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REC 02/07

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25-1-2008
C(2008)272

NOT FOR PUBLICATION

COMMISSION DECISION

Of 25-1-2007

finding that post-clearance entry in the accounts of import duties is not justified in a particular case

(Only the German text is authentic)

(Request submitted by the Federal Republic of Germany)

(REC 02/07)

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(REC 02/07)

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 Code¹, as last amended by Regulation (EC) No 1791/2006²,

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92³, as last amended by Regulation (EC) No 214/2007⁴,

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) By letter dated 23 April 2007, received by the Commission on 3 May 2007, the Federal Republic of Germany asked the Commission to decide, under Article 220(2)(b) of Regulation (EEC) No 2913/92, whether waiving post-clearance entry in the accounts was justified in the following circumstances.
- (2) From 1998, a German trader imported aluminium alloys in ingots under an inward processing authorisation. The alloys were used in the manufacture of wheels. Under its authorisation, the trader was also authorised to use equivalent goods in place of the imported goods. It was also entitled to use the prior exportation procedure.
- (3) All three alloys covered by the authorisation fell under tariff code 7601 2010 000, and had the following names: ALSi7MG, AlSi9Mg and AlSi11Mg. The trader considered the alloys to have similar technical and commercial characteristics. It therefore used them interchangeably in the manufacture of the compensating product and held a single bill of discharge for the three alloys.
- (4) In October 2005 the customs authorities carried out an audit on the trader's firm for the period 1 November 2002 to 31 December 2005. In connection with this audit it was found that the three alloys could not in fact be deemed to be of the same nature or to be the same goods.
- (5) Following this audit, the competent authorities initiated recovery of EUR XXXXX, the amount in respect of which the trader is requesting waiver of post-clearance entry in the accounts under Article 220(2)(b) of Regulation (EC) No 2913/92, citing its good faith and the mistakes made by the competent authorities which it could not have detected.

- (6) According to the trader, waiver of post-clearance entry in the accounts is justified for the following reasons: the customs authorities were aware from the start that different aluminium alloys had been used; the competent authorities committed an error in the authorisation by not distinguishing between the different imported goods although they had known from the outset that different aluminium alloys were used; the competent authorities originally deemed the alloys to be practically identical, which is why, when they themselves were preparing the bill of discharge for the arrangement, they made no distinction between the three alloys used in the manufacture of the compensating product; clearance of the inward processing procedure where several practically identical products are used is a complex legal issue, and the trader had no experience in the application of inward processing procedures.
- (7) Pursuant to Article 871 of Regulation (EEC) No 2454/93, the trader stated that it had seen the dossier submitted to the Commission by the German authorities and had nothing to add.
- (8) In accordance with Article 873 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met to examine the case on 18 December 2007 within the framework of the Customs Code Committee - Repayment Section.
- (9) Under Article 220(2)(b) of Regulation (EEC) No 2913/92, there can be no post-clearance entry in the accounts 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.
- (10) The Court of Justice of the European Communities has consistently ruled that the legitimate expectations of a trader are protected only if the competent authorities themselves gave rise to those expectations.

- (11) As regards the possibility of an error on the part of the customs authorities when the authorisation was issued, it should be noted that the trader's arguments on this point disputes, partly or in whole, the very existence of the customs debt. However, such disputes do not fall within the scope of waiver of post-clearance entry in the accounts under Article 220(2)(b) 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 is not to determine whether a customs debt has been [incurred](#) or the [size](#) of the [debt](#)⁵. 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.
- (12) As regards the error on the part of the competent authorities in supervising the procedure, the following should be noted.
- (13) The file shows that the German authorities did indeed make a mistake. The trader did inform the customs authorities of the exact nature of the processing planned when it submitted its first application for inward processing authorisation. It also attached to its application the delivery specifications for the three aluminium alloys ALSi7MG, AlSi9Mg and "AlSi11Mg. These specifications very clearly showed the composition and technical characteristics of the three alloys.
- (14) Furthermore, until 31 October 2002 the customs authorities themselves kept the register on the basis of which the bill of discharge for the procedure could be drawn up, and made no distinction between the three alloys, which shows that they considered them to be interchangeable and usable interchangeably in the manufacture of the compensating product. When the trader drew up the bills of discharge itself, it did so in the same way as the customs authorities had done.
- (15) Lastly, despite the checks they performed on the bills of discharge drawn up by the trader, the customs authorities never made any comments on the way in which they had been drawn up.

⁵ See judgments in *Sportgoods* (C-413/96; 24.9.1998), *Kia Motors* (T-195/97; 16.7.1998) and, *Hyper Srl* (T-205/99 – 11.7.2002).

- (16) The Commission therefore considers that the German authorities committed an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (17) As the Court of Justice of the European Communities has consistently ruled, when determining whether the person concerned could reasonably have detected the customs authorities' error, account must be taken of the nature of the error and the professional experience and [diligence](#) of the person concerned⁶.
- (18) With regard to its professional experience, the file shows that the trader had never used a customs procedure with economic impact before 1998. Furthermore, between 1998 and 2002 it was the customs authorities themselves who drew up the bills of discharge. Only from the end of 2002 did the trader draw them up itself. The trader cannot therefore be deemed experienced in inward processing.
- (19) As regards the nature of the error, the Court of Justice of the European Communities 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.
- (20) As shown in the request sent by the German authorities, the authorities persisted in their error from October 1998 when the first authorisation was issued until the end of 2005.
- (21) The legislation cannot be considered complex.
- (22) With regard to the trader's diligence, the file sent by the German authorities shows that the trader was not guilty of any negligence as it first provided the competent authorities with all the relevant information and then, from 2002, merely followed the methods applied by those authorities since 1998. Furthermore, the differences in the technical characteristics of the alloys are very slight and had only a negligible effect on the quality of the compensating products. Lastly, the request from the German authorities shows that negotiations for the three alloys were conducted at the same time and the same price was negotiated for all of them.

⁶ See *Deutsche Fernsprecher GmbH* (Case C-64-89; 26.6.1990).

- (23) The circumstances in this case therefore reveal an error on the part of the German customs authorities themselves, which could not have been detected by an operator acting in good faith, within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (24) It is also clear from the request submitted by the German authorities that it must be accepted that the trader acted in good faith.
- (25) It is further clear from that request that the trader complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (26) Post-clearance entry of import duties in the accounts is therefore not justified in this case,

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of EUR XXXXX which are the subject of the request from the Federal Republic of Germany dated 23 April 2007 shall not be entered in the accounts.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 25-1-2008

For the Commission
László KOVÁCS
Member of the Commission