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**REM 06/05**

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 1-12-2006

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NOT TO BE PUBLISHED

**COMMISSION DECISION**

**Of 1-12-2006**

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

(Only the Portuguese text is authentic.)

**(Request submitted by Portugal)**

**(REM 06/05)**

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**COMMISSION DECISION**

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**(Request submitted by Portugal)**

**(REM 06/05)**

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<sup>1</sup>, as last amended by Regulation (EC) No 648/2005<sup>2</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<sup>3</sup>, as last amended by Regulation (EC) No 402/2006<sup>4</sup>, and in particular Article 907 thereof,

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

<sup>2</sup> OJ L 117, 4.5.2005, p. 13.

<sup>3</sup> OJ L 253, 11.10.1993, p. 1.

<sup>4</sup> OJ L 70, 9.3.2006, p. 35.

Whereas:

- (1) By letter dated 18 October 2005, received by the Commission on 21 October 2005, Portugal 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) A firm established in Portugal, hereinafter "the firm", imported several consignments of canned tuna from Ghana in the period from March 1998 to September 1999.
- (3) At the time in question, products of this type originating in Ghana could be imported into the Community under the preferential arrangements applicable to the African, Caribbean and Pacific countries provided for by the Fourth ACP-EC Lomé Convention<sup>5</sup>, as revised by the Agreement signed in Mauritius on 4 November 1995, hereinafter referred to as the "Fourth Lomé Convention"<sup>6</sup>. In accordance with Article 12 of the Fourth Lomé Convention's Protocol 1 concerning the definition of the concept of "originating products" and administrative cooperation methods, products covered by an EUR.1 certificate of origin issued by Ghana's competent authorities were eligible for preferential tariff treatment when released for free circulation in the Community.
- (4) In the case in point, the firm presented EUR.1 origin certificates issued by the competent Ghanaian authorities in support of its customs declarations for release for free circulation. The Portuguese customs authorities accepted the declarations and granted preferential tariff arrangements.
- (5) Following an investigation into the conditions under which the Ghanaian authorities issued EUR.1 certificates of origin, carried out in Ghana by representatives of several Member States and the Commission in February 2000, it was found that a number of fishing vessels (and vessel-owners) that had supplied tuna to the firm's supplier did not meet the origin criteria laid down in Article 2 of Protocol 1 to the Fourth Lomé Convention and that the tuna caught by these vessels did not therefore qualify under the ACP preferential rules of origin.

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<sup>5</sup> OJ L 229, 17.8.1991, p. 3.

<sup>6</sup> OJ L 156, 29.5.1998, p. 3.

- (6) On the basis of the findings of this investigation, it was established that in the case in point the firm had used EUR.1 certificates of origin that should not have been issued. Since the products imported to Portugal were not therefore eligible for preferential tariff treatment, the Portuguese authorities demanded that the firm pay import duties in the amount of XXXXXX, the amount for which remission is requested.
- (7) The competent Portuguese authorities forwarded the application to the Commission on 18 October 2005. In the application it is stated that by issuing certificates of origin which later proved to be invalid, Ghana's competent authorities made an error constituting a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92. Moreover, the firm argues that the case in point is comparable in fact and law to cases covered by Commission Decision No 3627 of 3 October 2002 (REM 01/02) and Commission Decision No 3493 of 24 September 2004 (REM 02/04), in which the Commission decided that the remission of duties was justified.
- (8) Pursuant to Article 905 of Regulation (EEC) No 2454/93, the firm stated in support of the application from the competent Portuguese authorities that it had seen the dossier submitted to the Commission and had nothing to add.
- (9) By letter dated 24 February 2006 the Commission requested additional information from the Portuguese authorities. The Portuguese authorities provided the information by letter dated 21 July 2006, received by the Commission on 25 July 2006.
- (10) The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93, between 25 February 2006 and 25 July 2006.
- (11) 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 13 September 2006 within the framework of the Customs Code Committee (repayments section) to consider the case.
- (12) Article 239 of Regulation (EEC) No 2913/92 allows import duties to be repaid or remitted in situations other than those referred to in Articles 236, 237 and 238 of that Regulation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

- (13) The Court of Justice of the European Communities has consistently taken the view that these provisions represent a general principle of equity designed to cover a special 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.
- (14) In the case in point, the granting of preferential tariff treatment for the imports was subject to presentation of EUR.1 certificates of origin issued by the relevant Ghanaian authorities.
- (15) Following the investigation into the conditions under which the Ghanaian authorities issued EUR.1 certificates of origin, carried out in Ghana by representatives of several Member States and the Commission in February 2000, the competent Portuguese authorities considered the certificates of origin presented when the products in question were imported to be invalid because they failed to meet some of the origin criteria provided for in Article 2 of Protocol 1 mentioned above. More specifically, the fishing vessels that had caught the fish and the firms that owned them did not meet the conditions laid down in the third indent of Article 2(2) of the Protocol.
- (16) Under Article 904(c) of Regulation (EEC) No 2454/93, reliance on the validity of certificates of preferential origin 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.
- (17) 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 expectations. Consequently, when the authorities' error is due to inaccurate declarations from exporters, reliance on the validity of the certificates of origin is no longer protected.
- (18) In this instance, the exporters declared on the certificates of origin that the goods they referred to met the conditions for obtaining the certificates.

- (19) However, in the light of [recent rulings](#) of the Court of First Instance of the European Communities<sup>7</sup>, the fact that the competent Ghanaian 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 Article 239 of Regulation (EEC) No 2913/92.
- (20) In the case in point a number of factors can be considered as constituting a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (21) The fact that the relevant authorities in Ghana had issued certificates later shown to be invalid over a long period and the firm had therefore benefited from preferential arrangements over that same period could have lead the firm to believe that its imports complied with the regulations.
- (22) Moreover, until 28 August 2002, the competent Ghanaian authorities had refused to sign the report written after the Community investigation in 2000. The Ghanaian authorities eventually recognised that the fishing vessels belonging to a number of exporters did not meet the origin criteria laid down in Article 2 of Protocol 1 to the Fourth Lomé Convention. On the other hand, there was disagreement as to the results of the 2000 Community investigation. Even when they accepted the results of the investigation, the Ghanaian competent authorities did not withdraw the certificates of origin they had issued.
- (23) The circumstances presented in recital (21) served only to reinforce the firm's conviction that it was entitled to benefit from the preferential arrangements. These factors, taken together with the circumstances presented in recital (22), must count in the importer's favour as it acted in good faith.
- (24) The circumstances of this case are therefore such as to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (25) However, such a situation can give rise to the remission of import duties only if no deception or obvious negligence can be attributed to the person concerned.

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<sup>7</sup> Judgment in the “Turkish televisions” case 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 [2001] ECR II-1337.

- (26) On the basis of the letters the Portuguese authorities addressed to the Commission, it must be considered that there was neither deception nor obvious negligence on the part of the firm.
- (27) Remission of import duties is therefore justified in this case.
- (28) Where special circumstances warrant repayment or remission, Article 908 of Regulation (EEC) No 2454/93 authorises the Commission to determine the conditions under which the Member States may repay or remit duties in cases involving comparable issues of fact and law.
- (29) Cases comparable in fact and law to this one are requests for repayment or remission lodged within the legal time limits in respect of import operations covered by EUR.1 certificates issued by Ghana's competent authorities in the period covered by the Community investigation in question (1997-2000), where the goods were caught by fishing vessels belonging to the companies referred to in the report drawn up after the Community investigation of 2000 or by the vessels included on the list drawn up after the meeting of 16 May 2002 between the Ghanaian authorities and OLAF and where those operations were carried out in circumstances comparable in fact and law to those which gave rise to this case. There must have been no deception or obvious negligence on the part of the importers,



HAS ADOPTED THIS DECISION:

*Article 1*

The remission of import duties in the amount of XXXXX requested by Portugal on 18 October 2005 shall hereby be deemed justified.

*Article 2*

This Decision is addressed to the Republic of Portugal.

Done at Brussels 1-12-2006

*For the Commission*  
László KÓVACS  
*Member of the Commission*