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**REM 46/99**



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.3.2000

NOT TO BE PUBLISHED

**COMMISSION DECISION**

**Of 22.3.2000**

**finding that remission of import duties is justified in a particular case and refusing the Federal Republic of Germany an authorisation under article 908 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation (EEC) No 2913/92.**

**(request submitted by the Netherlands)**

**(request for authorisation submitted by the Federal Republic of Germany)**

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### 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,<sup>1</sup> as last amended by Regulation (EC) No 955/1999;<sup>2</sup>

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,<sup>3</sup> as last amended by Regulation (EC) No 1662/1999,<sup>4</sup> and in particular Article 907 thereof,

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<sup>1</sup> OJ No L 302, 19.10.1992, p. 1.

<sup>2</sup> OJ No L 119, 7.5.1999, p. 1.

<sup>3</sup> OJ No L 253, 11.10.1993, p. 1.

<sup>4</sup> OJ No L 197, 29.7.1999, p. 25.

Whereas:

- (1) By letter dated 13 August 1997, received by the Commission on 18 August 1997, the Netherlands 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,<sup>5</sup> as last amended by Regulation (EEC) No 1854/89,<sup>6</sup> whether remission of duties was justified in the following circumstances.
- (2) Between 29 July and 8 September 1993 a Netherlands company, acting as the principal, drew up seven Community external transit documents for the transport of cigarettes, with the office of destination in Antwerp.
- (3) These non-Community goods were never presented at the customs office of destination. The failure to present the goods at the office of destination gave rise to a customs debt of XXXXXXXX.
- (4) The investigations carried out by the competent Netherlands authorities showed that the transit documents had been fraudulently stamped with the Antwerp customs office stamp by a Belgian customs official.
- (5) Arguing that it had acted in good faith and been the victim of fraud by organised criminal groups, the company applied for the import duties to be remitted.
- (6) In support of the application submitted by the Netherlands authorities the company indicated that, in accordance with Article 905 of Regulation (EEC) No 2454/93, it had seen the dossier the authorities had sent to the Commission and had nothing to add.

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<sup>5</sup> OJ No L 175, 12.7.1979, p.1.

<sup>6</sup> OJ No L 186, 30.6.1989, p.1.

- (7) In its Decision C(98) 372. def. of 18 February 1998 (REM 15/97), the Commission refused the requested remission on the grounds that the circumstances did not constitute a special situation in which neither deception nor obvious negligence could be attributed to the person concerned.
- (8) In its judgement of 7 September 1999 ([Case C-61/98](#)) the Court of Justice invalidated the Commission Decision of 18 February 1998 on the grounds that the demands of an investigation conducted by the national authorities may constitute, 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, a special situation within the meaning of Article 13 of Regulation No 1430/79.
- (9) The Commission must take the steps called for by the Court's judgment and re-examine in this light, whether Article 13 of Regulation No 1430/79 applies to the circumstances in point in the main proceedings, the periods referred to in Articles 907 and 909 of Regulation No 2454/93 beginning, as indicated in the judgment, from the date of delivery of the judgment.
- (10) 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 22 November 1999 within the framework of the Customs Code Committee (Section for General Customs Rules/Repayment) to consider the case.
- (11) Under Article 13(1) of Regulation (EEC) No 1430/79, import duties may be repaid or remitted in special situations, other than those laid down in sections A to D of that Regulation, resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

- (12) 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 might find himself compared with other importers carrying out the same activity.
- (13) In this case the company incurred a customs debt through its failure to present the goods in question, which had been placed under the Community transit procedure, at the customs office of destination.
- (14) As the principal, the company is responsible to the competent authorities for the proper conduct of Community transit operations even if it is the victim of fraudulent activities by third parties. Such eventualities are one of the commercial risks that must be borne by the company.
- (15) However, in this case the Court of Justice of the European Communities found, in its judgment of 7 September 1999, that in July 1993 the customs authorities were already aware that a consignment of cigarettes was being organised under Community transit, involving irregularities that would give rise to a customs debt. Those authorities had had the transit operations under surveillance and had in this case deliberately allowed offences to be committed to help them break up the fraud network and identify the perpetrators.

- (16) Inasmuch as this decision, made in connection with the prosecution of offences, had the effect of placing on the person liable the burden of customs debts arising from the incorrect conduct of the transit operations, it constitutes a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79. The company was put in an exceptional situation in comparison with other operators engaged in the same business, since it was not informed by the competent authorities that the customs debts were being incurred without its knowledge while the authorities themselves, through their close surveillance of the operations, were perfectly aware that the debts were being incurred and who the person liable was.
- (17) In its judgment of 7 September 1999 the Court of Justice also stated that the national customs authorities' investigations had revealed that the Antwerp customs office stamp had been fraudulently affixed to the T1 documents by a Belgian customs official.
- (18) This active participation of a customs official in the fraud meant that the company could not realise that the goods had not arrived at the customs office of destination in Antwerp.
- (19) The risk to be borne by the principal in connection with the proper conduct of the transit operation does not extend to a representative of the customs authorities himself actively assisting in fraud. The principal, who has no involvement with such activities, has the right to expect that the exercise of administrative duties will not be vitiated by corrupt customs officials.

- (20) The participation of an official with a direct interest in the operations is a particularly serious factor, profoundly undermining the system on which Community transit is based. The effectiveness of that customs procedure depends on two factors: the responsibility of the principal for the proper conduct of the operation and the findings of the customs officials duly and properly recorded on the transit documents, on which the operator can legitimately rely.
- (21) Inasmuch as the person who voluntarily misled the company, and put it in a situation where it incurred a financial liability to the authorities, was himself a representative of those authorities, payment of the customs debt would be unfair and would create flagrant legal insecurity for traders.
- (22) Furthermore, the Court of Justice, in its judgment of 7 September 1999, also considered that the company had not been in any way involved in the fraud, and had believed in good faith that the transit operations had been carried out properly, even though one of the suspects was a member of its staff. No negligence or deception can therefore be attributed to the company.
- (23) Therefore the remission of import duties requested is justified in this case.
- (24) Under Article 908 of Regulation (EEC) No 2454/93, where the circumstances under consideration justify repayment or remission, the Commission may, under conditions which it shall determine, authorise one or more Member States to repay or remit duties in cases involving comparable issues of fact and of law.
- (25) In a letter of 1 December 1999 the Federal Republic of Germany requested authorisation to repay or remit duties in cases involving comparable issues of fact and law.



(26) However, this decision, pursuant to Article 233 of the Treaty establishing the European Community, draw the legal consequences of a judgement of the Court of Justice of the European Communities. Therefore it has a very singular character, both factually and legally. Consequently it cannot serve as a reference for possible national decisions taken under an authorisation granted by the Commission.

HAS DECIDED AS FOLLOWS:

*Article 1*

The remission of import duties in the sum of XXXXXX requested by the Netherlands on 13 August 1997 is hereby found to be justified.

*Article 2*

The authorisation requested by the Federal Republic of Germany in its letter of 1 December 1999 under article 908 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation (EEC) No 2913/92, is refused.

*Article 3*

This Decision is addressed to the Netherlands and the Federal Republic of Germany.

Done at Brussels, 22.3.2000

*For the Commission*

*Member of the Commission*