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REM 06/01



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14.01.2002

NOT FOR PUBLICATION

COMMISSION DECISION

of 14.01.2002

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

(Request submitted by France)

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FR

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Communities,

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 993/2001,⁴ 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 141, 28.5.2001, p. 1.

Whereas:

- (1) By letter dated 8 February 2001, received by the Commission on 12 February 2001, France asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether the remission of import duties was justified in the following circumstances.
- (2) In August and September 1996 a French firm (hereinafter “the firm”⁵) released for free circulation three shipments of urea ammonium nitrate solution originating in Poland. These three shipments were purchased by a French company (hereinafter “the middleman”) from the Polish exporter Zakłady Azotowe Pulawy and then sold on to another three companies established in France. In the firm’s capacity as a customs agent, it imported these goods on behalf of the three end-customers. The invoices issued by the middleman to the three other French importing companies were attached to the declarations.
- (3) At the time of import, the goods in question were subject to an anti-dumping duty under Council Regulation (EC) No 3319/94 of 22 December 1994 imposing a definitive anti-dumping duty on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, exported by companies not exempted from the duty, and collecting definitively the provisional duty imposed.⁵ This Regulation introduced a *variable* duty based on a minimum price of ECU 89 per tonne on imports of the products covered by the Regulation and which were invoiced directly to an unrelated importer by one of the Polish exporters or producers named in the Regulation. Conversely, where such imports were not invoiced directly, their release for free circulation was subject to a *specific* anti-dumping duty.

⁵ OJ No L 350, 31.12.1994, p. 20.

- (4) The competent customs authority accepted the customs declarations submitted by the firm in which the latter applied for exemption from anti-dumping duties.
- (5) Following post-clearance checks the competent customs authority, finding that the imports had not been directly invoiced to the importers (the invoices were addressed to the middleman, who then re-sold and re-invoiced to three other companies) and that the products were certified as being produced by Zakłady Azotowe Pulawy, applied the specific duty of ECU 19 a tonne, a total of XXXXX, the sum which the firm is seeking to have remitted.
- (6) In their requesting letter of 8 February 2001 the French authorities said that they considered that a special situation existed for the following reasons. The import price was not lower than the minimum price laid down in Regulation (EC) No 3319/94. Furthermore, had the middleman itself entered the goods for free circulation on the basis of the Polish producer's invoice, the specific duty would not have been applied. They concluded that this placed the firm in an exceptional situation in comparison with other operators engaged in the same business and importing the products in question without going through a middleman. The letter also mentioned that there was no evidence that deception could be attributed to the firm nor, despite its experience, could it be considered to have been obviously negligent given the difficulty of interpreting the relevant legislation (Regulation (EC) No 3319/94).
- (7) In support of the application submitted by the French 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.

- (8) By letter of 27 July 2001 the Commission requested further information from the French authorities. This information was provided by letter dated 5 September 2001, received by the Commission on 7 September 2001. The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93, between 28 July 2001 and 7 September 2001.
- (9) By letter dated 27 September 2001, sent on 5 October 2001, the Commission notified the company of its intention to withhold approval and explained the grounds for its decision.
- (10) By letter dated 23 October 2001, received by the Commission on 26 October 2001, 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 239 of Regulation (EEC) No 2913/92, involving neither deception nor obvious negligence on its part. It stated that a special situation was involved because Article 1 of Regulation (EC) No 3319/94 was tricky to interpret. It also said that in a case it considered similar another company had been granted a refund and so it should also be granted one on equitable grounds. It pointed out that the initial selling price was above the ECU 89 minimum, arguing that nothing was laid down in Regulation (EC) No 3319/94 for cases in which the initial price exceeded that threshold. It concluded that the specific duty was not applicable. Lastly, it introduced a new argument for a special situation having obtained, which had not been referred to in the letter of 8 February 2001 from the French authorities. This was that the competent customs authorities had committed an active error since they had accepted the three declarations concerned in this case and granted the exemption from anti-dumping duties requested although they had actually inspected the goods and accompanying documents.

- (11) The firm did not consider that it had shown obvious negligence, stressing that it was not particularly experienced with chemical products since its activities were not product-specific. It further stated its view that the application of Regulation (EC) No 3319/94 was open to interpretation and that the acceptance of its initial declaration by French customs naturally led it to believe that the declaration was correct and to submit subsequent declarations on the same terms.
- (12) The administrative procedure was suspended, in accordance with Article 907 of Regulation (EEC) No 2454/93, between 6 and 26 October 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 7 December 2001 within the framework of the Customs Code Committee (Section for General Customs Rules/Repayment) to consider the case.
- (14) 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.
- (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) The dossier submitted to the Commission by the French authorities shows that the firm requested and was wrongly granted exemption from anti-dumping duties when a specific anti-dumping duty should have been imposed. The imports released for free circulation were not directly invoiced to the importers and therefore under Regulation (EC) No 3391/94 the specific anti-dumping duty (ECU 19/tonne) was due.
- (17) The second subparagraph of Article 1(3) Regulation (EEC) No 3319/94 clearly states the circumstances in which the specific anti-dumping duty applies: when goods not directly invoiced by the exporter of the producer to the unrelated importer are released for free circulation. It is therefore clear that indirect invoicing between the exporter or producer and the importer of the goods into EU territory necessarily entails the application of the specific anti-dumping duty.
- (18) In this case the goods sold by the Polish exporter were not directly invoiced to the end-customers named in the declarations for release for free circulation. It should also be noted that the firm named the three companies as the importers of the goods intentionally, rather than through an oversight.

- (19) The fact that the import price is not lower than the minimum price specified in Regulation (EC) No 3319/94 has no bearing on whether a specific anti-dumping duty is due. Price is a factor when applying a variable anti-dumping duty, but it does not preclude the application of a specific anti-dumping duty, which automatically applies whenever goods are not directly invoiced. Since the specific anti-dumping duty was introduced to avoid circumvention of anti-dumping measures, as explained by paragraph 39 of Regulation (EEC) No 3319/94, there can be no question of using a condition associated with the variable anti-dumping duty to claim exemption from the specific anti-dumping duty. To allow such a claim would be to risk completely undermining the Regulation.
- (20) Nor can the fact that the trade operations concerned did not, according to the firm, involve dumping, be taken to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92. It is up to the operator to use the legal means at his disposal to assert that the trade operations concerned did not constitute dumping.
- (21) As to the fact that another business was granted repayment of duties in a prior case which the firm considers similar to its own, this in no way justifies granting remission of duties in the present case on grounds of equity. For this principle to apply the issues of fact and law involved in the two cases would have to be strictly comparable. That is not, however, the case here. In the present case, in contrast to the case in which repayment was granted, the firm indicated the names of the three companies importing the goods in the relevant declarations intentionally, and not by oversight. This means that the three companies named as importers were indeed the importers of the goods but were not the addressees of the invoices issued by the exporter.

- (22) As to the new argument introduced by the firm in its letter of 23 October 2001, that the competent French authorities had committed an active error which in itself meant that a special situation existed, the following points should be made. Although an entry was made in the customs computer system that the declarations should enter *circuit 1*, in which checks on the goods and documents relating to the declarations are recommended, the checks were not in fact carried out in this case. In the interests of avoiding unnecessary disturbance of trade operations while ensuring that appropriate checks are made, it is left to the discretion of the customs office to select which of the checks recommended by the customs clearance computer system it actually carry out. In this case, when the three declarations were accepted, the competent customs office had only, as indicated on the declarations, confirmed that the documents submitted to it were in order. This means that it did not check the documents in detail and did not carry out a physical check on the goods. It should be noted in this connection that, under Article 78 of Regulation (EEC) No 2913/92, acceptance of declarations in no way precludes the right of the competent customs authorities to carry out post-clearance checks. The initial acceptance of the three declarations concerned was not therefore grounds for legitimate expectations concerning the correctness of the entries made by the firm on the declarations.
- (23) Moreover, it should be noted that in this case the relevant customs office only accepted three statements over a period of approximately a month. Without far greater numbers of declarations having been accepted over a long period, there can be no question of an active error on the part of the authorities such as to give grounds for legitimate expectations on the part of the firm.
- (24) Therefore the authorities' behaviour did not constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

- (25) The dossier as a whole does not therefore give grounds for finding that there was a special situation within the meaning of Article 239(1) of Regulation (EEC) No 2913/92.
- (26) Nor has the Commission identified any other factors constituting a special situation.
- (27) With regard to the second condition provided for in Article 239 of Regulation (EEC) No 2913/92, namely the absence of deception or obvious negligence, the Court of Justice of the European Communities has consistently taken the view that account must be taken of the operator's experience and the care it has taken.
- (28) As the French authorities stated in their covering letter of 8 February 2001, no deception has been found on the part of the firm.
- (29) As to obvious negligence, as a professional customs agent, which cleared goods on behalf of companies specialising in the importation of fertilisers, the firm can be considered an experienced operator with regard to the imports in question. The fact that its the range of its activities covers all products, as it stated in its letter of 23 October 2001, does not alter the fact that it is a professional customs agent or that in this case it was acting for three different companies all specialising in the same type of product.
- (30) As an operator with experience of importing the type of goods concerned and by virtue of its responsibilities as a customs agent (to pay import duties and ensure that the documents it submits to the customs authorities are in order), the firm should have been familiar with the relevant legislation, which, as already pointed out, specifies the importance of the type of invoicing (direct or indirect) in determining which anti-dumping duty is applicable. The firm should therefore have known that the type of invoicing was relevant to the application of the anti-dumping duty and should have taken more care in this respect. At the very least it should have checked with the importers what names were to be entered on the declarations for release for free circulation.

- (31) Consequently, the Commission does not consider that the second condition laid down in Article 239 of Regulation (EEC) No 2913/92 has been fulfilled in this case.
- (32) The remission of import duties requested is not therefore justified in this case,

HAS ADOPTED THIS DECISION:

Article 1

The remission of import duties in the sum of XXXXX requested by France on 8 February 2001 is not justified.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 14.01.2002

For the Commission

Member of the Commission