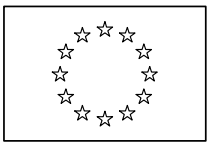
REC 05/07



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 16-1-2009
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COMMISSION DECISION

Of 16-1-2009

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

(only the Portuguese text is authentic)

(Request submitted by Portugal)

(REC 05/07)

FR

COMMISSION DECISION

Of 16-1-2009

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(only the Portuguese text is authentic)

(Request submitted by Portugal)

(REC 05/07)

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[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 28 November 2007, received by the Commission on 30 November 2007, Portugal asked the Commission to decide whether, under Article 220(2)(b) of Regulation (EEC) No 2913/92, waiving post-clearance entry in the accounts of import duties or, in the alternative, remission of those duties on the basis of Article 239 of that Regulation, was justified in the following circumstances.

(2) A Portuguese firm, hereinafter referred to as "the firm", imported between September 2003 and February 2005 frozen shrimp declared as originating in Indonesia for release for free circulation.

(3) At the time in question, imports into the Community of this type of product originating in Indonesia qualified for preferential treatment under the System of Generalised Preferences (GSP)[3]. Under Article 80 of the version of Regulation (EEC) No 2454/93 in force at the time, products covered by a Form A certificate of origin (hereinafter

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1 OJ L 302, 19.10.1992, p. 1.

2 OJ L 253, 11.10.1993, p. 1.

3 Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004 (OJ L 346, 31.12.2001, p. 1).

Form A certificate) issued by the competent authorities in Indonesia were eligible for preferential tariff treatment on their release for free circulation.

(4) In the case in point, the firm presented Form A certificates in support of each customs declaration for release for free circulation. The Portuguese customs authorities accepted the declarations and granted preferential tariff treatment.

(5) A joint administrative cooperation mission comprising representatives of the European Anti-Fraud Office (OLAF) and some Member States visited Indonesia from 29 June to 15 July 2005 to investigate exports to the Community of frozen shrimp declared as originating in Indonesia. It was suspected that significant quantities of shrimp imported into the Community from Indonesia under Form A certificates actually originated in third countries and that the purpose of this fraud might be to circumvent a ban on imports into the Community of shrimp from China. The mission found that some consignments of frozen shrimp exported to the Community under Form A certificates by Indonesian exporters, including the firm's supplier, did not satisfy the GSP rules of origin. A second joint administrative cooperation mission went to Indonesia from 14 to 22 February 2006 to check the origin of the shrimp exported by the firm's supplier in particular.

(6) The fact that the shrimp exported by this supplier did not satisfy the rules of origin and could not therefore be eligible for the GSP preferential rate having been established, the Portuguese customs authorities initiated proceedings against the firm for the post-clearance recovery of EUR XXXXX in import duties resulting from the difference between the standard rate (12%) and the preferential rate (4.20%).

(7) It is this amount that is the subject of the application for waiver of post-clearance entry in the accounts and remission sent by the Portuguese authorities.

(8) In support of the request made by the Portuguese authorities, the firm stated, in accordance with Articles 871(3) and 905(3) of Regulation (EEC) No 2454/93, that it had seen the dossier submitted to the Commission by the Portuguese authorities and had nothing to add.

(9) In a letter of 11 April 2008 the Commission asked the Portuguese authorities for additional information. They replied by letter of 23 July 2008, received at the Commission on 29 July 2008. Examination of the application was therefore suspended between 12 April and 29 July 2008.

(10) By letter dated 23 October 2008, received by the firm on 24 October 2008, the Commission notified the firm of its intention to withhold approval and explained the reasons for this.

(11) By letter dated 5 November 2008, received by the Commission on 18 November 2008, the firm stated its position on the Commission's objections.

(12) In accordance with Articles 873 and 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 Articles 873 and 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on

5 December 2008 within the framework of the Customs Code Committee (Repayment Section) to consider the case.

(14) The request sent to the Commission by the Portuguese authorities and the letter from the firm dated 5 November 2008 suggested that waiving entry in the accounts and remission were justified for the following reasons:

- the Indonesian authorities committed an error that could not have been detected by an operator acting in good faith by issuing over a prolonged period Form A certificates for goods that did not fulfil the conditions laid down by the GSP;

- post-clearance recovery was not justified since the joint mission had established that the raw material originated in Malaysia and the applicable customs duty was the same (GSP rules and the ASEAN regional group);

- the firm had always exercised due care and in correspondence with its supplier it systematically asked for certificates of the goods' Indonesian origin;

- the firm acted in good faith throughout and no obvious negligence or deception may be attributed to it.

(15) First, the argument that recovery is not justified because at least some of the goods originated in Malaysia and were therefore subject to the same rate of customs duty that would have applied if they originated in Indonesia is tantamount to calling into question the existence of the customs debt. This argument does not fall within the scope of the procedure for waiving post-clearance recovery of duties under Article 220(2)(b) or the procedure for remission or repayment under Article 239 of Regulation (EEC) No 2913/92. It is for the Member States, not the Commission, to determine whether a debt has been incurred and, if so, the amount of the debt. Furthermore, the Court of Justice has consistently ruled that the purpose of Commission decisions under the procedures for waiving post-clearance entry in the accounts or remission/repayment on an equitable basis is not to determine whether a customs debt has been incurred or the size of the debt[4]. An operator who does not recognise the existence of a customs debt must challenge the decision establishing that debt before the national courts in accordance with Article 243 of Regulation (EEC) No 2913/92.

I. Examination of the application under Article 220(2)(b) of Regulation (EEC) No 2913/92

(16) Under Article 220(2)(b) of Regulation (EEC) No 2913/92 post-clearance entry in the accounts is 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 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 declaration.

A - Condition concerning an error on the part of the customs authorities

[4] See judgments in Sportgoods (C-413/96, 24.9.1998), Kia Motors (T-195/97, 16.7.1998) and Hyper Srl (T-205/99, 11.7.2002).

(17) In the case under consideration preferential tariff treatment was subject to the submission of Form A certificates. With no documents to confirm the preferential origin of the shrimp, the certificates in question were invalid.

(18) Reliance on the validity of such certificates is not as a rule protected, as this is considered a normal commercial risk and therefore the responsibility of the person liable for payment.

(19) 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[5]. Thus only errors attributable to the active behaviour of those authorities are grounds for granting waiver of post-clearance recovery of duties.

(20) This condition cannot, then, be considered to be fulfilled where the competent authorities have been misled by inaccurate declarations submitted by the exporter.

(21) In the case of fishery products, only products wholly obtained in the territorial waters of the beneficiary country, or outside its territorial waters but fished by its vessels, are eligible for preferences under the GSP.

(22) The two joint missions referred to above established that the supplier did not in fact know the GSP rules of origin and it was due to a misunderstanding of the concept of "wholly obtained goods" that Form A certificates were requested for consignments of shrimp from China. This explains why the letter "P" was always entered in box 8 of the certificate when the Form A certificate was requested, meaning that the goods in question had been wholly obtained in Indonesia whereas they had been imported from other countries and for the most part only packed in Indonesia, and to a lesser part cooked and packed in Indonesia. It should furthermore be noted that, contrary to what the firm seems to argue in its letter of 5 November 2008, whether or not the exporter acted in good faith is not relevant for assessing whether or not the facts were presented incorrectly. It follows from the above that the exporter concerned presented the facts incorrectly, which led to the issuing of invalid Form A certificates.

(23) Nor does the Commission believe that the fact that all the certificates were issued retrospectively constitutes an error on the part of the Indonesian authorities. Even though the retrospective issuing of Form A certificates should remain an exceptional procedure, in this case the authorities asked the exporter to produce the export declaration, the bill of lading and the health certificate for the goods before issuing the Form A certificates.

(24) Finally, the fact that the Indonesian authorities did not require the presentation of a separate written request by the exporters but said the form of the certificate was in itself such a request was also not an error on the part of the authorities under Article 220(2)(b). An error of the authorities has to be the result of an incorrect analysis on their part, it is not constituted by their accepting the certificate as constituting an application for the issuing of the certificate instead of requiring a separate application.

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[5] Mecanarte judgment of 27 June 1991 (Case C-348/89) and Faroe Seafood et al. judgment of 14 May 1996 (joined cases C-153/94 and C-204/94).

(25) The issuing of incorrect certificates by the Indonesian authorities does not therefore constitute an error on their part in this case.

(26) However, under Article 220(2)(b) there would have been an error if the issuing authorities knew or should have known that the goods did not satisfy the conditions laid down for preferential treatment.

(27) At this stage in the procedure it emerges from the case file, above all the two mission reports, that the exporter in question was also engaged in farming shrimp and that he exported on his own account shrimp that indeed originated in Indonesia.

(28) In the case in point the invoices attached to the export declarations were drawn up the exporter himself for a broker based in Singapore. But the fact that the exports were carried out on behalf of this broker does not mean that the Indonesian authorities should have systematically called into question the origin declared by the exporter. Contrary to what the firm argues, the fact that the broker's name appears on the invoices presented at the time of export does not mean that the Indonesian authorities knew or should have known that the exported goods were not of Indonesian origin.

(29) Finally, the fact that Indonesian authorities confirmed that the certificates in question were authentic in August 2006, i.e. after the joint missions and after these authorities had signed and therefore approved the mission reports, does not constitute grounds for concluding that when the certificates were issued, i.e. between 2003 and 2005, the Indonesian authorities knew or should have known that the goods for which they were issuing these certificates did not fulfil the conditions for the GSP rules of origin. The authenticity of the documents and stamps is not in question, only the knowledge of whether the goods fulfilled the conditions for the GSP.

(30) In view of the above, the Commission believes that there is no sign in this case that the Indonesian authorities knew or should have known that the goods in question did not fulfil the conditions for the GSP. Therefore the authorities did not commit an error within the meaning of Article 220(2)(b).

B - Conditions regarding the good faith of the person concerned and compliance with the rules in force as regards the customs declaration

(31) The Portuguese authorities' application and letter to the Commission of 23 July 2008 show that the firm acted in good faith and complied with all the provisions in force regarding its declaration.

(32) However, since it has not been established that the Indonesian authorities committed an error, entry in the accounts of the amount of duty in question is justified.

II - Examination of the request under Article 239 of Regulation (EEC) No 2913/92

A. Existence of a special situation

(33) It is necessary to check whether the firm's situation should be considered exceptional in comparison with the other firms engaged in the same business.

(34) For the reasons set out in point I.A, the Commission believes that the Indonesian authorities' issuing of Form A certificates that were subsequently shown to be incorrect cannot have placed the firm in an exceptional situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(35) In their letter of 28 November 2007 the Portuguese authorities concluded that the Malaysian exporter had not taken adequate measures for the issue of Form A certificates in Malaysia, which would have enabled the exporter to ask the Indonesian authorities on the basis of these certificates (in the framework of the ASEAN regional group) for the normal issuing of certificates for goods exported to the Community.

(36) The Commission does not believe that this justifies the view that the firm was placed in a special situation; under Article 80 of Regulation (EEC) No 2454/93 products originating in GSP beneficiary countries enjoy the tariff preferences referred to in Article 67 subject to submission of:

(a) either a Form A certificate of origin;

(b) or, in the cases referred to in Article 89(1) of Regulation (EEC) No 2454/93, an invoice declaration.

(37) Without these documents, tariff preferences may not be accorded. If the goods were indeed of Malaysian origin, it was up to the firm's supplier or the person in whose name it acted to ask the Malaysian authorities to issue Form A certificates, which then had to be transmitted to the competent Indonesian authorities. Those authorities would then decide whether the certificates could be taken into account as retrospectively issued certificates and act accordingly.

(38) Whatever the case, to admit that the alleged error of the Malaysian exporter constituted a special situation would be tantamount to changing the rules for proof of origin and cannot be accepted.

(39) According to the Commission, this argument indirectly calls into question the very existence of the customs debt and to call into question 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 (see recital 15).

(40) In view of the above, the Commission does not consider that the first condition laid down in Article 239 of Regulation (EEC) No 2913/92 has been fulfilled.

B. Absence of deception or obvious negligence

(41) The Portuguese authorities' application and letter to the Commission of 23 July 2008 show that no obvious negligence or deception 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 of the Code may not be granted.

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

HAS ADOPTED THIS DECISION:

Article 1

1. The import duties in the sum of EUR XXXX which are the subject of the application from Portugal dated 28 November 2007 shall be entered in the accounts.

2. The remission of import duties in the sum of EUR XXXX requested by Portugal on 28 November 2007 is not justified.

Article [2]

This Decision is addressed to Portugal.

Done at Brussels, 16-1-2009

For the Commission
László Kovács
Member of the Commission