REC 01/2005

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 27-5-2005
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NOT FOR PUBLICATION

COMMISSION DECISION

Of 27-5-2005

finding that post-clearance entry in the accounts of import duties is not justified in a particular case

(Only the German text is authentic.)

(Request submitted by Germany)
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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 the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded,[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 2286/2003,[4]

1 OJ L 302, 19.10.1992, p. 1.
2 OJ L 236, 23.9.2003, p. 33.
3 OJ L 253, 11.10.1993, p. 1.
4 OJ L 343, 31.12.2003, p. 1.

Whereas:

(1) By letter dated 2 August 2000, received by the Commission on 21 August 2000, Germany asked the Commission to decide, under Article 220(2)(b) of Regulation (EEC) No 2913/92, whether waiving post-clearance entry in the accounts of import duties was justified in the following circumstances.

(2) Under the second paragraph of Article 2 of Commission Regulation (EC) No 1335/2003 of 25 July 2003, the provisions of that Regulation do not apply to cases sent to the Commission before 1 August 2003. Therefore the references that follow in this Decision to Articles 871 and 873 of Regulation (EEC) No 2454/93 refer to that Regulation as last amended by Commission Regulation (EC) No 881/2003 of 21 May 2003.[5]

(3) Between 13 and 18 July 1995 and 4 and 22 September 1995 a German firm declared for import a number of consignments of frozen chicken cuts of CN code 0207 41 10 originating in Thailand.

(4) Imports into the Community of this product were covered by preferential arrangements as part of an annual Community tariff quota provided for in Article 3 of Council Regulation (EC) No 774/94 of 29 March 1994 opening and providing for the administration of certain Community tariff quotas for high-quality beef, and for pigmeat, poultrymeat, wheat and meslin, and brans, sharps and other residues,[6] as amended by Commission Regulation (EC) No 2198/95 of 18 September 1995.[7] In accordance with Article 1 of Commission Regulation (EC) No 1431/94 of 22 June 1994 laying down detailed rules for the application in the poultrymeat sector of the import arrangements provided for in Council Regulation (EC) No 774/94 opening and providing for the administration of certain Community tariff quotas for poultrymeat and certain other agricultural products,[8] the goods in question were eligible for preferential tariff treatment when released for free circulation if they were covered by an import licence.

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5 OJ L 134, 29.5.2003, p. 1.
6 OJ L 91, 8.4.1994, p. 1.
7 OJ L 221, 19.9.1995, p. 3.
8 OJ L 156, 23.6.1994, p. 9.

(5) The firm in question did not attach an import licence to its customs declarations.

(6) However, because of an error in the German User Tariff, the competent customs office mistakenly applied the tariff quota and granted exemption from import duties.

(7) Because it had doubts about the duties applied when the July 1995 consignments were cleared, the firm telephoned the Federal Finance Ministry and the Central Office for Supervision of Tariff Quotas in August 1995 to find out more about the rules in question. Initially, both offices confirmed by telephone that the duties had been correctly levied even though no import licence had been supplied in support of the customs declarations. The firm then asked to have this put in writing. However, in a letter dated 22 August 1995, the German customs administration stated that use of the quota was conditional upon presentation of an import licence. On the same day, the Finance Ministry retroactively altered the German User Tariff. The purpose of this alteration was to make it clear that since 1 July 1995, it had been necessary to present an import licence in order to draw on the tariff quota.

(8) The competent customs office therefore initiated proceedings for the post-clearance recovery of import duties totalling XXXXXX for the imports of July 1995 and XXXXX for September's).

(9) Pleading its good faith, the error by the German authorities and the fact that it could not have detected that error, the firm asked for the import duties to be waived in this case. It did however state in its letter to the Commission of 8 June 2001 that it was only seeking remission for the imports of July 1995. Nevertheless, since the German administration's request of 2 August 2000 concerned consignments imported in both July and September 1995, a decision had to be taken on both the July and September imports.

(10) In accordance with Article 871 of Regulation (EEC) No 2454/93, the firm stated that it had seen the dossier sent to the Commission by the German authorities, stated its position and added its comments, which were passed on to the Commission by the German authorities in their letter of 2 August 2000.

(11) In Decision C(2001) 2533 of 14 August 2001 (REC 4/00), the Commission found that the import duties concerned had to be entered in the accounts, since the facts of the

case showed that the customs authorities had committed an error but that this error could have been detected by an operator acting in good faith within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

(12) The firm then asked the Court of First Instance of the European Communities (CFI) to annul the part of the Commission's decision of 14 August 2001 which ordered post-clearance entry in the accounts of the import duties for July 1995 of XXXXX. In a ruling of 17 September 2003 the Court rejected the firm's appeal.[9]

(13) The firm then brought an appeal before the Court of Justice calling for annulment of the CFI decision of 17 September 2003 and annulment of the part of the Commission's decision of 14 August 2001 which found that post clearance entry in the account of import duties of XXXXXXX was justified for the July 1995 imports.[10]

(14) In its judgment of 3 March 2005 on Case C-499/03 P, the Court annulled the CFI ruling of 17 September 2003 and partially annulled the Commission's Decision C(2001) 2533 of 14 August 2001 on the grounds that the Commission was wrong to justify post-clearance entry in the accounts of import duties by finding that the facts of the case did not show that there had been an error on the part of the customs authorities which could not have been detected by an operator acting in good faith within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

(15) The Commission must act on this partial annulment and re-examine in the light of the Court's judgment the applicability of Article 220(2)(b) of Regulation No 2913/92 to the declarations submitted by the firm in July 1995; the time limits referred to in Articles 873 and 876 of Regulation (EEC) No 2454/93 run from the date of that judgment.

(16) In accordance with Article 873 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met to examine the case on 22 March 2005 within the framework of the Customs Code Committee, Repayment Section.

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9 Joined cases T-309/01 and T-239/02 (Biegi and Commonfood).

10 Case C-499/03 P (Biegi et Commonfood).

(17) Under Article 220(2)(b) of Regulation (EEC) No 2913/92, post-clearance entry in the accounts is waived where the amount of duties 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.

(18) In terms of the first condition of Article 220(2)(b), it must be admitted that the German customs authorities committed two errors, the first being the publication of a version of the German User Tariff containing a mistake, the second that they granted preferential tariff treatment when no import licence was presented. This condition must therefore be deemed to be fulfilled.

(19) The Court of Justice of the European Communities has consistently ruled that, in determining whether the firm could reasonably have detected the customs authorities' error, account must be taken of the nature of the error, the firm's professional experience and the diligence it showed.

(20) The rules applicable to use of the Community tariff quota concerned in this case are set out in the legislation on the opening, management and detailed rules for the application of the quota, Regulation (EC) No 774/94, as amended by Regulation (EC) No 2198/95, and Regulation (EC) No 1431/94. These are not complex texts.

(21) However, the firm maintains that the complexity of the legislation results from Commission Regulation (EC) No 1359/95 amending Annexes I and II to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, and repealing Regulation (EEC) No 802/80.[11]

(22) In this Regulation the Commission published a new version of the Combined Nomenclature for goods, applicable from 1 July 1995, including, in Annex 7, a list of the WTO tariff quotas to be granted by the competent Community authorities. In this Annex there is no entry in column 6 (“Other terms and conditions”) for item 18, which concerns the combined nomenclature of the goods in question, whereas for other

[11] OJ L 142, 26.6.1995, p. 1.

goods that column contains an entry stating that “Qualification for this quota is subject to conditions laid down in the relevant Community provisions. ”

(23) Thus, with effect from 1 July 1995, the Combined Nomenclature resulting from Regulation (EC) No 1359/95 for the first time showed separately the WTO tariff quotas to be granted by the competent Community authorities. Consequently that Regulation, the third recital of which states that “it is necessary to implement, with effect from 1 July 1995, certain tariff measures, in particular for agricultural products as defined within the framework of the Uruguay Round multilateral negotiations”, could have been perceived to open, from that date, new tariff quotas separate from those opened with effect from 1 January 1994 by Regulation (EC) No 774/94. The relevant tariff quotas for the imports concerned were in fact only opened retroactively with effect from 1 July 1995 by Regulation (EC) No 2918/95 of 18 September 1995, i.e. after the imports in question had occurred.

(24) At the same time, the fact that the conditions of qualification for quotas were specified for other goods in the new Combined Nomenclature, but not for the goods concerned, could give rise to the belief that qualification for the tariff quotas concerned was not subject to any conditions.

(25) Furthermore, Regulation (EC) No 1359/95 contained no indication to give the firm to understand that the information in its Annexes had a purely declaratory function..

(26) It must be concluded from the foregoing that in itself Regulation (EC) No 1359/95 contained an ambiguity concerning the actual scope of its provisions on the WTO tariff quotas, in particular as regards goods of CN codes 0207 41 10, 0207 41 41 and 0207 41 71. In particular, the combination of the heading and the different entries in column 6 of Annex 7 to that Regulation created a situation in which it was not sufficiently easy to understand by simply reading them that drawing on the relevant tariff quotas from 1 July 1995 was conditional upon presenting an import licence, as laid down in Regulation (EC) No 1431/94. The Regulation concerned may therefore be objectively described as complex.

(27) This description is directly derived from the content of Annex 7 of Regulation (EC) No 1359/95 which, only a few days before the imports in question, showed the WTO tariff quotas for the first time in the Combined Nomenclature. The firm’s trade

experience with the goods concerned cannot therefore in this case be treated as grounds for finding that it could easily have detected the error in the German User Tariff. Furthermore this error was committed by the highest German customs authorities themselves, who, when they amended their User Tariff to take account of Regulation (EC) No 1359/95, omitted to specify that importing goods of the above CN codes was subject to presentation of an import licence. This error was not corrected until several weeks after publication of the German User Tariff, following the firm's initiatives to check with those authorities that its import transactions were in order. In this respect the firm cannot be accused of having failed to show due diligence by failing to consult the competent authorities in writing before carrying out the imports.

(28) Therefore the firm could not reasonably have been expected to detect the customs authorities' errors.

(29) Moreover, it complied with all the provisions laid down by the legislation in force as regards the customs declaration.

(30) Post-clearance entry in the accounts of import duties is not therefore justified in this case,

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of XXXXXXXX referred to in Germany's request of 2 August 2000 shall not be entered in the accounts.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 27-5-2005

For the Commission
László KOVÁCS
Member of the Commission