ultra-active use of these rulings, as well as the mechanism for eliminating discrepancies between them, require call for particular attention.

As prescribed by Canadian customs law, in cases of a national customs ruling modification or revocation, the Canada Border Services Agency may, under its own initiative or upon receipt of a request from the applicant, delay the effective date of the modification or revocation for a period of up to 90 calendar days from the date of issue. Such a delay shall be granted to the applicant, provided they can demonstrate to the satisfaction of the Canada Border Services Agency that they relied in good faith and to their detriment on the national customs ruling. The delay shall apply with respect to goods covered by the national customs ruling that are imported by the applicant or any other person importing those goods directly from that applicant. The evidence of reliance shall include contracts, purchase orders, past importations, or other documentation tending to establish that contracts for, and production of

goods to be imported after the modification or revocation, were arranged prior to the modification or revocation and shall specifically identify the national customs ruling on which reliance is claimed. An application for postponement of the effective date of the modification or revocation should be made in writing, to the office that issued the modification or revocation, within 90 days from the issuance of the modification or revocation, or within 90 days of receipt of a reassessment of goods imported in the 90-day period after the issuance of a modification or revocation (Canada Border Services Agency Memorandum D11-11-1 § 37) [3].

Regarding the ways of ensuring the uniformity and correctness of the application of rules and regulations on customs clearance and customs control during the issuance, modification and revocation of national customs rulings, it is to be noted that according to the law of Canada in the event an authorized person has submitted multiple national customs ruling requests for the same good on behalf of multiple applicants and the authorized person receives conflicting national customs rulings, the authorized person must notify one of the Canada Border Services Agency Offices of the Trade Operations Divisions from which a national customs ruling was received. The Canada Border Services Agency will immediately undertake a review of the national customs rulings and, as appropriate, modify or revoke the existing national customs rulings. Any modified national customs ruling will indicate its effective date and will be valid from that date forward (Canada Border Services Agency Memorandum D11-11-1 § 42). If a person has been issued conflicting rulings or conflicting decisions for the same goods or, in the case of valuation, the same import scenario, the most recent decision will take precedence (Canada Border Services Agency Memorandum D11-11-1 § 54) [3].

## 5. Conclusions.

The Canadian legislation making provision for the subject matter for national customs ruling (customs binding information decisions), the grounds and legal consequences of their issuance, modification and revocation (cancellation), including aspects of ultra-active use of these decisions through postponement of the effective date of the modification or revocation, as well as relating to the procedure for publishing of national customs rulings for ensuring the uniformity of conclusions of customs authorities expressed in them is studied. The particular attention is attached to those rules and regulations that could serve as a comparative legal basis for the improvement of parts of customs legislation of European countries which concern customs binding information decisions. In light of the purpose of this research it was substantiated that of particular interest are Canadian legislative solutions concerning: 1) establishing the need for the applicant to indicate in his application for the issuance of a national customs ruling, whether to the best of their knowledge the respective issue was the subject of another/separate request for a national customs ruling, administrative or judicial appeal, which are as grounds for suspending (postponing) consideration of the request for the issuance of a national customs ruling; 2) the grounds for the occurrence of retrospective legal consequences of the modification or revocation of a national customs ruling in relation to goods imported into the customs territory before its modification or revocation; 3) determination for the purposes of ultra-active use (postponement of the effective date of the modification or revocation) of the national customs ruling that evidence reliance on good faith on a national customs ruling may include contracts, purchase orders, past imports or other documentation to demonstrate that the contracts and production of goods to be imported after the modification or revocation of the national customs ruling were initiated prior to that and have to identify the specific national customs ruling that was relied on; 4) mandatory publication of a national customs ruling issued by the customs authority on its own initiative (in response to a request by a branch association of entrepreneurs or for a generalization of the practice of customs clearance or customs control, administrative appeal or litigation) on issues of tariff classification, customs valuation, origin or marking of goods to ensure the consistency of application of domestic customs rules and international trade agreements; 5) formation of a publicly available online repository of national customs decisions to promote the uniformity and transparency of customs administration, as well as the introduction of information and telecommunication tools for submission of requests for national customs decisions, their further implementation, as well as for notification of interested parties regarding changes in their status and other issues, relating to the circulation of national customs decisions.

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