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**REC 05/03**

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 27-7-2004  
C(2004)2853

NOT FOR PUBLICATION

**COMMISSION DECISION**

**Of 27-7-2004**

**finding that post-clearance entry in the accounts of import duties is not justified in a particular case and authorising Germany to waive post-clearance entry in the accounts in cases involving comparable issues of fact and law**

(Only the German text is authentic)

**(Request submitted by the Federal Republic of Germany)  
(REC 05/03)**

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**(Request submitted by the Federal Republic of Germany)  
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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,<sup>1</sup> as last amended by Regulation (EC) No 2700/2000,<sup>2</sup>

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,<sup>3</sup> as last amended by Regulation (EC) No 2286/2003,<sup>4</sup>

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<sup>1</sup> OJ L 302, 19.10.1992, p. 1.

<sup>2</sup> OJ L 311, 12.12.2000, p. 17.

<sup>3</sup> OJ L 253, 11.10.1993, p.1.

<sup>4</sup> OJ L 343, 31.12.2003, p.1.

Whereas:

- (1) By letter dated 21 May 2003, received by the Commission on 26 May, 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) Under the second paragraph of Article 2 of Commission Regulation (EC) No 1335/2003 of 25 July 2003,<sup>5</sup> the provisions of Article 1 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 and 875 of Regulation (EEC) No 2454/93 refer to that Regulation as last amended by Commission Regulation (EC) No 881/2003 of 21 May 2003.<sup>6</sup>
- (3) In the period 1 April 1999-30 April 2002 a German warehousekeeper used a simplified procedure to release shrimp for free circulation from its warehouse. The firm concerned declared the shrimp, which was destined for its customers, in its own name and on its own behalf as “frozen shrimp, cooked, deveined, peeled with tail on” under code 0306 13 50 of the Combined Nomenclature (CN). The customs declarations were accompanied by invoices describing the goods as “cooked, peeled (deveined) shrimps tail on”.
- (4) The firm’s customers held binding tariff information (BTI) notices classifying the goods in CN code 0306 13 50, and the competent customs authorities had several times confirmed that tariff classification orally. Those authorities had also clearly stated that partly peeled shrimp were to be considered unpeeled.

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<sup>5</sup> OJ L 187, 26.7.2003, p. 16.

<sup>6</sup> OJ L 134, 29.5.2003, p. 1.

- (5) In May 2000 the classification of this product was discussed at German customs headquarters. It was decided that the shrimp in question should actually be classified in CN heading 1605. Local customs offices were not, however, notified of this change of approach and continued to allow the goods in question to be classified in the wrong heading. The inaccurate BTIs were not rescinded until March 2002. The firm was first informed of its error and of the correct classification after a customs audit at its premises between 30 April and 24 June 2002. On the basis of the audit the competent authorities on 14 August 2002 took steps to recover XXXXXXXX in duties.
- (6) The firm applied for a waiver of post-clearance recovery of these import duties, citing its good faith and the errors made by the competent authorities, which it could not have detected.
- (7) Pursuant to Article 871 of Regulation (EEC) No 2454/93, the firm stated that it had seen the dossier submitted by the German authorities and had nothing to add.
- (8) By letter of 18 November 2003 the Commission requested further information from the German authorities. The German authorities provided the information by letter dated 4 May 2004, received by the Commission on 7 May. The administrative procedure was therefore suspended in accordance with Article 873 of Regulation (EEC) No 2454/93 between 19 November 2003 and 7 May 2004.
- (9) In accordance with Article 873 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 17 June 2004 within the framework of the Customs Code Committee (Repayment Section) to consider the case.

- (10) 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 a result of an error on the part of the customs authorities 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.
- (11) 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 those expectations.
- (12) The Commission considers the competent authorities' continued acceptance of incorrect declarations for three years without expressing reservations about the classification of the product concerned and customs headquarters' failure to notify local customs offices of the change in classification resulting from the discussions held at headquarters in May 2000 to be an error on the part of the customs authorities themselves such as to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (13) The Court of Justice of the European Communities has consistently ruled that, 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.
- (14) The firm in question has to be considered an experienced trader.
- (15) However, [the Court has ruled](#) that it is necessary to establish whether or not there was anything that might appear to indicate, even to an experienced trader, that his customs declarations were correct.<sup>7</sup>
- (16) In this case, the competent authorities accepted the firm's declarations for at least three years without contesting the classification of the product.

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<sup>7</sup> Case C-250/91 *Hewlett Packard France v Directeur Général des Douanes* [1993] ECR I-01819.

- (17) It is also clear from the request transmitted by the German authorities on 21 May 2003 that the competent authorities had considered the products concerned to belong in the heading declared by the firm ever since 1991 and accepted declarations containing the wrong tariff heading accordingly.
- (18) The customs authorities had, moreover, issued BTI notices to the firm's customers. The German authorities' letter of 21 May 2003 also shows that the firm relied on the BTI notices issued to its own customers when declaring the goods, "occasionally" checking the classification orally with the competent customs authorities, which repeatedly confirmed the accuracy of the tariff heading used.
- (19) In view of the above, the firm had no reason to doubt the accuracy of the classification. It cannot therefore be considered negligent for not having taken further steps to check the accuracy of the classification.
- (20) The request submitted by the German authorities also shows that it is accepted that the firm acted in good faith.
- (21) The circumstances of the case therefore point to an error on the part of the customs authorities themselves which could not reasonably have been detected by an operator acting in good faith, within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (22) Moreover, the firm acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (23) Post-clearance entry of the import duties in the accounts is therefore not justified in this case.
- (24) Under Article 875 of Regulation (EEC) No 2454/93, where the circumstances under consideration are such that the duties need not be entered in the accounts, the Commission can, under conditions which it is to determine, authorise one or more Member States to refrain from post-clearance entry of duties in the accounts in cases involving comparable issues of fact and of law.

- (25) Germany has requested authorisation to waive post-clearance entry of import duties in the accounts in cases involving comparable issues of fact and law.
- (26) Such authorisation may be granted on condition that it is used only in cases strictly comparable in fact and law to the present case. In such cases importers must have acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration,

HAS ADOPTED THIS DECISION:

*Article 1*

The import duties in the sum of XXXXXX which are the subject of the request from Germany of 21 May 2003 shall not be entered in the accounts.

*Article 2*

Germany is authorised to waive post-clearance entry of import duties in the accounts in cases involving issues of fact and of law comparable to the case cited in its request of 21 May 2003.

*Article 3*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 27-7-2004

*For the Commission  
Frits Bolkestein  
Member of the Commission*