

COMMISSION DECISION

C(2012) 8694

of 30.11.2012

finding that it is justified to waive post-clearance entry in the accounts in a particular case (REC 01/2011)

(only the Finnish and the Swedish texts are 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 Code¹, and in particular Article 220 (2) (b) thereof,

Having regard to Regulation (EEC) No 2454/93 of 2 July 1993² laying down provisions for the implementation of Council Regulation (EEC) No 2913/92,

Whereas:

- (1) By letter dated 28 April 2011, received by the Commission on 22 June 2011, Finland asked the Commission to decide, under Article 220(2) (b) of Regulation (EEC) No 2913/92, whether waiving the entry in the accounts of import duties was justified in the following circumstances.
- (2) Between 13.5.2008 and 07.7.2009 a Finnish company (the applicant) decided to complement its domestic production of bicycles by importing bicycles from Cambodia to Finland.
- (3) At the time in question, imports into the Union of this type of product originating in Cambodia qualified for preferential treatment under the scheme of generalised tariff preferences (GSP). Under the relevant provisions of Regulation (EEC) No 2454/93 in force at the time, the products were eligible for preferential tariff treatment upon release for free circulation if they were covered by a Form A certificate of origin issued by the competent authorities in Cambodia.
- (4) The Cambodian manufacturing company is a subsidiary of a Taiwan based firm (mother company) which has another subsidiary manufacturing firm in Vietnam. In addition, another company of the group, which is registered in the British Virgin Islands and operates from the same address in Taiwan pays a monthly lump sum to the Cambodian company.
- (5) Prior to placing the first order in 2008, during the negotiation process with the Cambodian company, the applicant requested confirmation that the conditions for preferential tariff treatment to be granted to the bicycles imported from Cambodia

¹ OJ L 302 19.10.1992, p. 1

² OJ L 253, 11.10.1993, p. 1.

were fulfilled. During the negotiation stage the applicant was also in contact with Finnish Customs in order to clarify the conditions for preferential treatment.

- (6) In addition, before the first consignment was ordered in 2008, the director of the Cambodian company established a customs control post where a customs official checks the deliveries arriving at the factory and its compliance with the rules of origin.
- (7) The applicant's representative in Cambodia went through the conditions governing the acquisition of preferential origin and the relevant documentation with the Cambodian manufacturer and paid attention to the cost calculation for the product, including the labour costs and the countries of manufacture for all the component parts to ensure that the origin criteria giving entitlement to preferential treatment were met in relation to the component parts manufactured elsewhere as well. The applicant's representative monitored quality control, compliance with the schedule and with the rules of origin and made efforts to obtain certificates of origin Form A proving the preferential origin of the products ordered and checked that these certificates were actually issued by the Cambodian authorities.
- (8) For every consignment the Cambodian firm produced a cost calculation, with a breakdown in relation to its own production and labour, the component parts acquired from other countries, the countries they were from and the value of the acquisition.
- (9) The importing company presented GSP certificates of origin Form A issued by the Cambodian authorities with the 33 declarations for release for free circulation in Finland. The Finnish customs authorities accepted the declarations and granted the preferential tariff treatment.
- (10) Between 19 June and 2 July 2009, a joint investigation team composed of members of the European Anti-Fraud Office (OLAF) and of representatives of some Member States visited the premises of the Cambodian firm and found that a number of certificates of origin Form A issued by the Cambodian authorities should not have been issued on the basis of certificates Form B and D and therefore found that the rules of origin applicable within the framework of the scheme of generalised tariff preferences had not been complied with.
- (11) As the bicycles were imported into Finland on the basis of Form A certificates incorrectly issued, the Finnish authorities required the firm to pay import duties of EUR XXXX.
- (12) The company applied for non-recovery of the import duties concerned, citing its good faith and the mistakes made by the Cambodian competent authorities, which it could not have detected.
- (13) In accordance with Article 871(3) of Regulation (EEC) No 2454/93, the firm stated that it had seen the dossier submitted to the Commission by the Finnish authorities and had nothing to add.
- (14) On 23 November 2011, the Commission requested additional information to Finland. The letter was received on that same date.
- (15) Finland provided additional information by letter of 1st August 2012, received by the Commission on 13 August 2012.
- (16) Therefore, the nine months period allowed to the Commission for adoption of its decision were suspended between the 24 November 2011 and the 13 August 2012.

- (17) In accordance with Article 873 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 10 September 2012 within the framework of the Customs Code Committee (Customs Debt and Guarantees Section) to consider the case.
- (18) Under Article 220(2)(b) of Regulation (EEC) No 2913/92, there may 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 declaration³.
- (19) The Court of Justice of the European Union has consistently ruled that the legitimate expectations of a trader are protected only if the competent authorities themselves gave rise to the expectations. Therefore, only errors attributable to acts of those authorities confer entitlement to the waiver of post-clearance recovery of customs duties⁴. It is therefore a matter of determining whether, in this particular case, the competent authorities committed an error.
- (20) The file sets out the following arguments suggesting that waiver of entry in the accounts or in the alternative remission of import duties is justified.
- (21) In the case under consideration, granting preferential tariff treatment for the imports was subject to presentation of GSP certificates of origin Form A.
- (22) The competent Cambodian authorities committed an error in issuing Form A certificates and accepting as evidence of the ASEAN origin Forms B or Forms D from the other members of the regional group. In accordance with the GSP rules certificates B and D are not acceptable proof of origin under the rules of regional cumulation. In fact, in various communications addressed in 2010 to the Customs authorities of Estonia, France, Italy and Spain in reply to their requests for verification of certificates of origin Form A, the Cambodian authorities admitted procedural errors in issuing Form A certificates. The Cambodian authorities recognised that mistakenly they have accepted Forms B or Forms D certificates issued by other members of the regional cumulation group which are not acceptable proofs of origin under the GSP rules or origin.
- (23) The Cambodian authorities recognised that they had incorrectly covered different bicycle models under a single form for issuing certificates of origin Form A and that prices used in the calculations determining the preferential origin were not the real prices.. In addition, they stated that if the proper procedures had been followed, most of the bicycles for which Form A certificates were issued in error would still have qualified for certificates of origin Form A.
- (24) These procedural errors were corrected in September 2009, following contacts between the Cambodian Ministry of Commerce and OLAF.
- (25) In those communications, the Cambodian competent authorities have confirmed that the certificates of origin Form A were issued by the Ministry of Commerce, that the

³ Case C-314/87 Foto-Frost paragraph 22; Hewlett Packard France, paragraph 13; Faroe Seafood, paragraph 83, and Case C-370/96 Covita, paragraphs 25 to 28

⁴ Case C-348/89 Mecanarte, paragraphs 22- 23; Case C-173/06 Agrover paragraph 31, and Joined Cases C-153/94 and C-204/94 Faroe Seafood and Others, paragraph 91.

certificates corresponded to products actually exported from Cambodia and that the signatures and stamps were authentic.

- (26) The circumstances in this case therefore reveal an active error on the part of the Cambodian authorities themselves which could not have been detected by an operator acting in good faith within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (27) With regard to the firm's good faith, the applicant prior to concluding the contract with the Cambodian partner took necessary precautions that the applicable conditions governing acquisition of preferential origin in relation to the bicycles would have been met and made extensive efforts to ensure that adequate supporting documentation to obtain certificates of origin Form A proving the preferential origin of the products was available; it had ordered and requested confirmation that these Form A certificates of origin were actually issued by the Cambodian authorities.
- (28) There is nothing in the file to indicate that the way in which it carried out the imports in question departed from normal commercial practice.
- (29) It has therefore to be concluded that the applicant acted in good faith.
- (30) It is also clear from the application that the trader 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 import duties is not therefore justified in this case.
- (32) Where special circumstances warrant waiver of entry in the accounts, Article 875 of Article Regulation (EEC) No 2454/93 authorises the Commission to determine the conditions under which the Member States may waive the entry in the accounts in situations involving comparable issues of fact and law.
- (33) Cases comparable in fact and law to this one are requests lodged within the legal time limits in respect of goods covered by certificates of origin Form A issued by the Cambodian competent authorities in the period covered by the OLAF investigation in question (2006-2009) concerning the two exporting companies referred to in the report, where the goods were bicycles declared as originating in Cambodia and 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 EUR XXXX which are the subject of the request from the Republic of Finland of 28 April 2011 shall not be entered in the accounts.

Article 2

This Decision is addressed to the Republic of Finland.

Done at Brussels, on 30.11.2012.

For the Commission
Algirdas ŠEMETA
Member of the Commission