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**REC 04/07**

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19-5-2009  
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NOT FOR PUBLICATION

**COMMISSION DECISION**

**Of 19-5-2009**

**finding that post-clearance entry in the accounts of import duties is not justified in a particular case**

**(Only the German text is authentic)**

## COMMISSION DECISION

Of 19-5-2009

**finding that post-clearance entry in the accounts of import duties is not justified in a particular case  
(REC 04/07)**

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>,

Having regard to Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92<sup>2</sup>,

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

<sup>2</sup> OJ L 253, 11.10.1993, p. 1.

Whereas:

- (1) By letter dated 5 November 2007, received by the Commission on 14 November 2007, Germany asked the Commission to decide whether, under Article 220(2)(b) of Regulation (EEC) No 2913/92, waiving post-clearance entry of import duties in the accounts was justified:
- (2) Between 14 January 1999 and 12 April 2000 a German firm entered for release for free circulation a product described as "rijstepap, Halffabriikaat voor de bereiding van bakkerijgrondstoffen", consisting of 87.2% milk powder and 12.8% white rice, from the Netherlands Antilles (Curaçao).
- (3) Under Article 101 of Council Decision 1991/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community (hereinafter "OCT Decision")<sup>3</sup>, products originating in the overseas countries and territories (OCTs) could at that time be imported into the Community free of import duty on presentation of an EUR.1 movement certificate or an invoice declaration issued by the exporter.
- (4) The concept of "originating products" is defined in Annex II to the OCT Decision. Under Article 1 of Annex II, a product is considered as originating in the OCT, the Community or the ACP States if it has been either wholly obtained or sufficiently worked or processed there.
- (5) Article 3 of Annex II defines "sufficient working or processing". Paragraph 1 stipulates that non-originating materials are considered to be sufficiently worked or processed when the product obtained is classified in a heading which is different from that in which all the non-originating materials used in its manufacture are classified, subject to paragraphs 2 and 3. Paragraph 3 stipulates, for the purpose of implementing paragraphs 1 and 2, that simply mixing products of different kinds, whether or not there is a change of heading, is considered insufficient working or processing to confer the status of originating products, unless one or more components of the mixture meet the conditions laid down in Annex II to enable them to be considered as originating in an ACP State, the Community, or an OCT and provided that such components contribute to the determination of the essential characteristics of the finished product.

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<sup>3</sup> OJ L 263, 19.09.1991, p. 1.

- (6) In the case in point, the firm presented EUR.1 certificates issued by the competent authorities of the Netherlands Antilles in support of its customs import declarations. The German customs authorities accepted the declarations and granted exemption from customs duties.
- (7) Following a mission conducted by representatives of a number of Member States and the European Commission in the Netherlands Antilles from 10 to 22 September 2000 for the purpose of examining the conditions in which the authorities of the Netherlands Antilles issued EUR.1 certificates, it was found that the product in question could not be considered to originate in the Netherlands Antilles because it was simply a mixture of a non-originating product (milk powder) with an originating product (rice) and the rice did not contribute to the determination of the essential characteristics of the finished product.
- (8) The goods were not therefore eligible for duty-free importation into the Community. On 20 December 2006, after a number of appeals, the competent German authorities therefore notified the firm that it owed duties in the sum of XXXXXX, for which the firm has requested waiver of post-clearance entry in the accounts under Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (9) Pursuant to Article 871 of Regulation (EEC) No 2454/93, the firm stated that it had seen the dossier submitted to the Commission by the German authorities and had nothing to add.
- (10) In a letter of 26 February 2008 the Commission asked the German authorities for additional information. They replied by letter of 27 November 2008, received at the Commission on 4 December 2008. Examination of the application was therefore suspended between 27 February and 4 December 2008.
- (11) In accordance with Article 873 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met to examine the case on 17 April 2009 within the framework of the Customs Code Committee - Customs Debt and Guarantees Section.
- (12) In this case, preferential tariff treatment was conditional upon presentation of EUR.1 certificates issued by the competent authorities of the Netherlands Antilles.
- (13) However, following the Member State/Commission mission of September 2000 to investigate the conditions in which the authorities of the Netherlands Antilles issued

EUR.1 certificates, the competent German authorities decided that the EUR.1 certificates presented upon importation of the goods concerned were not valid since the goods did not meet all the origin criteria set out in the OCT Decision.

- (14) 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.
- (15) 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 those expectations. Consequently, when the authorities' error is attributable to inaccurate declarations by exporters, reliance on the validity of the certificates of origin is no longer protected.
- (16) In the case in point, the report of above mission suggests that the exporter may have provided incorrect or incomplete information for the purpose of obtaining EUR.1 certificates.
- (17) However, it is plain from the case-law of the Court of First Instance of the European Communities that, even if the exporters did mislead the competent authorities of the Netherlands Antilles, this would not necessarily rule out the possibility of an error attributable to the competent authorities.
- (18) The mission report shows that the customs authorities of the Netherlands Antilles knew or should have known that the product did not qualify for preferential treatment. Following a number of letters from the economic affairs department ("Dienst Economische Zaken") of the Netherlands Antilles, the customs authorities were in possession of full details of the manufacture and composition of the goods, including their origin.
- (19) The circumstances of the case therefore point to an error on the part of the customs authorities themselves which could not reasonably have been detected by an operator acting in good faith, within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (20) It is also clear from the request submitted by the German authorities that it must be accepted that the trader acted in good faith.

- (21) It is also clear from that request that the trader complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (22) Post-clearance entry of import duties in the accounts is therefore not justified in this case.
- (23) Where special circumstances warrant waiver of post-clearance entry of duties in the accounts, Article 875 of Regulation (EEC) No 2454/93 authorises the Commission to determine the conditions under which the Member States may waive post-clearance entry of duties in the accounts in cases involving comparable issues of fact and law.
- (24) Cases comparable in fact and law to this one are requests submitted within the legal time limits to waive post-clearance entry in the accounts in respect of imports in the period 1997 to 2000 of mixtures of the same kind (milk powder originating in a third country and rice originating in an OCT or an ACP state) from the Netherlands Antilles where those import operations were carried out in circumstances comparable in fact and law to those which gave rise to this case. The operators concerned must have acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration,

HAS ADOPTED THIS DECISION:

*Article 1*

The import duties in the sum of XXXXX which are the subject of the request from Germany of 5 November 2007 shall not be entered in the accounts.

*Article 2*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 19-5-2009

*For the Commission*  
*László Kovács*  
*Member of the Commission*