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**REM 14/03**

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 1-2-2006  
C(2006)190

NOT FOR PUBLICATION

**COMMISSION DECISION**

**Of 1-2-2006**

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

**(Only the Dutch text is authentic)**

**(request submitted by the Netherlands)  
(REM 14/2003)**

FR

**COMMISSION DECISION**

**Of 1-2-2006**

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

(Only the Dutch text is authentic)

**(request submitted by the Netherlands)  
(REM 14/2003)**

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 648/2005,<sup>2</sup>

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,<sup>3</sup> as last amended by Regulation (EC) No 883/2005,<sup>4</sup> and in particular Article 907 thereof,

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<sup>1</sup> OJ L 302, 19.10.1992, p. 1.

<sup>2</sup> OJ L 117, 4.5.2005, p. 13.

<sup>3</sup> OJ L 253, 11.10.1993, p. 1.

<sup>4</sup> OJ L 148, 11.6.2005, p. 5.

Whereas:

- (1) By letter dated 29 July 2003, received by the Commission on the same day, the Netherlands asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether the remission of import duties was justified in the following circumstances.
- (2) Under the second paragraph of Article 2 of Commission Regulation (EC) No 1335/2003 of 25 July 2003<sup>5</sup> amending Regulation (EEC) No 2454/93, the provisions of that Regulation do not apply to cases sent to the Commission before 1 August 2003. Therefore the references that follow in this Decision to Regulation (EEC) No 2454/93 refer to that Regulation as last amended by Commission Regulation (EC) No 881/2003 of 21 May 2003.<sup>6</sup>
- (3) In 1997 a customs agent established in the Netherlands declared 43 consignments of fisheries products from Sri Lanka for release for free circulation for its client, an importer established in the Netherlands.
- (4) When the declarations concerned were investigated by the tax intelligence and investigation department (FIOD), the customs value declared by the customs agent was found to be incorrect. It was found that the customs value did not include certain quality-control costs, which were invoiced separately to the importer by the exporter, or the air-freight costs.
- (5) On 12 November 1999 the Netherlands authorities therefore made a post-clearance entry in the accounts post-clearance of customs duties in the sum of EUR 40 465.99, the sum which the customs agent is seeking to have remitted on the basis of Article 239 of Regulation (EEC) No 2913/92.

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<sup>5</sup> OJ C 187, 26.7.2003, p.16.

<sup>6</sup> OJ L 134, 29.5.2003, p. 1.

- (6) In support of the application submitted by the Netherlands authorities, the customs agent indicated that, in accordance with Article 905(3) of Regulation (EEC) No 2454/93, it had seen the dossier the authorities had sent to the Commission and it gave its comments, which were sent to the Commission.
- (7) By letter of 30 January 2004, the Commission asked the Dutch authorities to provide additional information. The Dutch authorities provided the information by letter dated 29 September 2005, received by the Commission on 3 October 2005.
- (8) The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93, between 31 January 2004 and 3 October 2005.
- (9) By letter dated 27 October 2005, received by the customs agent on 31 October 2005, the Commission notified the agent of its intention to withhold approval and explained the reasons for this. The customs agent did not reply to this letter.
- (10) In accordance with Article 907 of Regulation (EEC) No 2454/93, the time limit of nine months for the Commission to take a decision was therefore extended for one month.
- (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 21 December 2005 within the framework of the Customs Code Committee - Section for Repayment.
- (12) 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.

- (13) The Court of Justice of the European Communities has ruled that this provision represents a general principle of equity designed to cover an exceptional situation in which an operator 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 operators carrying out the same activity.
- (14) A circumstance cited as constituting a special situation under Article 239 of Regulation (EEC) No 2913/92 is that fact that the customs office concerned (Hoofddorp) was informed in December 1994 by a firm in Sri Lanka that the importer for which the customs agent drew up the declarations was making false declarations, and that the competent authorities nevertheless did not inform the customs agent until after the FIOD investigation. The customs agent therefore invokes the ruling of the Court of Justice in Case C-61/98 (*De Haan*) in support of its claim that the circumstances of this case constitute a special situation. It also cites its “cooperation agreement” with the customs authorities as further evidence of the special nature of this case. Lastly, it emphasises that it acted in good faith.
- (15) The fact that the customs agent acted in good faith, as confirmed by the competent Netherlands authorities, does not in itself constitute a special situation under Article 239 of Regulation (EEC) No 2913/92.

- (16) The following points should be made regarding the argument based on the *De Haan* case. In that case, in the interests of their investigation, the national authorities deliberately allowed offences or irregularities to be committed against the Community external transit rules, thus causing the principal to incur a customs debt. The Court therefore deemed the person liable to be in a special situation compared to other operators because the customs authorities were aware of the existence of a risk of fraud and had not notified the person concerned of that risk. The Court therefore held that while it may be legitimate to allow infringements or irregularities to be committed in order to identify perpetrators of fraud, to place on the person liable the burden of the customs debt arising as a consequence thereof is inimical to the objective of fairness enshrined in Article 239 of Regulation (EEC) No 2913/92.
- (17) The situation in this case is different. In this case the Schiphol customs office received, on 20 December 1994, a letter from a person in Colombo (Sri Lanka) accusing the exporter in Sri Lanka and the importer of manipulating the price of fishery products imported into the Netherlands in order to facilitate a fraud when completing customs formalities on import. Moreover, the allegations in question concern only the possibility of double invoicing in transactions between the importer and its Sri Lankan supplier (declaring an FOB price far lower than the real FOB price), not the amount of freight costs declared by the customs agent.
- (18) The customs office in question did not immediately open an investigation on receiving this letter. The local customs authorities rightly first carefully checked the declarations for release for free circulation of the products going to the importer concerned; having established that there were indeed irregularities, the authorities asked the FIOD to launch an investigation to confirm their suspicions. This investigation began on 30 September 1997. Since all the declarations concerned by this request were made out before 30 September 1997, the fact that the competent Netherlands authorities did not inform the customs agent before the FIOD investigation was opened cannot be deemed to constitute a special situation.

- (19) This analysis is confirmed by the judgment of the Court of First Instance in the [GeoLogistics BV case](#).<sup>7</sup> In this case, which, like the *De Haan* case, concerns a principal carrying out transactions under the Community external transit arrangements, the Court ruled that “the fact that the principal, the victim of a fraud, is not informed of the fraud is, from a specific time to be determined in the light of the circumstances of the case, a factor of such a kind as to place the principal in a special situation, as regards the customs debt relating to fraudulent operations taking place after the discovery of the fraud and connected to it but before the principal has been notified of it. To place on the bona fide operator the burden of a customs debt arising from the failure of the national authorities to alert him to the existence of a fraud affecting him, or their delay in so doing, would be inimical to the objective of the fairness clause inasmuch as the person liable would thereby find himself in an exceptional situation in comparison with other operators engaged in the same business” (Paragraphs 60 and 61). In the *GeoLogistics BV* case, the customs authorities knew of the existence of a fraud from information sent directly to the Netherlands authorities by the Spanish authorities. In the case now under consideration, however, when the investigation was opened, all the competent customs authorities had to go on was an allegation, which could have proved unfounded; therefore they did not yet know of the existence of a fraud. Therefore the Commission does not consider that the circumstances prior to the opening of the FIOD investigation constitute a special situation.
- (20) The existence of a cooperation agreement between customs and the customs agent, which provided for intensive cooperation regarding customs supervision and control and for the supply and protection of information in order to safeguard the customs agent's legitimate interests as much as possible gives no grounds for changing this view.

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<sup>7</sup> Judgment of 27.9.2005 on Case T-26/03.



- (21) As already pointed out, the customs authorities could not inform the customs agent of a fraud when they did not know that such a fraud in fact existed before the FIOD investigation began on 30 September 1997. Furthermore, as the Netherlands authorities point out in the request sent to the Commission on 29 July 2003, the cooperation agreement in question concerned the transport of goods by sea, not air freight, and was concluded with the Amsterdam customs district, not the Hoofddorp district.
- (22) The dossier as a whole does not therefore give grounds for finding that there was a special situation within the meaning of Article 239(1) of Regulation (EEC) No 2913/92.
- (23) Nor has the Commission identified any other factors constituting a special situation. There is therefore no need to examine second condition laid down in Article 239 of Regulation (EEC) No 2913/92.
- (24) The remission of import duties requested is not therefore justified,

HAS ADOPTED THIS DECISION:

*Article 1*

The remission of import duties in the sum of EUR 40 465.99 requested by the Netherlands on 29 July 2003 is not justified.

*Article 2*

This Decision is addressed to the Netherlands.

Done at Brussels, 1-2-2006

*For the Commission*

*László KOVÁCS*

*Member of the Commission*