EUROPEAN COMMISSION

Brussels, 6-5-2010
C(2010)2858

COMMISSION DECISION

Of 6-5-2010

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 but is not justified in the particular case of another debtor

(REC 07/07)

(Only the French and Dutch texts are authentic)

COMMISSION DECISION

Of 6-5-2010

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 but is not justified in the particular case of another debtor

(REC 07/07)

(Only the French and Dutch texts are authentic)

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code[1], and in particular Articles 220 and 239 thereof,

Whereas:

(1) 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.

(2) The Belgian authorities sent the file to the Commission for a decision in accordance with the third indent of Article 871(1) and the third indent of Article 905(1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993, laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code[2], given that the amount in question was more than €500 000.

(3) Under Articles 871(2) and 905(2), the file is not sent where the Commission has already adopted a decision in a case involving comparable issues of fact and law or where the Commission is already considering a case involving comparable issues of fact and of law.

---

1 OJ L 302, 19.10.1992, p. 1.
2 OJ L 253, 11/10/1993, p. 1.

(4) On 14 December 2007, Belgium also sent the Commission a file part of which involved a case comparable in fact and law. The case in question concerned imports of the same product dating from 1998 by the same operators with the same characteristics as those involved in this case. The case was registered as REC 06/07. In its decision of 8 April 2010, the Commission took the view that post-clearance entry of import duties and remission of those duties were justified. In paragraph 49 of this decision, the Commission specified what should be understood by cases comparable in fact and law.

(5) Since the imports carried out in 1998 in this case are comparable in fact and law to those with which decision REC 06/07 is concerned, 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.

(6) Accordingly, this 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, which took place in the following circumstances.

(7) Between 1 January and 8 November 1999 a Belgian customs agent submitted to the Belgian customs authorities declarations for release for free circulation of fresh bananas originating in Ecuador. The customs agent was acting as an indirect representative of a Belgian company.

(8) At the time, imports into the Community of bananas originating in non-ACP third countries, and in particular Ecuador, qualified for favourable tariff treatment under the tariff quota provided for in Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas[3]. Products covered by import licences issued by the authorities of a Member State in accordance with Article 17 of the version of Regulation (EEC) No 404/93 in force at the time were eligible for favourable tariff treatment on release for free circulation, within the limits of the tariff quota concerned.

(9) Before 1 January 1999 the tariff quota was divided among three categories of operators (A, B and C); category A and B operators obtained licences on the basis of the average quantities of bananas that they had marketed over the three previous years. Since 1 January 1999, the distinction between A, B and C operators has been discontinued and the quota has been 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 Belgian company for which the customs agent was acting was a traditional operator.

(10) Under Article 21 of Commission Regulation (EEC) 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[4]; the Regulation also lays down certain rules and prohibitions concerning transfers between operators of

---

3 OJ L 47, 25.02.1993, p. 1.

4 OJ L 293, 31.10.1998, p. 32.

different categories. In particular, rights cannot be transferred from newcomers to traditional operators.

(11) When the goods were released for free circulation, the customs agent presented import licences which had apparently been issued by the Spanish authorities. The Belgian company had obtained the licences from two Spanish companies, through a Portuguese trader (employed by a Portuguese company in Lisbon). For the imports in question, the Belgian company did not appear on the licences because it had simply purchased the use thereof but was not a transferee. The majority of these licences were supposed to belong to newcomers and a minority to traditional operators.

(12) The Belgian customs authorities accepted the declarations and granted favourable tariff treatment.

(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 the licences presented by the customs agent for the imports in question.

(14) Since the imported goods were not therefore eligible for favourable tariff treatment, the Belgian customs authorities initiated proceedings for the recovery of the import duties owed, totalling EUR XXXXX, from the customs agent and the Belgian company ("the persons concerned"). This is the amount in respect of which the persons concerned have requested waiver of entry in the accounts and, in the alternative, remission.

(15) In support of the request made by the Belgian authorities, the firms stated, in accordance with Articles 871(3) and 905(3) of Regulation (EEC) No 2454/93, that they had seen the dossier submitted to the Commission by the Belgian authorities and made some comments.

(16) By letter of 5 May 2008, the Commission asked the Belgian authorities to supply additional information. The Belgian authorities replied by letter of 8 September 2008, received by the Commission on 9 September 2008. Examination of the request was therefore suspended between 6 May 2008 and 9 September 2008.

(17) By letters of 18 November 2008, 26 November 2008 and 15 January 2009, the Commission asked the Belgian authorities to supply additional information. This information was sent by letter of 22 January 2009, received by the Commission on 30 January 2009 and by letter of 5 January 2010, received by the Commission on the same day. Examination of the request was therefore again suspended between 19 November 2008 and 5 January 2010.

(18) By letter of 8 January 2010, received by the persons concerned on 12 January 2010, the Commission notified the persons concerned of its intention to withhold approval and explained the reasons for this.

(19) By letter of 8 February 2010, received by the Commission on the same date, the persons concerned commented on the Commission’s objections.

(20) 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.

(21) By letter of 4 March 2010, the Commission again asked the Belgian authorities for additional information. This information was provided by letter dated 23 March 2010, received by the Commission on 29 March 2010. Examination of the request was therefore suspended again between 05 March 2010 and 29 March 2010.

(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 to examine the case on 12 April 2010 within the framework of the Customs Code Committee - Customs Debt and Guarantees Section.

(23) The file sets out the following arguments suggesting that waiver of entry in the accounts or remission are justified.

- It was not possible for the persons concerned to verify whether the operators to which the licences were issued by the Member States were in fact registered operators, which they had to be to qualify for the scheme in question, or whether the licences and the stamps which they bore were authentic.

- Moreover, it was not possible for the national authorities to verify these facts conclusively, and the Community authorities had failed to carry out verification.

- The persons concerned also put forward a number of arguments concerning the Spanish authorities: that they had not taken the necessary precautions before issuing the licences; that there were suspicions regarding the involvement of a Spanish official in the fraud. Lastly, they argue that the Spanish authorities had not informed the Commission that the stamp used to validate the licences had been changed in the period 1995/1999 and the words "Dirección General de Comercio Exterior" had been replaced by "Secretariá General de Comercio Exterior".

- The persons concerned also express doubts as to whether the licences actually were forged and point out that if their doubts proved founded there would be no customs debt.

(24) Firstly, the last argument calls into question the very existence of the customs debt. Contesting the debt in this way falls outside the scope of the procedure for waiving post-clearance entry in the accounts of duties under Article 220(2)(b) and the procedure for remission or repayment under Article 239 of Regulation (EEC) No 2913/92. It is for the Member States, not the Commission, to determine whether a debt has been incurred and, if so, the amount of the debt. Furthermore, the Court of Justice has consistently ruled[5] that the purpose of Commission decisions under the procedures for waiving post-clearance entry in the accounts or remission/repayment on grounds of equity is not to determine whether a customs debt has been incurred or the size of the debt. An operator which does not recognise the existence of a customs debt

[5] Case C-413/96 *Skatteministeriet* v *Sportgoods A*/S [1998] ECR I-05285, Case T-195/97 *Kia Motors Nederland BV and Broekman Motorships* BV v *Commission* [1998] ECR II-02907, and Case T-205/99 *Hyper Srl* v *Commission* [2002] ECR II-03141.

must challenge the decision establishing that debt before the national courts in accordance with Article 243 of Regulation (EEC) No 2913/92.

I - Examination of the request under Article 220(2)(b) of Regulation (EEC) No 2913/92

(25) 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 duty legally owed failed to be entered in the accounts as the 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.

A - Condition concerning an error on the part of the customs authorities

(26) In the case under consideration, granting favourable tariff treatment was subject to the presentation of import licences. However, the Spanish authorities stated in their letter of 21 August 2000 that they had not issued the licences in question. The licences were therefore forged.

(27) Since the licences were forged and had been neither issued nor stamped by the Spanish authorities, it cannot be said that the Spanish authorities had committed an error since they had had absolutely no part in drawing up the licences.

(28) As to the hypothesis that a Spanish official had been involved in the fraud, this was raised at the very beginning of the investigation and was subsequently dropped following correspondence between the European Anti-Fraud Office (OLAF) and the Spanish judicial authorities.

(29) The fact that, according to the persons concerned, it was not possible for the economic operators to check whether the operators to whom the licences had been issued by the Member States really were registered operators or whether the licences and the stamps they bore were authentic does not constitute an error on the part of the authorities.

(30) The fact that, according to the persons concerned, it was impossible for the national authorities to verify the facts does not constitute an error on the part of the authorities within the meaning of Article 220(2)(b) of the Customs Code either; indeed, this argument seems to be contesting the legislation itself.

(31) Lastly, the alleged failure on the part of the Community authorities to perform checks does not constitute such an error either; indeed, this lack of verification does not in itself appear to have led to the customs debt being incurred in connection with the use of forged licences.

(32) The Commission does not therefore consider that there was any error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92 in this case.

B - Conditions regarding the good faith of the interested party and compliance with the rules in force as regards customs declarations

(33) Since there was no error on the part of the competent authorities, there is no need to check whether the other two conditions under Article 220(2)(b) of Regulation (EEC) No 2913/92 are fulfilled.

(34) Accordingly, the entry in the accounts of the amount of the duties is justified.

II – Examination of the request under Article 239 of Regulation (EEC) No 2913/92

(35) Under 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.

(36) The Court of Justice of the European Union has ruled that this provision represents a general principle of equity and that the existence of a special situation is established where it is clear from the circumstances of the case that the person liable is in an exceptional situation as compared with other operators engaged in the same business and that, in the absence of such circumstances, he would not have suffered the disadvantage caused by the post-clearance entry in the accounts of customs duties[6].

A. The condition concerning the existence of a special situation

(37) It is necessary to check whether the situation of the persons concerned should be considered exceptional in comparison with that of other operators engaged in the same business.

(38) In the context of preferential arrangements, according to the relevant rules (Article 904 of Regulation (EEC) No 2454/93) and settled case-law[7], the presentation, for the purpose of obtaining preferential tariff treatment of goods declared for free circulation, of documents subsequently found to be forged should not be considered a special situation justifying remission of import duties even where such documents were presented in good faith. By analogy, the presentation of forged import licences for the purpose of obtaining favourable tariff treatment under a tariff quota cannot be considered to constitute a special situation either.

(39) In the present case, however, the persons concerned do not merely claim that at the time of the imports they presented forged documents in good faith. The main grounds for their requests for remission are the alleged failings on the part of the Commission in particular in monitoring the application of the tariff quota for banana imports.

(40) Under Article 211 of the Treaty establishing the European Community, which was applicable at the time[8], and in accordance with the principle of sound administration, the Commission is required to ensure the application of measures adopted by the European institutions, which in this particular case means ensuring that the banana tariff import quota is correctly applied and is not exceeded[9].

(41) Under Article 29 of Regulation (EEC) No 404/93 and Article 27 of Regulation (EEC) No 2362/98, Member States are required to provide the Commission with certain information concerning banana imports and the use of import licences.

(42) Thus, under Article 21 of Regulation (EEC) No 1442/93, Member States had to forward to the Commission every week or month, depending on the case, a set of data on the quantities of bananas released for free circulation with an import licence issued under the banana tariff quota. Under Article 17 of the same Regulation, they had to

---

6 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 and Others* v *Commission* [2001] ECR II-01337.

7 Cases C-98/83 and C-230/83 *Van Gend & Loos and Wim Bosboom* v *Commission* [1984] ECR 03763, Case 827/79 *Amministrazione delle finanze dello Stato* v *Entreprise Ciro Acampora* [1980] ECR 03731, Case C-97/95 *Pascoal & Filhos Ld*ª v *Fazenda Pública* [1997] ECR I-04209, Case T-50/96 *Primex et al.* v Commission [1998] ECR II-03773.

8 This Article was replaced, in substance, by Article 17 of the Treaty on European Union

9 Case T-50/96 *Primex*, as cited above.

notify the Commission of the quantities for which the licences issued had not been used. For its part, the Commission set the total quantity for which licences could be issued.

(43) The Member States had to inform the Commission every month of the total volume and value of bananas released for free circulation, broken down by country of origin (Article 27(b) of Regulation (EC) No 2362/98). They also had to inform the Commission every quarter of the quantities for which they had issued import licences, the quantities for which those licences had been used and returned to the issuing authorities, and the quantities for which the licences had not been used (Article 27(c) of Regulation (EC) No 2362/98). The Member States also had to provide on a quarterly basis certain data on non-quota banana imports.

(44) Recital 15 of Regulation (EC) No 2362/98 shows that one of the purposes of compiling these data was the administration of the tariff quota.

(45) As the Commission knew the quantity of bananas that could be imported into the Union as a whole under the tariff quota, it should have been able to establish, on the basis of the information provided by the Member States, whether the total volume of bananas released for free circulation under the tariff quota exceeded the total volume of bananas for which import licences had been issued.

(46) However, the Court of Auditors Special Report No 7/2002[10] shows that large quantities of bananas had been released for free circulation in the Community on presentation of forged licences, without the Commission or the Member States noticing that the quota had been exceeded.

(47) It is not possible to establish whether this was a result of a failure by national authorities to submit relevant information or a failing in the Commission's management of the quota.

(48) It is true that the Community law does not normally protect the expectations of a person liable for payment as to the validity of an import licence which is found to have been forged when subsequently checked, since such a situation forms part of commercial risk. However, in this case the forgeries may have resulted in large quantities of non-tariff-quota bananas being imported at a reduced tariff because of the situation described above.

(49) It should also be noted that the Spanish authorities did not take all the necessary precautions regarding the issue of licences. In particular, they did not notify the changes made to the model of the stamp used by the authorities responsible for the issue of import licences.

(50) In these circumstances, the forgeries detected, which were, moreover, highly professional, exceeded the normal commercial risk which must be borne by the applicants.

---

[10] OJ C 294, 28.12.2002, p. 1.

(51) In view of the above, the Commission is of the opinion that the circumstances of the case must be considered to constitute a special situation covered by Article 239 of Regulation (EEC) No 2913/92.

B. The condition concerning the absence of deception or obvious negligence

(52) The Court of Justice of the European Union[11] has consistently taken the view that, when examining whether there has been deception or obvious negligence, account must be taken, in particular, of the complexity of the legislation and the operator's experience and diligence.

(53) As the customs debt was incurred because of licence forgery and not an incorrect application of the legislation, the complexity or otherwise of the legislation need not be assessed.

(54) As regards the professional experience of the persons concerned, the Court of Justice has ruled[12] that it must be verified whether they are professionally engaged in an activity consisting essentially in import and export operations, and whether they already had some experience of trading in the goods in question, that is to say whether in the past they had carried out similar transactions on which customs duties had been correctly calculated.

(55) According to the Belgian authorities, the Belgian company is a major traditional trader, experienced in trading in and importing bananas and the customs agent is experienced in handling the formalities for banana imports.

(56) The Commission therefore considers that the persons concerned are experienced in the transactions concerned.

(57) As regards the firm's diligence, the person liable for payment may plead good faith if he can demonstrate that, during the period in which the transactions concerned took place, he took due care to ensure that all the conditions for favourable treatment were fulfilled.

(58) It would appear from the file that as of 1 January 1999, in view of the replacement of the distinction between A, B and C operators by a distinction between "traditional" operators and "newcomers" and given that traditional operators were no longer transferring their licences in order not to lose the right to obtain them in the future, the following arrangement was put in place to allow a trader who does not have a sufficient number of licences to benefit from a lower customs tariff under the tariff quota:

- a trader who is the owner of the bananas prior to importation, charges the value of the bananas to another operator who has a licence;

- the bananas are released for free circulation in the name of the owner of the licence who acts as the real importer when they are released for free circulation;

---

11 Case C-250/91 *Hewlett Packard* v *Directeur général des douanes* [1993] ECR I-01819.

12 Case C-250/91 *Hewlett Packard* [1993], as cited above.

- the bananas are then resold to the trader who owned them initially at a price that includes the cost of the use of the licence and clearance costs.

(59) It appears from the file that in 1999, the bananas were released for free circulation by the customs agent on the basis of the instructions given by the Belgian company; accordingly, the holder of the licence was indicated as consignee of the goods on the declaration of release for free circulation without the bananas having actually been sold to him. The amount owed in customs duty was nonetheless charged by the customs agent to the Belgian company.

(60) However, there is no trace in the file of contacts between the Belgian company and the companies that were supposed to be the holders of the licences, even though the goods cannot be released for free circulation without such contacts and the names of the licence holders appear on the declarations of release for free circulation, for which these companies may be held liable. If the Belgian company had contacted these firms, it would have been immediately apparent that they were not in fact aware of the sale of the use of the (forged) licences issued in their name.

(61) In fact, the arrangements made and the lack of contact with the companies indicated as holders of the forged licences show that the Belgian company concerned was ready to take certain risks to ensure that it was able to bring bananas into the EU market benefiting from the tariff quota.

(62) Moreover, it is apparent from the file that the negotiations concerning the sale of the import licences were conducted directly between the Belgian company and the Portuguese trader mentioned in paragraph 11 above.

(63) The payments by the Belgian company were all made, not to the employer of the trader in question, as might be expected, but directly into his personal account with a Portuguese bank in Lisbon.

(64) Furthermore, the Belgian company is unable to provide evidence that the licences that it was supposed to return to the Portuguese trader, mentioned in paragraphs 62 and 63, were in fact received by this person. However, the Belgian company was aware of the considerable value of these licences and knew that the holders of the licences would recover them after they had been used in order to secure the release of the guarantee that had been provided. It should therefore have shown some interest in this matter.

(65) Moreover, the purchase of the use of the licences was charged using pro forma invoices sent by fax by the two Spanish companies mentioned above. It transpires from the file that some of these pro forma invoices were sent by fax from unknown addresses or by unknown persons. The Commission doubts that it is standard trading practice to pay very large sums of money on the basis of pro forma invoices received by fax in such circumstances. However, there is nothing in the file to suggest that this raised the slightest concern on the part of the Belgian company. The company cannot be relieved of its own liability simply because it states that it trusted the Portuguese trader.

(66) Lastly, the fact that the Belgian company alerted the Commission in 2000 to irregularities that it observed regarding the import licences issued that year, has no bearing on the case at hand, which concerns imports dating from 1999.

(67) In light of the above, the Commission considers that for the imports in question, the Belgian company has not shown the diligence normally expected of an experienced operator and that, therefore, with regard to this company, the second condition in Article 239 of Regulation (EEC) No 2913/92 has not been fulfilled.

(68) However, it should be concluded, in light of the file, that the customs agent did not engage in any deception or obvious negligence and that, consequently, with regard to him, the second condition in Article 239 of Regulation (EEC) No 2913/92 has been fulfilled.

(69) It is therefore not justified to grant the remission of import duties requested to the Belgian company in question, but it is justified to grant the remission of these duties to the customs agent.

(70) Where special circumstances warrant repayment or remission, Article 908 of Regulation (EEC) No 2454/93 authorises the Commission to determine the conditions under which Member States may repay or remit duties in cases involving comparable issues of fact and of law.

(71) Cases comparable in fact and law to this one are repayment or remission requests lodged by customs agents within the legal time limits in respect of imports of bananas originating in non-ACP third countries carried out before 31 December 1999 for which the licences presented were supposed to have been issued by the Spanish authorities. The licences must not include contradictory remarks (particularly remarks such as those in case REC 08/07) There must have been no deception or obvious negligence on the part of the customs agents,

HAS ADOPTED THIS DECISION:

Article 1

1. The import duties in the sum of EUR XXXXX 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 XXXXX, 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 XXXXX, requested by Belgium on 14 December 2007, is not justified with regard to the Belgian company.

Article [2]

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 6-5-2010

For the Commission
Algirdas ŠEMETA
Member of the Commission