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**REM 04/2004**

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19-5-2006  
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NOT TO BE PUBLISHED

**COMMISSION DECISION**

**Of 19-5-2006**

**finding that the remission of import duties is justified in a particular case  
(Only the Dutch text is authentic)**

**(request submitted by the Netherlands)  
(REM 04/2004)**

FR

**COMMISSION DECISION**

**Of 19-5-2006**

**finding that the remission of import duties is justified in a particular case  
(Only the Dutch text is authentic)**

**(request submitted by the Netherlands)  
(REM 04/2004)**

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,<sup>1</sup> as last amended by Regulation (EC) No 648/2005,<sup>2</sup>

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92,<sup>3</sup> as last amended by Regulation (EC) No 402/2006,<sup>4</sup>

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<sup>1</sup> OJ L 302, 19.10.1992, p. 1.

<sup>2</sup> OJ L 117, 04.05.2005, p. 1.

<sup>3</sup> OJ L 253, 11.10.1993, p. 1.

<sup>4</sup> OJ L 70, 09.03.2006, p. 35.

Whereas:

- (1) By letter dated 31 March 2004, received by the Commission on 2 April 2004, the Netherlands asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether the remission of import duties was justified in the following circumstances.
- (2) In 1998 a customs agency established in the Netherlands (hereinafter “the firm”) carried out formalities for the release for free circulation of aluminium imported into the Community. The goods in question, which were exported from Canada, were first shipped to Saint Pierre and Miquelon, where they were released for free circulation. The local authorities then issued an “EXP” certificate attesting that the goods had been released for free circulation. The goods were then re-exported to the Community.
- (3) Under Article 101(2) of Council Decision No 91/482/EEC on the association of the overseas countries and territories with the European Economic Community (hereinafter the “OCT Decision”),<sup>5</sup> products not originating in the overseas countries and territories (OCT) which were in free circulation in an OCT and were re-exported to the Community were, at the time of the facts, accepted for import into the Community free of customs duties and taxes having equivalent effect provided that: customs duties or taxes having equivalent effect of a level equal to, or higher than, the customs duties applicable in the Community on import of these same products originating in third countries eligible for the most-favoured-nation clause had been paid in the OCT concerned; they had not been the subject, in whole or in part, of an exemption from, or a refund of customs duties or taxes having equivalent effect; they were accompanied by an export certificate.
- (4) The firm presented EXP certificates issued by Saint Pierre and Miquelon's authorities in support of its customs declarations. The Dutch customs authorities accepted the declarations and granted exemption from customs duties.
- (5) In July 1998 the Commission learned that aluminium from Canada and Brazil was being imported into the Community at a price lower than the international market rate with duties paid; it thereupon conducted an investigation, which showed the

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<sup>5</sup> OJ L 263, 19.09.1991, p. 1.

aluminium to have been imported into the Community after release for free circulation in Saint Pierre and Miquelon.

- (6) In February 1999 a number of Member States were asked to conduct further investigations.
- (7) It was found that traders releasing goods for free circulation in Saint Pierre and Miquelon were eligible for “transport aid”. This aid was paid at a rate of USD 25 a tonne on the basis of ad hoc decisions by Saint Pierre and Miquelon's local authorities (*Conseil général*).
- (8) After examining Saint Pierre and Miquelon's application of Article 101(2) of the OCT Decision, the Commission concluded that there was a link between the payment of the customs duties and the subsequent transport aid, that the system established in the OCT (collection of customs duties followed by payment of transport aid) did not comply with Article 101(2) and that the transport aid should therefore be considered a partial refund of customs duties. The goods were not therefore eligible for duty-free import into the Community.
- (9) Accordingly, on 20 December 2000 the competent Netherlands authorities claimed duties in the sum of EUR 1 808 053.74 from the firm, a sum for which the firm is seeking remission under Article 239 of Regulation (EEC) No 2913/92.
- (10) The firm believes that the behaviour of the authorities of Saint Pierre and Miquelon, the Commission and the authorities of certain Member States (France and the Netherlands) placed it in a special situation. It argued that there had been no deception or obvious negligence on its part.
- (11) In support of the application submitted by the Dutch authorities the firm stated that, in accordance with Article 905(3) of Regulation (EEC) No 2454/93, it had seen the file the authorities had sent to the Commission and had nothing to add.
- (12) By letter of 29 October 2004, the Commission asked the Dutch authorities to provide additional information. The Commission again asked for additional information by letter dated 7 July 2005. This information was sent to the Commission by letter of 7 October 2005, received by the Commission on 10 October 2005 and by letter of 13 February 2006, received by the Commission on 21 February.

- (13) The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93, between 30 October 2004 and 21 February 2006.
- (14) By letter dated 1 March 2006, received by the firm on 2 March 2006, the Commission notified its intention to withhold approval and explained the reasons for this. The firm's lawyer consulted the file on the Commission's premises on 9 March 2006.
- (15) By letter dated 31 March 2006, received by the Commission on the same date, the firm expressed its opinion on the Commission's objections.
- (16) In accordance with Article 907 of Regulation (EEC) No 2454/93, the time limit of nine months for the Commission to take a decision was therefore extended for one month.
- (17) 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 24 April 2006 within the framework of the Customs Code Committee - Repayment Section.
- (18) Under Article 239 of Regulation (EEC) No 2913/92 import duties may be repaid or remitted in situations other than those referred to in Articles 236, 237 and 238 of that Regulation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.
- (19) The Court of Justice of the European Communities has consistently ruled that this provision represents a general principle of equity designed to cover an exceptional situation in which a trader who would not otherwise have incurred the costs associated with post-clearance entry in the accounts of customs duties, might find himself compared with other traders carrying out the same activity.
- (20) As regards the behaviour of the Commission, the following point should be made. The firm considers that the Commission knew or should have known how the territory was applying the provisions of Article 101(2) of the OCT Decision. In either case the Commission, it is argued, failed in its obligations.

- (21) As for whether the Commission knew, there is no provision in the OCT Decision for the Commission to be notified of the implementation of Article 101(2) in the OCTs. The Commission cannot therefore be blamed for not knowing what was going on. And as for whether it should have known, it must be stressed that the Commission learned of the traffic in July 1998 and alerted the Member States in February 1999. The Commission cannot therefore be held to have been slow to act on learning the facts. Accordingly, the Commission's behaviour in this case cannot be held to constitute a special situation.
- (22) As regards the behaviour of the French authorities, the firm argues that the provisions in question were laid down by the authorities of Saint Pierre and Miquelon in close cooperation with the French government, which failed to notify the Commission of their existence. The firm cites in this respect a letter of 14 October 1996 from the French Ministry of Foreign Affairs.
- (23) However, as mentioned in recital 21, there is no provision in the OCT Decision for the Commission to be notified of the measure in question; in addition, in its letter the Ministry for Foreign Affairs observes that the project “is not in itself problematic as long as it complies with the conditions laid down in Article 101 of the Decision and Annex III thereto”. These factors do not constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (24) As regards the behaviour of the competent Dutch authorities, the firm blames them for failing to implement the procedure laid down in Article 108 of the OCT Decision and Article 7 of Annex III thereto for the verification of EXP certificates and for initiating recovery on the basis of the report drawn up by the Anti-Fraud Office (OLAF) on completing the investigation it carried out with the authorities concerned.
- (25) The firm thereby contests the way in which the competent Dutch authorities applied the customs rules and initiated recovery. It is, however, settled case-law that applications submitted to the Commission pursuant to Article 239 of Regulation No 2913/92 are not concerned with whether the provisions of substantive customs law have been correctly applied by the national customs authorities and are not intended as a means of contesting the fact that the customs debt is legally payable. The national customs authorities have sole competence for the application of substantive customs

law, and decisions adopted by these authorities, including demands for the post-clearance payment of unpaid customs duties, must be contested through the competent national courts, which may [refer the case](#) to the [Court of Justice](#).<sup>6</sup> There can therefore be no question of a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92 existing in this respect.

- (26) As regards the behaviour of Saint Pierre and Miquelon's authorities, the following point should be made.
- (27) It is plain from recent rulings of the Court of First Instance of the European Communities that even if the exporters had misled Saint Pierre and Miquelon's authorities, that does not necessarily rule out the existence of a special situation in this case within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (28) In any case, the fact that the exporter confirmed on the EXP certificates that the conditions for obtaining them had been met is not in itself proof that Saint Pierre and Miquelon's competent authorities were misled. It is necessary to ascertain whether the exporters made these declarations on the assumption that the competent authorities were acquainted with all the facts necessary to apply the rules in question and whether the authorities, despite that knowledge, raised no objection to the declarations.
- (29) In the case in point, there is evidence to suggest that Saint Pierre and Miquelon's competent authorities knew or, at the very least, should have known that the goods for which they were issuing EXP certificates did not fulfil the conditions laid down for favourable treatment on import into the Community. Saint Pierre and Miquelon's competent authorities can also be blamed for a number of failings liable to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (30) The local authorities (*Conseil général*) instituted transport aid by their decision of 26 June 1996, then by their decision of 23 June 1997 and finally by their decision of 22 December 1997. The draft of the decision of 22 December 1997 was submitted to the Saint Pierre and Miquelon Prefect, who found it to be legally in order and moreover stated that it seemed to him an excellent initiative.

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<sup>6</sup> See *Kia Motors* (Case T-195/97, 16.7.1998) and *Hyper Srl* (Case T-205/99, 11.7.2002).



- (31) “Transport aid” was allocated on the basis of decisions entitled “Decision... applying the provisions of Decision No 233/97 of 22 December 1997 to the release of goods for free circulation.”
- (32) In addition, the local authorities have actively promoted transport aid among traders, either directly or via persons acting on their behalf. The decisions referred to in paragraph 30 had been transmitted to the firm’s client before it started the operations concerned.
- (33) Finally Saint Pierre and Miquelon's authorities could not have been unaware of the relationship between the considerable increase in aluminium exports from Saint Pierre and Miquelon to the EU between 1997 and 1999 and the granting of transport aid, even if that aid was paid by a different department to the one responsible for collecting customs duties on goods released for free circulation in Saint Pierre and Miquelon and for issuing EXP certificates.
- (34) It follows that the authorities of Saint Pierre and Miquelon were not misled by the exporters. The fact that they issued EXP certificates when they knew or, at the very least, should reasonably have known that such certificates would confer an undue advantage when the goods were subsequently imported into the Community must therefore be considered to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (35) In view of the above, the Commission takes the view that the circumstances of this case constitute a special situation within the meaning of Article 239(1) of Regulation (EEC) No 2913/92.
- (36) As for the second condition in Article 239 of Regulation (EEC) No 2913/92, the file submitted by the Dutch authorities to the Commission on 31 March 2004 and the information subsequently received by the Commission, in particular in reaction to its letter of 1 March 2006, show no deception or obvious negligence on the part of the firm, which acted on behalf of its client as a service provider.
- (37) The remission of import duties requested is therefore justified,
- (38) Where special circumstances warrant repayment or remission, Article 908 of Regulation (EEC) No 2454/93 authorises the Commission to determine the conditions

under which the Member States may repay or remit duties in cases involving comparable issues of fact and law.

- (39) Cases comparable in fact and law to this one are repayment or remission requests lodged within the legal time limits by customs agents acting on behalf of Community importers in respect of imports into the Community from Saint Pierre and Miquelon, where those import operations were carried out in circumstances comparable in fact and law to those which gave rise to this case. There must have been no deception or obvious negligence on the part of the customs agents,

HAS ADOPTED THIS DECISION:

*Article 1*

The remission of import duties in the sum of EUR 1 808 053.74 requested by the Netherlands on 31 March 2004 is justified.

*Article 2*

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 19-5-2006

*For the Commission*

*László KÓVACS*

*Member of the Commission*