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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21-5-2003
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Not for publication

COMMISSION DECISION

of 21-5-2003

**finding that repayment of import duties is not justified in a particular case.
(Only the Danish text is authentic)**

**(Request submitted by Denmark)
REM 16/2002**

FR

COMMISSION DECISION

of 21-5-2003

**finding that repayment of import duties in a particular case is not justified.
(Only the Danish text is authentic)**

**(Request submitted by Denmark)
REM 16/2002**

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 Council Regulation (EEC) No 2913/92,³ as last amended by Regulation (EC) No 444/2002,⁴ 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 68, 12.3.2002, p. 11.

Whereas:

- (1) By letter dated 23 July 2002, received by the Commission on 25 July 2002, Denmark 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) The dossier sent by the Danish authorities shows that on 13 March 2000 a customs agent - the applicant - released frozen beef for free circulation in Denmark.
- (3) The beef had first been imported from Brazil by a Dutch firm, which placed the beef under the customs warehousing procedure in the Netherlands. The Dutch importer subsequently sold the meat to a Norwegian firm and sent it to Norway under the common transit procedure (T1 procedure). The Norwegian firm, finding that the meat contained salmonella, then decided to return it to the Netherlands.
- (4) A Norwegian haulage company was then commissioned to forward the goods from Norway to Denmark, and, in view of the entry "delivered duty paid" on the invoice to the Dutch firm drawn up by the Norwegian purchaser, instructed the applicant to declare the goods for release for free circulation.
- (5) On the basis of these instructions, on 13 March 2000, the applicant declared the meat for release for free circulation in Denmark. The import duties amounted to XXXX.
- (6) On 30 March 2000, the applicant discovered that the goods should not have been entered for free circulation but should have been forwarded direct to the Dutch importer under the external transit procedure for customs warehousing followed by re-export.

- (7) The applicant made word-of-mouth enquiries at the local customs centre about the possibility of getting the duties back, possibly by having the goods transported back from the Netherlands to Denmark so that, once they had been returned, a new transit procedure document could be drawn up with a view to repayment of duties. The local customs office told the applicant that this could not be done under the relevant legislation, since it would have the effect of invalidating the declaration for release for free circulation, which was not legally possible, or of using the procedure for returned goods, which is only applicable where the goods that are re-entering Community customs territory were exported from the Community as Community goods, which was not the case in this instance.
- (8) On 4 April 2000 the applicant applied for repayment of import duties under Article 239 of Regulation (EEC) No 2913/92, suggesting two alternative references: Article 900(1)(b) or the second subparagraph of Article 900(2) of Regulation (EEC) No 2454/93.
- (9) As a further alternative the applicant suggested applying Article 185(2)(b) of Regulation (EEC) No 2913/92 and Article 844(1)(iii) and (2)(a) of Regulation (EEC) No 2454/93.
- (10) In the alternative, the applicant requested that its application be submitted to the Commission under the procedure provided for in Article 905 of Regulation (EEC) No 2454/93.
- (11) Both the application for repayment and the request for its application to be submitted to the Commission were rejected by the Vejle customs and tax office in its decision of 16 May 2000.

- (12) On 18 May 2000 the applicant brought an appeal before the Danish national tax tribunal, which, in a ruling of 21 December 2001, found in favour of the customs authorities' decision rejecting the application under Articles 185 and 239 of Regulation (EEC) No 2913/92. However, the tribunal found that the applicant had been guilty of neither deception nor obvious negligence when it made the customs clearance error and therefore ordered the Danish customs authorities to submit the applicant's request for repayment of DKK 104 685 to the Commission.
- (13) The competent Danish authorities forwarded the application to the Commission on 23 July 2002. In support of the application the applicant indicated that, in accordance with Article 905 of Regulation (EEC) No 2454/93, it had seen the dossier submitted by the Danish authorities and had nothing to add.
- (14) In a letter of 19 February 2003, sent on 20 February 2003, the Commission informed the applicant that it intended to reject its application, gave its reasons and asked the applicant to send its comments within one month, failing which the Commission would assume it did not wish to state its opinion.
- (15) The administrative procedure was suspended, in accordance with Article 907 of Regulation (EEC) No 2454/93, between 21 February and 21 March 2003. The applicant did not wish to state its opinion.
- (16) 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 7 May 2003 within the framework of the Customs Code Committee (Repayment Section) to consider the case.
- (17) Article 239 of Regulation (EEC) No 2913/92 allows import duties to be repaid or remitted in situations other than those referred to in Articles 236, 237 and 238 of that Regulation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

- (18) The Court of Justice of the European Communities has consistently taken the view that these provisions represent a general principle of equity designed to cover a special situation in which a trader, 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 traders carrying out the same activity.
- (19) As regards the first condition, the existence of a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92, it appears that non-Community goods were entered for free circulation and were released, giving rise to the customs debt in respect of which the applicant has requested repayment. The goods were declared for free circulation as the result of an error which arose either from erroneous information given by the Norwegian purchaser and/or haulage company on the invoice sent to the applicant or from a misinterpretation by the applicant. The invoice did indeed bear the entry "DDP" (delivered duty paid). The question of whether this error constitutes a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92 must therefore be examined.
- (20) The applicant considers it did not commit an error, but merely interpreted the entry "DDP" on the invoice as it usually does for many consignments every month, without encountering any problems.
- (21) In its opinion, the Danish authorities were therefore wrong to refuse its offer to return the meat to the Padborg customs office and regularise the operation with an external transit (T1) document with the Netherlands as the destination.
- (22) In addition it points out that the goods were already damaged when they were sent to Norway, and, lastly, stresses that the amount of duties wrongly paid would put it under particularly heavy financial strain.

- (23) Regarding the argument that the applicant did not commit an error, but simply drew the logical conclusion from the entry "DDP" on the invoice, it should be noted that this Incoterm defines the reciprocal obligations of parties to an international contract. It thus forms part of the contractual relations between the Norwegian exporter or the company commissioned by the exporter to forward the goods from Norway to Denmark and the applicant in its capacity of declarant. Hence it is a matter of contractual relations between private traders, and the deleterious consequences of a client giving erroneous or insufficiently explicit instructions cannot be borne by the Community. Those consequences are part of the normal commercial risks an agent assumes when it agrees to act for a client, and there are ways for an agent to offset the injury it considers it has suffered as a result of following its client's instructions other than applying for repayment under Article 239 of Regulation (EEC) No 2913/92.
- (24) Furthermore, the words "RETUR AV VARER" ("returned goods") were entered on the invoice as well as the entry "DDP". Lastly, the fact that the applicant entered the country code "508" on the invoice shows that it knew that the meat was of Brazilian origin.
- (25) In view of the facts cited in the previous paragraph, the applicant had sufficient information at its disposal to alert it to the atypical nature of the transaction, despite the entry "DDP" on the invoice. The different items of information available, contradicting each other in part, should have led it to contact its client for more information. In any event, these facts do not support the hypothesis that the applicant was in an exceptional situation compared with other traders engaged in the same activity.

- (26) The Danish customs authorities' refusal to accept the applicant's offer to return the goods to the Padborg customs office and regularise the transaction by drawing up an external transit (T1) document for the Netherlands was, as the Danish national taxation tribunal implicitly recognised in its judgment of 21 December 2001, simply the result of correct application of the relevant provisions of customs law and so could not constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (27) As to the claim that the goods, although released for free circulation and thus from all customs constraints, were stored in a warehouse in the Netherlands, this would not appear to be grounds for the existence of a special situation. No relevant conclusions regarding the existence of a special situation can be drawn from this alleged circumstance, since the Danish customs authorities were right to refuse the applicant's proposal referred to in the previous paragraph.
- (28) Still less can any relevant conclusions be drawn from the fact that the goods were already damaged when they were sent to Norway. The only conclusion that the applicant could have drawn from this fact, if it had become aware of it before it entered the goods for free circulation, would have been that it should not do so, but should place the goods under the transit procedure with the Netherlands as the destination. In any event, taking account of the information that appeared on the invoice sent to the applicant by the client, this circumstance would not appear to place the applicant in a special situation.
- (29) Lastly, that fact that the amount of duties paid will place the applicant under particularly heavy financial strain does not constitute a special situation. In this connection, case law shows that even the insolvency of the person on whose behalf the declaration was made does not constitute a special situation, since Article 239 of Regulation (EEC) No 2913/92 was not designed to protect customs agents from consequences of their clients going into liquidation.

- (30) As regards the second condition laid down in Article 239 of Regulation (EEC) No 2913/92, i.e. the absence of deception or obvious negligence, the Court of Justice of the European Communities has consistently taken the view that account must be taken, in particular, of the complexity of the law and the trader's experience and diligence.
- (31) As regards the complexity of the legislation concerned, the Court of Justice of the European Communities has stated that this issue should be examined taking into consideration only those provisions the non-fulfilment of which led the customs debt to be incurred.
- (32) In the case under consideration, it was up to the applicant to choose whether it was appropriate to place the goods under the external transit procedure or release them for free circulation, and to know the relevant provisions, which cannot be considered very complex.
- (33) The Courts have consistently ruled that a trader may be considered experienced if it has carried out several import operations relating to the same goods. Moreover, a trader's experience is assessed not exclusively in terms of its experience of importing the goods concerned, but also on how accustomed it is to carrying out import and export operations in general.
- (34) In this case the applicant is a professional customs clearance agent which carries out many such transactions every month and so can be considered an experienced trader.
- (35) As regards the degree of diligence shown, it would appear that the applicant paid attention only to the entry "DDP" and ignored the words "returned goods" despite the fact that they also appeared clearly on the invoice. Equally, it did not take account of its knowledge that the goods were of Brazilian origin.
- (36) Hence the fact that the applicant initially had no doubts about which customs procedure to use can only be interpreted as a lack of diligence on its part.
- (37) In the light of the foregoing the applicant must therefore be considered to have been obviously negligent.

(38) Therefore the repayment of import duties is not justified in this case,

HAS ADOPTED THIS DECISION:

Article 1

The repayment of import duties in the sum of XXXXX requested by Denmark on 23 July 2002 is not justified.

Article 2

This Decision is addressed to Denmark.

Done at Brussels, 21-5-2003

For the Commission

Frits Bolkestein

Member of the Commission