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REM 01/2003

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 1-4-2004
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NOT FOR PUBLICATION

COMMISSION DECISION

Of 1-4-2004

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

(Only the English text is authentic.)

(Request submitted by the United Kingdom of Great Britain and Northern Ireland)

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(REM 01/2003)

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 Council Regulation (EEC) No 2913/92,³ as last amended by Regulation (EC) No 2286/2003,⁴

¹ OJ L 302, 19.10.1992, p. 1.

² OJ L 311, 12.12.2000, p. 17.

³ OJ L 253, 11.10.1993, p. 1.

⁴ OJ L 343, 31.12.2003, p. 1.

Whereas:

- (1) By letter of 17 December 2002, received by the Commission on 6 January 2003, the United Kingdom of Great Britain and Northern Ireland asked the Commission to decide whether the remission of import duties under Article 239 of Regulation (EEC) No 2913/92 was justified in the following circumstances.
- (2) Under the second paragraph of Article 2 of Regulation (EC) No 1335/2003, the provisions of Article 1 of that Regulation do not apply to cases sent to the Commission before 1 August 2003. Therefore the references that follow in this Decision to Articles 905 and 907 of Regulation (EEC) No 2454/93 refer to that Regulation as last amended by Commission Regulation (EC) No 881/2003 of 21 May 2003.⁵
- (3) Between May 2000 and January 2002 a UK firm imported 21 consignments of individually frozen Alaska pollack fillets (hereinafter "fillets") falling under tariff code 0304 20 85 90 but declared under 0304 20 85 10, a code eligible for exemption from duties under end-use arrangements.
- (4) Until April 2000 the firm imported the goods under the correct tariff heading. However, on being advised by a customer that it could use the end-use arrangements for fillets presented individually, the firm contacted the local customs office and described the product it was importing (individually frozen Alaska pollack fillets) and the processing it would undergo. The office informed it, orally, that the products in question were eligible for exemption from duties because of their end-use.
- (5) The firm therefore applied for amendment of the end-use authorisation it already held, which hitherto had only covered imports of cod of Chapter 3 of the tariff. However, the amendment of the authorisation in April 2000 merely included in the list of products covered frozen fillets presented in the form of blocks for processing.
- (6) When the firm applied for renewal of its authorisation in November 2000, it expressly entered in the heading for goods covered by the authorisation fillets of heading 0304 20 85 90, though no reduced or zero rate of duty on the grounds of end-use existed for that heading. The authorisation was nevertheless issued. It was valid from 1 January to 31 December 2001.

- (7) The firm applied for its authorisation to be renewed on 7 February 2002. The UK customs authorities issued the authorisation on 28 March 2002, backdating its validity to 1 January 2002. The new authorisation also featured the incorrect code 0304 2085 90.
- (8) After carrying out checks on the imported products and taking samples in January 2002, the competent authorities informed the firm that the products concerned were not eligible for exemption from duties on the grounds of end-use. In April 2002 they therefore asked the firm to pay duties of XXXXX; this is the amount for which the firm has requested remission.
- (9) In support of the application submitted by the UK authorities, the firm 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 17 December 2002 from the UK authorities to the Commission.
- (10) By letters of 6 May and 13 October 2003, the Commission requested additional information from the UK authorities. This information, together with the firm's comments, were sent to the Commission by letters of 26 June 2003, received at the Commission on 9 July 2003, and 31 December 2003, received at the Commission on 8 January 2004. The UK authorities also sent additional information in October 2003.
- (11) The administrative procedure was therefore suspended in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93 between 7 May and 9 July 2003 and between 14 October 2003 and 8 January 2004.
- (12) By letter dated 29 January 2004, received by the firm on 2 February 2004, the Commission notified the firm, through the firm's lawyer, of its intention to withhold approval and explained the grounds for its decision.
- (13) By letter dated 26 February 2004, received by the Commission on the same date, the firm's lawyer stated his opinion regarding the Commission's objections. He pointed out that the firm considered that it had had legitimate expectations regarding the validity of the procedure used since it had submitted a very large number of declarations

⁵ OJ L 134, 29.5.2003, p. 1.

without the customs authorities making any comment whatsoever. He also argued that no deception could be attributed to the firm, which had always acted transparently and honestly in its relations with the competent authorities.

- (14) The administrative procedure was suspended in accordance with Article 907 of Regulation (EEC) No 2454/93 between 3 February and 2 March 2004.
- (15) In accordance with Article 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met to examine the case on 9 March 2004 within the framework of the Customs Code Committee - Repayment Section.
- (16) 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.
- (17) 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.
- (18) Given the importance of authorisations for the end-use arrangements, the authorisations issued by the competent authorities should first be examined. In doing so, a distinction must be made between the period from 14 April 2000 to 31 December 2000 and the period after 31 December 2000.
- (19) Before the imports under consideration were carried out, the firm had already had an end-use authorisation for certain fish. However, at the beginning of 2000 its authorisation only covered cod of Chapter 3 of the tariff.
- (20) In April 2000 the firm asked for its authorisation to be amended to include fillets presented in the form of blocks intended for processing. The competent authorities agreed to amend the initial authorisation, with effect from 14 April 2000. This authorisation was valid up to 31 December 2000. They also stated in the authorisation that it covered "any fish within main headings 0302, 0303 and 0304 of the integrated

tariff of the United Kingdom for which, at the time of presentation to Customs of a Customs entry for that fish, a reduced or nil rate of duty is available where that rate is conditional upon the fish being intended for processing for human consumption only. The approved processes are subject to restrictions which are shown in the tariff." This general provision was intended to encourage the firm, at the moment of import, to refer to the tariff and make sure that the end-use was indeed applicable. Since fish of heading 0304 20 85 10 were eligible for end-use arrangements, the UK customs authorities did not commit an error such as to constitute a special situation within the meaning of Article 239 of the Code when they issued this authorisation.

- (21) In the case of the authorisations issued for 2001 and 2002, the applications for these authorisations clearly stated that the products concerned included Alaska pollack fillets of 0304 2085 90, a heading for which the end-use arrangements could not be used. The competent authorities nevertheless issued the authorisations; in so doing, although they included the words in the 2000 authorisation reminding the firm that it should consult the tariff when importing, they committed an error such as to constitute a special situation within the meaning of Article 239 of the Code.
- (22) It is therefore established that for 2000 the competent authorities did not issue the firm with any authorisation to place fish of CN heading 0304 20 85 90 under the end-use arrangements. The issue of such an authorisation is one of the essential bases of the procedure. Use of the end-use procedure without such authorisation therefore constitutes a serious failing on the part of the firm. However, the firm's other arguments that it had been placed in a special situation in comparison with other traders carrying out the same activity in April and December 2000 must be examined.
- (23) The firm considers that there was a special situation for the following reasons. Firstly, it argues that it was on the advice of one of its customers, which already had an end-use authorisation for individually frozen fillets, issued by another customs office, that it asked its local customs office whether it was eligible for such an authorisation. An official confirmed this point orally. The firm considers that in approaching the customs authorities for information about the rules, it was only following the advice given in "Guidance Notice No 770" issued by UK customs, and it could therefore expect the information it was given to be correct.

- (24) The UK authorities admit that some officials may indeed have made mistakes about whether the end-use arrangements could be used for individually frozen fillets. However, it should first be noted that the information given to the firm orally by a UK customs official cannot constitute an "error" on the part of the competent authorities since, by its nature, information given orally cannot be the basis for legitimate expectations on the part of the persons liable for duty and so cannot be deemed to constitute precise assurances given by the administration. Secondly, the error committed by customs officials of a customs office other than the one to which the firm made its application for the end-use arrangements and in respect of a trader other than the firm could not have placed the firm itself in a special situation within the meaning of Article 239 of the Code. Lastly, the advice given in "Guidance Notice No 770" is of a very general nature and so does not have any weight as grounds for the existence of a special situation.
- (25) The firm also claims that it used the code corresponding to fillets presented in the form of blocks (0304 20 85 10) instead of the correct code in its customs declarations on the advice of a customs official. However, in their letter of 31 December 2003 the British authorities state that there is no tangible evidence to support this claim. This argument must therefore be rejected on the same grounds as those invoked in the previous paragraph (non-validity of information given orally).
- (26) Lastly, in his letter of 26 February 2004 the firm's lawyer argues that the firm had grounds for legitimate expectations in view of the number of declarations accepted by customs without comment during the period concerned (April 2000 to January 2002). To examine whether there was a special situation between April and December 2000 because of customs' acceptance of a number of declarations, only the declarations submitted in 2000 should be considered, not all the declarations accepted by the competent authorities between April 2000 and January 2002. In 2000 the competent authorities accepted nine declarations under the conditions described above. This number does not seem so high as to give rise to legitimate expectations on the part of the firm concerning the validity of the mistakenly used tariff classification and the correctness of the procedure followed.
- (27) The Commission does not therefore consider that there was a special situation within the meaning of Article 239 of the Code for the period prior to 1 January 2001. On the

other hand, the issue of an end-use authorisation for fish of heading 0304 20 85 90 for the years 2001 and 2002 does constitute a special situation.

- (28) However, such a situation can give rise to the remission of import duties only if no deception or obvious negligence may be attributed to the person concerned.
- (29) The Court has consistently taken the view that account must be taken, in particular, of the complexity of the legislation and the trader's experience and diligence when examining whether there has been deception or obvious negligence.
- (30) As regards the firm's experience, the dossier sent to the Commission shows that the firm must be deemed an experienced trader. Furthermore the firm states that it was because it was experienced that it questioned the competent authorities about the possibility of using the end-use arrangements for fillets of heading 0304 20 85 90.
- (31) As regards the complexity of the legislation, the integrated Community tariff had two subheadings under heading 0304 20 85: 0304 20 85 10 for "industrial blocks for processing", and 0304 20 85 90: "others". Applying this legislation cannot be considered complex, and a diligent trader applying the basic rules for the classification of goods should have noticed that the customs authorities had committed an error.
- (32) Furthermore, since the UK's computerised clearance system would not have allowed the end-use arrangements to be used for goods of heading 0304 20 85 90, an experienced and diligent trader should have noticed a contradiction between the locally issued authorisation and the clearance rules built into the centralised computerised clearance system.
- (33) On the contrary, the firm declared the goods under heading 0304 20 85 10 although it had declared them under the correct tariff heading before April 2000 and the commercial documents (invoice, health certificate and origin certificate) showed that the goods were fillets frozen individually, not in blocks.
- (34) It was up to the firm to establish the tariff heading to be declared for each declaration on the basis of the documents relating to each consignment. Therefore, despite the initial error on the part of the competent authorities in issuing the end-use authorisation, the firm should have detected that error when clearing goods through customs.

- (35) In view of the foregoing the Commission considers that the firm was obviously negligent.
- (36) Remission of import duties 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 the United Kingdom on 17 December 2002 is not justified.

Article 2

This Decision is addressed to the United Kingdom.

Done in Brussels, 1-4-2004

For the Commission

Frits Bolkestein

Member of the Commission