REM 02/08

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18-1-2010
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COMMISSION DECISION

Of 18-1-2010

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 Spanish text is authentic)

(Request submitted by the Kingdom of Spain)

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(REM 02/08)

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 Code[1], and in particular Articles 220 and 239 thereof,

Whereas:

(1) By letter dated 17 March 2008, received by the Commission on 18 April 2008, Spain asked the Commission to decide whether waiver of the post-clearance entry of import duties in the accounts was justified under Article 220(2)(b) of Regulation (EEC) No 2913/92 or, in the alternative, whether remission of those duties was justified under Article 239 of the same Regulation, in the following circumstances.

(2) Between 4 October 2000 and 8 March 2001 a Spanish company (hereinafter “the interested party”) imported a number of colour television receivers (hereinafter "CTVs") assembled in Turkey. Upon import, the goods were declared under tariff subheading 8528 12 76 00.

(3) The import declarations drawn up by the interested party stated that the goods originated in Turkey. The imports had A.TR. movement certificates issued by the Turkish authorities and stating that the goods were in free circulation in accordance with Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union[2] (hereinafter "Decision No 1/95"). These documents indicated that the goods had been subject to a compensatory levy in Turkey.

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1 OJ L 302, 19.10.1992, p. 1.
2 OJ L 35, 13.02.1996, p. 1.

(4) At that time, goods imported under the tariff subheading declared by the interested party were not subject to the anti-dumping duties provided for in Council Regulation (EC) No 710/95 of 27 March 1995 imposing a definitive anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand and collecting definitively the provisional duty imposed[3].

(5) Following an administrative cooperation mission carried out in Turkey from 29 April to 2 May 2003 by representatives of the European Anti-Fraud Office (OLAF) and of certain Member States, it was established that over the period during which the imports at issue were assembled the interested party's supplier had used cathode ray tubes originating in China or Korea in the CTVs which it produced and sold to the interested party. In accordance with Annex 11 to Regulation (EEC) No 2454/93 laying down provisions for the implementation of the Community Customs Code, which sets value thresholds (added value or, failing that, parts value) for determining the non-preferential origin of CTVs whose production has involved several countries, it was established that the CTVs in question were in fact of non-preferential - either Chinese or Korean - origin.

(6) Following this investigation, the Spanish authorities considered that the goods initially declared under tariff subheading 8528 12 76 00 should actually have been declared under either tariff subheading 8528 12 52 10 or 8528 12 56 00 and that, based on the outcome of the investigation, anti-dumping duties in the amount of €XXXXXX should be paid. Consequently, on 14 June 2004 the authorities demanded payment of this amount, the remission of which the interested party has requested under Article 220(2)(b) in conjunction with Article 236 and under Article 239 of Regulation (EEC) No 2913/98 .

(7) In support of the request submitted by the Spanish authorities, the interested party stated that, in accordance with Article 905(3) of Regulation (EEC) No 2454/93, it had seen the file which the Spanish authorities had sent to the Commission and had made comments, which were annexed to the request sent to the Commission.

(8) By letter of 15 July 2008, the Commission asked the Spanish authorities for additional information. They replied by letter of 4 June 2009, received by the Commission on 15 June 2009. Examination of the request was therefore suspended between 16 July 2008 and 15 June 2009.

(9) By letter dated 20 October 2009, received by the interested party on 21 October 2009, the Commission notified the interested party of its intention to withhold approval and explained the grounds for its decision.

(10) By letter of 20 November 2009, received by the Commission on the same day, the interested party expressed its opinion on the Commission's objections. It also submitted several documents on 30 November 2009, i.e. outside the time limit provided for in Articles 872a and 906a of Regulation (EEC) No 2454/93.

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[3] OJ L 73, 01.04.1995, p. 3.

(11) 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 by one month.

(12) The interested party was given access to the case file and to documents not included in the file, some of which do not necessarily reflect the views of the Commission.

(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 to examine the case on 2 December 2009 within the framework of the Customs Code Committee - Customs Debt and Guarantees Section.

(14) The request (hereinafter "the initial request") sent to the Commission by the Spanish authorities suggests that remission is justified for the following reasons.

(a) the European Community committed an error by failing to inform the interested party that, in accordance with Article 46 of Decision No 1/95, it had notified the Customs Union Joint Committee (hereinafter "CUJC") that it intended to extend the anti-dumping duties imposed on CTVs to goods in free circulation;

(b) the Turkish authorities committed an error by incorrectly stating that the Customs Union Joint Committee had not been informed in accordance with Article 46 of Decision No 1/95;

(c) the customs authorities of the Member States committed an error by failing to further investigate the origin of the CTVs upon import, and in particular, failing to request further proof of their origin, although they should have had serious and well-founded doubts on the matter.

(15) In its letter to the Commission of 20 November 2009 the interested party altered the approach it had taken in the initial request: in that request the interested party had declared that, for the purpose of this procedure, it accepted that the notification provided for in Article 46 of Decision No 1/95 had duly taken place[4]; in its letter of 20 November the interested party claims that the Commission committed an error within the meaning of Article 220(2)(b) of the Code by failing to submit the information required under Article 46 of Decision No 1/95. The interested party's arguments have also been changed on other points since the initial request.

(16) The interested party argues that even if these factors are not found to constitute errors within the meaning of Article 220(2)(b) of the Code, they do in any case constitute a special situation within the meaning of Article 239 of the Code.

(17) It is therefore necessary to analyse the request in the light of Article 220(2)(b) and then Article 239 of the Code.

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

[4] Note 2 of the letter from the interested party dated 30 May 2007 and note 6 of its letter of 8 May 2007.

(18) Under Article 220(2)(b) of Regulation (EEC) No 2913/92, there can be no post-clearance entry in the accounts where the amount of duty 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 having 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

(19) The Commission does not consider that the first condition referred to in Article 220(2)(b) of the Code is fulfilled for the following reasons.

(20) It should be borne in mind that the customs authorities are defined as being any authority responsible *inter alia* for applying customs rules (Article 4(3) of the Code). Any authority which, acting within the scope of its powers, furnishes information relevant to the recovery of customs duties and may thus cause the person liable to entertain legitimate expectations, must be regarded as a "competent authority" within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92[5]. The errors referred to cover all the errors of interpretation or application of the texts relating to import or export duties which could not reasonably have been detected by the person liable for payment.

(21) The interested party's arguments should therefore be analysed to determine whether such an error occurred in this case.

1. Error on the part of the Commission

(22) It is alleged that the European Community committed an error in its application of Article 46 of Decision No 1/95 and by failing to inform the economic operators as appropriate.

a) Alleged error in the European Community's application of Article 46 of Decision No 1/95

(23) As already mentioned, the interested party did not raise this point in its initial request. To support its arguments, the interested party alludes to correspondence between Commission departments, which, it claims, show that the Commission was aware that the Article 46 of Decision No 1/95 had not been applied correctly. However, this correspondence does not reflect the overall opinion of the Commission but rather is the usual exchange of views necessary to determine the Commission's position. The Commission informed Turkey of its opinion on how Article 46 should be interpreted in a letter of 6 February 2004, a copy of which was given to the interested party for information.

(24) With this argument, the interested party, which contends that the CUJC must be informed before any anti-dumping measure is applied, is disputing the actual existence of the customs debt. Disputing 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)

[5] Judgment of 27 June 1991 in case C-348/89, *Mecanarte*, paragraph 22.

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[6] that the purpose of Commission decisions under the procedures for waiving post-clearance entry in the accounts or remission/repayment on grounds of equity is not to determine whether a customs debt has been incurred nor the size of the debt. 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.

(25) It should also be borne in mind that the Court of Justice of the European Union (hereinafter the Court) ruled in its *ASDA Stores* judgment[7] that the provisions of Article 46 of Decision No 1/95 created obligations only for the parties to the EEC-Turkey Association Agreement and that "*that simple formality of inter-institutional information, which does not in any way affect the rights or obligations of individuals and the breach of which would have no effect on the position of the latter, is thus not capable of conferring direct effectiveness on those provisions*". The purpose of Article 46 of Decision No 1/95 is to protect Turkey's rights as a member of the EC-Turkey Customs Union but not those of economic operators. The individual operators cannot therefore reasonably plead infringement of this Article (an infringement which, moreover, did not actually take place) to as grounds for not paying anti-dumping duties normally due. Furthermore, the interested party is mistaken in its view that the anti-dumping duties apply to goods from Turkey only when the information provided for in Article 46 of Decision No 1/95 has been duly notified: the legal basis for collection of these duties is the anti-dumping Regulation and not the provision of information provided for in Article 46. Furthermore it is inappropriate to refer to the extension of anti-dumping duties to television sets manufactured in Turkey: in this particular instance, the applicable measures relate only to television sets of Chinese or Korean non-preferential origin.

(26) Finally, it should also be noted that by letter of 8 October 1996 the Commission did provide the information provided for in Article 46 of Decision No 1/95 concerning the anti-dumping measures applicable to colour television receivers from Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand. Contrary to the claim made by the interested party in its letter of 20 November 2009, the Commission did fulfil all its obligations under Article 46 of Decision No 1/95.

(27) The Commission cannot therefore be found to have committed any error within the meaning of Article 220(2)(b) of the Code as regards the application of Article 46 of Decision No 1/95.

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6 See judgments in cases C-413/96, *Sportgoods* (24 September 1998), T-195/97, *Kia Motors* (16 July 1998) and T-205/99, *Hyper Srl*, (11 July 2002).

7 Judgment of 13 December 2007 in case C-372/06, *Asda Stores Ltd*.

b) **Alleged error of the European Community in failing to inform the interested party that, under Article 46 of Decision No 1/95, it had notified the Customs Union Joint Committee that it intended to extend the anti-dumping duties imposed on CTVs to goods in free circulation and failing to inform operators that the Regulation was applicable to goods in free circulation in the EC-Turkey customs union.**

(28) On this point, the interested party puts forward two arguments: one regards informing operators of the existence of a notification to the CUJC under Article 46 of Decision No 1/95, and the other the inadequacy of the publication of the anti-dumping duties in the Official Journal and the references to those duties in TARIC.

(29) The interested party claims that as the specific intention of one party to the customs union between the Community and Turkey to extend the existing commercial defence mechanisms to imports from the other party can only be demonstrated through the notification of this intention to the CUJC, importers cannot know whether the mechanisms have been thus extended unless they are so informed (point 22 of the letter of 8 May 2007). It argues that importers need to told to which goods the European Community has decided to apply existing anti-dumping duties, as the adoption of anti-dumping duties constitutes an exception to the fundamental principle of the free movement of goods. Such notification, it is suggested, is merely the practical application in this particular case of the fundamental principle of legal certainty laid down in Article X of the GATT.

(30) As Article 46 of Decision No 1/95 does not have direct effect, and as the Court confirmed in paragraph 95 of its judgment in case C-372/06 *ASDA Stores Ltd*, the publication of applicable anti-dumping duties in the Official Journal is sufficient to ensure legal certainty and there is no call for reference to Article X of the GATT; in this instance, the duties were published in Official Journal L 324, 2.12.1998, p. 1[8].

(31) In this context, the indication in TARIC[9] that the anti-dumping measures were also applicable to products imported from Turkey but originating in countries subject to the measures cannot be considered to have led the interested party to doubt the application of anti-dumping duties, but rather to have served to make operators more aware of the need to pay particular attention to the actual origin of the goods (non-preferential origin) which they imported from Turkey.

(32) No error on the Commission's part within the meaning of Article 220(2)(b) of the Code can therefore be found as regards informing economic operators.

(33) The Commission therefore did not commit an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

2. Alleged error on the part of the Turkish authorities in incorrectly stating that the CUJC had not been informed in accordance with Article 46 of Decision

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8 Council Regulation (EC) No 2584/98 of 27 November 1998 amending Regulation (EC) No 710/95 imposing a definitive anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand and collecting definitively the provisional duty imposed *(OJ L 324 of 2.12.1998, p. 1).*

9 This information has been available in TARIC since 1991; the content has remained the same even if the wording has changed as a result of the applicable legal framework.

No 1/95 and that anti-dumping duties were not applicable to goods processed in Turkey.

(34) In the file, the interested party refers to several messages or documents from the Turkish authorities and in particular to a letter dated 11 May 2000 to the interested party's supplier and another letter which bears neither a date nor the address of the intended recipient. Although it is clear that the Turkish authorities consider the collection of anti-dumping duties on goods exported from Turkey illegal, it should be noted that, firstly, nothing in the case file proves that the interested party was aware at the time of the imports concerned of the Turkish authorities' position regarding the application of anti-dumping duties in this specific case[10] and secondly, all the documents mentioned, except the letter of 11 May 2000, bear dates subsequent to the time of the disputed imports.

(35) It is accepted that, in substance, the Turkish authorities were wrong to state that the CUJC did not receive notification under Article 46 of Decision No 1/95. However, in order to constitute an error within the meaning of Article 220(2)(b) of the Code, the error in question would have had to be made by a competent authority, which, as the Court has reiterated in several judgments, is "any authority which, acting within the scope of its powers, provides information relevant to the recovery of customs duties and may thus cause the person liable to entertain legitimate expectations".

(36) However, in this instance, neither the application of Council Regulation (EC) No 710/95 nor the interpretation of the rules of non-preferential origin is within the scope of the Turkish authorities' powers. Only the Community customs authorities may establish the non-preferential origin of goods and apply the relevant legislation, as published in the Official Journal. Consequently, the error committed by the Turkish authorities does not constitute an error within the meaning of Article 220(2)(b) of the Code.

(37) Furthermore, it is irrelevant to compare this case to that of REC 4/95 (Commission Decision C(1995) 2737 of 8 November 1995) and that giving rise to the *Ilumitrónica*[11] judgment.

(38) Case REC 4/95 dealt with an error in a national tariff and the authorities concerned were competent authorities within the meaning of Article 220(2)(b) of the Code (see third last paragraph of the Decision).

(39) The context of the judgment in the Ilumitrónica case was completely different from that of this case. The dispute concerned imports into the European Union of television sets manufactured in Turkey; these television sets included components of third-country origin which had not been released for free circulation in Turkey and on which the countervailing levy had not been charged when the finished products were exported to the European Union, but for which the Turkish authorities had issued A.TR certificates for a long time although they knew or should reasonably have known that they should not issue them. In the Ilumitrónica case, the Turkish

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[10] Even though the interested party states in its letter of 8 May 2007 that its supplier had requested further information from the Turkish authorities on behalf of its customers, no letter from the supplier to the interested party is annexed to the request.

[11] Judgment of 14 November 2002 in case C-251/00, *Ilumitrónica*

authorities actually were the competent authorities within the meaning of Article 220(2)(b) of the Code.

(40) It can be concluded from the above that the Turkish authorities did not commit an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

3. Alleged error of the Member States' customs authorities in failing to further investigate the origin of the CTVs concerned upon import, and, in particular, failing to request further proof of their origin, when they should have had serious and well-founded doubts on the matter.

(41) In this respect, it should suffice to note that, for the imports in question, the interested party declared the goods under code 8528 12 76 00, for which there were no anti-dumping duties.

(42) Furthermore, the customs authorities do not have to carry out systematic checks.

(43) Finally, as regards the argument that no objection was raised by the customs authorities although the origin is clearly indicated on the tubes and a simple inspection would have sufficed, it should be noted that it is quite normal for the customs authorities to conduct mainly document-based checks, and physical checks only occasionally, and in this particular instance the Spanish customs authorities had no reason to doubt the tariff code declared by the interested party. Furthermore, searching a container, checking its content and dismantling a television set do not constitute a "simple" check and there is no proof that the actual origin would have been indicated on the television set.

(44) Consequently, the Spanish authorities did not commit an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

(45) In view of the above, the Commission does not consider that the first condition laid down in Article 220(2)(b) is fulfilled.

B - Conditions regarding the good faith of the interested party and compliance with the rules in force as regards customs declarations

(46) In order to determine whether the interested party acted in good faith and complied with the rules in force as regards the customs declaration, account must be taken of the nature of the error (complexity of the legislation), the interested party's professional experience and the diligence it showed.

(47) As a preliminary remark, it should be noted that the fact that the Spanish authorities consider that the interested party acted in good faith and complied with the rules in force as regards the customs declaration does not mean that the Commission will share that view. Otherwise the Commission could not evaluate the request.

(48) As regards the criterion concerning the complexity of the legislation, the interested party raises several points concerning Article 46 of Decision No 1/95, the rules concerning the origin of the goods and the anti-dumping investigations carried out since 1994.

(49) As regards Article 46, it should again be pointed out that this provision does not have any direct effect for operators. Even if the Turkish and Community interpretations of this provision differed, the Commission does not agree that it can be considered complex.

(50) As regards the rules on determining the non-preferential origin of CTVs, the Court's judgements in joined cases C-447/05 and C-448/05 *Thomson Multimedia Sales Europe* and *Vestel France*[12] stated that the fundamental criterion of added value is a clear and objective criterion, which, in respect of such goods composed of many different parts, makes it possible to explain what is meant by the substantial processing that confers origin. These provisions do not lend themselves to several interpretations but rather, their content is easily understandable and applicable in legal terms, although there may be technical difficulties in applying them in specific cases, due the nature of the product in question (high number of components and of countries of origin).

(51) The interested party's comments as regards the "residual rule" used to determine the non-preferential country of origin of a product do not appear relevant either. The interested party refers here to the "residual rules" defended by the European Union during negotiations on the World Trade Organisation Harmonization Work Programme, which defined the concept of "last substantial transformation"; however, origin is determined on the basis of the criteria set out in Annex 11 to Regulation (EEC) No 2454/93; it is only if the origin cannot be determined on the basis of the criteria in this Annex that the general concept of "last substantial processing" provided for in Article 24 of the Code, should be used. The "residual rules" are used to help customs authorities and operators to apply Article 24 of the Code. However, it does not appear from the file that it was necessary to use these "residual rules" in this instance to determine the origin of the CTVs in question.

(52) Finally, it is of course correct, as indicated in DG TAXUD's letter annexed to the initial request (Annex 12 of the letter dated 8 May 2007), that in the event of a dispute it is the court which has the final say on the interpretation of the texts. In the light of the foregoing, the relevant legislation for determining the non-preferential origin of the CTVs cannot be considered complex.

(53) Furthermore, as regards the declaration of the origin of the goods, which is a legal requirement, the interested party has always declared the goods as originating in Turkey.

(54) As regards the anti-dumping legislation, the interested party seems to refer to a change in the Commission's approach to determining the origin of CTVs (point 46 of the letter of 8 May 2007). In this respect, it should first be noted that recital 26 of Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the people's Republic of China, the Republic of Korea, Singapore and Thailand[13] clearly states that "the question of origin was addressed in the light of the provisions of Commission Regulation (EEC) No 2632/70 of 23 December 1970 on determining the origin of radio and television receivers, replaced on 1 January 1994 by Article 39 of

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[12] Judgment of 8 March 2007 in joined cases C-447/05 and C-448/05 (point 39). See also judgment of 29 September 2009 in joined cases T-225/07 and T-364/07, *Thomson*

[13] OJ L 255, 01.10.1994, p. 50.

and Annex 11 to Regulation (EEC) No 2454/93"; recital 27 stresses that the findings of the investigation "are restricted to the investigation period and may well be different from the origin of the CTVs concerned before or after the investigation period". A review of the file does not show the change of approach alleged by the interested party.

(55) As regards the criterion relating to the interested party's experience, it submitted 95 import declarations in 2000 and 2001, 40 of which for goods from Turkey. It must therefore be regarded as an experienced operator. Furthermore, as shown in the Spanish authorities' letter of 4 June 2009, the interested party is the Spanish subsidiary of a group with broad experience in this particular economic sector.

(56) The interested party states in its letter of 20 November 2009 that neither the economic operators nor the customs authorities knew that anti-dumping duties could be applicable. To support its claim, it points out that the computerised customs clearance systems in several Member States did not allow an origin other than Turkey to be entered on declarations accompanied by an A.TR certificate. However, the correspondence annexed to the this letter shows that in such cases operators must contact the customs authorities to establish what procedure should be followed. The Court of First Instance has ruled in a similar situation that this is a technical problem which does not render determination of the product's origin more complex[14].

(57) Finally, as regards the criterion relating to the diligence shown by the interested party, it should be noted that it wrongly declared the goods it was importing under code 8528 12 76 00, a code for which there were no anti-dumping duties, even though the classification of the goods concerned cannot be considered complex. The Commission does not therefore consider that the interested party acted diligently.

(58) The second condition referred to in Article 220(2)(b) of Regulation (EEC) No 2913/92 is therefore also not fulfilled.

(59) Accordingly, the entry in the accounts of the amount of the duties is justified.

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

(60) 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.

(61) The Court has ruled that this provision represents a general principle of equity designed to cover an exceptional situation in which an operator which would not otherwise have incurred the costs associated with post-clearance entry in the accounts of customs duties would find itself compared to other operators engaged in the same business[15].

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14 See judgment of 29 September 2009 in joined cases T-225/07 and T-364/07, *Thomson*, point 123

15 Judgment of 10 May 2001 in joined 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).

A. The condition concerning the existence of a special situation

(62) It should be verified whether in this case the interested party was in an exceptional situation compared to other operators engaged in the same business. In Annex 3 to its letter of 18 May 2005 sent to the Spanish authorities and in its letters of 8 and 30 May 2007, the interested party does not make any new points regarding the analysis of the file in the light of Article 239 of the Code. To assess the interested party's situation compared to that of other operators, it is appropriate to review the points examined under I.A above.

(63) It is however necessary to first examine the interested party's claim that it found itself in a special situation compared to other operators who imported the same goods into a Member State which did not take action to recover anti-dumping duties. It should noted that the fact that the customs authorities of a Member State misinterpret a provision and therefore fail to launch recovery proceedings although they should does not mean that operators which are required to pay duties normally due can claim to be in a special situation within the meaning of Article 239 of the Code.

(64) It should also be noted that the argument that collection of anti-dumping duties clearly discriminates between manufacturers within the EC-Turkey Customs Union according to whether they are established in the Community or in Turkey (interested party's letter of 30 May 2007, point B), disputes the actual existence of the customs debt and can therefore not be analysed here (see point 24 above).

1. Special situation resulting from actions of the Commission

(65) As already indicated in point I.A.1 above, the Commission did not commit an error within the meaning of Article 220(2)(b) of the Code, fulfilled all its obligations under Article 46 of Decision No 1/95 and provided sufficient information to economic operators on the application of anti-dumping duties to the CTVs in question. In its letter of 8 May 2007, the interested party nevertheless considers that, following Turkey's wrong assertions, the Commission should have stated its position and informed importers. In particular, it refers to the judgment of the Court 10 May 2001 in the *Kaufring* case.

(66) However, such an interpretation would mean giving direct effect to the provisions concerned: Turkey would only need to state that there had been no notification for a special situation to be constituted, giving rise to an obligation to inform. As already mentioned, this interpretation would grant Turkey the power to decide whether Community anti-dumping measures were actually applicable in this case. Finally, the reference to the *Kaufring* case does not seem relevant in this case as the judgment was given against a completely different factual and legal background (issue of A.TR certificates by the Turkish authorities over a long period of time when they knew or should have known that the goods did not meet the requirements).

(67) In this case, the Community fulfilled its obligations, firstly by notifying the CUJC of the measures concerned and then by specifying its point of view in a letter to the Turkish authorities or through the CUJC.

(68) The actions of the Commission did not therefore give rise to a special situation.

2. Special situation resulting from actions of Turkey

(69) The Commission considers that even if Turkey mistakenly claims that there was no notification under Article 46 of Decision No 1/95 and that the anti-dumping measures were not applicable to the goods when in free circulation within the EC-Turkey customs union, this error does not constitute a failure to comply with the country's obligations as the provisions laid down in Decision No 1/95 are intended to ensure the smooth running of the EC-Turkey customs union, which is based on the principle of the free movement of goods in free circulation within the customs union; hence the application of the anti-dumping duties constitutes an exception to the principle of free movement established by the Decision. In this context, the Community autonomously applies the rules of the common commercial policy and the consultation and decision procedures provided for in Articles 54 to 60 of the Decision are not applicable; the Community's only obligation (as a party intending to implement or that has implemented anti-dumping measures) is to notify the CUJC, in accordance with Article 46 of Decision No 1/95, of the anti-dumping measures which it is taking or has taken and which may apply to goods from Turkey. Turkey cannot oppose the application of these measures and, as the Court ruled in its judgment in the ASDA case, the provisions of Article 46 do not have any direct effect for operators.

(70) Conversely, accepting that Turkey's mistaken claims placed the interested party in a special situation would amount to granting Turkey the power to determine the conditions of application of common commercial policy measures, when in fact, of course, it is not competent for this Community policy. As has already been pointed out, this interpretation would also, indirectly, give direct effect to Article 46 of Decision No 1/96. The same logic must be applied as regards Turkey's claim that the anti-dumping measures were not applicable to goods in free circulation within the EC-Turkey customs union.

(71) The Commission therefore does not consider that any special situation resulted from Turkey's actions.

3. Special situation resulting from the actions of Member States' customs authorities

(72) In the Commission's opinion, the actions of the Member States customs authorities did not put the interested party in a special situation as compared to other operators; it should again be noted that the request relates to only two declarations for release for free circulation and in those two declarations the interested party erroneously declared the goods under a tariff code which does not carry anti-dumping duties. In taking action subsequently to recover duties in respect of these two declarations, the Spanish authorities were therefore simply applying Articles 78 and 220(1) of the Code.

(73) Furthermore, the Commission has not identified any other factors likely to constitute a special situation.

(74) No special situation resulting from the customs authorities' actions can therefore be established.

(75) In view of the foregoing, no special situation within the meaning of Article 239 of the Code can be established.

B. The condition concerning the absence of deception or obvious negligence

(76) The Court has consistently ruled[16] that when examining whether there has been deception or obvious negligence account must be taken, in particular, of the complexity of the legislation and the operator's experience and diligence.

(77) Given the conclusions of point I.B above, the Commission does not consider that the interested party acted diligently as regards the imports in question.

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

HAS ADOPTED THIS DECISION:

Article 1

1. The import duties amounting to €XXXXXX which were the subject of the request from Spain on 17 March 2008 shall be entered in the accounts.

2. The remission of the import duties amounting to €XXXXXX requested by Spain on 17 March 2008 is not justified.

Article 2

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 18-1-2010

For the Commission
Laszlo KOVÁCS
Member of the Commission

[16] Judgment of 11 November 1999 in case C-48/98, *Firma Söhl & Sölhke*.