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COMMISSION DECISION

of 12.10.2017

**on finding that the remission of import duties is justified in a particular case
(REM 03/2013 (REV))**

(only the Spanish text is authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 establishing the Union Customs Code, and in particular Article 123(2) thereof,

Whereas:

- (1) For the time of the facts and of the procedure leading to Decision C(2014)3007, the substantive provisions of Council Regulation (EEC) No 2913/92¹ establishing a Community Customs Code are still to be applied.
- (2) By letter of 18 April 2013, received by the Commission on 2 May 2013, Spain asked the Commission to decide whether remission of import duties was justified under Article 236 in connection with Article 220(2)(b) of Council Regulation (EEC) No 2913/92 and with Articles 869 and 871 of Commission Regulation (EEC) No 2454/93 of 2 July 1993² or, in the alternative, under Article 239 of Council Regulation (EEC) No 2913/92 and 905 of 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.
- (3) Between 30 June 2009 and 24 September 2010, a firm (hereafter referred to as the "applicant") established in Spain, imported certain processed tuna products classified under the TARIC code 16.04.14.16.45 declared as originating in Ecuador to the EU.
- (4) At the time of the facts, the rules and conditions for applying a scheme of generalised tariff preferences for imports into the EU of those products originating in Ecuador was Council Regulation (EEC) No 732/2008, which provided for suspension of Common Customs Tariff ad valorem duties instead of the regular 24% duty for imports of countries under the EU's Generalised System of Preferences (GSP) or a reduced 5% rate of duty for imports of Panamá.³
- (5) In application of Regulation No 732/2008, the only products entitled to benefit from the preferential rate of duty on export of fishery products were those resulting from raw materials of Chapter 03 of the Harmonised System (HS) wholly obtained in the beneficiary country, in its territorial waters or caught by its vessels outside those

¹ OJ L 302 19.10.1992, p. 1

² OJ L 253, 11.10.1993, p. 1

³ By Commission Decision of 9 June 2010 (L 142/10) Panama joined again the GSP plus system for the period 1st July 2010-31 December 2011.

waters with the addition, where applicable, of cumulation of origin with other Member States of the same regional group and or the European Union.

- (6) In the framework of the rules of cumulation, the mechanism for determining which member of the regional group is to be considered as the country of origin of the final product is laid down in Article 72a of Regulation No 2454/93⁴.
- (7) According to this provision, the final product exported to the EU has the origin of the country of last working or processing if more than a minimal operation takes place there and the working or processing carried out in the last processing country exceeds the operations set out in Article 70 of Regulation No 2454/1993 (the value added is greater than the highest customs value of all the products used originating in any one of the other countries of the regional group). If those two criteria are not fulfilled, the final product has the origin of the country of the regional group which accounts for the highest customs value of the originating products used coming from the other countries of the regional group.
- (8) The issue of a Form A certificate of origin by the Ecuadorian authority was based on the submission of an application form by the exporter, in which the exporter declared that the origin of the goods was Ecuador and that the goods they referred to meet the conditions for obtaining the certificates of origin.
- (9) In the case under consideration, the applicant presented Form A certificates of origin issued by the relevant authorities of Ecuador in support of its customs declarations for release for free circulation. The Spanish customs authorities accepted the declarations and granted preferential tariff treatment.
- (10) From 14 to 30 September 2010 a joint administrative cooperation mission including representatives of the European Anti-Fraud Office (OLAF) and some Member States travelled to Ecuador to investigate the origin of raw materials used in Ecuador in the production of processed tuna products exported to the EU covered by certificates of origin Form A issued in Ecuador in order to benefit from the tariff preferences under the GSP scheme.
- (11) The joint mission found that the Ecuadorian authorities had wrongly issued certificates of origin Form A for tuna products processed in this country from raw material caught by Salvadorian and Panamanian fishing vessels without having complied with the rules for considering the goods as of Ecuadorian origin.
- (12) For the raw fish caught by vessels registered in El Salvador and which sailed under Salvadorian flag, even though El Salvador was a GSP beneficiary country, the goods from that country were not eligible for cumulation in order to benefit from the tariff preferences because the Salvadorian authorities did not prove the origin of the fish as required by Article 72a and Article 80 of Regulation No 2454/93.
- (13) In the case of raw fish caught by Panamanian vessels, Form A certificates had been issued by Panama to prove the originating status of the raw material originated in Panama, but the value added rule set out in Article 70 of Regulation No 2454/1993 had not been respected.
- (14) Since the processed tuna products declared as of Ecuadorian origin and imported into the EU were not eligible for preferential tariff treatment, on the basis of the final report of the OLAF joint mission, the Spanish customs authorities initiated in 2012

⁴ References to Chapter 2 of Title IV of Regulation 2454/1993 are made to the provisions in force at the time of the facts

proceedings for the post-clearance recovery of a total amount of EUR xxxxxxxx in regular import duties. This is the amount for which remission is being requested in this case.

- (15) The Spanish authorities considered that remission of duties is justified because there was an error on the part of the Ecuadorian authorities which misinterpreted and misapplied the rules for determining the origin of fishery products for GSP purposes, the certificates that OLAF found to be incorrect were issued on the basis of a correct presentation of the facts by the exporter and the error could not have been detected by the applicant despite its professional experience.
- (16) The applicant confirmed that it had read the dossier that the Spanish authorities proposed to submit and made comments on the information that it considered should be included.
- (17) By letter dated 8 May 2013, the Commission asked the Spanish authorities for additional information. This information was provided by letter dated 28 May 2013, received by the Commission on 11 June 2013.
- (18) The Commission asked again for additional information on 17 September 2013. The new information was sent by letter of 21 October 2013, received by the Commission on 5 November 2013.
- (19) In all those cases, the applicant confirmed that it had seen the letters from the Commission and made comments to the replies which the Spanish authorities proposed to submit.
- (20) The administrative procedure was accordingly suspended between 9 May 2013 and 11 June 2013 and again between 18 September 2013 and 5 November 2013 under Articles 873 and 907 of Commission Regulation (EEC) No 2454/93.
- (21) In accordance with Articles 873 and 906a of Regulation (EEC) No 2454/93, the Commission invited the applicant by letter dated 12 February 2014 received by the firm on 17 February 2014 to comment in writing on the objections on any issues of fact or law which might lead to the refusal of the application.
- (22) In its letter of reply to the Commission of 5 March 2014 received on 10 March 2014, the applicant expressed its opinion on the Commission's objections and claimed that it should not be held responsible for a malfunction of the preferential system in case of an error made by the authorities of a third country. It held also that it acted in good faith and expressed its disagreement with the interpretation made by the Commission on the trader's lack of diligence for imports it carried out between 21 May and 24 September 2010.
- (23) In accordance with Articles 873 and 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.
- (24) In accordance with Articles 873 and 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 8 May 2014 within the framework of the Customs Code Committee (Debts and Guarantees section) to consider the case.
- (25) In its decision C(2014)3007 of 15 May 2014, the Commission decided that the remission of import duties is justified for the amount corresponding to imports made before 21 May 2010 and that remission of import duties is not justified for another amount corresponding to imports made after 21 May 2010.

- (26) Concerning imports by the applicant of tuna from Ecuador into the EU after 21 May 2010, the Commission found that the applicant could not be considered as acting in good faith and taking due care in ensuring that all the conditions for the preferential treatment were fulfilled according to Article 220(2)(b) of Regulation (EEC) No 2913/92, in view of the "Notice to importers on imports of tuna from Colombia and El Salvador into the EU" published in the Official Journal C 132 of 21 May 2010, page 15⁵. Taking into account the applicant's long professional experience and the fact that it operates in different regions of the world subject to different rules of origin, it could and should have taken necessary precautions to ensure a proper control on the evidence of origin presented for the correct application of GSP preferential treatment for regional cumulation Group II.
- (27) Regarding the application of Article 239 of Council Regulation (EEC) No 2913/92, the Commission has not identified any factors likely to constitute a special situation.
- (28) In view of the above, the Commission decided in Article 2 of Decision C(2014)3007 that the remission of duties corresponding to imports made from 21 May to 24 September 2010 was justified neither on the basis of Article 236 in connection with Article 220(2)(b), nor on the basis of Article 239 of Council Regulation (EEC) No 2913/92.
- (29) Spain subsequently asked the General Court to annul Article 2 of the Commission's Decision of 15 May 2014.
- (30) In its judgment of 15 December 2016 in the case T-548/14, the General Court annulled Article 2 of the Commission Decision C(2014)3007, in which the Commission decided against the remission of the amount corresponding to imports made between 21 May 2010 and 24 September 2010. As, in the Commission's decision, the issuing of the "Notice to importers on imports of tuna from Colombia and El Salvador into the EU" of 21 May 2010 was decisive for separating between the customs duties that fulfilled the conditions for remission (imports made between 1 January 2009 and 20 May 2010) and those which have not (imports made between 21 May 2010 and 24 September 2010), the General Court has assessed in detail the notice. The Court noted that there was no mention of Ecuador, neither in the notice's title, nor in its text. On the contrary, the first paragraph of the notice clearly referred to imports of tuna-based products in the Union which are declared as originating in Colombia or El Salvador.
- (31) The Court therefore upheld the argument brought forward by Spain that it is possible to raise the question whether, by mentioning the GSP regime, the notice covers all the countries benefiting from such a system, or only those that are part of the same regional group as Colombia and El Salvador, namely regional group II. Given the lack of clarity in the "Notice to importers", the Court could not rule out that some even very experienced operators may have difficulties interpreting it.
- (32) The Court considered that the lack of clarity in the notice, which contained only a general statement that irregularities could not be excluded in other countries, did not remove the doubts regarding the geographical scope of its application. The Court concluded that the Commission erred in law when it held that, based on the existence on the "Notice to importers on imports of tuna from Colombia and El Salvador into the EU" from 21 May 2010, the applicant could not invoke good faith.
- (33) The Court recalled, in this context, that the Commission already found in its decision that the applicant could not detect the error before the "Notice to importers" had been

⁵ OJEU C (2010)C 132/05.

adopted. In addition, the Court noted that the parties did not dispute that the applicant was diligent before and after the adoption of the notice of 21 May 2010, the Commission faulting the operator for not carrying out a broader inspection only after the publication of the notice.

- (34) The Commission must act on this ruling and issue a new decision in conformity with the General Court's decision in case T-548/14, in which it analyses whether the remission of duties corresponding to imports made from 21 May to 24 September 2010 was justified in light of the judgment of 15 December 2016 in the case T-548/14.
- (35) Commission Decision C(2014)3007 already recognised both for the imports before and also for those taking place after 21 May 2010 that the circumstances of the case reveal that the Ecuadorian authorities misinterpreted and misapplied the rules for the issue of certificates Form A and did not comply with the relevant provisions of Regulation 2454/93. The fact that the relevant authorities in Ecuador had wrongly issued Form A certificates over a long period of time and that the firm had therefore benefited from preferential arrangements over that same period of time could have led the applicant to believe that its imports complied with the legislation in force. The recurrence of the error may be thus considered to function in favour of the applicant acting in good faith.
- (36) The Commission's "Notice to importers on imports of tuna from Colombia and El Salvador into the EU" does not alter this finding. The notice only refers to Colombia and El Salvador and states that "it could not be excluded that consignments are imported from other countries benefitting from the generalized system of preferences GSP without fulfilling requirements of GSP rules of origin concerning cumulation of origin". Such formulation may not be considered sufficiently clear to be understood by the applicant in the sense that he needs to take the necessary precautions to ensure a proper control on the evidence of origin presented for the correct application of GSP preferential treatment for products originating in Ecuador.
- (37) It follows from the file that it is not possible to establish whether the error committed by the Ecuadorian authorities could have been detected by the applicant even for imports carried out after 21 May 2010.
- (38) In what regards the applicable legislation, the conditions for repayment are governed by the Community Customs Code in force during the time of the transactions, as they represent substantial issues⁶.
- (39) According to Article 220(2)(b) of Regulation (EEC) 2913/92, the issuing of a certificate by the authorities of a third country, should it prove to be incorrect, shall constitute an error which could not reasonably have been detected by the person liable for payment, the latter for its part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (40) As remission of import duties is thus justified also for the duties corresponding to imports made after 21 May 2010, it is no longer necessary to check whether, as of 21 May 2010, the applicant's situation should be considered exceptional in comparison with other operators engaged in the same business under Article 239 Regulation (EEC) 2913/92.
- (41) In accordance with Article 123(2), corroborated with Article 285(2) of Regulation (EU) No 952/2013, the Member States examined the case and delivered their opinion,

⁶ See *Molenbergnatie* case, C-201/04, para. 39 et seq.

in conformity with Article 4 of Regulation (EU) No 182/2011, on 5 May 2017 within the framework of the Customs Code Committee, Debt and Guarantees Section.

- (42) Articles 1 and 3 of Decision C(2014)3007 of 15 May 2014 remain unaltered, as they were neither challenged, nor annulled by the General Court's judgment in case T-548/14.
- (43) In accordance with Article 875 of Regulation (EEC) No 2454/93, the Commission had specified in its Decision C(2014)3007 of 15 May 2014 (paragraphs 46-47) the conditions under which the customs authorities of the Member States are to repay or remit duties in cases involving comparable issues of fact and of law. The cases comparable in fact and law were defined in Decision C(2014)3007 as regarding requests lodged within the legal time limits in respect of tuna products declared as originating in Ecuador covered by certificates of origin Form A issued by the Ecuadorian competent authorities in the period and for the companies covered by the OLAF investigation in question (2008-2010). Following the judgment of the General Court of 15 December 2016 in the case T-548/14 and in accordance with the present decision, the declarations for release for free circulation may have been submitted both before and after 21 May 2010,

HAS ADOPTED THIS DECISION:

Article 1

Article 2 of Decision C(2014)3007 of 15 May 2014 is hereby replaced by the following:

"The import duties in the sum of EUR xxxxxxx which are the subject of the request from the Kingdom of Spain on 18 April 2013 for imports made between 21 May 2010 and 24 September 2010 shall be remitted."

Article 2

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 12.10.2017

For the Commission
Pierre MOSCOVICI
Member of the Commission