REC 05/05

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 4-12-2006
C(2006)5789

NOT FOR PUBLICATION

COMMISSION DECISION

Of 4-12-2006

finding that the post-clearance entry in the accounts of a certain amount of import duty is not justified and finding that the post-clearance entry in the accounts of another amount of import duty is justified and that the remission of those duties is not justified in a particular case.
(Only the German text is authentic)

(Request submitted by Austria)

(REC 05/05)

FR

COMMISSION DECISION

Of 4-12-2006

finding that the post-clearance entry in the accounts of a certain amount of import duty is not justified and finding that the post-clearance entry in the accounts of another amount of import duty is justified and that the remission of those duties is not justified in a particular case.

(Only the German text is authentic)

(Request submitted by Austria)

(REC 05/05)

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 648/2005[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 402/2006[4],

[1] OJ L 302, 19.10.1992, p. 1.
[2] OJ L 117, 4.5.2005, p. 13.
[3] OJ L 253, 11.10.1993, p. 1.
[4] OJ L 70, 9.3.2006, p. 35.

Whereas:

(1) In a letter dated 1 June 2005, received by the Commission on 10 June 2005, the Republic of Austria asked the Commission to decide, under Article 220(2)(b) of Regulation (EEC) No 2913/92, whether it was justified to waive post-clearance entry of import duties in the accounts or, in the alternative, if the remission of those duties was justified under Article 239 of the same Regulation, in the following circumstances.

(2) An Austrian company trading in agricultural products (hereafter "the applicant") imported 76 consignments of sugar originating in Croatia in the period from 20 September 2001 to 8 August 2002.

(3) At that time, imports into the Community of sugar from Croatia benefited from an exemption from customs duty under Council Regulation (EC) No 2007/2000 (until 31 December 2001) and under the EU-Croatia Interim Agreement on trade and trade-related measures (as from 1 January 2002), provided that the sugar was covered by a EUR.1 movement certificate (hereafter "EUR.1 certificate") or a declaration of origin in the invoice (hereafter "invoice declaration").

(4) In the case in point, the applicant submitted a EUR.1 certificate in support of each customs declaration for release for free circulation. The Austrian customs authorities accepted the declarations and granted the preferential tariff treatment.

(5) The Austrian authorities analysed the product imported in five consignments (import consignments Nos 11, 24, 25, 26 and 49) and carried out post-clearance checks on the validity of 12 EUR.1 certificates covering the last 12 consignments imported between 22 May 2002 and 8 August 2002. The Croatian customs authorities confirmed the validity of the certificates. Following the confirmation of the validity of the certificates by the Croatian authorities, the Austrian authorities released the security lodged for five consignments (consignments Nos 65 to 69 imported between 22 May 2002 and 3 July 2002) and informed the applicant of the reply given by the Croatian authorities. The tariff classification of the consignment imported on 24 July 2002 was checked and confirmed by the Austrian authorities. No checks were carried out to establish whether the sugar in question was cane or beet sugar.

(6) On 2 April 2002 the Member States were informed by the European Anti-Fraud Office (OLAF) within the framework of mutual assistance that false declarations of origin were suspected in imports of sugar from the Western Balkans. Statistics showed a rise in the volume of sugar exports to Croatia and the Federal Republic of Yugoslavia and, at the same time, a steady increase in the volume of preferential imports of sugar declared as originating in these countries.

(7) In the notice dated 26 June 2005[5], the Commission informed Community traders that there were grounds for doubting the proper application of the preferential arrangements for sugar of headings CN 1701 and 1702, which is declared at import as originating in Croatia, among other countries.

(8) On 28 October 2002, OLAF informed the Member States that it had discovered lots of sugar in Greece which were declared as originating in Croatia, but which in fact consisted of a mixture of beet sugar and cane sugar and so could not have originated in Croatia. Member States were asked to continue to carry out increased checks on the consignments concerned, including taking and analysing samples.

(9) In June 2003 the Greek authorities, assisted by OLAF, conducted an on-site investigation at the sugar producer in Croatia that exported the sugar to the applicant. This producer was found to use raw cane sugar to produce its sugar. As a result of this investigation, the Croatian authorities withdrew all EUR.1 certificates issued between 14 September 2001 and 17 September 2002, including those submitted by the applicant.

[5] OJ C 152, 26.6.2002, p. 14.

(10) In a letter dated 30 June 2004, the Austrian authorities informed the applicant that the certificates had been withdrawn and, on 9 August 2004, notified the applicant that EUR XXXXX in customs duties were subject to post-clearance recovery. The applicant lodged an appeal, which is still pending before the national courts, and requested a waiver of post-clearance entry of the above amount, under Article 220(2)(b) of Regulation (EC) No 2913/92, and in the alternative, remission of this amount under Article 239 of the same Regulation.

(11) In accordance with Articles 871 and 905 of Regulation (EEC) No 2454/93, the customs agent stated that it had seen the dossier sent to the Commission by the Austrian authorities, and made some comments, which were forwarded to the Commission.

(12) Non-recovery or, in the alternative, remission is justified for the following reasons.

(13) The applicant cannot be considered to be an experienced trader since it only started importing the sugar in question in September 2001, and the applicable rules only date from 2000 and 2001.

(14) The Commission did not publish a notice for importers in the Official Journal until after the applicant had imported most of its consignments. The applicant obtained an explicit guarantee in its contracts with the Croatian supplier that the sugar supplied was of Croatian origin.

(15) The applicant insisted on the issue of EUR.1 certificates rather than invoice declarations of origin. By doing so, it wanted to ensure that the Croatian customs authorities would verify the origin of the goods thoroughly before issuing the documents of origin which it needed.

(16) When post-clearance checks were conducted on 12 EUR.1 certificates, the Croatian authorities confirmed the validity of these certificates. The applicant therefore felt it could be justifiably confident that the certificates of origin presented were in order and could not have anticipated that, following the mission of the Greek authorities assisted by OLAF, the Croatian authorities would change their mind regarding the validity of the certificates issued and retrospectively withdraw the EUR.1 certificates that it had originally confirmed as being valid. Having received specific confirmation of the validity of nine EUR.1 certificates concerning consignments imported after the publication in the Official Journal of the notice to importers, the applicant could be justifiably confident that the warning in the Commission's notice published in the Official Journal, which was general in nature, did not apply to those certificates of origin.

(17) The Croatian authorities must have already realised when they issued the certificates of origin that the supply of sugar from Croatia to the EU had increased so sharply that some irregularities must be suspected. Since substantial quantities of cane sugar were being imported into Croatia, they should have already had doubts when the exporter asked them to confirm the EUR.1 certificates.

(18) By letter dated 2 August 2005, the Commission requested further information from the Austrian authorities. This information was provided by letter dated 12 April 2006, received by the Commission on 21 April 2006. Examination of the request for remission was therefore suspended between 3 August 2005 and 21 April 2006.

(19) By letter dated 11 July 2006, received by the applicant on 13 July 2006, the Commission informed the applicant that it intended to take a decision which would be unfavourable for the applicant with regard to the duties on imports as from 26 June 2002, the date on which the notice to importers was published in the OJ. The Commission also gave the reasons for its objections.

(20) By letter of 11 August 2006, received by the Commission on the same date, the applicant expressed its opinion on the Commission's objections. In particular, it noted that it had acted in good faith and had been especially vigilant after the notice had been published in the OJ. In fact, it requested that a verification procedure be implemented by the customs authority of the non-EU country. This customs authority verified that the certificates showing that the goods were eligible for preferential treatment had been issued properly. Indeed, this authority conducted another check to determine whether the requirements for issuing certificates had been properly satisfied.

(21) In accordance with Articles 873 and 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.

(22) 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 13 September 2006 within the framework of the Customs Code Committee (Repayment Section) to consider the case.

(23) Under Article 220(2)(b) of Regulation (EEC) No 2913/92, there can be no post-clearance entry in the accounts where the amount of duties legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities 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.

(24) In the case in point, there is evidence – in particular the substantial rise in supply of sugar from Croatia to the EU and imports into Croatia of substantial quantities of cane sugar – that the competent Croatian authorities knew or, at the very least, should have known that the goods for which they were issuing EUR.1 certificates did not fulfil the conditions laid down for preferential treatment.

(25) The Commission is therefore of the opinion that, by issuing EUR.1 certificates which were shown to be incorrect, the Croatian authorities committed an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

(26) The Court of Justice of the European Communities has consistently ruled that, in determining whether the applicant could reasonably have detected the customs authorities' error, account must be taken of the nature of the error, the applicant's professional experience and the diligence it showed.

(27) As regards the nature of the error, the Court of Justice has ruled that it should be assessed in terms of the complexity of the legislation concerned and the length of time over which the authorities persisted in their error.

(28) In this case the competent Croatian authorities issued EUR.1 certificates for goods which did not fulfil the conditions for obtaining such certificates, and also confirmed the validity of the certificates when the Austrian authorities requested post-clearance checks.

(29) Moreover, it should be noted that the notice informing Community importers of the risks involved in importing sugar from the Western Balkans was not published in the Official Journal of the European Communities until 26 June 2002. A proportion of the consignments concerned were therefore imported before this publication.

(30) With regard to the applicant's experience, it should be noted that the applicant is an undertaking which trades in agricultural products and, therefore, should be considered an experienced operator.

(31) Lastly, regarding the diligence shown by the applicant, it should be noted that under Article 220(2)(b) of the Code, liable persons may plead good faith when they are able to show that, during the trading period concerned, they acted with diligence to ensure that all conditions for preferential treatment were fulfilled. The person liable may not, however, plead good faith if the European Commission has published a notice in the Official Journal of the European Communities, stating that there are grounds for doubt concerning the proper application of the preferential arrangements by the beneficiary country.

(32) Given that a notice to importers was published on 26 June 2002 stating that there were problems with regard to imports of sugar from the Western Balkans to the Community, the Commission determined that the applicant had exercised diligence with regard to imports made prior to 26 June 2002 but that the applicant had not exercised diligence with regard to imports made as from 26 June 2002.

(33) The fact that the Croatian authorities confirmed the validity of certain certificates issued after publication of that notice is not relevant in the case in point. When the applicant imported the consignments in question, it knew the risks involved in importing sugar from Croatia under the preferential arrangements. The fact that the Croatian authorities confirmed the validity of the certificates concerned cannot provide legitimate confidence in the validity of the unduly issued certificates. To accept, even when a notice to importers has been published, that confirmation of validity by authorities incorrectly applying the preferential arrangement rules could provide legitimate confidence in the validity of these certificates would have the effect of rendering the last subparagraph of Article 220(2)(b) entirely meaningless.

(34) It should be noted that, subsequent to the date on which the applicant submitted its request for the waiver of entry in the accounts and, in the alternative, for remission in the case in point, the Commission adopted Decision C (2005) 3147 of 12 October 2005 (REC 03/05) which authorises Member States to waive entry of import duties in the accounts in cases where the issues of fact and law are comparable to the case in point.

(35) In accordance with paragraph 34 of that Decision, requests for waiver of post-clearance entry in the accounts may only be considered comparable to this case in fact and in law where they are submitted within the legal time limits, relate to imports covered by EUR.1 certificates issued from 14 September 2001 and subsequently invalidated by the competent Croatian authorities and where the declarations for release for free circulation to which they relate were submitted before 26 June 2002, the date on which the notice to importers No 2002/C 152/05 was published in the Official Journal of the European Communities. The importers (the declarant or his representative) must have acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

(36) In the case in point, since the Austrian authorities considered the applicant to have acted in good faith and to have observed all the provisions of the rules in force in respect of customs declarations, the Commission considers that the approach adopted in REC 03/05 should also be adopted in the case in point for the imports made before 26 June 2002 and for the portion of the debt pertaining to those imports.

(37) Consequently, the waiver of the entry of customs duties totalling EUR XXXXX in the accounts is justified. Therefore, there is no need to examine whether the remission of this amount under Article 239 of Regulation (EEC) No 2913/92 is justified. However, there is a need for such an examination with regard to the customs duties on imports made as from 26 June 2002.

(38) 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.

(39) The Court of Justice of the European Communities 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 activity[6]. The existence of an error committed by the competent customs authorities itself constitutes such an exceptional situation. The first condition referred to in Article 239 of Regulation (EEC) No 2913/92 is therefore met.

(40) Therefore it is necessary to examine whether the second condition referred to in Article 239 of Regulation (EEC) No 2913/92 has been fulfilled.

---

[6] Cases T-186/97, T-190/97 to T-192/97, T-211/97, T-216/97 toT-218/97,T-279/97,T-280/97,T-293/97 and T-147/99, *Kaufring AG*, [2001] ECR II-01337.

(41) The Court of Justice of the European Communities has consistently upheld that, when examining whether there has been obvious negligence, account must be taken, in particular, of the complexity of the legislation, the experience of the trader and the diligence shown by the trader[7].

(42) Given the publication in the Official Journal of the European Communities on 26 June 2002 of the above-mentioned notice to importers, it must be considered for the above reasons that the applicant, who was aware of the risk that releasing for free circulation sugar imported from Croatia could give rise to a customs debt, did not act with the required diligence and consequently displayed obvious negligence.

(43) That being the case, the waiver of post-clearance entry of duties in the accounts is justified under Article 220(2)(b) of Regulation (EEC) No 2913/92 in respect of the portion of the duties pertaining to imports made before 26 June 2002 (EUR XXXXX). However, the post-clearance entry of duties is justified and the remission of duties under Article 239 of that same Regulation is not justified in respect of the duties on imports made as from 26 June 2002 (EUR XXXXXX).

[7] Case C-250/91, *Hewlett Packard* [1993] ECR I-01819.

HAS ADOPTED THIS DECISION:

Article 1

1. The import duties in the sum of EUR XXXXX which are the subject of the Republic of Austria's request of 10 June 2005 shall not be entered in the accounts.

2. The import duties in the sum of EUR XXXXX which are the subject of the Republic of Austria's request of 10 June 2005 shall be entered in the accounts.

2. The remission of import duties in the sum of EUR XXXXX which are the subject of the Republic of Austria's request of 10 June 2005 is not justified.

Article 2

This Decision is addressed to the Republic of Austria.

Done at Brussels, 4-12-2006

For the Commission
László KÓVACS
Member of the Commission