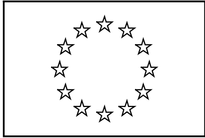
EN

REM 18/01



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 26-02-2003
C(2003)618

NOT FOR PUBLICATION

COMMISSION DECISION

of 26-2-2003

finding that the remission of import duties in a particular case is justified

(Only the English text is authentic.)

(Request submitted by the United Kingdom of Great Britain and Northern Ireland)

(REM 18/01)

FR

COMMISSION DECISION

of 26-2-2003

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(Request submitted by the United Kingdom of Great Britain and Northern Ireland)

(REM 18/01)

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,[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 Council Regulation (EEC) No 2913/92,[3] as last amended by Regulation (EC) No 444/2002,[4] and in particular Article 907 thereof,

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[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 68, 12.03.2002, p. 11.

Whereas:

(1) By letter dated 23 July 2001, received by the Commission on 2 August 2001, the United Kingdom asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether the remission of import duties is justified in the following circumstances.

(2) From June 1995 to December 1997 a firm released butter and cheese originating in New Zealand for free circulation under a tariff quota.

(3) Access to the tariff quota was governed by a system of import licensing in accordance with Commission Regulation (EC) No 1600/95 of 30 June 1995 laying down detailed rules for the application of the import arrangements and opening tariff quotas for milk and milk products,[5] and the preceding legislation.

(4) The products were stored in a type-C customs warehouse under the firm's responsibility, which was changed into a type-E customs warehouse on 29 December 1995. The firm was authorised to use the local clearance procedure involving entry in the records followed by a monthly recapitulative declaration. The entry in the records constituted the declaration for free circulation. As of 15 July 1995 the firm was authorised to use common storage and equivalence under Article 524 of Regulation (EEC) No 2454/93, in the version valid at the time in question.

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[5] OJ L 151, 1.7.1995, p. 12.

(5) An audit by the UK authorities subsequently established that neither equivalence nor common storage could be used for goods falling under the tariff quota because the Protocol 18 or IMA 1 certificate and the corresponding import licence had to be presented when the goods specifically covered by that certificate and licence were released for free circulation. This obligation had not been respected, since the firm considered any consignment of butter or cheese in the warehouse as equivalent to any other consignment of that product. The butter was also found to have been heated, standardised and repacked into retail packs, a treatment which did not figure among the usual forms of handling listed in Annex 69 to Regulation (EEC) No 2454/93.

(6) The UK authorities concluded that the butter and cheese did not qualify for entry under the tariff quota and that the mandatory supporting documents for specific consignments were missing at the time of release for free circulation. The UK authorities thereupon asked the firm to pay the difference between the normal rate of import duty and the reduced rate applicable under the tariff quota, a sum of XXXXX. The firm has requested the remission of this sum in this case.

(7) Under Article 905 of Regulation (EEC) No 2454/93 and in support of the request made by the UK authorities, the firm stated that it had seen the dossier submitted to the Commission by the UK authorities and had nothing to add.

(8) By letter of 4 December 2002 the Commission asked the UK authorities for further information. This information was provided by letter dated 15 March 2002, received by the Commission on 25 April 2002. By letter of 29 May 2002 the Commission asked the UK authorities for further information a second time. This information was provided by letter dated 23 July 2002, received by the Commission on the same day. By letter of 24 July 2002 the Commission asked the UK authorities for further information a third time. This information was provided by letter dated 8 October 2002, received by the Commission the same day. The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93, between 5 December 2001 and 25 April 2002, 30 May 2002 and 23 July 2002 and 25 July 2002 and 8 October 2002.

(9) By letter of 18 November 2002, received by the firm's appointed representative on 20 November 2002, the Commission notified the firm of its intention to refuse the request and explained the grounds for its decision.

(10) By letter of 20 December 2002, received by the Commission the same day, the firm's representative responded to the letter. The administrative procedure was therefore suspended, in accordance with Article 907 of Regulation (EEC) No 2454/93, between 20 November and 20 December 2002.

(11) In its letter of 20 December 2002, the firm's representative opened by arguing that the summary of the facts in the Commission's letter of 18 November 2002 was too succinct. In particular, the firm's representative claimed that the summary, by failing to mention the various authorisations granted to the firm by the UK customs authorities between 1979 and 1995, omitted crucial evidence that the authorities had been continuously informed in detail about the firm's activities and the manner in which it managed its warehouse. The summary thereby failed to shed sufficient light on the passive - but nevertheless significant - contribution of the competent UK authorities to the firm's alleged failings.

(12) The firm's representative went on to contest the Commission's assertion, in its letter of 18 November 2002, that the UK authorities had seriously suspected the firm of obvious negligence. In particular, the firm's representative argued that the UK authorities had expressly answered this question in the negative, acknowledging that the irregularities were the result of a misunderstanding between themselves and the firm concerning the nature and scope of the authorisations.

(13) The firm's representative also argued that the sequence of events needed to be considered in greater detail than in the Commission's letter of 18 November 2002. Such an examination would, it was argued, basically show that the UK authorities had been slow to realise that neither equivalence nor common storage could be used for goods of the tariff quota concerned. To substantiate this claim, the firm argues that the UK authorities continued to content themselves with the authorisations already granted, even though changes in the rules had so restricted the scope for using the system of equivalence and common storage that the trader could consider as equivalent only goods covered by a specific import licence and the associated Protocol 18 or IMA 1 certificate.

(14) As for the existence of a special situation, the firm stated that it regards the doubts expressed by the Commission in its letter of 18 November 2002 as groundless and reiterated its view that this case presents a series of factors constituting a special situation.

(15) The firm strongly contested any suggestion that it had behaved with obvious negligence, arguing that the authorisations granted by the UK customs authorities were indeed short on detail, but that its applications had left no doubt as to the operations and procedures planned.

(16) 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 21 January 2003 within the framework of the Customs Code Committee-Repayment Section to consider the case.

(17) 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.

(18) 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.

(19) The Courts have consistently ruled 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.[6]

(20) Both the firm and the competent UK authorities have invoked the principle of proportionality in this respect. Article 239 of Council Regulation (EEC) No 2913/92 does not, however, mention this concept with regard to the existence of a special situation. The argument that a customs debt is disproportionate to the debtor's failing is not relevant in this case, since Article 239 allows remission of import duties only where two conditions (existence of a special situation, absence of obvious negligence) are met, making no provision for a debt to be adjusted according to the degree of negligence and the amount of the debt.

(21) In this instance a customs debt was incurred when the competent customs authorities subsequently found that import licences and Protocol 18 or IMA 1 certificates presented in support of declarations for free circulation had not been specific to the consignments cleared but concerned identical goods. Moreover, the butter had been heated, standardised and repacked while under the customs warehousing procedure. Yet the legislation in force at that time did not recognise these operations as usual forms of handling for the purposes of the customs warehousing procedure.

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[6] 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

(22) The firm claimed that it had consulted the UK customs authorities on several occasions, both before and during the period in question, and obtained from them a variety of authorisations. Since the nature of its facilities and its activities were known to the competent authorities, the firm argues that it had reason to believe that the system it applied throughout the period in question was consistent with the law.

(23) The dossier shows, however, that the UK customs authorities never expressly authorised the use of equivalence between different consignments under the tariff quotas for New Zealand butter and cheese but simply authorised common storage for goods with different customs statuses, i.e. the storage of non-Community goods with Community goods. The competent UK authorities cannot therefore be held to have committed an active error such as to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(24) In this case, however, the firm is not alleging an active error on the part of the competent UK authorities, instead basing its request for remission on a misunderstanding between it and UK customs concerning the true scope of the authorisation granted for common storage and equivalence. It should be stressed that the UK authorities admit a profound and long-running misunderstanding which first came to light after the last operations concerned by the recovery notice.

(25) It is clear that the UK authorities should have questioned the economic interest (and the customs risk inherent in the maintenance) of an authorisation under which the trader could only use equivalence and common storage for goods of a single consignment covered by a specific Protocol 18 or IMA 1 certificate and the related import licence. Their knowledge of the nature of the firm's facilities and activities should have led them to warn the firm or even to consider revoking authorisations which changes in the law had effectively invalidated or, at least, robbed of much of their economic interest. This consideration, which is relevant to the firm's misinterpretation of the authorisation to use equivalence, also explains why the firm believed it was authorised to heat and repack the butter: the operations and clearance methods for which the firm is being blamed form an economic whole and are only of benefit when used in conjunction with each other.

(26) The firm's failure to present, in support of its declarations for free circulation, import licences and Protocol 18 or IMA 1 certificates specifically corresponding to the consignments cleared (something materially impossible after the handling carried out), instead providing authentic, valid documents corresponding to equivalent goods of the same origin, had no real impact on the working of the preferential tariff arrangements concerned. Since the firm only used the warehouse in question to store products originating in New Zealand for which it possessed the requisite documents, it is established that, while the goods and the documents did not actually correspond, no product benefited improperly from the preferential tariff arrangements concerned and that remission would therefore have no impact on the Community budget.

(27) In view of the evidence, especially the fact that the UK authorities allowed the misunderstanding at the origin of the firm's actions to arise and persist, the Commission considers the above circumstances to be of a nature such as to create a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(28) Concerning the second condition of Article 239 of Regulation (EEC) No 2913/92 referred to above, i.e. whether there has been deception or obvious negligence, the UK authorities, in their letter of 23 July 2001, expressed doubts, not regarding deception, of which there is no question here, but about the firm's diligence. In subsequent correspondence, however, the authorities reviewed this issue in depth and toned down considerably the doubts originally expressed.

(29) In their letter of 8 October 2002, the UK authorities explained that it would be unreasonable to describe the firm's behaviour as obviously negligent because the irregularities detected were due entirely to a misunderstanding between them and the firm. More specifically, the UK authorities have admitted that the authorisations granted were not explicit enough, meaning that they left the firm too great a margin of interpretation. In these circumstances, even if it was somewhat negligent in failing to clarify the situation, the firm cannot be accused of obvious negligence.

(30) It is therefore established that the firm was not obviously negligent.

(31) The circumstances of this case therefore constitute a special situation in which no deception or obvious negligence may be attributed to the company concerned.

(32) Remission of import duties is therefore justified in this case,

HAS ADOPTED THIS DECISION:

Article 1

The remission of import duties in the sum of XXXXX requested by the United Kingdom on 23 July 2001 is hereby found to be justified.

Article 2

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 26-2-2003

For the Commission
Frits Bolkestein
Member of the Commission