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EUROPEAN COMMISSION

Brussels, 26-5-2010  
C(2010)3224

**COMMISSION DECISION**

**Of 26-5-2010**

**finding that remission of one amount of import duties and repayment of another amount of import duties are justified in a particular case**

**(REM 05/04)**

**(Only the Portuguese text is authentic)**

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code<sup>1</sup>, and in particular Article 239 thereof,

Whereas:

- (1) By letter of 27 September 2004, received at the Commission on 1 October 2004, the Portuguese authorities asked the Commission whether remission of one amount of duties and repayment of another amount of duties were justified in the following circumstances.
- (2) Between 14 April and 12 October 1994 an employee of a Portuguese firm drew up 68 declarations placing consignments under the Community external transit procedure, the firm being the principal for these transit operations. 64 of the declarations concerned tobacco and 4 concerned non-denatured ethyl alcohol. Transport of the goods was entrusted to a haulier independent of the firm.
- (3) In some cases Copies No 5 of the (T1) transit declarations were not returned to the office of departure. In other cases they were returned with falsified stamps and signatures. Neither the documents nor the goods were presented at the office of destination.

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

- (4) Since the transit procedure was not discharged, a customs debt was incurred under Article 203 of Regulation (EEC) No 2913/92 and the customs authorities asked the firm to pay duties of €XXXXX. The firm requested remission of €XXXXX and repayment of €XXXXX under Article 239 of Regulation (EEC) No 2913/92.
- (5) In support of the request submitted by the Portuguese authorities the firm stated, in accordance with Article 905 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code<sup>2</sup>, that it had seen the dossier which the Portuguese authorities had sent to the Commission and had nothing to add.
- (6) In a letter of 23 December 2004, received by the firm on 28 December 2004, the Commission informed the firm of its intention to refuse the request and stated its reasons.
- (7) In accordance with Article 907 of Regulation (EEC) No 2454/93, the nine-month period within which a decision has to be taken by the Commission was, therefore, extended by one month.
- (8) By letter of 19 January 2005, received by the Commission on the same day, the firm expressed its position on the Commission's objections. It stated that in its opinion the competent authorities had committed an error and the case should therefore be examined not only under Article 239 of the Customs Code but also under Article 236 in conjunction with Article 220(2)(b).
- (9) 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 22 March 2005 within the Customs Code Committee, Repayment Section.
- (10) In its decision C(2005) 2040 of 6 July 2005, the Commission decided that the remission of one amount of import duties and the repayment of another amount were not justified. The Commission based its decision on its finding that the circumstances of the case were not such as to establish the existence of a special situation.

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<sup>2</sup> OJ L 253, 11.10.1993, p. 1.

- (11) In their letter of 12 August 2005, the Portuguese authorities notified the firm that the remission and the repayment had been denied.
- (12) The firm then asked the Court of First Instance to annul the findings made in the Commission's decision of 6 July 2005 finding that the remission and the repayment were not justified.
- (13) In its judgment of 23 September 2009, in the case T-385/05 (Transnáutica), the Court of First Instance annulled the Commission decision insofar as that decision found that the circumstances of the case did not constitute a special situation.
- (14) The Commission must act on this ruling and re-examine, in the light of the Court's judgment, the applicability of Article 239 of Regulation No 2913/92 to this case. The time limits referred to in Articles 907 and 909 of Regulation (EEC) No 2454/93 apply from the date of that judgment.
- (15) 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 consider the case on 19 October 2009 within the framework of the Customs Code Committee, Customs Debt and Guarantees Section.
- (16) 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 party concerned.
- (17) 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.
- (18) Article 94 of the Customs Code requires the principal to provide security in order to ensure payment of any customs debt or other charges which may be incurred in respect of the goods.

- (19) The firm held a comprehensive guarantee for the maximum amount of 8 million Portuguese escudos, i.e. around 40 000 euros. This amount appeared on the firm's comprehensive guarantee certificate dated 9 December 1993.
- (20) It must be noted that the Portuguese customs authorities accepted an insufficient guarantee for the 68 declarations in question.
- (21) Had the Portuguese customs authorities checked, when the Community transit declarations were lodged, whether the amount of duties and other charges that might be incurred on each consignment was covered by the comprehensive guarantee provided by the firm, the 68 declarations could not have been issued.
- (22) The Portuguese customs authorities should have required the firm provide an additional guarantee – necessary in view of the large customs debt likely to be incurred – or should have refused to issue the declarations. Had the Portuguese customs refused the guarantee on the grounds that the amount was insufficient and required an additional guarantee, not only would the declarations not have been issued, the firm would have been able to discover the fraud committed by its employee.
- (23) As the Court remarks, "an error in checking the guarantee, on issuing of the T1 declaration, will have a definite impact on the capacity of the principal to pay the customs debt that is likely to be incurred. The intervention of the relevant customs authorities, on issuing of the T1 declaration, is a fundamental step in the procedure that can bring to light irregularities that may have occurred." The failure of the customs authorities to check the guarantee at an early and fundamental stage of the external Community transit procedure led to the issuing of the 68 transit declarations not covered by the guarantee certificate and to the perpetration of fraud without the firm's knowledge.
- (24) It must therefore be concluded that the lack of diligence on the part of the Portuguese customs authorities in the exercise of their duty to conduct checks prior to issuing T1 declarations, particularly as regards setting and checking the amount of the comprehensive guarantee, undermined the verification system for external Community transit established by the Customs Code and its Implementing Regulation and, consequently, deprived the firm of a concrete opportunity to detect the fraud before it was committed.

- (25) The first condition referred to in Article 239 of Regulation (EEC) No 2913/92 is therefore fulfilled.
- (26) It is also clear from the request submitted by the Portuguese authorities that the firm did not engage in any deception or obvious negligence.
- (27) Remission and repayment of import duties are therefore justified in this case.
- (28) Where special circumstances warrant repayment or remission, Article 908 of Regulation (EEC) No 2454/93 authorises the Commission to determine the conditions under which the Member States may repay or remit duties in cases involving comparable issues of fact and law.
- (29) Cases comparable to this one in fact and law are repayment or remission requests lodged within the legal time limits in respect of Community transit operations carried out prior to 1 January 2001, where those transit operations were carried out in circumstances comparable in fact and law to those that gave rise to this case. There must have been no deception or obvious negligence on the part of the importers,

HAS ADOPTED THIS DECISION:

*Article 1*

The remission of import duties in the sum of EUR XXXX requested by Portugal on 27 September 2004 is justified. The repayment of import duties in the sum of EUR XXXX requested by Portugal on the same date is justified.

*Article 2*

This Decision is addressed to Portugal.

Done at Brussels, 26-5-2010

*For the Commission*  
*Algirdas ŠEMETA*  
*Member of the Commission*