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REM 14/01



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28-6-2002

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NOT FOR PUBLICATION

COMMISSION DECISION

of 28-6-2002

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

(Only the Italian version is authentic.)

(Request submitted by Italy)

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(REM 14/01)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Communities,

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 444/2002,⁴ and in particular Article 907 thereof,

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 4 June 2001, received by the Commission on 15 June 2001, Italy asked the Commission to decide, under Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties, as last amended by Regulation (EEC) No 1854/89,⁵ and under Article 239 of Council Regulation (EEC) No 2913/92, whether remission of duties was justified in the following circumstances.
- (2) The first thing to point out is that the customs debt arose in 1991. The basis for the remission request is not therefore Article 239 of Regulation (EEC) No 2913/92 in conjunction with Article 13 of Council Regulation (EEC) No 1430/79, but Article 13 of Regulation (EEC) No 1430/79 alone, since that was the act applicable when the customs debt was incurred. However, this point concerning the legal basis in no way affects the admissibility of the request or the conditions governing remission.
- (3) On 16 November 1991 a forwarding company and customs agent acting in its capacity as declarant and principal lodged an external Community transit document for fastenings and cardboard boxes with the Ferneti customs office in Italy.
- (4) The competent customs office had checks carried out by the police on the load covered by the declaration and found it to be composed entirely of cigarettes. The goods were seized and the driver of the vehicle was arrested.

⁵ OJ L 186, 30.06.1989, p. 1.

- (5) The driver later informed Italian criminal investigators that he had carried another three shipments, on 16 September, 30 October and 5 November 1991. Using the agreement on mutual administrative assistance for the prevention and prosecution of customs fraud the Italian authorities established that the other three cases also involved cigarettes, though the external Community transit documents declared otherwise.
- (6) The company had signed external Community transit documents No 1 of 30 October 1991 and No 16 of 5 November 1991 as declarant and principal, just as it had signed the document for the operation of 16 November 1991.
- (7) Under Article 31 of Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit,⁶ the competent customs office revoked the company's authorisation to use a comprehensive guarantee.
- (8) Under Article 11 of Council Regulation (EEC) No 2726/90 of 17 September 1990 on Community transit⁷ and Article 13 of Regulation (EEC) No 222/77, the competent Italian authorities subsequently demanded that the company, which had signed the external transit documents of 30 October and 5 November 1991 as principal, pay the duties evaded, a sum of XXXXXX. The company is requesting remission of that sum.

⁶ OJ L 38, 9.02.1977, p. 1.

⁷ OJ L 262, 26.09.1990, p. 1.

- (9) In their requesting letter of 4 June 2001 the Italian authorities said that they considered that a special situation existed for the following reasons. They claimed that according to the [judgment of the Court of Justice of the European Communities in Case C-61/98 of 7 September 1999](#),⁸ the demands of the investigation conducted by the customs authorities constituted a special situation in the absence of any deception or negligence on the part of the person liable, who had not been informed that the investigation was being carried out. They further argued that according to the general principles laid down in the [Court's judgment in Case T-42/96](#),⁹ Article 13 of Regulation (EEC) No 1430/79 constitutes a general equity provision and, that, since the case under consideration was a special situation, the company was entitled to the remission of duties, there being no obvious negligence on its part. They further posited that equity demanded that account be taken of the fact that the criminal investigation led to the identification and conviction of the persons who actually committed the smuggling offences, against whom the customs authorities have brought actions to recover the debt. Lastly, they claimed that there was no doubt as to the absence of negligence or deception on the part of the company, since the prosecutor's office of the Trieste civil and criminal court concluded after an initial investigation that there was absolutely no proof that the company knew that the freight for which it was acting as principal consisted of contraband goods.
- (10) Pursuant to Article 905 of Regulation (EEC) No 2454/93, the company stated in support of the request from the competent Italian authorities that it had seen the dossier submitted to the Commission by those authorities and had set out its arguments in documents annexed to the authorities' letter to the Commission of 4 June 2001.

⁸ Judgment of 7 September 1998 in Case C-61/98, *De Haan Beheer BV v Inspecteur der Invoerrechten en Accijnzen te Rotterdam*.

⁹ Judgment of 19 February 1998, Case T-42/96 *Eyckeler & Malt AG v Commission of the European Communities*.

- (11) By letter dated 18 December 2001 the Commission requested further information from the Italian authorities. This information was provided by letter dated 11 February 2002, received by the Commission on 4 March 2002. The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93, between 19 December 2001 and 4 March 2002.
- (12) By letter dated 9 April 2002, received by the company on 11 April 2002, the Commission notified the company of its intention to withhold approval and explained the grounds for its decision.
- (13) By letter dated 6 May 2002, received by the Commission on 8 May 2002, the company expressed its opinion on the Commission's objections. Firstly, it contested the legality of part of the customs debt. Secondly, it maintained its view that the circumstances of the case made it a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79, involving neither deception nor obvious negligence on its part, saying that a special situation existed in this case since it had been the unwitting victim of smuggling activities by a criminal association, and that those activities must be considered exceptional in relation to the usual course of events. It averred that the exceptional nature of the situation arose from the seriousness of the illegal acts and the fact that the national legal authorities had established that a crime had been committed and recognised that the company was not party to it.
- (14) It further argued that a special situation existed because it did not have the authority to inspect the goods for which it had signed the declarations, the weight of the lorry was compatible with the load of packaging which had been declared and no inspection had been conducted by the competent customs authorities.
- (15) Lastly, it considered that a special situation existed because the customs debt arose as a result of an investigation conducted by the customs authorities.

- (16) The company did not consider that it had been obviously negligent and stressed in this respect that in its capacity of “Spedizionieri” it was not authorised to check the goods.
- (17) The administrative procedure was suspended, in accordance with Article 907 of Regulation (EEC) No 2454/93, between 11 April and 11 May 2002.
- (18) 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 12 June 2002 within the framework of the Customs Code Committee (Section for General Customs Rules/Repayment) to consider the case.
- (19) In accordance with Article 13(1) of Regulation (EEC) No 1430/79, import duties may be repaid or remitted in special situations, other than those laid down in sections A to D of that Regulation, resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.
- (20) 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.
- (21) As regards the amount of the debt, and the question of whether it is owed in its entirety, it should be pointed out that the request from the Italian customs authorities of 4 June 2001 was submitted under Article 13 of Regulation (EEC) No 1430/79, and under that Article the issue to be examined is not whether the debt is due, but whether it should be remitted on grounds of equity. It is the responsibility of the national authorities to establish the final amount of the debt.

- (22) In this respect it should be noted that in their requesting letter of 4 June 2001 and in their letter of 11 February 2002 the Italian authorities stated that as a result of different national judgments the debt had been definitively established for an amount of XXXXX.
- (23) Moreover, contrary to the claims of the company, it has not been proved that the smuggled cigarettes contained in the consignments of 30 October and 5 November 1991 were transported to the secret warehouse in Bareggio. The Trieste Civil and Criminal Court, in its judgment of 21 September 1998, stated that it could not be certain that the goods found in the Bareggio warehouse were the same as those transported in the consignments that passed through the Ferneti customs office on 30 October and 5 November 1991.
- (24) Consequently, contrary to the company's stated opinion, the debt cannot be considered cancelled on the grounds that the goods were confiscated in accordance with the legislation in force at the time - i.e. Article 8(1)(b) of Council Regulation (EEC) No 2144/87 of 13 July 1987 on the customs debt.¹⁰ It has not been proved that the goods seized were those contained in the consignments of 30 October and 5 November 1991.
- (25) As regards the existence of a special situation, the following points should be made.
- (26) Article 2(1)(c) of Council Regulation (EEC) No 2144/87 stipulates that a customs debt is incurred by the removal of goods liable to import duties from the customs supervision involved in their being placed under a customs procedure which involves customs supervision.

¹⁰ OJ L 201, 22.07.1987, p. 5.

- (27) Where a customs debt has been incurred pursuant to Article 2(1)(c) of Regulation (EEC) No 2144/87, Article 4(2) of Council Regulation (EEC) No 1031/88 of 18 April 1988 determining the persons liable for payment of a customs debt¹¹ stipulates that the person jointly and severally liable for payment of the customs debt has to fulfil the obligations arising from the use of the customs procedure under which the goods have been placed. In this case, the company is liable for the debt incurred by the removal of the goods from customs supervision because it declared the goods on 30 October and 5 November 1991.
- (28) Under Article 1(2)(b) of Council Regulation (EEC) No 3632/85 of 12 December 1985 defining the conditions under which a person may be permitted to make a customs declaration,¹² the customs declaration is the act by which a person indicates in the prescribed form and in accordance with the prescribed procedures the wish to place goods under a given customs procedure.
- (29) Furthermore, Article 8(2) of Council Regulation (EEC) No 678/85 of 18 February 1985 simplifying formalities in trade in goods within the Community¹³ stipulates that the lodging of a declaration bearing his signature with a customs office renders the declarant liable for the accuracy of the information given in the declaration, the authenticity of the documents attached and the observance of all the obligations inherent in placing the goods in question under the procedure concerned.
- (30) Moreover, a customs agent, by the very nature of its activities, accepts liability both for the payment of import duties and the conformity and accuracy of the documents it presents to the customs authorities. It remains liable even if it is the victim of fraud by a third party. Such a situation is part of its normal commercial risk and cannot constitute a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79.

¹¹ OJ L 102, 21.04.1998, p. 5.

¹² OJ L 350, 27.12.1985, p. 1.

¹³ OJ L 079, 21.03.1985, p. 1.

- (31) In its [judgment of 11 November 1999 in Case C-48/98](#)¹⁴ the Court ruled that the repayment or remission of import and export duties, which may be made only under certain conditions and in cases specifically provided for, constitutes an exception to the normal import and export procedure and, consequently, the provisions which provide for such repayment or remission are to be interpreted strictly.
- (32) In its judgment in Case C-61/98, cited by the Italian administration in its request of 4 June 2001, the Court ruled that “*the demands of an investigation conducted by the national authorities may, in the absence of any deception or negligence on the part of the person liable, and where that person has not been informed that the investigation is being carried out, constitute a special situation ... where the fact that the national authorities have, in the interests of the investigation, deliberately allowed offences or irregularities to be committed, thus causing the principal to incur a customs debt, places the principal in an exceptional situation in comparison with other operators engaged in the same business.*”
- (33) This case does not involve a situation of the kind described by the Court in its judgment in Case C-61/98. In that case the customs authorities were already aware, or at least had serious grounds for suspecting, that a Community transit operation was being organised for cigarettes, involving irregularities such as to give rise to a customs debt. They then knowingly allowed operations to be conducted which they knew to be fraudulent. This is not the case here. In the case now under consideration it was the seizure of smuggled goods during checks conducted on 16 November 1991, and the investigation that followed, which enabled the competent authorities to discover that illegal acts had been committed in the operations of 17 September, 30 October and 5 November 1991.

¹⁴ Case C-48/98 Firma Söhl & Söhlke v Hauptzollamt Bremen.

- (34) The company affirms that the customs authorities knew that irregular operations had been conducted before 16 November 1991 and allowed them to happen. As evidence it cites the way in which the checks on the lorry were conducted on 16 November 1991. However, the checks were carried out in the usual fashion. It frequently happens in Italy that a customs office calls on the *Guardia delle Finanze* to carry out checks. Furthermore, the transit operation started on 17 September 1991 and carried out by the same driver, which was retrospectively found to be fraudulent, had been cleared with the return of Copy 5 of the T1 document to the Ferneti customs office on 20 September 1991. The customs authorities could not therefore have derived any information from that operation before the smuggled goods were discovered during the checks carried out on 16 November 1991. It was, indeed, only at the beginning of December that the Trieste customs division started an investigation of the clearance of the operation of 17 September 1991.
- (35) To invoke a special situation in this case would therefore breach the principle of strict interpretation established by the Court's ruling in Case C-48/98. The documents provided by the Italian authorities in this case show that the competent customs office did not deliberately allow offences or irregularities to be committed but later discovered, following thorough checks on a transit declaration and statements by the driver accompanying the goods concerned by that declaration, that earlier transit operations had led to the removal of cigarettes from customs supervision and thereby given rise to a customs debt. In this case, therefore, an investigation carried out by the competent authorities at a later date revealed the offence committed with regard to the declarations lodged on 30 October and 5 November 1991. There can therefore be no question of a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79.

- (36) The fact that the competent customs authorities did not carry out thorough checks during the operations of 30 October and 5 November 1991 does not constitute a special situation either. The acceptance of declarations in no way precludes the right of the competent customs authorities to carry out post-clearance checks. No special situation can therefore be considered to exist on these grounds.
- (37) Furthermore, under Article 4(2) of Regulation (EEC) No 1031/88, where several people are liable for a customs debt arising from the removal of goods from customs supervision, the person required to fulfil the obligations arising from the customs procedure under which they have been placed is jointly and severally liable for payment of the debt with the persons who removed the goods from customs supervision, any persons who participated in the removal of the goods from customs supervision and any persons who are liable by reason of such removal. In this case, the company is jointly and severally liable for the debts incurred by the operations of 30 October and 15 November 1991 because it was the declarant.
- (38) The dossier as a whole does not therefore give grounds for finding that there was a special situation within the meaning of Article 13(1) of Regulation (EEC) No 1430/79.
- (39) Nor has the Commission identified any other factors constituting a special situation.
- (40) With regard to the second condition provided for in Article 13 of Regulation (EEC) No 1430/79, 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.

- (41) As the Italian authorities stated in their covering letter of June 2001, no deception was found on the part of the company and it is not considered to have participated in fraudulent operations.
- (42) As a regular declarant and customs agent, the company is an experienced operator specialising in customs clearance and should therefore be aware of customs rules and the commercial risk inherent in its business.
- (43) Furthermore, the principal has obligations that arise, and continue to exist, from the moment it contracts them. Given its responsibilities as declarant, the firm should have taken all necessary precautions against the commercial risk inherent in the clearance operations for which it vouched (supervising customers, checking that the goods in the lorries were as declared).
- (44) The fact that the weight of the loads seemed to correspond to the goods declared in no way means that the goods contained in the lorry were actually those declared. There are many products that have similar weights. Nor did the indication provided by the weight of the goods in any way remove the company's obligation to take all the precautionary measures necessary for the proper conduct of the customs operation for which it was making a declaration.
- (45) Consequently, the Commission is of the view that the second condition laid down in Article 13 of Regulation (EEC) No 1430/79 has not been fulfilled in this case.
- (46) The remission of import duties requested is not therefore justified in this case,

HAS ADOPTED THIS DECISION:

Article 1

The remission of import duties in the sum of XXXXXXXX requested by Italy on 4 June 2001 is not justified.

Article 2

This Decision is addressed to the Republic of Italy.

Done at Brussels, 28-6-2002

For the Commission

Member of the Commission