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REM 21/00, REM 22/00, REM 23/00, REM 24/00



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 23-7-2001

NOT FOR PUBLICATION

COMMISSION DECISION

of 23-7-2001

finding that remission of import duties in a number of cases is justified and authorising the Kingdom of the Netherlands to repay or remit duties in cases involving comparable issues of fact and law

(requests submitted by the Netherlands)

(REM 21/00, REM 22/0, REM 23/00, REM 24/00)

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THE COMMISSION OF 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, and in particular Article 907 thereof,⁴

¹ OJ L 302, 19.10.92, p. 1
² OJ L 311, 12.12.00, p. 17
³ OJ L 253, 11.10.93, p. 1
⁴ OJ L 141, 28.05.01, p. 1

Whereas:

- (1) By four letters dated 18 September 2000, received by the Commission on 27 September, the Netherlands 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) Four Dutch firms respectively imported from Bangladesh 164 boxes of woven and knitted goods on 11 January 1996 (case REM 21/00), 300 boxes of woven and knitted children's pyjamas on 25 September 1995 (case REM 22/00), 595 boxes of knitted and woven T-shirts on 5 September 1995 (case REM 23/00) and 166 boxes of knitted and woven T-shirts on 24 June 1996 (case REM 24/00).
- (3) Products of this type originating in Bangladesh could be imported into the Community at a preferential rate under the Generalised System of Preferences (GSP). Under Article 77 of the version of Regulation (EEC) No 2454/93 in force at the time, products covered by a Form A certificate issued by the competent authorities in Bangladesh were eligible for preferential tariff treatment on their release for free circulation.
- (4) In the cases in point, the firms presented form A certificates issued by the competent Bangladesh authorities in support of their customs declarations for release for free circulation. The Dutch customs authorities accepted the declarations and granted preferential tariff treatment in all four cases.
- (5) Following an investigation into the conditions under which the Bangladesh authorities issued Form A certificates of origin, carried out in Bangladesh by representatives of several Member States and the Commission between 13 November and 5 December 1996, it was found that a great many certificates issued for textiles were false or should not have been issued because the origin rules had not been complied with.

- (6) During the investigation it was found that 6909 Form A certificates of origin (checked on the spot) for textile products had been wrongly issued by the Bangladesh authorities. These authorities then cancelled and withdrew those certificates. These certificates constitute "List B".
- (7) At the end of their mission, the investigators submitted other Form A certificates to the Bangladesh competent authorities for post-clearance checks. The request for a post-clearance check was confirmed by the Commission in a letter dated 2 December 1996. On 2 June 1997 a reminder was sent to the Bangladesh authorities.
- (8) On 1 October 1997 the Bangladesh authorities informed the Commission that 6309 certificates, constituting "List C", had been cancelled because they had been wrongly issued. However, the Bangladesh authorities stated that they wanted to recheck 2253 of the certificates cancelled. The Bangladesh authorities provided no further information concerning specific certificates within the ten-month period provided for by Article 94(5) of Regulation (EEC) No 2454/93. The cancellation announced by letter of 1 October 1997 was therefore considered definitive.
- (9) On 11 January 1996 one of the firms (case REM 21/00) used Form A certificate of origin No EPB/4451, which was later included in List B and therefore withdrawn by the competent Bangladesh authorities.
- (10) On 25 September 1995 one of the firms (case REM 22/00) used Form A certificate of origin No EPB/3987, which was later included in List C and in the list of certificates to be rechecked. The Bangladesh authorities provided no further information concerning specific certificates within the ten-month period provided for by Article 94(5) of Regulation (EEC) No 2454/93. The cancellation announced by letter of 1 October 1997 was therefore considered definitive.

- (11) On 5 September 1995 one of the firms (case REM 23/00) used Form A certificate of origin No EPB/3970, which was later included in List C and therefore withdrawn by the competent Bangladesh authorities.
- (12) On 24 June 1996 one of the firms (case REM 24/00) used Form A certificate of origin No EPB/5723, the authenticity of which was queried by the Dutch authorities on the basis of the conclusions of the Community investigation. The certificate was therefore sent by Dutch customs to the competent Bangladesh authorities for post-clearance checks on 5 February 1998. After waiting six months for a response the Dutch authorities sent the Bangladesh authorities a reminder on 5 August 1998. No response having been received within the ten-month period provided for in Article 94(5) of Regulation (EEC) No 2454/93, preferential tariff treatment was withheld by virtue of that Article on grounds of reasonable doubt.
- (13) Since the textile products imported into the Netherlands were not therefore eligible for preferential tariff treatment, the Dutch authorities demanded payment of import duties in the sums of XXXXXX (case REM 21/00), XXXXXX (case REM 22/00), XXXXX (case REM 23/00) and XXXXX (case REM 24/00), remission of which is requested in these cases.
- (14) In support of the applications submitted by the competent Dutch authorities the firms stated that, in accordance with Article 905 of Regulation (EEC) No 2454/93, they had seen the dossiers the authorities had sent to the Commission and had nothing to add.
- (15) By letter dated 20 April 2001, the Commission notified the firms that it intended to refuse their requests and explained the grounds for its objection. The Commission also informed them that they could consult the non-confidential documents relevant to the requests for remission.

- (16) On 4 May 2001 representatives of the firms consulted the documents at the Commission's premises.
- (17) By letter dated 17 May 2001, received by the Commission on the same date, the firms expressed their opinion on the Commission's objections. They maintained their 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 their part. They said that the competent authorities in Bangladesh could not be considered to have been misled by incorrect exporters' declarations since they knew that a large proportion of the certificates of origin issued were not valid. By the same token they said that those authorities had failed to meet their obligations since they had issued, and later withdrawn, a large number of invalid certificates. This suggested that the authorities had not properly checked the certificates issued. They also maintained that the Commission too had failed to meet its obligations, arguing that it had neither adequately supervised the proper operation of the preferential arrangements concerned nor informed the importers soon enough about its doubts concerning the validity of the certificates of origin issued by the authorities in Bangladesh. The firms also asserted that the Dutch authorities were partly responsible because they were slow to inform Dutch traders.
- (18) The firm concerned in case REM 24/00 also argued that weather conditions and poor filing systems had prevented the Bangladesh authorities from checking the certificates within the time limits laid down in Article 94(5) of Regulation (EEC) No 2454/93
- (19) The firms did not feel that they had been obviously negligent.
- (20) The administrative procedure for all four applications was suspended, in accordance with Article 907 of Regulation (EEC) No 2454/93, from 21 April to 17 May 2001.

- (21) 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 15 June 2001 within the framework of the Customs Code Committee (Section for General Customs Rules/Repayment) to consider the case.
- (22) Under Article 239 of Regulation (EEC) No 2913/92 import duties may be repaid or remitted in special situations (other than those laid down in Articles 236, 237 and 238 of the said Regulation) resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.
- (23) 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.
- (24) In the cases in point, the granting of preferential tariff treatment for the imports was subject to presentation of Form A origin certificates.
- (25) As has been pointed out, the certificates in cases REM 21/00, REM 22/00 and REM 23/00 were withdrawn by the Bangladesh authorities.
- (26) Reliance on the validity of such certificates is not normally protected, as this is considered part of the importer's normal commercial risk and therefore the responsibility of the person liable for payment
- (27) The Court of Justice has consistently ruled that the legitimate expectations of a trader are protected only if the competent authorities themselves gave rise to the expectation.
- (28) In this instance, the exporters declared on the certificates of origin that the goods they referred to met the conditions for obtaining the certificates.

- (29) However, in the light of recent rulings of the Court of First Instance of the European Communities, the fact that the Bangladesh authorities might have been misled by the exporters did not necessarily mean that the circumstances of the case could not constitute a special situation within the meaning of Regulation (EEC) No 2913/92.
- (30) In any case, the fact that the exporters had confirmed on the Form A certificates that the conditions for obtaining them had been met was not in itself proof that the competent Bangladesh authorities had been misled. It is necessary to ascertain whether the exporters made these declarations on the assumption that the competent authorities were acquainted with all the facts necessary to apply the rules in question and whether the authorities, despite their knowledge, raised no objection to the declarations.
- (31) In the case in point, there is evidence to suggest that the competent Bangladesh authorities knew or, at the very least, should have known that the goods for which they were issuing Form A certificates did not fulfil the conditions laid down for preferential treatment. Furthermore, the competent Bangladesh authorities can be blamed for a number of oversights of a nature such as to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (32) It must be borne in mind that exports of knitted and woven articles to the European Union from Bangladesh had since the mid-1990s far outstripped the country's yarn-production capacity.

- (33) The competent authorities could, moreover, have gauged the quantities of imported raw materials incorporated in the finished products from the documents submitted by the exporters in support of their applications for Form A certificates of origin.
- (34) Those authorities had also twice requested exemptions from the origin rules applied to them, in 1989 and 1994. Information contained in the first request suggests that the competent Bangladesh authorities knew or should have known that the bulk of the ready-to-wear clothing exported with Form A certificates issued in Bangladesh did not satisfy the criteria for origin.
- (35) By the same token, it can be deduced from the Bangladesh government's policy of expanding the country's spinning industry and the various requests for exemptions from the rules of origin that the Bangladesh authorities knew or, at the very least, should have known that neither the country's cotton harvests nor its spinning capacities were sufficient to produce the quantities of yarn used in the manufacture of products for export.
- (36) Thus, the Bangladesh authorities knew or should have known for a number of years that third-country yarns accounted for a substantial proportion of the knitted and woven articles exported to the European Community on the basis of the preferential treatment accorded to products originating in GSP beneficiary countries. The fact that they issued Form A certificates for such products when they knew or should have known that they did not satisfy the conditions of origin necessary to benefit from preferential tariff treatment must therefore be considered a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

- (37) The existence of a special situation is borne out by the fact that the Bangladesh authorities subsequently withdrew a large percentage of the many Form A certificates they had issued for the products in question after carrying out post-clearance checks. Very few of the certificates issued withstood post-clearance scrutiny.
- (38) The existence of a special situation in this case is further borne out by the fact that the competent Bangladesh authorities were unable to carry out post-clearance checks on a great many of the Form A certificates that they had issued.
- (39) The circumstances of these cases are therefore such as to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (40) These circumstances involve neither deception nor obvious negligence on the part of the firms concerned.
- (41) Indeed, the Court of Justice has ruled that the negligence of importers has to be measured against the period of time during which the competent authorities persisted in their behaviour. In the case in point, the competent Bangladesh authorities issued Form A origin certificates for goods that did not qualify for such certificates for at least the three-year period from end 1993 to 1996 covered by the investigation of 13 November-5 December 1996.
- (42) Furthermore, the firms involved have to be absolved of any obvious negligence since there is no evidence that they deviated from normal business practice when concluding their purchase contracts and carrying out the imports concerned.
- (43) Lastly, the importers were neither informed of the Bangladesh authorities' oversights nor warned of the potential risks of importing the textile products in question from Bangladesh.

- (44) The firms concerned have therefore acted in good faith and committed no deception or obvious negligence.
- (45) Remission of import duties is therefore justified in these cases.
- (46) Where special circumstances warrant repayment or remission, Article 908 of Regulation (EEC) No 2454/93 allows the Commission, under conditions that it may determine, to authorise one or more Member States to repay or remit duties in cases involving comparable issues of fact and law.
- (47) Accordingly, the Netherlands, by correspondence dated 18 September 2000 (case REM 24/00) and 18 June 2001 (cases REM 21/00, REM 22/00 and REM 23/00), requested authorisation to repay or remit import duties in cases involving comparable issues of fact and law.
- (48) Such authorisation may be granted to the Netherlands on the condition that it is used only in cases strictly comparable in issues of fact and of law to the cases in question. Above all, there must be no deception or obvious negligence on the part of the importers.

HAS ADOPTED THIS DECISION:

Article 1

The remission of import duties in the sum of XXXXX requested by the Netherlands on 18 September 2000 (case REM 21/00) is hereby found to be justified.

The remission of import duties in the sum of XXXXX requested by the Netherlands on 18 September 2000 (case REM 22/00) is hereby found to be justified.

The remission of import duties in the sum of XXXX requested by the Netherlands on 18 September 2000 (case REM 23/00) is hereby found to be justified.

The remission of import duties in the sum of XXXXX requested by the Netherlands on 18 September 2000 (case REM 24/00) is hereby found to be justified.

Article 2

The Netherlands is hereby authorised to repay or remit import duties in cases involving issues of fact and law comparable to the cases referred to in the requests submitted on 18 September 2000 (cases REM 21/00, REM 22/00, REM 23/00 and REM 24/00).

Article 3

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 23-7-2001

For the Commission

Member of the Commission