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REM 34/99

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11.04.2000

NOT TO BE PUBLISHED

COMMISSION DECISION

Of 11.04.2000

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

(request submitted by the Netherlands)

(REM 34/99)

FR

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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 955/1999;[2]

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation (EEC) No 2913/92,[3] as last amended by Regulation (EC) No 1662/1999,[4] and in particular Article 907 thereof,

1 OJ L 302, 19.10.1992, p.1
2 OJ L 119, 7.5.1999, p.1
3 OJ L 253, 11.10.1993, p.1
4 OJ L 197, 29.7.1999, p. 25

Whereas:

(1) By letter dated 17 June 1999, received by the Commission on 25 June 1999, the Netherlands asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether the remission of import duties is justified in the following circumstances.

(2) From October 1995 a Netherlands company, acting on instructions from its client, declared kosher-slaughtered and kosher-prepared turkey meat from Israel for import. On the declaration forms the goods were classified under tariff heading 1602 of the Combined Nomenclature (CN). The kosher slaughtering and preparation had taken place in Israel. Before October 1995 the imported turkey meat was seasoned in Israel. After that date most of the turkey meat imported was unseasoned.

(3) On 15 August 1995 the company's client applied for eight Binding Tariff Information notices (BTIs) for kosher-prepared turkey meat. After contacting the applicant, the customs department thought that the turkey meat was seasoned in the course of kosher preparation since, as the applicant had stated, it was immersed in a bath comprising a mixture of salt and spices. On 19 October 1995 it issued the eight BTIs requested, classifying the meat under heading 1602 of the Combined Nomenclature. However, it took care to specify that the meat covered by these BTIs had to be seasoned. The recipient of the BTIs accepted them without objection.

(4) A post-clearance check on the company's monthly declarations for the period between October 1995 and February 1997 found that the turkey meat had been imported under CN heading 1602 although it had been immersed in a salt bath for only one hour during the kosher preparation process. This meant that the meat was not seasoned since, as confirmed by the customs investigation, the use of spices was not allowed in a slaughterhouse during kosher preparation and no seasoning had been added after that preparation. Consequently, the meat should have been classified under CN heading 0207. Customs also found that the company did not use the BTIs issued on 19 October 1995 for the imports that were the subject of post-clearance checks.

(5) The Dutch authorities therefore asked the company to pay the import duties due, a total of XXXXXX - the amount in respect of which remission has been requested.

(6) In support of the application submitted by the Netherlands 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 and had nothing to add.

(7) By letter dated 19 January 2000, sent on 21 January 2000, the Commission notified the company of its intention to withhold approval and explained the grounds for its objections.

(8) By letter of 11 February 2000, received by the Commission on 15 February 2000, the company responded to these objections. It maintained its view that the circumstances of the case made it a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92, involving neither deception nor obvious negligence on its part. In its view the tariff classification adopted by the customs department is incorrect and, in particular, it considers it wrong to say that the presence or absence of seasoning is a decisive factor in this case for classification under heading 1602 of the Combined Nomenclature. It also states that the customs department did not show due diligence when they issued the BTIs. Lastly, it holds that the differences between the tariff headings it had declared and the tariff headings that customs considered correct had been discovered by customs in February/March 1996, i.e. when they first carried out checks. Yet, it says, customs waited until October 1996 to begin the investigations.

(9) The administrative procedure was therefore suspended, in accordance with Article 907 of Regulation (EEC) No 2454/93, between 21 January and 15 February 2000.

(10) 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 13 March 2000 within the framework of the Customs Code Committee - Section for General Customs Rules/Repayment.

(11) 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.

(12) The Court of Justice of the European Communities has consistently taken the view that the provisions of Article 239 of Regulation (EEC) No 2913/92 represent a general principle of equity designed to cover an exceptional situation in which a declarant might find himself compared with other importers carrying out the same activity.

(13) Under that Article, the Commission is not responsible for determining whether import duties are legally due in a particular case when it is notified of a request for the remission of import duties. It is the responsibility of the competent national authorities to do so in the context of a post-clearance investigation.

(14) In this case the competent national authorities found that a customs debt had been incurred, since the products declared by the company actually fell under heading 0207, and not heading 1602, of the Combined Nomenclature. Consequently, in the context of a request for the remission of import duties under Article 239 of Regulation (EEC) No 2913/92, it is not the Commission's place to contest the results of checks or investigations carried out by the national authorities in compliance with their obligations under Regulation (EEC) No 2913/92.

(15) Therefore the company's arguments contesting the tariff classification adopted by the Netherlands authorities are not admissible in this case, since their purpose is to contest the actual existence of the customs debt.

(16) Only the facts, particularly those adduced by the company that may give rise to a special situation covered by Article 239 of Regulation 2913/92, should therefore be considered.

(17) As regards the arguments relating to the binding tariff information notices (BTIs) issued, the investigation carried out by national customs showed that the company had not used those notices for the imports concerned. Although the company's client had the BTIs, the dossier sent to the Commission by the Netherlands authorities shows that the company did not ask its client for the information they contained until December 1996, and at no point cited them in the course of the import operations. As the company itself admits in its letter to the Commission dated 11 February 2000, it did not simply follow the information supplied by its client to classify the goods, but classified them under tariff heading 1602 on the basis of the description of the goods and its professional experience of customs matters. It cannot therefore cite after the fact the BTIs issued to its client or claim that it had any legitimate expectations based on them.

(18) Consequently the arguments based on the claim that the BTIs were wrong or that the department that issued them failed to show due diligence are unfounded. In any event there are no grounds for concluding that the department that issued the BTIs failed to show due diligence, since it issued them on the basis of the description of the goods in the applications, contacted the applicant to obtain information on the procedure used in kosher preparation before issuing them, and took care to specify on the BTIs it issued that the meat had to be seasoned to be classified under heading 1602 of the Combined Nomenclature. Furthermore, there was nothing to prevent the recipient of the BTIs contesting them if he considered that they did not correspond to his applications.

(19) The dossier sent to the Commission by the Netherlands authorities and the letter of 11 February 2000 from the company to the Commission show that the national authorities did not start investigating the case until several months after the department that checked the customs declarations had doubts about the tariff classification on the declarations. The company considers that since it was not informed about these doubts, it could not have taken measures to avoid incurring further customs debts. It asserts that this fact gave rise to a special situation covered by Article 239 of Regulation (EEC) No 2913/92.

(20) Under Article 78 of Regulation (EEC) 2913/92, customs authorities may carry out post-clearance checks at any time after releasing goods. Where the duty resulting from a customs debt has not already been entered or where the amount entered is less than that legally owed, such checks result in post-clearance entry of import duties in the accounts. Under Article 221(3) of the Regulation the amount entered post clearance must be communicated to the debtor within three years of the date on which the customs debt was incurred. By contrast, there is no provision in the Regulation requiring the debtor to be informed within that period of any doubts the customs authorities may have regarding the correctness of any declarations submitted.

(21) Contrary to the company's claim, its situation cannot be considered comparable to the one that gave rise to the judgement of the Court of Justice of the European Communities of 7 September 1999 in case C-61/98.[5]

[5] "De Haan Beheer BV" case, not yet published in the European Court Records.

(22) While it appears that the customs authorities had doubts about the tariff classification of the goods as early as February/March 1996, though did not inform the company until December that year, they nevertheless did not deliberately allow customs debt to be incurred in the interests of the investigation. There was no direct link between the post-clearance investigation and any surveillance operation in progress and no customs debt was incurred without the knowledge of the company. In this respect the company's situation is in no way comparable with that of a principal in the context of a Community transit operation. The company's liability in this case derives from its own customs declarations and the data which it submitted itself for tariff assessment, whereas the liability of a principal is automatic since the principal is financially responsible for the proper conduct of the Community transit operation even if it has no knowledge whatever of the reasons for which a customs debt is incurred.

(23) Only when customs checks have been carried out is customs in a position to establish whether or not the tariff classification is correct. Moreover, as the company admits itself in its letter of 11 February 2000, it had sometimes in the past rightly contested the tariff classifications adopted by the customs official responsible for checking the declarations in this case. Therefore, until the national authorities have finally ruled, following an investigation if necessary, on the tariff classification that should have been applied to particular goods, customs cannot be held to know of the existence of customs debts incurred without the knowledge of the company in circumstances comparable to those which gave rise to the Court of Justice judgment of 7 September 1999 referred to above.

(24) The dossier sent to the Commission by the Netherlands authorities also shows that customs continued for several months to accept declarations on which the wrong tariff classification was entered. However, this fact does not, in this case, constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(25) In such a situation, according to Court of Justice of the European Communities case law, an active error occurs where, although a debtor repeatedly imports a large volume of goods, the customs authorities do not raise any objections about the tariff classification even though a comparison between the declared tariff heading and the explicit goods description provided in accordance with nomenclature rules shows that the classification is wrong.

(26) In this case such comparison could not show up a wrong tariff classification as the goods description did not indicate that the meats were not preparations within the meaning of CN heading 1602. This fact does not, therefore, give rise to a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(27) From October 1996 the Netherlands customs repeatedly accepted customs declarations bearing a different Combined Nomenclature code from that on the health certificates and some transport documents accompanying them. Since those documents are not decisive for the purposes of tariff classification or the applicable rate of duty, this fact cannot be such as to give rise to a situation covered by Article 239 of Regulation (EEC) No 2913/92.

(28) In any event, even if this fact were held to give rise to a special situation covered by Article 239, that situation could only warrant the remission of import duties if no deception or obvious negligence could be attributed to the company. To establish whether this condition is fulfilled, account must be taken of the failure of which the customs department is accused, the professional experience of the company and the diligence shown by the company.

(29) The dossier sent to the Commission by the Netherlands authorities shows that the company is a customs agent and must therefore be considered experienced.

(30) Because of the financial implications of tariff classification, particular care must be taken in selecting the correct one. If a trader has any doubts as to the correctness of the tariff classification he must make enquiry and seek all possible clarification to satisfy himself on this point. He may be considered to have done so if he can cite binding tariff information issued by the customs authorities of a Member State.

(31) In this case the tariff classification entered on the declarations did not correspond to the one entered on a number of accompanying documents. However, if this fact could have given rise to a special situation covered by Article 239 of Regulation (EEC) No 2913/92, by the same token it should also have raised doubts for the company. The company did not, then, show due diligence, since it allowed the situation to continue (without, moreover, ever taking a sample) and never directly applied to the Netherlands authorities for binding tariff information (BTIs), or even asked its client for the BTIs the client held. If it had done so it would have realised that the BTIs did not tally with the imported goods since they applied to seasoned goods, whereas the classification the company had selected was not linked to any seasoning. It could then have made enquiries about the accuracy of the BTIs and either asked its client to contest them or itself applied for new ones.

(32) Finally, the company argues that it cannot recover the amount of the customs debt from the buyers of the goods, and the size of that debt could put it in financial difficulties. These facts cannot in themselves constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92. As the Court of Justice of the European Communities has already stated, it is the responsibility of professional economic operators to take the necessary measures to protect themselves against such risks, which fall within the category of professional risks to which they expose themselves.

(33) 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 XXXXX requested by the Netherlands on 17 June 1999 is hereby found not to be justified.

Article 2

This Decision is addressed to the Netherlands.

Done at Brussels, 11.04.2000

For the Commission

Member of the Commission