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**REM 09/02**

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28-12-2004  
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NOT FOR PUBLICATION

**COMMISSION DECISION**

**Of 28-12-2004**

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

(Only the German text is authentic.)

**(Request submitted by Germany)**

**(REM 09/02)**

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**COMMISSION DECISION**

**Of 28-12-2004**

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

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**(REM 09/02)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code,<sup>1</sup> as last amended by the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded,<sup>2</sup>

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,<sup>3</sup> as last amended by Regulation (EC) No 2286/2003,<sup>4</sup>

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<sup>1</sup> OJ L 302, 19.10.1992, p. 1.

<sup>2</sup> OJ L 236, 23.9.2003, p. 33.

<sup>3</sup> OJ L 253, 11.10.1993, p. 1.

<sup>4</sup> OJ L 343, 31.12.2003, p. 1.

Whereas:

- (1) By letter dated 30 April 2002, received by the Commission on 13 May 2002, Germany asked the Commission to decide whether the remission of import duties was justified under Article 239 of Council Regulation (EEC) No 2913/92 in the following circumstances.
- (2) Under the second paragraph of Article 2 of Commission Regulation (EC) No 1335/2003 of 25 July 2003<sup>5</sup> amending Regulation (EEC) No 2454/93, 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 Regulation (EEC) No 2454/93 refer to that Regulation as last amended by Commission Regulation (EC) No 881/2003 of 21 May 2003<sup>6</sup>.
- (3) A German firm was authorised on 19 February 1992 to operate a private type C customs warehouse under customs seal. By letter of 14 January 1994 the firm informed the competent main area customs office that in the night of 6-7 January 1994 its warehouse had been burgled and 3 233 715 cigarettes, placed under customs warehousing arrangements, had been stolen.
- (4) The competent German customs authorities therefore sent the firm a recovery notice on 3 February 1994 claiming the duties and other charges for which the firm had become liable following the removal of the goods from customs supervision. Import duties of DEM XXXXX (EUR XXXXXX) were charged.

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<sup>5</sup> OJ L 187, 26.7.2003, p. 16.

<sup>6</sup> OJ L 134, 29.5.2003, p. 1.

- (5) By letter of 11 May 1994 the firm sent the competent main area customs office a request for remission of duties in the above amount. The office rejected the request for remission by notice of 14 October 1994. The firm then brought an action for annulment before the competent *Finanzgericht* [Finance Court] concerning the customs office's refusal to submit the request for remission to the European Commission in accordance with Community law. The action was dismissed and the firm appealed against this decision. In the national court to which the case was referred, the firm maintained that the court of first instance had wrongly interpreted Article 905 of Regulation (EEC) No 2454/93. The national court requested a preliminary ruling from the European Court of Justice on two questions: the scope of Articles 900(1)(a) and 905(1) of Regulation (EEC) No 2454/93 and the interpretation of the term "special situation". After the Court had delivered its [ruling](#),<sup>7</sup> the *Bundesfinanzhof* [Federal Finance Court], in a ruling of 21 May 1999 (V II R 106/95), annulled the notice and decision on the firm's request from the main area customs office and a ruling of the competent *Finanzgericht*; the *Bundesfinanzhof* also asked the competent main area customs office to forward the dossier to the Commission for examination under Article 239 of Regulation (EEC) No 2913/92.
- (6) The German authorities therefore forwarded the dossier to the Commission, asking it to decide whether remission of duties in the amount of DEM XXXX (EUR XXXXX) was justified under Article 239 of Regulation (EEC) No 2913/92.
- (7) In support of the application submitted by the competent German authorities and in accordance with Article 905 of Regulation (EEC) No 2454/93, the firm's lawyers stated that they had seen the dossier and added a number of comments which were annexed to the dossier sent to the Commission.
- (8) By letter dated 2 December 2002, received by the firm on 4 December 2002, the Commission notified the firm, through its lawyers, of its intention to withhold approval and explained the reasons for its decision.
- (9) By letter dated 3 January 2003, received by the Commission on the same date, the firm's lawyers responded to the Commission's objections.

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<sup>7</sup> *Woltmann* judgment of 25.2.1999 (Case C 86/97).

- (10) In accordance with Article 907 of Regulation (EEC) No 2454/93, the time limit of nine months for the Commission to take a decision was therefore extended for one month.
- (11) By letter of 10 January 2003 the Commission requested further information from the German authorities. By letter of 25 October 2004, received at the Commission on 3 November 2004, the German authorities supplied this information.
- (12) The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93, between 11 January 2003 and 3 November 2004.
- (13) In accordance with Article 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 1 December 2004 within the framework of the Customs Code Committee (Repayment Section) to consider the case.
- (14) 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.
- (15) The Court of Justice of the European Communities has consistently taken the view that these provisions represent a general principle of equity designed to cover a special 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.
- (16) The Courts have [consistently ruled](#)<sup>8</sup> that in using its discretion to assess whether the conditions for granting remission or repayment have been fulfilled, the Commission must balance the Community interest in ensuring that the customs provisions are respected against the interest of the importer acting in good faith not to suffer harm beyond normal commercial risk.

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<sup>8</sup> 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).

- (17) In this case the customs debt was incurred because goods were removed from customs supervision and, as holder of the authorisation to operate the customs warehouse, the firm is therefore liable for that debt.
- (18) The firm considers that the theft of which it was victim placed it in a special situation in comparison with other operators carrying out the same activity, particularly in view of the warehouse management conditions, the nature of the goods stolen, the geographical area where the warehouse was located, the fact that the stolen goods could not be insured and the fact that recovery of the import duties would put the very survival of the firm at risk.
- (19) It should first be noted that the fact that the firm acted in good faith, as the German authorities believe, does not in itself constitute an exceptional situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (20) The following points should be made about the firm's arguments regarding the particular nature of the security measures taken for its warehouse:
- (21) The customs warehouse was locked with two different keys, one of which was held only by the customs authorities. Other measures had also been taken: a customs seal had been attached and twenty-four hours notice was required for entry into the warehouse. In the firm's view these requirements were not at all customary. Yet despite these enhanced security measures a theft took place. The firm, which fulfilled all the conditions required of it, considers that it cannot therefore be said to have failed in its obligations and that it must be acknowledged to be in a special situation in comparison with other operators. Furthermore, it helped to clarify the situation by carrying out its own investigation after the robbery.

- (22) In the Commission's view a theft, whether an isolated incident or carried out by organised crime, falls within the [normal commercial risk](#)<sup>9</sup> to be borne by those subject to the obligations arising from the use of the customs arrangement under which goods are placed. Theft must thus be seen as a fairly common occurrence which can happen when goods are placed under certain customs arrangements; it does not therefore constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92. It is therefore up to traders to take the necessary measures to equip them to deal with the risks of post-clearance recovery, and even the fact that the amounts recovered are large is part of the [normal commercial risk](#) to be borne by traders.<sup>10</sup>
- (23) The application of enhanced security measures does not relieve the firm of its obligations as holder of the authorisation to operate a customs warehouse. Moreover, the firm had initially applied for an authorisation for a type D warehouse, and had been refused by the authorities, who considered that because of the high amount of duties and other charges that might be incurred, the only option was a type C customs warehouse under customs seal. The firm should therefore have been fully aware of the risk involved in taking on the warehousing of cigarettes.
- (24) The firm does not consider that the theft it suffered can be compared to a theft taking place under transit arrangements since in its view transit conditions are very different from the conditions for keeping goods in customs warehousing. It therefore believes that the theft went beyond the normal commercial risk that it should be expected to bear.

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<sup>9</sup> *Ministero delle Finanze v Esercizio Magazzini Generali SpA* judgment of 5 October 1983 (Joined cases 186/82 and 187/82) ECR 2951.

<sup>10</sup> *Faroe Seafood and Føroya Fiskasøla* judgment of 14 May 1996 (Joined cases C-153/94 and C-204/94), ECR I-2465.



- (25) The Commission does not consider that the commercial risk borne by the principal in the transit procedure is less than that borne by the holder of a customs warehouse authorisation. Moreover, the principal's situation in the transit procedure is comparable to that of the holder of a customs warehouse authorisation both regarding the goods themselves (under customs supervision) and regarding the [liability of the holder](#) of the procedure.<sup>11</sup> It is therefore legitimate to treat both situations in the same way.
- (26) The following points should be made regarding the firm's arguments about the nature of the stolen goods.
- (27) The firm believes that the fact that the cigarettes are not identifiable could constitute a special situation. Article 900(1)(a) of Regulation (EEC) No 2454/93 provides that import duties are to be repaid or remitted when "non-Community goods placed under a customs procedure involving total . . . relief from import duties . . . are stolen, provided that the goods are recovered promptly and placed again in their original customs situation in the state they were in when they were stolen." However, the firm argues, unidentifiable goods could never objectively fulfil these conditions, meaning that remission or repayment has to be systematically refused, despite the fact that in this case the cigarettes concerned may have been – although this has not been proven – among those seized by the customs authorities.
- (28) The Commission does not consider this argument relevant since any operators storing goods that are not easily identifiable (as might be the case with cigarettes in certain circumstances) would find themselves in the same situation if they were the victims of theft; the situation is thus an objective one, affecting an indeterminate number of operators. This does not therefore constitute a special situation.

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<sup>11</sup> *Aslantrans* judgment of 12 February 2004 (Case T-282/01).

- (29) The firm contends that, in view of the technical characteristics of the stolen cigarettes, to insist on payment of the customs debt would be to impose an incommensurate burden. The cigarettes came from a stock constituted following a seizure carried out by an East German customs office and under German food law would not have been eligible for the certificate required for cigarettes and beverages, and so could not be marketed in Germany. Therefore, if the theft had not taken place, payment of import duties would not have been required. The firm also maintains that even if the stolen goods were disposed of among final consumers in Germany, these could only have been members of the Russian armed forces still stationed in Germany at the time, who were subject to special customs regulations. The firm argues that these circumstances do indeed constitute a special situation.
- (30) This argument is not relevant since theft does not mean that the goods stolen are not for sale; on the contrary, the Court of Justice of the European Communities has [ruled](#)<sup>12</sup> that in the event of theft it may be assumed that the goods, whatever their nature, pass into the Community commercial circuit. The firm's position must therefore be rejected and it must be judged that no special situation exists on these grounds.
- (31) The firm considers that it was in a special situation because of the geographical location of the warehouse. It contends that the risk of theft was particularly high as the warehouse was located in the new German *Länder* where the State's powers of enforcement were weak. Moreover, since it was the only economic operator engaging in cigarette warehousing on this territory, the firm argues that its situation could not be compared to that of other economic operators.

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<sup>12</sup> *Esercizio Magazzini Spa and Mellina Agosta* judgment of 5 October 1983 (Joined Cases 186 and 187/82) ECR 2951.

- (32) This argument based on the connection between an activity and a specific geographical area is one that could affect an indeterminate number of economic operators carrying out the same activity. Therefore, even if the firm was the only one actually carrying out this activity in the new *Länder*, this is an objective situation and as the Court of Justice of the European Communities has [ruled](#),<sup>13</sup> does not as such constitute a special situation. Moreover the firm was not the only holder of a warehousing authorisation in the new *Länder*.
- (33) During the procedure the firm also invoked an argument relating to the impossibility of obtaining insurance cover for the duties on the goods concerned.
- (34) It held that an uninsurable situation could not be described as normal, and was therefore a special situation. It also maintained that there was no legal obligation to insure the goods.
- (35) In this connection, the following points should be made.
- (36) In general terms the Commission does not dispute that it is up to the economic operator to decide whether or not to take out insurance, whatever the cover; in this case it has not been firmly established whether it was possible to take out insurance for any duties that might become payable; be that as it may, in the Commission's view, if the firm really was unable to take out insurance, it nevertheless continued its activity in full knowledge of this circumstance. The risk of theft must therefore also be considered normal commercial risk to be borne by the firm in this case.
- (37) Lastly, the firm cites as possible grounds for a special situation the fact that it faces likely ruin if the debt is enforced.
- (38) In this connection it should be pointed out that the Court has [consistently ruled](#)<sup>14</sup> that the purpose of Article 239 of Regulation (EEC) No 2913/92 is not to protect operators from the risk of bankruptcy. This does not therefore constitute a special situation within the meaning of Regulation (EEC) No 2913/92.

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<sup>13</sup> *Coopérative agricole d'approvisionnement des Avirons* judgment of 26 March 1987 (Case 58/86), ECR 01525.

<sup>14</sup> *Méhibas* judgment of 18 January 2000 (Case T-290/97) ECR II-00015.

- (39) In the opinion of the Commission the circumstances cited by the firm and set out above do not represent a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (40) The Commission has found no other factors constituting a special situation.
- (41) The remission of import duties requested is not therefore justified in this case,

HAS ADOPTED THIS DECISION :

*Article 1*

Remission of import duties in the sum of EUR XXXXX (DEM XXXXX) requested by Germany on 30 April 2002 is not justified.

*Article 2*

This Decision is addressed to Germany.

Done at Brussels, 28-12-2004

*For the Commission*

*László KOVÁCS*

*Member of the Commission*