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REC 10/03

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 10-3-2004
C(2004)723

NOT FOR PUBLICATION

COMMISSION DECISION

Of 10-3-2004

**finding that it is justified to waive post-clearance entry in the accounts of import duties
in a particular case**

(Only the German text is authentic.)

**(Request submitted by the Federal Republic of Germany)
(REC 10/03)**

FR

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Of 10-3-2004

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(Request submitted by the Federal Republic of Germany)

(REC 10/03)

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 Council Regulation (EEC) No 2913/92,³ as last amended by Regulation (EC) No 2286/2003,⁴

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 343, 31.12.2003, p.1.

Whereas:

- 1) By letter dated 17 July 2003, received by the Commission on 23 July 2003, the Federal Republic of Germany asked the Commission to decide, under Article 220(2)(b) of Regulation (EEC) No 2913/92, whether it is justified to waive post-clearance entry in the accounts in the following circumstances:
- 2) Under Article 2(2) of Regulation (EC) No 1335/2003, the provisions of that Regulation do not apply to cases sent to the Commission before 1 August 2003. Therefore the references that follow in this Decision to Articles 871 and 873 of Regulation (EEC) No 2454/93 refer to that Regulation as last amended by Commission Regulation (EC) No 881/2003⁵ of 21 May 2003.
- 3) It must first be pointed out that the customs debt arose between 1 July 1990 and 30 October 1993. Therefore the request for a waiver of post-clearance entry in the accounts must be considered to be based not on Article 220(2)(b) of Regulation (EEC) No 2913/92 but on Article 5(2) of Council Regulation (EEC) No 1697/79⁶ of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties, as last amended by Regulation (EEC) No 1854/89,⁷ which was the text applicable before 1 January 1994. However, this does not affect the validity of the request for a waiver of post-clearance entry in the accounts or the conditions for obtaining such a waiver.
- 4) A German firm imported honey from the former USSR. In June 1993, the competent German authorities conducted an audit of imports between 1 July 1990 and 30 October 1993.
- 5) The honey was declared for free circulation, sometimes after a period in a customs warehouse. In most cases, the commercial contract was a CIF contract (cost, insurance, freight).

⁵ OJ L 134, 29.5.2003, p. 1.

⁶ OJ L 197, 3.8.1979, p.1.

⁷ OJ L 186, 30.6.1989, p. 1.

- 6) The purchase contract stipulated that the vendor was to confirm the quality of the honey by means of analyses. The honey was shipped by boat to the port of Hamburg, where it was put in temporary storage and tested for conformity with the German law on honey.
- 7) The cost of testing was charged to the firm as a flat-rate amount to be added to the selling price. The separate invoices for these testing costs were not taken into account by the firm in declaring the customs value.
- 8) The customs office responsible for examining the analytical report did not regard these costs as separate from the selling price and considered that they should be included in the customs value. On this basis it re-calculated the duties due on the honey imported between 1 July 1990 and 30 October 1993 to reflect these costs and issued three tax alteration notices charging the firm duties totalling XXXXXXXX. The firm appealed against the tax notices.
- 9) The recovery procedure was suspended, since a parallel case was pending before the Finanzgericht (the court which decides tax cases) in Bremen.

The parallel case

- 10) In the parallel case, on 12 April 1994 the Bremen Finanzgericht ruled that the costs of analyses charged to a purchaser by a supplier on the basis of separate contractual agreements form part of the transaction value of the honey if the supplier has to take samples and provide the results of chemical analyses after import to prove that the honey complies with German legislation. It further ruled that the principle of protecting legitimate expectations excluded the possibility of post-clearance recovery because the customs declarant could reasonably assume, since no objections had been raised after a previous audit which covered customs value, that it did not have to include the additional costs in the customs value.
- 11) Following this judgment, the Federal Finance Ministry submitted a request to the Commission for remission on grounds of equity under Article 13 of Regulation (EEC) No 1430/79. In its Decision No C (95) 2325 final of 28 September 1995, the Commission decided that remission was not justified in the case in question.
- 12) The Bremen main customs office then rejected the appeals against the tax alteration notices and the firm appealed against this decision.

- 13) The Bremen Finanzgericht then asked the Court of Justice for a preliminary ruling in this case on the interpretation of Article 3(1) of Regulation (EEC) No 1224/80, Article 5(2) of Regulation (EEC) No 1697/79 and Article 13 of Regulation (EEC) No 1430/79 in the versions in force at the time of the facts.
- 14) In its [judgment of 19 October 2000](#) the Court ruled⁸ that the costs of analyses designed to establish the conformity of imported goods with the national legislation of the importing Member State, which the seller invoices to the buyer in addition to the price of the goods, must be regarded as an integral part of their transaction value within the meaning of Article 3(1) of Regulation (EEC) No 1224/80, and that the customs authorities of a Member State must refrain from post-clearance recovery of duty pursuant to Article 5(2) of Regulation (EEC) No 1697/79 if, at an on-the-spot audit of previous imports, they raised no objection to the non-inclusion of flat-rate expenses in the customs value of similar transactions and it does not appear that the trader, who had complied with all of the provisions laid down by the rules in force as far as his customs declaration is concerned, could have been in doubt about the correctness of the results of the audit.

This case

- 15) The company applied for a waiver of post-clearance recovery of the import duties concerned, citing its good faith, the mistakes made by the competent authorities, which it could not have detected, and failings on the part of the competent authorities.
- 16) Pursuant to Article 871 of Regulation (EEC) No 2454/93, the company stated that it had seen the dossier submitted by the German authorities and had nothing to add.
- 17) In accordance with Article 873 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 12 February 2004 within the framework of the Customs Code Committee (Repayment Section) to consider the case.
- 18) Under Article 5(2) of Regulation (EEC) No 1697/79, there can be no post-clearance entry in the accounts where the amount of duties 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.

- 19) The Court of Justice has consistently ruled that the legitimate expectations of a trader are protected only if the competent authorities themselves gave rise to the expectation.
- 20) In this case it appears that when the audit covering the period from 1 June 1987 to 30 March 1990 was conducted, the auditor raised no objections to the non-inclusion of the testing costs in the customs value, despite the fact that all the necessary paperwork (purchase accounts, purchase contracts, creditor accounts, purchase invoices, etc.) was made available to him and that he checked the transactions booked in July 1989 as a sample. Even if these costs were not included in the purchasing accounts, but in a separate account, it must be assumed that the auditor knew about the testing costs, since the invoices for these costs were provided along with the purchase invoices. The competent German authorities therefore made an error in not objecting to the non-inclusion of the testing costs in the customs value.
- 21) As the Court of Justice of the European Communities has consistently ruled, when determining whether the firm could reasonably have detected the customs authorities' error, account must be taken of the nature of the error, the firm's professional experience and the diligence it showed.
- 22) In this case the dossier submitted by the German authorities shows that the firm had no reason to doubt the accuracy of the results of the audit conducted on the transactions it had carried out between June 1987 and March 1990, of which it was informed on 22 June 1990.
- 23) The request submitted by the German authorities also shows that it is accepted that the firm acted in good faith.
- 24) The circumstances in this case 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 5(2) of Regulation (EEC) No 1697/79.
- 25) Moreover, the firm acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

⁸ Case C-15/99, "Hans Sommer".

- 26) Post-clearance entry in the accounts of import duties is not therefore justified in this case.

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of XXXXXXXXX referred to in the request from the Federal Republic of Germany of 17 July 2003 need not be entered in the accounts.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 10-3-2004

*For the Commission
Frits Bolkestein
Member of the Commission*