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REC 03/2005

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12-10-2005
C(2005)3747

NOT FOR PUBLICATION

COMMISSION DECISION

Of 12-10-2005

**finding that it is justified to waive post-clearance entry in the accounts of import duties
in a particular case**

(Only the German text is authentic.)

(Request submitted by Austria)

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(REC 03/2005)

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

Having regard to Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the
implementation of Council Regulation (EEC) No 2913/92,²

¹ OJ L 302, 19.10.1992, p. 1. Regulation as last amended by Regulation (EEC) No 648/2005 (OJ L 117, 4.5.2005, p. 13).

² OJ L 253, 11.10.1993, p. 1. Regulation as last amended by Regulation (EEC) No 883/2005 (OJ L 148, 11.6.2005, p. 5).

Whereas:

- (1) By letter dated 1 June 2004, received by the Commission on 10 June 2005, Austria asked the Commission to decide whether waiving post-clearance entry in the accounts of import duties under Article 220(2)(b) in conjunction with Article 236 of Regulation (EEC) No 2913/92 or, in the alternative, remission of import duties under Article 239 of that Regulation, was justified under the following circumstances.
- (2) On 4 and 7 June 2002 an Austrian customs agent released for free circulation two consignments of sugar from Croatia on behalf of a client, a trader specialising in agricultural commodities.
- (3) In 2001 and 2002 imports into the Community of sugar originating in Croatia and covered by a EUR.1 movement certificate (hereinafter “EUR.1 certificate”) or an invoice declaration of origin were eligible for exemption from duties. The legal basis for this exemption for imports carried out before 1 January 2002 was Council Regulation (EC) No 2007/2000 of 18 September 2000 introducing exceptional trade measures for countries and territories participating in or linked to the European Union’s Stabilisation and Association process, amending Regulation (EC) No 2820/98 and repealing Regulations (EC) No 1763/1999 and (EC) No 6/2000;³ for imports carried out from 1 January 2002 it was the Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Croatia, of the other part.⁴
- (4) The customs agent presented a EUR.1 certificate with each customs declaration for release for free circulation. The customs authorities accepted the declarations and granted the preferential tariff treatment.

³ OJ L 240, 23.9.2000, p. 1. Regulation as last amended by Commission Regulation (EC) No 607/2003 of 2 April 2003 (OJ L 86, 3.4.2003, p. 18).

⁴ OJ L 330, 14.12.2001, p. 3.

- (5) On 2 April 2002 the Member States were informed by the European Anti-Fraud Office (OLAF) within the framework of mutual assistance that false origin declarations were suspected to have been used for imports of sugar from the Western Balkans. The statistics showed that the volume of sugar exports to Croatia and other western Balkan countries was increasing and at the same time the volume of sugar imports declared as originating in those countries was rising steadily.
- (6) When the customs agent carried out the two imports, the Austrian authorities made post-clearance checks on the validity of the EUR.1 certificates presented. In both cases the Croatian authorities confirmed that the certificates they had issued were valid. The Austrian authorities therefore released the guarantees collected for the two imports. They also informed the customs agent of the Croatian authorities' answers. When the sugar was imported, the Austrian authorities took samples and the tariff classification of the product was found to be correct. However, no laboratory tests were carried out to establish whether the consignments were cane or beet sugar.
- (7) In notice to importers No 2002/C 152/05 of 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 CN headings 1701 and 1702 declared upon import to originate in Croatia, among other countries.
- (8) On 28 October 2002, OLAF informed the Member States that consignments of sugar declared as originating in Croatia and tested in Greece were actually composed of a mixture of beet sugar and cane sugar.
- (9) In June 2003 the Greek authorities requested OLAF's assistance in a criminal case, carried out checks on a sugar producer in Croatia and found that it had deliberately, regularly and habitually used raw cane sugar in the production of its own sugar. This producer was also the supplier of the customs agent's client. The Croatian authorities withdrew all the EUR.1 certificates issued between 14 September 2001 and 17 September 2002, including those attached to the customs agent's declarations.

⁵ OJ C 152, 26.6.2002, p. 14.

- (10) The Austrian authorities therefore considered that a customs debt had been incurred for the customs agent's imports and on 2 August 2004 they notified the agent of a debt of XXXXXX. This is the amount for which the customs agent is requesting waiver of post-clearance entry in the accounts under Article 220(2)(b) of Regulation (EC) No 2913/92 and, in the alternative, remission under Article 239 of the same Regulation. The customs agent has also lodged an appeal, the outcome of which has not yet been decided.
- (11) In its request the customs agent states that the competent Croatian authorities committed an error in issuing the EUR.1 certificates when they knew that the preferential origin conditions had not been fulfilled.
- (12) 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.
- (13) 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 July 2005 within the framework of the Customs Code Committee (Repayment Section) to consider the case.
- (14) 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.
- (15) In the case under consideration, granting preferential tariff treatment for the imports was subject to presentation of EUR.1 certificates.
- (16) As already noted, the certificates concerned were cancelled by the Croatian authorities.

- (17) Reliance on the validity of such certificates 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
- (18) 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 expectations.
- (19) In this instance, the exporters declared on the EUR.1 certificates that the goods they referred to met the conditions for obtaining the certificates.
- (20) However, as the [Court has recently ruled](#),⁶ the fact that the exporters submitted incorrect applications does not in itself preclude the possibility that the competent authorities committed an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92. The authorities' behaviour has to be evaluated in the light of the broader context in which the relevant customs provisions were applied.
- (21) Thus the fact that the exporter confirmed on the EUR.1 certificates that the conditions for obtaining them had been met is not in itself proof that the competent Croatian authorities were misled. It is necessary to ascertain whether the exporter made these statements 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 statements.
- (22) In the case in point, there is evidence 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.

⁶ *Ilumitrónica* judgment of 14 November 2002, Case C-251/00.

- (23) It should be borne in mind that from 2001 there had been a very substantial increase in exports of sugar from Croatia to the European Union although production capacity for sugar originating in Croatia did not increase on the same scale and large quantities of sugar were imported into Croatia.
- (24) The circumstances in this case therefore reveal an error on the part of the Croatian customs authorities themselves within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (25) The Court of Justice of the European Communities has consistently ruled that, in determining whether the person concerned could reasonably have detected the customs authorities' error, account must be taken of the nature of the error, the operator's professional experience and the diligence it showed.
- (26) 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 carried out post-clearance checks.
- (27) It should also be noted that at the time of the events no notice had been published in the Official Journal of the European Communities advising importers to take precautions with EUR.1 certificates issued for sugar by the Croatian authorities. No such notice was published until 26 June 2002.
- (28) As a customs agent the person concerned may be considered to be a professional with experience of customs formalities. However, this factor cannot be deemed decisive in this case.
- (29) Lastly, as regards the diligence shown by the customs agent, there is nothing in the dossier to indicate that the way in which it carried out the imports in question departed from normal commercial practice. Furthermore, the purchase contract clearly stated that the sugar purchased under the contract must originate in Croatia.

- (30) It must therefore be accepted that the error of the competent Croatian authorities could not have been detected by the customs agent.
- (31) Moreover, the customs agent complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (32) Post-clearance entry in the accounts of import duties is not therefore justified in this case. Under these circumstances there is no need to examine the dossier in the light of Article 239 of Regulation (EEC) No 2913/92.
- (33) Where special circumstances warrant waiver of post-clearance entry of duties in the accounts, Article 875 of Regulation (EEC) No 2454/93 authorises the Commission to determine the conditions under which the Member States may waive post-clearance entry of duties in the accounts in cases involving comparable issues of fact and law.
- (34) 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,

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of XXXX which are the subject of the request from Austria of 1 June 2005 shall not be entered in the accounts.

Article 2

This Decision is addressed to the Republic of Austria.

Done at Brussels, 12-10-2005

For the Commission

László KÓVACS

Member of the Commission