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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,6-11-2003
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COMMISSION DECISION

Of 6-11-2003

finding, in a particular case, that repayment of one amount of import duties is justified and repayment of another amount of import duties is not justified
(Only the Danish text is authentic)

(Request submitted by Denmark)
(REM 20/2002)

FR

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(Request submitted by Denmark)
(REM 20/2002)

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 19933 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92,[3] as last amended by Regulation (EC) No 1335/2003,[4]

1 OJ L No 302, 19.10.1992, p. 1
2 OJ L No 311, 12.12.2000, p. 17
3 OJ L 253, 11.10.1993, p. 1
4 OJ L 187, 26.7.2003, p. 16

Whereas:

(1) By letter dated 22 November 2002, received by the Commission on 25 November 2002, Denmark 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) Under the second paragraph of Article 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 Regulation (EEC) No 2454/93 refer to that Regulation as last amended by Commission Regulation (EC) No 881/2003 of 21 May 2003.[5]

(3) The dossier sent by the Danish authorities shows that from 1 January 1996 to 31 October 1998 a Danish firm released steel products for free circulation in Denmark.

(4) On 54 occasions the firm declared the goods under tariff heading 7207 12 10, considering them to be semi-finished products. In autumn 1998 the competent Danish authorities carried out post-clearance checks on these transactions and concluded that the goods fell under heading 7208; they therefore charged import duties of XXXX, which the firm paid.

(5) The firm then applied to the competent Danish authorities for repayment of that amount, citing the fact that officials had carried out checks on its premises in October 1997. The checks related to an import declaration relating to the goods in question. On that occasion the authorities were shown the goods and their tariff classification was discussed. The customs authorities then took the view, on the basis of the description for heading 7207 in the explanatory notes and some photographs of the goods, that heading 7207 was indeed the most appropriate. The company was informed of this conclusion orally.

(6) When considering this application, the competent Danish authorities felt they should consult the Customs Code Committee (Nomenclature Section) on the distinction between products of heading 7207 and those of heading 7208.

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5 OJ L 134, 29.5.2003, p. 1

(7) After discussing this matter at four of its meetings and consulting an expert, the Customs Code Committee at that point decided to classify the goods under CN heading 7208. At the same time it was decided to update the Explanatory Notes to Chapter 72 in line with the changes in the industry's production methods and to review the classification of products covered by Regulation (EEC) No 2275/88 once the ECSC Treaty had expired.

(8) Pursuant to Article 905 of Regulation (EEC) No 2454/93, the firm stated that it had seen the dossier submitted to the Commission by the Danish authorities and had nothing to add.

(9) By letter of 12 February 2003, the Commission asked the Danish authorities for some additional information. The Danish authorities provided the information by letter dated 24 March 2003, received by the Commission on 26 March 2003. Further information was obtained from the Danish authorities in June 2003.

(10) The administrative procedure was therefore suspended in accordance with Article 907 of Regulation (EEC) No 2454/93 between 13 February and 26 March 2003.

(11) In a letter of 13 August 2003, received by the firm on 14 August 2003, the Commission informed the firm of its intention to refuse the request for repayment, stated its reasons and forwarded the documents received from the Danish authorities in June 2003.

(12) By letter dated 12 September 2003, received by the Commission on the same date, the firm stated its position regarding the Commission's objections. In particular, it stated its view that the competent authorities had committed an error and that the case should be considered not only under Article 239 of the Customs Code, but also under Article 236 in conjunction with Article 220(2)(b) of the Code.

(13) In accordance with the third paragraph of 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.

(14) In accordance with Article 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 7 October 2003 within

the framework of the Customs Code Committee (Repayment Section) to consider the case.

(15) As regards the argument that the request initially submitted exclusively on the basis of Article 239 of the Code should also be considered in the light of Article 236 in conjunction with Article 220(2)(b), errors committed by the customs authorities within the meaning of Article 220(2)(b) of the Code can constitute a special situation within the meaning of Article 239 of the Code. It is therefore sufficient to consider whether the circumstances of the case constitute a special situation within the meaning of Article 239, whether because of an error by the customs authorities or for other reasons.

(16) 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.

(17) The Court of Justice of the European Communities has consistently taken the view that these provisions represent a general principle of equity designed to cover a special situation in which a trader, 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 traders carrying out the same activity.

(18) As regards the first condition - the existence of a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92 - the firm declared the goods it imported under tariff heading 7207 12 10.

(19) Before 1 October 1997 the Danish authorities did not carry out physical checks on the imported goods. In their letter of 24 March 2003, the authorities state that only document checks were carried out on the declarations because heading 7207 12 10 was deemed to be a low-risk heading

(20) However, the firm points out that a number of the declarations were subjected to full document checks and comments that the customs authorities should therefore have discovered that the wrong tariff heading had been declared.

(21) According to the firm, the information given on the declaration was sufficiently explicit. The goods are described in box 31 as "Hot-rolled steel slabs, second quality". In a number of the declarations the thickness of the sheets is also specified in the form "10-40 mm" (declaration of 2 May 1997) or "10-100 mm" (declaration of 2 July 1998).

(22) Thus in the firm's view the declarations contained all the facts necessary to apply the relevant legislation and no facts were detected in the course of a subsequent check. The firm concludes, referring to rulings of the Court of Justice,[6] that it was because of an error by the competent authorities that it was not required to pay the duties until after clearance, which placed it in a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(23) Yet it appears that the firm's error could not have been detected by means of a document check, since the description of the goods in box 31 of the declaration is consistent with the tariff heading declared. Thus the term "slab" is used to describe semi-finished products, and note 1.ij) to Chapter 72 of the nomenclature of the common customs tariff states that that semi-finished products can include products that have undergone primary hot-rolling. And heading 7207 12 10, the heading declared by the firm, does indeed cover semi-finished products of iron or steel. Therefore comparison of these different items of information, consistent with each other, would not have led the customs authorities to question the tariff classification entered by the firm.

(24) However, it is true that consulting the Explanatory Notes to the Combined Nomenclature could have prompted the customs authorities to question the appropriateness of the classification declared, at least where the declarations stated the thickness of the products; Note B of the General section of Chapter 72 of the version of those Notes applicable at the time, states that "Flat products meeting one of the following conditions are to be regarded as flat-rolled products and not semi-finished products: - thickness of less than 100 mm, ...".

(25) However, firstly, these Explanatory Notes do not have legal weight, although they are a tool for the classification of goods, and secondly, document controls consist in

checking consistency between entries on the declaration and need not lead to in-depth checks on factors affecting tariff classification. Such verification is more the domain of physical checks, as is borne out by the checks carried out on the firm's premises on 1 October 1997 (see below).

(26) Thus, contrary to what the firm says, the Danish authorities cannot be said to have committed an error constituting a special situation at that stage since not all the firm's customs declarations stated the thickness of the products, which was the only information which, at the level of document controls, might have given rise to doubts as to the correctness of the classification declared and possibly led the authorities to question it. Where the thickness of the products was not stated in the declaration, comparing the tariff heading declared and the commercial description of the goods could not reveal the erroneous tariff classification.

(27) To accept that the competent authorities committed an error in failing to detect the erroneous tariff classification when the entries on the declaration were internally consistent and did not give grounds for suspecting the error would be to undermine the very principle of post-clearance inspections provided for in Article 78 of Regulation (EEC) No 2913/92.

(28) Therefore the Danish authorities did not commit an error within the meaning of Article 220(2)(b) of the Customs Code when they carried out their document controls up to 1 October 1997. Neither, in the Commission's view, do these circumstances constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(29) Consideration must therefore be given to whether there were other circumstances constituting a special situation for the firm.

(30) In this connection the firm argues that the tariff classification it declared was in line with the *Stahllexikon* [Steel Lexicon] published by the *Bundesverband Deutscher Stahlhandel* [Federal Association of German Steel Traders]. However, the fact that the specialist technical literature places the products in a different category cannot be taken into consideration. Similarly, the fact that the tariff classification does not

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[6] CJEC Cases C-250/91 (Hewlett Packard - Judgment of 14.4.1993) and C-314/85 (Foto-Frost - Judgment of 22.10.1987).

exactly reflect the most advanced technology is not a reason for classifying goods according to that technology rather than the proper legal rules. This fact does not therefore either constitute a special situation within the meaning of Article 239 of the Customs Code.

(31) The firm also cites the fact that a detailed description of the product was supplied to the Customs Code Committee in December 2000 and the Committee only decided to classify the product in heading 7208 after several meetings and consultation of an expert. But that is precisely what the Committee is meant to do: examine problems with tariff classification. So there is nothing unusual about the emergence of differences of opinion between the experts in the course of the discussion. This fact does not therefore seem such as to constitute a special situation within the meaning of Article 239 of the Customs Code either.

(32) Nor does the fact that the Committee decided to amend the Explanatory Notes seem relevant to the case in hand; Communication 88/301/02 was inserted into the 1989 edition of the Explanatory Notes to the EC Combined Nomenclature to help users classify the goods in question. It was withdrawn in the version of the Explanatory Notes published in 2002[7] because technological developments meant that it was no longer a relevant basis for classifying goods. It should also be noted that strict application of this Communication would have prompted the firm to classify the goods in heading 7208 and not heading 7207.

(33) Therefore, as regards the imports carried out up to and including 1 October 1997, the facts of the case do not show that the firm was in a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(34) On 26 September 1997 the Danish authorities were informed by the Finnish customs authorities that sheet steel had been imported from Russia under tariff heading 7207 12 10 which was in fact hot-rolled sheet steel of heading 7208. It was also stated that the firm concerned in this case was the importer.

(35) This prompted the customs authorities to carry out checks on a declaration submitted by the firm on 1 October 1997. In the course of the inspection the Danish authorities informed the firm orally that the tariff heading seemed to them to be the correct one.

(36) They entered on their copy of the declaration "Physical check carried out on goods. No anomaly found."

(37) In a report drawn up on 28 November 1998, i.e. after the post-clearance recovery procedure had been started, the authorities stated that after discussion with the firm on the product's characteristics they concluded that the classification under heading 7207 was appropriate. They also said that they had consulted the Explanatory Notes to heading 7207 concerning semi-finished products of iron or non-alloy steel.

(38) The firm holds that after this inspection it was convinced that the tariff heading declared was correct. Although it received no written document from the competent authorities, the latter admit that they agreed that the tariff classification seemed correct to them.

(39) It must therefore be concluded that the firm had no reason to entertain doubts as to the correctness of the results of the inspection and could legitimately assume in respect of transactions after the date of the inspection that heading 7207 was correct.

(40) Therefore, for the period subsequent to the inspection of 1 October 1997 the circumstances of this case must be deemed to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(41) Concerning the second condition of Article 239 of Regulation (EEC) No 2913/92, i.e. whether there has been deception or obvious negligence, the Court of Justice of the European Communities has consistently taken the view that account must be taken, in particular, of the complexity of the law and the trader's experience and the diligence it has shown. This condition need only be examined for the period subsequent to the inspection of 1 October 1997.

(42) In respect of that period, from the moment the customs authorities inspected the goods and agreed that they had been classified in the correct tariff heading, the firm, despite its professional experience, no longer had any reasons to doubt the correctness of the classification it habitually used for the goods.

(43) It cannot therefore be considered negligent in having omitted to take steps to check that the competent authorities' opinion was right.

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[7] OJ C 256 23.10.2002, p. 268.

(44) Neither deception nor obvious negligence can, therefore, be attributed to the firm.

(45) In the light of the foregoing repayment of import duties for the part of the debt incurred up to 1 October 1997 is not justified. However, repayment of the import duties for the part of the debt incurred after 1 October 1997 is justified,

HAS ADOPTED THIS DECISION:

Article 1

Repayment of XXXXX, being one part of the import duties that are the subject of Denmark's request of 23 July 2002, is not justified.

Repayment of XXXXX, being the other part of the import duties that are the subject of Denmark's request of 23 July 2002, is justified.

Article 2

This Decision is addressed to Denmark.

Done at Brussels 6-11-2003

For the Commission
Frits Bolkestein
Member of the Commission