

**EN**

**REM 01/06**

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 17.11.2006  
C(2006)5437

NOT FOR PUBLICATION

**COMMISSION DECISION**

**Of 17.11.2006**

**finding that repayment of import duties is not justified in a particular case  
(Only the Dutch text is authentic)**

**(request submitted by the Netherlands)  
(REM 01/2006)**

FR

**COMMISSION DECISION**

**Of 17.11.2006**

**finding that repayment of import duties is not justified in a particular case  
(Only the Dutch text is authentic)**

**(request submitted by the Netherlands)  
(REM 01/2006)**

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<sup>1</sup>, as last amended by Regulation (EC) No 648/2005<sup>2</sup>,

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<sup>3</sup>, as last amended by Regulation (EC) No 402/2006<sup>4</sup>, and in particular Article 907 thereof,

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<sup>1</sup> OJ L 302, 19.10.1992, p. 1.

<sup>2</sup> OJ L 117, 4.5.2005, p. 13.

<sup>3</sup> OJ L 253, 11.10.93, p. 1.

<sup>4</sup> OJ L 70, 9.3.2006, p. 35.

Whereas:

- (1) By letter dated 20 January 2006, received by the Commission on 27 January 2006, the Netherlands asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether the repayment of import duties was justified in the following circumstances.
- (2) A Netherlands undertaking (hereinafter “the firm”) placed a number of motorcycles in free circulation between 31 May 1998 and 31 May 2001.
- (3) The motorcycles were covered by a contract between the exporter and importer which provided the purchaser with a guarantee against any defect found in the vehicle following delivery. On 31 May 2001, the firm asked for the repayment, under Article 239 of Regulation (EEC) 2913/92 establishing the Community Customs Code, of customs duties amounting to XXXXX paid at the time of importation to take into account the cost of repairs between 31 May 1998 and 31 May 2001, resulting from the terms of the guarantee.
- (4) Article 145 of Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 was amended on 19 March 2002 by Commission Regulation (EC) No 444/2002 of 11 March 2002. Article 145 provides for the possibility to adjust the customs value if the price charged by the seller to the buyer is lowered in performance of a warranty obligation relating to defects in the goods supplied. The adjusted customs value may be taken into account only if that adjustment is made within 12 months of the date on which the declaration for the goods’ release for free circulation is lodged. The amended Article 145 lays down a number of conditions that have to be met before the customs value can be adjusted post-clearance. Regulation (EC) No 444/2002 contains no retroactivity clause.
- (5) In support of the application submitted by the Netherlands authorities the firm stated that, in accordance with Article 905(3) of Regulation (EEC) No 2454/93, it had seen the file the authorities had sent and had nothing to add.

- (6) By letter dated 25 July 2006, received by the firm on 26 July 2006, the Commission notified the firm of its intention to withhold approval and explained the reasons for this.
- (7) By letter of 9 August 2006, received by the Commission on the same date, the firm replied that it had no comments to make on the Commission's letter.
- (8) In accordance with Article 907 of Regulation (EEC) No 2454/93, the period of nine months within which the Commission decision must be taken was extended by one month.
- (9) In accordance with Article 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met to examine the case on 13 September 2006 within the framework of the Customs Code Committee - Repayment Section.
- (10) Article 239 of Regulation (EEC) No 2913/92 allows import duties to be repaid or remitted in situations other than those referred to 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.
- (11) The Court of Justice of the European Communities has consistently held that this provision represents a general principle of equity designed to cover an exceptional situation in which an operator, who would not otherwise have incurred the costs associated with the customs duties concerned, might find itself compared with other traders carrying out the same activity.
- (12) In this connection the fact that a firm has acted in good faith does not in itself constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

- (13) The firm cited the following factors as constituting a special situation under Article 239 of Regulation (EEC) No 2913/92: the Commission has not given a retroactive effect to Regulation (EC) No 444/2002; the Commission never made it clear whether it considered that the amendment to Article 145 of Regulation (EEC) No 2454/93, as worded in Regulation (EC) No 444/2002, reflected in law the position it had always held; the competent national and Community authorities started discussing the draft regulation to amend Article 145 in 1997, but Regulation (EC) No 444/2002 was not adopted until 11 March 2002; the Member States have given diverging interpretations of Article 145 as worded prior to Regulation (EC) No 444/2002.
- (14) For these reasons, the firm considers that the Commission's behaviour placed it in a special situation under Article 239. The Netherlands authorities support its position.
- (15) The firm's first argument concerns retroactive application of Article 145(2) and (3) of Regulation (EEC) No 2454/93 as amended by Regulation (EC) No 444/2002. It should be noted that the issue is one of the competent customs authorities of the Member States determining the amount of the customs debt. Whether a debt has been incurred and for what amount is a matter that falls within the Member States' competence, not the Commission's under Article 239 of Regulation (EEC) No 2913/92. The Court of Justice has consistently held that the object of Commission decisions under the procedures for waivers of post-clearance entry in the accounts or remission/repayment is not to determine whether a customs debt has been incurred and, if so, the amount of the debt<sup>5</sup>. If the firm does not accept the amount of the debt as determined by the customs authorities, it must challenge it under Article 243 of Regulation (EEC) No 2913/92.
- (16) Moreover, the fact that the discussions leading to the adoption of Regulation (EC) No 444/2002 continued for five years cannot be considered as relevant. Working out a legal provision requires thoroughgoing discussions, which can be regarded as a guarantee for the quality of the legislation and can in no way place a person in a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

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<sup>5</sup> 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.

- (17) As regards the divergent interpretations by the Member States and the question of whether the amendment to Article 145 reflects in law an interpretation applied previously, the following should be noted.
- (18) Diverging interpretations by Member States cannot systematically be considered as constituting a special situation. The issue is rather whether any given administration's interpretation is correct. In this respect, Report No 23/2000<sup>6</sup> by the European Court of Auditors is perfectly clear. Point 73 states that "the Court drew the Commission's attention to the practice of the German customs authority of granting value reductions on imports of motor vehicles against repair costs covered under warranty arrangements". In its reply to this, the Commission observed that it considered this practice in line with Community customs legislation. The Commission has thus clearly expressed its point of view; however, the issue in this case is whether a customs debt has arisen, so that there are therefore no grounds for repayment under Article 239 of Regulation (EEC) No 2913/92.
- (19) The case 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.
- (20) Nor has the Commission identified any other factors constituting a special situation. There is therefore no need to examine whether the second condition laid down in Article 239 of Regulation (EEC) No 2913/92 has been met.
- (21) The repayment of import duties requested is therefore not justified,

HAS ADOPTED THIS DECISION:

*Article 1*

The repayment of import duties in the sum of XXXXX requested by the Netherlands on 20 January 2006 is not justified.

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<sup>6</sup> Special Report No 23/2000 concerning valuation of imported goods for customs purposes (customs valuation), together with the Commission's replies (OJ C 84, 14.3.2001)

*Article 2*

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 17.11.2006

*By the Commission*  
*László KOVÁCS*  
*Member of the Commission*