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REM 08/04

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20.10.2006
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NOT FOR PUBLICATION

COMMISSION DECISION

Of 20.10.2006

finding that the repayment of import duties in a particular case is justified

(Only the Danish text is authentic.)

(Request submitted by Denmark)
(REM 08/2004)

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**(Request submitted by Denmark)
(REM 08/2004)**

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 Code¹, as last amended by Regulation (EC) No 648/2005²,

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92³, as last amended by Regulation (EC) No 402/2006⁴, and in particular Article 907 thereof,

¹ OJ L 302, 19.10.1992, p. 1.

² OJ L 117, 4.5.2005, p. 13.

³ OJ L 253, 11.10.93, p. 1.

⁴ OJ L 70, 9.3.2006, p. 35.

Whereas:

- (1) By letter dated 16 November 2004, received by the Commission on 17 November 2004, Denmark asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether the repayment of import duties was justified in the following circumstances.
- (2) On 29 October 1997 and 2 June 1998, a Danish firm (hereinafter 'the firm') released shrimps and prawns from the United Arab Emirates (UAE) for free circulation.
- (3) At the time in question, imports into the Community of this type of fishery product originating in the UAE qualified for preferential treatment under the System of Generalised Preferences. Therefore, since the products were covered, in accordance with the provisions of Article 81 of Commission Regulation (EEC) No 2454/93, as amended by Commission Regulation (EC) No 12/97 of 18 December 1996⁵, by a Form A certificate issued by the UAE authorities, the preferential tariff treatment could be granted when the products were released for free circulation.
- (4) In the case in point, the firm presented Form A certificates issued by the competent UAE authorities in support of its customs declarations for release for free circulation. The Danish customs authorities accepted the declarations and granted preferential tariff treatment.
- (5) On 20 October 1999, the European Anti-Fraud Office informed the Member States of doubts regarding the validity of Form A certificates issued by the UAE authorities for fishery products (chiefly shrimp and prawn, squid and cuttlefish). It was noted that investigations had been held into the illegal transshipment into the Community via third countries of fishery products originating from Bangladesh and India during the period August 1997 to mid-1998, at which point exports originating from those countries were either banned or subject to strict controls on the number of firms authorised to export to the Community.
- (6) As part of the Community administrative cooperation mission carried out by the representatives of several Member States and the European Commission from 1 to 16

⁵ OJ L 9, 13.1.1997, p. 1.

February 2000, investigations were carried out in the UAE. On this occasion, members of the mission visited four exporting firms, including the two operators that exported the goods involved in the case in point. As a result of these investigations, a large number of certificates issued by the UAE authorities, including the firm's two certificates, were declared invalid as they had been wrongly issued by those authorities. Since the imported shrimps and prawns could no longer be eligible therefore for preferential tariff treatment, the Danish authorities requested that the firm pay import duties of DKK XXXXX, an amount which the firm had initially paid but had subsequently asked to be refunded.

- (7) On completion of the administrative appeal stage, the file was forwarded to the competent court which, on 23 January 2004, ruled that the matter should be referred to the Commission so that an investigation could be carried out to determine whether repayment on the basis of Article 239 of Regulation (EEC) No 2913/92 was justified.
- (8) The firm has claimed a special situation under Article 239 of Regulation (EEC) No 2913/92 on the grounds that the UAE authorities committed an error in authorising the certificates in question; in particular, those authorities were acting on a misinterpretation of the applicable rules; the firm adds that the UAE authorities should have known that the UAE fleet did not have sufficient capacity to land the quantities of fish declared to have originated in that country.
- (9) In support of the application submitted by the Danish authorities, the firm stated that, in accordance with Article 905(3) of Regulation (EEC) No 2454/93, it had seen the file the authorities had sent and had nothing to add.
- (10) By letters of 4 February 2005 and 28 October 2005, the Commission asked the Danish authorities for some additional information. This information was sent to the Commission by letter of 9 September 2005, received by the Commission on 12 September 2005, and by letter of 30 March 2006, received by the Commission on 5 April 2006.
- (11) The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93, between 5 February 2005 and 12 September 2005 and again between 29 October 2005 and 5 April 2006.

- (12) By letter dated 12 July 2006, received by the firm on 13 July 2006, the Commission notified the firm of its intention to withhold approval and explained the reasons for this. By e-mail of 18 July 2006, the firm requested an additional period of one month; by e-mail of 24 July 2006, the firm was informed it would not be granted the extension it had requested. By letter of 7 August 2006, the firm submitted its observations on the Commission letter of 12 July 2006.
- (13) In accordance with Article 907 of Regulation (EEC) No 2454/93, the period of nine months within which the Commission decision must be taken was extended by one month.
- (14) 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 examine the case on 13 September 2006 within the framework of the Customs Code Committee - Repayment Section.
- (15) 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.
- (16) The Court of Justice of the European Communities has consistently held that this provision represents a general principle of equity designed to cover an exceptional situation in which an operator, who would not otherwise have incurred the costs associated with the customs duties concerned, might find itself compared with other traders carrying out the same activity.
- (17) In the case in point, granting the preferential tariff treatment for the imports in question depended on the submission of Form A certificates of origin. However, as stated above, the certificates in this case were invalidated by the UAE authorities.
- (18) Reliance on the validity of such certificates is not normally protected, as this is considered part of the importer's 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 an operator are protected only if the competent authorities themselves gave rise to the expectation.
- (20) In this instance, the exporters declared on the certificates of origin that the goods these referred to met the conditions for obtaining the certificates.
- (21) As the Court of First Instance of the European Communities has ruled, even if the exporters had misled the competent authorities of the UAE, this does not necessarily rule out the existence of a special situation in this case within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (22) In any event, the fact that the exporters had confirmed on the Form A certificates that the conditions for obtaining them had been met was not in itself proof that the UAE authorities had been misled.
- (23) In the case in point, there is evidence to suggest that the UAE authorities knew or, at the very least, should have known that the goods for which they were issuing Form A certificates did not meet the conditions laid down for preferential treatment.
- (24) The circumstances of this case therefore constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (25) These circumstances do not involve deception or obvious negligence on the part of the firm.
- (26) In view of the above, repayment of the import duties is justified in this case.
- (27) Where special circumstances warrant repayment or remission, Article 908 of Regulation (EEC) No 2454/93 authorises the Commission to determine the conditions under which the Member States may repay or remit duties in cases involving comparable issues of fact and law.
- (28) Cases comparable in fact and law to this one are repayment or remission requests and requests for waiver of post clearance entry in the accounts lodged within the legal time limits by Community importers or their representatives in respect of imports carried out in the period covered by the Community mission's investigation and up to 16 February 2000 at the latest, where those import operations were carried out in

circumstances comparable in fact and law to those which gave rise to this case. The authorisation for Member States to decide themselves in cases similar in fact and law does not cover requests for repayment, remission or the waiver of entry in the accounts by Community importers cited in the report of the Community administrative cooperation mission carried out in the UAE by representatives of several Member States and the European Commission from 1 February to 16 February 2000. There must have been no deception or obvious negligence on the part of the importers concerned.

HAS ADOPTED THIS DECISION:

Article 1

The repayment of import duties in the sum of DKK XXXXX (EUR XXXX) referred to in the request from Denmark dated 16 November 2004 is justified.

Article 2

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 20.10.2006

By the Commission
László KOVÁCS
Member of the Commission