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EUROPEAN COMMISSION

Brussels, 2.2.2011
C(2011) 483 final

COMMISSION DECISION

of 2.2.2011

**finding that remission of import duties is justified for a certain amount but that remission of these duties is not justified for another amount in a particular case
(REM 04/09)**

(Only the English text is authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code¹, and in particular Article 239 thereof,

Whereas:

- (1) By letter of 14 October 2009, received by the Commission on 30 October 2009, the United Kingdom asked the Commission to decide whether, under Article 239 of Regulation (EEC) No 2913/92, the remission of import duties was justified in the following circumstances.
- (2) Between 11 September 2005 and 30 June 2008, a British firm, hereafter "the applicant", submitted 424 customs declarations for the release for free circulation of set-top boxes incorporating a hard disk recording function (hereafter "set-top boxes").
- (3) These set-top boxes were first declared under subheading 8528 12 91 and as of 1 January 2007, because of a change in the numbering structure of the Harmonised System under subheading 8528 71 13, which is correlated from former subheading 8528 12 91.
- (4) On 7 May 2008 Explanatory Notes were published² for subheading 8528 71 13 of the Combined Nomenclature stating that "Set-top boxes which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive) are excluded from this subheading (subheading 8521 90 00)".
- (5) These explanatory notes confirmed that the set-top boxes imported by the applicant therefore had to be classified under subheading 8521 90 00 charged with a tariff rate of 13.9 % instead of 0% under subheading 8528 71 13.
- (6) On 11 September 2008, the UK authorities therefore initiated proceedings for post-clearance recovery of duties. The amount concerned, as reduced on 11 December

¹ OJ L 302, 19.10.1992, p. 1.

² OJ C 112 of 7.5.2008 p. 8.

2008, is set at GBP XXXX (EUR XXXX), in respect of which the firm has requested remission under Article 239 of Regulation (EEC) No 2913/92.

- (7) In support of the request submitted by the UK authorities, the applicant, in accordance with Article 905(3) of Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code³, stated that it had seen the dossier that the UK authorities had sent to the Commission and had made comments, which were enclosed with the request sent to the Commission.
- (8) In a letter dated 31 March 2010, the Commission asked the UK authorities for additional information. The authorities replied in a letter of 1 July 2010, which the Commission received on 9 July 2010. Examination of the application for remission was therefore suspended between 1 April 2010 and 9 July 2010.
- (9) In a letter dated 28 September 2010, the Commission asked the UK authorities a second time for additional information. The authorities replied in a letter of 25 November 2010, which the Commission received on 29 November 2010. Examination of the application for remission was therefore suspended between 29 September 2010 and 29 November 2010.
- (10) By letter of 1 December 2010, the Commission notified the applicant of its intention to withhold approval for the amount of duty corresponding to the imports that took place as of 7 May 2008 and explained the reasons for this.
- (11) By letter of 22 December 2010, received by the Commission on the same day, the applicant commented on the Commission's objections.
- (12) In accordance with Article 907 of Regulation (EEC) No 2454/93, the time limit of nine months for the Commission to take a decision was therefore extended for one month.
- (13) 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 consider the case on 17 January 2011 within the framework of the Customs Code Committee - Customs Debt and Guarantees Section.
- (14) It appears from the request addressed to the Commission by the UK authorities that remission would be justified, since, until 7 May 2008, there was uncertainty on the correct classification of the goods concerned and since the UK authorities did not object to the classification used by the applicant and did not instruct it to use any other classification.
- (15) Under Article 239 of Regulation (EEC) No 2913/92, import duties may be remitted in situations other than those referred to in Articles 236, 237 and 238 of that Regulation if they result from circumstances in which no deception or obvious negligence can be attributed to the person concerned.
- (16) The [Court of Justice](#) 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

³ OJ L 253, 11.10.1993, p. 1.

the circumstances of the case that the person liable is in an exceptional situation as compared with 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 post-clearance entry in the accounts of customs duties⁴.

- (17) It results from the file that the UK authorities accepted 424 declarations where the set-top boxes in question were classified under subheading 8528 12 91, subsequently 8528 71 13; these declarations were submitted within 33 months, without objection. Such acceptance took place for most imports in a period where discussions were on-going at EU level on the classification of these set-top boxes.
- (18) The Commission considers the situation described above to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (19) Regarding the second condition of Article 239 of Regulation (EEC) No 2913/92, the [Court has consistently ruled](#)⁵ that when examining whether there has been deception or obvious negligence account must be taken, in particular, of the complexity of the legislation and the operator's experience and diligence.
- (20) As to the complexity of the legislation, it should be noted that Combined Nomenclature Explanatory Notes were published in the Official Journal on 7 May 2008 regarding the classification of set-top boxes. The whole purpose of adopting these notes was to clarify the situation and put an end to the complexity. Until that date, the classification of the devices in question must therefore be considered complex. On the contrary, as of 7 May 2008, the classification of the goods concerned cannot be considered as complex anymore.
- (21) The dossier submitted to the Commission shows that the applicant is an experienced trader.
- (22) As for the condition relating to the absence of obvious negligence on the part of the applicant, the file submitted to the Commission by the UK authorities shows that, in view of the specificity of the case, which is directly related to the complexity and uncertainty of the tariff background to the operations, the applicant cannot be considered to have been obviously negligent until the date of publication of the explanatory notes.
- (23) However this context radically changed with the publication of the Explanatory note in the Official Journal on 7 May 2008. In this regard, it has to be underlined that the [Court has stated](#) that it is not unreasonable to expect an experienced economic operator, which is the case here, to keep abreast of the Union law applicable to its transactions by reading the relevant Official Journals⁶.
- (24) The applicant continued declaring the set-top boxes under subheading 8528 71 13, although the explanatory notes made it perfectly clear that this kind of devices

⁴ Cases T-186/97, T-190/97 to T-192/97, T-211/97, T-216/97 to T-279/97, T-280/97, T-293/97 and T-147/99 *Kaufring AG v Commission* [2001] ECR II-01337

⁵ Case C-48/98 *Firma Söhl & Söhlke v Hauptzollamt Bremen* [1999] I-07877

⁶ Binder Judgment of 17 July 1989 (Case C-161/88) and Behn Judgment of 28 June 1990 in case C-80/89.

incorporating a hard disk recording function was excluded of this subheading and had to be classified under subheading 8521 90 00.

- (25) It follows from the foregoing that the second condition referred to in Article 239 of Regulation (EEC) No 2913/92 is therefore not met as of 7 May 2008.
- (26) The remission of import duties requested is therefore justified for the amount of GBP XXXX (EUR XXXX) corresponding to the imports that took place before 7 May 2008 and that remission is not justified for the amount of GBP XXXX (EUR XXXX) corresponding to the imports that took place as of 7 May 2008.
- (27) Where special circumstances warrant repayment or remission, Article 908 of Regulation (EEC) No 2454/93 authorises the Commission to determine the conditions under which the Member States may repay or remit duties in cases involving comparable issues of fact and law.
- (28) Cases comparable to this one in fact and law are repayment or remission requests lodged within the legal time limits in respect of imports of set-top boxes of the same kind into the customs territory of the Community, where those imports operations were carried out in circumstances comparable in fact and law to those that gave rise to this case. The declarations for release for free circulation must have been submitted before 7 May 2008, the date on which Explanatory Notes for set-top boxes were published in the Official Journal. There must have been no deception or obvious negligence on the part of the importers concerned,

HAS ADOPTED THIS DECISION:

Article 1

1. The remission of the import duties amounting to GBP XXXX (EUR XXXX) requested by the United Kingdom of Great Britain and Northern Ireland on 14 October 2009 is justified.
2. The remission of the import duties amounting to GBP XXXX (EUR XXXX) requested by the United Kingdom of Great Britain and Northern Ireland on 14 October 2009 is not justified.

Article 2

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 2.2.2011.

For the Commission
Algirdas ŠEMETA
Member of the Commission

