EN

REM 02/02

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20-12-2002
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NOT FOR PUBLICATION

COMMISSION DECISION

Of 20-12-2002

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

(Only the French text is authentic.)

(Request submitted by France)

(REM 02/02)

FR

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(REM 02/02)

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 Regulation (EEC) No 2913/92,[3] as last amended by Regulation (EC) No 444/2002,[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 68, 12.3.2002, p.11

Whereas:

(1) By letter dated 14 February 2002, received by the Commission on 20 February 2002, 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) Firm A, established in Germany, purchased three consignments of urea ammonium nitrate solution from a producer established in Poland, Zaklady Azotowe Pulawy. It then sold the consignments on to firm B, also established in Germany, which in turn sold them to firm C, established in Belgium.

(3) Firm A and firm C commissioned a customs agent to clear the goods through customs at the French port of La Rochelle-Pallice.

(4) The agent was instructed to release the goods for free circulation on behalf of firm A and for consumption on behalf of firm C. This meant submitting two customs declarations for the same goods, specifying two different consignees, so that the payment of customs duties and VAT could be separated as the two firms wished.

(5) In line with these instructions, the products were initially released for free circulation on behalf of firm A under EU0 declarations. The invoices from Zaklady Azotowe Pulawy, addressed to firm A, were attached to the declarations. EUR.1 certificates stating that the goods were of Polish origin was also attached. The goods were then immediately placed under the warehousing procedure, although firm C says it had given no instructions to that effect. Lastly, the customs agent released the goods for consumption, naming firm C as the consignee. The customs agent acted as an indirect representative of firms A and C.

(6) The releases for free circulation and for consumption took place on 19 March, 29 July and 5 September 1997. In each case the declaration for release for consumption was accepted only a few minutes after the declaration for release for free circulation (e.g. on 19 March 1997 at 08.11 and 08.7 respectively, meaning that the goods spent no more than four minutes under the warehousing procedure).

(7) Initially the competent French authority accepted the declarations, granted exemption from import duties on the basis of the EUR.1 certificates and did not charge anti-dumping duties.

(8) However, 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]

(9) Article 1(3) of that Regulation provides that "the amount of anti-dumping duty for imports originating in Poland shall be the difference between the minimum import price of ECU 89 per tonne product and the cif Community frontier price plus the CCT duty payable per tonne product in all cases where the cif Community frontier price plus the CCT duty payable per tonne product is less than the minimum import price and where the imports put into free circulation are directly invoiced to the unrelated importer by the following exporters or producers located in Poland ...". The same Article sets a **specific duty** of ECU 19 per tonne product on imports put into free circulation which are not directly invoiced to the unrelated importer by the producer or exporter situated in Poland and which are certified to be produced by Zaklady Azotowe Pulawy.

5 OJ L 350, 31.12.1994, p. 20.

(10) After conducting post-clearance checks, the competent French authorities took the view that the interim warehousing was a legal fiction, since the goods were only in the warehouse for an extremely short time and no stock records were available for the warehouse. They also found that firm C had in all three cases acquired the goods before the declarations for release for free circulation on behalf of firm A had even been submitted.

(11) The French authorities therefore considered that firm C, and not firm A, was the real importer of the goods. Yet firm C had not been directly invoiced by Zaklady Azotowe Pulawy. They therefore considered that, since the products were certified as being produced by Zaklady Azotowe Pulawy, the specific duty of ECU 19 per tonne established by Regulation (EC) No 3319/94 should have been applied in all three cases, and accordingly charged the customs agent who had submitted the declarations XXXXXX; this is the amount for which firm C is jointly and severally liable, since the customs agent acted as its indirect representative, and for which firm C has requested remission.

(12) In the letter from the French authorities of 14 February 2002 and the annexed documents, the following arguments were made for the existence of a special situation.

(13) The circumstances characterising firm C's relationship with the authorities were such that it would be inequitable to require firm C to bear a loss which it would not normally have incurred, since, firm C argued, Regulation (EC) No 3319/94 was a particularly unusual piece of legislation, there were very few anti-dumping Regulations imposing specific duties such as the one concerned, and Regulation (EC) No 3319/94 was particularly recent when, in March, July and September 1997, the goods were released for free circulation. Moreover, in its view the Regulation was difficult to interpret and the mechanism had yet to be endorsed by the Court of Justice of the European Communities.

(14) It was further argued that firms A, B and C purchased and sold on the product concerned at a price higher than the minimum import price of ECU 89 per tonne set in Regulation (EC) No 3319/94, and that relations between the three firms were organised in such a way (CIF sales) that release for free circulation in the Community was the exclusive responsibility of the first purchaser, firm A, which was the purchaser "directly invoiced" within the meaning of Regulation (EC) No 3319/94. Firm C also stated that it had in no way sought to exploit the warehousing procedure, which, it initially stressed, was used on the sole initiative of the customs agent. Therefore, it argued, the anti-dumping duties had become applicable purely as the result of a technical error on the part of the customs agent (use of the warehousing procedure). Later, in the light of comments made by the French authorities regarding the customs procedure that should have been used in this case, firm C insisted that it was up to the customs agent to select the appropriate customs procedure for carrying out its instructions.

(15) Firm C also claimed that the French authorities had applied a particularly strict interpretation of Regulation (EC) No 3319/94, whereas other authorities (in Germany and Belgium) had applied the Regulation more flexibly. It argued that this particularly strict interpretation by the French authorities resulted in the customs agent becoming liable for penalties for a purely technical offence. Firm C asserted that this was characteristic of French law, as opposed to the national law of other Member States, and so placed it in an unequal position.

(16) It also considered that it was in a special situation in that, as the duties were established as a result of post-clearance checks, it could not pass on the cost to its purchaser(s).

(17) Lastly, it denied any deception or obvious negligence on its part on the grounds that it had absolutely no intention of circumventing anti-dumping Regulation (EC) No 3319/94 but had, despite the difficulties involved in interpreting it, taken all possible steps to comply with it strictly and avoid any problems.

(18) In support of the application submitted by the French authorities, firm C 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. It stated its position and comments, which were annexed to the letter of 14 February 2002 from the French authorities to the Commission.

(19) By letter dated 9 September 2002, received on 12 September 2002, the Commission notified firm C of its intention to reject the application and explained the grounds for its decision.

(20) By letter dated 11 October 2002, received by the Commission on the same date, firm C expressed its opinion on the Commission's objections.

(21) It first emphasised that, in order to correct errors which, in its view, vitiated the analysis set out in the Commission's letter of 9 September 2002, and as part of its rights of defence, it had requested a hearing from the Commission but had been turned down, which it considered abnormal and inexplicable, since the refusal of a hearing effectively deprived it of a fundamental right recognised by Community case-law.

(22) 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.

(23) It also stated its view that the Commission had not considered every possible aspect when analysing whether there was a special situation, and had thus wrongly restricted its analysis.

(24) It averred that in this case the special situation was the result of three sets of circumstances, and in doing so partly altered the arguments it had put forward with the request submitted by the French authorities on 14 February 2002. Firstly, it cited the fact that the specific anti-dumping duties no longer applied under current legislation as evidence that the system never worked. Secondly, it argued that the mistakes made by the customs agent during customs clearance and the fact that the agent had not kept it informed had left it completely unable to supervise or alter the clearance procedure. Thirdly, it invoked uncertainties and errors on the part of the public authorities.

(25) It stressed that it had been neither deceitful nor obviously negligent.

(26) As regards the question of obvious negligence, it claimed that the Commission committed a legal error in considering this issue in terms of the complexity of the legislation and firm C's experience and diligence. It argued that in assessing whether there was obvious negligence within the meaning of Articles 239 of Regulation (EEC) No 2913/92 and Article 905 of Regulation (EEC) No 2454/93, the Commission should have taken account of the precise nature of the error, and the trader's professional experience and diligence, but was not entitled to submit the analysis of a request for remission to the cumulative consideration of these three conditions.

(27) As regards the first factor, i.e. the precise nature of the error, firm C pointed out that the Court of Justice of the European Communities had ruled that this involves assessing the complexity of the provisions non-compliance with which has resulted in the customs debt being incurred. In this case, firm C considered that it would be difficult to deny the complexity of the provisions concerned, given that both the French customs authorities and the Commission made mistakes about their interpretation in April 2000 and only arrived at the correct interpretation thereafter. It also cited the fact that a single anti-dumping duty of EUR 19 per tonne had since been introduced as proof of the complexity of the provisions.

(28) As regards professional experience, firm C argued that this must be considered in terms of whether or not a trader's business activities consist mainly in import-export operations, and whether it has acquired a certain amount of experience of such operations. The question would then, in its view, be whether it had behaved as an attentive trader would by reading the Official Journal of the European Communities. It pointed out that it had been constantly vigilant as to compliance with and proper application of Regulation (EC) No 3319/94 and argued that the Commission had not taken sufficient account of its extreme attentiveness, and had thus failed to strike the appropriate balance between its rights and duties and those of the customs agent.

(29) With regard to its diligence, firm C stated that the Court of Justice of the European Communities has ruled that where doubts exist as to the exact application of the provisions non-compliance with which may result in a customs debt being incurred, the onus is on the trader to make enquiries and seek all possible clarification to ensure that he does not infringe those provisions, and claims that this is exactly the attitude it adopted in the case in point. When it read the French customs authorities' infringement report, firm C initially thought the only problem was that arising from the errors made by the customs agent. Only later did it have doubts about the correct instructions to give to the customs agent making declarations in France to ensure that he did so in conformity with Community law.

(30) Firm C also wished to correct what it considered to be inaccuracies and errors in the Commission's letter of 9 September 2002. Among other things, it explained why the French authorities had seized three invoices from firm B to firm C relating to the same goods, i.e. to the consignment cleared through customs on 5 September 1997. Although the Commission's letter of 9 September 2002 did not address the matter of the amounts covered by the invoices, firm C also explained in detail the amounts in various invoices between firms A and B for the same operation of 5 September 1997.

(31) It argued its case in a detailed document of more than 20 pages, with a large number of annexes, most of which had already been sent with the request submitted by the French authorities on 14 February 2002.

(32) The administrative procedure was suspended, in accordance with Article 907 of Regulation (EEC) No 2454/93, for one month, between 12 September and 12 October 2002.

(33) 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 12 November 2002 within the framework of the Customs Code Committee (Section for Repayments) to consider the case.

(34) Firstly, as regards the request for a hearing made by firm C in its letter of 2 October 2002 and repeated in its letter of 11 October 2002, as the Commission stated in its letter of 8 October 2002, the procedure to be followed in the case of requests for repayment or remission is that when the Commission has informed the applicant in writing of its objections to remission/repayment, the applicant is invited to respond in writing (Article 906a of Regulation (EEC) No 2454/93). This firm C did, setting out in the greatest possible detail all the facts and legal arguments it considered relevant. It did not provide any evidence that there were arguments or information that it could not submit in writing, but only orally.

(35) 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 that Regulation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

(36) 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.

(37) The Courts have consistently ruled (1) (2)[6] that in using its margin of assessment regarding fulfilment of the conditions for granting remission, 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.

(38) Firm C considers that the Commission failed to do this in its letter of 9 September 2002 and so failed to consider all the possible grounds for the existence of a special situation.

(39) However, when the Commission set out on page 5 of its letter of 9 September 2002 the conditions under which a special situation could exist, it did not intend to specify the way in which the Commission's margin of discretion for assessing these conditions should be exercised.[7] This does not mean that the balancing of interests referred to by firm C did not take place. Furthermore, in its letter of 9 September 2002 the Commission discussed all the arguments advanced in the request for remission of 14 February 2002 and annexed documentation. In the same letter it stated that it had not found any other factors constituting a special situation.

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6 *Eyckeler & Malt* judgment of 19 February 1998 (Case T-42/96) ECR-I; *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

7 These are two different factors in establishing whether or not a special situation exists. In its judgment of 10 May 2001 cited above, the Court of First Instance of the European Communities explains these two factors separately. It first discusses the conditions under which a special situation can exist and then the Commission's "margin of assessment" as to whether these conditions are fulfilled.

(40) The dossier sent to the Commission by the French authorities shows that they had applied a specific anti-dumping duty by virtue of Council Regulation (EC) No 3319/94. They considered that firm C was the real importer of the goods and had not been directly invoiced by the Polish exporters concerned and so, in accordance with that Regulation, the specific anti-dumping duty of ECU 19 per tonne should have been applied.

(41) Regulation (EC) No 3319/94 clearly states the circumstances in which the specific anti-dumping duty applies: when goods not directly invoiced by the producer to the unrelated importer are released for free circulation.

(42) In this case the goods sold by the Polish exporter were not directly invoiced to firm C, which the French authorities established was the real importer. A customs debt was therefore incurred for which the customs agent and firm C are liable.

(43) As regards the fact that the anti-dumping legislation currently in force is no longer the same as that in force at the time of the imports, it should first be noted that this point was not made in the letter of 14 February 2002 requesting remission, or in its annexes. Furthermore, Regulation (EC) No 3319/94, which imposed the anti-dumping duty under discussion, was in force and valid at the time concerned. It has not since been declared invalid. It cannot therefore be argued that a special situation exists because the anti-dumping duties imposed under that Regulation were subsequently altered under Council Regulation (EC) No 900/2001 of 7 May 2001,[8] and then reduced to an amount of 0 EUR per ton, by Council Regulation (EC) No 1841/2002 of 14 October 2002.[9]

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8 OJ L 127, 9.5.2001, p. 1.
9 OJ L 279, 17.10.2002, p. 3.

(44) It should also be noted that anti-dumping duties reflect sales for export below the normal value by a specific exporter at a specific point in time and it is natural that if that situation changes the anti-dumping duty should be revised. This does not mean that the previous application of the duty was an error or constituted a special situation for a trader.

(45) Furthermore, Regulation (EC) No 900/2001, which altered the situation, imposed a specific anti-dumping duty of ECU 19 per tonne for all imports of the product concerned produced by the Polish firm Zaklady Azotowe Pulawy. In other words, Regulation (EC) No 900/2001 maintained the specific anti-dumping duty and the situation it established would in any case not have been more favourable to firm C than that which obtained under Regulation (EC) No 3319/94, since it would automatically have led to the application of a specific anti-dumping duty of ECU 19 per tonne on the imports.

(46) There are various indications in the dossier accompanying the request for remission that firm C contests the validity of Regulation (EC) No 3319/94 and the existence of the debt for anti-dumping duties on the grounds that the French authorities' interpretation of what is meant by "the real importer" is erroneous. It should be noted in this respect that disputes over the existence of a customs debt do not fall within the scope of the procedure for remission on the grounds of equity. As the Court of Justice and Court of First Instance of the European Communities have ruled (1) (2) (3),[10] the purpose of Commission decisions on remission on grounds of equity is not to decide whether a customs debt has been incurred, nor whether the Regulation imposing the anti-dumping duty is valid.

[10] *Sportgoods judgment* of 24 September 1998 (Case C-413/96): ECR I - 05285; *Kia Motors* judgment of 16 July 1998: ECR II - 02907; (Case T-195/97), *Hyper* judgment of 11 July 2002 (Case T-205/99) - not yet published.

(47) In their letter of 19 January 2001 the French authorities stated that the customs clearance should have been carried out using one of the following two procedures: by lodging a declaration of release for free circulation and release for consumption on behalf of firm A (entailing payment of import duties and VAT on this transaction), or by lodging a declaration for release for free circulation on behalf of firm A, at the same time placing the goods under the warehousing procedure, and then lodging a declaration for release for consumption on behalf of firm C. The latter procedure would entail compliance with the rules on warehouse management, for instance that the goods must actually be placed in the warehouse and stock records kept.

(48) Consequently, according to the French authorities, the instructions firms A and C gave their customs agent (to submit, more or less simultaneously, two customs declarations for the same goods - one for release for free circulation, the other for release for consumption - on behalf of two different consignees) were not practicable under the legislation in force.

(49) The customs agent cannot therefore be said to have committed an error by placing the goods under the warehousing procedure since, firstly, he could not in any case carry out the instructions he had received and, secondly, according to the French authorities, if the goods had really been placed in a warehouse they could actually have been released for free circulation on behalf of firm A and released for consumption on behalf of firm C.

(50) Firm C's comparison of its case with that of REM 1/98 (Commission Decision C(98)1811 final) is therefore irrelevant. The fact that another business was granted repayment of duties in a prior case which firm C considers similar to its own does not mean that it is also entitled to obtain remission of duties on grounds of equity. For it to do so, 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 firm C's case, unlike the one it cites, the customs agent did not make a mistake when indicating the consignees of the imports, leading to the application of anti-dumping duties (either on the declarations for release for free circulation or on those for release for consumption). The agent deliberately, following firm C's instructions, named firm A as the consignee on the declaration for release for free circulation and firm C on the declaration for release for consumption. Furthermore, as already pointed out, the fact that the agent placed the goods under the warehousing procedure on his own initiative was not an error on his part since he had to do so to comply with the instructions to release the goods for free circulation on behalf of firm A and for consumption on behalf of firm C. The customs agent did not therefore commit an error leading to the application of anti-dumping duties as the agent did in case REM 1/98.

(51) As to the argument advanced in the letter of 11 October 2002 that the customs agent's error lay in his failure to inform firm C of the impossibility of carrying out its instructions regarding customs clearance, this matter falls under the contractual relations between firm C and its customs agent. The parties concerned are both private operators, one of whom decided, under a contractual agreement, to give the other responsibility for carrying out customs clearance on its behalf. The Community cannot be liable for any damage resulting from actions in breach of that contract. Moreover, firm C could have attempted to obtain compensation from the customs agent for the injury it had suffered.

(52) Nor does the fact that the import price is not lower than the minimum price specified in Regulation (EC) No 3319/94 have any bearing on whether a specific anti-dumping duty is applicable. 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 in recital 39 to Regulation (EC) No 3319/94, there can be no question of taking a condition associated with the variable anti-dumping duty and applying it to the specific anti-dumping duty. To do so would be to risk completely undermining the Regulation. If the imports were not dumped, there may be grounds for an application for repayment under the basic anti-dumping Regulation, but there is no special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(53) When firm C says that Regulation (EC) No 3319/94 is difficult to interpret and unclear, it is contesting the Regulation's validity, and the invalidity or any lack of clarity of a Community regulation does not constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92: it is up to economic operators who consider themselves to have suffered injury as a result of invalid Community regulations to use the legal means available to them to contest these regulations or prevent their application to certain goods by means of an appeal against the recovery of anti-dumping duties.

(54) With regard to the argument that the Regulation was a recent one, it should be noted that it had been in force since 1 January 1995, i.e. for two years before the events concerned. It is not therefore pertinent to claim that the Regulation was too recent for firm C to have evaluated its content or requested any necessary explanations.

(55) Furthermore, in its judgment in Case C-161/88 of 12 July 1989[11] the Court of Justice stated that it was not unreasonable to expect an experienced economic operator, which firm C is, to keep abreast of the Community law applicable to its transactions by reading the relevant Official Journals. Since Regulation (EC) No 3319/94 was published in the Official Journal of the European Communities on 31 December 1994, it was up to firm C, from that date, to be informed of its content.

(56) A special situation cannot, therefore, be claimed to have existed because the Regulation was published on 31 December 1994.

(57) As to the fact that firm C could not subsequently pass on to its customers the cost of the anti-dumping duties, the Courts have consistently ruled[12] that it is up to traders to take the necessary measures to equip them to deal with the risks of post-clearance recovery and the fact that the cost cannot be passed on to their clients. This did not therefore constitute a special situation.

(58) As regards firm C's opinion that the customs penalties imposed by French national law are unduly severe in relation to the offence committed, the penalties for non-compliance with customs legislation are not a matter for harmonised customs law but are set by national law, so that discrepancies may exist between the customs penalties imposed in different Member States without this constituting a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.[13]

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11 *Binder* judgment of 12 July 1989 (Case C-161/88): ECR 02415.

12 *Méhibas* judgment of 18 January 2000 (case T-290/97): ECR II - 00015.

13 See *Méhibas* judgment cited above.

(59) Moreover, if, as firm C claims, the competent French authorities applied Regulation (EC) No 3319/94 more strictly than the customs authorities in certain other Member States, or than other French customs offices, this would not constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92. Since the French authorities complied with the applicable provisions of Community law, this cannot constitute a special situation in favour of firm C. Furthermore, any incorrect application of customs or anti-dumping law must be contested through other legal channels than a request for remission on grounds of equity under Article 239 of Regulation (EEC) No 2913/92.

(60) As regards the errors and uncertainties attributed to the public authorities, it should first be noted that this point is not explicitly made in the arguments invoked in the request for remission of 14 February 2002. In support of its argument firm C cites letters from the French and Community authorities of 17 April and 6 April 2000 respectively, both dates significantly later than the events giving rise to the customs debt. The letters were responses to a letter sent to the French authorities by the firm on 7 March 2000 concerning future customs clearance transactions it was planning. Firm C could not derive from these letters any legitimate expectations concerning customs clearance transactions which had been conducted long before they were sent. Information given after the events concerned cannot constitute a special situation for firm C.

(61) Moreover, the argument advanced by firm C indirectly relates to the French authorities' conclusions regarding the debt for anti-dumping duties, and, as already pointed out, the question of whether a customs debt has been incurred is a matter for the national authorities; it is outside the scope of the procedure for requesting remission on grounds of equity.[14]

[14] See *Hyper* judgment cited above.

(62) In addition, firm C's reading of the letters, particularly that of 17 April 2000 from the French authorities, is highly subjective. The letter from the French authorities states that since firm A and the Polish exporter concerned are unrelated, the conditions for applying the variable anti-dumping duty are fulfilled, since firm A is both the purchaser and the importer. In other words, the main purpose of the letter was to convey that the specific anti-dumping duty imposed under Regulation (EC) No 3319/94 would not apply if firm A were both the purchaser and the importer into the EU and firm A was unrelated to the Polish exporter. It in no way touches on the issue of whether the specific anti-dumping duty would be applicable if firm C were considered to be the real importer of the goods, nor does it deal in detail with the matter of simultaneous release for free circulation and release for consumption of the same goods on behalf of two different consignees.

(63) There are thus no grounds for considering that the French authorities had gone back on the position set out in their report of 4 December 1998 establishing a customs debt for anti-dumping duties. No error such as to constitute a special situation can therefore be attributed to the French authorities in this case.

(64) As regards the error the Commission is alleged to have made in its assessment of the situation, the following points should be made. According to firm C the Commission's error lies in the fact that its letter of 9 September 2002 takes no account of the letter from the French authorities of 17 April 2000 or the letter from the Commission of 6 April 2000. It argues that the latter indicates that the Commission was acting on the principle that one Directorate could follow one interpretation and another Directorate another interpretation, an attitude which the firm condemns. On this point it should first be noted that the arguments initially advanced by firm C for the existence of a special situation were not explicitly based on those letters. On the contrary, it asserted, in a case related to this one (REM 03/02) and with regard to the statement of position by DG Trade on the interpretation of Regulation (EC) No 3199/94, that the statements of position issued by one Directorate-General could not be regarded as pertinent since, it claimed, "the position of a single Directorate-General of the Commission in no way constitutes an official interpretation of Regulation (EC) No 3319/94, binding on the Commission and thus authoritative. The Commission is a collegiate institution. The interpretation of Regulations is a matter for the Commission as a whole, possibly in cooperation with the competent customs committee..." Thus in one case firm C considers that a statement of position by a Directorate-General does constitute an official statement of the Commission's position and in another it denies the right of a Directorate-General to speak on the Commission's behalf. This is at the very least contradictory. It should also be noted that interpretation of Community customs and anti-dumping law is, in principle, a matter for national authorities and courts and, where appropriate, the Court of Justice of the European Communities.

(65) Moreover, the letters from the French authorities of 17 April 2000, and from the Commission of 6 April 2000, to which firm C refers merely state that if the exporter and firm A are unrelated, the conditions for the application of a variable anti-dumping duty are fulfilled provided that firm A is both the purchaser and the importer of the same goods. They do not give any opinion, as firm C claims they do, on what would happen if firm C were the real importer, which the French authorities consider it was in the case in point. And as the French authorities have also pointed out to firm C, the Commission's letter of 6 April 2000 was not an answer to the question of whether the customs and tax procedures used were legal. There is therefore no inconsistency between the Commission's letter of 9 September 2002 and the letter of 6 April 2000 from DG Trade or the letter of 17 April 2000 from the French authorities. The difference as to which firm is considered to be the real importer (firm A in the letters of 6 and 17 April 2000 and firm C in the letter of 9 September 2002) is the reason for the difference as to which anti-dumping duty should be applied (variable or specific).

(66) Therefore neither the behaviour of the competent customs authorities nor that of the Commission constitutes a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(67) 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.

(68) Nor has the Commission identified any other factors constituting a special situation.

(69) 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 Court of Justice of the European Communities has consistently taken the view that account must be taken, in particular, of the complexity of the law and the operator's experience and diligence.

(70) In its judgment of 10 May 2001 the Court of First Instance of the European Communities ruled that the question of whether there had been deception or obvious negligence was linked to the issue of whether the error was detectable, and that Community case-law showed that in order to assess whether the error was detectable account must be taken of the precise nature of the error and the operator's professional experience and diligence.

(71) The Court also stated that according to case-law, the nature of the error should be assessed inter alia in the light of the amount of time during which the authorities persisted in their error and the complexity of the provisions concerned. Since there was no error on the part of the competent authorities, the complexity of the legislation must be considered.

(72) When firm C claims that subjecting a consideration of the trader's negligence to these three conditions would be a legal error, it is thus contradicting the case-law of the Court of First Instance of the European Communities.

(73) Nor are the above conditions, as firm C suggests in its letter of 11 October 2002, the three conditions that must be fulfilled for post-clearance entry in the accounts to be waived (which are: that there was an active error on the part of the competent customs authorities that could not have been detected by the person concerned, that the person concerned acted in good faith and that he complied with all the provisions of the legislation in force concerning the customs declaration). Therefore when the Commission considers the issue of negligence in terms of the complexity of the legislation and the operator's experience and diligence, it is not subjecting its consideration of negligence to the cumulative conditions that must be fulfilled for post-clearance entry in the accounts to be waived.

(74) As the French authorities state in their letter of 14 February 2002, no evidence of deception by firm C has been found.

(75) As regards the legislation, Article 1 of Regulation (EC) No 3319/94 clearly provides that a definitive anti-dumping duty must be levied on imports of urea ammonium nitrate solution originating in Bulgaria and Poland and falling within CN code 3102 80 00. It sets a specific duty for imports not directly invoiced to the unrelated importer by certain exporters or producers situated in Poland (including Zaklady Azotowe Pulawy).

(76) As regards firm C's experience, the Courts have consistently ruled[15] that a trader may be considered experienced if it has carried out several import operations relating to the same goods. Moreover, a trader's experience is assessed not only in terms of its experience of importing the goods concerned but also of how accustomed it is to carrying out import and export operations in general. The letter of 7 December 1999 attached to the requesting letter states that firm C is a wholesale dealer in chemical products and supplies for agriculture, including specifically nitrogen solution (urea ammonium nitrate), and frequently purchases the products covered by Regulation (EC) No 3319/94 from the countries covered by that Regulation. Furthermore, as this request for remission and another one both show, firm C had first imported the product concerned from the Polish producer Zaklady Azotowe Pulawy in 1995. Since firm C had specialised in trade in nitrogen solutions and had already imported the product concerned, it can be described as an experienced economic operator.

(77) The criteria established by the Courts' rulings to assess whether an operator has been obviously negligent are linked: the degree of an operator's experience determines the extent to which it may be expected to know and correctly understand the relevant legislation and the degree of care it should have taken.

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15 See in particular *Günzler* judgment of 5 June 1996 (case T-75/95): ECR II - 00497.

(78) Since firm C frequently purchased and imported the products covered by Regulation (EC) No 3319/94, it was essential for it to be familiar with that Regulation. Furthermore, in its judgment in Case C-161/88 of 12 July 1989 the Court of Justice stated that it was not unreasonable to expect an experienced economic operator, which firm C is, to keep abreast of the Community law applicable to its transactions by reading the relevant Official Journals. It should therefore have been familiar with the Regulation concerned.

(79) In addition, as the Courts have ruled, when an operator has doubts concerning the interpretation of a rule or point of legislation it must seek information and all possible clarification to check whether its doubts are justified.

(80) Regulation (EC) No 3319/94 was published in the Official Journal on 31 December 1994, more than two years before the imports concerned in this case, and firm C stated in its letter of 7 December 1999, attached to the dossier, that this Regulation was difficult to interpret.

(81) Yet it failed to ask the competent authorities for specific information about the Regulation's meaning until they sent it the notice of recovery of anti-dumping duties relating to an import transaction prior to the imports concerned in this case. Although it was an experienced trader with an obligation to be familiar with Regulation (EC) No 3319/94, and for which a correct understanding of the Regulation was essential, and although it now says that the Regulation was difficult to interpret, it obviously failed to seek the necessary clarification at the time of the imports concerned, thus failing to show due diligence.

(82) In its letter of 11 October 2002 firm C stated that after reading the French authorities' report it had first believed that the only problem arose from the mistakes made by the customs agent. It says that this is why it did not at that point request fuller information about the meaning of the provisions of Regulation (EC) No 3319/94 or the customs clearance method that should be used. However, the firm assumes liability to the other contracting party as soon as it engages in customs clearance transactions, and it seek all the information it needs to conduct them properly before, and not after, such transactions.

(83) It should also be noted that in the course of their post-clearance investigation the French authorities found an anomaly in the invoicing chain for the third consignment cleared through customs on 5 September 1997. The investigators found three invoices between firms B and C relating to the sale of the same goods, namely invoices Nos 97088757 of 1 September 1997 (CIF value: FF 595 per tonne), 97088764 of 8 September 1997 (CIF value: FF 595 per tonne) and 97088765 of 8 September 1997 (CIF value: FF 601 per tonne). In its letter of 24 October 2000 attached to the requesting letter, firm C stated that invoice No 97088757 had been cancelled, No 97088764 was merely a credit note and No 97088765 was the only valid invoice for the transaction. It referred to these arguments in its letter of 11 October 2002. Nevertheless, an invoicing error concerning the sale price, particularly where this is an essential factor in the application of the specific anti-dumping duty, does not support the thesis that firm C showed due diligence.

(84) The French authorities also found that the declaration for release for consumption No 225005 of 5 September 1997 had been accompanied by invoice No 97085505 of 1 September 1997, drawn up between firm A and firm B, and not invoice No 97085522 of 4 September 1997, drawn up between the same parties, as claimed in the letter of 7 December 1999 from one of firm C's lawyers requesting remission. In firm C's letter of 24 September 2001, it stated in this connection that the invoice attached to the import declaration had indeed been the one referred to by the authorities in their post-clearance checks but had not been the one which should have been attached in support of the declaration. This means that, firstly, there was more than one invoice relating to the sale of the same products, which does not argue for firm C's diligence and, secondly, since the sale price of the product concerned is a key factor in determining whether to apply the variable anti-dumping duty, the fact that, according to firm C, it attached the wrong invoice to the declaration also demonstrates a lack of due diligence.

(85) In its letter of 11 October 2002 firm C gave some additional information about the amount of each of the invoices but did not explain the existence of several invoices for a single sale.

(86) 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.

(87) 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 XXXXXX requested by France on 14 February 2002 is not justified.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 20-12-2002

For the Commission
Frits Bolkestein
Member of the Commission