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COMMISSION DECISION

of 6.1.2016

**finding that repayment of import duties is not justified in a particular case
(REM 02/14).**

(only the English 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 Articles 220(2)(b) and 236 thereof,

Having regard to Regulation (EEC) No 2454/93 of 2 July 1993² laying down provisions for the implementation of Council Regulation (EEC) No 2913/92,

Whereas:

- (1) On April, 10th 2014, the Commission has received from the UK Customs an application for repayment of customs duties concerning imports of steel fasteners from the Philippines, on the basis of Article 220(2)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992, in connection with Article 871 of Commission Regulation (EEC) No 2454/93.
- (2) According to Article 871(5) of the implementing provisions of the Community Customs Code (Regulation (EEC) No 2454/93), the Commission has requested further additional information to be supplied on July 2nd, 2014 and on April 30th, 2015. The Commission has received from the UK Customs the requested additional information on January 20th, 2015 and on September 7th, 2015, respectively. According to Article 873 of the implementing provisions of the Community Customs Code, the nine-month period granted to the Commission to adopt its decision was extended by a period equivalent to that between the date the Commission sent the request for additional information and the date it received the requested information.
- (3) Under Article 873 of Regulation (EEC) No 2454/93, the Commission has notified the applicant of its reasons for intending to refuse the applicant's request, the period within which the Commission must take a decision being extended by one month.
- (4) The applicant is an importer of stainless steel fasteners based in the UK. In 2010 it imported steel fasteners from a company based in the Philippines and declared these goods as originating in the Philippines.
- (5) The exporting company was set up in 2010 by two Taiwan companies. Both of these companies have a long standing business relationship with the UK importer dating back to 1988 and 1995 respectively.

¹ OJ L 302 19.10.1992, p. 1

² OJ L 253, 11.10.1993, p. 1.

- (6) These imports were supported by General Preference (GSP) Form A certificates issued by the Philippine authorities to confirm that the goods originated in the Philippines.
- (7) In 2011, OLAF opened an investigation concerning suspected fraudulent imports of stainless steel fasteners from the Philippines supposedly originating from China and/or Taiwan and therefore liable to antidumping duty. This case concerned the imports supplied by six Philippine companies including exporting company in the present case. The investigative actions – in particular the data on Philippine imports and exports by these companies obtained in the course of and following a preliminary OLAF mission conducted to the Philippines in September 2012 – showed that the exporting company had simply transhipped Taiwanese stainless steel fasteners via the Subic Bay Freeport by declaring them for import and export to the Subic Bay Metropolitan Authority. OLAF established the relevant audit trails per import into the EU which were the subject of the investigation and provided the relevant evidence to the importing Member States for duty recovery purposes (conventional customs and antidumping duty). The evidential link between the imported and re-exported fasteners could be made via the purchase order numbers, the quantity and/or the technical specifications of the fasteners as shown in the invoices. Thus, OLAF found the goods to have originated in Taiwan.
- (8) In addition, OLAF asked the Philippine Customs authorities to confirm that the GSP certificates issued for the relevant shipments by the exporting company to the EU were invalid. In the response dated 19 July 2013, the Philippine Bureau of Customs advised OLAF that "they wanted to withdraw all the certificates of origin Form A issued due to false and misleading information".
- (9) The reason given for the closure of the exporter/manufacturing company in May 2012 was that the facility became uneconomic, because of the downturn in business, following the speculation in the Philippines surrounding circumvention of anti-dumping duties (ADD).
- (10) As a result of the OLAF findings, the importer became liable to import duty at the full rate on these imports. They also incurred liability for anti-dumping duties which were payable on steel fasteners of Taiwan origin under Council Regulation 1890/2005.
- (11) A post clearance demand note was issued by HMRC (UK Customs) to the importer in the sum of £XXXX on 11/04/2013 for the additional duties and import VAT (the amount consists of £XXXX import duty, £XXXX ADD and £XXXX import VAT). This was paid by the applicant on 24/05/2013.
- (12) A claim for remission was received from the importer under Article 220(2)(b) of the Customs Code. This stated that the importer had acted in good faith when claiming a preferential rate of duty and it was the Philippine issuing authorities, who had made an error in issuing the GSP certificates without undertaking the necessary checks.
- (13) UK Customs deemed that the importer has fulfilled the conditions for remission to be granted for the amount of £XXXX (£XXXX import duty and £XXXX ADD) under Article 220(2)(b) of the Customs Code and has consequently submitted the claim under the 2nd indent of Article 871 of Commission Regulation 2454/93 for consideration.

Examination of the request under Article 236 in connection with Article 220(2)(b) of Regulation (EEC) No 2913/92

- (14) The applicant argued that there has been an error on the part of the Philippine customs authorities who have issued the relevant GSP Form A certificates. The applicant also

considered that the errors could not reasonably have been detected by him. Moreover, the applicant explained the measures he took to satisfy himself on the validity of the information given to him by the exporter and claimed that he was given written assurance that the goods were 100% manufactured in the Philippines and not transshipped.

- (15) In reality, the above mentioned assurances consisted only of e-mail messages exchanged with the exporter.
- (16) Although a visit by the applicant (in the person of the purchasing manager) to the production facilities in July 2010 is mentioned, the applicant claimed that there was no formal written report of this visit. No proof was provided to the Commission that the exporting company possessed the capacity to manufacture the products. The only evidence provided by the applicant to the Commission consisted of a few photographs of the early factory set-up, which could not support in any way the conclusion that the exporting company had the manufacturing capacity to fulfil the purchase orders and subsequent shipments. In addition, the photographs gave no indication as actually being the exporting and manufacturing company's premises.
- (17) The applicant claims that, if the issuing authorities carried out even basic checks, they should have been aware that the goods did not satisfy the conditions for entitlement to preferential treatment. The applicant further considers that the authorities should have been fully aware of the sensitive nature of these stainless steel fastener products bearing in mind the anti-dumping duty investigations involving several countries in South East Asia, including Taiwan and the Philippines, in 2004/2005 and Taiwan and China in 2009/2010.
- (18) Firstly, the Commission would like to point out that there was no legal obligation to carry out checks incumbent to the Philippine issuing authorities, as the applicant is claiming. The verification of the real origin of the goods or of the conditions for issuing of the certificates falls outside the scope of the GSP regime.
- (19) As a principle, the declarant is responsible for the content of the documents presented to the customs authorities³. This also includes the possibility of the applicant supporting the negative consequences of the exporter's incorrect behaviour, when it exists, which cannot be borne by the EU⁴.
- (20) Moreover, stating another principle for interpreting the Code, the EU Court of Justice (EUCJ) has ruled that allowing imports without the respect of the legislation in force, only because the authorities have accepted them even in such conditions, would mean allowing a negligence which would encourage operators to benefit from errors from their customs authorities⁵.
- (21) The applicant declared that he was unable to obtain a copy of the application form for the relevant GSP Form A certificates.
- (22) While the applicant claims that the Philippine issuing authorities, basing their analysis on import and export statistics for fasteners, should have known that the goods covered may not have met the origin rules, the Commission considers that this reasoning is even more so applicable to the applicant, who was in direct relation with

³ Case T-42/96, *Eyckeler & Malt*, paragraph 162.

⁴ Case C-97/95, *Pascoal e Filhos*, paragraph 55.

⁵ See Case C-38/07 *Heuschen & Schrouff*, para. 64

the exporter, had a long standing trading relation with him and visited the alleged manufacturing facilities.

- (23) Even if the Philippine authorities issued for a long period of time certificates subsequently declared invalid, this alone cannot be evidence enough, according to the case-law of the EUCJ, for releasing the applicant from its obligation to respect the legislation in force.
- (24) It is also worth mentioning the specific status of Subic Bay Freeport Zone (SBFZ) - military base converted into a tax- and duty-free zone similar to Hong Kong and Singapore, operated and managed by the Subic Bay Metropolitan Authority (SBMA) - and the inherent difficulties for the Philippine customs authorities to verify the transfer of goods through this area.
- (25) The Commission considers that the Philippine authorities did not commit an error under Article 236 analysed in connection with Article 220(2)(b) of Regulation (EEC) No 2913/92 when issuing the Form A certificates.
- (26) No claim of error from the part of the UK Customs or the Commission was retained from the application.
- (27) In what regards the anti-dumping duties (ADD), the third country authorities are not competent to take a decision about the fulfilment of the conditions of the non-preferential origin which is binding on the customs authorities responsible for the recovery. Therefore, the condition concerning an error on the part of the customs authorities cannot be fulfilled in the case of ADD, as we are under an objective assumption (resulting from the regulation) that there was no error on the part of the customs authorities, as third country authorities are not to be considered as customs authorities within the meaning of article 220(2)(b) of the Code with regard to ADD.
- (28) In order to determine whether the debtor could not reasonably have detected the error committed by the Philippine authorities, the Commission has to take into account all the circumstances of the case⁶, the nature of the error, the operator's experience and its diligence.
- (29) The EUCJ has ruled that the nature of the error should be assessed in terms of the complexity of the legislation concerned⁷.
- (30) Regarding the complexity of the legislation, the Commission considers that the rules concerned cannot be judged as complex, fact which was not challenged by the operator in its application. Moreover, once a regulation is published in the Official Journal of the EC/EU, it constitutes the sole relevant positive law and everyone is deemed to be aware of that law⁸.
- (31) The applicant has been involved in the importation of fasteners for many years and, as such, is considered to be an experienced trader. It is aware of ADD provisions and the impact this has on the business and its sector.

⁶ Paragraph 19 in Case C-64/89, Deutsche Fernsprecher GmbH.

⁷ Case C-250/91 Hewlett-Packard, paragraph 23; Case C-153/94 and C-204/94 Faroe Seafood, paragraph 100; Case C-251/00 Ilumitronica, paragraph 56; Case C-64/89 Deutsche Fernsprecher GmbH, paragraph 20

⁸ See, for example, Case C-161/88 Binder, para. 59

- (32) The EUCJ has stated several times in judgments on repayment/remission cases⁹, that the EU should not bear the adverse consequences of the wrongful acts of suppliers. The EUCJ confirmed that the term “obvious negligence” should be interpreted in such a way that limits the repayment cases¹⁰ and underlined that in case of doubts the onus is on the trader to make inquiries and seek all possible clarification how provisions should be correctly applied¹¹.
- (33) In the 2005 Commission Communication on rules of origin¹² it has been established that the importer bears the responsibility with regard to the particulars of his customs declaration and the possible customs debt incurred. The Communication underlines that the wrong statement on the originating status of products for which preferences are claimed would be part of the commercial risk borne by the importer.
- (34) Taking into account the normal routines for imports of a sensitive nature such as the stainless steel fasteners, which include actions such as the visit the applicant has paid to the alleged manufacturing facilities, the applicant could have detected that the exporter was not capable of delivering the said products. As indicated above, there is no evidence to show, even after the visit the applicant has paid to the manufacturing facilities in the Philippines, that the exporter had the capacity to produce the contracted steel fasteners.
- (35) Even if the applicant made inquiries and organized a visit, the conclusion of these efforts should have been that exporter was not able to produce in the Philippines the contracted goods.
- (36) In view of the above, the Commission considers that the repayment of duties corresponding to consignments of stainless steel fasteners imported by the applicant in the amount of £XXXX (£XXXX import duty and £XXXX ADD), is not justified on the basis of Article 236 in connection with Article 220(2)(b) of Council Regulation (EEC) No 2913/92.

HAS ADOPTED THIS DECISION:

Article 1

Repayment of duties in the sum of £XXXX, requested by the United Kingdom of Great Britain and Northern Ireland on 27 March 2014, is not justified.

Article 2

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

⁹ See in this regard Case C 438/11 Lagura, paragraph. 33

¹⁰ Case C-48/98 Söhl & Söhlke, paragraph. 52

¹¹ Case C-48/98 Söhl & Söhlke, paragraph 58

¹² Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on rules of origin in preferential trade arrangements of 16.03.2005, Commission (2005) 100 final.

Done at Brussels, 6.1.2016

For the Commission
Pierre MOSCOVICI
Member of the Commission

