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REC 09/03

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18-11-2004
C(2004)4395

NOT FOR PUBLICATION

COMMISSION DECISION

Of 18-11-2004

finding that post-clearance entry in the accounts of import duties is not justified in a particular case and authorising France to waive post-clearance entry in the accounts of import duties or to remit or repay them in cases involving comparable issues of fact and of law.

(Only the French text is authentic)

**(Request lodged by France)
(REC 09/03)**

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(Request presented by France)

(REC 09/03)

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 the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded,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 2286/2003,⁴

¹ OJ L 302, 19.10.1992, p. 1.

² OJ L 236, 23.09.2003, p. 33.

³ OJ L 253, 11.10.1993, p. 1.

⁴ OJ L 343, 31.12.2003, p. 1.

Whereas:

- (1) By letter dated 3 July 2003, received by the Commission on 7 July 2003, France asked the Commission to decide whether it was justified in the following circumstances either to waive post-clearance entry in the accounts of import duties under Article 220(2)(b) of Regulation (EEC) No 2913/92 or, in the alternative, remit the import duties under Article 239 of that Regulation.
- (2) Under Article 2(2) of Regulation (EC) No 1335/2003, 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 Articles 871, 873, 875, 905, 907 and 908 of Regulation (EEC) No 2454/93 refer to that Regulation as last amended by Commission Regulation (EC) No 881/2003⁵ of 21 May 2003.
- (3) A customs agent acting on behalf of a French company released for free circulation a product known as “a baby monitoring device”, which had been imported from China. From 1998 to 2001, the product was classified on import under heading 8525 20 99 of the Combined Nomenclature.
- (4) Under Commission Regulation (EC) No 305/2001 of 12 February 2001 concerning the classification of goods in the Combined Nomenclature (published in the Official Journal of 15 February 2001)⁶, the product belongs under heading 8527 90 98 of the Combined Nomenclature, which carries a higher rate of duty (normal or preferential) than the declared heading.
- (5) Accordingly, on 22 May 2002 the competent authorities informed the importer and, on 6 August 2002 the customs agent which had drawn up the customs declarations for the importer under the direct representation arrangements (referred to below as the persons concerned) that a customs debt amounting to XXXX was owed in respect of ten consignments imported from 22 September 1999 to 14 February 2001.

⁵ OJ L 134, 29.5.2003, p. 1.

⁶ OJ L 44, 15.2.2001, p. 22.

- (6) The file from the French authorities suggests that the persons concerned used the wrong tariff heading (8525 20 99) on the basis of the answer given in 1998 by the central classification department to a classification request from the Le Havre customs office. The samples were taken in connection with a declaration submitted on 20 February 1998 by the customs agent concerned, on behalf of the importer. The classification service apparently confirmed the classification under the wrong tariff heading.
- (7) According to the French authorities, however, the classification request was not handled by the central classification department but by a local department. Hence the resultant decision was not the administration's official position. Furthermore, the document used for the classification procedure (model 110) was an internal document, not intended for the person concerned.
- (8) The copy of the import declaration that would have contained the inspection certificate and therefore the outcome of any classification enquiry was destroyed by the relevant customs office and so is not available to be consulted. In the view of the French administration, it is not possible to establish with any certainty that the persons concerned were entitled to rely on confirmation from the department in question.
- (9) The persons concerned applied for a waiver of post-clearance recovery or, in the alternative, remission of these import duties, citing their good faith, the mistakes made by the competent authorities, which they could not have detected, and the authorities' negligence. They argued that following the taking of samples in connection with the declaration of 20 February 1998, they had merely acted in accordance with the opinion of the competent authorities, and were entitled to expect the results of those checks to be correct. They also claim that the competent authorities issued binding tariff information notices (BTIs) for the product which gave the wrong tariff heading and that, prior to the adoption of Regulation (EC) No 305/2001 referred to above, they argued in the Customs Code Committee that the correct tariff heading was 8525 20 99.
- (10) In accordance with Articles 871 and 905 of Regulation (EEC) 2454/93, the lawyer acting for the persons concerned said that he was aware of the file sent by the French authorities and made comments which were attached to the request.

- (11) By letters of 23 September 2003 and 1 April 2004, the Commission requested further information from the French authorities. This information was sent to the Commission by letter of 23 December 2003, received by the Commission on 5 January 2004 and by letter of 11 August 2004, received by the Commission on 16 August. The administrative procedure was therefore suspended, in accordance with Articles 873 and 907 of Regulation (EEC) No 2454/93, from 24 September 2003 to 5 January 2004 and again from 6 January 2004 to 16 August 2004.
- (12) In accordance with Articles 873 and 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 19 October 2004 within the framework of the Customs Code Committee (Repayment Section) to consider the case.
- (13) Under Article 220(2)(b) of Regulation (EEC) No 2913/92, there can be no post-clearance entry in the accounts where the amount of duties legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (14) The Court of Justice has consistently ruled that the legitimate expectations of a trader are protected only if the competent authorities themselves gave rise to the expectations.
- (15) The fact that the competent authorities maintained that the product should be classified under heading 8525 20 99 both in the BTI and in discussions in the Customs Code Committee (Nomenclature Section) prior to adoption of Regulation (EC) No 305/2001 referred to above, does not constitute sufficient grounds for attributing to the authorities an active error that would justify the waiving of post-clearance entry in the accounts, since, firstly, the persons concerned cannot use the BTI in support of their claims because they were not the holders of it and, secondly, the persons concerned were not aware of the position taken by the competent authorities in the Customs Code Committee until after they had been informed of the customs debt.

- (16) With regard to the French authorities' argument that local customs departments are not competent authorities within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92 the [Court has consistently ruled](#)⁷ that any authority which, acting within the scope of its powers, furnishes information relevant to the recovery of customs duties and which may thus cause the person liable to entertain legitimate expectations must be considered a "competent authority". Therefore, if the persons concerned were indeed informed of the customs authorities' decision selecting the wrong tariff heading, that decision must be considered to have been taken by a competent authority within the meaning of Article 220(2)(b).
- (17) When a consignment was imported on 20 February 1998, the competent authorities decided to take several samples of the product in question. The customs agent was aware that these samples had been taken, as is clear from its letter to the authorities of 23 February 1998, in which the agent agreed to the removal of four samples and declared that they were representative of the batch as a whole. The additional information sent by the competent authorities on 11 August 2004 reveals that the agent informed the importer for whom he was acting under the direct representation arrangements that the customs service had taken samples of the goods in question.
- (18) On 24 March 1998, the customs authorities decided that the product imported by the person concerned should be classified under heading 8525 20 99 and recorded this decision in the model 110 document.
- (19) Since the declaration has been destroyed by the customs authorities, there is no longer any document that could prove that the competent authorities informed the customs agent of their classification decision.
- (20) However, it must be acknowledged that the persons concerned could reasonably have believed that, if the authorities had thought the declared tariff heading was wrong, they would have recovered the import duties as they did in 2002 following adoption of Regulation (EC) No 305/2001. Since they did not do so, the persons concerned were entitled to expect that the classification made at the time of the importation was correct.

⁷ Judgment of 27 June 1991 in Case C-348/89, ("Mecanarte").

- (21) The Commission therefore believes that when the customs authorities carried out the checks on the declaration of 20 February 1998, they committed an active error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (22) The Court of Justice of the European Communities has consistently ruled that, in determining whether the firm could reasonably have detected the customs authorities' error, account must be taken of the nature of the error, the firm's professional experience and the diligence it showed.
- (23) The files indicate that the persons concerned must be deemed to be experienced.
- (24) The French authorities have cast doubt on the undetectability of the error. In particular, they point out that the goods in question were part of an ongoing stream of imports and that the importer concerned did not request a BTI notice. They also make the point that, on 6 March 2001, i.e. after the entry into force of Regulation (EC) No 305/2001 (published in the Official Journal on 15 February 2001), the importer imported another consignment of the product, under a declaration giving the wrong tariff heading.
- (25) However, though traders have a right to request a BTI, they are under no obligation to do so and, following the checks carried out in 1998, the persons concerned were entitled to expect that the competent authorities' classification was valid.
- (26) With regard to the error committed after the entry into force of Regulation (EC) No 305/2001, the importer has paid the import duties relating to the consignment in question and is not applying to have them remitted.
- (27) The circumstances in this case therefore reveal an error on the part of the French customs authorities themselves which could not have been detected by an operator acting in good faith within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (28) Moreover, the persons concerned acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

- (29) Post-clearance entry in the accounts of import duties is not therefore justified in this case. Under these circumstances there is no need to examine the dossier in the light of Article 239 of Regulation (EEC) No 2913/92.
- (30) Under Articles 875 and 908 of Regulation (EEC) No 2454/93, where the circumstances under consideration are such that the duties need not be entered in the accounts, the Commission can, under conditions which it is to determine, authorise one or more Member States to waive post-clearance entry of import duties in the accounts in cases involving comparable issues of fact and of law.
- (31) France has requested the Commission to authorise it to waive post-clearance entry of import duties in the accounts or to remit or repay them as appropriate in cases involving comparable issues of fact and law.
- (32) Such authorisation may be granted to the Member State concerned on condition that it is used only in cases strictly comparable in fact and law to the cases in question. The authorisation should cover requests for the waiving of post-clearance entry in the accounts, remission or repayment lodged within the legal time limits in respect of import operations carried out by the importer in question or by one of the customs agents acting on the importer's behalf prior to the entry into force of Regulation (EC) No 305/2001, where such operations were carried out in circumstances comparable in fact and law to the circumstances in this case. In such cases the persons concerned must have acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration, or, as the case may be, must not be guilty of deception or obvious negligence.

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of XXXX which are the subject of the France's request of 3 July 2003 shall not be entered in the accounts.

Article 2

France is authorised to waive post-clearance entry of import duties in the accounts or to remit or repay them in cases involving issues of fact and of law comparable to the case cited in France's request of 3 July 2003.

The authorisation shall cover requests for waiver of entry of import duties in the accounts, remission or repayment, lodged within the legal time limits in respect of import operations carried out by the person concerned prior to entry into force of Regulation (EEC) No 305/2001, where such operations were carried out in circumstances comparable in fact and law to those which gave rise to the requests referred to in the previous subparagraph.

Article 3

This Decision is addressed to France.

Done at Brussels, 18-11-2004

For the Commission
Frits Bolkestein
Member of the Commission