

**EN**

**REC 13/03**

**EN**

**EN**



**COMMISSION OF THE EUROPEAN COMMUNITIES**

Brussels, 15-3-2004  
C(2004)779

NOT FOR PUBLICATION

**COMMISSION DECISION**

**Of 15-3-2004**

**finding in a particular case that post-clearance entry in the accounts and remission of one amount of import duties and repayment of another amount of import duties are justified**

**(only the Danish text is authentic)**

**(Request submitted by Denmark)**

**(REC 13/03)**

FR

**COMMISSION DECISION**

**Of 15-3-2004**

**finding in a particular case that post-clearance entry in the accounts and remission of one amount of import duties and repayment of another amount of import duties are justified**

**(only the Danish text is authentic)**

**(Request submitted by Denmark)**

**(REC 13/03)**

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,<sup>1</sup> as last amended by Regulation (EC) No 2700/2000,<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>

---

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

<sup>2</sup> OJ L 311, 12.12.2000, p. 17.

<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 31 July 2003, received by the Commission on 6 August 2003, Denmark asked the Commission to decide in respect of one amount whether waiving post-clearance entry of import duties in the accounts was justified under Article 220(2)(b) of Regulation (EEC) No 2913/92, and in the alternative, whether remission of import duties was justified under Article 239 of Regulation (EEC) No 2913/92, in the following circumstances. In respect of another amount, Denmark asked the Commission whether repayment of import duties was justified under Article 239 of Regulation (EEC) No 2913/92 in the same circumstances.
- (2) Under the second paragraph of Article 2 of Regulation (EC) No 1335/2003, 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 Articles 871, 873, 905 and 907 of Regulation (EEC) No 2454/93 refer to that Regulation as last amended by Commission Regulation (EC) No 881/2003 of 21 May 2003.<sup>5</sup>
- (3) A Danish firm acting as principal placed 32 consignments of butter originating in the Czech Republic under the external Community transit procedure between 28 June and 19 October 1994. The declarations were submitted to a customs office located in Denmark. The offices of destination were located in Ravenna and Naples in Italy.
- (4) As the Danish authorities state in the letter referred to above, a request for assistance dated 13 January 1994 sent by the Community authorities to the Member States reported cases of fraud involving butter in transit via the Community and discharge of transit declarations using false stamps, called on Member States to pay special attention to consignments of butter originating in third countries and in transit through EU territory and asked them, from that date, to extend the early warning system for sensitive goods to butter consignments. Further requests on the same subject were sent to the Member States in February and June 1994.

---

<sup>5</sup> OJ L 134, 29.5.2003, p. 1

- (5) When the goods were placed under the external Community transit procedure the customs office of departure did not require a comprehensive guarantee covering the total amount of duties and other charges payable. The customs authorities did not use the early warning system either.
- (6) Initially it was believed that in the case of 6 transactions the consignments had been delivered in accordance with the rules, since the competent Danish office had received the return copies 5 of the transit documents concerned at the end of 1994.
- (7) When the Danish authorities informed the Commission that the firm had placed 32 consignments of butter under the transit procedure, the Commission asked the Italian authorities to confirm the authenticity of the copies 5 of the declarations concerned.
- (8) After carrying out post-clearance controls, the Italian authorities stated - in December 1995 in respect of 31 consignments and in August 1996 in respect of one consignment - that the signatures and stamps on the copies 5 of the declarations were false and that neither the goods nor the documents had been presented at the office of destination.
- (9) Investigations revealed that in the case of 9 declarations a customs debt had been incurred in Italy. In the case of the other 23 declarations, the Danish authorities considered that since the transit operations had not been discharged, a customs debt had been incurred in Denmark. The Danish authorities therefore asked the firm to pay import duties in respect of those 23 declarations of XXXXXX, the amount for which the firm has requested a waiver of post-clearance entry in the accounts and, in the alternative, remission. The firm paid XXXX, corresponding to the amount of the guarantee lodged.
- (10) The firm has requested the waiver of post-clearance entry in the accounts and, in the alternative, remission of XXXXX, as well as repayment of XXXXX.
- (11) The firm gives the following reasons for considering non-recovery and, in the alternative, remission, as well as repayment, to be justified. Firstly, it argues, when the operations were initiated the Danish customs authorities did not require a comprehensive guarantee at a level complying with Article 361(2) of the version of Regulation (EEC) 2454/93 in force at the time. The fact that the guarantee was

insufficient was the result of an error on the part of the customs authorities, who also allegedly failed to comply with the administrative obligation to provide prior information.

- (12) Pursuant to Articles 871 and 905 of Regulation (EEC) No 2454/93, the firm stated in support of the request from the competent Danish authorities that it had seen the dossier submitted to the Commission, and set out its arguments in a document annexed to the authorities' letter to the Commission of 31 July 2003.
- (13) In accordance with Articles 873 and 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 12 February 2004 within the framework of the Customs Code Committee (Repayment Section) to consider the case.
- (14) Since the request for waiver of post-clearance entry in the accounts and the request for repayment are based on the same facts and since the errors of the customs authorities within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92 also constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92, the two requests should be examined together.
- (15) Article 220(2)(b) of Regulation (EEC) No 2913/92 requires post-clearance entry in the accounts to be 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) In this case the competent Danish authorities considered that the non-discharge of the external Community transit declarations concerned gave rise to a customs debt for which the firm was liable.
- (17) With regard to the concept of error on the part of the competent authorities within the meaning of Article 220(2)(b), the following points must be made.

- (18) In its judgment of [27 June 1991](#),<sup>6</sup> the Court of Justice of the European Communities ruled that the legitimate expectations of the customs debtor should be protected under Article 5(2) of Regulation (EEC) No 1697/79 (the applicable provision before the entry into force of Article 220(2)(b) of Regulation (EEC) No 2913/92) only if the competent authorities themselves created the basis for those expectations. The same judgment defines “competent customs authority” as any authority which, acting within the scope of its powers, furnishes information relevant to the recovery of customs duties. Therefore only errors that are attributable to acts of the competent authorities that furnished information relevant to the calculation of the duties and that could not reasonably have been detected by the customs debtor confer entitlement to the waiver of post-clearance recovery of customs duties.
- (19) In this case, however, there can be no question of an error in the sense of an active error for the following reasons.
- (20) As regards the level of the comprehensive guarantee for the consignments, the following points should be made. Article 361(1) of the version of Regulation (EEC) No 2454/93 in force at the time provides that the amount of the guarantee must be set at a minimum of 30% of the duties and other charges payable. Article 361(2) of the version of Regulation (EEC) No 2454/93 in force at the time provides that the comprehensive guarantee is to be fixed at a level equal to the full amount of duties and other charges payable when three conditions are fulfilled. Firstly, the external Community transit operations must concern goods imported into the customs territory of the Community. Secondly, those goods must figure in the list in Annex 53 to Regulation (EEC) No 2454/93. Thirdly, they must have been the subject of specific information from the Commission concerning transit operations presenting increased risks of fraud, in particular pursuant to the provisions of Council Regulation (EEC) No 1468/81. The goods did fulfil these three conditions.
- (21) However, under Article 361(2) of the version of Regulation (EEC) No 2454/93 in force at the time, the customs authorities had the right to set the level of the comprehensive guarantee for sensitive goods at 50% of the amount of the duties and other charges concerned for traders meeting certain conditions. In this case the guarantee certificate referred to in the version of Article 362(3) in force at the time had

---

<sup>6</sup> *Mecanarte* judgment of 27 June 1991.

to bear the entry “application of Article 361(2) of Regulation (EEC) No 2454/93”. However it appears that no such certificate was required of the firm and the firm did not hold a certificate bearing the entry referred to.

- (22) The competent Danish authorities therefore committed an error in failing to require a comprehensive guarantee calculated according to the version of Article 361(2) in force at the time, since the conditions for the application of that provision were fulfilled. However, there is no causal link between the failure to set a comprehensive guarantee at a level equal to the full amount of duties and other charges payable and the fact that a customs debt was incurred. The customs debt in this case arose simply because the goods were removed from customs supervision. The error by the Danish customs authorities concerning the guarantee does not therefore constitute an active error giving rise to legitimate expectations on the part of the person liable.
- (23) As regards use of the early warning system, it should be noted that Article 384 of the version of Regulation (EEC) No 2454/93 in force at the time provides that where necessary the customs authorities of the Member States must communicate to one another all findings, documents, reports, records of proceedings and information relating to transport operations carried out under the Community transit procedure and to irregularities and offences in connection with that procedure. The Customs Code Committee set up an early warning system for communicating information relating to the transport of goods considered sensitive.
- (24) Firstly, the systems of communication between authorities set up for this purpose are not intended for traders. They are designed for the use of the authorities, to optimise the exchange of information between authorities and facilitate the prompt initiation of investigations in the event of illegal operations. In any case, the early warning system is unrelated to the placing of goods under the external Community transit procedure.
- (25) Moreover, neither Article 384 of Regulation (EEC) No 2454/93, nor any other provisions of that Regulation or of the basic Regulation (EEC) No 2913/92 specifies what the consequences may be for authorities that fail to comply with the early warning system.



- (26) In addition, as the Court of Justice of the European Communities stated in its ruling of [23 March 2000](#),<sup>7</sup> an administrative agreement between Member States (administrative arrangement) has no legal force. Therefore it cannot be invoked against the authorities by a trader.
- (27) Consequently, the fact that the office of departure did not follow an administrative arrangement for the communication of information does not constitute an error on the part of the customs authorities within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (28) Accordingly, none of the circumstances referred to above show evidence of any error on the part of the customs authorities within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (29) In the absence of any error on the part of the competent authorities, it is not appropriate to examine the other conditions set out in Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (30) 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.
- (31) 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.

---

<sup>7</sup> *Leszek Labisz* judgment of 23 March 2000 (Joined cases C-310/98 and C-406/98) ECR I-1797.

- (32) The [Court has consistently ruled](#)<sup>8</sup> that in using its discretion to assess whether the conditions for granting remission have been fulfilled, the Commission must balance the Community interest in ensuring that the customs provisions are respected and the interest of the importer acting in good faith not to suffer harm beyond normal commercial risk.
- (33) In this case the failure to correctly discharge the transit operations gave rise to a customs debt for which the firm is liable as principal for the operations.
- (34) As the 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 resulting from organised crime. Such an eventuality is part of the firm's normal commercial risk.
- (35) As has already been pointed out, no active error can be attributed to the competent authorities in respect of the transit operations.
- (36) However, at the time the Community authorities had already warned the Danish authorities about fraud involving butter of Czech origin transported under the external Community transit procedure.
- (37) The Danish authorities therefore had knowledge of certain information which should have prompted increased vigilance on their part in view of the high risk of fraud affecting the operations involved in this case.
- (38) Yet the dossier shows that despite having been informed of a variety of facts pointing to a high risk of fraud, the Danish authorities did not require a comprehensive guarantee equal to the full amount of the duties and other charges payable for these transit operations as they should have done. They therefore failed to fulfil their obligations in that they did not act with due diligence.

---

<sup>8</sup> See inter alia 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), ECR II - 01337.

- (39) Furthermore, after finding that fraud was being perpetrated the Community authorities had repeatedly asked the national authorities to use the early warning system for these goods. Yet, as stated by the Danish authorities in their letter of 31 July 2003, the competent authorities did not use this system for the operations concerned.
- (40) In the Commission's view, the above circumstances and the negligence of the competent Danish authorities therefore constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (41) As for the second condition laid down in Article 239 of Regulation (EEC) No 2913/92, namely the absence of deception or obvious negligence on the part of the person concerned, the Danish authorities stated in their request of 31 July 2003 that their investigations had cleared the firm of any involvement in the fraud concerned and that its approach could not be described as obviously negligent.
- (42) Therefore, in respect of the amount of XXXXXX, post-clearance entry of the import duties in the accounts and remission of those duties are justified in this case and in respect of the amount of XXXXX, repayment of import duties is justified in this case,

HAS ADOPTED THIS DECISION:

*Article 1*

The import duties in the sum of XXXXXXXX referred to in the request from Denmark of 31 July 2003 shall be entered in the accounts.

*Article 2*

The remission of import duties in the sum of XXXXXXXX referred to in the request from Denmark dated 31 July 2003 is justified.

*Article 3*

The repayment of import duties in the sum of XXXXXXXX referred to in the request from Denmark dated 31 July 2003 is justified.

*Article 4*

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 15-3-2004

*For the Commission  
Frits Bolkestein  
Member of the Commission*