EN

REM 08/00

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 7-10-2002
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NOT FOR PUBLICATION

COMMISSION DECISION

of 7-10-2002

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

(only the Dutch version is authentic)

(request submitted by the Kingdom of the Netherlands)

(REM 08/00)

FR

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(REM 08/00)

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 of 2 July 1993 laying down provisions for the implementation of Regulation (EEC) No 2913/92,[3] as last amended by Regulation (EC) No 444/2002,[4] and in particular Article 907 thereof,

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 68, 12.3.2002, p. 11.

Whereas:

(1) By letter dated 10 May 2000, received by the Commission on 24 May 2000, the Netherlands asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether the remission of import duties is justified in the following circumstances.

(2) From January to August 1995 a Netherlands firm made out, as principal, external Community transit documents for consignments of meat to Morocco. Fourteen of these declarations were not properly discharged. In response to a request from the Netherlands authorities, the Spanish authorities stated that the documents submitted to them covered transit operations that had not been properly discharged and bore false stamps and signatures.

(3) Since the transit documents in question had not been properly discharged, the Netherlands authorities considered the goods to have been removed from customs supervision. This gave rise to a customs debt, in accordance with Article 203 of Regulation (EEC) No 2913/92. The competent Netherlands authorities therefore demanded that the firm pay the import duties owing.

(4) The Netherlands authorities subsequently granted the firm remission in respect of two declarations which they found to meet the conditions laid down.

(5) In this case the firm is requesting remission of the customs debt for the transit operations carried out after 23 March 1995 (eight operations over the period 25 April-7 July 1995), a total of XXXXXXXXX.

(6) According to the firm, the remission of duties in this case is justified for a number of reasons. Firstly, it claims that the Netherlands customs authorities should have been aware of suspected irregularities at the time of the eight transit operations in question. Had the authorities passed on this information within a reasonable period, which the firm puts at 14 days, it could then, it argues, immediately have refused to act as principal for other transit operations on behalf of the same client. The firm also considers that it would then have been able to recover the cost of duties for the transit operations already carried out by seizing goods of the client still at its disposal. Lastly, it argues that there was no deception or obvious negligence on its part.

(7) In support of the request submitted by the Netherlands authorities, the firm indicated that, in accordance with Article 905 of Regulation (EEC) No 2454/93, it had seen the dossier the authorities had sent to the Commission. It stated its position and made comments, which were forwarded to the Commission by the Netherlands authorities in their letter of 10 May 2000.

(8) By letters dated 4 July 2000, 24 November 2000 and 22 November 2001, the Commission asked the Netherlands authorities for further information. That information was provided by letters of July 2000, August 2001 and August 2002, received by the Commission on 4 August 2000, 27 August 2001 and 6 August 2002 respectively. The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93, between 5 July 2000 and 4 August 2000, 25 November 2000 and 27 August 2001 and 23 November 2001 and 6 August 2002.

(9) By letter dated 11 October 2001, received on 15 October 2001, the Commission notified the firm of its intention to reject the application and explained the grounds for its decision.

(10) By letter dated 9 November 2001, received by the Commission on the same date, the firm responded to the Commission's objections. It stood by its view that the circumstances constituted a special situation of the kind referred to in Article 239 of Regulation (EEC) No 2913/92 involving neither deception nor obvious negligence on its part. The firm explained that the competent administration should have informed it that there was a risk of fraud on 23 March 1995 and argued that the administration's failure to do so had given rise to a special situation. The firm also deployed a new argument for the existence of a special situation, one not mentioned in the Netherlands administration's request of 10 May 2000. In its letter of 9 November 2001 the firm alleged evidence to suggest that Spanish customs officials had been involved in the fraud and that the matter had yet to be investigated. The firm argued that this constituted a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(11) The firm considers that it has not been obviously negligent and argues, on the basis of the judgment of the Court of First Instance in Case T-42/96,[5] that falling victim to a fraud to which it was not a party goes beyond an operator's normal commercial risk.

(12) The administrative procedure was suspended, in accordance with Article 907 of Regulation (EEC) No 2454/93, between 15 October and 9 November 2001.

(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 17 September 2002 within the framework of the Customs Code Committee (Section for General Customs Rules/Repayment) to consider the case.

[5] Case T-42/96 Eyckeler & Malt AG v Commission of the European Communities [1998] ECR II-00401.

(14) Under Article 239 of Regulation (EEC) No 2913/92, import duties may be repaid or remitted in special situations other than those laid down 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 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.

(16) In this case the competent Netherlands authorities took the view that the transit documents had not been properly discharged, that the goods had therefore been removed from customs supervision and that the firm had thereby incurred a customs debt.

(17) As 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 by third parties. That is part of the principal's commercial risk.

(18) The firm, however, believes that its predicament has to be considered a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92 because the Netherlands customs authorities were already aware of suspected irregularities at the time at which the declarations were made and that, as the Court of Justice concluded in Case C-61/98,[6] this fact constituted a special situation.

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[6] Case C-61/98 De Haan Beheer BV v Inspecteur der Invoerrechten en Accijnzen te Rotterdam [1999] ECR I-05003.

(19) In Case C-48/98 the Court of Justice ruled that the remission of import and export duties,[7] which may be granted only under certain conditions and in cases specifically provided for, constitutes an exception to the normal import and export procedure and, consequently, the provisions which provide for such repayment or remission are to be interpreted strictly.

(20) In Case C-61/98 the Court of Justice ruled that "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".

(21) This case does not involve a situation of the kind described by the Court of Justice in its judgment in Case C-61/98. In the situation that gave rise to the above judgment, the customs authorities were already aware, or at least had serious grounds for suspecting, that a Community transit of cigarettes being organised would involve irregularities such as to give rise to a customs debt. Those authorities then deliberately allowed operations they knew to be fraudulent to go ahead. This is not, however, the case here.

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[7] Case C-48/98 Firma Söhl & Söhlke v Hauptzollamt Bremen [1999] ECR I-07877.

(22) The Netherlands authorities did not deliberately allow offences and irregularities to be committed. As it explains in its letter of 8 August 2001, the Netherlands customs administration had to collate data from three different cases, with different principals and goods in some instances, before reaching the conclusion that certain elements of these three cases were part of the same fraud.

(23) The customs centre in Rotterdam had begun by selecting a number of declarations for examination while investigating a fraud involving veal sweetbreads. One of these declarations had been made out by the firm involved in this case. Meanwhile sample checks by the Heerlen customs office revealed that two transit declarations made out by the firm on 8 March 1995 for products other than veal sweetbreads had not been properly discharged. These declarations were forwarded to the Rotterdam investigations departments early in July 1995. At that time the Netherlands customs authorities had yet to make the connection with the first offence detected by the Rotterdam customs centre. The Heerlen customs office subsequently found that another two transit declarations made out by the applicant, this time on 25 April 1995, had not been properly discharged. These declarations were forwarded to the Rotterdam investigations departments in mid-July 1995. On 24 July 1995 a connection was made between all these irregularities.

(24) Accordingly, contrary to the firm's assertions, though the Spanish customs authorities did indeed inform the Rotterdam customs centre that one of the declarations made out by the firm concerned in this case, which had been submitted to them for post-clearance checks, bore false stamps and signatures, this did not mean that the competent Netherlands authorities were aware at that time of the fraud under way.

(25) To invoke a special situation in this case would therefore breach the principle of strict interpretation established by the Court of Justice's ruling in Case C-48/98. The evidence submitted by the Netherlands authorities in this case shows that the competent customs office did not deliberately allow offences or irregularities to be committed. In this case, the Netherlands authorities were alerted by a number of customs centres to irregularities in relation to transit operations. After collating the data they realised that the irregularities concerned the same client and notified the firm. There can therefore be no question of a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(26) As for the firm's claim that it was unable to pass on to its client the cost of the customs duties demanded of it, the Courts have consistently ruled that it is up to traders to take the necessary measures to equip themselves to deal with the risks of post-clearance recovery and the fact that the cost cannot be passed on to their clients.[8] A special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92 did not therefore exist on these grounds.

(27) As for the argument set out by the firm in its letter of 9 November 2001 (an argument which did not figure in the Netherlands' authorities request of 10 May 2000 and was only fleetingly mentioned in the letter of 19 May 1998 from the firm's lawyer annexed to that request), namely the possibility of corruption on the part of Spanish officials giving rise, in the firm's view, to a special situation, the following considerations should be borne in mind.

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[8] Case T-290/97 Mehibas Dordtselaan BV v Commission of the European Communities [2000] ECR II-00015.

(28) Firstly, at the time of the preparation by the Netherlands authorities of the dossier for presentation to the Commission, the firm stated that it had seen that dossier. Yet there was no mention of possible corruption on the part of officials in the Netherlands authorities' request of 10 May 2000, and nor was that line of argument pursued in the documents annexed to that dossier at the firm's request. This argument was not therefore developed in any detail until a very advanced stage in the proceedings. Indeed it is for this reason that the Commission, in follow-up to the firm's letter of 9 November 2001, asked the Netherlands authorities for further information.

(29) The deliberate and active involvement of customs officials in fraud, notably by discharging transit documents where goods have not been presented, would constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(30) The principal's liability for the proper conduct of Community transit operations cannot be expected to extend to cases in which representatives of the customs administration actively assist in committing fraud. Unless the principal is himself an accomplice to the fraud, he can legitimately expect the functioning of the administration not to be undermined by corrupt customs officials.

(31) According to the dossier submitted to the Commission by the Netherlands authorities, the competent national authorities have not formally established that one or more officials acted corruptly or actively participated in committing fraud.

(32) However, the Court of First Instance ruled in Case T-330/99[9] that the Commission was not entitled to limit the scope of its assessment to the possibility of active complicity by a particular customs official and require the applicant to supply, if necessary by producing a document from the competent authorities, formal and definitive proof of such complicity.

(33) In the case in point, the Netherlands customs administration, in the course of its investigation and in accordance with the rules on mutual assistance between the administrative authorities of the Member States, asked the competent Spanish administration, in a number of letters concerning the transit operations in question, for further details concerning the discharge of the relevant documents.

(34) In its replies of 10 July, 17 August and 23 August 1995, the Spanish customs administration explained that both the stamps and the signatures on the transit documents concerned were false.

(35) Examination of the facts in this case, taking account of the information provided by the Spanish administration and the conclusions drawn from it by the Netherlands administration, shows that the only evidence of possible corruption by a Spanish customs official is the fact that the Fiscal Information and Investigation Service (FIOD), in its report of 2 September 1996, states that certain transit documents for operations conducted by the firm (Nos 5102442, 5102443, 5104187 and 5104188) seemed to bear false stamps. The firm infers from the use of the verb "seem" that Spanish officials could have been involved in the fraud.

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[9] Case T-330/99 Spedition Wilhelm Rotermund GmbH v Commission of the European Communities [2001] ECR II-01619.

(36) Firstly, it must be pointed out that two of the documents (Nos 5102442 and 5102443 of 8 March 1995) do not relate to the transit operations conducted after 23 March 1995 for which the firm is seeking remission. These documents are therefore not part of this request. Secondly, the FIOD report of 2 September 1996 only uses the verb "seem" in respect of two of the operations concerned in this case, to wit those covered by documents Nos 5104187 and 5104188. This choice of wording is, moreover, surprising in that the Spanish authorities' letter of 10 July 1995 clearly states that the stamps and signatures on documents Nos 5104187 and 5104188 are false and, in documents subsequent to 2 September 1996 (for instance, their request of 10 May 2000), the Netherlands authorities themselves eventually concluded that the stamps on documents Nos 5104187 and 5104188 and those on all the other transit documents covered by this request were false.

(37) Furthermore, in Case T-330/99 the Court of First Instance ruled, in respect of transit goods not presented at the office of destination, that the return of the T1 document to the office of departure through official channels, like the fact that a letter sent to the office of departure certifying that the T1 document was in order had been written on the Spanish office of destination's headed notepaper, bore a registration number that appeared to be in order and had been posted using the office's franking machine, was a fraud that could only be explained by the active complicity of an employee of the Spanish office of destination or by bad organisation at that office which allowed a third party to use that administration's equipment. There was therefore circumstantial evidence suggesting that either an official was an accomplice to fraud or that the organisation of the office of destination was flawed.

(38) This is not, however, the case here. Though the T1 documents in this case were returned to the office of departure, there was no official letter of the kind described in the judgment in Case T-330/99 certifying that the discharge documents were in order. In the case in point, no use was made of the Spanish office of destination's official letterhead or its franking machine.

(39) Also, contrary to the firm's assertions, the apparent failure of the Spanish authorities to investigate whether Spanish officials were involved in the fraud concerned is not evidence of fraud or a shortcoming on the part of the Spanish authorities. Having concluded that all the stamps and signatures concerning the transit operations in question were false, they had no reason to open a corruption investigation.

(40) It cannot therefore be concluded from the evidence in the dossier provided by the Netherlands authorities that one or more customs officials of the European Community were involved in fraud or that the flawed organisation of the office of destination enabled a third person to use the equipment of the administration in question. Moreover, contrary to the situation examined by the Court of First Instance in Case T-330/99, there is no further evidence to corroborate the existence of such complicity or shortcomings.

(41) As for the firm's argument, based on the Court of First Instance's ruling in Case T-42/96, that falling victim to a fraud to which it was not a party goes beyond an operator's normal commercial risk and so constitutes a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92, the following points should be made.

(42) In that judgment the Court of First Instance considered that the circumstances of the case exceeded the operator's normal commercial risk because quotas had been greatly exceeded not only as a result of the falsification of certificates of authenticity but as a result of the attitude of the Commission, which had failed in its duty to supervise and monitor application of the quota in 1991 and 1992. In other words, it is not falsification alone which caused the normal commercial risk to be exceeded but the fact that the Commission had, by failing in its duty to supervise and monitor the application of the quota, permitted the widespread falsification of documents.

(43) The Commission was directly involved in that case as the administrator of a tariff quota. This is not the case here. The Commission does not physically manage the working of the transit system. It was neither the Commission's job nor responsibility directly to monitor or supervise the transit operations in question. There has therefore been no failure on the part of the Commission that could in itself create, in the manner envisaged by the Court of First Instance in its judgment in Case T-42/96, a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(44) The body of evidence in the dossier does not therefore attest to the existence of a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(45) Nor has the Commission found any other factors constituting a special situation.

(46) Concerning the second condition of Article 239 of Regulation (EEC) No 2913/32 referred to above, i.e. whether there has been deception or obvious negligence, the Court of Justice of the European Communities has consistently held that account must be taken, in particular, of the operator's experience and diligence, and of the complexity of the rules.

(47) As regards the firm's experience, the letter of 20 March 1998 annexed to the request from the Netherlands shows it to be a customs forwarding agency. As such, it is familiar with import-export operations and can therefore be considered an experienced economic operator. It should therefore be familiar with customs rules and the commercial risks to which its business is subject.

(48) The rules on transit operations (Article 96 of the version of Regulation (EEC) No 2913/92 in force at the time) clearly state the obligations of the principal and the resulting liability for the proper conduct of transit operations. Furthermore, Article 203 of Regulation (EEC) No 2913/92 stipulates clearly that a customs debt is incurred when goods liable to import duties are removed from customs supervision and that the debtors include the person required to fulfil the obligations arising from the use of the customs procedure under which those goods are placed.

(49) With regard to the firm's diligence, it should, in the light of its obligations as principal, have taken all necessary precautions to guard against its commercial risk by, for instance, supervising the persons involved in the transport and taking out appropriate insurance.

(50) The evidence in the dossier does not warrant the conclusion that the firm took the necessary steps to guard against commercial risk. Moreover, though the Commission mentioned this oversight in its letter of 10 October 2001, the firm's reply of 9 November 2001 provided no further information on this issue. In the circumstances, the firm cannot be considered to have exercised all due diligence.

(51) In view of the firm's experience, the fact that the rules were not complex and the firm's lack of diligence, its acts must be considered the result of obvious negligence on its part.

(52) The remission of import duties requested is not therefore justified,

HAS ADOPTED THIS DECISION:

Article 1

The remission of import duties in the sum of XXXXXX requested by the Netherlands on 10 May 2000 is found not to be justified.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 7-10-2002

For the Commission
Frits Bolkestein
Member of the Commission