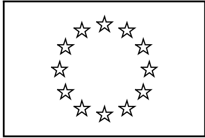
**EN**

**REM 09/01**



EUROPEAN COMMISSION

Brussels, 22/08/2002

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NOT FOR PUBLICATION

**COMMISSION DECISION**

**of 22/08/2002**

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

(Only the German text is authentic.)

**(Request submitted by the Federal Republic of Germany)**

**(REM 09/01)**

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**COMMISSION DECISION**

**of 22/08/2002**

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

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**(Request submitted by the Federal Republic of Germany)**

**(REM 09/01)**

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 Regulation (EEC) No 2913/92,[3] as last amended by Regulation (EC) No 444/2002,[4] and in particular Article 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 68, 12.03.2002, p. 11.

Whereas:

(1) By letter dated 6 March 2001, received by the Commission on 22 March 2001, the Federal Republic of Germany asked the Commission to decide, under Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties,[5] as last amended by Regulation (EEC) No 1854/96,[6] and under Article 239 of Regulation (EEC) No 2913/92, whether remission of duties was justified in the following circumstances.

(2) It should be pointed out that the customs debt in question came into being after 1 January 1994. The basis for the remission request is therefore not Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 but only Article 239 of Regulation (EEC) No 2913/92, since that was the act applicable when the customs debt arose. However, this point concerning the legal basis in no way affects the admissibility of the request or the conditions governing remission.

(3) A German firm imported textile products on a large scale under preferential arrangements, and subsequently exported some of the goods thus introduced into Community customs territory.

(4) During the period from October 1994 to February 1995, non-Community goods which the firm had brought into the Community customs territory were regularly dispatched to Bremen under the transit procedure, where they were presented to the competent Customs Office. They were then provisionally stored on the firm's premises.

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[5] OJ L 175, 12.07.1979, p. 1.
[6] OJ L 186, 30.06.1989, p. 1.

(5) By letter of 2 August 1993, the firm informed the competent Customs Office that computerisation of its customs accounts had not yet been completed, and consequently it would not always be possible to meet the 20-day time-limit for the assignment of a customs-approved use or treatment, as laid down in Article 49(1) of Regulation (EEC) No 2913/92.

(6) By letter of 7 January 1994, the competent Customs Office informed the firm that in the past it had regularly drawn the firm's attention to the expiry of these time-limits. The letter further stated that in future this practice could not be continued, in the light of Regulation (EEC) No 2913/92 which came into effect on 1 January 1994. Finally, it was pointed out to the firm that in future, failure to comply with these time-limits would create a customs debt under Article 204(1)(a), in conjunction with Article 49, of Regulation (EEC) No 2913/92.

(7) In February 1994, the firm declared that it was unable to meet the deadlines for assigning customs-approved use or treatment, adding that it did not wish to set up a customs warehouse.

(8) Following an audit the competent customs authorities discovered that part or all of 61 consignments had not been assigned to a customs-approved use or treatment between mid-February and September 1994 by the deadlines laid down (the temporary storage time-limit preceding assignment having been regularly exceeded).

(9) By letter of 12 October 1994, the competent Customs Office requested that the firm explains why it had not met these deadlines, on pain of bearing the consequences of its acts.

(10) The firm did not reply to this letter. However, on 31 October 1994, it applied for a 20-day extension of the deadline. This request was subsequently granted for 9 consignments presented in October 1994. On 8, 17 and 20 November 1994, the firm applied for a 20-day extension for a further nine consignments from October 1994 and for twelve consignments from November of the same year. These requests were justified by reference to the unforeseen backlog of work resulting from the computerisation of accounting procedures, and to a high rate of staff absences due to illness.

(11) The customs authorities refused the requests on the grounds that the reasons given by the applicant did not justify an extension of the prescribed time-limit.

(12) Over the period from 20 October 1994 to 14 February 1995, the competent Customs Office issued 125 assessment notices for consignments cleared between February and December 1994, the duty to be recovered totalling XXXXX. In doing so, the Customs Office granted no reduction or remission of customs duty, on the grounds of re-import after outward processing, preferential treatment or any other factor.

(13) The firm then argued that in the light of the preferential treatment which should have been applied it should be granted a reduction of XXXXX in the payment due. For this amount the firm is now requesting remission.

(14) In their requesting letter the German authorities said they believed a special situation existed for the following reasons.

(15) Requests to extend such time-limits were often dealt with more flexibly by other German customs offices. In official discussions at Federal level the German Ministry of Finance repeatedly stated at the time that considerable discretion could be exercised in extending time limits under Article 49 of Regulation (EEC) No 2913/92 if they involved no economic advantages.

(16) The firm initially refused to set up a customs warehouse, as it was unaware that this would allow it greater flexibility with clearance deadlines.

(17) Although at the time the firm was overloaded with work and short-staffed, it itself carried out the deduction of the quantities imported after outward processing in the processing records, thus saving the Central Customs Office work and securing the rapid return of the processing documents, it being vital that the textile products concerned, like all fashion products, should be marketed as rapidly as possible. The firm claimed that such deductions are normally carried out by the customs authorities, and that other customs offices would usually have made these deductions themselves.

(18) The competent Customs Office had for many years shown great flexibility with regard to time-limits.

(19) The firm also argued that there existed an exceptional situation, free of any negligence on its part, for reasons which it cited in its appeals to the German courts for remission of the customs debt.

(20) The workload involved in complying with the Community Customs Code and its implementing provisions, together with the transition to a computerised customs accounts system, took a lot of time and prevented the firm from meeting deadlines. These new developments also required training activities, which also took up a lot of time. As it happened, many of the firm's staff were on sick-leave over this period.

(21) Data concerning the importing of goods under outward processing arrangements could only be dealt with by qualified staff, and it would not have been possible to recruit such staff rapidly, just as attempts to contract out the work failed. The law in this area is very complicated, and the question therefore arises whether the only way the firm could have avoided incurring the customs debt would have been by personally acquiring a thorough knowledge of many of these rules which are far more complex than those governing the time-limits for submission of declarations.

(22) In the past, the firm had always fulfilled its customs obligations. The firm took all possible steps to comply with the deadlines laid down.

(23) In support of the request submitted by the German authorities and in application of Article 905 of Regulation (EEC) No 2454/93, the firm indicated that it had been given access to the documentation the said authorities sent the Commission. The firm also stated its position and made observations on the documentation and the German authorities forwarded these to the Commission in their letter of 6 March 2001.

(24) In its letter of 18 Mai 2001, the Commission asked the Federal German authorities for additional information. This was sent in a letter dated 12 November 2001 and received by the Commission on 21 November 2001. Given that the reply did not answer all the questions, in its letter of 18 December 2001 the Commission asked the Federal German authorities for further information. This was sent in two letters dated 14 January 2002 and 14 February 2002 and received by the Commission on 22 January 2002 and on 21 February 2002 respectively. In accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93 the administrative procedure was therefore suspended between 19 May and 21 November 2001 and between 19 December 2001 and 22 January 2002.

(25) In its above mentioned letters the Commission asked for clarification as regards the existence of a special situation as well as the non existence of obvious negligence. The German authorities replied that a special situation was mainly involved, given the fact that the firm was charged with an official measure, i.e. the deduction of imported goods in processing records, that should have been carried out by the customs office. As regards the non existence of obvious negligence the German authorities answered that in their view the fact that the provisions governing the outward processing procedure with textiles are extremely complex had not been sufficiently taken into account.

(26) In a letter of 21 May 2002, which the firm received on 23 May 2002, the Commission informed the firm that it was considering taking a decision that went against the firm, and set out its reasons for doing so.

(27) In a letter of 19 June 2002, which the Commission received on the same day, the firm stated its position on the Commission's objections. The firm maintained that this was a special situation and that no deception or obvious negligence could be attributed to the company. It reminded the Commission of the fact that it was the firm itself which deducted the quantities of imported goods in the processing records and that this task should have been carried out by the customs office. The customs office in turn had saved a considerable amount of work and therefore tolerated the exceeding of the 20-day time-limit for the assignment of customs-approved treatment or use, as laid down in Article 49(1) of Regulation (EEC) No 2913/92, for a long period. When the company was ultimately informed by the customs administration that this practice could not continue, it tried to hand back the work in question with a view to gaining time for completion of the necessary customs declarations. The customs authorities replied that this would cause considerable delays, so the firm had no choice but to continue the established practice.

(28) In accordance with the third paragraph of Article 907 of Regulation (EEC) No 2454/93, the administrative procedure was suspended for one month running from 23 May 2002 to 23 June 2002.

(29) 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 12 July 2002 as the Customs Code Committee (Section for General Customs Rules/Repayment) to consider the case.

(30) 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.

(31) 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 an exceptional situation in which an operator finds itself, 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.

(32) In this case the documentation the German authorities sent the Commission showed that the firm failed to assign a customs-approved use or treatment for the goods placed in temporary storage within 20 days, as laid down in Article 49 of Regulation (EEC) No 2913/92 for goods carried otherwise than by sea. The firm is therefore liable for the customs debt arising from its failure to fulfil this obligation.

(33) Firstly, it should be pointed out that the need to take steps to comply with the provisions of Regulation (EEC) No 2913/92, which came into force on 1 January 1994, that is, only a few months before the events of the case in hand, did not affect this firm alone, but impacted on all operators working in similar conditions at that time (i.e., all those who were importing goods under the outward processing arrangements). It follows that this was an objective situation, affecting an undefined number of economic operators. The circumstances in which the imports were carried out can therefore not be deemed to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(34) Next, it should be pointed out that, in its ruling of 11 November 1999 on the facts in the present case[7], the European Court of Justice declared that neither unexpected sick-leave or holiday taken by staff, induction of new staff members, problems arising from the use of a customs administration software programme, nor a huge overload of work due to calculations required under the outward processing arrangements constitute circumstances which might justify an extension of the deadline laid down in Article 49 of Regulation (EEC) No 2913/92. The European Court of Justice did however not decide whether the fact that it was the company itself which deducted the quantities of imported goods in the processing records, might have justified an extension of the said deadline or create a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(35) Moreover, the events which the firm described concern its internal organisation and are part of its day-to-day internal operations. As the firm itself acknowledged, in its letter of 19 February 2001, these events in no way by themselves constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

7 Case C-48/98 Firma Söhl & Söhlke v Hauptzollamt Bremen [1999] ECR I-07877.

(36) As for the claim that the deduction of quantities of goods imported under outward processing arrangements is normally carried out by the customs authorities as one of their duties, the following points should be made. As declarant of the goods which the firm introduced into free circulation within the framework of the outward processing arrangements, the firm has the right under Article 221 of Regulation (EEC) No 2913/92 to indicate in its declaration the amount of duty that is owing. To do this, the firm would have to make the necessary deductions between the quantities exported and the quantities imported under the outward processing arrangements. In addition, it should be noted that the firm itself chose to make these deductions, so as to ensure the rapid return of the processing documents concerned. Because this was a voluntary decision on the firm's part, the fact that other German customs offices, unlike the office concerned, have performed these tasks, does not mean that the firm's situation is a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92, when compared to that of other economic operators engaging in the same kind of activity.

(37) Moreover, the fact that the German authorities did not decide to calculate these deductions themselves cannot, in any case, constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(38) It should be pointed out that in its ruling of 11 November 1999 cited above, the European Court of Justice stated that the circumstances mentioned as examples by the court to which the case had been referred did not constitute conditions which would justify an extension to the deadline laid down in Article 49(1) of Regulation (EEC) No 2913/92.

(39) It should also be emphasised that the existence of a special situation must in any case be assessed in the light of the practice of all the European Union Member States' customs authorities, and not simply in relation to what may have been standard practice within the German customs authority. In fact, Article 2 of Regulation (EEC) No 2913/92 states that customs regulations apply to the whole of the Community customs territory. The field of application of Article 239 is thus the whole of this customs territory. It is to be noted that, for example, the European Court of Justice, in its ruling of 26 October 1995,[8] cited the fact that the analogous provisions which preceded those of Article 49(1) of Regulation (EEC) No 2913/92, namely, Article 15(1) of Council Regulation (EEC) No 4151/88 of 21 December 1988 laying down the provisions applicable to goods brought into the customs territory of the Community,[9] had been strictly applied by the Portuguese customs authorities prior to the date of the events which constitute the case in question. Once the 20-day time limit had been exceeded, when conditions did not justify granting an extension to that time limit, the Portuguese authorities could proceed to sell the goods through one of their customs offices, once the legal formalities had been carried out.

(40) Finally, it should be noted that the fact that the German customs authority did not recommend the firm to use a simplified procedure as laid down in Article 76 of Regulation (EEC) No 2913/92 cannot constitute a special situation within the meaning of Article 239 of the same Regulation. On the one hand, the authority is not obliged to make such a recommendation; and on the other, it was up to the firm to request the use of such a procedure, in particular since it may be deemed to be an experienced economic operator.

(41) None of the information included in the dossier therefore allows the conclusion that a special situation of the kind referred to in Article 239 of Council Regulation (EEC) No 2313/92 existed.

(42) Nor has the Commission found any other factors constituting a special situation.

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8 Case C-36/94 Siesse

9 OJ L 367 of 31.12.1998,p.1.

(43) Concerning the second condition of Article 239 of Regulation (EEC) No 2913/92 referred to above, 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 operator's experience and diligence, and of the complexity of the law.

(44) As regards the complexity of the provisions concerned, it should be noted that the Court of Justice of the European Communities has stated that this issue should be examined taking into consideration only those provisions the non-fulfilment of which led the customs debt in question to be incurred (cf. e.g., the ruling of 11 November 1999 cited above). In the present case, those provisions cannot be deemed to be complex. Article 49 of Regulation (EEC) No 2913/92 clearly states that when a summary declaration has been made for goods carried otherwise than by sea, the formalities necessary for them to be assigned a customs-approved treatment or use must be carried out within 20 days of the date on which the declaration was lodged. Article 204 of the same Regulation also makes clear that non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage shall incur a customs debt.

(45) As regards the professional experience of the operator, it must be asked whether or not an economic operator whose main economic activity is import-export operations is concerned, and whether it had acquired a certain amount of experience of such operations.

(46) As the Advocate General pointed out in his conclusions of 29 April 1999 relating to the 11 November 1999 ruling of the Court of Justice mentioned above, the firm was carrying out import operations on a huge scale under the outward processing regime. Moreover, as the firm itself stated in its letter of 19 February 2001, it has been carrying out import and export operations for more than thirty years. The firm can therefore be considered an experienced economic operator.

(47) As such, it was the firm's duty to be familiar with the laws applicable to the operations it was performing, and in particular, Article 49 of Regulation (EEC) No 2913/92. In its judgement in Case C-161/88,[10] the Court of Justice added that it was not unreasonable to expect an experienced economic operator, like this company, to keep abreast of the Community law applicable to its transactions by reading the relevant Official Journals. The judgement in Case C-370/96[11] reiterated in the same terms the idea that experienced economic operators should keep themselves informed by consulting the relevant issues of the Official Journal.

(48) As regards diligence, whenever an operator has doubts about exactly how provisions may apply which, if not carried out, might lead to him incurring a customs debt, he has a duty to obtain information and request all necessary clarifications, to ensure that he does not contravene the provisions in question.

(49) In the case in question, while the firm did keep the competent authorities informed of its difficulties in meeting the deadlines set, a period of several months elapsed during which the firm took no notice of the recommendations which the customs office made in return. It should be pointed out that the competent authority had periodically issued warnings to the firm concerning failure to assign customs-approved use or treatment within the time limit laid down prior to the date of the events that constitute the present case. On 7 January 1994, they indicated to the firm that after Regulation (EEC) No 2913/92 had come into force, failure to respect these time limits would lead the firm to incur a customs debt under Article 204(1)(a) and Article 49 of Regulation (EEC) No 2913/92. Subsequently, on 12 October 1994, they invited the firm to explain why it had once again missed the deadline. It should be pointed out that the firm did not reply to this letter, but merely repeated its request for permission to extend the deadline.

10 Case C-161/88 Binder [1989] ECR 2415.
11 Case C-370/96 Covita [1998] ECR I-7711.

(50) It should also be noted that during the period from February to October 1994, the firm did not request any deadline extensions, but simply missed its deadlines without obtaining any form of authorisation.

(51) Moreover, even though the Customs Office had explained to the firm that it could have solved its problems by using a customs warehouse, the firm began by turning down this solution, and only came round to it later the following year. Since the firm is an experienced economic operator, and as such should be familiar with the laws covering the products it exports, it cannot argue that it refused to use a customs warehouse because it was not aware of the possibilities this solution presented.

(52) It should also be pointed out that these irregularities were not isolated events, but occurred repeatedly. As the Advocate General stated in his conclusions on Case C-48/98, these repeated failures on the part of the firm led it to use the temporary storage arrangements as if they were a customs warehouse, without having obtained the authorisation and/or implemented the control procedures that would have been required under the law.

(53) The Commission therefore considers that the second condition laid down in Article 239 of Regulation (EEC) No 2913/92 has not been met in this case.

(54) Remission of the import duties requested is therefore not justified,

HAS ADOPTED THIS DECISION:

*Article one*

Remission of import duties in the sum of XXXXX requested by the Federal Republic of Germany on 6 March 2001 is not justified.

*Article 2*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 22/08/2002

*For the Commission*

*Member of the Commission*