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REC 18/98

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15-9-1999

COMMISSION DECISION

of 15-9-1999

finding that it is justified to take action for the post-clearance recovery of import duties in a particular case

(request submitted by Germany)

(Ref. REC 18/98)

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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 873 thereof,

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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 by letter dated 10 November 1998, received by the Commission on 20 November 1998, Germany asked the Commission to decide, under Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties,[5] as last amended by Regulation (EEC) No 1854/89,[6] whether it was justified not to take action for recovery of import duties in the following circumstances:

In the period 1987-89 a German firm, hereinafter referred to as "the interested party", imported from South Africa various dried parts of plants of the protea family. On release for free circulation, the plant parts were declared under heading 0603 of the Combined Nomenclature, which covers "cut flowers and flower buds of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared".

On 30 November 1988, the Munich finance court (Finanzgericht München) gave a definition of "flower buds" and took the view that only botanical and scientific considerations should come into play when defining such items; decorative characteristics should not be a part of the definition.

5 OJ L 197, 3.8.1979, p.1.
6 OJ L 186, 30.6.1989, p.1.

On the basis of this judgment and the Federal Finance Ministry's ensuing implementing decision of 28 November 1989, the Zolltechnische Prüfungs- und Lehranstalt (ZPLA - Munich customs laboratory and training college) issued another German firm with a number of binding tariff information notices (BTIs) for different protea varieties on 27 December 1989; these came to the notice of the interested party. The Munich customs laboratory classified the protea samples provided in heading 0604, "foliage, branches and other parts of plants, without flowers or flower buds, and grasses, mosses and lichens, being goods of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared"). The laboratory considered in every case that the samples had to be deemed to have stopped flowering.

Citing the BTIs issued by the Munich customs laboratory, the interested party applied in May 1990 for the protea varieties imported before the BTIs were issued to be reclassified under heading 0604.

On the basis of customs declarations and invoices, the customs office admitted this application and refunded XXXXX of import duties.

In November 1990, the customs office changed its view, concluding that merely examining the invoices did not make clear which of the goods belonged in heading 0603 and which belonged in heading 0604. The composition of dried protea parts differed according to their botanical maturity and needed to be examined in every single case to establish classification. Since no samples of the 1987-89 imports were available for retrospective analysis, the customs office demanded that the refunds be repaid to the extent allowed by the prescription rules. The amount involved was XXXXX, and the interested party contested recovery. An appeal against the recovery decision was also lodged;

Whereas the interested party said that it had examined the dossier submitted to the Commission by the German authorities and had nothing to add;

Whereas by letter of 25 May 1999 the Commission informed the interested party of its intention to refuse its request and gave the reasons for this decision;

Whereas the interested party failed to reply to the Commission within the time-limit laid down by Article 872a of Regulation (EEC) No 2454/93;

Whereas the administrative procedure was suspended in accordance with Article 873 of Regulation No (EEC) 2454/93 for one month;

Whereas, in accordance with Article 873 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 2 September 1999 within the framework of the Customs Code Committee (Section for General Customs Rules/Repayment) to consider the case;

Whereas in accordance with Article 5(2) of Regulation (EEC) No 1697/79, the competent authorities may refrain from taking action for the post-clearance recovery of import or export duties that were not collected as a result of an error made by the competent authorities themselves which could not reasonably have been detected by the person liable, the latter having acted in good faith and observed all the provisions laid down by the rules in force as far as the customs declaration is concerned;

Whereas the binding tariff information notices had been issued after the goods in question had been released for free circulation; whereas even if in theory they did apply to those goods, it should have been established in the case of every import transaction involved and to the satisfaction of the competent customs authorities that the imported goods matched the goods described in the tariff information notices in every respect;

Whereas irrespective of the differences in opinion over the scientifically and botanically correct dividing line between Combined Nomenclature headings 0603 and 0604, it is clear that in the light of the nature of the goods in question, customs declarations and invoices could not be taken as proof that they matched the goods described in the binding tariff information notices;

Whereas the November 1990 decision that the duties should not have been repaid was therefore correct;

Whereas the original customs debt was therefore once again due, and whereas the customs authorities thus justifiably sought to recover it within the prescription period allowed;

Whereas the purpose of Article 5(2) of Regulation 1697/79 is to protect the legitimate expectation of the person liable for payment;

Whereas in order for the customs authorities' error in repaying the duties to be considered an error within the meaning of Article 5(2) of Regulation (EEC) No 1697/79, it must be likely to give rise to legitimate expectations on the part of the person liable for payment;

Whereas in order to determine if this was indeed the case, the entire framework of rules and regulations governing relations between customs administrations and the persons liable for payment needs to be examined;

Whereas these relations are typified by rapid processing in the interests of preserving the flow of international trade and by a heavy workload of customs clearance operations for the administrations; whereas for the sake of balancing the principles of legal security, proper enforcement of Community legislation and protection of the financial interests of the European Communities, Community legislation has left the competent national authorities a limit of three years from the date on which the customs debt was incurred in which to make any necessary alterations to previous findings regarding that customs debt; whereas it is impossible under these circumstances to consider every stage of releasing goods for free circulation as being open to errors giving rise to legitimate expectations, as do to this would be to prevent the customs administrations from correctly fulfilling their function of protecting the financial interests of the European Communities;

Whereas given that no legitimate expectations have been created for the interested party, the circumstances of the case have not shown the competent authorities to have made an error not detectable by the person liable for payment within the meaning of Article 5(2) of Regulation (EEC) No 1697/79;

Whereas in this case even if it had been found that an error within the meaning of Article 5(2) of Regulation (EEC) No 1697/79 had occurred, it would have to be considered that the error could reasonably have been detected by the interested party; whereas the latter argued that a change had taken place in the tariff classification of dried plants involved in previous customs transactions; whereas in order to find out whether the dried plants in question fell within Combined Nomenclature heading 0603 or Combined Nomenclature heading 0604, a detailed examination had to be made of all the types of plant declared for free circulation by the interested party over a period of several preceding years; whereas to that end the precise characteristics of each of the plants imported had to be determined; whereas it should have been clear to the interested party that distinguishing between the two tariff headings solely on the basis of the descriptions on the customs declarations and invoices could not produce a classification which was not open to challenge, and that the classification was therefore liable to be reviewed, provided the prescription period was adhered to;

Whereas in this case it is justified to take action for the recovery of the import duties,

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of XXXXX which are the subject of request by Germany dated 10 November 1998 shall be recovered.

Article 2

This decision is addressed to Germany.

Done at Brussels, 15-9-1999

For the Commission
Member of the Commission