Commission Decision

of 20-04-1999

finding that post-clearance recovery of import duties

is justified in a particular case

(request submitted by Germany)

REC: 4/98

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code,[1]

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92, and in particular Article 873 thereof, [2]

Whereas by letter dated 28 May 1998, received by the Commission on 24 June 1998, Germany asked the Commission to decide, under Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties,[3] as last amended by Regulation (EEC) No 1854/89,[4] and under Article 220(2) of Regulation (EEC) No 2913/92, whether waiving the entry in the accounts of import duties is justified in the following circumstances:

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1 OJ No L 302, 19.10.1992, p.1.
2 OJ No L 253, 11.10.1993, p.1.
3 OJ No L 197, 03.08.1979, p.1.
4 OJ No L 186, 30.06.1989, p.1.

A firm imported in 1993 and 1994 computer games from Japan under CN heading 9504 1000 at a customs rate of 5.6% *ad valorem*. The games were in the form of a cassette containing an integrated circuit on which the games software was stored.

The firm's parent company in the UK procured the games software from developers based inside and outside the EU, transferred it to its own data media and supplied these as "prototypes" to the Japanese manufacturer. The manufacturer then transferred the prototype data onto the games cassettes later imported by the firm. The parent company paid licence fees to the games developers for the purchase of the software.

Following an external audit at the firm, it was established that under Article 8(1)(b)(iv) of Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes,[5] as last amended by Regulation (EEC) No 4046/89,[6] with regard to operations prior to 1 January 1994, and Article 32(1)(b)(iv) of Regulation (EEC) No 2913/92, for operations after 1 January 1994, the software development costs should be included in the customs value of the imported goods if the software was developed outside the Community. On the basis of these findings, on 12 July 1995 the German customs administration demanded payment from the firm of import duties totalling XXXX.

However, as a result of further investigation of the case by the relevant German authorities, it was found that the products supplied by the parent company to the Japanese manufacturer were in fact covered by Article 8(1)(b)(ii) of Regulation (EEC) No 1224/80 and Article 32(1)(b)(ii) of Regulation (EEC) No 2913/92. Consequently, software development costs incurred within the Community should also be included in the customs value of the finished products imported from Japan. On 18 March 1996 the German customs service therefore issued a further demand for the payment of import duties in the sum of XXXXX; the firm applied to have this amount waived;

5 OJ No 134, 31.05.1980, p.1.
6 OJ No L 388, 30.12.1989, p.24.

Whereas the firm states that it has seen the dossier submitted to the Commission by the German authorities and has nothing to add; whereas the firm sent a statement of its position to the German authorities, which forwarded it to the Commission in annex to their letter of 28 May 1998;

Whereas by letter dated 17 December 1998, the Commission notified the firm that it intended to refuse its request and explained the grounds for its objections;

Whereas by letter dated 15 January 1999, received by the Commission the same day, the firm responded to those objections; whereas it argued that games development costs incurred in the Community should not be included in the customs value of the imported goods, so that the additional recovery notice related to a non-existent customs debt, and that therefore the application for a waiver applied only in connection with the inclusion, in the customs value of the imported goods, of development costs incurred outside the Community;

Whereas in accordance with Article 873 of Regulation (EEC) No 2454/93, the administrative procedure was suspended from 17 December 1998 to 15 January 1999;

Whereas in accordance with Article 873 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 25 February 1999 within the framework of the Customs Code Committee (Section for General Customs Rules/Repayment) to consider the case;

Whereas Article 5(2) of Regulation (EEC) No 1697/79, which applies in this case to the imports effected before 1 January 1994, states that the competent authorities may refrain from taking action for the post-clearance recovery of import duties or export duties which were not collected as a result of an error made by the competent authorities themselves which could not reasonably have been detected by the person liable, the latter having for his part acted in good faith and observed all the provisions laid down by the rules in force as far as his customs declaration is concerned;

Whereas Article 220(2)(b) of Regulation (EEC) No 2913/92, which applies in this case to the imports effected after 1 January 1994, states that subsequent entry in the accounts shall not occur where the amount of duty legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration;

Whereas the competent German authorities considered, upon re-examining the conclusions of the audit, that the products supplied by the parent company to the Japanese manufacturer were covered by Article 8(1)(b)(ii) of Regulation (EEC) No 1224/80 and Article 32(1)(b)(ii) of Regulation (EEC) No 2913/92; whereas, consequently, they concluded that the software development costs incurred in the Community should also be included in the customs value of the finished imported products;

Whereas import duties on those costs in the sum of XXXXX have not been recovered;

Whereas the request from the German authorities of 28 May 1998 related only to the latter amount, and the matter of the sum demanded in the recovery notice of 12 July 1995 was not referred to the Commission;

Whereas the German customs authorities made an error, in that it was incorrectly stated in the conclusions of the audit, and later confirmed by the recovery notice issued on 12 July 1995, that the costs in question were covered by Article 8(1)(b)(iv) of Regulation (EEC) No 1224/80 and Article 32(1)(b)(iv) of Regulation (EEC) No 2913/92;

Whereas the purpose of Article 5(2) of Regulation (EEC) No 1697/79 and Article 220(2)(b) of Regulation (EEC) No 2913/92 is to protect the legitimate expectations of the person liable for payment;

Whereas, while the position stated by an administration with regard to the assessment of customs value in a recovery notice may give rise to legitimate expectations on the part of the person liable for payment in respect of customs operations carried out subsequent to the administration's statement of that position, the same is not true of operations referred to in the recovery notice itself and therefore carried out prior to the notice;

Whereas, while it must obey the rules regarding the prescription period, an administration may require a certain length of time to reach a definitive opinion when assessing all the facts in a case;

Whereas as long as the prescription period has not expired, an administration may decide to carry out new checks or re-examine the conclusions of previous checks; whereas the prescription period would otherwise serve no useful purpose if administrations were not allowed some latitude in cases which are far from straightforward;

Whereas the decision to rectify a recovery notice, following the re-examination of the conclusions of an audit of a company, cannot be considered as likely to affect legitimate expectations which the person liable for payment might have derived from the conclusions stated in the initial recovery notice;

Whereas, therefore, the circumstances of the cases do not constitute an error on the part of the customs authorities which could not reasonably have been detected by a trader acting in good faith, within the meaning of Article 5(2) of Regulation (EEC) No 1697/79 and Article 220(2)(b) of Regulation (EEC) No 2913/92;

Whereas, moreover, the firm did not comply with all the provisions laid down by the legislation in force as regards its customs declaration; whereas no software development costs were included in the customs declarations despite the fact that they constituted information relevant to the calculation of the customs value of the goods concerned and therefore of the amount of import duty;

Whereas post-clearance recovery of import duties is therefore justified in this case,

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of XXXXX requested by Germany on 28 May 1998 must be recovered.

Article 2

This Decision is addressed to Germany.

Done at Brussels, 20-04-1999

For the Commission

MEMO TO THE COMMISSION

In 1993 and 1994 a firm imported from Japan computer games manufactured using prototypes supplied by the firm's parent company, based in the UK. The prototypes included software bought both inside and outside the Community.

Following an external audit at the firm, it was established that under Regulation Nos 1224/80 and 2913/92, the software development costs should be included in the customs value of the imported goods if the software was developed outside the Community. On the basis of these findings, on 12 July 1995 the German customs administration demanded payment from the firm of import duties totalling DM 13 085.40.

However, as a result of further investigation of the case by the relevant German authorities, it was found that the software development costs incurred within the Community should also be included in the customs value of the finished imported products. On 18 March 1996 the German customs service therefore issued a further demand for the payment of import duties in the sum of DM 12 450.35; the firm applied to have this amount waived.

While it must obey the rules regarding the prescription period, an administration may require a certain length of time to reach a definitive, substantiated opinion when assessing all the facts in a case. As long as the prescription period has not expired, an administration may decide to carry out new checks or re-examine the conclusions of previous checks. The decision to rectify a recovery notice, following re-examination of the conclusions of an audit of a company, cannot be considered as likely to affect legitimate expectations which the person liable for payment might have derived from the conclusions stated in the initial recovery notice.

Moreover, the firm did not comply with all the provisions laid down by the legislation in force as regards its customs declaration; no software development costs were included in the customs declarations.

Post-clearance recovery of import duties is therefore justified in this case.

When the Customs Code Committee was consulted about this case, on 25 February 1999, the UK delegation was in favour of recovery. The Belgian, Danish, German, Spanish, Irish, Italian, Dutch, Portuguese and Swedish delegations were against post-clearance recovery of the duty. The French, Luxembourg, Austrian and Finnish delegations abstained. The Greek delegation was absent.