REC 11/03

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 17-6-2004
C(2004)2091.

NOT FOR PUBLICATION

COMMISSION DECISION

Of 17-6-2004

finding that post-clearance entry in the accounts of import duties and remission of import duties are justified in a particular case
(Only the Dutch and French texts are authentic.)

Request submitted by Belgium
(REC 11/03)

FR

COMMISSION DECISION

Of 17-6-2004

finding that post-clearance entry in the accounts of import duties and remission of import duties are justified in a particular case
(Only the Dutch and French texts are authentic.)

Request submitted by Belgium
(REC 11/03)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Communities,

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 24 July 2003, received by the Commission on 25 July 2003, Belgium asked the Commission to decide whether waiver of post-clearance entry in the accounts of import duties under Article 220(2)(b) of Regulation (EEC) No 2913/92 or, in the alternative, remission of import duties under Article 239 of that Regulation 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 Articles 871, 873, 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.[5]

(3) A Belgian firm has been importing bullion lead into the European Community since the 1960s. Since 1996, when the composition of the bullion lead changed, it has contained antimony as the principle other element by weight.

(4) From the entry into force of the Combined Nomenclature on 1 January 1988, the firm declared the bullion lead under CN heading 7801 99 10. The lead was imported duty-free under the firm's end-use authorisation. Following a check carried out by the Belgian authorities in August 2000, it was found that the lead imported since 1996 should have been classified in subheading 7801 91 since antimony was the principle other element by weight. This tariff heading carried an import duty of 2.5%; the competent authorities therefore made a post-clearance entry in the accounts of XXXXX, the amount for which waiver of entry in the accounts and, in the alternative, remission has been requested.

[5] OJ L 134, 29.5.2003, p. 1

(5) According to the firm, the request for non-recovery or, in the alternative, remission is justified for the following reasons.

(6) Before the entry into force of the Combined Nomenclature on 1 January 1998, bullion lead containing 0.02 % or more by weight of silver and intended for refining was classified in heading 7801 AI of the customs tariff and so could be imported duty-free under the end-use arrangements regardless of the quantity of antimony it contained.

(7) From the date of entry into force of the Combined Nomenclature, bullion lead containing antimony as the principal other element by weight and bullion lead not containing antimony as the principal other element by weight were classified under different subheadings of the Combined Nomenclature, and the former was subject to customs duties. The Explanatory Notes could lead one to believe that subheading 7801 91 is not intended to cover bullion lead containing 0.02% or more by weight of silver and intended for refining. Moreover, the correlation table introduced at the same time as the Combined Nomenclature does not distinguish between bullion lead containing antimony as the principal other element by weight and 0.02% or more by weight of silver, intended for refining, on the one hand, and other types of bullion lead on the other.

(8) Since 1976 the firm had held an end-use authorisation under which bullion lead containing 0.02% or more by weight of silver and intended for refining could be imported duty-free. Despite checks carried out in relation to this authorisation, the competent authorities did not make any comment about the product's classification until 2000; they did not do so in 1996 either, when the authorisation was adapted to the new nomenclature. Between 1996 and the checks carried out in 2000, they accepted 129 declarations without making any comment on the product's classification.

(9) Since the imported product was bullion lead, the firm first declared it under heading 7801 AI and then, after the entry into force of the Combined Nomenclature, under subheading 7801 99 10, since bullion lead is referred to in the wording of this subheading and the introduction of the Combined Nomenclature was supposed to be neutral in terms of the customs duties applicable and customs arrangements such as the end-use arrangement. Moreover, the firm argued, the lead it imported was never used for the purposes specified in the Explanatory Notes to heading 7801 91 (*alloys used for the manufacture of accumulator plates and ternary alloys for the manufacture of printing type*).

(10) The firm also points out that Council Regulation (EC) No 2433/2001 of 6 December 2001[6] suspends duties on bullion lead of CN subheading 7801 91 00 for an indefinite period and that the recitals of that Regulation state that it is in the commercial interest of the Community to apply the same tariff treatment to both categories of bullion lead (CN codes 7801 91 00 and 7801 99 10) when they contain 0.02 % or more by weight of silver and are intended for refining; thus, since 1 January 2002 it has been possible to release unwrought lead for refining containing antimony as the principal other element by weight and containing 0.02% or more by weight of silver for free circulation duty-free under the firm's end-use authorisation.

(11) In support of the application submitted by the competent Belgian authorities the firm indicated that, in accordance with Articles 871 and 905 of Regulation (EEC) No 2454/93, it had seen the dossier which the Belgian authorities sent to the Commission and had nothing to add.

(12) In a letter of 26 November 2003, which the firm received on 28 November 2003, the Commission informed the firm that it intended to refuse its request, and set out its reasons for doing so.

---

6 OJ L 329, 14.12.2001, p. 4.

(13) By letter dated 18 December 2003, received by the Commission on 19 December 2003, the firm stated its position on the Commission's objections. The administrative procedure was therefore suspended for one month in accordance with Articles 873 and 907 of Regulation No (EEC) 2454/93.

(14) In its letter of 18 December 2003 the firm first reiterated the arguments referred to above. It went on to say that, firstly, if it had applied for its inward processing authorisation to be extended to the product concerned, the authorisation would have been granted and, secondly, that the antimony was extracted during the refining process and all of it was exported out of Community territory. The bullion lead that was left after the antimony was extracted was used for the purpose specified in the firm's end-use authorisation.

(15) By letter of 19 January 2004 the Commission asked the Belgian authorities for further information. This information was provided by letter dated 4 March 2004, received by the Commission on the same day. The administrative procedure was therefore suspended, in accordance with Articles 871, 873, 905 and 907 of Regulation (EEC) No 2454/93, between 20 January 2004 and 4 March 2004.

(16) 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 on 6 May 2004 within the framework of the Customs Code Committee (Repayment Section) to consider the case.

(17) 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 the result of an error on the part of the customs authorities themselves 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.

(18) In this case the competent Belgian authorities considered that the tariff classification error committed by the firm had given rise to a customs debt for which the firm was liable.

(19) 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. The Court of Justice has consistently ruled that the legitimate expectations of a trader are protected only if the competent authorities themselves gave rise to these expectations.

(20) In this case the fact that the Belgian authorities accepted a large number of declarations and carried out checks in relation to the end-use arrangements without expressing reservations about the classification of the product concerned constitutes an error on the part of the authorities within the meaning of Article 220(2)(b).

(21) In line with the consistent ruling of the Court of Justice of the European Communities, in determining whether the firm could reasonably have detected the customs authorities' error, account must be taken of the nature of the error, the firm's professional experience and the diligence it showed.

(22) As regards the nature of the error, the Court has ruled that it should be assessed in terms of the complexity of the legislation concerned and the length of time over which the authorities persisted in their error.

(23) The principles for classifying goods are laid down in the General Rules for the interpretation of the Combined Nomenclature, and in particular General Rule 1, which provides that for legal purposes classification must be determined according to the wording of the headings and section and chapter notes. In this respect, subheading 7801 91 00 clearly states that lead (*unwrought, other than refined*) containing antimony as the principle other element by weight falls under this subheading. The imported lead is therefore excluded from subheading 7801 99 10 and the competent authorities were right to correct the classification which they had initially accepted.

(24) Furthermore, the Explanatory Note to subheading 7801 91 00 gives examples of some products covered by the subheading, but clearly indicates, by using the words "*This heading* ***includes****...*" that the list is not exhaustive. Moreover, goods are to be classified, as indicated above, by simple application of the General Rules for the interpretation of the Combined Nomenclature, and although the Explanatory Notes to the Combined Nomenclature are an important factor for interpretation in all cases in which the provisions of the Nomenclature give rise to uncertainty, they cannot amend provisions the meaning and scope of which are sufficiently clear.[7]

(25) Lastly, the Correlation Tables CN 1988 to Nimexe 87 published by Eurostat clearly state that no legal value can be attached to the text and tables of which the volumes are composed and that the texts and tables cannot therefore be invoked by persons liable for duties, particularly at the level of data collection, in support of the classification of goods in a certain subheading of the Tariff and Statistical Nomenclature.

(26) Therefore, even though the customs authorities persisted in their error for four years, the legislation cannot be considered complex.

(27) As regards the firm's experience, the dossier submitted by the Belgian authorities shows that the firm has imported bullion lead since the 1960s, holds a number of authorisations for different customs procedures, and is accustomed to applying customs legislation. It must therefore be considered very experienced.

(28) The Commission therefore considers that the firm could reasonably have detected the error.

---

[7] *Witt/Hauptzollamt Hamburg-Ericus* judgment of 12 December 1973, Case T149/73, ECR p. 1587.

(29) 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.

(30) 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.

(31) The Court has consistently ruled[8] that in using its discretion to assess whether the conditions for granting remission have been fulfilled, the Commission must weigh the Community interest in ensuring that the customs provisions are respected against the interest of the importer acting in good faith not to suffer harm beyond normal commercial risk.

(32) In this case the erroneous tariff classification gave rise to a customs debt for which the firm is liable.

(33) However, it should be noted that the introduction of the Combined Nomenclature was supposed to be neutral in effect, that in December 2001 the Council adopted a Regulation suspending duties on bullion lead of CN subheading 7801 91 00 for an indefinite period, and that the recitals of that Regulation indicate that it is in the Community's commercial interest that the same tariff treatment should be applied to both categories of lead. These facts support the firm's view that it was right for it to continue importing bullion lead without paying duties.

---

[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.

(34) Furthermore, as the Belgian authorities have confirmed, over the entire period in question the firm held an end-use authorisation, exported the antimony and used the bullion lead thus obtained for the purpose specified in the end-use authorisation.

(35) Therefore, the above circumstances do in the Commission's view constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(36) The dossier submitted by the Belgian authorities shows that the firm was not guilty of deception or obvious negligence, since the special situation in which it found itself was such that it could not be accused of lack of vigilance in that connection.

(37) Post-clearance entry of import duties in the accounts is therefore justified in this case, and the remission of import duties is also justified,

HAS ADOPTED THIS DECISION :

Article 1

The import duties in the sum of XXXXXX referred to in the request from Belgium of 24 July 2003 shall be entered in the accounts.

Article 2

The remission of import duties in the sum of XXXXXX referred to in the request from Belgium dated 24 July 2003 is justified.

Article 3

This Decision is addressed to Belgium.

Done in Brussels, 17-6-2004

For the Commission
Frits Bolkestein
Member of the Commission