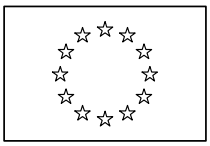
**REM 19/02**



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 17-6-2004
C(2004)2090

NOT FOR PUBLICATION

**COMMISSION DECISION**

**of 17-6-2004**

**finding that remission of import duties is not justified in a particular case**

(Only the Dutch text is authentic.)

**(request submitted by the Netherlands)**

**(REM 19/2002)**

FR

**COMMISSION DECISION**

**of 17-6-2004**

**finding that remission of import duties is not justified in a particular case**

(Only the Dutch text is authentic.)

**(request submitted by the Netherlands)**
**(REM 19/2002)**

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 13 September 2002, received by the Commission on 19 September 2002, the Netherlands asked the Commission to decide under Article 239 of Regulation (EEC) No 2913/92 whether the remission of import duties was justified in the following circumstances.

(2) Under the second paragraph of Article 2 of Regulation (EC) No 1335/2003,[5] the provisions of Article 1 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 905 and 907 of Regulation (EEC) No 2454/93 refer to that Regulation as last amended by Commission Regulation (EC) No 881/2003 of 21 May 2003.[6]

(3) A Dutch firm, acting in its own name and on its own behalf, imported a food product called "rice paper" into the Netherlands.

(4) The product was declared in subheading 1901 90 99 of the Combined Nomenclature. On 21 August 1996, after a physical check of the goods, the customs administration told the firm that this was the correct classification.

(5) On 27 June 1997 the Commission adopted classification Regulation (EC) No 1196/97 under which the product concerned had to be classified in CN subheading 1905 90 20. The Regulation was published on 28 June 1997 (OJ L 170, 28.6.1997, p. 13) and entered into force on 19 July 1997.

(6) However, the competent authorities continued to accept declarations by the firm with the wrong classification (1901 90 99). It was not until 16 March 1998 that they realised the firm's mistake. Nevertheless, on the same day they accepted another declaration by the firm with the wrong tariff code and again confirmed that they considered classification in this subheading to be correct.

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5 OJ L 187, 26.7.2003, p. 16.
6 OJ L 134, 29.5.2003, p. 1

(7) On 22 November 2000 the competent authorities made a post-clearance entry in the accounts of duties totalling XXXXX for declarations accepted by the competent authorities during the period 13 November 1997 to 31 December 1998. The firm admitted to a mistake in a declaration of 2 December 1998 and requested remission of duties in the amount of XXXXX. The competent authorities have already repaid the duties relating to the declaration of 16 March 1998. The amount under consideration in examining the request for remission is therefore XXXXX, corresponding to the declarations submitted from 25 November 1997 to 2 February 1998.

(8) In support of the application submitted by the Dutch authorities the firm stated that, in accordance with Article 905 of Regulation (EEC) No 2454/93, it had seen the dossier which the authorities had sent to the Commission and had nothing to add.

(9) By letter of 4 February 2003, the Commission asked the Dutch authorities to provide additional information. This information, along with comments from the firm, was sent to the Commission by letter dated 16 December 2003, received by the Commission on 6 January 2004.

(10) The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93, between 5 February 2003 and 6 January 2004.

(11) By letter dated 2 March 2004, received by the firm on 4 March 2004, the Commission notified the firm of its intention to withhold approval and explained the reasons for its decision.

(12) The administrative procedure was therefore suspended for one month in accordance with Article 907 of Regulation No (EEC) 2454/93.

(13) By letter dated 31 March 2004, received by the Commission on the same date, the firm's lawyer expressed his opinion regarding the Commission's objections. He argued that in view of the samples analysed and checks carried out by the competent authorities, the firm had no reason to doubt that the subheading it declared was correct. He further argued that the repeated misclassification of rice papers by various Dutch customs agents and the fact that it had been necessary to publish a classification regulation indicated that classification of the product was complex. For the Commission to make the firm bear the financial burden resulting for errors by the competent authorities would therefore be counter to the principle of equity.

(14) The firm also expressed doubts as to whether the classification regulation in question was applicable to the rice paper it had imported. This matter was the subject of an appeal by the firm before the Court of Appeal in Amsterdam.

(15) Lastly, the firm considered that it had in no way been negligent, given the errors of the competent authorities and the fact that it was entitled to trust the results of the checks they carried out.

(16) 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 6 May 2004 within the framework of the Customs Code Committee, Repayment Section.

(17) Under Article 239 of Regulation (EEC) No 2913/92 import duties may be repaid or remitted in special situations other than those laid down 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.

(18) The Court of Justice of the European Communities has ruled 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.

(19) The Commission considers that the competent authorities' continued acceptance of incorrect declarations after publication of Regulation (EC) No 1196/97 (*29 declarations over a six-month period with documentary checks and, in one case, physical checks*) without expressing reservations about the classification of the product concerned is an error on their part such as to constitute a special situation within the meaning of Article 239 of the Code.

(20) However, such a situation can give rise to the remission of duties only if no deception or obvious negligence may be attributed to the firm concerned.

(21) The Court of Justice has consistently taken the view 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. Since the dossier provided by the Dutch authorities shows that the firm was not guilty of any deception, the only question to be examined is that of the firm's possible negligence.

(22) As regards the complexity of the legislation, it should be noted that even if it is accepted that the legislation prior to the entry into force of Regulation (EC) No 1196/97 was complex, the whole purpose of adopting the Regulation was to clarify the situation and put an end to the complexity. Since all the imports concerned took place after the Regulation was published, the argument that the legislation was complex must be dismissed.

(23) It is true that the firm disputes that the classification of rice paper adopted in Regulation (EC) No 1196/97 is applicable to the imported products in question. However, such disputes do not fall within the scope of the procedure for remission or repayment under Article 239 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 that debt. The Courts have consistently ruled that the question of whether a customs debt has actually been incurred is not covered by Commission decisions under procedures for waiving post-clearance entry in the accounts or remission/repayment procedures.[7]

(24) As regards the firm's experience, the dossier submitted to the Commission shows that it is an experienced trader. Over the period concerned it imported about 50 different products and submitted approximately 70 declarations for a total value of around EUR 120 000.

(25) Furthermore, the fact that the firm employed the services of a customs agent to carry out the customs formalities does not relieve it of its responsibility. The fact that the agent acted as a direct representative (*in the name and on behalf of the firm*) leads to the conclusion that he was only acting under the responsibility of the firm, which must therefore be held accountable for the particulars in the declaration.

(26) In view of the firm's experience, the argument that it could not be expected to know better than the competent national authority cannot be accepted.[8]

(27) Coming to the question of the firm's diligence, the following points should be made.

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[7] See cases *Kia Motors* (case T-195/97, 16.7.1998) and *Hyper Srl* (case T-205/99, 11.7.2002).

[8] *Behn* judgment of 14 November 2002 (case C-80/89)

(28) Regulation (EC) No 1196/97 was published in the Official Journal on 28 June 1997. According to the consistent rulings of the Courts,[9] the Community tariff provisions in question are, as of their publication in the Official Journal of the European Communities, the only substantive law in the matter, and all are deemed to know that law. The error of the competent authorities could, then, have been detected by an attentive trader by reading the Official Journal in which the Regulation was published. It should also be stressed that the Court rulings referred to do not only apply to professional traders whose main activity is import-export.[10] Careful reading of the Official Journals should have led even a trader with little experience to doubt the accuracy of the classification in CN heading 1901 90 99 chosen by the competent customs authorities. Thus, by failing to consult the Official Journal the firm failed to act with due diligence, and it is therefore through its own negligence that it did not detect the error of the customs authorities and that it was issued with a demand for the amount of duties in question.

(29) The Commission therefore considers that the firm was obviously negligent.

(30) Remission of import duties is therefore not justified in this case,

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9 See in particular the *Binder* judgment of 12 July 1989 (case 161/88), the *Behn* judgment of 28 June 1990 (case C-80/89), the *Covita* judgment of 26 November 1998 (case C-370/96), and the *Pieter Biegi* judgment of 17 September 2003 (cases T-309/01 and T-239/02) .

10 *Günzler* judgment of 5 June 1996 (case T-75/95).

HAS ADOPTED THIS DECISION :

*Article 1*

The remission of import duties in the sum of XXXXX requested by the Netherlands on 13 September 2002 is not justified.

*Article 2*

This Decision is addressed to the Netherlands.

Done at Brussels, 17-6-2004

*For the Commission*
*Frits Bolkestein*
*Member of the Commission*