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REM 19/00

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18/07/2001
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NOT FOR PUBLICATION

COMMISSION DECISION

of 18/07/2001

finding that repayment of import duties in a particular case is not justified

(Request submitted by the Federal Republic of Germany)

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FR

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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,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 1 August 2000, received by the Commission on 24 August 2000, Germany asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether the repayment of import duties was justified in the following circumstances.
- (2) On 14 May 1997 an operator lodged with the Antwerp customs office a declaration concerning a consignment of 12 110 000 cigarettes to Montenegro under the external Community transit procedure. An Austrian customs office was given as the office of exit.
- (3) On 15 May 1997 the lorry and trailer, along with the consignment, were stolen at a motorway rest stop in Germany. On 2 and 3 June 1997 respectively the lorry and the trailer were found (in motorway rest stops in Germany and in Belgium), without the consignment. The thieves have never been identified.
- (4) At the end of May 1997 the operator was the victim of a similar theft in Antwerp.
- (5) The police believe there is a connection between these two thefts and that the thieves are extremely well organised. Numerous thefts, plus attempted thefts, of high-value goods are said to have occurred over the same period in parking areas close to where the offence occurred.
- (6) As the Community transit procedure was not discharged, a customs debt arose under Article 203 of Regulation (EEC) No 2913/92. The competent German authorities then asked the operator to pay the duties due on the imported consignment of cigarettes, XXXXX, which it duly paid and which it is now wants refunded.
- (7) Pursuant to Article 905 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.

- (8) By letter dated 1 March 2001, the Commission notified the operator of its intention to withhold approval and explained the grounds for its decision.
- (9) By letter dated 30 March 2001, received by the Commission on the same date, the operator expressed its opinion on the Commission's objections. In particular, it stood by its position that the circumstances in this case constituted a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92 in which no deception or obvious negligence could be attributed to it. It asserted that in this case the fact that it was the victim of well-organised criminals confirmed the exceptional situation in which it found itself compared with other persons carrying out the same economic activity. It also stated that it could not be held responsible for the activities of organised crime, and that such crime prospered as a result of the European Union's shortcomings in the fight against crime (the German, Belgian and Dutch police allegedly failed to coordinate their investigations at the time of the facts). It further added that the problems posed by organised crime had been known for a long time and that precautions should have been taken to protect traders. Finally it affirmed that the special circumstances referred to in Articles 49 and 239 of Regulation (EEC) No 2913/92 were of the same nature, since the Court found in its [judgment of 11 November 1999 on the Söhl and Söhlke case](#)⁵ that the concepts of obvious negligence evoked in Articles 905 and 859 of Regulation (EEC) No 2454/93 (provisions implementing Articles 239 and 49 respectively of Regulation (EEC) No 2913/92) referred to the same thing.
- (10) The administrative procedure was suspended, in accordance with Article 907 of Regulation (EEC) No 2454/93, between 1 March and 30 March 2001.
- (11) In accordance with Article 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 15 June 2001 within the framework of the Customs Code Committee - Section for General Customs Rules/Repayment.

5 Case C-48/98 Firma Söhl & Söhlke v Hauptzollamt Bremen, judgment of 11 November 1999.

- (12) Under Article 239 of Regulation (EEC) No 2913/92 import duties may be repaid or remitted in special situations resulting from circumstances in which no deception or obvious negligence may be attributed to the party concerned.
- (13) The Court of Justice of the European Communities has consistently taken the view that the provisions of Article 239 of Regulation (EEC) No 2913/92 represent a general principle of equity designed to cover an exceptional situation in which a declarant might find himself compared with other operators carrying out the same activity.
- (14) In the dossier sent to the Commission by the German authorities, they and the operator raised several circumstances which in their opinion might be such, individually or in combination, as to create a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92. These circumstances should therefore be examined.
- (15) In this case, having regard to Article 203 of Regulation (EEC) n° 2913/92, the competent German authorities considered that the non-discharge of the transit procedure for the goods which had been placed under the Community transit procedure created a customs debt for which the operator was liable.
- (16) As the principal, the operator is responsible to the competent authorities for the proper conduct of Community transit operations, even if it is the victim of fraud by third parties. Such an eventuality is part of the company's normal commercial risk.
- (17) The operator believes that its situation must be regarded as a special situation within the meaning of Article 239, in that it was the victim of fraudulent acts carried out by an organised criminal group, and not by a third party acting alone.
- (18) It also believes that the inadequate organisation of the transit procedure at the time, the significant number of unsolved offences of this sort and the lack of sufficient cooperation between the investigations of the police services concerned are further proof that a special situation existed.

- (19) But, as it stated in its [judgment of 5 October 1983 on Esercizio Magazzini Spa and Mellina Agosta](#),⁶ the Court of Justice of the European Communities considers that the theft of goods subject to customs duty by third parties through no fault of the debtor does not extinguish the customs debt on these goods. In no circumstance does the possibility that the fraudulent activities of which the principal was the victim may have been carried out by organised criminal groups relieve the principal of his obligations.
- (20) Theft, whether isolated or organised, is also a situation that is part of the principal's normal commercial risk and does not therefore create a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92. It is a common event which may occur whatever the customs status of the goods transported. Moreover, theft is one of the commonest forms of damage suffered by goods being transported, and operators generally take steps to insure themselves against it.
- (21) Nor can the organisation of the transit system (in this case, the system that was in force at the time of the events concerned) be said to have been defective on the grounds that the company's goods were stolen. This theft was an entirely external event which had no direct relationship to the procedure governing the supervision of the transit system.
- (22) Moreover, neither the problems that beset the transit system at a certain period, and which subsequently led to its reform, nor the allegedly high number of similar unsolved crimes, nor the alleged failure to take measures to combat organised crime have any direct bearing on the obligations of the principal in a transit operation as defined in Article 96 of the Community Customs Code. These obligations exist and apply from the moment the principal contracts them.

⁶ Joined cases C-186/82 and 187/82, Ministero delle Finanze v Esercizio Magazzini Generali SpA and Mellina Agosta Srl, judgment of 5 October 1983.

- (23) Nor is there any link between the supposed lack of cooperation between the police services conducting the investigations and the obligations of the principal in a transit operation. Moreover, even if the persons responsible for subtracting the goods in question from customs surveillance had been identified, the party concerned, as principal, would remain jointly and severally liable to the customs debt.
- (24) The German customs administration also mentioned in its letter of 1 August 2000 that the Court of Justice of the European Communities, in its [judgment of 25 February 1999 on the Reiner Woltmann case⁷](#) considers that a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92 can occur when the person concerned is in a situation which, in relation to that of other economic operators carrying out the same activity, is considered exceptional. They also point out that in its judgment of 11 November 1999 on *Söhl & Söhlke* the Court defined the notion of exceptional circumstances as extending to extraordinary situations which, even if they are not unknown to economic operators, are not events to which all operators are exposed in the normal course of business.
- (25) On this point it should be noted that the judgment of 11 November 1999 referred to above refers to the concept of circumstances within the meaning of Article 49(1) of Regulation (EEC) No 2913/92 and not that of Article 239 of that Regulation. In this judgment the Court examined the concept of circumstances in relation to the purpose of Article 49 of Regulation (EEC) No 2913/92. But Article 239 of Regulation No 2913/92 constitutes a general equity clause authorising remission or repayment in certain cases, whereas Article 49 of the same Regulation provides for the extension of the period for placement in temporary storage. These two articles therefore have different purposes.

7 Case C-86/97, *Reiner Woltmann v Hauptzollamt Potsdam*, judgment of 25 February.

- (26) In any event, even if the two articles have different purposes, such circumstances did not place the party concerned in an exceptional situation compared with that of other economic operators carrying out the same activity. Nor do they constitute an extraordinary situation unrelated to events to which each operator is exposed in the normal course of business.
- (27) In this case, the economic operator specialises in the carriage of goods. Specifically, these goods are high-risk goods since they are heavily taxed.
- (28) For operators who specialise in this kind of forwarding activity, theft, whether by an individual or by a group of organised criminals, does not constitute an exceptional circumstance, in the sense that all operators who are active in this sector may one day be exposed to this kind of event. All operators specialising in the transport of this kind of goods are potentially exposed to such acts of theft.
- (29) It follows that the facts of the case are not such, either individually or in combination, as to create a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (30) The request for repayment of import duties is therefore not justified in this case,

HAS ADOPTED THIS DECISION:

'Article 1

The repayment of import duties totalling XXXXXX, requested by Germany on 1 August 2000, is not justified.

'Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 18/07/2001

For the Commission

Member of the Commission