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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 16-12-2009
C(2009)10005

COMMISSION DECISION

of 16-12-2009

**finding that repayment of import duties is not justified in a particular case
(Request submitted by France)
(REM 07/08)**

(Only the French 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 16 October 2008, received by the Commission on 20 October 2008, France 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 2 July 2007 a French firm (hereinafter "the firm") submitted several customs declarations to the Saint-Nazaire-Montoir customs office for the release for free circulation of 838 876 tonnes of canned tuna of CN heading 1604, originating in Thailand. At the same time, the firm requested that that quantity be drawn on tariff quota 09.2005, opened under Council Regulation (EC) No 975/2003 of 5 June 2003 opening and providing for the administration of a tariff quota for imports of canned tuna covered by CN codes 1604 14 11, 16 04 14 18 and 1604 20 70². This Regulation provided for a quota with a 12% rate of duty for a quantity of 25 750 tonnes of canned tuna of CN codes 1604 14 11, 1604 14 18 and 1604 20 70 for the period 1 July 2007 to 30 June 2008. The quota was divided into four parts, one of which was a 52% share of the annual volume, with the order number 09.2005, reserved for imports originating in Thailand.
- (3) The firm's requests to draw on quota share 09.2005 were sent to the Commission, which processed them on 4 July 2007 at the same time as the requests relating to the declarations of 1 July 2007. As the quota share was exhausted by the drawing requests relating to declarations of 1 July 2007, the firm's requests were rejected.
- (4) The French authorities therefore initiated the post-clearance recovery procedure for duties of XXXXXX, which is the amount for which the firm is requesting repayment on

¹ OJ L 302, 19.10.1992, p. 1.

² OJ L 141, 7.6.2003, p. 1.

the grounds of a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

- (5) In support of the request submitted by the French authorities the firm indicated that, in accordance with Article 905(3) of Regulation (EEC) No 2454/93, it had seen the dossier which the French authorities had sent to the Commission and had nothing to add.
- (6) In a letter of 18 December 2008, the Commission asked the French authorities for additional information. They replied by letter of 24 April 2009, received by the Commission on 27 April 2009. Examination of the request was therefore suspended between 19 December 2008 and 27 April 2009.
- (7) By letter dated 5 October 2009, received by the firm on 6 October 2009, the Commission notified the firm of its intention to withhold approval and explained the reasons for this.
- (8) By letter dated 27 October 2009, received at the Commission on 29 October 2009, the firm stated its position on the Commission's objections.
- (9) 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 therefore extended by one month.
- (10) 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 2 December 2009 within the framework of the Customs Code Committee - Customs Debt and Guarantees Section.
- (11) In the request sent to the Commission by the French authorities and the letter of 27 October 2009 from the firm, it was argued that repayment was justified for the following reasons:
 - (a) the Commission had failed in its obligations by opening a critical tariff quota on a Sunday, a day on which not all the Member States open their customs offices, thus creating a situation of inequality among Community operators;
 - (b) the Commission had infringed Articles 308a and 308b of Regulation (EEC) No 2454/93;
 - (c) erroneous information about the processing of applications sent by the Italian customs authorities to the firm's parent company, which is established in Italy, may have contributed to the existence of a special situation;
 - (d) the quota had been exhausted exceptionally fast;
 - (e) paying the customs duties in question represented a considerable challenge for the firm;
 - (f) the firm had acted in good faith throughout and no obvious negligence or deception could be attributed to it.

- (12) Under Article 239 of Regulation (EEC) No 2913/92 import duties may be repaid in situations other than those referred to in Articles 236, 237 and 238 resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.
- (13) The Court of Justice of the European Union 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, might find itself compared with other operators carrying out the same activity³.
- (14) The firm blames the Commission for having opened a tariff quota on a Sunday, a day on which not all Member States open their customs offices. The firm thereby contests the very provisions of Regulation (EC) No 975/2003. Article 239 of Regulation (EEC) No 2913/92 does not allow the legality of an EU regulation to be challenged. Consequently, the fact that an EU regulation may be invalid does not constitute a special situation within the meaning of that Article. It is up to traders who consider themselves to have suffered harm as a result of mistakes in EU regulations to use the legal means available to them to challenge these regulations (see Articles 263 and 267 of the Treaty on the Functioning of the European Union).
- (15) It should also be noted that opening tariff quotas on a Sunday is not exceptional. For instance, the following quotas were opened on Sunday 1 April 2007: Nos 09.1118 (Regulation (EC) No 503/2005⁴), 09.1650 (Regulation (EC) No 196/97⁵), 09.1327 (Regulation (EC) No 54/2004⁶) and the following quotas were opened on Sunday 1 February 2009: Nos 091104 (Regulation (EC) No 503/2005), 09.1712 (Regulation (EC) No 53/2004⁷), 09.1385 (Regulation (EC) No 2279/2004⁸), 09.0025 and 09.0027 (Regulation (EC) No 1831/96⁹).
- (16) The argument that the Commission erroneously interpreted Articles 308a and 308b of Regulation (EEC) No 2454/93 by not giving equal treatment to the declarations accepted on Saturday, Sunday and Monday disputes the very existence of the customs debt. However, such disputes do not fall within the scope of the procedure for 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](#)¹⁰ 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 or the size of the debt. To dispute the existence of a customs debt, an operator must challenge the decision

³ *Kaufring* judgment of 10 May 2001 (Joined cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99), ECR 2001 p. II-1337).

⁴ OJ L 83, 1.4.2005, p. 13.

⁵ OJ L 31, 1.2.1997, p. 53.

⁶ OJ L 7, 13.1.2004, p. 30.

⁷ OJ L 7, 13.1.2004, p. 24.

⁸ OJ L 396, 31.12.2004, p. 38.

⁹ OJ L 243, 24.9.1996, p. 5.

¹⁰ *Sportsgoods* judgment of 24 September 1998, (Case C 413/96), ECR 1998 p. I 5285, *Kia Motors and Broekman Motorships* judgment of 16 July 1998, (Case T-195/97) ECR 1998 p. II 2907 and *Hyper* judgment of 11 July 2002 (Case T-205/99), ECR 2002 p. II 3141.

establishing that debt before the national courts in accordance with Article 243 of Regulation (EEC) No 2913/92.

- (17) The Commission does not therefore consider that it can be accused of any failing constituting a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (18) When a Member State sends a request for reimbursement or remission to the Commission for examination of whether the Commission has been guilty of a failing that may have placed a firm in a special situation within the meaning of Article 239 of Regulation (EEC) 2913/92, and where the amount concerned is less than EUR 500 000 and a failing on the Commission's part cannot be established, the Commission is not required to examine whether other facts may have constituted a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92. It is therefore up to the French authorities to decide whether the other arguments put forward by the firm give grounds for considering that the firm was placed in a special situation within the meaning of Article 239 of the Customs Code, or whether other factors may have placed it in such a situation.
- (19) There being no special situation, there is no need to examine whether the second condition laid down in Article 239 of Regulation (EEC) No 2913/92 is met.
- (20) The repayment of import duties requested is therefore not justified,

HAS ADOPTED THIS DECISION:

Article 1

The repayment of import duties in the sum of XXXXX requested by France on 16 October 2008 is not justified.

Article 2

This decision is addressed to the French Republic.

Done at Brussels, 16-12-2009

For the Commission
László KOVÁCS
Member of the Commission