



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.12.1999

**COMMISSION DECISION**

**Of 22.12.1999**

**finding that post-clearance recovery of import duties  
is not justified in a particular case**

**(Request submitted by Germany).**

**(REC 15/98)**

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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,<sup>1</sup> as last amended by Regulation (EC) No 955/1999,<sup>2</sup>

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,<sup>3</sup> as last amended by Regulation (EC) No 1662/1999,<sup>4</sup> and in particular Article 873 thereof,

Whereas:

- (1) By letter dated 16 November 1998, received by the Commission on 4 December 1998, Germany asked the Commission to decide, under Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties,<sup>5</sup> as last amended by Regulation (EEC) No 1854/89,<sup>6</sup> whether it is justified to waive recovery of import duties in the following circumstances:

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<sup>1</sup> OJ No L 302, 19.10.1992, p. 1.

<sup>2</sup> OJ No L 119, 7.5.1999, p. 1.

<sup>3</sup> OJ No L 253, 11.10.1993, p. 1.

<sup>4</sup> OJ No L 197, 29.7.1999, p. 25.

<sup>5</sup> OJ L No 197, 3.8.1979, p. 1.

<sup>6</sup> OJ No L 186, 30.6.1989, p. 1.

- (2) In the period July-December 1993 a German firm imported from Poland a variety of goods previously exported to that country and supplied free of charge to the Polish contractor for packaging.
- (3) After several contacts with the competent customs departments, the firm was initially told that the goods imported from Poland could be released for free circulation at zero duty if accompanied by origin certificates issued by the competent Polish authorities. It need only pay import turnover tax on the processing costs invoiced by the Polish contractor.
- (4) However, the firm was later informed that the goods had been reclassified and were now subject to a preferential duty of 4.9%. It used this preferential rate for its customs operations, but took the processing costs invoiced by the Polish contractor as the basis for calculating import duties.
- (5) The German competent authorities later had second thoughts about the clearance operations and recommended in November 1993 that the firm switch to the outward processing procedure for its operations in Poland. On 29 November 1993 the firm duly applied for an outward processing authorisation, which was granted with effect from 8 December 1993.
- (6) A post-clearance inspection by the German authorities revealed that the processing undergone by goods exported to Poland before the outward processing procedure had been insufficient to confer Polish origin and that import duties should not have been calculated solely on the basis of the processing costs invoiced by the Polish contractor.
- (7) The German competent authorities therefore found that duties in the sum of XXXXX were to be recovered for imports in the period July-December 1993; the firm applied to have this sum waived.
- (8) In support of the request by the German competent authorities, the firm stated in accordance with Article 871 of Regulation (EEC) No 2454/93 that it had seen the dossier submitted to the Commission and had nothing to add.

- (9) In accordance with the provisions of Articles 871 and 873 of Regulation (EEC) No 2454/93, the administrative procedure was suspended between 20 April and 17 August 1999 inclusive. Following the request made by the Commission in its letter of 20 April, the German authorities provided further information by letter of 29 July, which the Commission received on 17 August.
- (10) In accordance with Article 873 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 22 October 1999 within the framework of the Customs Code Committee - Section for General Customs Rules/Repayment to examine the case.
- (11) In accordance with Article 5(2) of Regulation (EEC) No 1697/79, the competent authorities may refrain from taking action for the post-clearance recovery of import duties that were not collected as a result of an error made by the competent authorities themselves which could not reasonably have been detected by the person liable, the latter having acted in good faith and observed all the provisions laid down by the rules in force as far as the customs declaration is concerned.
- (12) The letter of 16 November 1998 from the German competent authorities to the Commission shows that the customs office several times gave the firm advice about the customs procedure to be used for the planned operations. Thus, after detailed discussions several months before the first operation, the customs office told the firm which tariff heading to use and explained that the goods exported to Poland should be reimported with origin certificates issued by the Polish authorities. According to the office, the goods would thereby be exempt from import duties, and the firm would only pay import turnover tax on the processing costs invoiced by its Polish partner.
- (13) Following an opinion from the customs laboratory and training college in Münster, the customs office informed the firm before import operations got under way that the tariff heading it had recommended was incorrect and had to be changed. Imports under the new tariff heading were subject to a preferential rate of duty 4.9%. The office nevertheless stood by the customs procedure that it had recommended to the firm.

- (14) At no time did the customs office advise the firm to use the outward processing procedure, even though it was fully aware of the operations planned and the goods concerned, samples having been presented at the office by the firm on several occasions and examined by the customs officers there.
- (15) Once operations with Poland were under way, the customs office checked and accepted the declarations submitted and applied the preferential rate to the goods concerned, thereby confirming the approach it had recommended to the firm. Yet these declarations stated clearly that the amount invoiced covered only the cost of processing in Poland. Furthermore, box 37 contained the code 4022, a clear indication that the goods declared had been previously exported and processed in a third country. The customs office nevertheless calculated duties on the basis of the processing costs shown on the various invoices submitted and still did not tell the firm that the outward processing procedure could be used.
- (16) The competent German authorities therefore gave the firm inaccurate advice despite being in full possession of the facts and compounded this inaccurate advice by accepting without comment for several months the customs declarations submitted. Though aware of the exact nature of the customs operations concerned, not once in the period July-December 1993 did they advise the firm to use the outward processing procedure. They therefore made an active error within the meaning of Article 5(2) of Regulation (EEC) No 1697/79.
- (17) In order to determine whether the customs authorities' error could reasonably have been detected by the person liable, account must be taken of the nature of the error, the experience of the firm and the diligence shown by it.
- (18) As regards the nature of the error, the situation at the time in question appears to have been relatively complex, with the development of trade relations with the Central and Eastern European countries, Poland among them, creating considerable uncertainty about methods in the customs departments concerned.
- (19) That the customs situation was unclear at the time in question is borne out by the repetition of the inaccurate advice to the firm and the acceptance without comment of the declarations for release for free circulation for several months.

- (20) As regards the firm's professional experience, it is clear from the request submitted to the Commission by the German authorities on 16 November 1998 that the firm had no experience of customs clearance when it planned the customs operations in question and approached the local customs office for advice.
- (21) The firm seems to have shown all due diligence in this instance. Early in 1993, several months before starting the business operations in question, it contacted the local customs authorities for information about how to go about the planned operations. In the course of discussions with the local customs services, it described in detail the operations planned and presented samples of the goods. It then followed the advice given and stayed in regular contact with the local customs office. When, before the first consignment had even been imported, the customs office told it that the tariff classification had to be changed and that a preferential duty of 4.9% had to be collected, the firm again followed the advice given.
- (22) Moreover, when the customs office told it in November 1993 that it should seek an outward processing authorisation to avoid having to pay import duties on the customs operations in question, it immediately requested and obtained such an authorisation.
- (23) It is clear from the above that the firm acted in good faith and could not reasonably have detected the error by the German authorities.
- (24) The firm also observed all the provisions laid down by the rules in force as far as its customs declaration was concerned.
- (25) It is not justified to take action for the recovery of the import duties in this case,

HAS ADOPTED THIS DECISION:

*Article 1*

The import duties in the sum of XXXXXX which are the subject of the request by Germany dated 16 November 1998 shall not be recovered.

*Article 2*

This decision is addressed to Germany.

Done at Brussels, 22.12.1999

*For the Commission*

*Member of the Commission*