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COMMISSION DECISION

of 1.8.2018

**modifying Commission Decision C(2010)2858 final of 6 May 2010 as modified by
Commission's Decision C(2016)95 final of 20 January 2016 and finding that the import
duties shall be entered in the accounts and remitted in a particular case**

(REC 07/07(REV2))

(only the French and Dutch texts are authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 establishing the Union Customs Code, and in particular Article 123(2) thereof,

Whereas:

- (1) For the time of the facts and of the procedure leading to Decision C(2010)2858, the substantive provisions of Council Regulation (EEC) No 2913/92 establishing a Community Customs Code are still to be applied.
- (2) By letter of 14 December 2007, received by the Commission on 18 December 2007, Belgium asked the Commission to decide whether waiving post-clearance entry of import duties was justified under Article 220(2)(b) of Regulation (EEC) No 2913/92 and, in the alternative, whether the remission of those duties was justified under Article 239 of the same Regulation, in a particular case.
- (3) Between 22 June 1998 and 8 November 1999 the applicant ("the Belgian company"), through its customs agent, lodged with the Antwerp Customs Office (Belgium) 116 import declarations for bananas from Ecuador for the release for free circulation.
- (4) The import declarations were supported by 221 import licences, apparently issued by the Kingdom of Spain, which allowed bananas originating in non-ACP third countries to be imported into the European Community as part of a tariff quota with payment of a reduced customs duty of EUR 75 per tonne, under Council Regulation (EEC) No 404/93¹, as amended by Council Regulation (EC) No 3290/94², and Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Regulation No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32), for the period beginning 1 January 1999³.
- (5) At the time of release for free circulation of fresh bananas originating in Ecuador, the applicant presented import licences which had apparently been issued by the Spanish authorities. The licences allowed bananas to be imported into the European

¹ OJ L 47, 25.02.1993, p. 1.

² OJ L 349, 31.12.1994, p. 105.

³ OJ L 293, 31.10.1998, p.32.

Community, under part of a tariff quota with payment of a reduced customs duty of EUR 75 per tonne.

- (6) The Belgian customs authorities accepted the declarations and granted favourable tariff treatment.
- (7) On the basis of Article 13 of Commission Regulation (EEC) 1442/93 of 10 June 1993⁴, laying down procedures for applying the system for importing bananas into the Community, for imports carried out before 1 January 1999 and on the basis of Article 21 of Commission Regulation (EEC) n° 2362/98 of 28 October 1998 laying down rules for the application of Council Regulation (EEC) n° 404/93 for importing bananas into the Community for the imports carried out as from 1 January 1999, the rights arising from the import licences could be transferred for only one assignee. In accordance with Article 21(2) second subparagraph of Regulation 2362/98, the transfer of rights from newcomers to traditional operators was not permitted. Prior to 1 January 1999, the tariff quota was distributed amongst three categories of operators (A, B and C); an operator A or B obtained certificates on the basis of the average quantities of bananas that it had marketed during the last three years. The applicant was a category A operator. Under Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community, from 1 January 1999 the quota was shared between "traditional operators" and "newcomers". A traditional operator obtained licences on the basis of the quantities actually imported during the reference period, which was 1994-96 for imports to be carried out in 1999. The applicant was a "traditional operator".
- (8) The applicant obtained these certificates from two Spanish companies established in Spain, via a Portuguese tradesman established in Lisbon. For the imports carried out between 22 June 1998 and 31 December 1998, the applicant appeared as an assignee on the submitted certificates, the transferors being various Spanish companies belonging to category B.
- (9) As regards the period from 1 January 1999 to 8 November 1999, 108 licences were involved, all presented by the applicant to the Antwerp Customs Office. The majority of the licences (95 licences) belonged to "newcomers" within the meaning of Article 7 of Regulation 2362/98 and a minority (13 licences) belonged to "traditional operators".
- (10) Since the imports carried out in 1998 in this case were comparable in fact and law to those which have been dealt with in decision REC 06/07, the Belgian authorities were authorised to decide themselves what to do about these imports. The Belgian authorities were informed of this interpretation in a letter from the Commission dated 13 April 2010, in which the part of this case that involved the 1998 imports was referred back to these authorities.
- (11) Accordingly, the present decision concerns only the request for non-recovery and, in the alternative, the remission of the import duties relating to the imports carried out in 1999.
- (12) For the imports under dispute carried out in from 1 January 1999 to 8 November 1999, the applicant did not appear on the certificates, because it only paid for their use but was not an assignee. The customs declarations were made by the applicant's customs

⁴ OJ L 142, 12.6.1993, p.6.

agent and there was no evidence that the customs clearance was done on behalf of the holder of the certificates. The holder was only listed as consignee but not as a declarant.

- (13) Investigations conducted by the Member States and coordinated by the Commission found that forged import licences had been presented for release for free circulation in several Member States, including Belgium. This also was the case for the certificates submitted by the applicant's customs agent at the time of the imports in question (1 January 1999 to 8 November 1999).
- (14) By letter of 1 February 2000, the European Anti-Fraud Office (OLAF) informed the Belgian customs authorities that forged Spanish import licences, bearing forged stamps from the Spanish authority responsible for the issue of those documents, had been used to import bananas into the Community. In the course of an investigation the customs authorities discovered that the import licences, including the 108 licences corresponding to the period between 1 January 1999 and 8 November 1999, presented to Antwerp customs were forged Spanish licences.
- (15) In the case under consideration, granting favourable tariff treatment was subject to the presentation of import licences. However, the Spanish authorities stated that they had not issued the licences. The licences were therefore forged.
- (16) Insofar as the products imported into Belgium could not consequently benefit from the preferential tariff treatment, the relevant customs office initiated proceedings for the recovery of the import duties from the applicant and the customs agent, including of the EUR xxx corresponding to the period between 1 January 1999 and 8 November 1999, an amount for which the interested parties were asking not to be entered subsequently in the accounts and, alternatively, to be remitted.
- (17) The interested parties (the customs agent and the applicant) challenged the recovery of post-clearance customs duties. Belgian customs were of the opinion that the request for waiver of post-clearance recovery and for remission of customs duties should be granted.
- (18) By letter of 14 December 2007 received by the Commission on 18 December 2007, the Belgian customs and excise authority transmitted the file for decision to the Commission.
- (19) By its Decision C(2010)2858 of 6 May 2010 ("Decision C(2010)2858"), the Commission authorised post-clearance entry in the accounts of import duties (Article 1(1) of the Decision) and remission of duties in the case of one person liable – the customs agent, for the amount of EUR xxx (Article 1(2) of the Decision), but not in the particular case of another person liable, namely the applicant (Article 1(3) of the Decision), for the amount of EUR xxx.
- (20) The applicant, supported by the Kingdom of Belgium, brought an action lodged at the Registry of the General Court of the European Union ("the General Court") on 11 August 2010 claiming that the General Court should annul Article 1, paragraphs (1) and (3) of Decision C(2010)2858.
- (21) By Judgment in case T-324/10 of 19 March 2013, the General Court annulled Article 1(3) of Commission Decision C(2010)2858 and dismissed the action as to the remainder.
- (22) Following this partial annulment of its Decision C(2010)2858, the Commission had to adopt a new decision in the light of the judgment of the Court in Case T-324/10.

- (23) Following the adoption of the General Court’s judgment in case T-324/10, the Commission asked on 16 September 2013 for additional information from the Belgian customs authorities on the amounts corresponding to newcomers' and to traditional operators' licences, respectively, used by the applicant in 1999.
- (24) Given that the answer from the Belgian authorities dated 14 January 2014 did not contain the requested information, the Commission sent on 24 January 2014 a subsequent demand for the additional information previously requested to be provided.
- (25) The applicant reacted by appealing to the General Court – Cases T-603/13 and T-171/14 – asking for the annulment of the Commission’s letters of 16 September 13 and 24 January 2014 informing the applicant of the continued suspension of the time-limit provided for by Article 907 of Commission Regulation (EEC) No 2454/93 (OJ 1993 L 253, p. 1) for the taking of a decision on the remission of import duties on bananas from Ecuador, in the context of the review of the file pursuant to the judgment of the General Court of 19 March 2013 in Case T-324/10 xxx (Ref REC 07/07). The Commission has pleaded for the inadmissibility of both applications. The General Court in its decisions of 24 June 2014 and of 26 November 2014 in the two above-mentioned cases dismissed both actions (T-603/13 and T-171/14) .
- (26) The Commission has received the reply from the Belgian customs authorities on those amounts (corresponding to newcomers' and to traditional operators' licences, respectively, used by the applicant in 1999) on 18 February 2015.
- (27) Pursuant to Article 266 of the Treaty on the Functioning of the EU, the Commission had to adopt a new decision under Article 239 of the Customs Code.
- (28) The Commission has adopted the new decision C(2016)95-final on 20.01.2016. In this decision, the Commission found that the conditions for remission of the import duties in the sum of EUR xxx corresponding to traditional licences covering the period between 1 January 1999 and 8 November 1999, for traditional operators' licences used by the applicant on the basis of Article 239 of Regulation (EEC) n° 2913/92 are met. At the same time, the Commission found that the applicant, who is a “traditional operator”, by using rights from "newcomers" has not respected the prohibition stipulated in Article 21(2) second subparagraph of Regulation 2362/98 and that, on the basis of Article 239 of Regulation (EEC) n° 2913/92, there is no justification for the remission of the duties in the sum of EUR xxx related to newcomers’ licences used by the applicant and covering the period between 1 January 1999 and 8 November 1999.
- (29) The Commission, thus, decided that there is no justification for the remission of the duties in value of EUR xxx corresponding to newcomers’ licences (95 licences), calculated taking into account the additional information provided by the Belgian authorities by their letter dated 18 February 2015.
- (30) Commission Decision No. C(2016)95-final adopted on 20 January 2016 was subject to an action for annulment before the General Court under case No. T-125/16.
- (31) With its judgement of 11 December 2017, the General Court annulled the part of the Commission Decision C(2016)95-final of 20 January 2016 in which the Commission found that there is no justification for the remission of the duties in value of EUR xxx corresponding to newcomers’ licences (95 licences) on the consideration that the decision was adopted by the Commission outside “a reasonable period”.
- (32) The present decision by the Commission has to implement the annulment of the mentioned part of Commission Decision C(2016) 95-final of 20 January 2016 finding that post-clearance entry in the accounts of import duties is justified and that remission

of those duties is justified with regard to a debtor and is in part justified in the particular case of another debtor but in another part not justified with regard to that particular debtor, and modifying Commission Decision C(2010)2858 of 6 May 2010. Following the General Court's decision, the remission of the import duties in the sum of EUR xxx corresponding to newcomers' licences, requested by Belgium on 14 December 2007, is now also justified with regard to the Belgian company, given the late adoption of Commission Decision C(2016)95-final.

- (33) However, the General Court did not contest the correctness of the Commission's substantial observations underlying the annulled decision and proceeded with the annulment based exclusively on a formal motivation. Therefore, national customs authorities are not to remit themselves import duties in cases involving comparable issues of fact and of law, but have to submit/resubmit them to the Commission, as it is only up to the Commission to judge on the length of its own procedures.
- (34) Article 1, paragraph (2) of C(2010)2858 of 6 May 2010 has to remain unaltered as it was neither challenged nor annulled by the General Court's judgment in case T-125/16, whereas Article 1 paragraph (3) has to foresee the remission of the whole amount of import duties under this decision for the Belgian company,

HAS ADOPTED THIS DECISION:

Article 1

Article 1 of Decision C(2010)2858 of 6 May 2010 is hereby replaced by the following:

1. The import duties in the sum of EUR xxx which were the subject of Belgium's request of 14 December 2007 shall be entered in the accounts.
2. Remission of the import duties in the sum of EUR xxx requested by Belgium on 14 December 2007, is justified with regard to the customs agent.
3. Remission of the import duties in the sum of EUR xxx requested by Belgium on 14 December 2007, is justified with regard to the Belgian company.

Article 2

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 1.8.2018

For the Commission
Pierre MOSCOVICI
Member of the Commission