EUROPEAN COMMISSION

Brussels, 27.7.2011
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COMMISSION DECISION

of 27.7.2011

finding that the remission of import duties is not justified in a particular case (REM 01/2010)

(only the Dutch 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[1],

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 establishing the Community Customs Code[2],

Whereas:

(1) By letter of 18 February 2010, received by the Commission on 22 February 2010, the Dutch authorities asked the Commission to decide whether, under Article 239 of Regulation (EEC) No 2913/92, the remission of import duties was justified in the following circumstances.

(2) Between 19 February 1999 and 19 July 2001 a Dutch company ('the company') lodged, in its capacity as a customs agent, 52 customs declarations for release for free circulation of glyphosate of tariff heading 2931 00 95, declared as originating in Taiwan. Origin certificates issued by the Taiwanese Chambers of Commerce attesting to the Taiwanese origin of the goods were attached to these declarations.

(3) Commission Regulation (EC) No 1731/97 of 4 September 1997[3] imposed a provisional anti-dumping duty on imports into the EU of glyphosate originating in the People's Republic of China. The anti-dumping duty was made definitive by Council Regulation (EC) No 368/98 of 16 February 1998 imposing a definitive anti-dumping duty on imports of glyphosate originating in the People's Republic of China and collecting definitively the provisional duty imposed [4].

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1 OJ L 302, 19.10.1992, p. 1.
2 OJ L 253, 11.10.1993, p. 1.
3 OJ L 243, 5.9.1997, p.7.
4 OJ L 47, 18.2.1998, p. 1.

(4) On 14 December 1999 the Commission informed the Member States under the mutual assistance arrangements of a suspected fraud mechanism involving imports of glyphosate declared as originating in Taiwan.

(5) Commission Regulation (EC) No 909/2001 of 8 May 2001 initiating an investigation concerning the alleged circumvention of anti-dumping measures imposed by Council Regulation (EC) No 368/98 on imports of glyphosate originating in the People's Republic of China by imports of glyphosate consigned from Malaysia or Taiwan, and making such imports subject to registration was published in the Official Journal on 9 May 2001[5].

(6) The investigation found that circumvention had taken place and accordingly the anti-dumping duty was extended by Council Regulation (EC) No 163/2002 of 28 January 2002 extending the definitive anti-dumping duty imposed by Regulation (EC) No 368/98 on imports of glyphosate originating in the People's Republic of China to imports of glyphosate consigned from Malaysia or Taiwan, whether declared as originating in Malaysia or Taiwan or not, and terminating the investigation in respect of imports from one Malaysian and one Taiwanese exporting producer[6].

(7) The Dutch customs authorities carried out checks on the company on 30 July, 3 August, 30 November and 14 December 2001. These checks revealed that for most of the imports in question, the goods had been loaded in China and shipped to Rotterdam via Taiwan.

(8) The Dutch customs authorities concluded that the goods were actually of Chinese, not Taiwanese, origin and were therefore subject to the anti-dumping duties provided for by Council Regulation (EC) No 368/98. Accordingly, they initiated proceedings against the company to recover a total of €XXXXXX in anti-dumping duties, the sum for which the company has requested remission.

(9) This conclusion was confirmed by a Community deputation comprising representatives of the European Anti-Fraud Office (OLAF) and of some Member States which visited Taiwan between 18 March and 1 April 2003 to investigate exports to the European Union of glyphosate declared as originating in Taiwan.

(10) The company lodged applications for remission of anti-dumping duties on 9 December 2002. The Dutch authorities rejected the applications for remission on 9 September 2004.

(11) The company appealed against these decisions on 12 October 2004; the Dutch authorities confirmed their position by decisions of 6 September 2005. The company appealed against these decisions to the Haarlem District Court on 23 September 2005. This Court confirmed the authorities' decisions but the Amsterdam Court of Appeal annulled them and ordered the authorities to forward the file to the Commission for a decision.

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5 OJ L 127, 9.5.2001, p. 35.

6 OJ L 30, 31.1.2002, p. 1.

(12) In support of the request made by the Dutch authorities, the company stated, in accordance with Article 905(3) of Regulation (EEC) No 2454/93, that it had seen the file that the Dutch authorities proposed to submit to the Commission and had made comments which were attached to the request.

(13) By letter dated 13 July 2010, the Commission asked the Dutch authorities for additional information. The authorities replied by letter dated 11 February 2011, which the Commission received on 17 February 2011. Examination of the request for remission was therefore suspended between 14 July 2010 and 17 February 2011.

(14) By letter dated 3 May 2011, received by the company on 4 May, the Commission notified the company of its intention to withhold approval and explained the reasons for this.

(15) By letter dated 1 June 2011, received by the Commission on the same date, the company made known its views on the Commission's objections.

(16) 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.

(17) 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 20 June 2011 within the framework of the Customs Code Committee - Customs Debt and Guarantees Section.

(18) Under Article 239 of Regulation (EEC) No 2913/92, import duties may be remitted in situations other than those referred to in Articles 236, 237, and 238 resulting from circumstances in which no deception or obvious negligence may be attributed to the company.

(19) According to the request sent by the Dutch authorities to the Commission and the letter from the company dated 1 June 2011, remission was justified for the following reasons.

(20) The company was in a special situation for the following reasons:

– the Dutch authorities had failed to respect the company's rights of defence;

– they had informed the company belatedly of the amount of duty owed;

– at the time, it was not possible for a customs agent in the Netherlands to act by direct representation when it wished to make use of deferred payment;

– the behaviour of the Taiwanese authorities had put the company in a special situation; the company maintains that this case is comparable in fact and law with cases REM 21/00 to 24/00 in which the Commission ruled that the remission of import duties was justified (decision C(2001)2302 of 23 July 2001);

– the Commission had committed errors which put the company in a special situation; therefore the conclusions of the C.A.S. case[7] were also applicable to this case;

– the behaviour of the Dutch authorities had put the company in a special situation; prior to 14 December 1999 these authorities were already aware of fraud involving glyphosate and knew that the company's client was involved.

(21) There was no deception or obvious negligence on the part of the company.

(22) Firstly, the arguments raised by the company in support of its claim that decisions by the competent national authorities to force it to pay the disputed duties were unlawful[8] (failure to respect the rights of defence, belated notification of the amount of duty owed) call into question the existence of the customs debt. Disputing the debt in this way falls outside the scope of the procedure for waiving post-clearance entry in the accounts of duties under Article 220(2)(b) and the procedure for remission or repayment under Article 239 of Regulation (EEC) No 2913/92. It is for the Member States, not the Commission, to determine whether a debt has been incurred and, if so, the amount of the debt. Furthermore, the Court of Justice has consistently ruled[9] that the purpose of Commission decisions under the procedures for waiving post-clearance entry in the accounts or remission/repayment on an equitable basis is not to determine whether a customs debt has been incurred or the size of the debt. An operator who does not recognise the existence of a customs debt must challenge the decision establishing that debt before the national courts in accordance with Article 243 of the Code. The same applies to the argument that, at the time, it was not possible for a customs agent in the Netherlands to act by direct representation when it wished to make use of deferred payment.

I. Existence of a special situation

(23) The Court of Justice of the European Union has ruled that Article 239 of Regulation (EEC) No 2913/92 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[10].

(24) It is necessary to check whether the company's situation should be considered exceptional in comparison with other operators engaged in the same business.

A. Existence of a special situation as a result of the behaviour of the Taiwanese authorities

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7 See judgment of 25 July 2008 in Case C-204/07 *C.A.S. SpA* v *Commission* [2008] ECR I-6135.

8 See judgment of 6 July 1993 in joined cases C-121/91 and C-122/91 *CT Control and JCT Benelux* v *Commission* [1993] ECR I-3873.

9 See judgments in Cases C-413/96 *Skatteministeriet* v *Sportgoods A/S* [1998] ECR I-05285, T-195/97 *Kia Motors Nederland BV and Broekman Motorships BV* v *Commission of the European Communities* [1998] ECR II-02907 and T-205/99 *Hyper Srl* v *Commission of the European Communities* [2002] ECR II-03141.

10 See judgment of 10 May 2001 in joined cases T-186/97, T-190/97 to T-192/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99) *Kaufring AG and Others* v *Commission* [2001] ECR II–1337.

(25) The company maintains that it is in the same situation as the applicant in cases REM 21/00 to 24/00.

(26) Those cases involved imports into the EU of clothing declared as originating in Bangladesh. Goods of this type were eligible for preferential customs duty under the Generalised System of Preferences ('GSP'). Therefore such goods were entitled to preferential tariff treatment when released for free circulation on condition that they were covered by a Form A origin certificate issued by the competent authorities in Bangladesh.

(27) In its Decision the Commission found that the Bangladeshi authorities had, or should have, known that the clothing did not meet the requisite conditions to qualify for the preferential tariff treatment granted to goods originating in Bangladesh under the GSP. It therefore took the view that the behaviour of the competent authorities of Bangladesh had put the persons concerned in a special situation within the meaning of Article 239 of Council Regulation (EEC) No 2913/92.

(28) The Commission takes the view that this case is not comparable in fact and law with cases REM 21/00 to 24/00 for the following reasons:

(29) Cases REM 21/00 to REM 24/00 concern imports taking place within the framework of the GSP, whereas anti-dumping duties are covered by the rules on non-preferential origin. These are two legal frameworks with fundamental differences in terms of both their underlying principles and their implementation procedures.

(30) As regards the principles, the GSP preferential origin rules and the origin rules applicable to trade defence, including anti-dumping measures, are independent of each other and support measures with totally different objectives. The GSP preferential origin measures are aimed at fostering the economic development of certain countries, whereas the trade defence measures are aimed at countering certain unfair trading practices.

(31) Firstly, as regards the application of the rules of origin, it is common knowledge that one factor systematically taken into account when imposing an anti-dumping duty on a third-country product is the product's origin, as determined on the basis of the rules on non-preferential origin.

(32) The rules, procedures and mechanisms applied to determine preferential origin and those used to determine non-preferential origin are independent of each other. When a declaration is submitted for the release for free circulation of goods subject to anti-dumping duties, no certificate of origin is required, and there is no administrative cooperation procedure for determining and checking non-preferential origin with the country of export such as that applicable under the GSP.

(33) In addition, even if it should be acknowledged that the certificates issued by the Taiwanese Chambers of Commerce were inaccurate, the fact that these chambers of commerce made an error does not constitute an error within the meaning of Article 220(2)(b) of the code, because for that to be the case it would have to have been committed, as the Court states in several judgements, by 'any authority which, acting within the scope of its powers, furnishes information relevant to the recovery of customs duties and which may thus cause the person liable to entertain legitimate

expectations'. Yet in this instance the application of Council Regulations (EC) Nos 1731/97, 368/98 and 1086/2000 and of the rules on non-preferential origin is not within the scope of the powers of these chambers of commerce. As such, the company could derive no legitimate expectation from the fact that it held origin certificates issued by the Taiwanese Chambers of Commerce. It is the responsibility of the importer into the EU to establish and declare the non-preferential origin of imported goods so that they are subject to the EU measures applicable to that origin. In addition, checking that this non-preferential origin has been correctly established and that the relevant legislation as published in the Official Journal has been correctly applied is the exclusive responsibility of the EU customs authorities. As such, the error made by the Taiwanese Chambers of Commerce does not constitute an error within the meaning of Article 220(2)(b) of the code and cannot have put the company in a special situation within the meaning of Article 239 of the code.

(34) This interpretation is confirmed by Case T-191/09 *Hit Trading BV and Berkman Forwarding BV* v *European Commission*, which concerned the import of lamps from Pakistan. The Court ruled that the error made by the Pakistani customs authorities when determining Pakistani preferential origin could not be regarded as an error within the meaning of Article 220(2)(b) of the code as it also related to the non-preferential origin of these goods.

(35) It therefore follows from the above that cases REM 21/00 to 24/00 are not comparable with this case. The argument put forward by the company in its letter dated 1 June 2011 that the GSP and anti-dumping measures were unilateral measures taken by the European Commission, and that this case was therefore comparable with cases REM 21/00 to 24/00 is irrelevant. It should be noted that both the GSP and the anti-dumping measures are covered by Council, not Commission, regulations and that the above description clearly indicates that these measures are not comparable in any respect.

(36) The Commission therefore takes the view that the company was not placed in a special situation by virtue of the fact that the Taiwanese Customs Chambers issued inaccurate certificates.

B. Existence of a special situation as a result of the behaviour of the Commission

(37) The Amsterdam Court ordered the competent Dutch authorities to forward the file to the Commission on the basis that the conclusions of the C.A.S. judgment might also be applicable to this case. In this connection, the following points should be made.

(38) In its C.A.S. judgment the Court took the view that the applicant had been placed in a special situation as a result of serious failures on the part of the Turkish authorities and to the Commission in the context of the Association Agreement between the EU and Turkey. The Court pointed out that the Commission, as guardian of the EC Treaty and of the agreements concluded under it, must ensure the correct implementation by a third State of the obligations it has assumed under an agreement concluded with the Community, using the means provided for by the agreement or by the decisions taken pursuant thereto. It concluded that the Commission had failed to fulfil its obligations to supervise and monitor the proper implementation of the Association Agreement.

(39) The legal background of the case at issue is fundamentally different from that of the C.A.S. case. As stated previously, the Taiwanese authorities did not issue origin certificates within the framework of an agreement between the European Union and Taiwan, and the EU authorities were in no sense bound by the certificates issued by the Taiwanese Chambers of Commerce. Consequently, the Commission was under no obligation to assess the behaviour of the Taiwanese authorities.

(40) According to the company, even outside the legal framework of an association agreement, the Commission can be found to have failed to meet its obligations. In this case, the company takes the view that such obligations may be derived from other legal instruments, and appears to believe that there may have been a failure to meet the obligations laid down in Council Regulation (EC) No 515/97 of 13 March 1997 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 and agricultural matters[11]. However, since the Commission informed the Member States of the suspected fraud involving imports of glyphosate from China and conducted a Community mission to Taiwan in 2003, the Commission does not seem to have failed to meet any of its obligations in this case.

(41) Lastly, EU law does not require the Commission to notify importers when it has doubts about the validity of customs transactions carried out by those importers. The fifth paragraph of Article 220(2)(b) of the Code merely states, solely in respect of preferential agreements, that the person liable may not plead good faith if the Commission has published a notice in the Official Journal of the European Communities stating that there are grounds for doubt concerning the proper application of the preferential arrangements by the beneficiary country. Therefore, while this rule affects the scope for pleading good faith (or the absence of deception or obvious negligence), it has no impact whatsoever on whether the customs authorities committed an error or on the existence of a special situation. Furthermore, preferential arrangements are not an issue in this case.

(42) The Commission therefore takes the view that its own behaviour in this case cannot have given rise to a special situation within the meaning of Article 239 of the Code.

A. Existence of a special situation as a result of the behaviour of the Taiwanese authorities

(43) On 14 December 1999 the Commission informed the Member States of suspected fraud involving imports of glyphosate. According to the company, the Dutch authorities were aware of the fraud before that date and even knew that the company's client was involved.

(44) Accordingly, the company maintains that Court of Justice case-law (*De Haan*[12]) applies. In this connection, the following points should be made.

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11 OJ L 82, 22.3.1997, p. 1.

12 See judgment of 7 September 1999 in Case C-61/98 *De Haan Beheer BV* v *Inspecteur der Invoerrechten en Accijnzen ter Rotterdam* [1999] ECR I-5003.

(45) In the *De Haan* case, in the interests of their investigation, the national authorities deliberately allowed offences or irregularities to be committed against the Community external transit rules, thus causing the principal to incur a customs debt.

(46) There is no evidence that the Dutch authorities were actually aware of irregularities in connection with these glyphosate imports or that they deliberately allowed offences or irregularities to be committed so as to better tackle fraud aiming to circumvent anti-dumping measures.

(47) Although there were suspicions regarding the exact origin of the imported glyphosate, these suspicions had to be investigated, which was done when the Dutch authorities carried out checks in 2001. The findings were confirmed by the in-depth research carried out within the framework of the investigation initiated by the aforementioned Commission Regulation (EC) No 909/2001 of 8 May 2001 and the Community mission of 18 March to 1 April 2003.

(48) Furthermore, taking the view that the customs authorities cannot carry out post-clearance recovery of import duties on the grounds that they initially accepted the customs declarations without contesting them would be largely tantamount to declaring that post-clearance checks serve no purpose, which is not admissible[13].

(49) Consequently, in the Commission's view, it has not been established that the Dutch authorities were aware of the fraud before the imports in question even took place, and therefore the company was not placed in a special situation by the actions of the Dutch authorities.

(50) The investigation did not reveal any other factor which could have placed the company in a special situation.

(51) The first condition referred to in Article 239 of Regulation (EEC) No 2913/92 is therefore not fulfilled.

II. Absence of deception or obvious negligence

(52) According to established case-law, when examining whether there has been deception or obvious negligence account must be taken, in particular, of the complexity of the legislation and the operator's experience and diligence.

(53) Regarding the criterion of the rules' complexity, it should be pointed out that the rules determining the origin of goods cannot as such be considered complex. In any event, since this is a proven case of fraud, this condition is not really relevant in this case.

(54) With regard to the criterion concerning the company's experience, it should be noted that the company has been acted as a customs agent since 1971. It has also been established that the company declared glyphosate originating in China for the same

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[13] See, to the same effect, but in the context of preferential arrangements: judgment of the Court of 13 November 1984 in joined cases 98/83 and 230/83 *Van Gend & Loos NV*, Case T-205/99 *Hyper Srl* v *European Commission* [2002] ECR II-03141 and the aforementioned *Hit Trading* judgment. In the context of the anti-dumping rules, see the judgment in case T-239/00 *SCI UK Ltd* v *European Commission* [2002] ECR II-02957.

client as in this case in **July 1997**. In **October and November 1997**, i.e. after the entry into force of Commission Regulation (EC) No 1731/97, the company drew up customs declarations for release for free circulation of glyphosate declared as originating in Singapore. The company must therefore be regarded as an experienced operator.

(55) Lastly, as to the criterion concerning the diligence demonstrated by the company, the following points should be made.

(56) When the post-clearance checks were carried out on customs declaration for release for free circulation No 0000.73.672/02 00 3815 of **8 May 2000**, the Dutch authorities found that invoices for additional transport costs had been attached to the declaration and that these invoices stated that the containers had left from Shanghai (China). The fact that the internal administrative procedure initiated by the company did not enable it to see these documents before drawing up the declaration in question, as it stated in its letter of 1 June 2011, suggests that the company had not acted with the diligence that can be expected of a customs agent.

(57) Similar findings were made for the declarations dated 26 June and 24 August 2000, but the invoices were drawn up on a date subsequent to the date of the declaration.

(58) In addition, invoices and packing lists drawn up by Chinese companies were attached to three declarations dated 22 August 2000.

(59) This suggests that the company should have had doubts as to the real origin of the goods it was declaring by **8 May 2000** at the latest. In addition, as of 9 May 2001, the publication date of Commission Regulation (EC) No 909/2001, the company should have known that an investigation had been initiated concerning the alleged circumvention of anti-dumping measures imposed by Council Regulation (EC) No 368/98 on imports of glyphosate originating in the People's Republic of China by imports of glyphosate consigned from Malaysia or Taiwan. It should therefore have had doubts as to the real origin of the imported glyphosate.

(60) According to established case-law, if operators entertain doubts about the origin of goods, they are required to carry out all appropriate research to determine whether their doubts are justified[14]. The company does not appear to have applied this rule.

(61) The company stated that it had no doubts about the origin of the goods because it had received origin certificates issued by the Taiwanese Chambers of Commerce. In view of the value the company attached to the origin certificates, one might have expected it to check them in detail. This was not the case as it failed to notice a number of inconsistencies highlighted by the College van Beroep voor het Bedrijfsleven (Administrative Court of Last Instance in Matters of Trade and Industry) in its judgment of 12 October 2006[15]. That Court stated that an examination of the certificates had revealed various inconsistencies or irregularities (no date, identical registration numbers, different formats, different issuing authorities, etc.). These inconsistencies suggest that some of the certificates were not even issued by the

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[14] See judgment of 29 September 2009 in cases T-225/07 and T-364/07 *Thomson Sales Europe* v *Commission*, not yet published in the Court Reports, points 138 to 145 and the aforementioned *Hit Trading* judgment).

[15] Case AWB 04/803 (Herbex Produtos Quimicos S.A. v Dutch Ministry of Economic Affairs).

Taiwanese Chambers of Commerce. Therefore the company should have noticed at least some of these inconsistencies, which would inevitably have led it to question the real origin of the imported goods.

(62) In the light of the above, the Commission takes the view that the company has failed to demonstrate that it took all appropriate measures to ensure that the declarations for release for free circulation which it submitted were correct.

(63) Consequently, it appears that that the company did not act with the diligence that can be expected of a customs agent. The second condition referred to in Article 239 of Regulation (EEC) No 2913/92 is therefore not fulfilled either.

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

HAS ADOPTED THIS DECISION:

Article 1

Remission of the import duties in the sum of XXXXXXXX, requested by the Netherlands on 18 February 2010, is not justified.

Article 2

This Decision is addressed to the Netherlands.

Done at Brussels, 27-7-2011

For the Commission
Algirdas ŠEMETA
Member of the Commission