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REC 01/02

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 06-01.2003
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NOT FOR PUBLICATION

COMMISSION DECISION

Of 6-01-2003

finding that post-clearance entry in the accounts of import duties is justified and remission of import duties is justified in a particular case and refusing to grant Denmark 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

(only the Danish text is authentic)

(Request submitted by Denmark)

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(Request submitted by Denmark)
(REC 01/02)

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 444/2002,[4] and in particular Articles 873 and 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 141, 11.3.2002, p. 11.

Whereas:

(1) By letter dated 28 February 2002, received by the Commission on 7 March 2002, Denmark asked the Commission to decide, under Article 220(2)(b) of Regulation (EEC) No 2913/92, whether waiving the post-clearance entry in the accounts of import duties was justified and, in the alternative, whether remission of import duties under Article 239 of that Regulation was justified, in the following circumstances.

(2) On 2 June, 23 June and 8 July 1995 a Danish firm, acting as declarant and on instructions from a third party, submitted three customs declarations to a Danish customs office for three consignments of 69 tonnes of butter originating in the Czech Republic, to be transported under the Community external transit procedure; the declared office of departure from the European Union was in Alverca, Portugal. The firm acted as the principal for the three transit operations.

(3) As the Danish authorities point out in their requesting letter, in a SCENT communication of 28 November 1994, the Community authorities stated that a number of deliveries of Czech butter had gone astray during transit through the EU and that the relevant customs papers were found to have been endorsed with false stamps. The Danish authorities were asked to help the Community authorities establish whether certain consignments had been cleared in accordance with the rules. The Community authorities also asked the national authorities not to visit the firms concerned as part of the investigations. The SCENT communication indicated that a large number of fraudulent consignments had been carried out between German customs offices and a Danish customs office located in the same administrative area as the office where the goods concerned in this case were placed under the Community external transit procedure.

(4) The Danish authorities subsequently, in the period up to mid-1995, received further requests for mutual assistance in which extensive information was supplied on fraud in the transport of Czech butter between different Member States.

(5) When the goods were placed under the Community transit procedure the customs office of departure did not require a comprehensive guarantee arrangement covering the total amount of applicable duties and other charges. The customs authorities did not use the early warning system either.

(6) Initially it was believed that the consignments had been delivered in accordance with the rules, since the competent office received the copies 5 of the transit documents concerned in July 1995.

(7) However, following an investigation by the competent Danish authorities it was found that the goods had not in fact been presented at the office of destination in Alverca, Portugal, and that the stamps on the copies 5 of the T1 documents were forged.

(8) The Danish authorities therefore considered that the transit operations concerned had not been discharged. Since the goods had been removed from customs supervision a customs debt was incurred under Article 203 of Regulation (EEC) No 2913/92. The Danish authorities therefore asked the firm to pay import duties of XXXXXX, the amount for which the firm has requested a waiver of post-clearance entry in the accounts and, in the alternative, remission.

(9) The firm gives the following reasons for considering non-recovery and, in the alternative, remission, to be justified. Firstly, it argues, the customs authorities did not ask at the start of the operations for a comprehensive guarantee at a level complying with Article 361(2) of the version of Regulation (EEC) 2454/93 in force at the time. Moreover, they allegedly failed to comply with the administrative obligation to provide prior information. Thirdly, they did not inform the firm of the extensive fraud that had been detected in the transport of butter originating in the Czech Republic.

(10) Pursuant to Articles 871 and 905 of Regulation (EEC) No 2454/93, the firm stated in support of the request from the competent Danish authorities that it had seen the dossier submitted to the Commission, and set out its arguments in a document annexed to the authorities' letter to the Commission of 28 February 2002.

(11) By letter dated 7 October 2002, received on 8 October 2002 by the firm's lawyer, the Commission notified the firm of its intention to reject the application and explained the grounds for its decision.

(12) By letter dated 7 November 2002, received by the Commission on the same date, the firm stated its position regarding the Commission's objections. The administrative procedure was therefore suspended for a month, in accordance with Articles 873 and 907 of Regulation (EEC) No 2454/93, between 8 October and 7 November 2002.

(13) In its letter of 7 November 2002 the firm first states its view that the summary of the facts annexed to the Commission's letter of 7 October 2002 is very succinct compared to the letter and annexes from the Danish authorities of 28 February 2002, and so does not take sufficient account of the details of the case.

(14) It goes on to assert that, contrary to view set out in the Commission's letter of 7 October 2002, the Danish authorities never considered that the three conditions for the applicability of Article 220(2)(b) had not been fulfilled.

(15) It also sets out its interpretation of the concept of an error by the competent authorities, based in particular on a reading of the judgment of the Court of Justice of the European Communities of 27 June 1991.[5]

(16) It maintains its view that the competent customs authorities committed errors by not following the required administrative procedures, since they did not ask for a comprehensive guarantee calculated in accordance with Article 361(2) of the version of Regulation (EEC) No 2454/93 in force at the time and did not use the early warning system.

(17) The firm also emphasises that when they committed these errors the Danish customs authorities had not only known for a long time that irregularities were occurring with consignments of butter originating in the Czech Republic, but had even been involved in the investigation of this fraud already going on at the time.

(18) The firm also claims that the combination of factors affecting it placed it in a special situation.

[5] *Mecanarte* case C-348/89, 27.6.1991, ECR.I-3277.

(19) Firstly, it argues, the type of goods concerned had been the object of fraud operations for a long time and the competent customs authorities had had direct knowledge of this existence of such fraud since 1994, i.e. prior to the operations involved in this case. In addition, it asserts that the Danish customs authorities had already cooperated by initiating investigations of the fraud in the context of mutual administrative assistance. The firm also claims that there were many fraud cases pending involving these goods because of the failure of the competent authorities to take action at an early enough stage. It points out that the requests for investigation sent to the Member States by the Community authorities asked the Member State authorities not to contact the traders involved in the transit operations being investigated, and deduces from this that the Community authorities were more interested in establishing who was responsible for the fraud than in its prevention in the short term. It therefore considers that it is in a situation comparable to that referred to by the judgment of the Court of Justice of the European Communities of 7 September 1999.[6]

(20) The firm makes the following arguments for its view that the error could not have been detected and that it was not guilty of obvious negligence.

(21) As regards the relevant legislation, the firm argues that a trader cannot be expected to have a greater knowledge of the applicable rules than the customs authorities.

(22) It states that it had taken out normal insurance relating only to the value of the goods, and offers to provide any further explanation required on this point.

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6 *De Haan* judgment of 7 September 1999 (Case C-61/98), ECR I-05003.

(23) Lastly, it states that it had made all the contractual arrangements necessary to cover itself against commercial risk, and, following the removal of the goods from customs supervision, it claimed damages from its client under the clause covering such an eventuality. Since its client did not pay the damages, the firm initiated proceedings against it, but its client has since been declared bankrupt.

(24) 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 to examine the case on 6 December 2002 within the framework of the Customs Code Committee - Section for General Customs Rules/Repayment.

(25) Article 220(2)(b) of Regulation (EEC) No 2913/92 requires post-clearance entry in the accounts to be waived where the amount of duty legally owed was not entered in the accounts as a result of an error on the part of the customs authorities themselves that could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and observed all the provisions laid down by the legislation in force as regards the customs declaration.

(26) In this case, having regard to Article 203 of Regulation (EEC) No 2913/92, the competent Danish authorities considered that the non-discharge of the declaration for the goods which had been placed under the Community external transit procedure gave rise to a customs debt for which the firm was liable.

(27) 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.

(28) In its judgment of 27 June 1991,[7] the Court of Justice of the European Communities ruled that the legitimate expectations of the person liable should be protected under Article 5(2) of Regulation (EEC) No 1697/79 (the applicable provision before the entry into force of Article 220(2)(b) of Regulation (EEC) No 2913/92) only if the competent authorities themselves created the basis for those expectations. The same judgment defines "competent customs authority" as any authority which, acting within the scope of its powers, furnishes information relevant to the recovery of customs duties. Therefore only errors that are attributable to acts of the competent authorities that furnished information relevant to the calculation of the duties and that could not reasonably have been detected by the person liable confer entitlement to the waiver of post-clearance recovery of customs duties.

(29) Yet the firm argues in its letter of 7 November 2002 that Ground 24 of the judgment of 27 June 1991 should be interpreted to mean that failure of the customs authorities to comply with the procedures generally followed can constitute an error on the part of those authorities.

(30) In fact, on the contrary, Ground 24 of the judgment indicates that an error on the part of the competent authorities cannot be deemed to exist where those authorities have been led into error by an incorrect declaration by another person, for instance by the exporter when the certificate of origin is drawn up. The argument advanced by the firm is therefore not pertinent.

(31) However, the Court of Justice of the European Communities has recognised the existence of a type of active error arising from the failure of the customs authorities to take action over a long period, where they are under an obligation to act and minimal action would have enabled an irregularity to be detected.[8]

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7 *Mecanart* judgment of 27 June 1991.

8 *Hewlett Packard* judgment of 1 April 1993 (Case C-250/91), ECR - I 1819.

(32) In this case there was no active error or prolonged failure to act, for a number of reasons.

(33) As regards the level of the comprehensive guarantee for the consignments, the following points should be made. Article 361(1) of the version of Regulation (EEC) No 2454/93 in force at the time provides that the amount of the guarantee must be set at 30% of the duties and other charges payable. Article 361(2) provides that the amount of the comprehensive guarantee must be set at a level equal to the full amount of duties and other charges payable where the external Community transit operations concern goods that have been the subject of specific information from the Commission concerning increased risks of fraud, in particular pursuant to the provisions of Council Regulation (EEC) No 1468/81, and have been the subject of a communication by the Commission to the Member States, after an examination carried out by the Committee in accordance with Article 248 of Regulation (EEC) No 2913/92. The goods concerned in this case were the subject of a Commission communication (C1995/049/06) pursuant to Article 361 (5) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, published in the Official Journal of the European Communities.[9]

[9] OJ C 49, 28.2.1995, p. 6.

(34) The authorities therefore committed an error in failing to require a comprehensive guarantee calculated according to the version of Article 361(2) in force at the time, since the two conditions for the application of that provision were fulfilled. However, there is no causal link between the failure to set a comprehensive guarantee at a level equal to the full amount of duties and other charges payable and the fact that a customs debt was incurred. The customs debt was incurred purely as a result of the goods being withdrawn from customs supervision. The Danish authorities' error regarding the guarantee is not therefore an active error likely to create a legitimate expectation on the part of the debtor.

(35) As regards use of the early warning system, it should be noted that Article 384 of the version of Regulation (EEC) No 2454/93 in force at the time provides that where necessary the customs authorities of the Member States must communicate to one another all findings, documents, reports, records of proceedings and information relating to transport operations carried out under the Community transit procedure and to irregularities and offences in connection with that procedure. The Customs Code Committee set up an early warning system for communicating information relating to the transport of goods considered sensitive.

(36) Firstly, the systems of communication between authorities set up for this purpose are not intended for traders. They were designed for the use of the authorities, to optimise the exchange of information between them and facilitate the prompt initiation of investigations in the event of illegal operations. In any case, the early warning system is unrelated to the placing of goods under the external Community transit procedure.

(37) Moreover, neither Article 384 of Regulation (EEC) No 2454/93, nor any other provisions of that Regulation or of Regulation (EEC) No 2913/92 specifies what the consequences may be where authorities fail to comply with the early warning system.

(38) Furthermore, as the Court of Justice of the European Communities stated in its ruling of 23 March 2000,[10] an administrative agreement between Member States (administrative arrangement) has no legal authority. Therefore it cannot be invoked against the authorities by a trader.

(39) Consequently, the fact that the office of departure did not follow an administrative arrangement for the communication of information does not constitute an error on the part of the customs authorities within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

(40) Furthermore, this case involves only three transit operations, so there can be no question of a prolonged failure on the part of the authorities to act to a minimum degree that would be required of any customs authority. This was not therefore an error on the part of the Danish customs authorities within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

(41) As regards the obligation to inform traders referred to by the firm, it should first be noted that at the time the transit operations concerned were initiated, the Danish authorities were not certain that they were fraudulent. The situation is not therefore comparable to the one which gave rise to the *De Haan* judgment handed down by the Court of Justice of the European Communities on 7 September 1999, because in this case the customs authorities were not aware of the customs debts being incurred by the firm without its knowledge. There was therefore no error on the part of the customs authorities in this respect.

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10 *Leszek Labisb* judgment of 23 March 2000 (Case C-310/98), ECR I-1797.

(42) Consequently, none of the circumstances referred to above show evidence of any error on the part of the customs authorities within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

(43) As the Courts have ruled,[11] in the absence of an error on the part of the competent authorities, post-clearance recovery of duties is not an infringement of the principle of proportionality even if the duties charged can no longer by recovered from the client concerned. It is up to traders to make the necessary provision within the framework of their contractual relations to protect themselves against such risks.

(44) The circumstances in this case therefore show no error on the part of the competent authorities within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

(45) In the absence of any error on the part of the competent authorities, it is not appropriate to examine the other conditions set out in Article 220(2)(b) of Regulation (EEC) No 2913/92.

(46) 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.

(47) 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, 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.

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11 See inter alia *Faroe Seafood* judgment of 14 May 1996 (cases C-153/94 and C-204/94), ECR I - 02465.

(48) The Courts have consistently ruled[12] that in using its discretion to assess whether the conditions for granting remission are fulfilled, the Commission must balance the Community interest in ensuring that the customs provisions are respected and the interest of the importer acting in good faith not to suffer harm beyond normal commercial risk.

(49) In this case the failure to correctly discharge the three transit operations gave rise to a customs debt for which the firm is liable as principal for the three operations.

(50) 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 resulting from organised crime. Such an eventuality is part of a firm's normal commercial risk.

(51) Furthermore, even though this product had been the object of fraud for a long time when the transit operations were carried out, the danger of the firm's being a victim of that fraud is part of its commercial risk and in no way reduces its obligations as principal.

(52) As has already been pointed out, no active error can be attributed to the competent authorities in respect of the three transit operations.

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12 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

(53) Nor are the facts of this case identical to those covered by the Court of Justice judgment of 7 September 1999.[13] According to that judgment "the demands of an investigation conducted by the national authorities may, 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, constitute a special situation ... where the fact that the national authorities have, in the interests of the investigation, deliberately allowed offences or irregularities to be committed, thus causing the principal to incur a customs debt, places the principal in an exceptional situation in comparison with other operators engaged in the same business".

(54) In that case the customs authorities were already aware, or at least had serious grounds for suspecting, that a Community transit operation was being organised for cigarettes, involving irregularities such as to give rise to a customs debt. They then knowingly allowed operations to be conducted which they knew to be fraudulent. That is not, however, the case here.

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13 *De Haan* judgment of 7 September 1999.

(55) The dossier shows that although the customs authorities were aware at the time (as the Danish authorities state in their letter of 28 February 2002) that many irregularities were occurring in the transport of butter of Czech origin, they had not launched an investigation specifically relating to such butter transit operations, and they did not deliberately allow the firm to conduct its operations knowing them to involve fraud. When the customs office accepted the declaration placing the goods under the Community transit regime, it must have known that this was a high-risk operation, but did not know that these particular transit operations involved fraud. Therefore the national authorities did not deliberately allow a customs debt to be incurred.

(56) Nevertheless, the competent authorities had been alerted by the Community authorities over a year before the operations concerned that fraud was being committed involving butter of Czech origin transported under the external Community transit procedure. It affected goods placed under the transit arrangements in many European countries, including Denmark, in most cases following placement of the goods in customs warehousing subsequent to a prior transit operation. The competent national authorities had disseminated this information to regional offices in a communication of 4 May 1994.

(57) The authorities involved in this case were therefore aware of certain data which should have prompted them to be more vigilant in view of the greater risk factor attaching to the operations concerned, given the nature and origin of the goods and that fact that they had previously been through another transit operation and then been placed in customs warehousing. In these respects the situation was identical to those in which a large number of frauds had been perpetrated from different customs offices in Denmark and other Member States.

(58) Furthermore, the Community authorities had repeatedly asked the Danish authorities to investigate transit operations already carried out involving butter of Czech origin. The competent investigation office, located in the same regional customs office as that where the goods were placed under external transit, had already started investigations and found,[14] on a date close to or previous to that of the operations in this case, that butter of Czech origin presented for external Community transit at the same customs office in Denmark between June and October 1994 had never been presented at the Italian office of destination.

(59) From the end of 1994 the competent Danish authorities had also already started investigating external Community transit operations between Denmark and the same Portuguese office of departure from the EU as the one concerned in this case. These operations also concerned consignments of butter of Czech origin. In March 1995 the Danish authorities had been informed by the Community authorities that the consignments had never been presented at the office of departure in Portugal.

(60) Yet despite having been informed of a variety of facts pointing to a high risk of fraud, the Danish authorities did not require a comprehensive guarantee equal to the full amount of the duties and other charges payable, as they should have done. They therefore committed an error in that they did not act with due diligence.

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[14] Cf. the facts relating to the *SPKR 4 No 3482 ApS* judgment of 14 November 2002, not yet published in the Court Reports.

(61) Furthermore, after finding that fraud was being perpetrated the Community authorities had repeatedly asked the national authorities to use the EWS (early warning system) for these goods. In this case the competent authorities did try to use the system twice (for the operations of 2 June 1995 and 8 July 1995). The competent regional office sent information on the two operations to the competent central investigation department. On 18 July (more than six weeks after the first operation) the central department tried to forward the information to the competent department in Portugal. However, the information did not get through because the fax transmission failed and no other means of transmission was used.

(62) In the Commission's view, the above circumstances and the negligence of the competent Danish authorities constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(63) As regards the second condition laid down in Article 239 of Regulation (EEC) No 2913/92, namely the absence of deception or obvious negligence, the Danish authorities state in their requesting letter of 28 February 2002 that the Danish customs authorities' investigation established that the firm had not engaged in fraud, and the dossier shows that it was not obviously negligent.

(64) In its letter of 7 November 2002, the firm provides information on the contractual measures it had taken in relation to its client to protect itself against commercial risk.

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

(66) 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.

(67) In its letter of 28 February 2002, received by the Commission on 7 March 2002, Denmark requested authorisation to repay or remit duties in cases involving comparable issues of fact and law.

(68) This case is however quite unique in terms of both fact and law. It cannot therefore serve as a reference for national decisions taken in application of an authorisation granted by the Commission,

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of XXXXXXX referred to in the request from Denmark of 28 February 2002 shall be entered in the accounts.

Article 2

The remission of import duties in the sum of XXXXXXX referred to in the request from Denmark dated 28 February 2002 is justified.

Article 3

The authorisation requested by Denmark in its letter of 28 February 2002 under Article 908 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 is not granted.

Article 4

This Decision is addressed to Denmark.

Done in Brussels, 6-01-2003

For the Commission
Frits Bolkestein
Member of the Commission