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REC 08/03

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25-3-2004
C(2004)939

NOT FOR PUBLICATION

COMMISSION DECISION

Of 25-3-2004

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 08/03)

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(Request submitted by Denmark)
(REC 08/03)

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 Regulation (EC) No 2700/2000,[2]

Having regard to Commission Regulation (EEC) No 2454/93[3] of 2 July 19933 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 27 June 2003, received by the Commission on 1 July 2003, Denmark asked the Commission to decide, under Article 220(2)(b) of Regulation (EEC) No 2913/92, whether it was justified to waive post-clearance entry of the import duties in the accounts in the following circumstances, and in the alternative whether remission of import duties was justified under Article 239 of Regulation (EEC) No 2913/92, in the following circumstances.

(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, 905 and 907 of Regulation (EEC) No 2454/93 refer to that Regulation as last amended by Commission Regulation (EC) No 881/2003 of 21 May 2003.[5]

(3) A Danish firm acted as the principal, on 5 April, 2 May, 30 May and 10 June 1994, for the shipment of six loads of butter originating in the Czech Republic (around 136 tonnes) under the Community transit procedure. The declarations were submitted to a customs office located in Denmark. The offices of destination were located in Italy (Trieste-Fernetti and Ravenna).

(4) As the Danish authorities state in the letter referred to above, a request for assistance dated 13 January 1994 sent by the Community authorities to the Member States reported cases of fraud involving butter in transit via the Community and discharge of transit declarations using false stamps, called on Member States to pay special attention to consignments of butter originating in third countries and in transit through EU territory and asked them, from that date, to extend the early warning system for sensitive goods to butter consignments. Another request to that effect was sent to the Member States on 4 February 1994.

(5) When the goods were placed under the external Community transit procedure the customs office of departure did not require a comprehensive guarantee covering the total amount of duties and other charges payable. The customs authorities did not use the early warning system either.

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5 OJ L 134, 29.5.2003, p. 1.

(6) Initially it was believed that the consignments had been delivered in accordance with the rules, since the competent Danish office had received the return copies 5 of the transit documents concerned between April and August 1994.

(7) However, following an investigation by the competent Italian authorities it was found that the goods had not in fact been presented at the Italian offices of destination, Trieste-Fernetti and Ravenna, and that the stamps and signatures on the copies 5 of the T1 documents were forgeries.

(8) The Danish authorities therefore considered that the transit operations concerned had not been discharged. Owing to the removal of the goods from customs supervision, a customs debt was incurred under Article 203 of Regulation (EEC) No 2913/92. The Danish authorities therefore asked the firm to pay import duties of XXXX, the amount for which the firm has requested a waiver of post-clearance entry in the accounts or, in the alternative, remission.

(9) The firm gives the following reasons for considering non-recovery or, in the alternative, remission, to be justified. Firstly, it argues, when the operations were initiated the Danish customs authorities did not require a comprehensive guarantee at a level complying with Article 361(2) of the version of Regulation (EEC) 2454/93 in force at the time. Secondly, they failed to comply with the administrative obligation to provide prior information. Thirdly, they did not inform the firm of the extensive fraud that had been detected in the transport of butter originating in the Czech Republic.

(10) Pursuant to Articles 871 and 905 of Regulation (EEC) No 2454/93, the firm stated in support of the request from the competent Danish authorities that it had seen the dossier submitted to the Commission, and set out its arguments in a document annexed to the authorities' letter to the Commission of 27 June 2003.

(11) 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 12 February 2004 within the framework of the Customs Code Committee (Repayment Section) to consider the case.

(12) 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.

(13) In this case the competent Danish authorities considered that the non-discharge of the external Community transit operations concerned gave rise to a customs debt for which the firm was liable.

(14) With regard to the concept of error on the part of the competent authorities within the meaning of Article 220(2)(b), the following points must be made.

(15) In its judgment of 27 June 1991,[6] the Court of Justice of the European Communities ruled that the legitimate expectations of the customs debtor should be protected under Article 5(2) of Regulation (EEC) No 1697/79 (the applicable provision before the entry into force of Article 220(2)(b) of Regulation (EEC) No 2913/92) only if the competent authorities themselves created the basis for those expectations. The same judgment defines "competent customs authority" as any authority which, acting within the scope of its powers, furnishes information relevant to the recovery of customs duties. Therefore only errors that are attributable to acts of the competent authorities that furnished information relevant to the calculation of the duties and that could not reasonably have been detected by the customs debtor confer entitlement to the waiver of post-clearance recovery of customs duties.

(16) In this case, however, there can be no question of an error in the sense of an active error for a number of reasons.

(17) As regards the level of the comprehensive guarantee for the consignments, the following points should be made. Article 361(1) of the version of Regulation (EEC) No 2454/93 in force at the time provides that the amount of the guarantee must be set at a minimum of 30% of the duties and other charges payable. Article 361(2) of the version of Regulation (EEC) No 2454/93 in force at the time provides that the comprehensive guarantee is to be fixed at a level equal to the full amount of duties and other charges payable when three conditions are fulfilled. Firstly, the external Community transit operations must concern goods imported into the customs territory of the Community. Secondly, those goods must figure in the list in Annex 53 to

Regulation (EEC) No 2454/93. Thirdly, they must have been the subject of specific information from the Commission concerning transit operations presenting increased risks of fraud, in particular pursuant to the provisions of Council Regulation (EEC) No 1468/81. The goods did fulfil these three conditions.

(18) However, under Article 361(2) of the version of Regulation (EEC) No 2454/93 in force at the time, the customs authorities had the right to set the level of the comprehensive guarantee for sensitive goods at 50% of the amount of the duties and other charges concerned for traders meeting certain conditions. In this case the guarantee certificate referred to in the version of Article 362(3) in force at the time had to bear the entry "application of Article 361(2) of Regulation (EEC) No 2454/93". However it appears that no such certificate was required of the firm and the firm did not hold a certificate bearing the entry referred to.

(19) The competent Danish authorities therefore committed an error in failing to require a comprehensive guarantee calculated according to the version of Article 361(2) in force at the time, since the conditions for the application of that provision were fulfilled. However, there is no causal link between the failure to set a comprehensive guarantee at a level equal to the full amount of duties and other charges payable and the fact that a customs debt was incurred. The customs debt in this case arose simply because the goods were removed from customs supervision. The error by the Danish customs authorities concerning the guarantee does not therefore constitute an active error giving rise to legitimate expectations on the part of the person liable.

(20) As regards use of the early warning system, it should be noted that Article 384 of the version of Regulation (EEC) No 2454/93 in force at the time provides that where necessary the customs authorities of the Member States must communicate to one another all findings, documents, reports, records of proceedings and information relating to transport operations carried out under the Community transit procedure and to irregularities and offences in connection with that procedure. The Customs Code Committee set up an early warning system for communicating information relating to the transport of goods considered sensitive.

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6 *Mecanarte* judgment of 27 June 1991.

(21) Firstly, the systems of communication between authorities set up for this purpose are not intended for traders. They are designed for the use of the authorities, to optimise the exchange of information between authorities and facilitate the prompt initiation of investigations in the event of illegal operations. In any case, the early warning system is unrelated to the placing of goods under the external Community transit procedure.

(22) Moreover, neither Article 384 of Regulation (EEC) No 2454/93, nor any other provisions of that Regulation or of the basic Regulation (EEC) No 2913/92 specifies what the consequences may be for authorities that fail to comply with the early warning system.

(23) In addition, as the Court of Justice of the European Communities stated in its ruling of 23 March 2000,[7] an administrative agreement between Member States (administrative arrangement) has no legal force. Therefore it cannot be invoked against the authorities by a trader.

(24) Consequently, the fact that the office of departure did not follow an administrative arrangement for the communication of information does not constitute an error on the part of the customs authorities within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

(25) As regards the obligation to inform traders referred to by the firm, it should first be noted that at the time the transit operations concerned were initiated, the Danish authorities were not certain that they were fraudulent. The situation is not therefore comparable to the one which gave rise to the De Haan judgment handed down by the Court of Justice of the European Communities on 7 September 1999, because in this case the customs authorities were not aware of the customs debts being incurred by the firm without its knowledge. There was therefore no error on the part of the customs authorities in this respect.

(26) 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.

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[7] *Leszek Labis* judgment of 23 March 2000 (joint cases C-310/98 and C-406/98) ECR I-1797.

(27) 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.

(28) 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.

(29) The Court of Justice of the European Communities has consistently taken the view 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.

(30) The Court has consistently ruled[8] 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.

(31) In this case the failure to correctly discharge the six transit operations gave rise to a customs debt, for which the firm is liable as principal for the operations concerned.

(32) 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 resulting from organised crime. Such an eventuality is part of the firm's normal commercial risk.

(33) As has already been pointed out, no active error can be attributed to the competent authorities in respect of the six transit operations.

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[8] 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) Nor are the facts of this case identical to those covered by the Court of Justice judgment of 7 September 1999.[9] According to that judgment "the demands of an investigation conducted by the national authorities may, in the absence of any deception or negligence on the part of the person liable, and where that person has not been informed that the investigation is being carried out, constitute a special situation ... where the fact that the national authorities have, in the interests of the investigation, deliberately allowed offences or irregularities to be committed, thus causing the principal to incur a customs debt, places the principal in an exceptional situation in comparison with other operators engaged in the same business".

(35) In that case the customs authorities were already aware, or at least had serious grounds for suspecting, that a Community transit operation was being organised for cigarettes, involving irregularities such as to give rise to a customs debt. They then knowingly allowed operations to be conducted which they knew to be fraudulent. That is not, however, the case here.

(36) The dossier shows that although the customs authorities were aware at the time (as the Danish authorities state in their letter of 27 June 2003) of a certain number of irregularities in relation to the transport of butter of Czech origin, they had not launched an investigation specifically relating to the butter transit operations in this case, and they did not deliberately allow the firm to conduct its operations knowing them to involve fraud. When the customs office accepted the declarations placing the goods under the Community transit regime, it must have known that this was a high-risk operation, but it did not know that these particular transit operations involved fraud. Therefore the national authorities did not deliberately allow a customs debt to be incurred.

(37) However, at the time the Community authorities had already warned the Danish authorities about fraud involving butter of Czech origin transported under the external Community transit procedure.

(38) The Danish authorities therefore had knowledge of certain information which should have prompted increased vigilance on their part in view of the high risk of fraud affecting the operations involved in this case.

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9 *De Haan* judgment of 7 September 1999.

(39) The information in the dossier shows that, despite having been informed of a variety of facts pointing to a high risk of fraud, the Danish authorities did not require a comprehensive guarantee for the six transit operations equal to the full amount of the duties and other charges payable, as they should have done. They therefore failed to fulfil their obligations in that they did not act with due diligence.

(40) Furthermore, after finding that fraud was being perpetrated the Community authorities had repeatedly asked the national authorities to use the early warning system for these goods. Yet the competent authorities did not use this system for the operations concerned.

(41) In the Commission's view, the above circumstances and the negligence of the competent Danish authorities therefore constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(42) As for the second condition laid down in Article 239 of Regulation (EEC) No 2913/92, namely the absence of deception or obvious negligence on the part of the person concerned, the Danish authorities stated in their request of 27 June 2003 that their investigations had cleared the firm of any involvement in the fraud concerned and that its approach could not be described as obviously negligent.

(43) 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

The import duties in the sum of XXXXXXXX referred to in the request from Denmark dated 27 June 2003 shall be entered in the accounts.

Article 2

The remission of import duties in the sum of XXXXX referred to in the request from Denmark dated 27 June 2003 is justified.

Article 3

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 25-3-2004

For the Commission
Frits Bolkestein
Member of the Commission