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REC 05/00



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 31.07.2003
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NOT FOR PUBLICATION

COMMISSION DECISION

of 31.07.2003

**finding that repayment of import duties is justified in a particular case and authorising
Denmark, the Netherlands and Sweden to repay or remit duties in cases involving
comparable issues of fact and law**

(Only the Danish, Dutch and Swedish texts are authentic)

(Request submitted by Denmark)

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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,¹ as last amended by Regulation (EC) No 2700/2000,²

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92,³ as last amended by Regulation (EC) No 881/2003,⁴ and in particular Article 907 thereof,

¹ OJ L 302, 19.10.1992, p. 1

² OJ L 311, 12.12.2000, p. 17

³ OJ L 253, 11.10.1993, p. 1

⁴ OJ L 134, 29.5.2003, p. 11

Whereas:

- (1) By letter dated 2 October 2000, received by the Commission on 4 October, Denmark asked the Commission to decide, under Article 220(2)(b) of Regulation (EEC) No 2913/92, whether waiving post-clearance entry in the accounts of import duties, or repayment of the duties under Article 239 of the same Regulation, was justified in the following circumstances.
- (2) Between September 1997 and December 1998, a Danish company, referred to below as “the company”, imported various types of fish from Norway into the Community.
- (3) At the time, imports into the Community of fish originating in Norway were eligible for preferential treatment under Protocol 9 of the Agreement on a European Economic Area (the EEA Agreement) adopted by virtue of the Decision of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation.⁵ In accordance with the provisions of Protocol 4 to the EEA Agreement, therefore, fish originating in Norway was entitled to preferential tariff treatment when released for free circulation, on condition that it was covered by an EUR.1 movement certificate (referred to below as an EUR.1 certificate) or an invoice declaration of origin (referred to below as an “invoice declaration”).
- (4) In this instance, the company presented in support of its customs declarations for release for free circulation EUR.1 certificates issued by the competent Norwegian authorities indicating that the goods met the conditions required for the issuing of a EUR.1 or invoice declarations drawn up by authorised Norwegian exporters indicating that the goods were of EEA preferential origin. The Danish customs authorities accepted the declarations and granted preferential tariff treatment.
- (5) However, following post-clearance inspections of the company's activities, the Danish customs authorities submitted five EUR.1 certificates and 158 invoice declarations to

⁵ OJ L 1, 03.1.1994, p. 1

the competent Norwegian authorities under Article 32 of Protocol 4 to the EEA Agreement, for verification as to the preferential origin of the goods.

- (6) In some cases, the Norwegian customs authorities were able to confirm the validity of the origin documents. However, in the majority of the cases, the Norwegian exporters were not able to prove the origin of the goods.
- (7) In view of the replies given by the Norwegian authorities, the local Danish customs authorities were unable to grant the goods preferential tariff treatment and therefore demanded post-clearance recovery of import duties for goods imported between September 1997 and December 1998, amounting to XXXXXX; it is for this amount that waiver of entry in the accounts or, alternatively, repayment, is requested in this case.
- (8) Pursuant to Articles 871 and 905 of Regulation (EEC) No 2454/93, the company stated in support of the request from the competent Danish authorities that it had seen the dossier submitted to the Commission and made a number of comments, which were sent to the Commission in support of the dossier submitted by the authorities.
- (9) By letter of 28 March 2001 the Commission asked the Danish authorities for further information. This information was provided by letter dated 24 July 2001, received by the Commission on the same day. By letter of 26 July 2001 the Commission again asked the Danish authorities for further information. This information was provided by letter dated 12 September 2001, received by the Commission on the same day. By letter of 4 October 2001 the Commission asked the Danish authorities for further information for the third time. It also asked them to produce a consolidated version of the initial dossier, in cooperation with the company. This consolidated version, which contained the additional information requested, was provided by letter dated 11 April 2003, received by the Commission on the same day. In a letter of 6 June 2003, complemented by a letter of 7 July 2003, the Commission asked the Danish authorities for further information for the fourth time. This information was provided by letter dated 15 July 2003, received by the Commission on the same day (it concluded an exchange of information including two other letters, one dated 17 June and the other dated 7 July 2003). The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93,

between 29 March 2001 and 24 July 2001, 27 July 2001 and 12 September 2001, 5 October 2001 and 11 April 2003 and 7 June 2003 and 15 July 2003.

- (10) 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 on 7 May 2003 within the framework of the Customs Code Committee (Repayment Section) to consider the case.
- (11) Since the duties in question had already been paid, the request must first be examined in relation to Article 239 of Regulation (EEC) No 2913/92.
- (12) Article 239 of Regulation (EEC) No 2913/92 allows import duties to 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.
- (13) The Court of Justice of the European Communities has consistently taken the view 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 activity.
- (14) In this instance, the granting of preferential tariff treatment for the imports was subject to the presentation of EUR.1 certificates or invoice declarations.

- (15) As stated above, the Norwegian exporters were unable to prove the origin of the goods for most of the EUR.1 certificates and invoice declarations, giving rise to a customs debt of XXXXXX.
- (16) Reliance on the validity of such certificates and declarations is not normally protected, as this is considered part of the importer's normal commercial risk and therefore the responsibility of the person liable for payment.
- (17) The Court of Justice has consistently ruled that the legitimate expectations of a trader are protected only if the competent authorities themselves gave rise to the expectation.
- (18) In this instance, the exporters declared on the EUR.1 certificates that the goods they covered met the conditions under which the certificates can be issued or the invoice declarations drawn up.
- (19) However, in the light of the rulings of the Court of First Instance in the "Turkish televisions" [case of 10 May 2001](#),⁶ the fact that the Norwegian authorities might have been misled by the exporters does not necessarily mean that the circumstances of this case could not constitute a special situation within the meaning of Regulation (EEC) No 2913/92.
- (20) In any case, the fact that the exporters had confirmed on the EUR.1 certificates and the invoices that the conditions for issuing them or drawing them up had been met is not in itself proof that the competent Norwegian 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 their knowledge, raised no objection to the declarations.
- (21) In this instance, the competent Norwegian authorities can also be blamed for a number of deficiencies liable to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92. However, this does not constitute an active error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

⁶ Judgment in the "Turkish televisions" case 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.

- (22) Certain pieces of information reveal that the local Norwegian authorities did not carry out sufficient checks on the exports of fish to the Community by the company's supplier.
- (23) In particular, the Norwegian authorities authorised the exporters to draw up invoice declarations of origin without knowing for certain that they met the relevant conditions. Furthermore, the authorised exporters in question were not sufficiently well informed as to what kind of supporting documents they should keep for post-clearance inspections into the origin of the goods.
- (24) The fact that, for a number of years, the Norwegian authorities did not carry out checks on the authorised exporters and lacked information is one of the reasons that the situation which led to the irregularities continued for so long.
- (25) It is apparent from the above that, while the Norwegian authorities made no active error within the meaning of Article 220(2)(b) of Regulation, they did fail to fulfil their obligations in their approach to checking the fish exports to the Community by the company's suppliers. The shortcomings in the way in which the Norwegian authorities administered the certification system for the company's suppliers at local level must be deemed to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92, particularly in the light of the judgment of the Court of First Instance in the "Turkish televisions" case of 10 May 2001, referred to above.
- (26) The circumstances of this case are therefore such as to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (27) These circumstances do not involve deception or obvious negligence on the part of the firm.
- (28) Thus, the fact that, following an on-the-spot inspection of an import transaction in August 1997, the relevant import duties were recovered post-clearance from the company because its supplier was unable to prove the origin of the consignment in question to the Norwegian authorities, cannot, on the basis of the information in the dossier sent to the Commission on 11 April 2003, be used to demonstrate obvious negligence on the part of the company. The supplier reimbursed the company for the duties and the company may have concluded this was a one-off error, which the supplier had rectified and which did not constitute sufficient grounds for the company

to stop doing business with the supplier at that time. Subsequently, however, when the company realised the risks involved, it did in fact decide to stop trading with the supplier.

- (29) Furthermore, obvious negligence cannot be imputed to the company since there is no evidence that it deviated from normal business practice when concluding its purchase contracts and carrying out the imports concerned.
- (30) Fish originating in Russia is usually sold at a slightly lower price than fish originating in Norway. The company was charged a price corresponding to the price for Norwegian fish on importation of the consignments whose EEA preferential origin could not later be proved by the Norwegian authorities. Under [case law](#)⁷, this demonstrates the company's good faith when the disputed imports took place. Furthermore, the company's lack of suspicion as to the origin of the fish does not amount to obvious negligence. The price, which is an important indicator for a sensible trader, seemed to confirm that the fish the company was importing did indeed originate in Norway.
- (31) The dossier sent to the Commission on 11 April 2003 shows that the company acted in good faith and that there was no deception or obvious negligence on its part.
- (32) Moreover, in June 2003, following information that there were doubts on the good faith of the person concerned in the present case, the Commission requested the Danish authorities to inform them if these doubts were grounded.
- (33) Then, in a letter dated 15 July 2003, the Danish authorities confirmed the good faith of the person concerned and stated that no deception or obvious negligence could be attributed to this person.
- (34) In this instance, repayment of the import duties is justified and there is thus no need to examine the case in relation to Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (35) Where special circumstances warrant repayment or remission, Article 908 of Regulation (EEC) No 2454/93 allows the Commission, under conditions that it may

⁷ Case T-50/96 ("Primex") of 17 September 1998.

determine, to authorise one or more Member States to repay or remit duties in cases involving comparable issues of fact and law.

- (36) Denmark, the Netherlands and Sweden have requested the Commission's authorisation to repay or remit import duties in cases involving issues of fact and law comparable to the present case.
- (37) Such authorisation may be granted to the Member States concerned on condition that it is used only in cases strictly comparable in fact and law to the cases in question. The authorisation should cover requests for repayment or remission of duties submitted within the statutory time limits and relating to goods imported under invoice declarations up to 30 June 2000; the goods in question must have been supplied by the suppliers referred to in Denmark's request of 2 October 2000, as presented in the consolidated version sent to the Commission on 11 April 2003. There must be no deception or obvious negligence on the part of the importers.

HAS ADOPTED THIS DECISION:

Article 1

The repayment of import duties amounting to XXXXXX, referred to in Denmark's request of 2 October 2000, as presented in the consolidated version sent to the Commission on 11 April 2003, is justified.

Article 2

Denmark, the Netherlands and Sweden are authorised to repay or remit import duties in cases strictly comparable in fact and law to the case at issue in the request of 2 October 2000, as presented in the consolidated version sent to the Commission on 11 April 2003.

The authorisation shall cover requests for repayment or remission of duties submitted within the statutory time limits and relating to goods imported under invoice declarations up to 30 June 2000. The goods in question must have been supplied by the supplier referred to in the above-mentioned request.

Article 3

This Decision is addressed to the Kingdom of Denmark, the Kingdom of the Netherlands and the Kingdom of Sweden.

Done at Brussels, 31.07.2003

For the Commission
Frits Bolkestein
Member of the Commission