EN

REM 09/00

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 16-11-2001
.

NOT FOR PUBLICATION

COMMISSION DECISION

of 16-11-2001

finding that remission of import duties is not justified in a particular case
(request submitted by the Netherlands)
(REM 09/00)

FR

COMMISSION DECISION

of 16-11-2001

finding that remission of import duties is not justified in a particular case
(request submitted by the Netherlands)
(REM 09/00)

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 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 Regulation (EEC) No 2913/92,[3] as last amended by Regulation (EC) No 993/2001,[4] and in particular Article 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, 28.05.2001, p. 1.

Whereas:

(1) By letter dated 22 May 2000, received by the Commission on 29 May, the Netherlands asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether the remission of import duties is justified in the following circumstances.

(2) In the period February-July 1994 a Dutch firm made out, as an authorised consignor, 11 external Community transit documents for cigarette shipments to Slovakia. The first eight documents named Schirnding as the customs office of destination in Germany and the other three Philippsreut.

(3) An investigation by the competent Dutch authorities established the following facts. All 11 documents were actually presented at the Philippsreut customs office, where a corrupt customs officer endorsed them using an original German customs stamp. The registration numbers of the lorries carrying the goods were mentioned only on the Copies No 4 of the T1 documents in question. Though the first eight T1 documents mentioned Schirnding as the customs office of destination, the firm found that the documents were systematically being stamped at the Philippsreut office. The head of the firm's customs section visited the office of departure to obtain approval for the fact that the Copies No 5 were not returned through the usual channels (via the competent national customs administrations and, where they had already been set up, their central offices), but directly by the customs office. The firm claims that it had wanted to do this by giving the envelopes provided to the lorry drivers so that they could hand them in to the office of destination, which would then return Copy No 5 of the T1 document directly to the office of departure. Copies No 5 of the documents concerned were indeed returned via the drivers to the firm, which then returned them itself to the customs office of departure. They were not, therefore, returned through official channels via the German administration or by the means described to the customs office of departure. The firm nevertheless claims that it informed the Dutch customs authorities of the method actually used by the German office of destination to return Copies No 5 of the T1 documents. The firm also telephoned the Philippsreut office, speaking to the corrupt German official, to find out whether the stamp of the office of destination had indeed been placed on the transit documents. Some shipments were allegedly accompanied by employees of the firm. The two firms that purchased the cigarette consignments, which were ostensibly based in Slovakia, did not figure, as they should have done, in the local company register, that being the only means of proving their existence. Furthermore, all the shipments in question were paid for in cash.

(4) The Dutch authorities therefore took the view that the transit documents in question had not been discharged and that the goods had not been presented at the office of destination. The removal of these goods from customs supervision gave rise to a customs debt under Article 203 of Regulation (EEC) No 2913/92. The Dutch authorities therefore demanded that the firm pay the import duties owing, a sum of XXXX, remission of which is being requested in this case.

(5) According to the firm, the remission of duties in this case is justified for a number of reasons. Firstly, it argues that it was the victim of fraud, in which a German customs official was actively involved. Then it cites a number of circumstances suggesting that the goods in question were smuggled into the Czech Republic. The cigarettes were not, therefore, placed on the Community market. Payment of the customs debt in the Community would therefore be unfair. Lastly, the firm argues that some of the cigarettes in question were manufactured in the Community under the inward processing procedure from imported tobacco and that the customs debt should therefore cover only the import goods and not the compensating products. The firm claims that no deception or obvious negligence can be attributed to it.

(6) In support of the application submitted by the Netherlands authorities the firm 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. It stated its position and made comments, which were passed on to the Commission by the Dutch authorities in their letter of 22 May 2001.

(7) By letters dated 27 October 2000 and 13 June 2001 the Commission asked the Dutch authorities for further information. This information was provided by letters dated April and July 2001, received by the Commission on 4 May 2001 and 2 August 2001 respectively. The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93, between 28 October 2000 and 4 May 2001 and again between 14 June 2001 and 2 August 2001.

(8) By letter dated 21 September 2001, the Commission notified the firm that it intended to refuse its request and explained the grounds for its objections.

(9) By letter dated 17 October 2001, received by the Commission on the same date, the firm expressed its opinion on the Commission's objections. It stood by its view that the circumstances constituted a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92 referred to above, involving neither deception nor obvious negligence on its part. It argued that the circumstances cited by the Commission as constituting deception, namely that copies No 5 of the T1 documents were not returned through the usual administrative channels, that the agent involved in the sale of the goods (and not the firm's employees) accompanied certain consignments, that the goods had been paid for in cash, that telephone conversations had taken place between the firm and an official at the office of destination who happened to be the corrupt official, that the lorries' registration numbers did not figure on all copies of the T1 documents and that the Schirnding office continued to be given as the office of destination on the T1 documents when the firm knew that these documents were being stamped at the Philippsreut office, were not proof of deception on its part.

(10) Nor does the firm consider that it has been obviously negligent, pointing out that it took precautions to prevent irregularities. It stresses that it contacted the customs office of destination to make sure that the documents had indeed been discharged, though it was under no obligation to do so. It also explained why, in its view, the return of Copies No 5 of the T1 documents through channels other than the usual ones, the continuing indication of Schirnding as the office of destination on eight transit declarations, the failure to mention the lorries' registration numbers on all copies of the T1 documents and the failure to check the registration and existence of the customers in Slovakia could not be construed as obvious negligence.

(11) The administrative procedure was suspended, in accordance with Article 907 of Regulation (EEC) No 2454/93, between 22 September and 17 October 2001.

(12) 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 9 November 2001 within the framework of the Customs Code Committee (Section for General Customs Rules/Repayment) to consider the case.

(13) 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 the said Regulation) resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

(14) 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.

(15) In the case in point, the competent Dutch authorities took the view that the transit documents in question had not been discharged and that the goods had not been presented at the office of destination. This constituted removal of goods from customs supervision and gave rise to a customs debt on the part of the firm.

(16) As principal, the firm 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. That is part of a principal's commercial risk.

(17) It is nevertheless accepted that the deliberate and active involvement of customs officials in fraud, notably by discharging transit documents where goods have not been presented, would constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(18) The principal's liability for the proper conduct of Community transit operations cannot be expected to extend to cases in which representatives of the customs administration actively assist in committing fraud. Unless the principal is itself an accomplice to the fraud, it can legitimately expect the functioning of the administration not to be undermined by corrupt customs officials.

(19) In the case in point, the active involvement of a customs official in the fraud has been established and that official convicted for the offence in question. Since the official's involvement gave rise to the customs debt (through the fraudulent discharge of transit operations), this involvement has to be considered a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(20) Since the Commission takes the view that this case does involve a special situation within the meaning of Article 239, the first condition laid down by this Article 239 must be considered fulfilled.

(21) However, such a situation can give rise to the remission of duties only if no deception or obvious negligence may be attributed to the person concerned.

(22) The explanations given by the firm in its reply of 17 October 2001, even if they constitute a defence against charges of deception, in no way diminish the possibility of obvious negligence on its part, an issue examined below.

(23) The responsibilities assumed by the firm as principal oblige it to take all necessary measures against the commercial risk associated with the transit of goods. This is especially true where there is a high risk of fraud owing to the level of duties and taxes on the goods concerned. Cigarettes are a prime example of this. In this case, however, despite the high risk of fraud associated with the goods in question, the firm tolerated certain inconsistencies with Community rules and the truth and failed to verify certain aspects of Community transit operations.

(24) In this case, the firm, in its letter of 17 October 2001, stated that returning the Copies No 5 of the T1 documents via the driver and having them passed on to the office of departure by the firm itself was not its idea. It argued that its original intention had simply been to provide the lorry drivers with prepaid, pre-addressed envelopes that they could give to the customs office of destination to facilitate that office's task of returning documents. It says that it did so to speed up the discharge of the transit operations in question. It claims that it was the customs office of destination that decided to hand the Copies No 5 back to the driver. The firm also claimed that the Dutch customs authorities were aware both of the method it was envisaging and that ultimately adopted by the office of destination. The firm went on to argue that the rules in force at the time did not exclude this possibility in so far as Article 356(3) of Regulation (EEC) No 2454/93 stipulated only that the customs office of destination should return a copy of the document to the office of departure without delay. The firm also argues that this article did not expressly state how documents were to be returned.

(25) In this connection, it should be pointed out that the firm was acting as an authorised consignor and had therefore been authorised by the competent customs administration, by virtue of the volume of its business and its familiarity with the applicable rules, to ship consignments under the Community transit procedure without presenting the goods or transit declarations to the customs office beforehand. Furthermore, the firm itself admits, in its letter to the Commission of 17 October 2001, that it makes out more than 10 000 T1 documents each year, proof if ever there was of its experience in the transit field, its familiarity with the rules applicable and the key principles governing this system. As the holder of authorisation as an authorised consignor, and in view of its experience, it should have known the rules applicable to transit operations and, therefore, been aware both of the crucial importance of returning Copies No 5 of T1 documents through the proper administrative channels established between the Union's customs administrations and of the fact that it could not tolerate a return system completely different to that laid down by the legislation in force. That system, specified in Article 356(3) of Regulation (EEC) No 2454/93, is clear and precise, assigning the task of returning Copy No 5 of the T1 document to the office of destination and it alone. The latter is required to return the control copy to the central office of the country of departure (where that exists) or, failing that, to the office of departure. In no circumstances may a third party replace the administration in this procedure. The firm should therefore have known that no return channels other than the official channels could be used and that by using or tolerating the use of any other method it was deliberately circumventing the return procedure laid down by the legislation in force and exposing itself to risks for which it would bear sole responsibility. As the principal for the operations in question, the firm, by tolerating a system whereby documents were returned via the drivers for the duration of 11 transit operations involving high-risk goods, failed to display due care and so exposed itself to risk.

(26) As regards the making-out of the transit documents and the entry of the registration numbers of the vehicles on the various copies of the T1 documents, the firm stated in its letter of 17 October 2001 that it had entered the registration numbers on the Copies No 4 of the documents and the prior notification documents. Since Copy No 5, like Copy No 4, of the T1 document accompanies the shipment of goods, both must be aboard the vehicle throughout the journey. It is therefore hard to understand why, even if the sheets had already been separated, the registration number figured on Copy No 4 of the document but not on Copy No 5. Even if it had not been entered on departure, this information could at least have been entered later, the firm, by virtue of its status as an approved consignor, having full control over the making-out of the documents in question. The fact that the Dutch customs administration, according to the firm, tolerated this practice in no way detracts from the fact that this is one of the obligations incumbent on a principal. That it failed to provide this information on 11 occasions proves that it did not exercise due care, thereby lacking in diligence, even though it was assuming responsibility for the transport of sensitive goods under the Community transit procedure.

(27) As regards the mention of the customs office of destination on the T1 documents, the firm points out that Article 356(3) of the version of Regulation (EEC) No 2454/93 in force at the time authorised it to change the office of destination during shipment without discharging further formalities. It also argued that, geographically, the route via the Schirnding border post made more sense in view of the addresses provided for the purchasers by the firm's agent. However, queues at this border post were often unusually long, sometimes causing delays of 10 to 22 hours. If delays looked to be too long, the drivers decided to go via the Philippsreut office. The firm went on to explain that, on noticing that the T1 documents were systematically being stamped at the Philippsreut office, it ended up entering that office as the office of destination.

(28) It seems, however, strange that the firm should have named Schirnding as the office of destination on a further seven documents when it was clear from the first few operations that the goods were systematically going through the Philippsreut office. This would tend to bear out the firm's lack of diligence.

(29) As for the fact that the firm did not check the identity of the two purchasers, it argues in its letter of 17 October 2001 that it was neither obliged nor indeed able to do so. The firm states that it had no direct contacts with the end-purchasers because it was dealing through an agent. Having dealt with that agent for a number of years without problems, the firm saw no need to check whether the purchasers prospected by the agent actually existed. The firm added that it was neither obligatory nor customary for a declarant to do so. It concluded by arguing that the situation in Slovakia at the time (the lack of a proper network of chambers of commerce) would have made it very difficult for it to obtain the information in question anyway.

(30) It must, however, be pointed out that as the principal responsible for the shipment of sensitive goods it could at least have sought information concerning the purchasers or written proof of their existence from the agent, with whom it was in frequent contact and whom it allowed to accompany all the shipments in question. This failure to seek information from its agent further bears out the firm's lack of diligence.

(31) Lastly, the firm argues that it covered itself as far as possible against the risks associated with the making-out of T1 documents (sealing the loads, having the agent accompany the shipments, sending one load at a time, telephoning the customs office of destination). However, these were not steps it was obliged to take, whereas it failed to comply with a number of obligations (not allowing Copies No 5 of T1 documents to be returned through channels other than the official ones, entering the registration numbers of vehicles on all copies of the T1 documents).

(32) Given the type of goods in question, the firm should, to prevent all possibility of fraud, have exercised particular care when making out the transit documents and checking the details of the operations to be carried out. Since it failed to do so, the Commission takes the view that the firm acted with obvious negligence.

(33) The remission of import duties requested is not therefore justified,

HAS ADOPTED THIS DECISION:

Article 1

The remission of import duties in the sum of XXXXXX requested by the Netherlands on 22 May 2000 is hereby found not to be justified.

Article 2

This Decision is addressed to the Netherlands.

Done at Brussels, 16-11-2001

For the Commission

Member of the Commission