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REM 05/05

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20.7.2006
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NOT FOR PUBLICATION

COMMISSION DECISION

Of 20.7.2006

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

(Only the Dutch text is authentic)

(request submitted by the Netherlands)

(REM 05/2005)

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(REM 05/2005)

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 648/2005²,

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 402/2006⁴, and in particular Article 907 thereof,

¹ OJ L 302, 19.10.1992, p. 1.

² OJ L 117, 04.5.2005, p. 13.

³ OJ L 253, 11.10.1993, p. 1.

⁴ OJ L 70, 9.3.2006, p. 35.

Whereas:

- (1) By letter dated 4 October 2005, received by the Commission on 19 October 2005, the Netherlands asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether the repayment of import duties was justified in the following circumstances.
- (2) Between October 1996 and December 1997 a Dutch firm (hereinafter “the firm”) released for free circulation a great number of integrated circuits from the Middle East and paid customs duties in the sum of EURXXXXXX.
- (3) On 22 October 1998, the firm applied for repayment of this sum on the basis of Article 239 of the Community Customs Code. As grounds for its request, it stated that the goods could have been reimported with total or partial relief from duties under the outward processing procedure because they consisted of wafers previously exported from the European Community.
- (4) At the time the firm held an authorisation to use the outward processing procedure. The goods that were to undergo processing operations and the compensating products covered by the authorisation were recorded in electronic files. These files contained the inventory numbers of the chips. However, in the event the products that were temporarily exported for processing were not chips but wafers, in other words sets of chips arranged on a board forming a whole put up in plastic.
- (5) On 30 January 2003 the competent authorities rejected the request because they felt that the facts of the case did not constitute a special situation and that the firm had been obviously negligent.
- (6) Following this decision, the firm referred the matter to the competent national court, which on 28 April 2005, first, found that the firm had indeed been negligent, but not obviously negligent, and, secondly, asked the competent Dutch authorities to forward the case to the European Commission for examination.
- (7) In support of the application submitted by the Dutch authorities the firm stated that, in accordance with Article 905(3) of Regulation (EEC) No 2454/93, it had seen the file the authorities had sent and had nothing to add.

- (8) In this case, the firm cites the following factors as constituting a special situation under Article 239 of Regulation (EEC) No 2913/92:
- (9) All manufacturers of integrated circuits used the outward processing arrangements for the products in question. A producer's failure to take advantage of these arrangements cannot be considered a normal commercial risk.
- (10) According to the firm, Articles 900 to 903 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 list a number of situations in which duties can be repaid or remitted where errors result in the payment of duties in cases where an exemption was possible. The firm argues that this case is comparable to such situations.
- (11) According to the firm, this case is comparable to case REM 01/00, in which the Commission granted remission (Commission Decision No C (2000) 3096 of 25 October 2000) because the goods could easily have been placed under the outward processing arrangements if the formalities had been carried out correctly.
- (12) The firm argues that the error committed had no "material" consequences. The firm's record-keeping systems permitted post-clearance checks to verify exactly which exported products had been used to manufacture the imported integrated circuits.
- (13) By letter dated 10 March 2006, received by the firm on 14 March 2006, the Commission notified the firm of its intention to withhold approval and explained the reasons for this. The firm did not reply to this letter.
- (14) In accordance with Article 907 of Regulation (EEC) No 2454/93 the period of nine months within which the Commission decision must be taken was therefore extended by one month.

- (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 on 24 April 2006 to examine the case in the course of the Customs Code Committee meeting - Section for Repayment.
- (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 person concerned.
- (17) The Court of Justice of the European Communities has consistently held that this provision represents a general principle of equity designed to cover an exceptional situation in which a trader, who would not otherwise have incurred the costs associated with the customs duties concerned, might find himself compared with other traders carrying out the same activity.
- (18) In this connection the fact that a firm is acting in good faith does not in itself constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (19) The argument that all manufacturers of integrated circuits use the outward processing arrangements, entitling the firm to benefit from those arrangements for the operations in question, calls for the following remarks.
- (20) All operators wishing to benefit from the outward processing procedure must hold an authorisation and therefore apply for such an authorisation or for the extension of an existing authorisation to new products. Article 498 of the version of Regulation (EEC) No 2454/93 applicable at the time provides that “the lodging of an application signed by the applicant shall indicate that the person concerned wishes to use the customs procedure applied for.” Moreover, export and reimport declarations must show that the goods concerned have been placed under the outward processing procedure.
- (21) The file shows, however, that the product in question (“wafers”) was not in fact covered by an authorisation and that there was nothing on either the export or the reimport declarations to show that the goods were covered by the outward processing procedure. The firm did not, therefore, at any point in the procedure indicate its wish to benefit from the outward processing arrangements for the goods in question.

- (22) As a result the competent authorities were unable to perform the requisite checks to establish whether they could authorise the use of the outward processing procedure for the wafers or physically inspect the goods at the time of export and reimportation (in particular to identify the goods).
- (23) The fact that the failure to seek authorisation to use the outward processing procedure can be linked to internal communication problems between the firm's plant and the central department responsible for customs affairs is not relevant here since it is a normal commercial risk. It is the firm's responsibility to organise relations between these two bodies in such a way as to prevent such internal problems from arising. The fact that the shortcomings in question are attributable to a failure to record wafers in the firm's outward processing file is also part of the commercial risk that the firm has to assume.
- (24) In view of the above, the Commission considers that the argument that the firm would, if not granted the requested repayment, be exposed to a risk exceeding the normal commercial risk is unfounded. Applying to use a customs procedure is a matter solely for the trader concerned. The firm's failure to apply to use this procedure does not place it in an exceptional situation compared with other operators carrying out the same activity.

- (25) The argument that the error committed had no “material” consequences calls for the following remarks. In the case brought before the Amsterdam *Gerechtshof*, reference was made to the European Court of Justice’s ruling in *Gefco SA* (Case C-411/01). However, the case brought by the firm differs fundamentally from Case C-411/01 in that it concerned goods placed under the outward processing procedure. In this case, however, it was more than a year after the operations that the firm realised that it would have been more advantageous to place the goods under the outward processing procedure and therefore requested the repayment of duties. Furthermore, the aim of the concept of a failing with no significant effect on the working of the procedure is to allow no debt to be deemed to have arisen in the event of such a failing. The existence of such a failing permits duties to be repaid on the basis of Article 236 of Regulation (EEC) No 2913/92 and is not therefore a matter for the Commission, whose competence is limited to certain cases falling within the scope of Article 239 of that Regulation. What is more, even where a failing has no significant effect on the working of a customs procedure, there must be no deception or obvious negligence on the part of the trader concerned.
- (26) The fact that, according to the firm, its management systems permitted post-clearance checks to verify exactly which exported products had been used to manufacture the imported integrated circuits does not affect this analysis and does not justify the view that the firm was placed in a special situation within the meaning of Article 239.

- (27) The argument that Articles 900 to 903 of Regulation (EEC) No 2454/93 cover situations comparable to this case in which repayment must be made calls for the following remarks. In a great many of these cases, the circumstances giving rise to the customs debt are unrelated to the debtor's actions, and in most instances repayment or remission is conditional on the goods' being re-exported. What is more, these circumstances must involve no deception or obvious negligence on the part of the person concerned. In this case, however, the circumstances that gave rise to the customs debt are not unrelated to the firm's actions. It is the firm that decided to stop exporting chips and to export wafers instead and that failed to ask for the existing authorisation to be amended to include wafers. This fact cannot constitute a special situation.
- (28) As for comparability with case REM 01/00, in this specific case, the purpose of the export was clear from the commercial documents submitted with the export declaration, and it was obvious that exportation was to be temporary. Moreover, the machine concerned had already been temporarily exported for repair on an earlier occasion. Lastly, at the time of reimportation, the trader had applied to use the relevant outward processing arrangements. Furthermore, since the operation carried out on the machine consisted of repairs, the outward processing authorisation would have been granted on a simplified basis in that acceptance of the export declaration would, in accordance with the version of Article 760 of Regulation (EEC) No 2454/93 applicable at the time, at the same time have constituted authorisation to place the machine under the outward processing procedure. In the light of the above, this case is not comparable to REM 01/00.
- (29) The case as a whole does therefore not give grounds for finding that there was a special situation within the meaning of Article 239(1) of Regulation (EEC) No 2913/92.
- (30) Nor has the Commission identified any other factors constituting a special situation. There is therefore no need to examine the second condition laid down in Article 239 of Regulation (EEC) No 2913/92.
- (31) The repayment of import duties requested is therefore not justified,

HAS ADOPTED THIS DECISION:

Article 1

The repayment of import duties in the sum of EUR XXXXXX requested by the Netherlands on 4 October 2005 is not justified.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 20.7.2006

By the Commission
László KÓVACS
Member of the Commission