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REM 04/02

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 23-12-2002
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NOT FOR PUBLICATION

COMMISSION DECISION

of 23-12-2002

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

(Only the Dutch text is authentic.)

(request submitted by the Netherlands)

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(request submitted by the Netherlands)

(REM 04/02)

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 444/2002,[4] and in particular Articles 873 and 907 thereof,

1 OJ L No 302, 19.10.1992, p. 1
2 OJ L No 311, 12.12.2000, p. 17
3 OJ L No 253, 11.10.1993, p. 1
4 OJ L No 68, 12.03.2002, p. 11

Whereas:

(1) By letter dated 22 February 2002, received by the Commission on 26 February 2002, the Netherlands asked the Commission to decide, under Article 220(2)(b) of Regulation (EEC) No 2913/92, whether waiving the post-clearance entry in the accounts of import duties was justified and, in the alternative, whether remission of these duties under Article 239 of the same Regulation was justified, in the following circumstances.

(2) The dossier sent to the Commission by the Netherlands authorities shows that on 7 May and 4 June 1999 a customs agent released consignments of shoes for free circulation in his own name on behalf of two Netherlands firms which the customs declarations indicated were the consignees. The declarations also stated that the goods originated in Hong Kong and were accompanied by certificates of origin issued by the Espoo Chamber of Commerce in Finland, on which either "Hong Kong - China", or "Hong Kong" was entered.

(3) The goods had first been sold by various Hong Kong firms to different Russian importers. However, during transport of the goods it transpired that the Russian purchasers were unable to pay the Finnish carrier. The carrier therefore acquired the goods as compensation and resold them to two Netherlands purchasers, who then imported them into the Netherlands.

(4) A few days after the first declaration for release for free circulation had been submitted and accepted, the Netherlands customs authorities decided to investigate the origin of the goods because of the entry "Hong Kong - China" on the certificates of origin attached to the declarations.

(5) When it was announced that the origin of the goods was to be investigated, the customs agent, on the instructions of one of the importers, asked for the declaration to be withdrawn. This request was refused by the Netherlands authorities. One of the importers then asked the Finnish vendor to confirm the origin of the goods with the Espoo Chamber of Commerce, which then issued new certificates indicating that the country of origin was Hong Kong. The certificates were submitted to the customs office concerned, which did not, however, accept them.

(6) In the case of the second declaration, the customs authorities informed the customs agent on the day that they accepted it that they would be carrying out a post-clearance check on the origin of the goods.

(7) In the course of this investigation the Netherlands authorities asked the Finnish authorities to verify the validity of the certificates of origin. The Finnish authorities replied that the Espoo Chamber of Commerce had issued certificates indicating that, according to the information on the container manifest, the goods originated in Hong Kong.

(8) Under the arrangements on cooperation and mutual assistance, the Hong Kong authorities were also asked to verify the origin of the goods. They told the Community authorities that 13 of the 18 containers contained goods of Chinese origin. However, they were unable to find the export documents relating to the other containers, and therefore could not declare their contents to be of Hong Kong origin.

(9) At the time of the imports, the shoes originating in China were subject to definitive anti-dumping duties under Council Regulation (EEC) No 467/98 of 23 February 1998 imposing a definitive anti-dumping duty on imports of certain footwear with uppers of leather or plastics originating in the People's Republic of China, Indonesia and Thailand.[5] The duty was equal to the difference between a minimum price of ECU 5.7 a pair and the free-at-Community-frontier price, before duty, per pair of imported shoes falling within CN code 6402 9998, originating in China.

(10) On finding that the goods were of Chinese origin and that their free-at-frontier price was estimated to be lower than the minimum price, the competent Netherlands authorities considered that the anti-dumping duty had to be applied and charged the customs agent XXXXXX, the amount for which non-recovery or remission has been requested.

(11) The customs agent applied for non-recovery and remission of the import duties concerned, citing his good faith, the mistakes made by the competent authorities, which he could not have detected, and failings on the part of the competent authorities.

(12) Under Articles 871 and 905 of Regulation (EEC) No 2454/93, the customs agent stated that he had seen the dossier sent to the Commission by the Netherlands authorities. He stated his position and made comments, which were passed on to the Commission by the Netherlands authorities as an annex to their letter of 22 February 2002.

[5] OJ L 60, 28.02.1998, p. 1.

(13) By letter dated 10 September 2002, received by the firm's lawyer on 12 September 2002, the Commission notified the customs agent of its intention to reject the application and explained the grounds for its decision.

(14) However, neither the customs agent nor his lawyer replied to the Commission within the period laid down by Articles 872a and 906a of Regulation (EEC) No 2454/93.

(15) The administrative procedure was therefore suspended for a month, in accordance with Articles 873 and 907 of Regulation (EEC) No 2454/93, between 12 September and 12 October 2002.

(16) 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 12 November 2002 within the framework of the Customs Code Committee - Section for General Customs Rules/Repayment - to consider the case.

(17) Article 220(2)(b) of Regulation (EEC) No 2913/92 requires post-clearance entry in the accounts to be waived where the amount of duty legally owed was not entered in the accounts as a result of an error on the part of the customs authorities themselves that could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and observed all the provisions laid down by the legislation in force as regards the customs declaration.

(18) According to the customs agent these conditions are fulfilled since the Netherlands authorities did not carry out the appropriate investigations concerning the prices agreed between the Chinese manufacturer and his clients, and he in any case disputes that the goods were of Chinese origin. He also argues that the Finnish authorities committed an error in issuing invalid certificates. Moreover he could not pass on to his clients the cost of antidumping duties charged after clearance and, if obliged to pay those duties, would experience financial difficulties. Lastly, he claims that there was no way he could have detected the Finnish authorities' error and he acted in good faith and complied with all the legislation in force as regards the customs declaration.

(19) There are various indications in the dossier accompanying the request for remission that the agent contests the existence of the debt in respect of anti-dumping duties on the grounds that the Netherlands authorities' interpretations of the free-at-frontier price and the origin of the products are erroneous. It should be noted in this connection that disputes over the existence of a customs debt do not fall within the scope of the procedure for waiving post-clearance entry in the accounts or granting remission under rules of equity. The Courts have consistently ruled that the question of whether a customs debt has actually been incurred is not covered by Commission decisions under procedures for waiving post-clearance entry in the accounts or remission procedures under rules of equity,[6] and according to the findings of the Netherlands authorities, the anti-dumping debt exists.

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6 *Sportgoods* judgment of 24 September 1998 (Case C-413/96), *Kia Motors* judgment of 16 July 1998, (Case T-195/97), *Hyper* judgment of 11 July 2002 (Case T-205/99).

(20) It should also be pointed out that the criterion for the application of anti-dumping duties is the origin of the product, to be determined according to Community law. Regulation (EC) No 467/98 did not require information on the product's origin to be certified by a competent authority in order for the product to be released for free circulation. Information concerning origin therefore had to be legally provided to the customs authorities by means of entries on the customs declaration. The rules set out in Annex 37 to Regulation (EEC) No 2454/93 provide that one of the declarant's obligations is to state the origin of the goods. It was therefore the responsibility of the customs agent to provide proof of origin via the entry he had to make in box 16 of the single administrative document.

(21) In the context of the rules on non-preferential origin, the competent customs authorities' acceptance of a customs declaration is not conditional on production of a certificate of origin. In other words, if an importer wishes an exporter to send him a certificate of non-preferential origin, which may be issued by the authorities in the country of origin of the products, he can in no event invoke it with regard to the application of anti-dumping duties, not least because the exporting country applies different rules of origin to those applied in the Community. Accordingly, the Espoo Chamber of Commerce, which is not even established in the exporting country, does not in the Commission's view, constitute a competent authority within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

(22) According to Community case law, a competent authority within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92 is any authority which, acting within the scope of its powers, furnishes information relevant to the recovery of customs duties and may thus cause the person liable to entertain legitimate expectations.[7]

[7] See *Mecanarte* judgment of 27 June 1991 (case C-348/89).

(23) In the case that concerns us here, as mentioned above, the burden of proving origin lay with the customs agent, and only entry of the goods' origin in box 16 of the single administrative document could have led to the application of the anti-dumping duty (under Article 201(1)(a) of Regulation (EEC) No 2913/92 a customs debt is incurred through the release for free circulation of goods liable to import duties, including anti-dumping duties). The customs agent could not therefore invoke with regard to the application of anti-dumping duties a certificate of some kind issued, at his request or the exporter's, by any "authority"; thus the information furnished by the Espoo Chamber of Commerce had no legal bearing on the recovery of customs duties in this case.

(24) Furthermore, Article 48(3) of Regulation (EEC) No 2454/93 states, with regard to non-preferential origin, that Community authorities may issue certificates of non-preferential origin for Community goods intended for export, but not that Community authorities may issue such certificates for third-country goods imported into the customs territory of the EU.

(25) Therefore, since for the reasons set out above, the Espoo Chamber of Commerce cannot be considered a competent authority within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92, it cannot have committed an error within the meaning of that Article.

(26) Under Article 78 of Regulation (EEC) No 2913/92, acceptance of a declaration in no way detracts from the right of the competent customs authorities to carry out post-clearance checks. Therefore the fact that the authorities initially accepted without objection the declarations for release for free circulation does not mean that they committed an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

(27) Therefore none of the above arguments put forward by the company constitutes a case for the competent authorities having made an active error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

(28) Nor has the Commission found any other factors constituting an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

(29) As the Courts have ruled,[8] in the absence of an error by the competent authorities, post-clearance recovery of duties is not an infringement of the principle of proportionality even if the duties charged can no longer by recovered from the purchaser of the imported products. It is up to traders to make the necessary provision within the framework of their contractual relations to protect themselves against such risks.

(30) In the absence of any error on the part of the competent authorities, there is no need to examine the second condition set out in Article 220(2)(b) of Regulation (EEC) No 2913/92.

(31) Post-clearance entry of import duties in the accounts is therefore justified in this case.

(32) 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.

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[8] See *Faroe Seafood* judgment of 14 May 1996 (cases C-153/94 and C-204/94).

(33) 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 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 customs agent argues that these conditions were fulfilled for the same reasons as those given for the existence of an error on the part of the customs authorities which he could not have detected.

(35) Firstly, if the customs agent considers that the imports were not dumped, this can be grounds for an application for repayment under the anti-dumping Regulation, but it does not constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(36) Secondly, as explained above, the customs agent was in this case entirely responsible for proof of and indication of origin. He could not therefore base any legitimate expectations on certificates issued by an "authority", since the issue of such certificates was not an obligation under the relevant provisions of customs law. The fact that the certificates may have been wrongly issued by the Espoo Chamber of Commerce cannot therefore give rise to a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(37) Nor can the fact that the customs declarations were initially accepted give rise to any legitimate expectations regarding the validity of the certificates presented, neither does it confirm the exactness of the certificates presented. Under Article 78 of Regulation (EEC) No 2913/92, acceptance of a declaration in no way precludes the right of the competent customs authorities to carry out post-clearance checks. Therefore the fact that the authorities initially accepted without objection the declarations for release for free circulation does not mean that they committed an error such as to create a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92 in this particular case.

(38) As to the fact that the agent cannot subsequently pass on to his clients the cost of the anti-dumping duties that he has to pay, the Courts have consistently ruled that it is up to traders to take the necessary measures to equip themselves to deal with the risks of post-clearance recovery and the fact that the cost cannot be passed on to their clients.[9] Since the customs agent did not do so, he must be deemed to have run a risk by concluding a contract which did not give him the power to check his client's sources of supply. A special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92 did not therefore exist on these grounds.

(39) In the Commission's view, the above circumstances do not constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(40) Nor has the Commission found any other factors constituting a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(41) In the light of these facts, the Commission considers that there is nothing to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(42) In the absence of a special situation the remission of import duties is therefore not justified in this case,

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[9] See *Méhibas* judgment of 18 January 2000, (case T-290/97) and *SCI UK Ltd* judgment of 4 July 2002 (case T-239/00).

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of XXXXXX which are the subject of the request from the Netherlands of 22 February 2002 must be entered in the accounts.

Article 2

The remission of the import duties in the sum of XXXXXXXX which are the subject of the request from the Netherlands of 22 February 2002 is not justified.

Article 3

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 23-12-2002

For the Commission
Frits Bolkestein
Member of the Commission