REC 05/02

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 24-4-2007
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NOT FOR PUBLICATION

COMMISSION DECISION

Of 24-4-2007

finding that post-clearance entry of import duties in the accounts is justified and that remission of import duties is not justified in a particular case

(Only the Dutch and French texts are authentic)

(request submitted by Belgium)

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(request submitted by Belgium)

(REC 05/02)

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 1791/2006[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 214/2007[4],

[1] OJ L 302, 19.10.1992, p. 1.
[2] OJ L 363, 20.12.2006, p. 1.
[3] OJ L 253, 11.10.1993, p. 1.
[4] OJ L 62, 1.3.2007, p. 6.

Whereas:

(1) By letter dated 12 August 2002, received by the Commission on 19 August, Belgium asked the Commission to decide, under Article 220(2)(b) of Regulation (EEC) No 2913/92, whether waiving the entry in the accounts of import duties was justified and, in the alternative, whether the remission of these duties under Article 239 of the same Regulation was justified, in the following circumstances.

(2) Under the second paragraph of Article 2 of Commission Regulation (EC) No 1335/2003 of 25 July 2003 amending Regulation (EEC) No 2454/93[5], the provisions of that Regulation do not apply to cases sent to the Commission before 1 August 2003. Therefore, unless otherwise indicated, the references that follow in this Decision to Regulation (EEC) No 2454/93 refer to that Regulation as last amended by Commission Regulation (EC) No 881/2003 of 21 May 2003[6].

(3) Between January 1994 and June 1995 a Belgian firm, in its capacity as customs agent and on behalf of an importer, lodged 62 declarations for release for free circulation for diskettes from Thailand.

(4) At the time imports into the Community of such products originating in Thailand were eligible for preferential tariff treatment under the system of generalised preferences (GSP) if covered, in accordance with Article 80 of the version of Regulation (EEC) No 2454/93 in force at the time, by a Form A certificate of origin issued by the competent authorities in Thailand.

(5) In the case in point, the firm presented a Form A certificate issued by the Thai authorities in support of each import declaration. The Belgian customs authorities accepted the declarations and granted preferential tariff treatment.

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5 OJ L 187, 26.7.2003, p.16.
6 OJ L 134, 29.5.2003, p. 1.

(6) As part of a Community administrative cooperation mission, investigations were carried out in Thailand from 20 to 30 March 1995 and from 29 January to 2 February 1996. As a result of these investigations, a number of certificates issued by the Thai authorities, including 60 of the firm's certificates, were declared invalid as they had been wrongly issued by those authorities.

(7) The goods were not therefore eligible for preferential tariff treatment when imported into the Community. Accordingly, the Belgian authorities informed the firm that it owed customs duties in the sum of EUR XXXXX. By letter dated 21 December 2006, the Belgian authorities deducted EUR XXXX from the sum demanded in respect of two certificates which had not actually been invalidated by the Thai authorities and for which the existence of a customs debt had not therefore been established. The customs debt therefore amounts to EUR XXXXX, for which the firm has requested 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.

(8) Pursuant to Articles 871 and 905 of Regulation (EEC) No 2454/93, the firm stated that it had seen the dossier submitted to the Commission by the Belgian authorities and had nothing to add.

(9) By letter dated 19 December 2002, the Commission requested further information from the Belgian authorities. This information was provided by letter dated 5 September 2006, received by the Commission on 15 September 2006. The examination of the request for waiver of entry in the accounts and, in the alternative, remission was therefore suspended, in accordance with Articles 873 and 907 of Regulation (EEC) No 2454/93, from 20 December 2002 to 15 September 2006.

(10) By letter dated 3 January 2007, received by the firm on 10 January 2007, the Commission notified the firm of its intention to withhold approval.

(11) By letter dated 9 February 2007, received by the Commission on the same date, the firm's lawyer responded to the Commission's objections. He argued that the Thai authorities had committed an active error by issuing certificates without making sure that the goods met the criteria concerning preferential origin and should anyway have known that the products in question were probably imported from Hong Kong, as a number of cargos of computer diskettes had been transferred upon arrival in Thailand to another container with the agreement of the customs authorities, and then re-exported with Form A certificates of origin.

(12) 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.

(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 16 March 2007 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 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.

(15) In the case in point, the granting of preferential tariff treatment for the imports in question was subject to the presentation of Form A certificates issued by Thailand's competent authorities.

(16) However, following a Community administrative cooperation mission to Thailand from 20 to 30 March 1995 and from 29 January to 2 February 1996 the certificates concerned by this case were invalidated by the Thai authorities.

(17) Under Article 904(c) of Regulation (EEC) No 2454/93, reliance on the validity of certificates of preferential origin 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 those expectations. The issue of an incorrect certificate does not constitute an error on the part of the authorities where the certificate is based on an incorrect account of the facts provided by the exporter, except where it is evident that the issuing authorities were aware or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment.

(19) In this case, the goods in question had been sold to the importer for whom the firm had made out the declarations for release for free circulation by three Thai exporters. However, the file attached to the application for waiver of recovery sent by the Belgian authorities shows that these three exporters had misrepresented the facts in order to obtain endorsement of the Form A certificates.

(20) Two exporters (A and B) admitted to making errors in the calculation of the value of the imported goods used in the manufacture of the diskettes which they were exporting; the value of the imported material incorporated into the final product was in fact above the 40% ceiling laid down for eligibility for a Form A certificate. The competent Thai authorities therefore informed the Commission in a letter dated 23 June 1995 of their decision to invalidate the certificates issued to these two exporters.

(21) As for the third exporter (C), further inquiries also led the Thai authorities to conclude that the exporter had misrepresented the facts in order to obtain Form A certificates. This is clear from both the letter from the Ministry of Commerce addressed to the Commission on 2 February 1996 ("*These certificates had been issued by this Department on the basis of incorrect information provided by the exporters concerned*") and the joint report written after the verification mission.

(22) It is settled case law that determining the origin of goods is based on a division of responsibilities between the authorities of the exporting country and those of the importing country, inasmuch as origin is established by the authorities of the exporting country and the proper working of the system is monitored jointly by the authorities concerned on both sides. As the Court has pointed out, the reason for this system is that the authorities of the exporting country are best placed to verify the facts determining origin directly. The Court has also expressed the view that the mechanism "can function only if the customs authorities of the importing country accept the determinations legally made by the authorities of the exporting country"[7]. Where the competent authorities of the state of exportation declare, following subsequent verification, that a Form A certificate does not apply to the goods actually exported, that is sufficient to enable the authorities of the state of importation to hold that duties legally due have not been charged and consequently institute proceedings to recover them. Nothing in the rules obliges the latter authorities to establish the accuracy of the results of the verification or the true origin of the goods.

(23) It is to be concluded from the above that, contrary to the firm's claims, the Commission is not obliged to question the findings made by the Thai authorities and communicated by them in the framework of the administrative cooperation provided for in Article 93 of the version of Regulation (EEC) No 2454/93 in force at the time. There is therefore no need to require the Thai authorities to produce supporting documents or carry out further investigations once those authorities have notified the Commission that the exporter has provided an incorrect account of the facts, consisting in the case in point of a miscalculation of the value of the goods imported (exporters A and B) or a misrepresentation of the production costs (exporter C).

[7] See Cases C-218/83 *Les rapides savoyards* and C-97/95 *Pascoal & Filhos*.

(24) As to whether the Thai authorities knew or should have known that the exported diskettes did not originate in Thailand, there is nothing in the file to suggest that the Thai authorities should, despite the misrepresentation of the facts by the exporters, have known that goods could not have originated in Thailand.

(25) The firm has produced no documentary evidence that the Thai authorities should have been aware of this fact.

(26) It is true that, at the time of the disputed imports, diskettes from Hong Kong were imported into Thailand and that these diskettes were then re-exported to the Community. However, the file does not indicate that these diskettes are those for which this request was made. This fact does not therefore in itself warrant the conclusion that the Thai authorities should have known that the goods in question did not qualify for preferential treatment.

(27) What is more, it appears from Annex 4 to the letter from the Belgian authorities dated 5 September 2006 that, in order to make sure that the diskettes had been manufactured in Thailand, the importer even had goods which appeared to be identical to the imports in question checked in the exporters' factories by a specialised firm. The importer had also visited Thai factories in 1994 and had observed that they had enough production capacity to meet its orders. It is therefore established that there were Thai producers manufacturing diskettes like the imports in question at the time.

(28) The argument that the Thai authorities could, had they carried out controls when they issued the Form A certificates, have discovered that the diskettes in question did not qualify for preferential treatment, must be dismissed. Quite apart from the fact that the lack of controls has not been substantiated, the person liable cannot entertain a legitimate expectation with regard to the validity of certificates by virtue of the fact that they were initially accepted by the customs authorities of a Member State, since the initial acceptance of declarations in no way prevents subsequent checks from being carried out[8].

(29) The circumstances in this case therefore show no error on the part of the customs authorities themselves which could not have been detected by an operator acting in good faith within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

(30) As there is no error on the part of the competent authorities, it is not necessary to check whether the other two conditions referred to in Article 220(2)(b) of Regulation (EEC) No 2913/92 have been met.

(31) In accordance with Article 239 of Regulation (EEC) No 2913/92, import duties may be repaid or remitted in special situations (other than those laid down 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.

(32) 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[9].

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8 See inter alia Case C-204/94 *Faroe Seafood*.

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

(33) It is necessary to check whether the firm's situation should be considered exceptional in comparison with other operators engaged in the same activity.

(34) It follows from the above paragraphs that the Thai authorities issued Form A certificates for diskettes that did not qualify for preferential treatment because the exporter provided an incorrect account of the facts. Furthermore, as already pointed out, the file does not show that the Thai authorities knew or should have known that the exported diskettes did not actually originate in Thailand. The firm cannot therefore be considered to have been placed in a special situation within the meaning of Article 239 of Regulation (EEC) 2913/92.

(35) There being no special situation, there is no need to examine whether the second condition laid down in Article 239 of Regulation (EEC) No 2913/92 is met.

(36) The circumstances in this case show no error on the part of the customs authorities themselves which could not have been detected by an operator acting in good faith within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

(37) The Commission is also of the opinion that the circumstances of the case do not support the position that the remission of duties under Article 239 of Regulation (EEC) No 2913/92 would be justified either.

(38) It is therefore justified to proceed to post-clearance entry of import duties in the accounts and not to grant remission of import duties,

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of EUR XXXXXX which were the subject of Belgium's request of 12 August 2002 shall be entered in the accounts.

Article 2

Remission of the import duties in the sum of EUR XXXX which were the subject of Belgium's request of 12 August 2002 is not justified.

Article 3

This decision is addressed to the Kingdom of Belgium.

Done at Brussels, 24-4-2007

For the Commission
László KOVÁCS
Member of the Commission