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COMMISSION DECISION

of 8.1.2016

**finding that repayment of import duties is not justified in a particular case
(REM 03/14)**

(only the English text is authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code¹,

Having regard to Regulation (EEC) No 2454/93 of 2 July 1993² laying down provisions for the implementation of Council Regulation (EEC) No 2913/92,

Whereas:

- (1) By the letter dated May 29th, 2014 received by the Commission on June 11th, 2014 the customs administration of the United Kingdom of Great Britain and Northern Ireland (hereinafter: “United Kingdom”) asked the Commission to decide, under Article 220(2)(b) of Regulation (EEC) No 2913/92, if the remission of customs duties was justified under certain circumstances, as described below.
- (2) According to Article 871(5) of the implementing provisions of the Community Customs Code (Regulation (EEC) No 2454/93), the Commission has requested further additional information to be supplied on December 11th, 2014 and on March 13th, 2015. The Commission has received from the UK Customs the requested additional information on September 17th, 2015. According to Article 873 of the implementing provisions of the Community Customs Code, the nine-month period granted to the Commission to adopt its decision was extended by a period equivalent to that between the date the Commission sent the request for additional information and the date it received the requested information.
- (3) Under Article 872a of Regulation (EEC) No 2454/93, the Commission has notified the applicant of its reasons for intending to refuse the applicant's request, hence, according to Article 873 of the same regulation, the period of nine months within which the Commission must take a decision was extended by one month.
- (4) The file involves an underpayment of customs duty in the sum of £XXXX by an importer of products designed for disabled persons. The debt has been incurred due to the operator's failure to comply with the conditions of a duty relief provided under Council Regulation (EC) 918/83 dated 28/03/1983 (now amended by Council Regulation 1186/2009).

¹ OJ L 302 19.10.1992, p. 1

² OJ L 253, 11.10.1993, p. 1.

- (5) The operator imported various products for the physically disabled and persons with restricted mobility. Most products were sold to independent dealers, who sold them onto end customers. However, certain other products were sold by the operator directly to disabled users, charities or hospital trusts.
- (6) During the period 2003 to February 2007 the operator applied to the UK's customs administration for an authorisation to use duty relief covering goods for the disabled. The nominated customs office - NIRU (National Import Reliefs Unit) – granted this authorisation (in the form of certificates) until August 2007.
- (7) Each application included a list of the products intended for import, the names of suppliers, the countries of origin and the justification for the import. All of the applications declared that the imports were intended for commercial purposes and that importation was undertaken on a regular basis.
- (8) The applications covered various products designed for the disabled and falling under different Combined Nomenclature (CN) subheadings - mobility scooters, power scooters and spares, respiration apparatus, orthopaedic equipment, wheelchairs, patient lifters, walking frames, speech aids etc.
- (9) Council Regulation (EC) No. 918/83 of 28 March 1983, which set up a Community system of duty reliefs, states:

Article 72

Articles specially designed for the education, employment or social advancement of physically or mentally handicapped persons other than blind persons shall be admitted free of import duties where:

a) they are imported:

either by handicapped persons themselves for their own use,

or by institutions or organizations that are principally engaged in the education of or the provision of assistance to handicapped persons and are authorized by the competent authorities of the Member States to receive such articles duty-free; and

b) equivalent articles are not being manufactured in the Community.

However, under the conditions laid down by implementing provisions adopted in accordance with the procedure referred to in Article 143 (2) and (3), a derogation may be made from condition (b), provided the granting or relief is not liable to prejudice the production of equivalent articles within the Community.

2. The relief referred to in paragraph 1 shall apply to spare parts, components or accessories specifically for the articles in question, and to the tools to be used for the maintenance, checking, calibration or repair of the said articles provided that such spare parts, components, accessories or tools are imported at the same time as the said articles, or, if imported subsequently, that they can be identified as being intended for articles previously admitted duty-free, or which would be entitled to relief at the time when such relief is requested for the specific spare parts, components or accessories and tools in question.

- (10) Article 76 of the same regulation states that articles imported duty-free by the persons referred to in Articles 72 "may not be lent, hired out or transferred, whether for a consideration or free of charge, without prior notification thereof to the competent authorities."

- (11) Council Regulation 918/83 has been replaced by Regulation 1186/2009 dated 16 November 2009.
- (12) Public Notice 371 ('Importing Goods for Disabled People free of Duty and VAT'), which was available online and in a paper version, explained eligibility to the relief and the procedures in the United Kingdom for claiming the relief. Section 2.4 covered restrictions on the use and disposal of the goods. It stated:

"If you are an organisation you must use the goods only to give educational, scientific or cultural help to disabled people (...). Your organisation may lend, hire out or transfer the goods on a non-profit making basis to disabled people without payment of duty and VAT."
- (13) Each certificate was valid for six months from the date of issue. It authorised the import of the listed goods described as "various aids for the handicapped" for a relief from customs duty (and also VAT if the goods had been donated free of charge to an importing organisation under the terms of paragraph 2.3 of Public Notice 371). Note 1 of each certificate referred to this point.
- (14) The goods were described on each certificate and details of the names and addresses of suppliers were listed, as well as its CN subheading and country of origin.
- (15) Customs Procedure (CPC) 400014 was used on the import declarations covered by this application. This CPC was intended for goods specially designed for use by disabled persons on which relief from customs duty was claimed under a NIRU certificate and on which VAT relief or a zero rating for VAT was claimed.
- (16) An audit officer visited the operator on 14 December 2004 and 01 June 2005. He examined the accuracy of the commodity codes declared for various products and checked various entries.
- (17) In a letter dated September 9th, 2005 the officer informed the company that he had found some anomalies during his visits. Some imported items had been misclassified and the importer was reminded of its responsibility for the correct tariff classification of its goods. It was also advised to obtain copies of declarations completed on its behalf and scrutinise them for accuracy.
- (18) CPC 400013 had also been inappropriately used for other imports of goods intended for use by disabled persons. The letter stated:

"Under Council Regulation (EEC) No. 918/83, articles 71-78 relief from duty and VAT should be claimed at the time of importation by entering CPC 400014 and presenting a copy of the relevant NIRU certificate (Notice 371 gives further information)."
- (19) The entitlement to use this relief was not questioned. A duty demand was issued; it covered goods declared to inward processing relief. As regards the use of CPC 400013 the letter stated that "no further action will be taken on this occasion."
- (20) On August 1st, 2007 the operator made a new application for a duty relief certificate, as its authorisation expired on August 16th, 2007.
- (21) The customs authority refused the application, in an e-mail dated August 3rd, 2007 on the grounds that an organisation importing goods for the disabled could only transfer such goods on a non-profit making basis. The applicant had declared that the supply of goods for the disabled was intended for profit. The relevant policy unit had been

consulted and instructed that such an application should be refused. The criteria in Articles 70 to 73 of Council Regulation 918/83 were not fulfilled.

- (22) On July 3rd, 2008 the UK Customs issued the operator with a duty demand for £XXXX consisting of £XXXX customs duty and £XXXX import VAT, because it had not been entitled to use the duty relief. The demand covers import declarations made during the period July 4th, 2005 to August 14th, 2007. These had all been declared to CPC 400014.
- (23) The current application for remission only covers the customs duty on imports made during the period July 4th, 2005 to August 2nd, 2007. This is because relief certificates for imports made between 06 and 14 August 2007, amounting to £XXXX, have been refused. The amount covered by this application is therefore £XXXX.
- (24) The applicant has requested remission, under Article 220(2)(b) of the Community Customs Code, arguing that the amount of duty has been incurred due to an error by the customs authority, the operator being incorrectly instructed and authorised to use the relief.
- (25) The United Kingdom's customs authority considers that this case fulfils the conditions for remission listed in Article 220(2)(b) of Regulation (EEC) No. 2913/92 because it issued certificates to enable the operator to incorrectly claim duty relief over several years. UK's customs authority further considers that, even though the error may be considered to be easily identifiable by looking at the appropriate legislation, the issue of the certificates over a period of five years may be seen to have provided the operator with a legitimate expectation of his entitlement to the relief.
- (26) The operator is considered by UK Customs to have acted in good faith to the extent that it declared that the imported products are sold both directly and indirectly to disabled users and selling of products forms part of its trade. Nevertheless, the applicant is considered to be an established and experienced importer.

Examination of the request under Article 236 in connection with Article 220(2)(b) of Regulation (EEC) No 2913/92

- (27) As a principle, the declarant is responsible for the content of the documents presented to the customs authorities³.
- (28) Each application form for duty relief from the operator clearly stated the reason for import as being for "Commercial Business; the imported products are sold both directly and indirectly to disabled users".
- (29) The relief certificates were issued to the operator as a result of a misinterpretation by NIRU of the eligibility of commercial companies involved in the import of goods for sale to the disabled.
- (30) A UK Customs officer visited XXXX on December 14th, 2004 and June 1st, 2005. He examined the accuracy of commodity codes used by SML for various products, including c.c. 87131000 and c.c. 87139000. He also made checks against various entries.
- (31) In a letter dated September 9th, 2005 the inspecting officer stated that he had found some anomalies during his visits. Some imported items had been misclassified. Sunrise Medical, as the importer, was reminded of its responsibility for the correct tariff classification of its goods. It was also advised to obtain copies of declarations

³ CaseT-42/96, Eyckeler & Malt, paragraph 162.

completed on its behalf and scrutinise them for accuracy. A C18 note was subsequently issued; this covered goods entered to inward processing relief.

- (32) CPC 400013 had been declared for goods imported for use by disabled persons. The letter stated: “Under Council Regulation (EEC) No. 918/83, articles 71-78 relief from duty and VAT should be claimed at the time of importation by entering CPC 400014 and presenting a copy of the relevant NIRU certificate.” No comments were made concerning the entitlement to use the CPC.
- (33) A policy review inside the UK Customs, which followed later, identified this problem and duty relief is now always rejected by NIRU staff in the event of the import being made by a commercial company.
- (34) As the duty relief certificates were regularly issued for several years by NIRU without any apparent objection or query, it can be concluded that the UK Customs have committed an error.
- (35) In order to determine whether the operator could not reasonably have detected the error committed by the UK authorities, the Commission has to take into account all the circumstances of the case⁴, the nature of the error, the operator's experience and its diligence.
- (36) The EU Court of justice (EUCJ) has ruled that the nature of the error should be assessed in terms of the complexity of the legislation concerned⁵.
- (37) Regarding the complexity of the legislation, the Commission considers that the rules concerned cannot be judged as complex, fact which was not challenged by the operator in its application. Once a regulation is published in the Official Journal of the EC/EU, it constitutes the sole relevant positive law and everyone is deemed to be aware of that law⁶.
- (38) The Commission would like to recall that, when doubts exist as to the applicable regime, non-compliance with which may result in a customs debt being incurred, the onus is on the trader to make inquiries and seek all possible clarification to ensure that he does not infringe those provisions⁷.
- (39) Moreover, the EUCJ has ruled that allowing imports without the respect of the legislation in force, only because the authorities have accepted them even in such conditions, would mean allowing a negligence which would encourage operators to benefit from errors from their customs authorities⁸.
- (40) Article 72 of Council Regulation (EC) No. 918/83 clearly states that “only goods specifically designed for the education, employment or social advancement of physically or mentally handicapped person shall be admitted free of import duties where the goods are imported by the handicapped persons themselves for their own use or institutions principally engaged in the education or the provision of assistance to handicapped persons”. The operator in this case does not qualify as a handicapped person or an institution principally engaged in education or the provision of assistance to handicapped persons.

⁴ Paragraph 19 in Case C-64/89, Deutsche Fernsprecher GmbH.

⁵ Case C-250/91 Hewlett-Packard, paragraph 23; Case C-153/94 and C-204/94 Faroe Seafood, paragraph 100; Case C-251/00 Ilumitronica, paragraph 56; Case C-64/89 Deutsche Fernsprecher GmbH, paragraph 20

⁶ See, for example, Case C-161/88 Binder, para. 59

⁷ See Cases C-48/98 Söhl & Söhlke, para. 58; C-38/07 Heuschen & Schrouff, para. 59

⁸ See Case C-38/07 *Heuschen & Schrouff*, para. 64

- (41) Even though there was an error by the UK Customs in issuing duty relief certificates to the operator, this error was easily identifiable due to Regulation No. 918/83 stating that “Articles (...) shall be admitted free of import duties where they are imported by (...) handicapped persons for their own use or by institutions (...) principally engaged in the education/assistance of handicapped persons”. The operator does not fulfil either of these conditions because the goods were imported to be sold.
- (42) In what regards the detectability of the error, the Commission considers that the error was detectable, especially as there were national instructions setting up the procedure to follow. Paragraph 2.4 of Public Notice 371 (‘Importing Goods for Disabled People free of Duty and VAT’) states that an organisation importing goods for the disabled may only lend or transfer such goods on a non-profit making basis.
- (43) At the time this error was discovered by the UK Customs, the operator had been importing these goods for over seven years and therefore is considered an experienced trader for these particular imports. As an example, UK Customs found 3,043 import declarations entered, in the name of the operator, to CPC 400000 for the four years that preceded the correction of the error.
- (44) The EUCJ confirmed that the term “obvious negligence” should be interpreted in such a way that limits the repayment cases⁹ and underlined that in case of doubts the onus is on the trader to seek all possible clarification how provisions should be correctly applied¹⁰.
- (45) Despite the clear legislation and the explanatory public notice, the operator continued to ask for duty free treatment, availing himself of the specious conduct of the UK Customs.
- (46) It is worth mentioning that the operator was involved in other breaches of customs legislation. A visit carried out in 2007 to the operator’s premises by UK Customs found that the operator had classified mobility scooters to the incorrect duty free commodity code (TH8713) instead of TH8703, a Commodity Code attracting 10% duty. The operator had also used CPC 400014 incorrectly.
- (47) The Commission finds that the second condition concerning the possibility to detect the error, the good faith of the interested party and compliance with the rules in force as regards the customs declarations has not been fulfilled.
- (48) Given the above, the Commission finds that the repayment under Article 236 in connection with Article 220(2)(b) of Council Regulation (EEC) No 2913/92 of duties in the sum of £XXXX is not justified.

HAS ADOPTED THIS DECISION:

Article 1

Repayment of duties in the sum of £XXXX, requested by the United Kingdom of Great Britain and Northern Ireland on 29 May 2014, is not justified.

⁹ Case C-48/98 Söhl & Söhlke, paragraph. 52

¹⁰ Case C-48/98 Söhl & Söhlke, paragraph 58

Article 2

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 8.1.2016

For the Commission
Pierre MOSCOVICI
Member of the Commission

