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EUROPEAN COMMISSION

Brussels, 1-10-2010
C(2010)6751

COMMISSION DECISION

Of 1-10-2010

finding that remission of import duties is not justified in a particular case

(REM 05/09)

(Only the Spanish text is authentic)

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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 239 thereof,

Whereas:

- (1) By letter of 3 November 2009, received by the Commission on 3 December 2009, the Spanish authorities asked the Commission to decide whether remission of import duties was justified under Article 239 of Council Regulation (EEC) No 2913/92 and Article 905 of 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 Code².
- (2) On 5 January, 8 January and 11 February 2004, a Portuguese firm (hereafter "the interested party") imported fish consignments from Morocco for release for free circulation. The goods were declared to have originated in Mauritania.
- (3) In accordance with Protocol I attached to Annex V to the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 ("the Cotonou Agreement")³, the products in question, which originated in Mauritania, were at the time of the facts imported into the European Union free of import duties upon presentation of EUR.1 movement certificates ("EUR.1 certificates").
- (4) In the case under consideration, the interested party presented a EUR.1 certificate in support of each customs declaration for release for free circulation. The Spanish customs authorities accepted the declarations and granted preferential tariff treatment.

¹ OJ L 302, 19.10.1992, p. 1.

² OJ L 253, 11.10.1993, p.1.

³ OJ No L 317, 15.12.2000, p. 3.

- (5) On 23 January 2006 the Spanish authorities sent a copy of the certificates in question to the Mauritanian authorities to have them verified in accordance with the provisions of Article 32 of the aforementioned Protocol I, since there was reasonable doubt regarding their authenticity.
- (6) In their reply of 29 March 2006, the Mauritanian authorities indicated that they had not issued the certificates in question and that those certificates were not authentic.
- (7) On 10 January 2007, the Head of Office in Nouadhibou-Pêche affirmed that the refrigerated fish consignments for which the EUR.1 certificates had been issued had indeed been exported from Nouadhibou in the Islamic Republic of Mauritania, and that the matter had been resolved through payment of the import duties and taxes chargeable and the penalties provided for by the rules. This attestation was sent to the Spanish authorities by the customs clearance agent who had issued the declarations of release for free circulation.
- (8) An administrative cooperation mission was conducted in Mauritania on 19-23 March 2007 by representatives of Spain and the European Commission, inter alia to establish the extent and the nature of the fraud and to clarify the background to the attestations issued by Mauritanian authorities. During this mission, on 21 March 2007, the Director of Customs Investigations and Control of Mauritania's Customs Directorate-General handed out a document to the members of the delegation stating that verification of the certificates in question had made it possible to establish that the EUR.1 certificates were forged and had been issued by means of forged stamps and signatures. The Mauritanian agents who had profited from this operation had been questioned regarding the infringement and, to rectify the situation, had been made to pay the import duties and penalties due. This rectification did not, however, justify the issue of any new EUR.1 movement certificates.
- (9) Given that the goods did not, therefore, qualify for the preferential rate applicable under the Cotonou agreement, the Spanish customs authorities initiated proceedings against the interested party on 22 May 2007 for the post-clearance recovery of EUR XXXX in import duties.
- (10) It is this amount that is the subject of the application for remission forwarded by the Spanish authorities.
- (11) The request sent to the Commission by the Spanish authorities suggests that remission is justified on the following grounds:
 - (a) it would not have been possible for the interested party to submit comments on the communication of the disputed import duties within the time limits applicable under Spanish law;
 - (b) the Spanish authorities had not complied with the period of three years provided for in Article 221(3) of the Code;
 - (c) it could not be established that the communication of the debt had been preceded by an entry in the accounting records in accordance with Article 217 of the Code;

- (d) when the interested party had received notification that the certificates were inauthentic, two years had passed since the declarations had been submitted, which made it impossible for it to take action;
- (e) the communication of the duties had merely stated that the certificates were forged, without indicating whether the authorities kept a copy of those certificates in their archives; to allow the interested party to defend itself, it should be possible – as is the case for theft, loss or destruction – to obtain a copy also in the event of forgery so as to be able to compare it to the certificate enclosed with the declaration;
- (f) the Mauritanian authorities had indicated that the situation regarding the certificates had been rectified, without providing any further details;
- (g) the goods in question had originated in Mauritania as stated in the public health certificate enclosed with the import declarations;
- (h) the interested party had acted in good faith throughout and no deception or obvious negligence could be attributed to it.
- (12) By letter of 25 May 2010, received by the interested party on 28 May 2010, the Commission informed the interested party that it intended to adopt an unfavourable decision with respect to it, explaining the reasons for its objections. The firm did not reply to this letter.
- (13) In accordance with Article 907 of Regulation (EEC) No 2454/79, a group of experts composed of representatives of all the Member States met on 24 September 2010 within the framework of the Customs Code Committee – Customs Debt and Guarantees Section to consider the case.
- (14) Under Article 239 of Regulation (EEC) No 2913/92, import duties may be remitted in situations other than those referred to in Articles 236, 237 and 238 of this Regulation if they result from circumstances in which no deception or obvious negligence can be attributed to the person concerned.
- (15) It emerges from the [case law](#) of the Court of Justice of the European Union that this provision constitutes a general equity clause and that the existence of a special situation is established where it is clear from the circumstances of the case that the person liable is in an exceptional situation as compared with other operators engaged in the same business and that, in the absence of such circumstances, he would not have suffered the disadvantage caused by the entry in the accounts a posteriori of customs duties⁴.

A. Condition concerning the existence of a special situation

- (16) It needs to be established whether the firm's situation should be considered exceptional in comparison with the other operators engaged in the same business.

⁴ Judgment of 10 May 2001 in *Kaufring AG* (Cases T-186/97, T-190/97 to T-192/97, 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-1337.

- (17) It should be noted, first of all, that the arguments put forward by the interested party to contest the [validity](#) of the decisions made by the national competent authorities regarding payment of the disputed duties (cited under points (a) to (d) above) do not fall within the scope of the procedure for remission or repayment under Article 239 of the Code⁵. These issues fall under the competence of the Member States and certainly not under that of the Commission. Furthermore, the [Court](#) of Justice [has consistently ruled](#)⁶ that the purpose of Commission decisions in proceedings for remission/repayment on grounds of equity is not to determine whether a customs debt has been incurred or the size of the debt. An operator who does not recognize the existence of a customs debt must challenge the decision establishing that debt before the national courts in accordance with Article 243 of the Code.
- (18) In the case under consideration, granting preferential tariff treatment was subject to the presentation of EUR.1 certificates. As already mentioned, the certificates in question were forged.
- (19) It follows from Article 904(c) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 that the presentation of a document subsequently found to be forged, falsified or incorrect, even if it is presented in good faith by the person liable for payment, cannot in itself constitute a justification for repayment or remittance.
- (20) It should be emphasized in this regard that under the Cotonou Agreement, one of the following documents listed in Article 14 of the aforementioned Protocol I must be submitted as proof of the origin of goods:
- (a) a EUR.1 movement certificate, or
 - (b) in the cases specified in Article 19(1) of Protocol I, a declaration given by the exporter on an invoice, a delivery note or any other commercial document describing the products concerned in sufficient detail to enable them to be identified ('invoice declaration').
- (21) Without these documents, tariff preferences may not be accorded. The public health certificate issued by the Spanish authorities at the time of importation cannot serve as a substitute for these documents.
- (22) With regard to the response from the Mauritanian authorities to the requests for subsequent verification of the EUR.1 certificates, the following should be noted:
- (23) Determining the origin of goods is based on a division of responsibilities between the authorities of the exporting country and those of the importing country, inasmuch as origin is established by the authorities of the exporting country and the proper working of the system is monitored jointly by the competent authorities on both sides. The Court has expressed the view that the administrative cooperation mechanism under the preferential agreements can function only if the customs authorities of the importing

⁵ See judgment of 6 July 1993 in '*CT Control*' and '*JCT Benelux*' (C-121/91 and C-122/91).

⁶ See judgments in '*Sportgoods*' (C-413/96, 24 September 1998), '*Kia Motors*' (T-195/97, 16.7.1998) and '*Hyper Srl*' (T-205/99, 11 July 2002).

country accept the determinations legally made by the authorities of the exporting country⁷.

- (24) Where the competent authorities of the exporting country declare, following subsequent verification, that a EUR.1 certificate is forged, this is sufficient to enable the authorities of the importing country to hold that duties legally due have not been charged and consequently institute proceedings to recover them. Nothing in the rules obliges the authorities of the importing country to establish the accuracy of the results of the verification or the true origin of the goods⁸.
- (25) Finally, with regard to the attestation issued by Mauritanian authorities on 10 January 2007, in which they state that the situation has been 'rectified', it follows from the document issued by those same authorities on 21 March 2007 that the verification of the certificates at issue had revealed that the EUR.1 certificates concerned were forged and had been issued by means of forged stamps and signatures. The rectification of the situation referred to by the Mauritanian authorities consisted in collecting a fine and the duties chargeable in Mauritania. Such rectification does not in any way imply that the goods qualify for preferential tariff treatment on release for free circulation in the European Union. Consequently, no special situation within the meaning of Article 239 of the Code can be invoked by the interested party.
- (26) In view of the above, the Commission takes the view that the first condition referred to in Article 239 of Regulation (EC) No 2913/92 is not met.

B. Condition concerning the absence of deception or obvious negligence

- (27) The Spanish authorities' request and letter to the Commission of 3 November 2009 show that no deception or obvious negligence may be attributed to the firm. However, since the existence of a special situation has not been established, remission on the basis of Article 239 may not be granted.
- (28) The Commission therefore considers that remission under Article 239 of Regulation (EEC) No 2913/92 is not justified,

HAS ADOPTED THIS DECISION:

Article 1

The remission of import duties in the sum of EUR XXXX which were the subject of the request from the Kingdom of Spain dated 3 November 2009 is not justified.

Article 2

This Decision is addressed to the Kingdom of Spain.

⁷ See, inter alia, judgments of the Court of Justice of 12 July 1984 in '*Les rapides savoyards*' (C-218/83) and of 17 July 1997 in '*Pascoal & Filhos*' (C-97/95).

⁸ See judgment in '*Pascoal & Filhos*', cited above, par. 37.

Done at Brussels, 1-10-2010

For the Commission
Algirdas ŠEMETA
Member of the Commission