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REC 12/03

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19-5-2004
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NOT FOR PUBLICATION

COMMISSION DECISION

Of 19-5-2004

finding that post-clearance entry in the accounts and remission of import duties are justified in a particular case

(Only the Danish text is authentic)
(Request submitted by Denmark)
(REC 12/03)

FR

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(Request submitted by Denmark)
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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,[1] as last amended by Regulation (EC) No 2700/2000,[2]

Having regard to Commission Regulation (EEC) No 2454/93[3] of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92, as last amended by Regulation (EC) No 2286/2003,[4]

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 343, 31.12.2003, p. 1.

Whereas:

(1) By letter dated 29 July 2003, received by the Commission the same day, Denmark asked the Commission to decide whether, in the following circumstances, it is justified to waive the entry in the accounts of import duties under Article 220(2)(b) of Regulation (EEC) No 2913/92 or, in the alternative, to remit import duties under Article 239 of that Regulation:

(2) Under the second paragraph of Article 2 of Commission Regulation (EC) No 1335/2003 of 25 July 2003,[5] the provisions of Article 1 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, 905 and 907 of Regulation (EEC) No 2454/93 refer to that Regulation as last amended by Commission Regulation (EC) No 881/2003[6] of 21 May 2003.

(3) A Danish firm had held an end-use authorisation since 1990 for the import of products to be used in the manufacture of containers. In an own-resources inspection carried out by the Commission in Denmark in March 1996 the Commission found that the goods in question were not in fact eligible for the end-use arrangements because they were used in the manufacture of containers but not directly in ships, whereas the end-use arrangements apply only to products that are used directly in ships.

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5 OJ L 187, 26.7.2003, p.16

6 OJ L 134, 29.5.2003, p. 1.

(4) By letter of 30 December 1997, the Danish administration informed the firm that, according to the Commission, the products in question could not be imported under the end-use arrangements but that the firm could continue to place the goods under those arrangements on the understanding that, if the Commission confirmed its position, the authorisation would be revoked with effect from 30 December 1997, and the firm would be required to pay the duties which would then become due under Article 204 of the Code. If the firm did not accept this solution the Danish authorities would regard the authorisation as having expired immediately.

(5) On receiving the letter, the firm discussed possible solutions with the Danish authorities and, at the authorities' suggestion, applied on 3 February 1998 for an inward processing authorisation. On 21 April 1998, the Danish administration issued an authorisation enabling the firm to use the inward processing arrangements for the goods, backdated to 3 February 1998, the date on which the application was made. Prior to this, the Danish administration had always told the firm that the inward processing arrangements could not be used in this particular case.

(6) By letter dated 9 November 1998 the Commission confirmed its view that an end-use authorisation should not have been issued for the operations in question. Accordingly, on 6 March 2003 the Danish administration asked the firm to pay the import duties incurred between 1 January 1998 and 3 February 1998 amounting to XXXXX, in respect of which waiver of post-clearance entry in the accounts or, in the alternative, remission has been requested.

(7) The firm gives the following reasons for considering non-recovery or, in the alternative, remission, to be justified.

(8) The firm claims that, in issuing the firm with an end-use authorisation, the Danish customs authorities made an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92 referred to above; there was a causal link between this error and the failure to enter the duties owed for the period from 1 January to 3 February 1998 in the accounts.

(9) Furthermore, it is claimed that the decision revoking the authorisation, communicated by letter of 30 December 1997, infringed the procedural safeguards provided for under EU law and Danish administrative law.

(10) It is argued that, under Article 9(4) of Regulation (EEC) No 2913/92, the Danish authorities should have given the firm time to bring its operations into line with the decision of 30 December 1997 and, in particular, to take account of goods that had already been ordered and were being delivered. The firm adds that the authorisation of 6 December 1996, which entered into force on 1 January 1997 and was due to expire at the end of December 1999, contained no reservation concerning possible revocation on the grounds that Community regulations had been infringed.

(11) Lastly, the firm felt that it should not be expected to have detected the authorities' error. The fact that the Commission and the Danish authorities took almost three years to agree on a position was sufficient proof of how complex the regulations were.

(12) Should the Commission not acknowledge the existence of an error under Article 220(2)(b) of Regulation (EEC) No 2913/92, the firm thinks that it should be deemed to be in a special situation under Article 239 of the Regulation for the reasons given below.

(13) The firm's operations were of a quite specific type and it was the only trader in the Community engaged in that particular line of business. The firm maintains that the Danish authorities' decision to revoke the authorisation they had erroneously issued necessarily placed the firm in a special situation.

(14) Given that the firm had complied with the regulations, as interpreted by the Danish authorities, it feels that the authorities' error went beyond the normal commercial risk that a trader must accept.

(15) The firm claims that, owing to the error on the part of the Danish administration that issued the authorisation and the lack of information from either the Commission or the administration, it was unable to avoid this unforeseeable damage. In the firm's view, it would not therefore be fair to expect it to bear the financial risk connected with the damage.

(16) Lastly, the firm argues that, since the goods could have been imported under inward-processing arrangements, the EU suffered no financial damage as a result of the fact that the end-use arrangements were erroneously applied.

(17) In support of the application submitted by the competent Danish authorities the firm indicated that, in accordance with Articles 871 and 905 of Regulation (EEC) No 2454/93, it had seen the dossier the Danish authorities had sent to the Commission and had nothing to add.

(18) 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 25 March 2004 within the framework of the Customs Code Committee (Repayment Section) to consider the case.

(19) Article 220(2)(b) of Regulation (EEC) No 2913/92 requires post-clearance entry in the accounts to be waived where the amount of duty legally owed was not entered in the accounts as a result of an error on the part of the customs authorities themselves that could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and observed all the provisions laid down by the legislation in force as regards the customs declaration.

(20) The following remarks relate to the procedure used to revoke the authorisation.

(21) In the view of the competent Danish authorities, the revocation of the authorisation was made final when the Commission confirmed that the end-use arrangements could not be used in this case.

(22) Article 9 of Regulation (EEC) No 2913/92 provides for revocation of a decision favourable to the firm where one or more of the conditions laid down for its issue were not or are no longer fulfilled. The person to whom the decision is addressed is notified of the revocation, which takes effect from the date of notification. As the products imported by the firm were not in fact eligible for the end-use arrangements, the Danish customs authorities were justified in revoking the authorisation in accordance with Article 9 of Regulation (EEC) No 2913/92.

(23) Though Article 9(4) does enable the customs authorities to defer the date when revocation takes effect in exceptional cases where the legitimate interests of the person to whom the decision is addressed so require, this is an option, not a requirement. Accordingly the Danish authorities are not at fault for not having used this option.

(24) It is beyond the scope of these proceedings to examine the firm’s argument that the revocation decision of 30 December 1997 infringed the procedural safeguards provided for under EU law and Danish administrative law. The Commission considers that if the firm does not agree with the decision, it must contest its validity in accordance with the national procedures in force and by exercising its right of appeal under Article 243 of Regulation (EEC) No 2913/92. The provisions of Article 220(2)(b) and Article 239 of Regulation (EEC) No 2913/92 cannot constitute an indirect means of contesting the Danish authorities' decision.

(25) Accordingly, none of the circumstances referred to above show evidence of any error on the part of the customs authorities within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

(26) In the absence of any error on the part of the competent authorities, it is not appropriate to examine the other conditions set out in Article 220(2)(b) of Regulation (EEC) No 2913/92.

(27) 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.

(28) The Court of Justice of the European Communities has consistently 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 himself compared with other importers carrying out the same activity.

(29) The Court has consistently ruled[7] that in using its discretion to assess whether the conditions for granting remission have been fulfilled, the Commission must balance the Community interest in ensuring that the customs provisions are respected and the interest of the importer acting in good faith not to suffer harm beyond normal commercial risk.

(30) In this case, the lack of an authorisation to use the end-use arrangements gave rise to a customs debt for which the firm is liable.

(31) Firstly, the Commission carried out its own-resource inspection on the Danish administration in March 1996 and it was only by letter of 30 December 1997 that the Danish authorities informed the firm that it would be considered liable for a customs debt if it continued to import goods under the end-use arrangements, and that the Commission had confirmed its interpretation. Furthermore, the letter from the Danish authorities was confusing for the firm because on the one hand the authorities told it they would continue to accept end-use declarations, giving it legitimate grounds for believing that the authorisation was still valid while, on the other hand, they said the authorisation would be considered revoked, with retroactive effect, if the Commission continued to maintain that the authorisation should not have been issued in the first place.

(32) Secondly, the firm obtained authorisation to use the inward-processing arrangements from 3 February 1998. The Danish authorities have confirmed that the conditions for the granting of such an authorisation were actually met as early as 1990. Thus the only reason that the firm used the end-use arrangements is that it was prompted to do so by the Danish administration.

(33) In view of the above, the Commission is of the opinion that the circumstances in this case do constitute a special situation under Article 239 of Regulation (EEC) No 2913/92.

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[7] See inter alia the Kaufring judgment of 10 May 2001 (joined cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99), ECR II - 01337.

(34) However, such a situation can give rise to the remission of duties only if no deception or obvious negligence may be attributed to the firm concerned.

(35) The request from the Danish authorities demonstrates that the no deception or obvious negligence may be attributed to the firm.

(36) Post-clearance entry of import duties in the accounts is therefore justified in this case, and the remission of import duties is also justified,

HAS ADOPTED THIS DECISION:

Article 1

Import duties amounting to XXXXXXX referred to in the request from Denmark dated 29 July 2003 shall be entered in the accounts.

Article 2

The remission of import duties amounting to XXXXXX referred to in the request from Denmark dated 29 July 2003 is justified.

Article 3

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 19-5-2004

For the Commission
Frits Bolkestein
Member of the Commission