

## COMMISSION DECISION

**C(2014) 2363**

**of 14/04/2014**

**finding that the remission of import duties under Article 236 in connection with Article 220 (2) (b) of the Community Customs Code (Regulation (EEC) No 2913/92) is justified and that remission for import duties for another amount is not justified in a particular case (REM 02/2013)**

(only the Spanish text is 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<sup>1</sup>,

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<sup>2</sup>, establishing the Community Customs Code,

Whereas:

- (1) By letter of 16 January 2013, received by the Commission on 21 January 2013, the Spanish authorities asked the Commission to decide whether remission of import duties was justified under Article 236 in connection with Article 220 (2) (b) of Council Regulation (EEC) No 2913/92 and Article 871 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) Between 2007 and 2009 two firms (hereafter referred to as the "debtor") of a group established in Spain, imported certain processed tuna products (canned tuna and frozen tuna loins) classified under the TARIC code 1604.14.16.45 allegedly originating in El Salvador, to the EU.
- (3) At the time of the facts, the rules and conditions for applying a scheme of generalised tariff preferences for those products originating in El Salvador was Council Regulation (EC) No 980/2005 of 27 June 2005 and its successor Council Regulation (EEC) 732/2008, which provided for suspension of Common Customs Tariff ad valorem duties instead of the regular 24% duty<sup>3</sup>.
- (4) In the case under consideration, the debtor presented Form A certificates of origin issued by the relevant authorities of El Salvador in support of its customs

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<sup>1</sup> OJ L 302, 19.10.1992 p. 1.

<sup>2</sup> OJ L 253, 11.10.1993, p.1.

<sup>3</sup> Or reduced duty rates for imports in El Salvador of tuna processed from the catches of Panamanian vessels for which Form A certificates had been issued in application of Council Regulation 732/2008

declarations for release for free circulation. The Spanish customs authorities accepted the declarations and granted preferential tariff treatment.

- (5) An administrative cooperation mission comprising representatives of the European Anti-Fraud Office (OLAF) and some Member States visited in El Salvador from 8 to 20 November 2009 to investigate into the conditions under which the Salvadorian authorities issued Form A certificates.
- (6) The joint mission found that significant quantities of tuna imported from El Salvador to the EU under GSP certificates of origin Form A had been unduly issued and therefore the tuna caught did not qualify under the GSP preferential rules of origin.
- (7) The irregularities concerned tuna supplies for further processing in El Salvador under cumulation provisions and covered: a) the use of non-preferential certificates of Community origin issued by the Chambers of Commerce of Spain and France; b) EUR.1 certificates stamped by the Ivory Coast customs, indicating usage of origin rules as established in the framework of the ACP-EEC preferential trade relations, certifying as origin Ivory Coast and indicating El Salvador as the destination country; c) EUR.1 certificates stamped by Seychelles customs, indicating usage of origin rules as established in the framework of the ACP-EEC agreement, certifying Community origin and indicating El Salvador as the destination country and d) Form A certificates of origin issued by the Panamanian authorities.
- (8) In addition, the obligation in Article 68 (2) of Commission Regulation (EEC) 2454/93 at the time of the facts, according to which 75% at least of the crew members had to be nationals of the beneficiary country or Member States, required for GSP was not fulfilled.
- (9) Furthermore, two of the fishing vessels used in the operations sailed under two flags (of El Salvador and the Seychelles), thus contravening the requirement of a single nationality<sup>4</sup> of a vessel that is necessary for preferential treatment of the fish under the GSP. Those vessels must be regarded as vessels without nationality and therefore their catches cannot be considered as originating in El Salvador.
- (10) In view of the findings of the joint mission, it was established that the tuna catches which were under one or more than one of the situations described above, were subject to the general duty rate for imports of tuna into the EU from third countries of 24% and not to the preferential duty rate provided for under the GSP for products originating in El Salvador.
- (11) In accordance with the OLAF report in 2010, the Spanish customs authorities initiated proceedings for the post-clearance recovery of import duties. This specific submission is made for remission of a total amount of EUR XXXX in regular import duties.
- (12) The Spanish customs authorities submitted the file “ex officio” to the Commission on 16 January 2013 in accordance with the last paragraph of Article 236(2) in combination with Article 220(2) (b) of Council Regulation 2913/92. Article 236(2) requires customs authorities to remit or repay on their own initiative if they discover

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<sup>4</sup> According to the United Nations Convention of 10 December 1982 on the Law of the Sea, a ship which sails under two or more flags and uses those according to convenience are assimilated to vessels without nationality. Under the European Union scheme of preferential origin, Article 68 (2) of Regulation 2454/93, fish caught by ships considered to be without nationality do not qualify for preferential origin.

that any of the situations in Article 236(1) exist, and of Articles 869 and 871 of Commission Regulation 2454/93, which reserve to the Commission the right to decide in cases where a Community investigation has being carried out.

- (13) The debtor agreed that the conditions of the above mentioned Customs Code provisions were met and shared the reasoning used by the Spanish Customs authorities in their submission to the Commission.
- (14) At the same time the debtor considered that Spain should not have sent the operator's application to the Commission on the grounds that a national Court took a positive stand in 2012 with regard to the appeal for the non-recovery or remission of duties for part of the amount the Spanish authorities intended to collect from a company of the same group. The debtor has stated during the procedure that the file should be sent back for decision to the national authorities or that a reference for a preliminary ruling should be or should have been referred to the Court of Justice of the European Union.
- (15) However, the fact that a national Court had already decided with regard to a portion of the customs duties to be recovered from the debtor following the OLAF investigation, cannot deprive the Commission of its duty to issue a decision in a case which falls under the Commission's own competence.
- (16) Thus, the Commission accepted the submission for remission of import duties "ex-officio" made by the Spanish Customs authorities.
- (17) By letter dated 13 February 2013 the Commission requested additional information from the Spanish authorities. The Spanish authorities provided the information by letter dated 13 May 2013, received by the Commission on 15 May 2013. The administrative procedure was therefore suspended, in accordance with Article 873 of Regulation (EEC) No 2454/93, between 14 February and 15 May 2013. The Commission requested additional information by letter of 16 July 2013. The Spanish authorities replied by letter of 4 September received by the Commission on 9 September 2013. The Commission asked again for additional information by letter of 8 October 2013 and obtained a reply by letter of the Spanish authorities on 30 October 2013, received by the Commission on 5 November 2013. The administrative procedure was therefore suspended between 17 July 2013 and 9 September 2013 and again between 9 October and 5 November 2013 in accordance with Article 873 of Regulation (CEE) n° 2454/93 of Regulation (EEC) No 2454/93.
- (18) In all those cases, the debtor confirmed that it had seen that letter from the Commission and made comments to the replies which the Spanish authorities proposed to submit.
- (19) In accordance with Article 873 of Regulation (EEC) No 2454/93, the Commission asked the debtor by letter dated 10 December 2013, received by the firm on 19 December 2013 to comment on any issues of fact or law which it feels might lead to the refusal of the application.
- (20) In its letter of reply to the Commission of 9 January 2014, received on 20 January 2014 the debtor expressed its opinion on the Commission's objections and claimed that there was an error on the part of the Salvadorian authorities. It also underlined that it acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (21) The debtor expressed its criticism to the interpretation made by the Commission on double flagging, signalled the difficulty to comply with the crew requirement

criterion laid down by article 68(2) of Regulation (EEC) 2454/93 applicable at the time of the facts and disputed the value of the OLAF's investigation and report.

- (22) Moreover, the debtor pointed out that the Commission had failed in providing the correct stamps to the Salvadorian authorities and in observing the principle of respect for the rights of the defence in so far as it did not provide the debtor with all the documents on which the Commission intended to base its decision.
- (23) In accordance with Article 873 of Regulation (EEC) No 2454/93, the nine-month period within which a decision has to be taken by the Commission was, therefore, extended by one month.
- (24) According to the request sent to the Commission by the Spanish authorities, remission of duties is justified because there was an error on the part of the Salvadorian authorities which misinterpreted and misapplied the rules for determining the origin of fishery products for GSP purposes, the certificates that OLAF found to be incorrect were issued on the basis of a correct presentation of the facts by the exporter and the error could not have been detected by the operator despite its professional experience.
- (25) In accordance with Article 873 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 17 February 2014 within the framework of the Customs Code Committee (Debts and Guarantees section) to consider the case.
- (26) Under Article 236 in connection with Article 220 (2) (b) of Council Regulation (EEC) No 2913/92 import duties shall be repaid in so far as it is established that the amount has been entered in the accounts contrary to Article 220 (2) of the Regulation.
- (27) According to Article 220 (2) (b) of Regulation (EEC) 2913/92, the issue of a certificate by the authorities of a third country, should it prove to be incorrect, shall constitute an error which could not reasonably have been detected by the person liable for payment, the latter for its part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (28) The circumstances of the case reveal that the Salvadorian authorities committed in all those situations an error as they issued incorrectly certificates of origin Form A without complying with the relevant Articles of Regulation 2454/93.
- (29) However, the fact that the customs authorities made an error is not in itself sufficient to prove that the error could not reasonably have been detected by the debtor.
- (30) Concerning the alleged error of the Commission in its duty to provide appropriate specimens of stamps to the Salvadorian authorities, even if that error had existed during some period, it would have been relevant only in case of forged certificates of origin. As the certificates were not forged, the allegation has no incidence in the recovery of the duties.
- (31) Contrary to the debtor's assertion, the Commission communicated its objections to the debtor in writing, provided a copy with all the documents on which it intended to base those objections before adopting a decision rejecting the application for remission, and allowed the debtor to express its views on those documents.

- (32) Consequently, no error can be imputed to the Commission for having failed to inform the exporting authorities. It may be concluded that no error has been committed by the Commission in the case under consideration.
- (33) In order to determine whether the debtor could have detected the error committed by the Salvadorian authorities, the Commission takes into account all the circumstances of the case<sup>5</sup>, the nature of the error, the debtor's experience and its diligence.
- (34) The Court of Justice of the European Union has ruled that the nature of the error should be assessed in terms of the complexity of the legislation concerned<sup>6</sup>. In assessing whether an error<sup>7</sup> has been made account needs to be taken of whether or not a simple examination of the facts could have allowed disclosure of the error and whether or not the rules are complex.
- (35) For the catches made by the vessels for which the crew percentage of nationals of EU Members States or nationals of the beneficiary country was less than 75%, given the nature of the debtor's activity it could have made sure that a strict respect of the conditions necessary for the preferential tariff treatment existed under the EU GSP rules of origin applied.
- (36) Where cumulation was applied on the basis of certificates other than Form A or EUR 1 according to the country of issuing, EUR 1 certificates from Seychelles and Ivory Coast are not acceptable. Likewise, according to Article 90 a of Regulation 2454/93 non preferential certificates issued by the Chambers of Commerce of Spain and France cannot be accepted for suspending the Common Customs Tariff ad valorem duties.
- (37) There were other situations listed by the Spanish authorities in which there were under the same Form A either: a) 2006 consignments or b) 2006 consignments- EUR 1 Seychelles or, c) non-preferential certificates issued by the Chambers of Commerce of Spain and France and Form A Panama or d) EUR 1 Seychelles and Form A Panama. In all those situations it has not been possible to trace the origin of the catches<sup>8</sup>. Therefore, the debtor did not comply with the provisions on rules of origin contained in Chapter 2 Title IV of Regulation (EEC) 2454/93 on GSP EU rules of origin. In all those situations, the debtor could have detected the error committed by the Salvadorian authorities because the exporter is a subsidiary belonging to the same group as the debtor.
- (38) On the contrary, in the situation in which the origin of the raw material processed by the exporter was evidenced by virtue of certificates of origin Form A from Panama, since this country belongs to the same GSP cumulation Group II as El Salvador, it can be admitted that the debtor could not have known whether the certificates had been correctly issued by the Salvadorian authorities once the raw material was transformed in the Salvadorian plant and could not have detected the error of the Salvadorian authorities.

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<sup>5</sup> Paragraph 19 in Case C-64/89, Deutsche Fernsprecher GmbH

<sup>6</sup> Case C-250/91 Hewlett-Packard, paragraph 23; Case C-153/94 and C-204/94 Faroe Seafood, paragraph 100; Case C-251/00 Ilumitronica, paragraph 56; Case C-64/89 Deutsche Fernsprecher GmbH, paragraph 20

<sup>7</sup> Case C-348/89 Mecanarte, paragraph 21

<sup>8</sup> See in this regard the criteria laid down in paragraphs 57 and 58 in joint cases C-153/94 and C-204/94 Faroe Seafood

- (39) As regards the condition relating to its professional experience, the debtor belongs to a group which is a global operator in the fishing, preparation, manufacturing, packaging and marketing of fish food products, whether fresh, chilled or canned in waters throughout the world. It follows that the debtor is to be considered as very experienced.
- (40) The debtor may plead good faith when it can demonstrate that, during the period of the trading operations concerned, it has taken due care to ensure that all the conditions for the preferential treatment have been fulfilled.
- (41) As regards the diligence shown by the debtor for the catches made by the vessels for which the crew percentage of nationals of EU Member States or nationals of the beneficiary country was less than 75%, given the nature of the debtor's activity and the fact that the group operates in different oceans with subject to different rules, the debtor has not been diligent as it did not respect the conditions to benefit from preferential treatment according to Council Regulation (EC) No 980/2005 of 27 June 2005 nor its successor Regulation<sup>9</sup> for suspending the Common Customs Tariff ad valorem duties during the considered period.
- (42) In addition, in cases of consignments dating from 2006, or consignments that under the same Form A included: 2006 lots- EUR 1 Seychelles, non-preferential certificates issued by the Chambers of Commerce of Spain and France and Form A Panama, or EUR 1 Seychelles and Form A Panama it has not been possible to trace the origin of the catches. Therefore, in the absence of the necessary traceability, the debtor did not comply with the provisions laid down by the legislation in force concerning the customs declarations as it did not respect the rules of origin contained in Chapter 2 Title IV of Regulation (EEC) 2454/93 on GSP EU rules of origin.
- (43) Furthermore, two vessels of the holding used double flagging or double registration of El Salvador and Seychelles contrary to Article 68 (2) of Regulation 2454/93 which requires that vessels be registered in the beneficiary country or in an EU Member State.
- (44) Even though the debtor claimed ambiguity in the concepts of dual registration, registration number and dual nationality, they are clearly defined in article 92 of the United Nations Convention on the Law of the Sea<sup>10</sup>. Although El Salvador has not ratified the United Nations Convention of 10 December 1982 on the Law of the Sea, the EU has ratified that Convention and the EU provisions clearly request that a fishing vessel must be registered in only one a country and must sail under the flag of only one country in order to benefit from the Union scheme of preferential origin.

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<sup>9</sup> Council Regulation (EC) 732/2008 of 22 July 2008 published in the OJEU L 211 of 6.8.2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007

<sup>10</sup> Article 92 "Status of ships 1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in

international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.

A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality".

- (45) These two vessels were registered as a joint enterprise in Seychelles and they fished with the flag of Seychelles between 31 August 2003 and 31 August 2008. This five year period was necessary for them to be entitled to keeping the aid granted for the creation of joint enterprises<sup>11</sup>. At the same time, since the vessels were registered in El Salvador, the debtor claimed that the requirement of the second indent of paragraph 2 of Article 68 of Regulation (EEC) 2454/93 was met and the fish could enjoy the GSP preference.
- (46) In addition, a subsidiary of the group in El Salvador provided the information on the basis of which the preferential certificates of origin Form A were issued by the Salvadorian authorities.
- (47) On the basis of the information provided to the Commission by Spain it can be established that the debtor has not shown the degree of care expected from a professional operator in relation to the customs treatment requested for the goods in question in the situations concerning a) fish landed directly in El Salvador but the crew percentage of nationals of EU Member States or nationals of the beneficiary country were less than 75%; b) cumulation applied on the basis of wrong proof of origin such as EUR 1 certificates from Seychelles and Ivory Coast or non-preferential certificates issued by the Chambers of Commerce of Spain and France and c) fish landed directly in El Salvador but caught by a vessel that flew two flags.
- (48) On the basis of this assessment, the Commission considers that it is only possible to remit import duties in the case of Form A certificates issued by Panama in conformity with article 72a(5) of Regulation 2454/1993 in the amount of EUR XXXX.
- (49) In relation to all other situations of operations in which the percentage of crew requirements within the meaning of article 68.2 of Regulation 2454/1993 to benefit from the GSP preferential treatment have not been fulfilled totalling EUR XXXX, 29 and all the operations in which the vessels flew a double flag amounting to EUR XXXX, the remission of import duties requested adding up to EUR XXXX is not justified,

HAS ADOPTED THIS DECISION:

*Article 1*

1. Remission of import duties in the sum of EUR XXXX requested by Spain on 16 January 2013 is justified.
2. Remission of import duties in the sum of EUR, XXXX requested by Spain on 16 January 2013 is not justified

*Article 2*

This Decision is addressed to the Kingdom of Spain.

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<sup>11</sup> The assistance co-financed under Regulation (EC) No 2792/1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector, was granted to the double flagging vessels.

Done at Brussels,

*For the Commission*  
*Algirdas Šemeta*  
*Member of the Commission*