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REM 44/99



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29.6.2000
C(2000)

NOT TO BE PUBLISHED

COMMISSION DECISION

Of 29.6.2000

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

(Request submitted by the United Kingdom of Great Britain and Northern Ireland)

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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 as last amended by Regulation (EC) No 955/1999,²

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation (EEC) No 2913/92,³ as last amended by Regulation (EC) No 1662/1999,⁴ and in particular Article 907 thereof,

¹ OJ L 302, 19.10.1992, p. 1.

² OJ L 119, 7.5.1999, p. 1.

³ OJ L 253, 11.10.1993, p. 1.

⁴ OJ L 197, 29.7.1999, p. 25.

Whereas:

- (1) By letter dated 27 August 1999, received by the Commission on 3 September 1999, the United Kingdom asked the Commission to decide, under Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties,⁵ as last amended by Regulation (EEC) No 1854/89,⁶ whether the repayment of import duties was justified in the following circumstances:
- (2) Commission Regulation (EEC) No 165/90 of 23 January 1990⁷ introduced provisional anti-dumping duty on imports of certain types of electronic microcircuits known as DRAMs (*dynamic random access memories*) originating in Japan.
- (3) Council Regulation (EEC) No 2112/90 of 23 July 1990⁸ transformed this provisional anti-dumping duty into a definitive duty. However, DRAMs were exempt from the anti-dumping duty when they were produced and sold with a view to export to the Community by one of the companies listed in the first indent of Article 1(4) of the Regulation. In this case, exemption from the antidumping duty was conditional upon the presentation to the customs authorities of documents issued by the manufacturers confirming that the products had been sold with a view to their exportation to the Community. These documents ("certification documents"), the model for which appears in Annex III to the Regulation, must show that the unit price for the products is not less than the relevant reference price.

⁵ OJ L 175, 12.7.1979, p. 1.

⁶ OJ L 186, 30.6.1989, p. 1.

⁷ OJ L 20, 25.1.1990, p. 5.

⁸ OJ L 193, 25.7.1990, p. 1.

- (4) In 1992, a company in the United Kingdom (“the company”) signed a contract for the manufacture and supply of a certain number of computers to another British company (“the buyer”). Under the terms of that contract, the company proceeded to purchase components (including DRAMs) from a Japanese supplier, who was related to the buyer. This was done under a contractual obligation agreed with the buyer. In practice, the company was unaware of the manner in which the supplier procured the DRAMs.
- (5) During the period from August to December 1992, 19 consignments of DRAMs manufactured by two of the producers named in the list in Article 1 of Council Regulation No 2112/90 were sent by the supplier and sold to the company mainly for incorporation in the computers covered by the contract. The company then acted as declarant. All the documents required for importation, in particular the certification documents, were furnished by the supplier.
- (6) At the start of 1995, the competent UK authorities carried out a post-clearance check and informed the company that the 19 consignments of DRAMs in question were subject to anti-dumping duty because the certification documents pertaining to these consignments were invalid.
- (7) After regularising the position as to 13 of the 19 documents, the UK authorities then issued recovery notices in respect of six consignments. The investigation by the national authorities revealed that the six certification documents concerned which had been used by the supplier did not relate to the consignments which they accompanied. They related to a previous order placed by the supplier with one of the two Japanese manufacturers. That order had then been cancelled but the documents had not been returned to the manufacturer. The investigation revealed that those documents had then been used fraudulently by the supplier.

- (8) Since the documents in question were invalid, the UK authorities gave the company notice to pay the anti-dumping duties applicable to the products forming part of these consignments for an amount of XXXXXX, repayment of which is sought in this case.
- (9) In accordance with Article 905 of Regulation (EEC) No 2454/93, the company stated that it had seen the dossier sent to the Commission by the UK authorities, and added several comments which were passed on to the Commission by the UK authorities in their letter of 27 August 1999.
- (10) By letter dated 18 April 2000, the Commission notified the company of its intention to withhold approval and explained the grounds for its decision.
- (11) By letter dated 16 May 2000, received by the Commission on the same date, the company expressed its opinion on the Commission's objections. In particular, it stood by its position that the circumstances in this case indicated a special situation in which no deception or obvious negligence could be attributed to the person concerned, within the meaning of Article 13 of Regulation (EEC) No 1430/79. It stated that in this case the special situation arose not simply from the presentation on import of documents which proved to be invalid but from a set of circumstances which, in its view, justified the repayment of duties. Specifically, it stated that the certification documents in question were not normal commercial documents since they were provided for in Community legislation and based on a model shown at Annex to Regulation (EEC) No 2112/90. It repeated that in practice it was impossible to check the validity of certification documents and that, in this case, it had been the victim of its supplier. It also stressed that it was the Commission which had set up the system of price undertakings and which discussed them with Japanese producers. Therefore the Commission should have closely supervised the system and should be considered responsible if any of the producers with whom it had discussed the price undertakings failed to fulfil their obligations.

- (12) The administrative procedure was suspended in accordance with Article 907 of Regulation (EEC) No 2454/93 between 18 April and 16 May 2000.
- (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 examine the case on 25 May 2000 within the framework of the Customs Code Committee - Section for General Customs Rules/Repayment.
- (14) In accordance with Article 13(1) of Regulation (EEC) No 1430/79, import duties may be repaid or remitted in special situations, other than those laid down in sections A to D of that Regulation, resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.
- (15) The Court of Justice of the European Communities has tended to the view that Article 13 of Regulation (EEC) No 1430/79 represents a general principle of equity designed to cover an exceptional situation in which an operator might find himself compared with other operators carrying out the same activity.
- (16) In the dossier sent to the Commission by the UK authorities, they and the company raised several circumstances which in their opinion might be such, individually or in combination, as to create a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79. These various circumstances must therefore be considered.

- (17) Firstly, the company argues that it presented the certification documents sent to it by the supplier in good faith. Indeed, it enjoyed exemption from anti-dumping duty by virtue of its presentation to the UK customs of authentic documents issued in accordance with the terms of Council Regulation (EEC) No 2112/90. As these documents came from the producers named in the list referred to in the first indent of Article 1(4) of the Regulation and since the information appearing on the commercial invoices accompanying the imports corresponded to the particulars in the documents, it claims to have acted in good faith and not to have had any reason to doubt the validity of these documents. This is corroborated by the fact that it was not aware of either the manner in which the supplier procured the components in question or of the supplier's cancellation of certain orders from the producers. Moreover, the company considers that the Japanese producer failed to meet its obligations, inasmuch as it failed to recover the six certification documents it had drawn up from the supplier after the initial order to which they referred was cancelled. But for that failure, the documents could not have been used fraudulently. These circumstances, it argues, are such as to constitute a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79.
- (18) One should point out here that the [Court of First Instance](#) of the European Communities⁹, in particular, has consistently held that submitting documents subsequently found to be falsified or invalid does not in itself constitute a special situation justifying the repayment of import duties even where such documents were presented in good faith. In the case in point it should be noted moreover that the certification document referred to in the third indent of Article 1(4) of Regulation (EEC) No 2112/90 is not a document authenticated by the administrative authorities of a Member State or the exporting country. Even if that Regulation provides for its existence and even if the model for it is set out in an Annex to the Regulation, it is actually a document made out by one private individual for another private individual for the purpose of presentation in support of a customs declaration for release into free circulation.

⁹ See judgment of 18 January 2000 (Case T-290/97, "Mehibas Dordtselaan BV") points 83 et seq.

- (19) As declarant the company assumed liability for the payment of import duties and presentation of the proper documents to the customs authorities. It follows that the damaging consequences of its contractual partners' incorrect behaviour cannot be borne by the Community. Consequently, the fact that in this case the certification documents (referred to in the third indent of Article 1(4) of Regulation (EEC) No 2112/90) presented on importation were incorrect, in that they did not relate to the products actually imported, must be regarded as forming part of the professional risks inherent in the activity of a declarant. Moreover, contrary to the company's statement in its letter of 16 May 2000, this type of commercial risk cannot be considered as unavoidable and unpredictable for a declarant.
- (20) Hence, the argument that the company could not have been aware that the documents supplied were not valid and that it had no reason to doubt such documents is not such as to create a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79. The same is true as regards the fact that the Japanese producer did not retrieve the documents that it had signed though they referred to cancelled orders. This is a matter of the private contractual relations between the different parties involved and forms part of the professional risk which the company must bear.
- (21) Secondly, the company argues that the fact that the customs authorities of the United Kingdom accepted the customs declarations without challenging the certification documents that accompanied them gave rise to legitimate expectations on the part of the person liable, therefore constituting a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79.
- (22) It should be noted in this regard that the Court of Justice has ruled that the person liable cannot entertain a legitimate expectation with regard to the validity of documents by virtue of the fact that they were initially accepted by the customs authorities of a Member State, since the role of those authorities in regard to the initial acceptance of declarations in no way prevents subsequent checks from being carried out.

- (23) Thirdly, relying on a judgment of the Court of First Instance of the European Communities of [19 February 1998](#),¹⁰ the company argues that, given the confidential and sensitive nature of the commercial information contained in the documents in question, it was up to the Commission to ensure that the system of price undertakings was operating properly. It therefore considers that, by failing to detect the fraudulent use of the six certification documents, the Commission failed to fulfil its obligations under Regulation (EEC) No 2112/90 to properly monitor the measures connected with the acceptance of price undertakings.
- (24) But by contrast with the rules which were the subject of the judgment of 19 February 1998, and contrary to the company's claim in the dossier sent to the Commission on 27 August 1999 and in its letter of 16 May 2000, the Commission, in monitoring price undertakings in connection with anti-dumping duties, does not play a direct part in managing the system. While the Commission plays a key role in setting reference prices and accepting the price undertakings offered by certain producers/exporters aimed at guaranteeing that selling prices in the Community are not lower than the reference price regarded as sufficient to reduce the injury caused to complainant companies to a satisfactory degree, it must be pointed out that it is the competent authorities of the Member States and not the Commission which have the task of verifying the authenticity and validity of the certification documents presented on importation for the purpose of obtaining exemption from anti-dumping duties.

¹⁰ In Case T-42/96 “Eyckeler & Malt v Commission”, ECR, p. II-401.

- (25) Under Article 10 of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community,¹¹ the Commission may require any party from whom an undertaking has been accepted to periodically provide information relevant to the fulfilment of such undertakings, and to permit verification of pertinent data. Non-compliance with such requirements is construed as a violation of the undertaking. With regard to the undertakings given in import operations, the Commission's task is therefore one of general surveillance, and cannot be compared with a substantive management task, where the Commission plays an active part in the operation of the system.
- (26) In the case at issue, there was no machinery enabling the Commission to check generally that the documents furnished by firms that gave undertakings corresponded to those presented in support of the customs declarations. Similarly, Regulation (EEC) No 2112/90 did not oblige Member States to provide the Commission with data concerning all the documents presented on importation. Nothing in the rules in force could give the importers to believe that a special checking system had been set up to protect them from the fraudulent use of authentic certification documents or the use of incorrect certification documents.
- (27) Consequently, the operation of the price undertakings system is in no way comparable to the situation referred to in the judgment of the Court of First Instance of 19 February 1998.

¹¹ OJ L 209, 2.8.1988, p. 1.

- (28) It is therefore incorrect to claim that the exemption from anti-dumping duties was based on a procedure directly controlled and administered by the Commission. Consequently, the Commission cannot be accused of any failure because an importer uses certification documents which are subsequently found to be incorrect or an importer's contractual partner fraudulently uses authentic certification documents.
- (29) It follows that in this case, the fact that authentic certification documents were used fraudulently and the fact that the Japanese producer did not retrieve the documents supplied after the order for which they were supplied was cancelled cannot be considered the result of a failure by the Commission to fulfil its obligations and does not, therefore, constitute a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79.
- (30) The company also cites a number of financial difficulties, including the fact that the supplier and the buyer have since gone into liquidation and it will therefore be difficult for it to recover the anti-dumping duties from these enterprises.

- (31) This does not constitute a special situation. It can be inferred from the case law of the Court of Justice that neither the fact that the customs debt can no longer be recovered from the buyer of the imported products nor the fact that the customs debt might force the debtor into liquidation is such as to create a special situation. Similarly, it is clear from the case law of the [Court of Justice](#) and the Court of First Instance of the European Communities¹² that Article 13 of Regulation (EEC) No 1430/79 is not intended to protect declarants against the bankruptcy of their customers or, by analogy, their contractual partners. The fact that the UK authorities only discovered that fraudulent use had been made of the certification documents in March 1995 after a lengthy investigation is not such as to modify this approach, since the authorities complied with the provisions of Article 221 of Regulation (EEC) No 2913/92 on time limits for notifying debtors of customs debts and since, in any event, Article 13 of Regulation (EEC) No 1430/79 is not intended to protect declarants against bankruptcy by their contractual partners in post-clearance recovery proceedings for import duties.
- (32) It follows that the facts of the case are not such, either individually or in combination, as to create a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79.
- (33) The repayment of import duties requested is not therefore justified in this case,

¹² See Court of Justice judgment of 13 November 1984 in Cases 98/83 and 230/83, “Van Gend & Loos v Commission”, ECR p. 3763, point 16 and the Court of First Instance judgment of 18 January 2000 in “Mehibas Dordtselaan BV”, referred to above.

HAS ADOPTED THIS DECISION:

Article 1

The repayment of import duties in the sum of XXXXXX requested by the United Kingdom of Great Britain and Northern Ireland on 27 August 1999 is not justified.

Article 2

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 29.6.2000

For the Commission

Member of the Commission