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REM 20/01

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20/06/2002
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NOT FOR PUBLICATION

COMMISSION DECISION

Of 20/06/2002

finding that repayment of import duties in a particular case is not justified

(Only the Dutch version is authentic.)

(request submitted by the Netherlands)

(REM 20/01)

FR

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(REM 20/01)

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 2700/2000,[2]

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation (EEC) No 2913/92,[3] as last amended by Regulation (EC) No 444/2002, and in particular Article 907 thereof,[4]

1 OJ L 302, 19.10.1992, p. 1.
2 OJ L 311, 12.12.2000, p. 17.
3 OJ L 253, 11.10.1993, p. 1.
4 OJ L 68, 12.03.2002, p. 11.

Whereas:

(1) By letter dated 7 August 2001, received by the Commission on 23 August, the Netherlands asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether the repayment of import duties is justified in the following circumstances.

(2) In July 1998 a Dutch firm authorised to operate a "Type E" warehouse began declaring high volume (small format) colour printers and parts and accessories thereof for release for free circulation under CN subheadings 8471 60 40 and 8473 30 90 respectively, both of them zero-rated.

(3) At the same time, on 1 July 1998 the firm applied under Article 12 of Regulation (EEC) No 2913/92 for binding tariff information (BTI) for a product described as "a high volume (small format) digital colour printer which is digitally driven via a network." In its application letter it proposed classifying the product under subheading 8471 60 40 of the Combined Nomenclature.

(4) The Netherlands authorities informed the firm that they could not issue a BTI for this type of product immediately since at the time they received the application, the classification of this type of "multifunctional" apparatus was being discussed both nationally and at Community level.

(5) In August 1998 the Netherlands authorities decided that, under General Rule 3(c) for the interpretation of the Combined Nomenclature, multifunctional apparatuses should be classified under subheading 9009 12 00, and published an explanatory note on the subject.

(6) By letter of 28 September 1998 the Netherlands customs authorities informed the firm that they did not yet have all the information necessary for the classification of the apparatus concerned, it not being possible to establish at that stage whether the copying function was of secondary importance, but that they would normally expect it to be classified under subheading 9009 12 00.

(7) After national discussions by experts in the Netherlands on 4 November 1998, the product was classified under subheading 9009 12 00. On 6 November 1998 the Netherlands authorities issued the firm a BTI classifying the whole apparatus under subheading 9009 12 00 with a 6% rate of duties.

(8) The Netherlands authorities then corrected the monthly declarations for August, September and October 1998. They found that a customs debt had been incurred and on 16 November 1998, 8 December 1998 and 28 January 1999 issued recovery notices for the goods released for free circulation in August, September and October 1998 respectively, charging the firm duties corresponding to (a) classification of the apparatus under subheading 9009 12 00 with duties of 6.2% and (b) classification of the parts and accessories under subheading 9009 90 10 with duties of 3.3%. The firm is requesting repayment of XXXXXX in import duties paid for the goods released for free circulation in August 1998.

(9) In support of the application submitted by the Netherlands authorities the firm indicated that, in accordance with Article 905 of Regulation (EEC) No 2454/93, it had seen the dossier the authorities had sent to the Commission. It stated its position and made comments, which were forwarded to the Commission by the Netherlands authorities in their letter of 7 August 2001.

(10) By letter dated 14 March 2002, received by the firm the following day, the Commission notified the firm of its intention to refuse repayment and explained the grounds for its decision.

(11) The firm did not contest these grounds. The administrative procedure was suspended, in accordance with Article 907 of Regulation (EEC) No 2454/93, between 15 March and 15 April 2002.

(12) In accordance with Article 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 7 May 2002 within the framework of the Customs Code Committee (Section for General Customs Rules/Repayment) to consider the case.

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

(14) The Court of Justice of the European Communities has consistently taken the view that this provision represents a general principle of equity designed to cover an exceptional situation in which an operator, which would not otherwise have incurred the costs associated with post-clearance entry in the accounts of customs duties, might find itself compared with other operators carrying out the same activity.

(15) In this case the dossier received by the Commission from the Netherlands authorities shows that the firm erroneously classified the goods under zero-rated subheadings in its additional global declaration for release for free circulation, whereas in fact they should have been classified under subheadings subject to customs duties. A customs debt was therefore incurred under Article 201 of Regulation (EEC) No 2913/92, for which the firm is liable as declarant.

(16) Under Article 78 of Regulation (EEC) No 2913/92, acceptance of a declaration in no way precludes the right of the competent customs authorities to carry out post-clearance checks. Furthermore, in this case post-clearance entry in the accounts of the amount of duties to be recovered was carried out in accordance with Article 220 and within the three-year time limit laid down in Article 221 of the same Regulation. This means that the initial acceptance without objection by the customs authorities of the additional monthly declaration for the goods released for free circulation in August 1998 did not in itself constitute an error that would give rise to a special situation.

(17) Furthermore, under Article 12(2) of Regulation (EEC) No 2913/92, BTIs bind the customs authorities in relation to BTI holders only for goods for which formalities were completed after the date of issue of the BTI concerned, so for the period prior to 6 November 1998, in which the imports concerned by this case took place, the firm could not invoke a BTI because none had yet been issued.

(18) Moreover, there is no evidence to support the firm's claim that the Netherlands authorities stated that duties would be payable only after the date of issue of the BTI. In their letter of 7 August 2001 the Netherlands authorities state that an in-depth national investigation had found that no such assurance could have been given; they did not therefore believe that the authorities had made any statement which could have given the firm grounds for believing that they would not engage in post-clearance recovery of import duties for the period up to the date of issue of the BTI (6 November 1998) on the basis of corrections to the tariff classification. Such a statement would also run counter to Articles 78 and 220 of Regulation (EEC) No 2913/92. Under these circumstances the firm’s argument for the existence of a special situation cannot be deemed valid.

(19) The following points should be made with regard to the fact that the application for the BTI was made in July 1998 and the BTI was not issued until the beginning of November 1998.

(20) The procedure for obtaining binding tariff information is provided for in Article 12 of Regulation (EEC) No 2913/92 and described in Articles 5 to 14 of Regulation (EEC) No 2454/93. Article 7 of the latter Regulation provides that binding tariff information must be notified to the applicant as soon as possible. If it has not been possible to notify binding tariff information to the applicant within three months of acceptance of the application, the customs authorities shall contact the applicant to explain the reason for the delay and indicate when they expect to be able to notify the information. At the time concerned the classification of "multifunctional" apparatus of the kind involved in this case was being discussed at national and Community level. At issue was the threshold of copies per minute below which the copying function could be deemed to be of secondary importance for the apparatus. The evidence for this is the fact that on 9 March 1999 the Commission adopted Regulation (EC) No 517/1999 concerning the classification of certain goods in the Combined Nomenclature, the goods concerned being apparatus of the kind involved in this case, and the adoption of such legislation presupposes preparatory discussion resulting from the existence of a difficulty. The Regulation lays down that multifunctional apparatus such as that concerned in this case that can reproduce up to thirty pages per minute is apparatus with more than one function, and that no single function can be considered to give it its essential character; under General Rule 3(c) for the interpretation of the Combined Nomenclature it must therefore be classified under subheading 9009 12 00 (multifunctional apparatus such as that concerned in this case must be classified under the heading which occurs last in numerical order among those which equally merit consideration). In July 1998 the threshold of numbers of copies per minute below which the copying function could be deemed not to be the essential function of a given piece of apparatus had not yet been decided and so the Netherlands customs authorities rightly deferred the issue of the BTI.

(21) They informed the firm of this in a letter of 28 September 1998, i.e. within the time limit of three months from the date of receipt of the application (1 July 1998), and told it that they would not be able to state a definitive position on the classification within three months of its application, but that they expected to classify the product under subheading 9009 12 00 since the national explanatory notes (published on 3 August 1999) classified such multifunctional apparatus under that heading. They told the firm that it would receive in any event an answer when the question had been decided by the experts on or around 4 November 1998. It should be noted in this respect that the information in a BTI has specific legal consequences for its holder and binds the customs authorities in respect of the holder. In certain cases the holder of a BTI that does not comply with the law established by a later Commission classification regulation may continue to apply the classification given in the BTI for a certain time after that regulation has entered into force. It was therefore natural that the Netherlands customs authorities should wish to ensure that the goods concerned were given the correct CN classification in the light of the discussion under way at the time the BTI application was submitted.

(22) As Article 7(1) of Regulation (EEC) No 2454/93 shows, the Community legislator took account of this eventuality by establishing a procedure for cases where BTIs cannot be issued within three months of the application. As soon as the experts had decided how the product should be classified (4 November 1998), the BTI was sent to the firm (6 November 1998). In so doing, the authorities met their obligations. The fact that the BTI was issued on 6 November 1998 cannot therefore be deemed to have given rise to a special situation.

(23) As regards the firm's claim that it was treated inequitably in relation to its competitors in the same sector, since some of them received BTIs in 1997 and 1998 which classified the self-same goods under heading 8471, the following points should be made.

(24) Under Article 10(1) of Regulation (EEC) No 2454/93, BTIs may only be invoked by their holders.

(25) Community legislation makes a fundamental distinction between those who hold BTIs and those who do not. As noted by the Netherlands authorities in their letter of application, this distinction partly determines the practical and legal consequences of a change of position regarding the CN classification of a product. Thus, when a regulation is adopted amending the previous classification, the holders of BTIs classifying a product under a different heading to that established by the regulation may, under certain circumstances, continue invoking their BTIs for a specified period after the regulation's entry into force. Community legislation thus explicitly provides for those who hold BTIs to be treated differently from those who do not hold BTIs.

(26) Accordingly, the firm's argument that equal treatment demanded that the date of adoption of Commission Regulation (EC) No 517/99 be the only date from which classification in a heading other than that laid down by the Regulation would be denied to all traders, irrespective of whether they held a BTI, is irrelevant. To do so would deprive of all practical effect the distinction in Community law between traders who hold BTIs and those who do not.

(27) Similarly, the firm would only have been at a disadvantage in relation to other traders if the same customs office had issued the latter with a BTI classifying identical goods under heading 8471 after 1 July 1998. In fact, contrary to the firm's claims, it is not possible to establish from the documents annexed to the application of 7 August 2001 from the Netherlands whether the BTIs cited by the firm concerned goods absolutely identical to those involved in this case. Thus, though a letter of 17 September 1999 from the Commission confirms that the Netherlands authorities had issued binding tariff information classifying different types of multifunctional apparatus in heading 8471, that letter does not specify that the apparatus concerned by these other BTIs was identical to that for which the firm requested a BTI. Nor does it indicate that the BTIs to which it refers were issued after 1 July 1998 by the same customs office.

(28) The BTI issued by the Belgian customs authorities was issued in 1997, i.e. prior to 1 July 1998.

(29) The claim that the principle of equality was violated, thus giving rise to a special situation within the meaning of Article 239 of the Customs Code must therefore be dismissed.

(30) As to the fact that other traders were treated differently because of a classification error by the offices that issued BTIs concerning products allegedly identical to those involved in this case, it must be pointed out that an error committed in relation to other traders in no way constitutes a special situation for the firm, which did not yet hold a BTI itself.

(31) With regard to the Netherlands customs authorities' refusal to inform the firm of any other BTIs issued to other traders, it should be noted that they were not obliged to do so under Community law.

(32) The dossier as a whole does not therefore give grounds for finding that there was a special situation within the meaning of Article 239(1) of Regulation (EEC) No 2913/92.

(33) Nor has the Commission found any other factors which may constitute such a special situation.

(34) With regard to the second condition provided for in Article 239 of Regulation (EEC) No 2913/92, namely the absence of deception or obvious negligence, the Court of Justice of the European Communities has consistently taken the view that account must be taken of the operator's experience and diligence.

(35) In this case the firm held authorisations for a type E warehouse and a local clearance procedure. Such authorisations are issued only to experienced traders, who have a duty to know the customs legislation. The firm can therefore be considered an experienced trader.

(36) In addition, as stated in the firm's letter of 21 October 1999, attached to the application of 7 August 2001 from the Netherlands, the firm specialises in the production and sale of office equipment, in particular a wide range of state-of-the-art products for the presentation and reproduction of information on paper. It operates as a supplier of such products. It is also specified that it purchases and imports part of the products it markets from outside the EU. These are additional grounds for deeming the firm to be an experienced trader specialising in the type of products involved in this case.

(37) As an experienced trader the firm should have been familiar with the relevant rules and applied them.

(38) Yet in its declarations for release for free circulation the firm did not apply the classification under subheading 9009 12 00 adopted by the Court of Justice of the European Communities in its ruling of 9 October 1997 (Rank Xerox Manufacturing, case C-67/95) for apparatus comprising, as does the product concerned in this case, a scanning device, a digital memory and a printing unit.

(39) Although the Court did not raise the question in its ruling of the threshold of copies per minute below which the copying function could be deemed a secondary feature of the apparatus, it did indicate that for this type of classification General Rule 3 in Title 1 of the Combined Nomenclature, and in particular General Rule 3(c), must be applied, and that therefore multifunctional apparatus such as that involved in this case must be classified under the heading which occurs last in numerical order among those which equally merit consideration.

(40) In classifying the product under subheading 8471 60 40 in its declarations for free circulation the firm failed to comply with General Rule 3(c) of the Combined Nomenclature and so acted with obvious negligence.

(41) Consequently, the Commission does not consider that the second condition laid down in Article 239 of Regulation (EEC) No 2913/92 has been fulfilled in this case.

(42) The request for repayment of import duties is therefore not justified in this case,

HAS ADOPTED THIS DECISION:

Article 1

The repayment of import duties in the sum of XXXXXX requested by the Netherlands on 7 August 2001 is not justified.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 20/06/2002

For the Commission

Member of the Commission