



EUROPEAN
COMMISSION

Brussels, 17.6.2014
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COMMISSION DECISION

of 17.6.2014

**finding that it is justified to waive post-clearance entry in the accounts of import duties
in a particular case (REC 02/2013)**

(only the German 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 1992¹ establishing the Community Customs Code, and in particular Article 220(2) (b) and Article 236 thereof,

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

Whereas:

- (1) On 30 July 2013, the competent authorities of the Federal Republic of Germany have asked the European Commission to decide if non-recovery of customs duties concerning "sweet cherries, preserved in alcohol, stoned" was possible under Article 236 of Council Regulation (EEC) No 2913/92, in connection with Articles 220(2) (b) of the same Regulation in the following circumstances:
- (2) Between 19 July 2004 and 4 January 2007, the applicant, a firm established in the EU, imported 134 consignments of "sweet cherries, preserved in alcohol, stoned" with a total weight of 2,026,130 kg under chapter 2008 6019 100 of the Combined Nomenclature into the EU and declared them for free circulation with end use (manufacture of chocolate products).
- (3) The sweet cherries in alcohol, sorted by size and stalked, were of Turkish origin and were exported to Bulgaria for outward processing (stoning). To this end, a company based in Turkey was granted an authorisation by the competent Turkish authorities for outward processing. As the cherries were intended for re-consignment to Germany, the company based in Turkey, which had previously been granted authorisation for outward processing, submitted an application for INF 2 information sheets to be issued in each case.
- (4) By presenting the INF 2 information sheets at a German customs office, the operator cleared the stoned cherries for free circulation with a reduction in customs duties following outward processing.
- (5) It was discovered during an audit in 2007 that the competent Turkish authorities should not have authorised the outward processing in Bulgaria on the basis of

¹ OJ L 302, 19.10.1992, p. 1.

² OJ L 253, 11.10.1993, p. 1.

Decision No 1/2001³ and of Decision No 1/2006⁴ laying down the detailed rules for the application of Decision No 1/95 of the EC-Turkey Association Council⁵, and that no INF 2 documents should have been issued, as agricultural products are not covered by the customs union between the EU and Turkey, and the provisions on triangular traffic in the context of outward processing do not apply.

- (6) Under Article 2 of Decision No 1/95, in conjunction with Article 11 of the Agreement establishing an association between the EEC and Turkey⁶, agricultural products are the products listed in Annex II to Article 38 of the Treaty Establishing the European Economic Community. This Annex lists all the preparations under Chapter 20 of the Combined Nomenclature, and includes therefore "sweet cherries preserved in alcohol" belonging to heading 20 08.
- (7) The German Customs authority levied post-clearance customs duties amounting to EUR XXXXX by notices of 11 July 2007 (EUR XXXXX for 48 import transactions), 3 December 2007 (EUR XXXXX for 7 import transactions) and 12 June 2008 (EUR XXXXX for 83 import transactions).
- (8) The applicant contested each of these three notices because the INF 2 information sheets constituted incorrect certificates within the meaning of the second subparagraph of Article 220(2) (b) of Council Regulation (EEC) No 2913/92 of 12 October 1992, and it could not have reasonably detected that the customs authorities had issued them by mistake.
- (9) The German customs authority rejected the applicant's objections, arguing that the error on the part of the customs authorities should have been detected by the operator. However, the German customs authority decreased the amount of customs duties to be paid to EUR XXXXX because the customs value had not been previously determined correctly.
- (10) On 9 April 2009 the applicant appealed against the customs decision in front of a national Tax Court.
- (11) The German authorities re-examined the facts in the context of the appeal proceedings. Subsequently, they arrived at the conclusion that the recovery of import duties of EUR XXXXX could be waived pursuant to Article 236 of Council Regulation (EEC) No 2913/92 of 12 October 1992 in connection with Article 220 (2) (b) of the same Regulation and transmitted the case to the European Commission for decision in accordance with Article 871(1), third indent of Regulation (EEC) No 2454/93.
- (12) The case is currently pending before a German Court of First Instance. The German Court is staying proceedings until the European Commission takes a final decision.
- (13) Under Article 871 of Regulation (EEC) No 2454/93, the applicant took note of the application that the German customs administration submitted to the Commission, which was registered under the reference number REC 02/2013.

³ Decision No 1/2001 of the EC-Turkey Customs Cooperation Committee of 28 March 2001 amending Decision No 1/96 laying down detailed rules for the application of Decision No 1/95 of the EC-Turkey Association Council, OJ L 098, 07.04.2001, p. 31.

⁴ Decision No 1/2006 of the EC-Turkey Customs Cooperation Committee of 26 September 2006 laying down detailed rules for the application of Decision No 1/95 of the EC-Turkey Association Council, OJ L 265, 26.09.2006, p. 18.

⁵ Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, OJ L 035, 13.02.1996, p. 1.

⁶ Official Journal of the European Communities (OJEC). 24.12.1973, "Agreement establishing an Association between the EEC and Turkey", p. 2-8.

- (14) By letter dated 8 October 2013, the Commission requested further information from the German authorities. This information was provided by letter dated 10 January 2014 received by the Commission on 13 January 2014. The applicant took note of this letter.
- (15) Therefore, the nine-month period allowed for the Commission to adopt its decision was suspended between 9 October 2013 and 13 January 2014.
- (16) In accordance with Article 873 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 08/05/2014 within the framework of the Customs Code Committee (Customs Debt and Guarantees Section) to consider the case.
- (17) According to the request sent by the German authorities to the Commission, the non-recovery of the import duties concerned would be justified taking into account the operator's good faith and the error made by the competent authorities, which the applicant could not have detected.
- (18) Under Article 220(2)(b) of Council Regulation (EEC) 2913/92, there can be no post-clearance entry in the accounts of import duties where the amount of duties legally owed was not entered in the accounts as a result of an error of the customs authorities themselves which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (19) The Court of Justice of the European Union has consistently ruled that the legitimate expectations of a trader are protected only if the competent authorities themselves gave rise to the expectations. Therefore, only errors attributable to acts of those authorities confer entitlement to the waiver of post-clearance recovery of customs duties⁷. It is therefore a matter of determining whether, in this particular case, the competent authorities committed an error.
- (20) The sweet cherries in question were of Turkish origin, were in free circulation in Turkey and were exported to Bulgaria for minimal processing in the form of having their stones removed. However, the reduction in customs duties following outward triangular processing is permitted only for customs union goods and not for goods covered by agricultural legislation, for which there is no legal basis for issuing INF 2 information sheets.
- (21) Therefore, in issuing the INF 2 information sheets, the Turkish customs authorities committed an error under Article 220 (2) (b) of Council Regulation (EEC) No 2913/92. A further error was made by the German authorities who wrongly accepted the INF 2 information sheets and did not levy the full import duties. The failure to levy the legally owed amount of duties was therefore the result of an error committed by the responsible customs authorities.
- (22) According to established case-law, in determining whether the customs authorities' error might reasonably have been detected by the operator, account must be taken, in particular, of the nature of the error and of the operator's professional experience and diligence.

⁷ Case C-348/89 Mecanarte, paragraphs 22- 23; Case C-173/06 Agrover paragraph 31, and Joined Cases C-153/94 and C-204/94 Faroe Seafood and Others, paragraph 91

- (23) With regard to the nature of the error, it has to be asked whether the provisions concerned were complex in nature, preventing the error to be easily detected upon customary examination of the facts.
- (24) Customs audits in accordance with Article 78 of Council Regulation (EEC) No 2913/92 were carried out by the German customs authorities both in 2006 and in 2007.
- (25) The German customs authorities failed to detect the error in the course of the customs audit conducted in 2006. Furthermore, the provisions on customs cooperation between the European Union and Turkey are dispersed in different and complex agreements and decisions and, as a result, the legal procedure governing the imports concerned could not have been determined through a simple reference to the Official Journal.
- (26) The complexity of the provisions is also evident from the fact that the responsible Turkish and German customs authorities persistently applied the law in the wrong way.
- (27) The trader's relevant experience and due care are criteria on the basis of which the Commission must ascertain if, in a specific case, there was good faith on the part of the trader.
- (28) The applicant concerned is a subsidiary of an international group which had in 2007 approximately forty mutually independent companies across the globe. Although the operator is a subsidiary in a group involved in international trade which has its own customs department, it had no experience with import operations of such a kind. None of the group's subsidiaries had done any outward processing trade under a customs union between the EC and a country not belonging to the customs territory of the Community (triangular trade). Hence, although the firm is a professional trader, it had no experience with similar operations.
- (29) As regards the diligence shown by the applicant, it acted with care, as it consulted and checked the provisions relevant to the business concerned beforehand. Because it had doubts about the information and entries required for preparing the declaration concerned and about the documents to be enclosed with the declaration, it wrote to the responsible German customs authority to ask whether the outward processing rules applied to the goods concerned. In its response dated 14 February 2003, the German customs authority provided erroneous information stating that when goods were re-imported into the Community, the outward processing procedure could be applied.
- (30) In their letter to the Commission dated 10 January 2014, the German authorities pointed out that they believe that the applicant acted in good faith, particularly since the three-way trade in question was based on confidence in incorrect and non-binding information provided by the German authorities on 14 February 2003.
- (31) There is nothing in the file to indicate that the way in which it carried out the imports in question departed from normal commercial practice. It has therefore to be concluded that the applicant acted in good faith.
- (32) It is also clear from the application that the applicant complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (33) Post-clearance entry in the accounts is therefore not justified,

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of EUR XXXXX which are the subject of the request by the Federal Republic of Germany on 30 July 2013 shall not be entered in the accounts.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 17.6.2014

*For the Commission
Algirdas ŠEMETA
Member of the Commission*