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**REM 12/00**



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14-8-2001

NOT FOR PUBLICATION

**COMMISSION DECISION**

**of 14-8-2001**

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

**(request submitted by the Netherlands)**

**(REM 12/00)**

FR

## COMMISSION DECISION

of 14-8-2001

**finding that remission of import duties is not justified in a particular case  
(request submitted by the Netherlands)  
(REM 12/00)**

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,<sup>1</sup> as last amended by Regulation (EC) No 955/1999,<sup>2</sup>

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<sup>3</sup>, as last amended by Regulation (EC) No 993/2001<sup>4</sup>, and in particular Article 907 thereof,

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

<sup>2</sup> OJ L 119, 07.05.1999, p. 1

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

<sup>4</sup> OJ L 141, 28.5.2001, p.1

Whereas:

- (1) By letter dated 6 July 2000, received by the Commission on 12 July 2000, the Netherlands asked the Commission to decide, under Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties,<sup>5</sup> whether remission of import duties is justified in the following circumstances:
- (2) On 16 June 1993 a Dutch firm, which was an approved consignor, lodged a customs declaration with the Rotterdam customs office on behalf of a third party for a shipment of alcohol to Morocco under the external Community transit procedure. It thereby took on the role of principal.
- (3) An investigation by the competent Dutch authorities revealed that the goods had not been presented to the office of destination in Algeciras (Spain), and that the transit operation had been discharged on paper only.
- (4) A customs debt having been incurred under Article 2 of Council Regulation (EEC) No 2144/87 of 13 July 1987 concerning the customs debt,<sup>6</sup> the competent authorities in the Netherlands asked the firm to pay import duties in the sum of XXXXX.
- (5) Pleading its good faith, that it had been the victim of fraudulent actions by Spanish customs officials in which neither it nor its employees had been involved and that the Commission had failed to take appropriate steps against a fraud of which it had been aware, the firm has requested the remission of the import duties in question.
- (6) In support of the application submitted by the Dutch 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 and had nothing to add.

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<sup>5</sup> OJ L 175, 12.07.1979, p. 1

<sup>6</sup> OJ L 201, 22.07.1987, p. 15

- (7) By letter dated 5 December 2000 the Commission asked the Dutch authorities for further information. This information was provided by letter dated 16 March 2001, received by the Commission on 30 March. The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93, between 6 December 2000 and 30 March 2001.
- (8) By letter dated 14 May 2001, the Commission notified the firm of its intention to withhold approval and explained the grounds for its decision.
- (9) By letter dated 12 June 2001, received by the Commission the same day, the firm expressed its opinion on the Commission's objections. It maintained its view that the circumstances of the case made it a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79, involving neither deception nor obvious negligence on its part. It argued that the evidence in this case of corruption or active complicity in fraud on the part of one or more customs officials had to be examined in the light of the judgment of the Court of First Instance of the European Communities of 7 June in [Case T-330/99](#). It explained that the Court had, in that case, ruled 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. Conversely, the firm interpreted the judgment, and in particular paragraph 57 thereof, as allowing the person concerned to establish that a customs official had been an active accomplice to fraud. It went on to argue that the apparent authenticity of some stamps could only be accounted for by the active complicity of an official in the Spanish office of destination or by organisational shortcomings at a Spanish office that enabled a third person to use a Spanish customs stamp.

- (10) The firm also considers that it has not been obviously negligent and points out that it took precautions to prevent irregularities. It stresses that it met the client and asked the driver for proof of identity.
- (11) The administrative procedure was suspended, in accordance with Article 907 of Regulation (EEC) No 2454/93, between 16 May and 12 June 2001.
- (12) 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 July 2001 within the framework of the Customs Code Committee (Section for General Customs Rules/Repayment) to consider the case.
- (13) In accordance with Article 13(1) of Regulation (EEC) No 1430/79, import duties may be repaid or remitted in special situations, other than those laid down in sections A to D of that Regulation, resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.
- (14) The Court of Justice of the European Communities has consistently taken the view that this provision represents a general principle of equity and a special situation is established where in the case in point the operator is in an exceptional situation compared with other operators carrying out the same activity and otherwise would not have incurred the costs associated with post-clearance entry in the accounts of customs duties.
- (15) In this case the firm incurred a customs debt through the failure to present the goods in question, which had been placed under the Community transit procedure, at the customs office of destination.
- (16) 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 by third parties. That is part of a principal's commercial risk.

- (17) It is nevertheless accepted that 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 13 of Regulation (EEC) No 1430/79.
- (18) 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 itself an accomplice to the fraud, it can legitimately expect the functioning of the administration not to be undermined by corrupt customs officials.
- (19) According to the dossier submitted to the Commission by the Dutch authorities, the competent national authorities have not formally found one or more officials to have acted corruptly or actively participated in committing fraud.
- (20) However, the Court, in its judgment of 7 June 2001 in Case T-330/99, ruled 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.
- (21) In the case in point, the Dutch customs administration, in the course of its investigation and in accordance with Council Regulation (EEC) No 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters,<sup>7</sup> asked the competent Spanish administration on 20 December 1993 for further details concerning the discharge of the transit document in question.

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<sup>7</sup> OJ L 144, 2.6.1981, p.1.

- (22) In its reply of 10 January 1994 the Spanish customs administration stated that the T1 document had not been registered by the Spanish customs authorities, that there was no proof that the goods had reached their destination and that, while some of the stamps appeared to be authentic, the signatures on the document were not those of Spanish customs officials.
- (23) 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 Dutch administration, shows that the only evidence for the involvement of a Spanish customs official is the apparent authenticity of some of the stamps on the transit document concerned.
- (24) In Case T-330/99 the Court ruled, with regard to a transit operation in which goods were 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 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 organisational shortcomings at that office which allowed a third party to use the administration's equipment. There were therefore several pieces of evidence suggesting that either an official was an accomplice to fraud or that there were organisational shortcomings at the office of destination.
- (25) That is not, however, the case here. In the case in point, even if the T1 document was 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 document of discharge was in order. No use was made in this case of the Spanish office of destination's official letterhead or its franking machine.



- (26) The evidence in the dossier provided by the Dutch authorities does not warrant the conclusion that one or more customs officials in the European Community were accomplices to fraud or that organisational shortcomings at the office of destination enabled a third person to use the equipment of the administration in question. The fact that the stamps might be authentic is not sufficient grounds for concluding that such complicity or shortcomings took place. Moreover, contrary to the situation examined by the Court in Case T-330/99, there is no other evidence to support the allegations of complicity or shortcomings.
- (27) As for the firm's argument, based on the Court's ruling of 19 February 1998 in [Case T-42/96](#), that the Commission was responsible for certain shortcomings in the administration of the transit system, the Commission was directly involved in that case as the administrator of a tariff quota, and the Court took the view that its failure to discharge its duty to supervise and monitor the application of the quota had permitted the widespread falsification of documents, a serious breach on its part which constituted a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (28) 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 operation in question. There was therefore no breach on the part of the Commission which could in itself give rise, in the manner envisaged by the Court in its judgment in Case T-42/96, to a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79.

- (29) Nor do the problems that beset the transit system at a certain period, and which subsequently led to its reform, have any direct bearing on the obligations of the principal in a transit operation as defined in Article 11 of Council Regulation (EEC) No 2726/90 of 17 September 1990 on Community transit.<sup>8</sup> These obligations exist and apply from the moment the principal contracts them.
- (30) The body of evidence in the dossier does not attest to the existence of a special situation within the meaning of Article 13(1) of Regulation (EEC) No 1430/79.
- (31) The remission of import duties requested is not therefore justified in this case,

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<sup>8</sup> OJ L 262, 26.09.1990, p. 1

HAS ADOPTED THIS DECISION:

*Article 1*

The remission of import duties in the sum of XXXXXX requested by the Netherlands on 6 July 2000 is hereby found not to be justified.

*Article 2*

This Decision is addressed to the Netherlands.

Done at Brussels, 14-8-2001

*For the Commission*

*Member of the Commission*