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REC 04/02

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25-6-2003
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NOT FOR PUBLICATION

COMMISSION DECISION

of 25-6-2003

finding that post-clearance entry in the accounts and repayment of import duties are justified in a particular case

(only the Danish text is authentic)

(Request submitted by Denmark)

(REC 04/02)

FR

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(Request submitted by Denmark)

(REC 04/02)

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 881/2003,[4] and in particular Articles 873 and 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 134, 29.05.2003, p. 1.

Whereas:

By letter dated 30 April 2002, received by the Commission the same day, Denmark asked the Commission to decide whether, in the following circumstances, it is justified to waive the entry in the accounts of import duties under Article 220(2)(b) of Regulation (EEC) No 2913/92 or, in the alternative, to repay import duties under Article 239 of that Regulation.

On 19 October 1994 the Italian authorities notified Danish customs headquarters that they had confiscated two consignments of Czech butter dispatched from Denmark. A third shipment, which had left for Italy on 15 October 1994, was assumed to have been returned to Denmark. On 3 November 1994 it was found that this shipment had indeed returned to Denmark on 22 October 1994. The regional customs authorities thereupon physically inspected the goods, which were still under customs supervision, and took a sample.

On 11 November 1994 a Danish firm lodged with its local customs office a customs declaration placing the shipment which had returned to Denmark after dispatch to Italy under the external Community transit procedure. The stated office of destination was Italy's Ravenna office. The firm was acting as principal for the transit operation. Danish customs headquarters notified the Guardia di Finanza by fax that the shipment had left for Italy. Danish customs did not inform the firm.

When the goods were placed under the external Community transit procedure the customs office of departure did not demand a comprehensive guarantee covering the total amount of duties and other charges payable. Nor did the customs authorities use the early warning system.

In December 1994 copy 5 of the transit document concerned was returned to the relevant office; it was therefore initially assumed that the shipment had been delivered in accordance with the rules.

However, an investigation by the competent Danish authorities revealed that the goods had not in fact been presented at the office of destination in Ravenna and that the stamps and signatures on copy 5 of the T1 document were forged.

The Danish authorities therefore considered that the transit operation had not been discharged. The removal of the goods from customs supervision gave rise to a customs debt under Article 203 of Regulation (EEC) No 2913/92. The Danish authorities therefore asked the firm to pay import duties of XXXXX, the amount for which the firm has requested a waiver of post-clearance entry in the accounts or, in the alternative, repayment.

According to the firm, the request for recovery to be waived or, in the alternative, for repayment is justified for the following reasons. Firstly, it argues, the customs authorities did not, when the declaration was lodged, demand a comprehensive guarantee of a level consistent with the provisions of Article 361(2) of the version of Regulation (EEC) No 2454/93 in force at the time. They also, allegedly, failed to comply with the administrative obligation to provide prior information. Thirdly, they did not inform the firm of the extensive fraud that had been detected in the transport of butter originating in the Czech Republic; the conclusions of the De Haan[5] judgment were therefore applicable. The firm therefore believes that these factors placed it in an special situation.

Pursuant to Articles 871 and 905 of Regulation (EEC) No 2454/93, the firm stated in support of the request from the competent Danish authorities that it had seen the dossier submitted to the Commission and set out its arguments in a document annexed to the authorities' letter to the Commission of 30 April 2002.

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[5] Case C-61/98 *De Haan Beheer BV v Inspecteur der Invoerrechten en Accijnzen te Rotterdam* [1999] ECR I-5003 .

By letter of 18 October 2002 the Commission asked the Danish authorities for further information. This information was provided by letter dated 14 March 2003, received by the Commission on the same day. The administrative procedure was therefore suspended, in accordance with Articles 871 and 873 or, in the alternative, Articles 905 and 907, of Regulation (EEC) No 2454/93, between 19 October 2002 and 14 March 2003.

In accordance with Articles 873 and 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 7 May 2003 within the framework of the Customs Code Committee - Section for General Customs Rules/Repayment.

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 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.

In this case the competent Danish authorities considered that the firm had, in accordance with Article 203 of Regulation (EEC) No 2913/92, incurred a customs debt through the failure to discharge the Community external transit declaration.

With regard to the concept of error on the part of the competent authorities within the meaning of Article 220(2)(b), the following points must be made.

In Mecanarte[6] the Court of Justice of the European Communities ruled that the legitimate expectations of the person liable should be protected under Article 5(2) of Regulation (EEC) No 1697/79 (the applicable provision before the entry into force of Article 220(2)(b) of Regulation (EEC) No 2913/92) only if the competent authorities themselves created the basis for those expectations. The same judgment defines "competent customs authority" as any authority which, acting within the scope of its powers, furnishes information relevant to the recovery of customs duties. Thus, only errors attributable to acts of the competent authorities furnishing information affecting the calculation of duties which could not reasonably have been detected by the person liable create entitlement to the waiver of post-clearance recovery of customs duties.

In this case, however, there can be no question of an active error for the following reasons.

As regards the level of the comprehensive guarantee for the consignment in question, reference should be made to Article 361(1) and (2) of the version of Regulation (EEC) No 2454/93 in force at the time. Paragraph 1 stipulates that the amount of the guarantee is to be set at at least 30% of the duties and other charges payable. Paragraph 2 provides that the comprehensive guarantee is to be fixed at a level equal to the full amount of duties and other charges payable when two conditions are fulfilled: the goods involved in the external Community transit operations figure in the list in Annex 53 to Regulation (EEC) No 2454/93 and have also been the subject of specific information from the Commission concerning transit operations presenting increased risks of fraud, in particular pursuant to the provisions of Council Regulation (EEC) No 1468/81. The goods concerned did figure on the list in Annex 53 and had been the subject of several Commission communications (in January, February and June 1994) warning the Member States of the increased risks of fraud presented by such operations.

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6 Case C-348/89 *Mecanarte - Metalúrgica da Lagoa Ldª v Chefe do Serviço da Conferência Final da Alfândega do Porto* [1991] ECR I-3277.

The administration did, therefore, commit an error when it failed to require a comprehensive guarantee calculated in accordance with Article 361(2), since the two conditions required for the application of that Article had been fulfilled. However, there is no causal link between the failure to set a comprehensive guarantee at a level equal to the full amount of duties and other charges payable and the fact that a customs debt was incurred. The customs debt in this case arose simply because the goods were removed from customs supervision. There is no direct link between the guarantee requirement and the fact that a customs debt arose when the goods were removed from customs supervision. The error by the Danish customs authorities concerning the guarantee does not therefore constitute an active error giving rise to legitimate expectations on the part of the person liable.

As regards use of the early warning system, it should be noted that Article 384 of the version of Regulation (EEC) No 2454/93 in force at the time provides that, where necessary, the customs authorities of the Member States must communicate to one another all findings, documents, reports, records of proceedings and information relating to transport operations carried out under the Community transit procedure and to irregularities and offences in connection with that procedure. The Customs Code Committee adopted the early warning system. This system is intended for the transmission of information on the carriage of goods considered to be sensitive.

It should, however, be pointed out that the systems of communication between authorities set up for this purpose are not intended for traders. They were designed for the use of the authorities, to optimise the exchange of information between them and facilitate the prompt initiation of investigations in the event of illegal operations. The fact that the Danish authorities did not use the early warning system has absolutely no direct bearing on the removal from customs supervision of goods placed under the external Community transit procedure.

Nor does Article 384 of Regulation (EEC) No 2454/93 or any other provision of that Regulation or Regulation (EEC) No 2913/92 specify the consequences of any failure by the authorities to comply with the early warning system.

Furthermore, as the Court of Justice of the European Communities ruled in Leszek Labis,[7] an administrative agreement between Member States (administrative arrangement) has no legal authority. An economic operator cannot therefore invoke the failure of the customs authorities to comply with that agreement.

Accordingly, the fact that the office of departure did not follow an administrative arrangement for the communication of information does not constitute an error on the part of the customs authorities within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

As regards the obligation to inform traders referred to by the firm, it should be noted that, at the time the transit operation concerned was initiated, the Danish authorities were not certain that it was fraudulent. The situation is not therefore comparable to that in *De Haan* because, in this case, the customs authorities were not aware that a customs debt would arise unbeknown to the person concerned. There was therefore no error on the part of the customs authorities in this respect.

Accordingly, none of the circumstances referred to above show evidence of any error on the part of the customs authorities within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

In the absence of any error on the part of the competent authorities, it is not appropriate to examine the other conditions set out in Article 220(2)(b) of Regulation (EEC) No 2913/92.

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[7] Case C-310/98 *Hauptzollamt Neubrandenburg v Leszek Labis* [2000] ECR I-1797.

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.

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.

The Courts have consistently ruled[8] that the Commission in using its discretion to assess whether the conditions for granting repayment have been fulfilled, must balance the Community interest in ensuring that the customs provisions are respected and the interest of the importer acting in good faith not to suffer harm beyond normal commercial risk.

In this case, the firm, as principal for the operation in question, incurred a customs debt because the transit operation was not discharged.

As the principal, the firm is responsible to the competent authorities for the proper conduct of Community transit operations even if it is the victim of fraudulent activities resulting from organised crime. Such an eventuality is part of a firm's normal commercial risk.

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[8] See inter alia Kaufring judgment of 10 May 2001 (Joined cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99), ECR II - 01337

Furthermore, even though this product had been the object of fraud for a long time when the transit operation was carried out, the danger of the firm's falling victim to that fraud is part of its commercial risk and in no way reduces its obligations as principal.

As has already been pointed out, no active error can be attributed to the competent authorities in respect of the transit operation.

Nor are the facts in this case identical to those referred to in the *De Haan* judgment. According to that judgment "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".

In that case the customs authorities were already aware, or at least had serious grounds for suspecting, that a Community transit movement of cigarettes would involve irregularities such as to give rise to a customs debt. They had then knowingly allowed operations to be conducted which they knew to be fraudulent. That is not, however, the case here.

Though the customs authorities were aware at the time in question of many irregularities concerning the transport of Czech butter, they had not launched an investigation into the specific transit operation concerned. Nor did the Danish authorities knowingly allow a fraudulent operation to be conducted. Though the customs office of departure should have been aware that it was dealing with a high-risk transit operation when it accepted the declaration placing the goods under the Community transit procedure, the Danish authorities did not deliberately allow the customs debt to arise.

However, the Community authorities had warned the competent authorities of fraud involving butter of Czech origin transported under the external Community transit procedure over ten months before the operation concerned. This fraud affected consignments placed under the transit procedure in many European countries, including Denmark, usually following the placing of goods under the customs warehouse procedure after earlier transit operations. The competent national authorities had disseminated this information to regional offices in a communication of 4 May 1994. Moreover, the competent authorities were aware that the consignment in question, which had first been dispatched from Denmark under the external transit procedure to an office of destination in Italy, had returned to Denmark and then again been placed under the external transit procedure with an Italian office of destination.

The authorities involved in this case were therefore aware of facts that should have prompted them to be more vigilant in view of the greater risk factor attaching to the operation concerned, given the nature and origin of the goods and the fact that they had previously been through another transit operation and then been placed in customs warehousing. In these respects the situation was identical to those in which a large number of frauds had been perpetrated from different customs offices in Denmark and other Member States.

Yet the Danish authorities, despite having been informed of a variety of facts pointing to a high risk of fraud, did not require a comprehensive guarantee equal to the full amount of the duties and other charges payable on the transit operation. In failing to do so and in failing to display the requisite diligence, they committed an error.

They also committed an error in failing to use the early warning system when the Community authorities, following the discovery of the pattern of fraud, had several times called on the national authorities to do so.

The above circumstances and the negligence of the competent Danish authorities constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

As for the second condition laid down in Article 239 of Regulation (EEC) No 2913/92, namely the absence of deception or obvious negligence on the part of the person concerned, the Danish authorities explained in their request of 30 April 2002 that their investigations had cleared the firm of any involvement in the fraud concerned and that the firm could not therefore be blamed for any irregularity. Nor does the file suggest that its attitude could be considered obviously negligent.

It is therefore justified in this case to proceed to post-clearance entry of import duties in the accounts and then to grant repayment of those duties,

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of XXXX referred to in the request from Denmark of 30 April 2002 are to be entered in the accounts.

Article 2

Repayment of import duties in the sum of XXXXX, requested by Denmark on 30 April 2002, is justified.

Article 3

This Decision is addressed to Denmark.

Done at Brussels, 25-6-2003

For the Commission
Frits Bolkestein
Member of the Commission