REC 04/2003

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19-12-2003
C(2003) 4891

NOT FOR PUBLICATION

COMMISSION DECISION

Of 19-12-2003

finding in a particular case that post-clearance entry in the accounts of one amount of import duties is not justified and post-clearance entry in the accounts of another amount and its remission are justified and authorising the Member States to waive post-clearance entry of normal customs duties in the accounts and to remit or repay normal customs duties and anti-dumping duties in cases involving comparable issues of fact and law.

(Request submitted by Belgium)
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(Request submitted by Belgium)

(REC 04/03)

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 1335/2003,[4]

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1 OJ L 302, 19.10.1992, p. 1.
2 OJ L 311, 12.12.2000, p. 17.
3 OJ No L 253, 11.10.1993, p.1.
4 OJ L 187, 26.7.2003, p. 16.

Whereas:

(1) By letter of 12 May 2003, received by the Commission on 15 May 2003, Belgium asked the Commission to decide under Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties,[5] as last amended by Regulation (EEC) No 1854/89,[6] whether waiver of post-clearance entry in the accounts of import duties was justified and, in the alternative, under Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties,[7] as last amended by Regulation (EEC) No 1854/89,[8] whether remission of import duties was justified in the following circumstances.

(2) Under the second subparagraph of Article 2 of Regulation (EC) No 1335/2003, the provisions 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 Regulation (EEC) No 2454/93 refer to that Regulation as last amended by Commission Regulation (EC) No 881/2003 of 21 May 2003.[9]

(3) A Belgian customs agent, acting in his own name and on behalf of a French firm, released car radios from Indonesia for free circulation in Belgium between April and December 1992.

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5 OJ L 197, 3.8.1979, p. 1.
6 OJ L 186, 30.6.1989, p. 1.
7 OJ L 175, 12.7.1979, p. 1.
8 OJ L 186, 30.6.1989, p. 1.
9 OJ L 134, 29.5.2003, p. 1.

(4) Imports into the Community of this type of product originating in Indonesia qualified for preferential arrangements under the Generalised System of Preferences. If, in accordance with Article 7 of Commission Regulation (EEC) No 693/88 of 4 March 1988,[10] the products were covered by a form A certificate issued by the competent Indonesian authorities they were eligible for preferential tariff treatment when they were released for free circulation.

(5) In the case in point, the customs agent presented form A certificates issued by the competent Indonesian authorities in support of the customs declarations for release for free circulation. The Belgian customs authorities accepted the declarations and granted preferential tariff treatment.

(6) Following an investigation into the conditions under which the Indonesian authorities issued Form A certificates of origin, carried out in Indonesia by representatives of several Member States and the Commission in March 1993, it was found that the car radios exported from Indonesia from 1991 to March 1993 were not eligible for preferential tariff treatment under the Generalised System of Preferences. All the certificates issued during that period had been wrongly issued, since the rules of origin had not been complied with. In fact the car radios should have been deemed to originate in the Republic of Korea. The Indonesian authorities confirmed in writing (in a "*note verbale"* of 14 March 1994) that the certificates had been wrongly issued.

(7) As this meant that the car radios imported into Belgium were no longer eligible for preferential tariff treatment and, because of their non-preferential South Korean origin, were liable for anti-dumping duties, the Belgian authorities charged the customs agent, the French firm on whose behalf he had acted and that firm's tax representative, hereinafter the persons concerned, customs duties of XXXXX and anti-dumping duties of XXXXXX, i.e. total import duties of XXXXXX.

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[10] OJ L 77, 22.3.1988, p. 1.

(8) The persons concerned applied for non-recovery of these import duties, citing their good faith and the mistakes made by the competent authorities, which they could not have detected.

(9) In particular, the persons concerned stated that the competent Indonesian authorities had committed an error in issuing the certificates when they knew that the preferential origin conditions had not been complied with. In any case, since the rules of non-preferential origin were no stricter than the preferential origin rules for the goods in question, the persons concerned considered that on the basis of the certificates issued by the Indonesian authorities the goods qualified for non-preferential origin. The error thus had the double effect referred to above (with implications for both customs duties and anti-dumping duties).

(10) Pursuant to Articles 871 and 905 of Regulation (EEC) No 2454/93, the persons concerned stated that they had seen the dossier submitted to the Commission by the Belgian authorities and submitted their own comments, which were forwarded to the Commission by the Belgian authorities as an annex to their letter of 12 May 2003.

(11) 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 to examine the case on 7 October 2003 within the framework of the Customs Code Committee - Section for General Customs Rules/Repayment.

(12) Under Article 5(2) of Regulation (EEC) No 1697/79, there can be no post-clearance entry in the accounts where the amount of duties legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

(13) In the case in point, a distinction must be made between the debt arising from the non-eligibility of the goods for preferential tariff treatment and the debt arising from the recognition of the South Korean non-preferential origin of the goods (anti-dumping duties).

(14) Granting preferential tariff treatment for the imports under consideration was subject to presentation of Form A certificates of origin.

(15) As already stated, in this case the Indonesian authorities confirmed in writing that all the certificates issued for car radios between January 1991 and March 1993 had been wrongly issued.

(16) Reliance on the validity of such certificates is not normally protected, as this is considered part of the importer's normal commercial risk and therefore the responsibility of the person liable for payment.

(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 expectation.

(18) In this instance, the exporters declared on the certificates of origin that the goods they covered met the conditions for obtaining the certificates.

(19) However, as the Court has recently ruled,[11] the fact that the exporters submitted incorrect applications does not in itself preclude the possibility that the competent authorities committed an error within the meaning of Article 5(2) of Regulation (EEC) No 1697/79. Where appropriate the authorities' behaviour must be evaluated taking account of the general context in which the relevant customs provisions were applied.

(20) Thus the fact that the exporters confirmed on the Form A certificates that the conditions for obtaining them had been met is not in itself proof that the competent Indonesian authorities were misled. It is necessary to ascertain whether the exporters made these declarations on the assumption that the competent authorities were acquainted with all the facts necessary to apply the rules in question and whether the authorities, despite their knowledge, raised no objection to the declarations.

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11 *Ilumitrónica* judgment of 14 November 2002, Case C-251/00.

(21) In the case in point, there is evidence to suggest that the competent Indonesian authorities knew or, at the very least, should have known that the goods for which they were issuing form A certificates did not fulfil the conditions laid down for preferential treatment.

(22) The Indonesian authorities issued the certificates despite the fact the files did not contain the necessary documents to prove Indonesian origin, that the certificates were sent back to the Indonesian exporters for them to alter the percentage of imported goods incorporated in the car radios to increase the percentage of Indonesian goods incorporated, and that the authorities did not ask for cost estimates until September 1992.

(23) Therefore, as regards the part of the debt arising from the non-eligibility of the goods for preferential tariff treatment, the circumstances of this case reveal an error on the part of the Indonesian customs authorities themselves which could not have been detected by an operator acting in good faith within the meaning of Article 5(2) of Regulation (EEC) No 1697/79. This error gave the persons concerned legitimate expectations regarding the validity of the certificates issued by the Indonesian authorities and so directly led to their applying, wrongly, for preferential tariff treatment.

(24) However, this line of reasoning cannot be deemed relevant to the debt resulting from the recognition of the South Korean origin of the goods (anti-dumping duties). It is the rules on non-preferential origin that apply to anti-dumping duties. Since the Indonesian authorities were not involved in determining the non-preferential origin, no error can be imputed to them in this respect.

(25) In accordance with the consistent rulings of the Court of Justice of the European Communities, when determining whether the persons concerned could reasonably have detected the customs authorities' error regarding the preferential origin of the goods, account must be taken of the nature of the error, the professional experience of the persons concerned and the diligence they demonstrated.

(26) In the case in point, the competent Indonesian authorities issued Form A origin certificates for goods that did not qualify for such certificates for at least the period covered by the investigation of March 1993 - i.e. from the beginning of 1991 to the end of March 1993. This behaviour confirmed the legitimate expectations of the persons concerned that the certificates issued by the authorities were valid.

(27) Furthermore, no notice asking importers to take precautions in the use of Form A certificates of origin issued for the products by the Indonesian authorities was published in the *Official Journal of the European Communities*.

(28) As regards the diligence shown by the persons concerned, there is nothing in the dossier to indicate that the way in which they concluded their contracts departed from normal commercial practice.

(29) It must therefore be accepted that the error of the competent Indonesian authorities regarding the preferential origin of the goods could not have been detected by the persons concerned.

(30) Moreover, the persons concerned acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

(31) Post-clearance entry in the accounts of the amount of import duties payable because of the non-eligibility of the goods for preferential tariff treatment is not therefore justified in this case. However, in the absence of an error by the Indonesian authorities relating to the anti-dumping duties, post-clearance entry in the accounts of the amount of those duties is justified.

(32) Under Article 13(1) of Regulation (EEC) No 1430/79, import duties may be repaid or remitted in special situations, other than those laid down in sections A to D of that Regulation, resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

(33) 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.

(34) The Court has consistently ruled[12] that in using its discretion to assess whether the conditions for granting remission have been fulfilled, 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.

(35) In this case the error committed by the Indonesian authorities not only led to the erroneous application of preferential tariff treatment but also the equally erroneous non-application of anti-dumping duties.

(36) As the non-preferential origin rules for the goods concerned were both as precise as the preferential origin rules (both using value-added criteria) and no stricter than the preferential origin rules, the persons concerned had no reason to doubt the non-preferential origin of the car radios, since they held certificates of preferential origin for them issued by the Indonesian authorities. They therefore believed, and were entitled to do so, that the goods concerned also complied with the non-preferential origin rules and could be deemed, in this context, to originate in Indonesia, and so could be granted preferential treatment and non-application of anti-dumping duties.

(37) In the Commission's view the circumstances set out above constitute a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79.

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[12] See inter alia *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

(38) As regards the second condition laid down in that Article, i.e. the absence of deception or obvious negligence, as the Belgian authorities state in their letter of request of 12 May 2003, nothing in the dossier casts doubt on the good faith of the persons concerned. They cannot therefore be considered guilty of any deception. Nor, in view of the points set out in recitals 26 to 28 and recital 36, can they be deemed guilty of obvious negligence.

(39) Remission of the anti-dumping duties is therefore justified in this case.

(40) Under Articles 875 and 908 of Regulation (EEC) No 2454/93, where the circumstances under consideration are such that the duties need not be entered in the accounts, or can be remitted or repaid, the Commission can, under conditions which it is to determine, authorise one or more Member States to waive post-clearance entry of duties in the accounts, or grant their remission or repayment, in cases involving comparable issues of fact and of law.

(41) At its meeting held on 7 October 2003 within the framework of the Customs Code Committee (Repayment Section), the group of experts composed of representatives of all the Member States provided for in Articles 873 and 907 of Regulation (EEC) No 2454/93 asked that all Member States be authorised to waive post clearance entry of import duties in the accounts, or grant their remission or repayment, in cases involving comparable issues of fact and law.

(42) Such authorisation may be granted to the Member States on condition that it is used only in cases strictly comparable in fact and law to the case in question. The authorisation should nevertheless also cover requests for waiver of post-clearance entry of normal customs duties in the accounts, or their remission or repayment, lodged within the legal time limits in respect of import operations relating to Form A certificates of origin issued from the beginning of 1991 to the end of March 1993, the period covered by the Community investigation, as well as requests for remission or repayment of anti-dumping duties under Article 13 of Regulation (EEC) No 1430/79 lodged within the legal time limits in respect of the same operations, where those operations were carried out in that period in circumstances comparable in fact and law to those which gave rise to this case. In such cases, as regards requests for waiver of post-clearance entry in the accounts, the importers must have acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration; as regards requests for remission or repayment, the importers must have been guilty of no deception or obvious negligence,

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of XXXXXX which are the subject of Belgium's request of 12 May 2003 shall not be entered in the accounts.

The import duties in the sum of XXXXXXX which are the subject of the same request shall be entered in the accounts.

Article 2

The remission of import duties in the sum of XXXXXXX which are the subject of Belgium's request of 12 May 2003 is justified.

Article 3

The Member States are authorised to waive post-clearance entry of normal customs duties in the accounts and grant their remission or repayment and the remission or repayment of anti-dumping duties on imports in cases involving issues of fact and of law comparable to the case cited in Belgium's request of 12 May 2003.

The authorisation shall cover requests for waiver of entry of import duties in the accounts, or for their remission or repayment, lodged within the legal time limits and relating to import operations covered by Form A certificates issued between the beginning of 1991 and the end of March 1993, and requests for remission or repayment of anti-dumping duties lodged within the legal time limits in respect of the same import operations where such operations were carried out during that period in circumstances comparable in fact and law to those which gave rise to the request referred to in the previous paragraph.

Article 4

This Decision is addressed to the Member States.

Done in Brussels, 19-12-2003

For the Commission
Frits Bolkestein
Member of the Commission