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REC 7/00



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21-12-2001

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NOT FOR PUBLICATION

COMMISSION DECISION

of 21-12-2001

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

(Request submitted by Germany)

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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 Regulation (EEC) No 2913/92,³ as last amended by Regulation (EC) No 993/2001,⁴ and in particular Article 873 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 28 November 2000, received by the Commission on 14 December 2000, Germany asked the Commission to decide, under Article 220(2)(b) of Regulation (EEC) No 2913/92, whether it was justified to waive post-clearance entry of import duties in the accounts in the following circumstances:
- (2) A German firm was authorised by the competent German customs department on 5 August 1997 to use the outward processing procedure to send products of various species of fish at different stages of preparation to Poland to be smoked and packaged for retail sale.
- (3) When entering the compensating products for release for free circulation, which it did through a single customs office, the firm systematically accompanied its declarations with a declaration of the customs value of the compensating products, its own calculation of the duties payable and the outward processing certificates relating to the goods exported under the procedure.
- (4) Post-clearance checks at the firm's premises revealed that the duties payable on the compensating products released for free circulation had not been properly calculated. On the one hand, the firm had calculated the duties using the value-added method set out in Article 153 of the version of Regulation (EEC) No 2913/92 in force at the time, whereas it should have used the differential method set out in Article 151. On the other, though it supplied the Polish processor with a certain number of inputs (plant, auxiliary products and ingredients), the firm left them out of its calculation of the customs value of the compensating products.

- (5) The German authorities therefore sent the firm two recovery notices dated 22 November 1999 demanding payment of import duties of XXXXX owing on compensating products released for free circulation in the final quarter of 1997 and the first quarter of 1998.
- (6) Duties also remain to be entered in the accounts for compensating products released for free circulation after the first quarter of 1998, a further XXXX. The duties to be recovered therefore total XXXX. The firm is seeking to have post-clearance entry in the accounts of this sum waived.
- (7) The firm applied for non-recovery of the import duties concerned, citing its good faith, the mistake made by the German authorities and the fact that it could not have detected the error. The dossier does indeed show that according to the firm its customs declarations had been regularly accepted by the customs services for two years and that it had stated in Box 44 of its declarations that it was using its outward processing authorisation, and it appended its processing certificates and customs declarations. It further claims that the customs authorities applied the wrong method of taxation, i.e. that they used the value-added rather than the differential method. The firm could not, it argues, have detected this error because earlier clearance operations of the same kind at customs offices elsewhere in the EU had not been contested. Lastly, the firm claims that it acted in good faith (customs investigators having found no evidence of any intention to deceive).
- (8) Pursuant to Article 871 of Regulation (EEC) No 2454/93, the operator stated that it had seen the dossier submitted to the Commission by the German authorities and had nothing to add.

- (9) By letter of 14 June 2001 the Commission requested further information from the German authorities. This information was provided by letter dated 7 August 2001, received by the Commission on 23 August 2001. The administrative procedure was therefore suspended, in accordance with Article 873 of Regulation (EEC) No 2454/93, between 15 June and 23 August 2001.
- (10) By letter dated 5 October 2001, the Commission notified the firm of its intention to withhold approval and explained the grounds for its decision.
- (11) However, the firm failed to reply to the Commission within the time-limit laid down in Article 872a of Regulation (EEC) No 2454/93.
- (12) In accordance with Article 872 (a) of Regulation No (EEC) 2454/93 the administrative procedure was therefore suspended 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 December 2001 within the framework of the Customs Code Committee - Section for General Customs Rules/Repayment.
- (14) Under Article 220(2)(b) of Regulation (EEC) No 2913/92, post-clearance entry in the accounts shall 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) Article 151 of Regulation (EEC) No 2913/92 stipulates that total or partial relief from import duties is to be effected by deducting from the amount of the import duties applicable to the compensating products released for free circulation the amount of the import duties that would be applicable on the same date to the temporary export goods if they were imported into the customs territory of the Community from the country in which they were processed. This is known as the “differential method”.

- (16) Article 153 of the version of that Regulation in force at the time, on the other hand, stipulates that where the purpose of the processing operation is the repair of temporary export goods and such repair is carried out in return for payment, the partial relief from import duties is to be granted by establishing the amount of the duties applicable on the basis of the taxation elements pertaining to the compensating products on the date of acceptance of the declaration of release for free circulation of those products and taking into account as the customs value an amount equal to the repair costs. This is known as the “value-added method”.
- (17) It is clear from these two Articles that the value-added method applies only to outward processing involving repairs for payment. This case, however, involves the processing of fish.
- (18) In the case in point, the firm lodged a number of declarations releasing compensating products for free circulation. The firm systematically appended to its declarations a calculation of the customs value of the compensating products and the import duties payable on them. It performed its calculations using the value-added method, but it should have used the differential value method. For two years, from 1997 to 1999, customs accepted the firm’s declarations. The authorities calculated the duties payable on the release for free circulation of the compensating products on the basis of the data provided by the firm and therefore also mistakenly used the value-added method.
- (19) However the repeated acceptance of customs declarations and the error made by the customs authorities in basing their calculations of import duties on data provided by the firm are such as to constitute an active error within the meaning of Article 220(2)(b) of the Code.
- (20) As regards the second condition set out in Article 220(2)(b) of Regulation (EEC) No 2913/92, the Court has consistently ruled that account must be taken of the nature of the error, the experience of the firm and the care shown by it.

- (21) Taking the nature of the error first, the Court has consistently ruled that one of the considerations relevant to the issue is the complexity of the legislation in question.
- (22) In this case, Articles 151, 152 and 153 of the version of Regulation (EEC) No 2913/92 in force at the time specify the method to be used when calculating import duties on compensating products released for free circulation under an outward processing procedure. Article 151 concerns outward processing operations in general, and Articles 152 and 153 respectively cover processing operations involving free repairs and repairs for payment. The rules in force therefore distinguish clearly between the various types of processing giving rise to differences when calculating the duties payable on compensating products.
- (23) Since this case involves the processing of fish rather than repairs, it was also clear that import duties on the compensating products had to be calculated on the basis of the elements specified in Article 151 of Regulation (EEC) No 2913/92, namely the differential value method.
- (24) Furthermore, as has already been pointed out, Article 151 clearly states that import duties are to be calculated by deducting from the amount of the import duties applicable to the compensating products released for free circulation the amount of the import duties that would be applicable on the same date to the temporary export goods if they were imported into the customs territory of the Community from the country in which they were processed.
- (25) As regards the firm's professional experience, the covering letter from the German customs authorities of 28 November 2000 indicates that in the years preceding the releases for free circulation concerned in this case the firm had already released identical compensating products for free circulation. This means that the firm had held an outward processing authorisation for several years and can therefore be considered an experienced trader in the relevant sphere.

- (26) As regards the care taken by the firm, it should be borne in mind that much of the outward processing procedure's economic benefit to a firm lies in the fact that the compensating products can be re-imported with total or partial relief from import duties. It therefore seems only reasonable that it should exercise the greatest possible care when identifying the elements for calculating duties and when performing the calculation.
- (27) Since the firm had apparently held an outward processing authorisation for a number of years and should therefore have been familiar with the legislation governing such authorisations, it cannot be considered to have exercised proper care in finding out about a key aspect of the procedure it was using.
- (28) As regards the similar operations which the firm had carried out previously at other EU customs offices, the dossier shows that these offices accepted the declarations without explicitly indicating to the firm that it was using the right method for calculating the value of the compensating products. Since the acceptance of a declaration in no way precludes subsequent checks, acceptance of the firm's declarations did not mean that it could assume that the method it was using was the right one, nor did it give grounds for any legitimate expectations; acceptance of the declarations therefore in no way mitigates the fact that the firm should have exercised more care in this matter.
- (29) Had it exercised proper care, it would have realised the error on the part of the German customs authorities.
- (30) It is therefore the Commission's view that in the circumstance no error was committed by the customs authorities themselves which could not have been detected by a trader acting in good faith within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (31) As to the third condition of Article 220(2)(b) of the Code, the Commission considers that it is not fulfilled.

- (32) Even if the firm did act in good faith, it did not, as the covering letter from German customs points out, comply with all the provisions relating to the customs declaration, since it misdeclared the value of the compensating products and miscalculated the amount of duties payable.
- (33) 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.
- (34) Post-clearance entry of import duties in the accounts is therefore justified in this case,

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of XXXX shall be entered in the accounts, as requested by the Federal Republic of Germany on 28 November 2000.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 21-12-2001

For the Commission

Member of the Commission