REM 07/2003

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 5-1-2004
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NOT FOR PUBLICATION

COMMISSION DECISION

Of 5-1-2004

finding that remission of import duties is not justified in a particular case

(Only the Dutch text is authentic)

(request submitted by the Netherlands)

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FR

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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 2700/2000,[2]

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 19933 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92,[3] as last amended by Regulation (EC) No 1335/2003,[4]

1 OJ L 302, 19.10.1992, p. 1.
2 OJ L 311, 12.12.2000, p. 17.
3 OJ L 253, 11.10.1993, p. 1.
4 OJ L 187, 26.7.2003, p. 16.

Whereas:

(1) By letter dated 22 April 1999, received by the Commission on 30 April 1999, the Netherlands asked the Commission to decide, under Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties,[5] as last amended by Regulation (EEC) No 1854/89,[6] and under Article 239 of Regulation (EEC) No 2913/92, whether repayment of duties was justified in the following circumstances.

(2) Under the second paragraph of Article 2 of Regulation (EC) No 1335/2003, the provisions of Article 1 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.[7]

(3) Between 1992 and 1994, a Dutch company placed 65 000 tonnes of maize under the inward processing procedure. The maize was for processing into glucose (main compensating product) and various secondary compensating products, namely residues from the manufacture of starch falling within Combined Nomenclature (CN) code 2303 10 11 and maize gluten feed falling within CN code 2303 10 19. The company possessed the necessary authorisations for the system of equivalent compensation and prior exportation.

(4) The main and secondary compensating products were exported (or placed under another customs arrangement) according to the standard yields within the time limits set.

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5 OJ L 175, 12.7.1979, p. 1.
6 OJ L 186, 30.6.1989, p. 1.
7 OJ L 134, 29.5.2003, p. 1.

(5) Checks carried out by the competent Dutch authorities in 1994 and 1995 revealed that the main compensating product exported by the company was not entirely obtained from maize but that some 75% had been derived from wheat obtained on the Community market. In the production of the main compensating product, an intermediate product derived from wheat (wheat starch slurry) had been mixed with an intermediate product derived from maize (maize starch slurry). The mixture had then been refined into glucose (the main compensating product). Whether manufactured from maize or from wheat, glucose falls within CN code 1702 30 99, the wording of which makes no distinction between the raw materials used.

(6) The competent Dutch authorities therefore concluded that only part of the main compensating product exported under the inward processing procedure could be considered as having been processed from maize and that the company had fallen short of its obligations under the inward processing procedure in respect of 48 400 tonnes of the goods placed under the procedure between 1992 and 1994.

(7) On 3 December 1996, the competent Dutch authorities therefore claimed the amount of the import duties from the company plus compensatory interest due under Article 62 of Commission Regulation (EEC) No 2228/91 laying down provisions for the implementation of Regulation (EEC) No 1999/85 on inward processing relief arrangements,[8] as last amended by Regulation (EEC) No 3709/92,[9] and Article 589 of the version of Regulation (EEC) No 2454/93 applicable at the time. The total amount claimed, which is now the subject of this remission application, amounts to XXXXX.

(8) In support of the application submitted by the Dutch authorities the company indicated that, in accordance with Article 905 of Regulation (EEC) No 2454/93, it had seen the dossier the authorities had sent to the Commission and had nothing to add.

(9) Having been informed, by letter dated 26 November 1999, of the Commission's intention to withhold approval of the request and of the grounds for its objections, the company set out its position on the Commission's objections in a letter of 23 December 1999.

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8 OJ L 210, 31.7.1991, p. 1.
9 OJ L 378, 21.12.1992, p. 6.

(10) By Decision C(2000) 485 final of 23 February 2000, the Commission found, first, that the application for remission was inadmissible in so far as it related to compensatory interest totalling XXXXXX; second, it found that the application was also inadmissible in so far as it related to duties on imports in the amount of XXXXX levied on imports effected prior to 3 December 1993; lastly, it refused to remit import duties in the sum of XXXXXX on the grounds that the company had shown obvious negligence.

(11) In its judgment in Case C-156/00, the Court of Justice of the European Communities upheld Commission decision C(2000) 485 final in so far as it found the remission request concerning compensatory interest to be inadmissible and found remission of import duties in the sum of XXXXXX to be unjustified. The Court did, however, annul the Commission decision in so far as it found the company's request for remission of import duties in the sum of XXXXX to be inadmissible; it did so on the grounds that the Commission is obliged to examine the application in question as it is and may not question the time periods within which the debt recovery procedure was instituted by the customs authorities.

(12) The Commission must follow up this partial annulment and review the applicability of Article 13(1) of Regulation No 1430/79 to the circumstances prior to 3 December 1993 in the light of the Court's judgment, the periods referred to in Articles 907 and 909 of Regulation (EEC) No 2454/93 running from the date of delivery of the judgment.

(13) By letter dated 26 May 2003, received by the firm the following day, the Commission notified the firm of its intention to refuse repayment and explained the grounds for its decision.

(14) By letter dated 10 June 2003, the company, through its lawyer, asked the Commission for a hearing.

(15) By letter dated 16 June 2003, the Commission informed the company that it could not accede to its request and again asked it to provide any information relevant to the case.

(16) By letter dated 26 June 2003, received by the Commission on the same date, the company stated its position on the Commission's objections. It argued that the debt had been incurred for failure to comply with the six-month time limit for exporting maize processed into glucose; that failure had, however, been established solely on the basis of its average annual use of maize and wheat, with no thorough verification of its actual operations. Since overstepping the time limit was the only failing on the part of the company - and a minor one at that - refusing to remit the customs debt would breach the principle of proportionality.

(17) The administrative procedure was therefore suspended in accordance with Article 907 of Regulation (EEC) No 2454/93 between 27 May and 27 June 2003.

(18) In accordance with Article 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 3 December 2003 within the framework of the Customs Code Committee - Section for Repayment.

(19) Article 13(1) of Regulation (EEC) No 1430/79, which applies to customs debts incurred before 1 January 1994, allows import duties to be repaid or remitted in special situations, other than those laid down in sections A to D of that Regulation, resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

(20) In view of the Court's judgment in Case C-156/00, the examination of the remission request now covers only the amount of duties represented by the customs debts incurred prior to 3 December 1993, a sum of XXXXXX.

(21) The Court of Justice of the European Communities has tended to the view that Article 13 of Regulation (EEC) No 1430/79 represents a general principle of equity designed to cover an exceptional situation in which an operator might find himself compared with other operators carrying out the same activity.

(22) In this case, it has been established that the company's practice was not in accordance with the regulations in force or the terms of its inward processing authorisation. Wheat could not be used as equivalent compensation under an inward processing authorisation relating to the processing of maize into glucose.

(23) Such a practice gave rise to a customs debt under Article 2(1)(d) of Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt,[10] as last amended by Regulation (EEC) No 4108/88,[11] owing to the irregular use of wheat obtained on the Community market in the manufacture of glucose exported under an inward processing authorisation.

(24) However, in this instance, other than in the case of the goods eligible for equivalent compensation under its inward processing authorisation, the company complied with the various rules applicable to the customs procedure concerned. Thus, all the maize imported under the inward processing procedure was processed into glucose and the firm met its obligations to export the main compensating product, namely glucose within the time limits laid down.

(25) Lastly, for several years, despite the large quantities of products processed, the competent customs authorities did not challenge the practice adopted by the company. That circumstance is such as to constitute an error on the part of those authorities.

(26) Consequently, the circumstances as a whole are such as to constitute a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79.

(27) However, such a special situation may only give rise to remission of import duties on condition that there was no deception or obvious negligence on the part of the company concerned.

(28) In this case, the dossier sent to the Commission by the Dutch authorities shows no deception on the part of the company. In particular, as it pointed out itself in a letter of 23 December 1999, the financial advantage which it obtained from the incorrect application of the inward processing arrangement, which far exceeded the normal financial advantage derived from the arrangement, is explained by price fluctuations. The report drafted on 19 July 1996 by the accounting service of the Dutch Ministry of Agriculture, Nature Management and Fisheries showed that the practice adopted by the company could equally have led to financial losses. At any rate, no competent authority has detected fraud on the part of the company.

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[10] OJ L 201, 22.7.1987, p.15.
[11] OJ L 361, 29.12.1988, p.2.

(29) However, the company has displayed obvious negligence in this case. It is a large enterprise with substantial professional experience in the field concerned. To judge by the application for remission which the Dutch authorities sent to the Commission on 22 April 1999, it is, or has been, involved in many arrangements, including customs arrangements, under the common agricultural policy. In view of the sums of money involved and its familiarity with customs procedures, such a company must be expected to show greater diligence than one with less experience.

(30) In this case, the inward processing authorisation which the company held was clear and referred only to maize as the product to be processed. Under Article 9 of Regulation (EEC) No 2228/91, where use is to be made of equivalent compensation, the equivalent goods must fall within the same eight-digit subheading of the CN code, be of the same commercial quality and have the same technical characteristics as the import goods. In this instance that was clearly not the case.

(31) The only exceptions provided for are listed exhaustively in Annex IV to Regulation (EEC) No 2228/91. The said Annex did not include the goods in question.

(32) The above Community Regulation was published in the Official Journal of the European Communities. The Court of Justice of the European Communities has consistently ruled that the Community provisions applicable are, as of their publication in the Official Journal of the European Communities, the only substantive law in the matter. All are deemed to know that law. A professional economic operator must therefore keep abreast of the Community law applicable to its operations by reading the relevant Official Journals.

(33) In view of the sums involved for the company and the fundamental importance of the equivalent compensation rules to the inward processing procedure, an experienced and normally diligent operator could not reasonably have overlooked the fact that it was not allowed under the terms of its inward processing authorisation to use wheat instead of maize to produce the glucose it exported.

(34) The fact that the manufacturing process in question, which involves refining intermediate products of maize and wheat together, is standard procedure in Community starch companies which use maize and wheat as raw material for producing glucose does not dispense the company from showing the diligence which experienced operators should show with regard to the Community legislation in force. The same applies to the argument that the exported glucose in this case falls within the same tariff heading whether it is obtained from maize or wheat.

(35) Even if the competent national authorities did have some doubts as to whether the practice followed meant that the company had incurred a customs debt, this has no bearing on the diligence which the company should have shown in the course of the operations in question, and anyway these doubts did not arise until after the operations which were subject to checks.

(36) With reference to the argument put forward by the company that the Commodity Board for Arable Products had confirmed, by letter of 29 June 1994, that equivalent compensation was possible between maize and wheat under the inward processing authorisation which the company held, it should be stated that that letter, which post-dated the operations in question and which was addressed to the national inspection authority, did not expressly state that the equivalent compensation covered wheat. It merely detailed the implementing arrangements for the inward processing authorisation for the "maize" component of glucose production.

(37) With reference to the argument put forward by the company that reports drafted in 1992 and 1993 by the inspection authorities explicitly stated that it had complied with its obligations under the inward processing authorisation, it has to be pointed out that those checks only ensured that the quantities of products imported for processing correlated with the quantities of compensating products exported, and that the time limit set for re-export had been complied with. The company cannot conclude from those reports that the inspection authority expressly considered the use of equivalent compensation between maize and wheat to be correct in this case.

(38) As for the company's argument, put forward in its letter of 26 June 2003, that it had failed only to comply with the time limit for re-export of compensating products, in actual fact the only failing detected was the use of wheat in equivalent compensation under an inward processing authorisation for the processing of maize into glucose, a practice which has been shown to be irregular.

(39) The company's argument that duties should be remitted because its only failing concerned its non-compliance with time limits for re-export is therefore untenable.

(40) As has been shown, the company's failing concerns one of the fundamental principles of equivalent compensation; accordingly, this failing cannot be considered minor.

(41) The remission of import duties requested is not therefore justified,

HAS ADOPTED THIS DECISION:

Article 1

The remission of import duties in the sum of XXXXXX requested by the Netherlands on 22 April 1999 is found not to be justified.

Article 2

This decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 5-1-2004

For the Commission
Frits Bolkestein
Member of the Commission