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REC 03/06

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28-8-2007
C(2007)3988

NOT FOR PUBLICATION

COMMISSION DECISION

Of 28-8-2007

**finding that it is justified to waive post-clearance entry in the accounts of import duties
in a particular case**

(Only the French text is authentic)

(Request submitted by the French Republic)

(REC 03/06)

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(REC 03/06)

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 Code¹, as last amended by Regulation (EC) No 1791/2006²,

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92³, as last amended by Regulation (EC) No 214/2007⁴,

¹ OJ L 302, 19.10.1992, p. 1.

² OJ L 363, 20.12.2006, p. 1.

³ OJ L 253, 11.10.1993, p. 1.

⁴ OJ L 62, 1.3.2007, p. 6.

Whereas:

- (1) By letter dated 10 November 2006, received by the Commission on 16 November, France asked the Commission to decide, under Article 220(2)(b) of Regulation (EEC) No 2913/92, whether waiving the entry of import duties in the accounts was justified in the following circumstances.
- (2) In 1996 a French firm began importing a product known as ascorbic acid-2-glucoside (AA2G), which it consistently declared under tariff heading 2936 27 00 of the Combined Nomenclature (CN), which is exempt from customs duties. This product is described as a provitamin.
- (3) Throughout the time in which the imports took place, the French customs authorities accepted the declarations under tariff heading 2936 27 00. This customs classification was confirmed to the firm on two occasions when samples were sent to the customs laboratory: the first concerned the import operation of 7 August 1998 and the second that of 18 February 2002.
- (4) On 15 January 2003 a subsidiary of the group to which the firm belongs obtained from the German authorities a binding tariff information notice (BTI) classifying the same product under tariff heading 2940 00 90 of the CN, which is subject to customs duties. The firm was informed of the adoption of this BTI. The BTI in question ceased to be valid from 1 January 2004 owing to an amendment to the Combined Nomenclature that took effect from this date. This amendment invalidated the BTI issued by the German authorities.
- (5) In March 2003, following a request for a BTI by the UK subsidiary of the same group, the UK customs authorities classified AA2G under tariff heading 2936 27. Two years later, they invalidated this BTI, acknowledging that the heading used by the German authorities in January 2003 was in fact the correct heading.
- (6) In May 2003 the German authorities informed the French authorities of the results of an inspection carried out at the German subsidiary and of their view that the product belonged in heading 2940. The French authorities then launched an investigation into the firm's operations, visiting its premises in October and December 2003. During the December 2003 visit they took samples of the product in question.

- (7) Following a series of exchanges with the German and UK administrations, the French administration finally decided that AA2G should be classified under tariff heading 2940 00 of the nomenclature of the Harmonised System. Consequently, the French authorities decided that the imports had engendered a customs debt and, on 3 November 2005, informed the firm that the amount of the customs debt not time-barred was XXXXXX.
- (8) Citing its good faith and the errors on the part of the competent authorities which it could not have detected, the firm has asked that post-clearance entry of the import duties in the accounts be waived under Article 220(2)(b) of Regulation (EEC) No 2913/92. In its view, waiving post-clearance entry is also justified for the following reasons: the BTI issued by the German authorities was invalidated on 1 January 2004; the firm demonstrated considerable diligence by having the UK subsidiary of the same group request a BTI for the same product; the firm could not have known that the French authorities would, following the check they carried out in October 2003, finally change the classification the firm had been using; lastly, the firm considers that the classification was not complicated and maintains that the product belonged in heading 2936 27 00.
- (9) Pursuant to Article 871 of Regulation (EEC) No 2454/93, the firm stated that it had seen the dossier submitted to the Commission by the French authorities and had nothing to add.
- (10) By letter dated 26 February, received by the firm on 27 February, the Commission informed the firm that it intended to take a decision which would be unfavourable for the firm with regard to the duties on imports subsequent to 15 January 2003, the date on which the German authorities issued a BTI classifying AA2G under heading 2940 00 90.
- (11) By letter dated 19 March 2007, received by the Commission the same day, the firm gives its reaction to the Commission's objections.
- (12) The administrative procedure was therefore suspended for one month in accordance with Article 873 of Regulation (EEC) No 2454/93.

- (13) In accordance with Article 873 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met to examine the case on 29 June 2007 within the framework of the Customs Code Committee - Repayment Section.
- (14) Firstly, it should be pointed out that the firm, by arguing that the imported goods should actually be classified in the heading in which the firm declared them and not that applied by the customs authorities, is contesting the very existence of the customs debt. Contesting the debt in this way falls outside the scope of the procedure for waiving the post-clearance recovery of the duties on the basis of Article 220(2)(b) and the procedure for remission or repayment on the basis of Article 239 of Regulation (EEC) No 2913/92. It is for the Member States, not the Commission, to determine whether a debt has been incurred and, if so, the amount of the debt. Furthermore, the Court of Justice has consistently ruled that the purpose of Commission decisions under the procedures for waiving post-clearance entry in the accounts or remission/repayment on an equitable basis is not to determine [whether](#) a [customs](#) debt has [been incurred](#) or the size of the debt⁵. Any operator who does not recognise the existence of a customs debt must challenge the decision establishing that debt before the national courts in accordance with Article 243 of Regulation (EEC) 2913/92.
- (15) Under Article 220(2)(b) of Regulation (EEC) No 2913/92, post-clearance entry in the accounts is 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.
- (16) The Court of Justice of the European Communities has consistently ruled that the legitimate expectations of a trader are protected only if the competent authorities themselves gave rise to those expectations.

⁵ See cases Sportgoods (case C-413/96, 24.9.1998), Kia Motors (case T-195/97, 16.7.1998) and Hyper Srl (case T-205/99, 11.7.2002).

- (17) The file shows that the French authorities did indeed commit an error in confirming on two occasions the tariff heading declared by the firm and in accepting a large number of declarations containing the incorrect tariff heading.
- (18) The Commission is therefore of the opinion that the authorities committed an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (19) As the Court of Justice of the European Communities has consistently ruled, when determining whether the person concerned could reasonably have detected the customs authorities' error, [account must be taken of the nature of the error and the professional experience and diligence of the person concerned](#)⁶.
- (20) As regards the firm's professional experience, the file shows that the firm, which has for many years been carrying out import operations requiring it to apply customs legislation, is to be considered to be an experienced operator.
- (21) As regards the nature of the error, the Court of Justice of the European Communities has ruled that it should be assessed among other things in terms of the complexity of the legislation concerned and the length of time over which the authorities persisted in their error.
- (22) According to the request submitted by the French authorities, these authorities persisted in their error from August 1998, the date on which the imported goods were first analysed by a customs laboratory, to the end of the operations in question in 2005.
- (23) As regards the complexity of the rules, the following point should be made.
- (24) AA2G is a derivative of ascorbic acid (vitamin C) and glucose (a sugar). It could be classified either under heading 2936 27 00 as vitamin C and its derivatives or under heading 2940 00 00 as "sugar ethers, sugar acetals and sugar esters, and their salts, other than products of heading 2937, 2938 or 2939". By virtue of Note 3 to Chapter 29, the product therefore belongs in heading 2940 00 00. As long ago as 1992 the wording of heading of 2940 already read "sugars...; sugar ethers, sugar acetals and sugar esters, and their salts, other than the products for headings 2937, 2938 and 2939"

⁶ See ruling of 26.6.1990 in Case C-64/89 *Deutsche Fernsprecher GmbH*.

and did not exclude products of heading 2936. At first glance, the classification of AA2G does not therefore seem complicated.

- (25) The HS Explanatory Notes refer to provitamins D (2936) and provitamins A (chapter 32) but not to provitamins C. They do not contain any exclusion of provitamins from heading 2940 either.
- (26) It is nevertheless true that the passage from the "Nomenclature pour la DEB (Nomenclature for the DEB)"⁷ taken from the French customs website and cited on page 7 of the applicant's comments attached to the letter of application of 10 November 2006 wrongly states that provitamins are excluded from heading 2940. In its letter of 19 March 2007, the firm stresses that this statement was still on the website in question on 1 March 2007.
- (27) Moreover, products comparable to AA2G have not been classified under heading 2940 in the ECICS⁸ database (CUS 32666 and 32667).
- (28) Furthermore, when the firm asked the UK subsidiary of the same group to request a BTI from the UK authorities for the product, the UK authorities, in March 2003, classified the product in heading 2936 27 00 before invalidating the BTI two years later because they believed AA2G actually belonged in heading 2940 00.
- (29) Lastly, the BTI issued by the German authorities in 2003 was challenged in the competent court, and the Düsseldorf *Finanzgericht* found on 29 November 2006 that the BTI issued by the German authorities on 15 January 2003 was unlawful.
- (30) In view of the above, the rules concerned in the case should be considered complicated.
- (31) As regards the diligence demonstrated by the firm, the following point should be made.
- (32) The file submitted by the French authorities and, in particular, the report drawn up by customs officers on 3 November 2005 show that the applicant knew that the customs authorities had taken samples of AA2G for analysis on 1 December 2003. Though the

⁷ [Déclaration d'Echanges de Biens/Declaration of Trade in Goods.](#)

⁸ [ECICS: European Customs Inventory of Chemical Substances.](#)

French authorities did not notify the firm of the amount of the customs debt until June 2005, there is nothing in the file to suggest that the French authorities gave the firm any cause whatsoever to believe that the control had been terminated at the end of 2003. The firm cannot therefore reasonably have been surprised when, by letter of 23 June 2005, the French authorities stated their view that AA2G should be classified under heading 2940 00 and, on 3 November 2005, informed it of the amount of the customs debt.

- (33) Similarly, the fact that the BTI issued by the German authorities in January 2003 ceased to be valid from 1 January 2004 could not have confirmed the firm's belief that the tariff heading it was using was valid; simply reading the tariff nomenclature applicable from 1 January 2004 shows that the heading for which the BTI was issued (2940 00 90) had been deleted, whereas heading 2940 00 continued to exist. Until 31 December 2003 heading 2940 00 contained two subdivisions: 2940 00 10 and 2940 00 90. From 1 January 2004 these two subdivisions were merged into heading 2940 00 00. This invalidation therefore had no bearing on the fact that the product was covered by heading 2940 00 and the firm should have realised this. No legitimate expectations could be derived from the invalidation of the BTI in question.
- (34) However, in view of the specific assurances received from the French authorities, whose customs website was still excluding the product in question from heading 2940 00 on 1 March 2007, and in view of the complexity of the legislation, the firm cannot be considered to have been negligent.
- (35) The circumstances in this case therefore reveal an error on the part of the French customs authorities themselves which could not have been detected by an operator acting in good faith, within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (36) It is also clear from the request submitted by the French authorities that it must be accepted that the firm acted in good faith.
- (37) It is likewise clear from that request that the firm complied with all the provisions laid down by the legislation in force as regards the customs declaration.

(38) Post-clearance entry of import duties in the accounts is therefore not justified in this case,

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of XXXXX which are the subject of the French Republic's request of 10 November 2006 shall not be entered in the accounts.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 28-8-2007

For the Commission
László KOVÁCS
Member of the Commission