EUROPEAN COMMISSION

Brussels, 16.9.2011
C(2011)6393
[…](2011) XXX draft

COMMISSION DECISION

of 16.9.2011

finding that remission of import duties is not justified in a particular case (REM 02/09)

(Only the German text is authentic)

COMMISSION DECISION

of 16.9.2011

finding that remission of import duties is not justified in a particular case (REM 02/09)

(Only the German text is authentic)

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code[1],

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 establishing the Community Customs Code[2],

Whereas:

(1) By letter dated 10 September 2009, received by the Commission on 17 September 2009, Germany asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether remission of import duties is justified in the following circumstances.

(2) Between 2004 and 2006 a German company (hereafter the applicant) submitted 10 declarations for the release for free circulation of mushrooms of the genus *Agaricus* classifiable under CN code 2003 1030 00 0 with country of origin China. Before being declared for release for free circulation the mushrooms had been placed under the customs warehousing procedure.

(3) At the time of the imports in question the mushrooms could benefit from a favourable tariff rate applied within a tariff quota that had been opened in relation to imports into the European Union of preserved mushrooms of the genus *Agaricus* classifiable within CN codes 0711 51 00, 2003 10 20 and 2003 10 30 (hereinafter referred to as preserved mushrooms), subject to the conditions laid down in Commission Regulation (EC) No 2125/95 of 6 September 1995[3] opening and providing for the administration of tariff quotas for preserved mushrooms of the genus Agaricus spp. (*applicable from 1-7-1995 till 31-12-04*) and Commission Regulation (EC) No 1864/2004 of 26 October 2004[4] opening and providing for the administration of tariff quotas for preserved mushrooms

1 OJ L 302, 19.10.1992, p. 1.
2 OJ L 253, 11.10.1993, p. 1.
3 OJ L 212, 7.9.1995, p. 16–20
4 OJ L 325, 28.10.2004, p. 30–38

imported from third countries (*applicable from 1-1-2005*) and amended by Commission Regulation (EC) No 1995/2005 of 7 December 2005[5].

(4) In accordance with Article 10 of Regulation (EC) No 2125/95 and as of 1-1-2005 in accordance with Article 14 of Regulation (EC) No 1864/2004, release for free circulation of mushrooms originating in China was subject at the time of the imports in question to the application of Articles 55 to 65 of Commission Regulation (EEC) No 2454/93.

(5) These Articles provide for specific provisions relating to non preferential certificates of origin for certain agricultural products subject to special import arrangements. In accordance with Article 56 of Commission Regulation (EEC) No 2454/93 the validity of those certificates shall be ten months from the date of issue by the competent authorities.

(6) In 2007, the German authorities established with regard to the imports in question that the non preferential certificates of origin were no longer valid at the moment the mushrooms were declared for release for free circulation.

(7) The German authorities therefore initiated in February 2007 the post-clearance recovery procedure for a total amount of duties of XXXXX EUR, which is the amount for which the applicant is applying for remission on the grounds of a special situation within the meaning of Article 239 of Council Regulation (EEC) No 2913/92.

(8) In support of the file forwarded by the German authorities, the applicant stated, in accordance with Article 905(3) of Regulation (EEC) No 2454/93, that it had seen the dossier that the German authorities proposed to submit to the Commission and had no comments to make.

(9) By letter dated 22 February 2010 the Commission asked the German authorities to provide additional information. They replied by letter of 12 January 2011, received by the Commission on 26 April 2011. Examination of the file was therefore suspended between 23 February 2010 and 26 April 2011.

(10) By letter dated 9 June 2011, received by the firm on 10 June 2011, the Commission notified the firm of its intention to withhold approval and explained the reasons for this.

(11) By letter dated 11 July 2011, received at the Commission the same day, the firm stated its position on the Commission's objections.

(12) In accordance with Article 907 of Regulation (EEC) No 2454/93, the time limit of nine months for the Commission to take a decision was therefore extended for one month.

(13) 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 consider the case on 14 September 2011 within the framework of the Customs Code Committee - Customs Debt and Guarantees Section.

---

[5] OJ L 320, 8.12.2005, p. 34-36

(14) The request sent to the Commission by the German authorities suggests that remission is justified on the following grounds:

– the agricultural non preferential certificate of origin was valid at the moment of placing the goods under the customs warehousing procedure;

– a preferential certificate of origin would have been accepted under the same circumstances;

– in the light of the case law of the Court of Justice of the European Union, the third country rate applied for the purpose of the contested post clearance recovery was disproportionately high;

– Article 220(2)(b) of Regulation (EEC) No 2913/92 stood in the way of post clearance recovery since there was an error on the part of the customs authorities concerning the validity of the agricultural certificates of origin because the Main Customs Office and other Hamburg Main Customs Offices, not just in these cases but in many others too, had simply believed it sufficient for the agricultural certificate of origin to be valid on the date on which the goods were placed under the customs warehousing procedure.

(15) Firstly, the argument raised by the applicant that the third country rate would be disproportionately high calls into question the existence of the customs debt or the amount of that customs debt. Disputing the debt in this way falls outside the scope of the procedure for waiving post-clearance recovery of duties under Article 220(2)(b) and the procedure for remission or repayment under Article 239 of Regulation (EEC) No 2913/92[6]. The application of substantive EU customs law falls within the exclusive competence of the national customs authorities. Decisions adopted by those authorities, including decisions requiring post-clearance payment of customs duties not previously levied, may be challenged before the national courts under Article 243 of Regulation (EEC) No 2913/92; those courts may make a reference to the Court of Justice pursuant to Article 267 of the Treaty on the functioning of the EU[7]. Moreover, the Court recently ruled in a case concerning imports of mushrooms from China that the applicable rate of duty was not disproportionately high[8].

(16) Since the application is based essentially on the fact that the competent German authorities committed an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92, it is necessary to analyse the case in the light of Article 236 in combination with Article 220(2)(b) and then, if necessary, Article 239 of the Code.

(17) Under Article 220(2)(b) of Regulation (EEC) No 2913/92, post-clearance entry in the accounts shall not occur where the amount of duty 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

---

6 See Court's rulings of 12 March 1987 in joined Cases 244/85 and 245/85 *Cerealmangimi and Italgrani v Commission* [1987] ECR 1303, paragraph 11, and of 6 July 1993 in Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux v Commission* [1993] ECR I-3873, paragraph 43.

7 See the Court of First Instance's ruling of 6 July 1998 in Case T-195/97 *Kia Motors Nederland and Broekman Motorships v Commission* [1998] ECR II-2907, paragraph 36.

8 Judgement of the Court of 25-11-2010, in case C-213/09 (Chabo).

part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

(18) It follows from the file submitted by the German administration that the authorities applied the favourable tariff, under the tariff quota opened for the preserved mushrooms, although no valid agricultural non preferential origin certificate was present. In practice, the following procedure was followed: each consignment was first placed under the customs warehousing procedure (or in some cases placed in a free zone) and later declared in parts for import for free circulation. Each time a quantity was released for free circulation, the applicant presented the certificate to the customs authorities which entered the quantities concerned on that certificate of origin; when the whole quantity corresponding to the certificate had been released for free circulation, the customs authorities retained the certificate. In practice, some goods were released for free circulation within the period of validity of the certificate and some after its expiry. In 2004, the customs authorities decided to recover duties for imports of goods for which the certificate of origin had expired; however they only recovered amounts corresponding to goods initially placed in a free zone but they did not take into account cases where the goods had been placed under the warehousing procedure, although the certificates were no longer valid. The post-release controls performed in 1998, 2002, 2004 and 2006 at the premises of the applicant did not lead to initiation of recovery procedure of duties because of non validity of the non preferential certificates.

(19) The Commission therefore considers that the competent authorities committed an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

(20) In order to determine whether it is justified to waive entry in the accounts of an amount of import duties, it is necessary to examine whether the applicant could have detected the error and whether he acted in good faith.

(21) According to the German authorities, the applicant could not have detected the error and acted in good faith.

(22) The Commission, however, considers that the applicant could have detected the error made by the German authorities.

(23) When assessing whether the applicant could have detected the error committed by the German authorities, the Commission took account of the nature of the error, the professional experience of the applicant and the diligence shown by him.

(24) As regards the criterion relating to the interested party's experience, it has to be noted that the applicant has been an importer since many years and is a member of the product association for import companies trading in canned fruits and vegetables. The applicant must therefore be regarded as experienced, as confirmed by the applicant itself in its letter of 11 July 2011.

(25) As regards the nature of the error, the Court of Justice of the European Union has ruled that it should be assessed in terms of the complexity of the legislation concerned and the length of time over which the authorities persisted in their error.

(26) In the case in point, only 10 declarations are concerned. At the same time it follows from the letter from the German authorities from 12 January 2011 that the same error

has been committed in 1996, although the exact number can no longer be established due to the fact that the documents are no longer available. Between 2002 and 2004 the same error would have been made for 8 declarations submitted by the applicant. Although the error has been committed over a longer period of time the number of cases as such is not very important. Although the applicant insists that the same error was made by the authorities with regard to imports made by other operators, this argument can not be taken into account as an operator cannot rely on information provided to other operators to justify its diligence, unless these operators belong to the same group as the applicant[9].

(27) As regards the complexity of the legislation concerned the Commission does not consider the applicable legislation to be complex. In accordance with Article 10 of Regulation (EC) Nr. 2125/95 the "*entry into free circulation*" and as of 1-1-2005 in accordance with Article 14 of Regulation (EC) No 1864/2004, "*the entry **and** release into free circulation*" of mushrooms originating in China was subject to the application of Articles 55 to 65 of Commission Regulation (EEC) No 2454/93; it clearly results from these provisions that of a valid non preferential certificate of origin had to be presented.

(28) The statement of the applicant in its letter from 11 July 2011 that Regulation (EC) Nr. 2125/95 was no longer valid at the moment of the facts is incorrect. This Regulation was in force until 1 January 2005 and therefore applicable for the imports that took place in 2004.

(29) Regardless the slight difference in wording between the Article applicable in 2004 and the Article applicable as of 1 January 2005, it follows clearly from both Articles that the release for free circulation of the mushrooms was subject to the application of Articles 55 to 65 of Commission Regulation (EEC) No 2454/93. There is nothing in the wording of the applicable legislation which would allow an operator to conclude that it would be sufficient for the certificate to be valid only at the moment of placing the goods under the warehouse procedure and that it would not be of importance if the certificate was no longer valid at the moment of "entry" or release for free circulation.

(30) In its letter of 11 July 2011 the applicant reiterates that the same rules should apply to both preferential and non-preferential certificates; as it was only required for a preferential certificate to be valid at the moment the goods were placed under the warehouse procedure and not at the moment the goods were declared for free circulation, the applicant considers that this should be possible for non preferential certificates as well.

(31) The Commission considers that if this argument aims at challenging the legislation applicable to non preferential certificates of origin at the time of the imports concerned, it falls outside the scope of the procedure for waiving post-clearance recovery of duties under Article 220(2)(b) and the procedure for remission or repayment under Article 239 of Regulation (EEC) No 2913/92. If this argument aims at proving that the legislation is complex simply because of the coexistence of different rules for non-preferential and preferential certificates, it may not be accepted. Indeed the applicable legislation was published in the Official Journal of the EU and it

[9] See in particular *Hewlett Packard France*, judgment of 1 April 1993 in case C-250/91

is not unreasonable to expect from an economic operator whose activities consist, essentially, of import-export operations, to consult the relevant official journals[10]. A simple reading of the legislation made obvious that presentation of a valid certificate of origin was required at the time of placing the goods under release for free circulation.

(32) The error on the part of the customs authorities, cannot, as a rule, release an operator from the consequences of its own negligence. To allow such negligence would be tantamount to encouraging operators to benefit from the errors of their customs authorities[11]. It should ne noted that the Finanzgericht Hamburg already ruled against the applicant in a similar case[12]. The Commission shares the views of the applicant that the file before the Finanzgericht Hamburg was different from the present case because it concerned goods initially placed under the free zone procedure and because for placing the goods in the free zone no presentation to customs is necessary contrary to what is required when goods are initially placed under the warehousing procedure. However, the Commission considers that an in-depth examination of the facts of the case before the Finanzgericht Hamburg and of the reasoning behind the initiation of a recovery action by the German authorities should have led the applicant to question the correctness of the procedure followed for the imports concerned in the present case.

(33) The Commission therefore considers that the applicant has not been diligent and could have detected the error committed by the German authorities.

(34) The Commission has examined all the arguments invoked by the applicant under Article 220(2)(b) of Regulation (EEC) No 2913/92 and has found no other elements that may justify consideration of the case under Article 239 of Regulation (EEC) No 2913/92. Besides, the criteria to be considered in determining whether the error could be detected by an operator having acted in good faith are the same as those to be examined for determining whether the person concerned committed obvious negligence within the meaning of Article 239 of Regulation (EEC) No 2913/92; there is therefore no need to further consider the case under Article 239 of Regulation (EEC) No 2913/92.

(35) The remission of import duties requested is therefore not justified,

HAS ADOPTED THIS DECISION:

Article 1

The remission of import duties in the sum of EUR XXXXX requested by Germany on 10 September 2009 is not justified.

---

10 See in particular *Friedrich Binder GmbH*, judgment of 12 July 1989 in Case 161/88.

11 See in particular *Heuschen & Schrouff Oriental Foods Trading BV*, judgement of 20-11-2008, in case C-38/07.

12 Aktz: 4 K 34/05 of 21.04.2006

Article 2

This decision is addressed to the Federal Republic of Germany.

Done at Brussels, 16-9-2011

For the Commission
Algirdas ŠEMETA
Member of the Commission