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REC 02/03

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18-11-2003
C(2003)4197

NOT FOR PUBLICATION

COMMISSION DECISION

Of 18-11-2003

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

(Only the French text is authentic)

**(Request submitted by France)
(REC 02/03)**

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(REC 02/03)

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 1993 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) In a letter dated 17 March 2003, received by the Commission on 20 March 2003, France asked the Commission to decide, under Article 220(2)(b) of Regulation (EEC) No 2913/92, whether it was justified to waive post-clearance entry of import duties in the accounts or, in the alternative, whether remission of duties was justified under Article 239 of the same Regulation, in the following circumstances.
- (2) Under the second subparagraph of Article 2 of Regulation (EC) No 1335/2003, the provisions of that Regulation do not apply to cases sent to the Commission before 1 August 2003. Therefore 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 2003.⁵
- (3) It should first be noted that the customs debt was incurred between 14 April 1992 and 5 January 1993. The request for waiver of post-clearance entry in the accounts must therefore be deemed to be based not on Article 220(2)(b) of Regulation (EEC) No 2913/92, but on Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties,⁶ as last amended by Regulation (EEC) No 1854/89,⁷ which was the legislation in force before 1 January 1994. Similarly, the request for remission must be deemed to be based not on Article 239 of Regulation (EEC) No 2913/92, but on Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties,⁸ as last amended by Regulation (EEC) No 1854/89, the legislation in force before 1 January 1994. However, this in no way affects the validity of the request for waiver or post-clearance entry in the accounts and, in the alternative, remission, or the conditions for obtaining that waiver or remission.

⁵ OJ L 134, 29.5.2003, p.1

⁶ OJ L 197, 3.8.1979, p.1.

⁷ OJ L 186, 30.6.1989, p. 1

⁸ OJ L 175, 12.7.1979, p.1.

- (4) The person concerned is a customs agent who, between 14 April 1992 and 5 January 1993, acting on behalf of a French client, submitted declarations for release for free circulation for cotton bed-linen from Bangladesh.
- (5) Imports into the Community of this type of product originating in Bangladesh benefited from preferential arrangements under the Generalised System of Preferences. If, in accordance with Article 7 of Commission Regulation (EEC) No 693/93 of 4 March 1988,⁹ the products were covered by a form A certificate issued by the competent Bangladesh authorities, they were eligible for preferential tariff treatment when they were released for free circulation.
- (6) In the case in point, the customs agent presented form A certificates issued by the competent Bangladesh authorities in support of its customs declarations for release for free circulation. The French customs authorities accepted the declarations and granted preferential tariff treatment.
- (7) During a mission concerning the conditions under which the Bangladesh authorities issued form A certificates of origin, carried out in Bangladesh in July 1996 by representatives of several Member States and the European Commission, a request was made for checks on the validity of a number of form A origin certificates. Those certificates included the ones in question in this case. In a letter of 9 October 1996 the competent Bangladesh authorities declared the certificates invalid, as they had been wrongly issued since the origin rules had not been complied with.
- (8) Since the textile products imported into France were therefore not eligible for preferential tariff treatment, the French authorities required the customs agent to pay import duties of XXXXX.
- (9) The customs agent applied for non-recovery and, in the alternative, remission of the import duties concerned, citing its good faith, mistakes by the competent authorities which it could not have detected, and failings on the part of the competent authorities.

⁹ OJ L 77, 22.3.1988, p. 1

- (10) In particular, the customs agent stated that the competent Bangladesh authorities had committed an error in issuing the certificates when they knew that the origin conditions were not fulfilled. It also considered that the Community authorities had been negligent in admitting to the customs territory large quantities of goods for which preferential origin had obviously been fraudulently claimed.
- (11) Under Articles 871 and 905 of Regulation (EEC) No 2454/93, the customs agent stated that it had seen the dossier submitted to the Commission by the French authorities and had nothing to add.
- (12) 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 12 September 2003 within the framework of the Customs Code Committee (Repayment Section) to consider the case.
- (13) Under Article 5(2) of Regulation (EEC) No 1697/79, 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 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.
- (14) In the case in point, the granting of preferential tariff treatment for the imports was subject to presentation of form A origin certificates.
- (15) As already noted, the certificates concerned were cancelled by the Bangladesh authorities.
- (16) Reliance on the validity of such certificates 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.
- (17) 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 the expectations.

- (18) In this instance, the exporters declared on the certificates of origin that the goods they covered met the conditions for obtaining the certificates.
- (19) However, as [the Court has recently ruled](#),¹⁰ the fact that the exporters submitted incorrect applications does not in itself preclude the possibility that the competent authorities committed an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92 (Article 5(2) of Regulation (EEC) No 1697/79). Where appropriate the authorities' behaviour must be evaluated taking account of the general context in which the relevant customs provisions were applied.
- (20) Thus the fact that the exporters confirmed on the form A certificates that the conditions for obtaining them had been met is not in itself proof that the competent Bangladesh authorities were misled. It is necessary to ascertain whether the exporters made these declarations on the assumption that the competent authorities were acquainted with all the facts necessary to apply the rules in question and whether the authorities, despite their knowledge, raised no objection to the declarations.
- (21) In the case in point, there is evidence to suggest that the competent Bangladesh authorities knew or, at the very least, should have known, that the goods for which they were issuing form A certificates did not fulfil the conditions laid down for preferential treatment.
- (22) It appears that the competent authorities could have gauged the quantities of imported raw materials incorporated in the finished products from the documents submitted by the exporters in support of their applications for form A certificates of origin.
- (23) The same authorities had twice requested exemptions from the origin rules applicable to them, in 1989 and 1994. Information contained in the first request suggests that the competent Bangladesh authorities knew or should have known that the bulk of the products exported with form A certificates issued in Bangladesh did not satisfy the criteria for origin.

¹⁰ *Ilumitrónica* judgment of 14 November 2002, Case C-251/00.

- (24) By the same token, it can be deduced from the Bangladesh government's policy of expanding the country's spinning industry and the various requests for exemptions from the rules of origin that the Bangladesh authorities knew or, at the very least, should have known that neither the country's cotton harvests nor its spinning capacities were sufficient to produce the quantities of yarn used in the manufacture of the products for export.
- (25) The circumstances in this case therefore reveal an error on the part of the Bangladesh customs authorities themselves which could not have been detected by an operator acting in good faith within the meaning of Article 5(2) of Regulation (EEC) No 1697/79.
- (26) As the Court of Justice of the European Communities has consistently ruled, when determining whether the person concerned could reasonably have detected the customs authorities' error, account must be taken of the nature of the error, the professional experience of the person concerned and the diligence he showed.
- (27) In the case in point, the competent Bangladesh authorities issued form A origin certificates for goods that did not qualify for such certificates during the period of the imports concerned, and also throughout the following period covered by the mission of 13 November - 5 December 1996. This behaviour confirmed the legitimate expectations of the customs agent that the certificates issued by the authorities were valid.

- (28) The customs agent also blames the Commission for having allowed a situation to persist in which large-scale imports of textile products did not correspond to the economic situation of Bangladesh. However, this view of the facts does not correspond to what really happened. Only with a certain amount of hindsight could the Commission realise that there were grounds for serious doubts about the way in which form A certificates of origin were being issued by the competent Bangladesh authorities and decide to send a mission to Bangladesh to check the situation on the spot. It is precisely because of those doubts that the Commission conducted an on-the-spot mission from 13 November to 5 December 1996, which followed a preparatory mission in July 1996. The preparatory mission was particularly effective, since the Bangladesh authorities notified the Commission in a letter of 9 October 1996 that the certificates concerned were invalid. There are therefore no grounds in this case for accusing the Commission of having failed in its duties.
- (29) It should also be noted that importers were neither informed of the Bangladesh authorities' failings nor warned of the potential risks of importing the textile products in question from Bangladesh until a notice to importers was published in the Official Journal of the European Communities on 5 April 1997.¹¹
- (30) Lastly, as regards the diligence shown by the customs agent, there is nothing in the dossier to indicate that the way it carried out the imports in question departed from normal commercial practice.
- (31) It must therefore be acknowledged that the customs agent was not obviously negligent.
- (32) Moreover, it acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (33) Post-clearance entry in the accounts of import duties is not therefore justified in this case. Under these circumstances there is no need to examine the dossier in the light of Article 13 of Regulation (EEC) No 1430/79,

¹¹ OJ C 107, 5.4.1997, p.16.

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of XXXXXX which are the subject of France's request of 17 March 2003 shall not be entered in the accounts.

Article 2

This Decision is addressed to France.

Done at Brussels 18-11-2003

*For the Commission
Frits Bolkestein
Member of the Commission*