REC 02/04

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15-12-2004
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NOT FOR PUBLICATION

COMMISSION DECISION

Of 15-12-2004

finding that post-clearance entry in the accounts of import duties is justified in a particular case

(only the German text is authentic)

(Request submitted by the Federal Republic of Germany)

(REC 02/04)

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(Request submitted by the Federal Republic of Germany)

(REC 02/04)

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 the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded,[2]

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 1993[3] laying down provisions for the implementation of Council Regulation (EEC) No 2913/92, as last amended by Regulation (EC) No 2286/2003,[4]

1 OJ L 302, 19.10.1992, p. 1.
2 OJ L 236, 23.9.2003, p. 33.
3 OJ L 253, 11.10.1993, p. 1.
4 OJ L 343, 31.12.2003, p. 1.

Whereas:

(1) By letter dated 27 April 2004, received by the Commission on 5 May 2004, Germany asked the Commission to decide, under Article 220(2)(b) of Regulation (EEC) No 2913/92, whether it is justified to waive post-clearance entry in the accounts in the following circumstances:

(2) For several years a German firm has imported concentrated fruit juices into the Community. The products concerned have different sugar contents and are reported as containing natural sugar (fructose) only. The firm was authorised under Article 76 of Regulation (EEC) 2913/92 to use the simplified procedure for its declarations of release for free circulation. The goods are declared by entering them in the records, after which a supplementary declaration is made. The declarations state the Brix value, which can be used to assess the sugar content of the concentrated fruit juices.

(3) Up to March 2003 the firm declared the goods as belonging to heading 2009 of the Combined Nomenclature (CN). On 19 March 2002, the competent customs authorities carried out physical checks on three consignments of concentrated apple juice with declared Brix values of 64.8, 64.8 and 65.4. On 12 April 2002, they confirmed that the goods belonged under heading 2009. The same authorities also carried out regular checks on the supplementary declarations and notified the firm of the results in writing. The firm's classification of the goods was never questioned. Between October 2001 and March 2003, the customs authorities accepted 402 declarations.

(4) On 28 September 2001 Commission Regulation (EC) No 1776/2001 of 7 September 2001[5] entered into force, amending Annex I of Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff; in order to preserve the original character of fruit juices under heading 2009, the minimum fruit-juice content for goods classified under subheadings containing the words "of a density not exceeding 1.33 g/cm^3 at 20°C" was set at 50% by weight. Additional note 5 to Chapter 20 was consequently replaced by the following:

5. (a) The added sugar content of products of heading 2009 corresponds to the "sugar content" less the figures given hereunder, according to the kind of juice concerned:

- lemon or tomato juice: 3,

- apple juice: 11,

- grape juice: 15,

- other fruit or vegetable juices, including mixtures of juices: 13.

(b) The fruit juices with added sugar, "of a density not exceeding 1.33 g/cm^3 at 20°C and containing less than 50% by weight of fruit juices in their natural state obtained from fruits or by dilution of concentrated juice, lose their original character of fruit juices of heading 2009".

(5) This amendment was incorporated into Commission Regulation (EC) No 2031/2001 of 6 August 2001,[6] which amended Annex I to Regulation (EEC) No 2658/87, referred to above. On 17 January 2002,[7] the expression "of a density not exceeding 1.33 g/cm^3 at 20°C" was replaced by the expression "of a Brix value not exceeding 67" to bring it into line with the Harmonised System which introduced the concept of the Brix value on 1 January 2002.

(6) At the end of January 2003, the competent customs authorities realised that additional note 5(b) meant that fruit juices with added sugar, of a Brix value not exceeding 67 and containing less than 50% by weight of fruit juices in their natural state, could no longer be classified under Chapter 20 but had to be classified as food preparations under CN heading 2106 and would consequently be subject to a higher rate of duty.

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5 OJ L 240, 8.9.2001, p. 3.

6 OJ L 279, 23.10.2001, p. 1.

(7) The firm has applied, under Article 220(2)(b) of Council Regulation (EEC) No 2913/92, for the waiving of post-clearance entry in the accounts of a sum of EUR XXXXX in duties (EUR XXXX in respect of goods released into free circulation in December 2002 and EUR XXXXX for other transactions between October 2001 and March 2003).

(8) In support of the request submitted by the competent German authorities, the firm has indicated that, in accordance with Article 871 of Regulation (EEC) No 2454/93, it has seen the dossier the authorities sent to the Commission and had nothing to add.

(9) According to the request submitted to the Commission by the German authorities, waiver of the entry in the accounts is justified for the following reasons: the administration made an error by accepting 402 declarations between October 2001 and March 2003 without commenting on the product's classification despite the sugar content being indicated in the declarations. After analysing the fruit juice, the administration had delivered three classification opinions which confirmed the classification chosen by the firm; the firm had no reason to doubt the classification it had chosen, which had been confirmed by the competent administration; in view of the complexity of the legislation, it would have been impossible to detect the administration's error. A new amendment to the additional notes to Chapter 20 of the CN was intended to take account of the case of fruit juices that contained natural sugars only.

(10) By letter dated 2 July 2004, received by the firm on 6 July 2004, the Commission notified the firm, through its lawyer, of its intention to withhold approval.

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[7] OJ L 15, 17.1.2002, p.58.

(11) By letter dated 16 July 2004, received by the Commission on the same date, the firm's lawyer expressed its opinion regarding the Commission's objections. It repeated its claim that it had no grounds for doubting the accuracy of the heading it had declared, adding that it was not clear either from the text of the legislation or from the way it was applied in practice by the competent German authorities that fruit juice concentrates should be classified in CN heading 2106. It also expressed its doubts as to the applicability of additional note 5(b) to Chapter 20 of the CN to fruit juice concentrates. Finally, it noted that other Member States used a different classification to the one used by the German authorities. One Member State, for instance, had issued binding tariff information on 18 May 2004 classifying an apple juice with a Brix value of 65 under CN heading 2009.

(12) In accordance with Article 873 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.

(13) In accordance with Article 873 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met to examine the case on 7 September 2004 within the framework of the Customs Code Committee, Repayment Section.

(14) 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.

(15) As a preliminary remark it should be noted that, in its letter to the Commission of 16 July 2004, the firm's lawyer said that it believed that the German authorities' error did not lie in the fact that for years they had allowed and confirmed the classification of the goods in CN heading 2009, but in the Commission's opinion that the imported goods should be classified in CN heading 2106. Also in the letter, the lawyer disputes the applicability of additional note 5(b) to Chapter 20 of the CN to the products in question. Yet it is evident from the request by the German authorities that they acknowledged their error in accepting declarations classifying the goods under CN heading 2009 rather than 2106. Moreover, the questions at issue involve determining whether a debt has been incurred and, if so, the amount of the debt. The Court has consistently ruled that the above questions are matters of the exclusive competence of the Member States and not of the Commission. The question of whether a customs debt has actually been incurred is not in fact covered by Commission decisions under procedures for waiving post-clearance entry in the accounts or remission/repayment procedures.[8]

(16) Regarding the error by the German authorities, the dossier sent to the Commission shows that they did in fact commit an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92 by accepting 402 declarations between October 2001 and March 2003 without commenting on the product's classification and by delivering three classification opinions, based on analyses, confirming the incorrect heading.

(17) The Courts have consistently ruled that the question of whether an error could have been detected should be considered in the light of the nature of the error, the experience of the trader and the diligence shown by the trader.

(18) Regarding the firm's experience, it should be noted that it has been an importer of fruit juices since 1982, it holds a number of authorisations for various customs procedures and it is used to applying customs legislation. The Commission therefore concludes that it can be considered very experienced.

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[8] See cases Kia Motors (case T-195/97, 16.7.1998) and Hyper Srl (case T-205/99, 11.7.2002).

(19) As regards the nature of the error, the Court of Justice 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.

(20) As regards the complexity of the legislation, it should be noted that the method of classification is determined by the General Rules for the interpretation of the Combined Nomenclature and that General Rule 1 provides that for legal purposes classification must be determined according to the terms of the headings and section and chapter notes.

(21) In this connection, additional note 5(a) to Chapter 20 sets out the procedure for determining the added sugar content of products classified under CN heading 2009. Even a product containing only natural sugars can, according to additional note 5(a), be considered as containing added sugar. This method was chosen because there is no test capable of distinguishing between the natural and the added sugar content. Additional note 5(a), therefore, enables a theoretical added-sugar value (or "notional" value, as the German authorities' request puts it) to be calculated, regardless of whether any sugar has actually been added to the product or not. It is clear therefore from the above that it is in fact irrelevant from the legal viewpoint whether sugar has been added or not.

(22) Furthermore, the firm's customs declarations demonstrate that it was aware of this calculation method because it declared concentrated fruit juices under subheadings for juices with added sugar (e.g. CN subheading 2009 79 30).

(23) Additional note 5(b) indicates quite clearly that fruit juices with added sugar, of a Brix value not exceeding 67 and containing less than 50% by weight of fruit juices in their natural state obtained from fruits or by dilution of concentrated juice, lose their original character of fruit juices of heading 2009.

(24) Moreover, explanatory notes on the application of additional note 5(b) to Chapter 20 were published in Official Journal C316 on 10 November 2001 and even included an example of a calculation to help users apply the legislation.

(25) Regarding the possibility of an amendment to the additional notes to Chapter 20 to take account of the case of fruit juices containing no added sugars, it should be noted that this argument does not imply that the applicable legislation is complex. The Commission cannot take account of amendments that may be made to the legislation in the future, unless the new rules are to apply retroactively. Moreover, insofar as it can be assumed from this argument that the firm contests the legislation concerned, it should be borne in mind that Article 220(2)(b) of Regulation (EEC) No 2913/92 does not allow the legality of a Community Regulation to be questioned; it is up to traders who consider themselves to have suffered injury as a result of invalid Community regulations to use the legal means available to them to contest these regulations or prevent their application to certain goods.

(26) Lastly, the fact that another Member State besides Germany issued binding tariff information classifying an apple juice with a Brix value of 65 under CN heading 2009 invites the following comments. Firstly, under Article 10 of Regulation No 2454/93, only the holder of binding tariff information may invoke it and it cannot therefore be invoked by the firm. Secondly the BTI in question was issued after the facts at issue. Finally, the fact that an error was committed by the authorities of another Member State does not imply de facto that the relevant legislation was complex.

(27) In the light of the above, the Commission does not therefore consider that the legislation is complex, even though the customs authorities persisted in their error for more than a year.

(28) Regarding the diligence shown by the firm, the Court[9] has stated as a general rule that the Community tariff provisions applicable are, as of their publication in the Official Journal of the European Communities, the only substantive law in the matter, and all are deemed to know that law. A professional trader, with a certain amount of experience in the matter, can therefore be expected to keep abreast of the Community law applicable to its operations by reading the relevant Official Journals.

[9] See judgment in Binder, 12.7.1989 (case C-161/88).

(29) It should also be pointed out that discussions on the amendment of additional note 5 to Chapter 20 started in 1999 and that representatives of the trade (including those from Germany) were involved in the talks. The firm could therefore have been informed at that time of the amendment to the note.

(30) The Commission accordingly believes that the firm was capable of detecting the authorities' error. An experienced trader can reasonably be expected to consult the Combined Nomenclature, and consulting the CN would have led it to suspect that the goods did not belong under heading 2009. However, this was not the case and the dossier does not indicate that the firm took any steps whatever to ensure that the tariff heading it was using was correct.

(31) Thus the circumstances in this case show no error on the part of the customs authorities themselves which could not have been detected by an operator acting in good faith within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

(32) Neither does the Commission believe that the circumstances in the case are such as to justify repayment or remission of the duties on the basis of Article 239 of Regulation (EEC) No 2913/92.

(33) Post-clearance entry of import duties in the accounts is therefore justified.

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of EUR XXXXX which are the subject of the request by Germany dated 27 April 2004 must be entered in the accounts.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 15-12-2004

For the Commission
Lásló KOVÁCS
Member of the Commission