(REC 04/06)

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29-8-2007
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NOT FOR PUBLICATION

COMMISSION DECISION

of 28-8-2007

finding that the post-clearance entry in the accounts of a certain amount of import duty is not justified and finding that the post-clearance entry in the accounts of another amount of import duty is justified and that the remission of those duties is justified in a particular case

(Only the German text is authentic)

(Request submitted by the Federal Republic of Germany)

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(Request submitted by the Federal Republic of Germany)

(REC 04/06)

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], as last amended by Regulation (EC) No 1791/2006[2],

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[3], as last amended by Regulation (EC) No 214/2007[4],

[1] OJ L 302, 19.10.1992, p. 1.
[2] OJ L 363, 20.12.2006, p. 1.
[3] OJ L 253, 11.10.1993, p. 1.
[4] OJ L 62, 1. 3.2007, p. 6.

Whereas:

(1) In a letter of 15 November 2006, received by the European Commission on 22 November 2006, the Federal Republic of Germany asked the Commission to decide, under Article 220(2)(b) of Regulation (EEC) No 2913/92, whether it was justified to waive post-clearance entry of import duties in the accounts or, in the alternative, if the remission of those duties was justified under Article 239 of the same Regulation, in the following circumstances.

(2) For many years a German firm imported for refining purposes bullion lead containing by weight antimony as the principal other element.

(3) From 1988, when the Combined Nomenclature (CN) entered into force, the firm declared the bullion lead it imported under CN subheading 7801 99 10. The bullion lead was imported duty-free under the firm's end-use authorisation.

(4) Following a check carried out by the German authorities in March 2002, it was found that the bullion lead imported by the firm since 1988 should actually have been classified in subheading 7801 91 00 since antimony was the principal other element by weight. This tariff heading carried an import duty of 2.5%; the competent authorities accordingly made a post-clearance entry in the accounts of XXXXXX for consignments imported between April 1999 and April 2001, the amount for which waiver of entry in the accounts and, in the alternative, remission has been requested.

(5) In December 2000 the firm was informed by a Belgian enterprise that bullion lead containing by weight antimony as the principal other element might be subject to an import duty of 2.5%; the Belgian enterprise in question also stated that it had made approaches to the European authorities in order to rectify this situation. In February 2001 the classification of bullion lead was the subject of discussions within the Customs Code Committee – Tariff and Statistical Nomenclature Section; the Committee also came to the conclusion that the bullion lead in question should be classified in CN subheading 7801 91 00. The German authorities informed the firm accordingly on 26 March 2001.

(6) According to the firm, the request for non-recovery or, in the alternative, remission would be justified for the following reasons.

(7) Before the entry into force of the Combined Nomenclature on 1 January 1998, bullion lead containing 0.02 % or more by weight of silver and intended for refining was classified in heading 7801 AI of the Customs Tariff and could be imported duty-free under the end-use arrangements, regardless of the quantity of antimony it contained; the introduction of duty on these goods from 1 January 1988 was allegedly in breach of the European Community's GATT obligations.

(8) The imported product should, irrespective of the quantity of antimony it contains, be characterised as bullion lead and consequently classified in subheading 7801 99 10 of the Combined Nomenclature.

(9) The German authorities carried out two checks on the firm, in 1989 and 1997, and, fully aware of the composition of the product, accepted its classification in subheading 7801 99 10 of the Combined Nomenclature. Moreover, despite checks carried out in relation to this authorisation under the end-use procedure, the authorities did not make any comment about the product's tariff classification.

(10) Since 1 January 2002 unwrought lead for refining containing antimony as the principal other element by weight and containing 0.02% or more by weight of silver can be released for free circulation duty-free by virtue of its end-use. The firm therefore considers that the indefinite suspension, from 1 January 2002 by Council Regulation (EC) No 2433/2001 of 6 December 2001[5] of duties on bullion lead of CN subheading 7801 91 00 showed that the introduction of customs duty on these goods at the time of the entry into force of the Combined Nomenclature was in fact unintentional.

(11) The firm should not be penalised for the lack of clarity resulting from the conversion of the tariff provisions on the introduction of the combined nomenclature. In view of the complexity of the rules, the firm could not have detected the error.

(12) The firm acted in good faith and complied with all the provisions laid down by the rules in force as regards the customs declaration.

(13) In support of the application submitted by the German competent authorities, the firm indicated that, in accordance with Articles 871 and 905 of Regulation (EEC) No 2454/93, it had seen the dossier sent by the authorities to the Commission and had made comments which were sent to the Commission.

(14) By letter of 26 January 2006, received by the firm the same day, the Commission notified the firm of its intention to reject the application for the amount of duties on imports subsequent to December 2000, when the firm was informed by "the lead industry in Belgium" that, according to the Belgian authorities, bullion lead containing by weight antimony as the principal other element should be classified in subheading 7801 91 00 of the Combined Nomenclature.

[5] Council Regulation (EC) No 2433/2001 of 6 December 2001 amending Regulation (EEC) No 2658/87 as regards suspension on an autonomous basis of the common customs tariff duties on certain industrial products (OJ L 329, 14.12.2001, p. 4).

(15) By letter of 26 February 2007, received by the Commission the same day, the firm made known its views on the Commission's objections. In its reply, the firm argued *inter alia* that it had in December 2000 simply been informed by a Belgian firm that the classification of bullion lead was under discussion. The firm had then immediately contacted the German authorities through the "Wirtschaftsvereinigung" to clarify the classification. It had, moreover, taken all necessary steps and should therefore be considered to have displayed diligence.

(16) The administrative procedure was therefore suspended for one month in accordance with Articles 873 and 907 of Regulation No (EEC) 2454/93.

(17) In accordance with Articles 873 and 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 29 June 2007 within the framework of the Customs Code Committee - Repayment Section to consider the case.

(18) By arguing that the imported goods, irrespective of the quantity of antimony they contained, are bullion lead and therefore belong in subheading 7801 99 10 of the Combined Nomenclature, the firm is contesting the very existence of the customs debt. Contesting the debt in this way falls outside the scope of the procedure for waiving the post-clearance recovery of the duties on the basis of Article 220(2)(b) and the procedure for remission or repayment on the basis of Article 239 of Regulation (EEC) No 2913/92. It is for the Member States, not the Commission, to determine whether a debt has been incurred and, if so, the amount of the debt. Furthermore, the Court of Justice has consistently ruled that the purpose of Commission decisions under the procedures for waiving post-clearance entry in the accounts or remission/repayment on an equitable basis is not to determine whether a customs debt has been incurred or the size of the debt[6]. An operator who does not recognise the existence of a customs debt must challenge the decision establishing that debt before the national courts in accordance with Article 243 of Regulation (EEC) No 2913/92.

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[6] Case C-413 *Skatteministeriet v Sportgoods A/S* [1998] ECR I-5285, Case T-195/97 *Kia Motors Nederland BV and Broekman Motorships BV v Commission* [1998] ECR II-2907, and Case T-205/99 *Hyper Srl v Commission* [2002] II-3141.

(19) Under Article 220(2)(b) of Regulation (EEC) No 2913/92, post-clearance entry in the accounts is waived where the amount of duty legally owed was not entered in the accounts as a result of an error on the part of the customs authorities themselves that could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and observed all the provisions laid down by the rules in force as regards the customs declaration.

(20) With regard to the concept of error on the part of the competent authorities within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92, the following points must be made. The Court of Justice has consistently ruled that the legitimate expectations of a trader are protected only if the competent authorities themselves gave rise to those expectations.

(21) In this case, the fact that the German authorities accepted a large number of declarations and carried out checks in relation to the end-use arrangements without expressing reservations about the classification of the product concerned constitutes an error on the part of the authorities within the meaning of Article 220(2)(b).

(22) The Court of Justice of the European Communities has consistently ruled that, in determining whether the firm could reasonably have detected the customs authorities' error, account must be taken of the nature of the error, the firm's professional experience and the diligence it showed.

(23) As regards the nature of the error, the Court has ruled that it should be assessed in terms of the complexity of the legislation concerned and the length of time over which the authorities persisted in their error.

(24) The principles for classifying goods are laid down in the General Rules for the interpretation of the Combined Nomenclature, and in particular in General Rule 1, which provides that, for legal purposes, classification must be determined according to the wording of the headings and section and chapter notes. In this respect, subheading 7801 91 00 expressly stipulates that lead *(unwrought, other than refined)* containing by weight antimony as the principal other element should be classified in that subheading. Moreover, when the classification of this product was put to the Customs Code Committee – Tariff and Statistical Nomenclature Section, the Committee adopted a unanimous opinion, which would suggest that the classification of the product concerned is not complex.

(25) Lastly, the Correlation Tables CN 1988 to Nimexe 87 published by Eurostat clearly state that no legal value can be attached to the text and tables of which the volumes are composed and that the texts and tables cannot therefore be invoked by persons liable for duties, particularly at the level of data collection, in support of the classification of goods in a certain subheading of the Tariff and Statistical Nomenclature.

(26) It is true nevertheless that the German authorities accepted the erroneous classification in subheading 7801 99 10 of the Combined Nomenclature from the entry into force of the Combined Nomenclature on 1 January 1988 until the end of April 2001, i.e. for a period of more than twelve years. Indeed, it was only after the Customs Code Committee – Tariff and Statistical Nomenclature Section delivered an opinion on the tariff classification of the goods and unanimously confirmed that they should be classified in subheading 7801 91 00 that the German authorities finally changed their view of the classification.

(27) It is also true, as the Commission pointed out in its decision in Case REC 11/03 (Decision No C(2004) 2091 of 17 June 2004), that the introduction of the Combined Nomenclature was supposed to be neutral in effect, that in December 2001 the Council adopted a Regulation suspending duties on bullion lead of CN subheading 7801 91 00 for an indefinite period, and that the recitals to that Regulation indicate that it is in the Community's commercial interest that the same tariff treatment should be applied to the two categories of lead.

(28) Thus, even through the rules in themselves could not be considered complex, the context in which the imports in question took place confirmed the firm's belief that it was right for it to continue importing bullion lead without paying duties.

(29) As regards the condition relating to the firm's professional experience, the Court of Justice has ruled[7] that it must be verified whether the trader is professionally engaged in an activity consisting essentially in import and export operations and whether it already had some experience of trading in the goods in question, that is to say whether in the past it had carried out similar transactions on which customs duties had been correctly calculated.

(30) In this connection, it should be pointed out that the firm may have imported the same product over a very long period, but the amount of duties to be collected had never, since the entry into force of the Combined Nomenclature on 1 January 1988, been correctly calculated as the product had always been classified in the wrong subheading of the Combined Nomenclature. The firm cannot therefore be considered, in this case, to be an experienced trader.

(31) However, the file submitted by the German authorities shows that, on 26 March 2001, the German customs administration informed the firm that the Customs Code Committee – Tariff and Statistical Nomenclature Section had concluded that the product in question belonged in subheading 7801 91 00

(32) The Commission therefore considers that the firm could reasonably have detected the error from 26 March 2001.

(33) It is clear from that request that the firm complied with all the provisions laid down by the legislation in force as regards its customs declaration.

[7] Case C-250/91 *Hewlett Packard* [1993] ECR I-1819.

(34) Consequently, it is justified to waive the entry in the accounts of customs duties in the sum of XXXXXXX. Therefore, there is no need to examine whether the remission of this amount under Article 239 of Regulation (EEC) No 2913/92 is justified. However, there is a need for such an examination with regard to the customs duties on imports carried out as from 26 March 2001.

(35) Under Article 239 of Regulation (EEC) No 2913/92, import duties may be repaid in situations other than those referred to in Articles 236, 237 and 238 resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

(36) The Court of Justice of the European Communities has ruled that this provision represents a general principle of equity and that the existence of a special situation is established where it is clear from the circumstances of the case that the person liable is in an exceptional situation as compared with the other operators engaged in the same business and that, in the absence of such circumstances, he would not have suffered the disadvantage caused by the entry into the accounts *a posteriori* of customs duties[8]. The existence of an error committed by the competent customs authorities itself constitutes such an exceptional situation. The first condition referred to in Article 239 of Regulation (EEC) No 2913/92 has therefore to be regarded as being met.

(37) Therefore it is necessary to examine whether the second condition referred to in Article 239 of Regulation (EEC) No 2913/92 has been met.

(38) It is also clear from the request submitted by the German authorities that it must be accepted that there was no deception on the part of the firm.

(39) As for the condition relating to the absence of obvious negligence on the part of the firm, the file submitted to the Commission by the German authorities shows that, in view of the nature and origin of the error, which is directly related to the complexity and uncertainty of the tariff background to the operations, and the period of time

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[8] Judgment of the Court of First Instance in Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 *Kaufring AG and Others v Commission of the European Communities* ECR [2001] II-01337.

during which the authorities persisted in their error, the firm cannot be considered to have been negligent.

(40) Remission of the amount of duties relating to the imports made subsequent to 26 March 2001 is therefore justified.

(41) Accordingly, waiving post-clearance entry of duties in the accounts is justified under Article 220(2)(b) of Regulation (EEC) No 2913/92 in respect of the portion of the duties pertaining to imports made before 26 March 2001 (XXXXXX). However, the post-clearance entry of duties in the accounts is justified, and the remission of duties under Article 239 of that same Regulation is justified in respect of the duties on imports subsequent to 26 March 2001 (XXXXX),

HAS ADOPTED THIS DECISION:

Article 1

1. The import duties in the sum of XXXXX which are the subject of the request from the Federal Republic of Germany dated 15 November 2006 shall not be entered in the accounts.

2. The import duties in the sum of XXXXXX which are the subject of the request from the Federal Republic of Germany dated 15 November 2006 shall be entered in the accounts.

2. The remission of import duties in the sum of XXXXX requested by the Federal Republic of Germany on 15 November 2006 is justified.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 29-8-2007

For the Commission
László KOVÁCS
Member of the Commission