

COMMISSION DECISION

C(2011/9750

of 5-1-2012

**finding that remission of import duties is justified in a particular case
(REM 03/2010)**

(only the German text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code¹,

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 establishing the Community Customs Code²,

Whereas:

- (1) By letter dated 23 April 2010, received by the Commission on 12 May 2010, Germany asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether remission of import duties was justified in the following circumstances.
- (2) During 2006 and 2007 a German company lodged in Germany several customs declarations on behalf of its clients for the shipment of textiles and consumer goods to another Member State under the external Community transit procedure. It thereby took on the role of principal.
- (3) An investigation by the competent authorities of the Member State of destination revealed that the goods had not been presented to the office of destination and that numerous transit procedures from German offices of departure had been fraudulently ended in NCTS.
- (4) A customs debt having been incurred under Article 203 of Council Regulation (EEC) No 2913/92, the competent authorities in Germany asked the firm to pay import duties in the sum of XXXXX EUR. It is this amount that is the subject of the request for remission submitted by the German authorities.

¹ OJ L 302, 19.10.1992, p. 1.

² OJ L 253, 11.10.1993, p. 1.

- (5) In support of the application submitted by the German authorities the company indicated that, in accordance with Article 905 of Regulation (EEC) No 2454/93, it had seen the dossier the authorities had sent to the Commission.
- (6) By letter dated 29 October 2010, the Commission asked the German authorities for additional information. A reply was provided by letter dated 24 March 2011, received by the Commission on 08 April 2011. Examination of the application for remission of duties was therefore suspended between 30 October 2010 and 8 April 2011.
- (7) The Commission sent additional requests for information to the German authorities on 10 May 2011, 25 May 2011 and 21 September 2011. The final reply provided by letter of 9 November 2011 was received by the Commission on 21 November 2011. Examination of the application for remission of duties was therefore suspended between 11 May 2011 and 21 November 2011.
- (8) 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 9 December 2011 within the framework of the Customs Code Committee - Customs Debt and Guarantees Section.
- (9) According to the request sent to the Commission by the German authorities, remission would be justified because the fraudulent entry in NCTS stating that the transit procedures had ended at the office of destination can be explained only by the involvement of customs officials at the office, or by unauthorised third parties having accessed the office's computer system.
- (10) Under Article 239 of Council Regulation (EEC) No 2913/92 import duties may be remitted in situations other than those referred to in Articles 236, 237 and 238 of that Regulation if they result from circumstances in which no deception or obvious negligence can be attributed to the person concerned.
- (11) The Court of Justice of the European Union 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.
- (12) In this case a customs debt was incurred through the failure by the firm to present the goods in question, which had been placed under the Community transit procedure, at the customs office of destination.
- (13) As the principal, the firm is responsible to the competent authorities for the proper conduct of Community transit operations even if it is the victim of fraudulent activities by third parties. That is part of a principal's commercial risk.
- (14) It is nevertheless accepted that the deliberate and active involvement of customs officials in fraud, notably by discharging transit documents where goods have not been presented, would constitute a special situation within the meaning of Article 239 of Council Regulation (EEC) No 2913/92.
- (15) The principal's liability for the proper conduct of Community transit operations cannot be expected to extend to cases in which representatives of the customs administration

actively assist in committing fraud. Unless the principal is itself an accomplice to the fraud, it can legitimately expect the functioning of the administration not to be undermined by corrupt customs officials.

- (16) According to the dossier submitted to the Commission by the German authorities, the competent national authorities acknowledge that customs officials may indeed have been involved but have not formally found one or more officials to have acted corruptly or actively participated in committing fraud.
- (17) However, the Court, in its judgment of 7 June 2001 in Case T-330/99, Rotermund, ruled that the Commission was not entitled to limit the scope of its assessment to the possibility of active complicity by a particular customs official and require the applicant to supply, if necessary by producing a document from the competent authorities, formal and definitive proof of such complicity.
- (18) The facts set out above relating to the fraud at issue can only reasonably be explained by the active complicity of an employee of the customs office of destination in the other Member State or by a failure of organisation on the part of that office which allowed a third party to access the NCTS system. Only someone who had access to the IT system and who was familiar with the passwords to access the system would be in a position to end the transit procedure in NCTS.
- (19) Therefore these factors constitute a special situation under Article 239 of Regulation (EEC) No 2913/92.
- (20) The circumstances of the case do not suggest any deception or obvious negligence on the part of the company, as the competent German authorities confirm.
- (21) The remission of import duties requested is therefore justified,

HAS ADOPTED THIS DECISION:

Article 1

The remission of import duties in the sum of EUR XXXX requested by the Federal Republic of Germany on 23 April 2010 is justified.

Article 2

This Decision is addressed to Germany.

Done at Brussels, 5-1-2012

For the Commission
Algirdas Šemeta
Member of the Commission