

## COMMISSION DECISION

**C(2012) 3127**

**of 15/05/2012**

**finding that repayment of import duties is not justified in a particular case (REC 01/10)**

(only the Spanish text is authentic)

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<sup>1</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 establishing the Community Customs Code<sup>2</sup>,

Whereas:

- (1) By letter of 14 December 2009, transmitted by the Permanent Representation of Spain to the EU by letter of 12 January 2010 and received at the European Commission on 15 January 2010, the Spanish authorities asked whether the repayment of import duties was justified in the present case under Article 236 in connection with Article 220 (2) b or in the alternative under Article 239 of Council Regulation (EEC) No 2913/92 of 12 October 1992. under the following circumstances:
- (2) On 20 October 2005, a Spanish company, hereafter referred to as the applicant, lodged one import declaration for release for free circulation of bed linen classifiable within subheading 6302 2290 of the Combined Nomenclature (CN) brought from the United Arab Emirates (UAE) into the EU. The goods were declared as originating in UAE.
- (3) In accordance with Article 80 of the version of Regulation (EEC) No 2454/93 in force at the time, products covered by a Form A certificate of origin issued by the competent authorities in the UAE were eligible for preferential tariff treatment under the system of generalised preferences (GSP) on their release for free circulation.

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

<sup>2</sup> OJ L 253, 11.10.1993, p. 1.

- (4) The release for free circulation in the European Union of textile products falling within Section XI of the Combined Nomenclature, listed in Annex I to Regulation (EEC) No 3030/93<sup>3</sup>, was at the time in question, subject to proof of their origin in one of the forms and in accordance with the procedures set out in Council Regulation (EC) No 1541/98 of 13 July 1998<sup>4</sup> on proof of origin for certain textile products falling within Section XI of the Combined Nomenclature and released for free circulation in the European Union, and on the conditions for the acceptance of such proof.
- (5) The Spanish customs accepted the customs declaration for release of the goods for free circulation and granted preferential tariff treatment, despite the fact that the declaration was not accompanied by a certificate of origin Form A even though in box 36 of that declaration was mentioned code 200 corresponding to a request to apply the GSP.
- (6) At the time of the facts, Council Regulation (EC) No 397/2004 imposed a definitive anti-dumping duty of 13,1% on imports of cotton type bed linen originating in Pakistan classifiable within certain CN codes, including subheading 6302 2290.
- (7) From 28<sup>th</sup> April to 13<sup>th</sup> May 2007, an administrative cooperation mission comprising representatives of the European Anti-Fraud Office (OLAF) and some Member States travelled to UAE to investigate exports to the EU of bed linen declared as originating in UAE and suspected to originate in Pakistan.
- (8) In the framework of those investigations, it was found that the Ministry of Economy of the UAE had issued 160 non preferential certificates of UAE origin for textile products to the UAE exporters, among which there was certificate number AE50301156 which was issued on 26/09/2005, corresponding to the applicant's declaration SAD-4611-5-433806 at stake.
- (9) OLAF concluded that the companies examined (among which was the company that obtained the non-preferential origin textile certificate for the operation considered) provided incorrect and misleading information to the authorities of the exporting country with a view to obtaining the textile certificates concerned. The bed linen was found to be originating in Pakistan and therefore liable for anti-dumping duties on importation into the European Union.
- (10) In addition, in the absence of a Form A certificate, the goods were not eligible for preferential tariff treatment on import into the European Union.
- (11) On the basis of those circumstances, the Spanish authorities have recovered on 21 October 2008 a total of EUR XXXX in customs duties and EUR XXXX in anti-dumping duties, corresponding to the declaration SAD-XXXX, for which the applicant has requested repayment.
- (12) In support of the request made by the Spanish authorities, the applicant stated that it had seen the dossier that the Spanish Customs authorities proposed to submit to the Commission and had nothing to add.

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<sup>3</sup> OJ L 275 of 8.11.1993, p.1

<sup>4</sup> OJ L 202 of 18.7.1998, p.11

- (13) By letter dated 2 June 2010, the Commission asked the Spanish authorities for additional information. This information was partly provided by letter dated 10 March 2011, received by the Commission on 31 March 2011.
- (14) The Commission sent an additional request for providing the missing information to the Spanish authorities on 23 May 2011. This information was provided by letter of 25 November 2011, received by the Commission on 02 December 2011.
- (15) The applicant confirmed that it had seen that letter from the Commission and the replies which the Spanish authorities proposed to submit.
- (16) Examination of the application was therefore suspended between 3 June 2010 and 2 December 2011.
- (17) By letter dated 7 March 2012, received by the applicant on 10 March 2012, the Commission notified the applicant of its intention to withhold approval and explained the reasons for this.
- (18) 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.
- (19) The applicant replied by letter of 29 March 2012 received by the Commission on 2 April 2012.
- (20) 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 11 April 2012 within the framework of the Customs Code Committee - Customs Debt and Guarantees Section.

**I. Examination of the request under Article 236 in connection with Article 220 (2) (b) of Council Regulation (EEC) No 2913/92**

- (21) Under Article 236 in connection with Article 220 (2) (b) of Council Regulation (EEC) No 2913/92 import duties shall be repaid in so far as it is established that the amount has been entered in the accounts contrary to Article 220 (2) of the Regulation.
- (22) Under Article 220(2)(b) of Council Regulation (EEC) No 2913/92, there shall be no post clearance entry in the accounts where the amount of duty legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

**A - Condition concerning an error on the part of the customs authorities which could not reasonably have been detected**

- (23) In the case in point, a distinction must be made between the debt arising from the non-eligibility of the goods for preferential tariff treatment ("normal" customs duties) and the debt arising from the finding that the goods were of Pakistani origin and subject to anti-dumping duties.

### **(a) Normal customs duties**

- (24) Imports into the EU of this type of product originating in the UAE, qualify for generalised tariff preferences as long as the products are accompanied by a certificate of origin Form A duly issued by the competent UAE authorities. In the case under consideration, preferential tariff treatment for products of subheading 6302 2290 was subject to the submission of a certificate of origin Form A to the customs authorities of the Member State of importation.
- (25) It results from the file and in particular from an email from the Spanish customs authorities of 13 January 2012, that no Form A certificate was in fact annexed to the customs declaration although the applicant asked for the preferential treatment by indicating code 200 in box 36 of the import declaration corresponding to a request to apply the GSP. In its letter of reply to the Commission on 29 March 2012, the applicant claimed that a Form A certificate of origin would not have added to the information already available in the file. Its absence could serve at best to deny the benefit of preferential treatment with regard to customs duties but it insists that the textile certificate of origin issued by the UAE authorities' shows that a proof of origin exists in the file. That certificate of origin is in the view of the applicant the proof that the UAE authorities committed an error within the meaning of Article 220 (2) (b) of Council Regulation (EEC No 2913/92).
- (26) According to the applicant, the absence of the Form A certificate could be used for Spanish customs authorities to request the difference between the normal duty rate (12%) and the preferential duty (9, 6%) but it should not be used to refuse in its entirety its request.
- (27) According to the Commission, an error of the UAE authorities may not be claimed in relation to the GSP preferential treatment since no Form A certificate of origin, issued by the UAE authorities, was submitted to the Spanish authorities at the moment of import.
- (28) Since no certificate of origin Form A has been submitted, there are no elements to establish whether the authorities in the UAE would have committed an error within the meaning of Article 220 (2) (b) of Council Regulation (EEC No 2913/92).
- (29) Therefore no error on the part of the customs authorities can be established with regard to the normal customs duties.

### **(b) Anti-dumping duties**

- (30) Regarding the anti-dumping duties, the applicant claimed that the issuance of a non-preferential textile certificate of origin by the UAE authorities constitutes an error within the meaning of Article 220 (2) (b) of Council Regulation (EEC No 2913/92).
- (31) In its reply to the Commission by letter of 29 March 2012, the applicant disagreed with the Commission's view according to which, since the authorities of the exporting country are not competent with regard to antidumping duties it is not necessary to assess whether the exporter made an incorrect presentation of the facts or not. It deems that accepting that notion would go against the company's legitimate expectations.

- (32) Given the applicant's legitimate expectation that the goods were of UAE origin for the purposes of the application of non-preferential origin rules applicable in case of anti-dumping rules, it should not bear the consequences of a false declaration of the origin, since there was no way for it to ascertain whether the declared origin UAE was incorrect or not.
- (33) However according to the Commission it is common knowledge that, with regard to the application of the rules of origin, 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.
- (34) The procedures and mechanisms applied to determine preferential origin and those used to determine non-preferential origin are independent of each other and pursue completely different objectives. The former are aimed at fostering the economic development of certain countries, whereas the latter are aimed at ensuring correct implementation of the EU's trade policy measures, including countering certain unfair trading practices.
- (35) Even if it should be acknowledged that the textile certificate issued by the UAE authorities was inaccurate, the fact that these authorities made an error does not constitute an error within the meaning of Article 220 (2) (b), first paragraph, of Council Regulation (EEC) No 2913/92. The errors referred to under that provision, as the Court has stated<sup>5</sup>, would have to have been committed 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'.
- (36) Yet in this instance, the application of Council Regulation (EC) No 397/2004 is not within the scope of the powers of these authorities. As such, the company could derive no legitimate expectation from a textile certificate issued by the UAE authorities, for which moreover no administrative cooperation procedure was foreseen, such as that applicable under the generalised system of preferences.
- (37) 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 rightly applied is the exclusive responsibility of the EU customs authorities. As such, the error made by the UAE authorities does not constitute an error within the meaning of Article 220(2) (b) of Council Regulation (EEC) No 2913/92.

**B - Conditions regarding the good faith of the person concerned and compliance with the rules in force as regards the customs declaration**

- (38) If an error on the part of the customs authorities had been established, it would be required to examine whether the applicant acted in good faith and complied with all the rules in force as regards the customs declaration. As no error within the meaning of Article 220(2) (b) of Council Regulation (EEC) No 2913/92 could be found, in principle it would not be necessary to examine the fulfilment of those conditions.

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<sup>5</sup> Case C-348/89 Mecanarte, paragraph 22

- (39) Anyhow, the Commission has examined the applicant's claim of good faith and compliance with the provisions in force as regards the customs declaration.
- (40) According to the Spanish authorities, the applicant showed good faith and complied with the rules in force as regards the customs declaration.
- (41) The applicant itself claimed its good faith during the whole period from the moment it bought the goods to the recovery procedure's stage. It has also underlined its permanent cooperation with the Spanish customs authorities in providing information for the instruction of the file and the recovery of the duties at stake.
- (42) To support its claim, the applicant argues that there was only a one-off import because the imported goods did not correspond to the quality and finishing expected. Moreover, as underlined by the customs authorities who recovered the duties in 2008 it did not commit an infringement according to the Spanish law. However, the applicant has entered code 200 in box 36 of the declaration corresponding to the GSP, although it did not have a Form A certificate.
- (43) Concerning compliance with the provisions in force as regards the customs declaration, the Commission has assessed the following : Article 199(1) of Regulation (EEC) No 2454/93 provides that 'the lodging of a declaration with a customs office 'shall render the declarant or his representative responsible under the provisions in force for:
- the accuracy of the information given in the declaration,
  - the authenticity of the documents presented, and
  - compliance with all the obligations relating to the entry of the goods in question under the procedure concerned.'
- (44) Therefore, contrary to its claim, the applicant has not complied with all the rules in force as regards the customs declaration since:
- It should have known that GSP preferential treatment cannot be granted to the products in question if a certificate of origin Form A was not presented to the customs office at the moment of release for free circulation.
  - It has entered code 200 in box 36 of the declaration corresponding to the GSP, although it did not have a Form A certificate.
- (45) It results from the above that repayment of the amount concerned is not justified on the basis of Article 236 in connection with Article 220 (2) (b) of Council Regulation (EEC) No 2913/92.

## **II. Examination of the request under Article 239 of Council Regulation (EEC) No 2913/92**

- (46) Under Article 239 of Council Regulation (EEC) 2913/92, import duties may be repaid in situations other than those referred to in Articles 236, 237 and 238 resulting from circumstances in which:

- A special situation exists and
- No deception or obvious negligence may be attributed to the person concerned.

#### **A. Existence of a special situation within the meaning of Article 239 of Council Regulation (EEC) 2913/92**

- (47) The Court of Justice of the European Union has ruled that Article 239 of Council 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<sup>6</sup>.
- (48) It is necessary to check whether the applicant's situation should be considered exceptional in comparison with other operators engaged in the same business.
- (49) A distinction must be made between the debt arising from the non-eligibility of the goods for preferential tariff treatment ("normal" customs duties) and the debt arising from the finding that the goods were of Pakistani origin and subject to anti-dumping duties.

##### **(a) Normal customs duties**

- (50) As no certificate of origin form A was submitted at the moment of import, the fact that such certificate might have been issued wrongly by the UAE authorities, cannot be regarded as constituting a special situation under Article 239 of Council Regulation (EEC) No 2913/92.

##### **(b) Anti-dumping duties**

- (51) Although the Commission asked the Spanish Administration and the applicant to provide further information to support the operator's application, the file contains no supporting documents from the firm which could prove a special situation on the part of the company in comparison with other operators engaged in the same business.
- (52) In the absence of facts which could constitute a special situation the Commission takes the view that the first condition referred to in Article 239 of Council Regulation (EEC) No 2913/92 has not been met.

#### **B. Absence of deception or obvious negligence**

- (53) According to the information maintained by the applicant and supported by the Spanish authorities, no deception or obvious negligence may be attributed to the applicant.
- (54) In principle, as no special situation could be established it would not be necessary to examine if the other conditions under Article 239 have been complied with.

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<sup>6</sup> 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.

- (55) Nevertheless, the Commission has also assessed the second condition of this provision and concluded that the applicant has been obviously negligent, for the following reasons:
- It should have known that GSP preferential treatment cannot be granted to the products in question if a certificate of origin Form A was not presented to the customs office at the moment of release for free circulation.
  - It has entered code 200 in box 36 of the declaration corresponding to the GSP, although it did not have a Form A certificate.
- (56) In view of the above, the Commission takes the view that the applicant did not act with the diligence to be expected and therefore the second condition referred to in Article 239 of Regulation (EC) No 2913/92 has not been met.
- (57) The repayment of normal customs duties and anti-dumping duties requested is therefore not justified,

HAS ADOPTED THIS DECISION:

*Article 1*

Repayment of normal customs duties in the sum of EUR XXXX and repayment of anti-dumping duties in the sum of EUR XXXX requested by the Kingdom of Spain on 14 December 2009, is not justified.

*Article 2*

This Decision is addressed to the Kingdom of Spain

Done at Brussels,

*For the Commission*  
*Algirdas ŠEMETA*  
*Member of the Commission*