



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
CUSTOMS POLICY
General legislation and uniform application of customs law

Brussels, 4.7.2007

TAXUD/741/2003-FINAL-EN

Working document

CUSTOMS CODE COMMITTEE

Repayments Section

Impact of tariff classification regulations on the provisions of the Code governing repayment/remission and post-clearance recovery of duties

(Question submitted by an administration)

This document was approved on 29 June 2007 by consensus of the members of the Customs Code Committee – Repayments Section.

The Member States are invited to apply the principles set out in this document.

Impact of tariff classification regulations on the provisions of the Code governing repayment/remission and post-clearance recovery of duties

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1. Question raised by an administration.

The European Commission has received the following letter from an administration:

"Issue

Uniformity of treatment of Tariff Classification Regulations in MS in respect of applying the provisions for repayment/remission and the pursuit of customs debt.

Background

Our policy has been to consider a regulation that rules that goods should be classified under a certain tariff heading as only being applicable from the date of implementation of that regulation. Therefore, if a regulation overturned our classification, we would not accept any repayment/remission claim nor pursue any customs debt for imports prior to the implementation of that regulation.

Our policy has recently been challenged in a recent tribunal case concerning Commission Regulation (EC) 1201/2001 and a retrospective repayment claim covering three years prior to the date of the Regulation's implementation. The challenge casts doubt on whether our policy is compatible with the Code and its Implementing Provisions and claims that it is out of step with other MS.

Legal Considerations

This issue is covered by the Advocate General's Opinion in ECJ case C-11/93 (*Siemens Nixdorf*), paragraph 10, which quotes a Commission submission that classification regulations cannot be applied retrospectively, citing *Biegi v Hauptzollamt Bochum* as supporting case-law. However the same submission suggests some classification regulations simply confirm the existing situation (that they should have applied prior to the date of the regulation's implementation).

Conclusion

We have not been able to obtain a copy of the Commission's submission in the *Siemens Nixdorf* case but it does seem to point to two types of classification regulations:

- those that include additional criteria to those already known for the classification to a certain heading like the *Biegi* case where there should be no retrospective consideration;
- those that determine the correct classification using/interpreting existing criteria and where there should be retrospective consideration in terms of repayments/remission or pursuit of customs debt, the latter being subject to the existence of BTIs or other grounds for remission.

Request

We are seeking the Commission's comments on the above and confirmation that our approach is correct.

Informal exchanges with other MS have provided a mixed picture. We therefore request that the issue be included on the agenda of the next General Rules Committee so that a consensus view can be obtained from other MS to ensure a uniform application of these classification regulations.

If there is a variation in the way MS apply these classification regulations, we propose that our approach of only applying them from the date of implementation should be made the general rule."

2. Opinion of the Commission services:

2.1. General

2.1.1. On classification regulations

Under Article 9 of Council Regulation (EEC) No 2658/87 the Commission adopts, in accordance with the procedure laid down in Article 10 of that Regulation, classification regulations designed to ensure uniform application of the combined nomenclature of the European Community (CN). The CN is based on the global Harmonized Commodity Description and Coding System, known as the "Harmonized System" (HS), whose six-digit codes it adopts. Only the seventh and eighth digits are specific to the CN.

The HS was created under the auspices of the World Customs Organisation (WCO) by an International Convention concluded in Brussels on 14 June 1983 and approved on behalf of the Community by Council Decision 87/369/EEC of 7 April 1987 concerning the conclusion of the International Convention on the Harmonized Commodity Description and Coding System and of the Protocol of Amendment thereto.

WCO regularly publishes explanatory notes for the HS and delivers classification opinions. In the absence of such opinions or if the interpretation they give appears to conflict with the terms of the CN heading, or if they clearly go beyond the margin of discretion which WCO is allowed, the Community legislator has responsibility for interpreting, by means of legislation and under the supervision of the Court of Justice of the European Communities (ECJ or the Court), the nomenclature as it has to be applied by the Community. To this end the Council has granted the Commission, acting together with customs experts from the Member States, a broad margin of discretion in fixing the content of eligible tariff headings for the classification of specific goods. However, the Commission's power to adopt the measures mentioned in Article 9(1)(a), (b), (d) and (e) of Regulation No 2658/87 does not authorise it to alter the subject-matter of the tariff headings which have been defined on the basis of the HS. Indeed, under Article 3 of the International Convention on the HS the Community has undertaken "not (to) modify the scope of the Sections, Chapters, headings or subheadings of the Harmonized System" (see the judgment in Case C-15/05 *Kawasaki* of 27.4.2006, paragraph 35).

A Commission classification regulation in the area of the HS (i.e. based on the first six digits of the nomenclature) can only be interpretative. If the Court, in a case concerning the classification adopted by a Commission regulation, considered that the regulation had modified the content of an HS heading (by providing that a product under that heading ought to be classified under a different HS heading), the Court would nullify that regulation. The regulation would then be deemed never to have existed, since it would have breached the Community's international obligations.

On the other hand, the Commission has more room for manoeuvre with CN subheadings (7th and 8th digits) and may adopt regulations which are purely interpretative or lay down additional requirements for classifying a product under a particular CN heading, in which case the classification regulation has a normative character.

Regulations of an interpretative nature may in principle apply retroactively, whereas a normative regulation will be applicable only for the future.

Since the question of the repayment/remission and post-clearance recovery of customs debt arises only in the case of regulations of an interpretative nature, the arguments below will be applicable only to the effects of such regulations.

2.1.2. On interpretative regulations

According to the Commission services, the impact of a classification regulation cannot be fundamentally different from that of a classification judgment by the Court.

Although from the legal angle classification regulations do not have retroactive effect, the exactitude of the classification which they impose depends on facts and rules of law which are applicable not only for the future, but also in the past.

In other words, such classification regulations may be taken into consideration for interpreting the CN, even for the period prior to their adoption.

If a classification regulation has been adopted by the Commission and the ECJ has been asked for a preliminary ruling on the validity of the classification it is using, the Court examines whether the CN heading concerned actually does include the product in question. If it does, the Court confirms the validity of the classification regulation and leaves it to the national courts to implement it. It is then considered that the classification applied by the regulation is correct and that the product had been properly classified under the heading it shows (see for example the Court judgment in Case C-164/95 *Eru Portuguesa*). Otherwise, the Court would declare the classification regulation concerned to be invalid (see for example the judgment in Case C-15/05 *Kawasaki*).

In looking at the consequences of the adoption of a classification regulation on post-clearance recovery and repayment/remission of customs debt, it is useful to differentiate according to the type of classification regulation.

2.2. *Differentiation according to the type of classification regulation*

It is necessary to make a distinction between "new" classification regulations (where no previous classification regulation exists) and those which amend or repeal an earlier classification regulation.

2.2.1. Case of a classification regulation which adopts a classification different from that used by a previous regulation, which it amends or repeals.

A classification regulation is amended or repealed in particular in order to take account of factors which were not taken into account at the time of adoption of the regulation to be amended or repealed (see for example Regulation (EC) No 1966/2005) or to specify the reasons for which a product is classified under a certain heading (see for example Regulation (EC) No 2197/1999).

A distinction has to be made according to whether the classification specified in the classification regulation will result in a customs debt higher or lower than that determined on the basis of the regulation which it amends or repeals.

2.2.1.1. The classification specified in the classification regulation results in a **lower customs debt**

* Principle

On the basis of Article 236 of the Customs Code, customs duties may be repaid or remitted at the debtor's request or on the initiative of the customs authorities within a period of three years.

This is the case, for example, with a regulation which classifies products under a tariff heading imposing a 5% duty while the repealed regulation classified the same products under a different tariff heading imposing a duty of 10%.

* Exception.

A derogation may be made from the above principle for specific reasons, such as the principle whereby the conclusions contained in the reports of the World Trade Organisation's Dispute Settlement Body are not retroactive. In this case the new regulation will make explicit reference to this in its recitals and its operative part. This is the case, for example, with Commission Regulation (EC) No 949/2006 of 27 June 2006 (OJ L 174, 28.6.2006, page 3), Article 3 of which provides that "This Regulation [...] shall have neither retroactive effect nor provide interpretative guidance on a retroactive basis" (see also recital 9 of that Regulation).

2.2.1.2. The classification specified in the classification regulation results in a **higher customs debt**

Example:

An initial classification regulation classified a product under a tariff heading imposing a 1% duty. This regulation is repealed by a second classification regulation which classifies the product under a tariff heading with a duty of 5%.

Comments:

The principles of legality, legal certainty and the protection of legitimate expectations of economic operators who, for a certain period of time, have benefited from a tariff classification allowing them to pay a lower amount of customs duty, conflict with the customs authorities' recovery of higher customs duties (those resulting from the second regulation).

By contrast, still using the same example, operators who declared the product concerned under a heading with a 1% duty during the period of validity of the first regulation may, even after the second regulation has entered into force, obtain a repayment or remission of an amount of duty corresponding to the difference between the amount determined on the basis of the rate in excess of 1% declared and the amount determined on the basis of the 1% rate resulting from the initial regulation. Indeed, during the period preceding the entry into force of the second regulation it is possible that operators who had paid duty on the basis of a rate in excess of 1% had asked for and obtained a refund of the customs duty on the basis of Article 236 of the Customs Code by citing the initial regulation. Since the initial regulation had been repealed on the date of entry into force of the second regulation, operators could still have requested reimbursement of duty paid before the entry into force of the second regulation by invoking the first regulation, provided of course that their request was admissible under Article 236 of the Customs Code, i.e. in particular that it complied with the three-year time limit laid down in paragraph 2 of that Article.

2.2.2. Other cases (no previous classification regulation)

The principles which led to the tariff classification adopted in the classification regulation were already applicable in the past and can therefore be cited by economic operators in respect of operations which gave rise to a customs debt before it was

adopted (but were of course not previously specified). This is precisely the situation in Case C-11/93 (*Siemens Nixdorf*).

The Commission services consider the various possible situations to be as follows.

2.2.2.1. The classification specified in the classification regulation results in a **lower customs debt**

Example:

The customs authorities have classified a product under a tariff heading with a 10% duty. A classification regulation introduced later places the same product under a different tariff heading with a duty of 5%. Since the classification regulation merely consolidates a situation existing before its entry into force, repayment (or remission) of the duty is possible.

Comments:

See working document TAXUD/1666/2002 of 12 February 2002 on guidelines concerning the product range under consideration and the repayment of duties in judgment C-463/98 (*Cabletron*).

According to the Commission services, the approach considered appropriate following a judgment of the ECJ or of the Court of First Instance (CFI) should likewise be applicable after the entry into force of a classification regulation. In other words, customs duties **may be repaid or remitted** at the debtor's request or on the initiative of the customs authorities **for a period of three years on the basis of Article 236 of the Customs Code**.

2.2.2.2. The classification specified in the classification regulation results in a **higher customs debt**

We have to distinguish between two cases:

- The case of operators who have paid lower duties than that resulting from the tariff classification regulation.

The customs authorities undertake to recover the customs debt on the basis of Article 220(1) of the Customs Code. However, not taking duties into account post-clearance is justified if the conditions of Article 220(2)(b) of the Customs Code are satisfied.

The information document on the implementation of Articles 220(2)(b) and 239 of the Community Customs Code, which is on DG TAXUD's Internet site (http://ec.europa.eu/taxation_customs/common/about/welcome/index_en.htm) contains several examples of situations where taking duties into account post-clearance is either justified or not, depending on the circumstances.

Furthermore, the Commission has on several occasions considered cases of this type sent in by the Member States:

- cases where it was considered justified not to take duties into account post-clearance: REC 6/96 and REC 09/03 ;

- cases where it was considered justified to recover duties post-clearance: REM 5/97.

- The case of operators to whom duties of the same amount as that resulting from the tariff classification regulation have been applied whereas duties lower than that resulting from this tariff classification regulation have been applied to other operators, who benefit from a decision not to take duties into account post-clearance on the basis of Article 220(2)(b) of the Customs Code.

The fact that these operators paid higher duties than other operators who had paid duties lower than that resulting from the tariff classification regulation means that duties cannot be repaid or remitted on the basis of Article 236 of the Customs Code insofar as these duties were legally due. Nor can this fact be cited as constituting a particular situation. Of course, if other factors are put forward the situation could be reviewed in the light of Article 239 of the Customs Code.

2.3. *Specific case: where the operator has used binding tariff information (BTI)*

The use of BTI by an economic operator who is its holder constitutes a specific case. In such a situation we distinguish the following cases:

- The classification specified in a classification regulation corresponds to that specified in the BTI and therefore results in the same customs debt: the BTI remains valid and there is no change in the customs debt.
- The classification specified in a classification regulation differs from that specified in the BTI and results in :

- a lower customs debt: the BTI ceases to be valid from the date of publication of the regulation. However, where this concerns past operations, customs duties may be repaid or remitted at the debtor's request or on the initiative of the customs authorities in accordance with Article 236 of the Customs Code.

- a higher customs debt: the BTI ceases to be valid from the date of publication of the regulation but may continue to be used in accordance with the provisions of Article 12(6) of the Customs Code for a period of three months. Customs duties are not recoverable in view of the legal certainty which the BTI gives the operator. The preferential treatment ends when the BTI ceases to be valid or at the end of the period of grace provided for by the classification regulation, in accordance with Article 12(6) of the Customs Code.

* * *

Delegations will find attached the letter of 29 May 1996 from the Commission to the Member States (document No 1428).

This letter, and any position taken previously which is contrary to this document, are to be considered null and void.