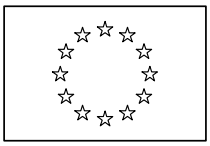

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 26/XI/2007

C (2007) 5645 final

COMMISSION DECISION

of 26/XI/2007

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

(Request submitted by the United Kingdom of Great Britain and Northern Ireland)

(REM 07/05)

(Only the English text is authentic)

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(Request submitted by the United Kingdom of Great Britain and Northern Ireland)

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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 1791/2006[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 214/2007[4], and in particular Article 907 thereof,

[1] OJ L 302, 19.10.1992, p. 1.
[2] OJ L 363, 20.12.2006, p. 1.
[3] OJ L 253, 11.10.1993, p. 1.
[4] OJ L 62, 01.03.2007, p. 6.

Whereas:

(1) By letter of 15 December 2005, received by the Commission on 21 December 2005, the United Kingdom asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether the remission of import duties was justified in the following circumstances.

(2) A UK company (the firm) imports whey protein preparations from New Zealand.

(3) The firm applied to UK Customs, in July 1992, for binding tariff information (BTI) concerning a whey protein concentrate "Alacen 132". After it was analysed by the customs laboratory, the product was classified under code 3502 90 70 0 10, which, at the time, covered whey protein concentrates. The BTI was issued in September 1992. This BTI was later revised and reissued, owing to a change to the holder's name. The last BTI for this product was valid from 1 January 1994 and specified the code as being 3502 90 70 0 00.

(4) At the same time, the firm also applied to UK Customs for a BTI concerning another powdered whey protein concentrate "Alacen 312". The BTI for this product was issued in November 1992. It was classified under code 3502 90 70 0 10. This BTI was later revised; the last BTI for this product, which was dated 21 March 1996 but was valid from 1 January 1996, specified the code as being 3502 90 70 00.

(5) From 1 January 1996, changes to the Harmonized System substantially altered the structure of Heading 3502. These changes were introduced by Commission Regulation (EC) No 2448/95 of 10 October 1995 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff[5]. The scope of Heading 3502 90 was revised and Heading 3502 20 was created to cover milk albumin (including concentrates of two or more whey proteins).

(6) As a result, as from 1 January 1996, 3502 90 70 00 was no longer the correct code for Alacen 132 and Alacen 312. UK customs failed to realise this until March 2001.

(7) The firm also requested BTIs for other whey protein products. The UK authorities therefore issued the firm with BTIs for the following products:

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[5] OJ L 259, 30.10.1995, p. 1.

- “LGC (Alacen) 342” (milk protein powder). The BTI issued on 24 September 1997 classified this product under code 3502 20 91 00;

- “LGC 472” (milk protein powder). The BTI issued on 24 September 1997 classified this product under code 3502 20 91 00;

- “LGI 895” (powdered mixture of whey proteins). The BTI issued on 15 May 1997 classifies this product under commodity code 3504 00 00 90. This BTI was withdrawn by the United Kingdom in July 2001, since the preparation was considered to fall under code 3502 20 91 00.

(8) On 2 April 2001 the UK authorities withdrew the BTI for Alacen 312 and informed the firm. They did not need to withdraw the BTI for Alacen 132 since this had expired on 1 January 1996 in accordance with Article 12(5) of Regulation (EEC) No 2913/92, following amendments to the nomenclature as from 1 January 1996.

(9) In July 2001 the firm was issued with a post-clearance recovery notice in the sum of XXXXX relating to import operations carried out between 6 January 2000 and 7 March 2001. These import operations concerned various whey protein preparations originating in New Zealand, including Alacen 132. For most of these preparations[6] the firm did not have a BTI. However, on 10 June 2000 the firm declared a shipment of Alacen 342 under the incorrect code 3502 90 70 though it had a BTI correctly classifying this product under 3502 20 91. All the imports covered by the request were declared under code 3502 90 70, but the authorities considered that they should have been declared under code 3502 20 91 00, which attracts a higher rate of import duty. The firm requested remission of this amount under Article 239 of Regulation (EEC) No 2913/92.

[6] Products for which the firm did not hold a BTI: Alacen 131, Alacen 132, Alacen 152, Alacen 162, Alacen 180, Alacen 332, Alacen 392, Alacen 450, Alacen 869, Alacen 892 and Alacen 8471. Alacen is the brand name of all these preparations. For instance, “LGC 131” was sold under the brand name Alacen 131.

(10) In response to the Commission's letter of 14 July 2006, the UK authorities stated that XXXXX, corresponding to imports of 6 January 2000 (Alacen 895) and 7 January 2000 (Alacen 312), should be withdrawn from the request. This letter also established that XXXXX, corresponding to imports of 4 April, 13 July and 12 December 2000, should be withdrawn from the request as the debt or the amount of the debt had not been established. Following the letter of 14 July 2006, the amount for which remission was requested was therefore XXXXX.

(11) In response to the Commission's letter of 26 June 2007, the UK authorities stated that the amount of the request should be further reduced by XXXXX, corresponding to imports of 6, 7 and 31 January and 17 and 30 May 2000. The definitive amount of the request is therefore XXXX.

(12) In support of the application submitted by the UK authorities, the firm stated that, in accordance with Article 905(3) of Regulation (EEC) No 2454/93, it had seen the file submitted to the Commission by the UK authorities and had nothing to add.

(13) The firm cited as a factor constituting a special situation under Article 239 of Regulation (EEC) No 2913/92 the fact that UK customs had issued several BTIs for these products and had erroneously classified them under CN code 3502 90 70. The firm classified the various Alacen preparations under CN code 3502 90 70 owing to their similarity to the products described on the BTI issued for Alacen 132 and Alacen 312. The firm added that UK customs never informed it that it could no longer safely use the BTI issued for Alacen 132 after it expired on 1 January 1996. Lastly, the firm asserted that different decisions concerning very similar products only served to create confusion about the correct tariff heading, that there was uncertainty about the correct classification of whey protein concentrates and isolates and that it had acted in good faith when erroneously using CN code 3502 90 70.

(14) By letters dated 24 January and 14 July 2006, the Commission asked the UK authorities for additional information. This information was sent to the Commission by letter of 8 June 2006, received by the Commission on 15 June 2006 and by letter of 6 September 2006, received by the Commission on 13 September 2006. Examination of the request for remission was therefore suspended between 25 January and 15 June 2006 and between 15 July and 13 September 2006.

(15) By letter dated 10 November 2006, received by the firm on 13 November 2006, the Commission notified the firm of its intention to withhold approval and explained the reasons for this.

(16) By letter of 8 December 2006, received by the Commission on the same date, the firm made known its views on the Commission's objections.

(17) In accordance with Article 907 of Regulation (EEC) No 2454/93, the period of nine months within which the Commission decision must be taken was extended by one month.

(18) By letter dated 10 January 2007, received by the Commission on the same date, the firm submitted copies of the documents to which it had referred in its letter dated 8 December 2006.

(19) By letters dated 2 March 2007 and 26 June 2007 the Commission asked the UK authorities for additional information. This information was provided by letter of 25 May 2007, received by the Commission on 5 June 2007 and by letter of 27 September 2007, received by the Commission on 16 October 2007. Examination of the request for remission was therefore suspended between 3 March and 5 June 2007 and between 27 June and 16 October 2007.

(20) 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 20 December 2006 within the Customs Code Committee - Repayment Section.

(21) Article 239 of Regulation (EEC) No 2913/92 allows import duties to be repaid or remitted in situations other than those referred to in Articles 236, 237 and 238 of that Regulation resulting from circumstances in which no deception or obvious negligence may be attributed to the party concerned.

(22) The Court of Justice of the European Communities has consistently held that this provision represents a general principle of equity designed to cover a special situation in which an operator, which would not otherwise have incurred the costs associated with the customs duties concerned, might find itself compared with other traders carrying out the same activity.

(23) It should be stated from the outset that the fact that the firm has acted in good faith does not in itself constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(24) For a correct appraisal of the present request, the import operation of 10 June 2000 must be regarded as separate from the other ones.

(25) The following points should be made regarding the import operation of 10 June 2000, which bears the number “Entry No 150.000330X” in the table annexed to the letter from the UK authorities dated 8 June 2006.

(26) The file shows that the firm had a BTI mentioning the correct tariff heading (3502 20 91) for Alacen 342, the product in question. It follows that the firm should have declared the goods under this tariff heading. Yet it actually declared the goods under heading 3502 90 70. In its letters of 8 December 2006 and 25 January 2007 the firm argues that the declaration was made by a customs agent acting on its behalf and that, given the context, this error should be considered comprehensible.

(27) There was no error in the BTI delivered by the UK authorities for Alacen 342. It was therefore the firm’s responsibility to provide its representative with precise instructions to ensure that the product was declared under the tariff heading given in the BTI. The firm cannot therefore contend that it was faced with a special situation: in the light of the BTI issued to it, it should have known that the goods were classified under heading 3502 2091 and that it owed duties under that heading.

(28) Consequently the Commission feels that for this import operation the firm was not faced with a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(29) The following remarks must be made with regard to the other import operations carried out by the firm.

(30) The argument put forward by the firm that the UK authorities made classification errors calls for the following observations.

(31) It is true that after 1 January 1996, the date on which the amendments to the CN came into force, the UK authorities made two errors when issuing BTI for whey protein preparations.

(32) The first error concerned the BTI delivered on 21 March 1996 for Alacen 312. By letter of 27 March 1996, the UK authorities even informed the firm that they had reached the conclusion that heading 3502 90 70 was the correct one for Alacen 312 after following the legal procedure for tariff classification and in particular general rules 1 and 6 for the interpretation of the combined nomenclature and the wording of CN headings 3502, 3502 90 and 3502 90 70.

(33) The second error made by the UK authorities concerned a product named LGI 895, for which a BTI classifying it under heading 3504 00 00 90 was issued on 15 May 1997.

(34) The UK authorities did not become aware of these two errors until 2001, at which point they withdrew the BTIs in question. The remission request under consideration does not concern these two products but products for which the firm did not have a BTI, with the exception of the import operation of 10 June 2000.

(35) The argument that UK customs had not informed the firm that it could no longer rely on the BTI issued for Alacen 132 once it had lapsed on 1 January 1996, a circumstance which the firm felt placed it in a special situation, warrants the following remarks.

(36) Under Article 12(5)(a)(i) of Regulation (EEC) No 2913/92, binding tariff information ceases to be valid where a regulation is adopted and the information no longer conforms to the law laid down thereby. The first indent of Article 12(2)(a) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 specifies that the BTI ceases to be valid on the date of applicability of the regulation in question. The nomenclature was amended by Commission Regulation (EC) No 2448/95 of 10 October 1995 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff[7]. Article 2 of that Regulation specifies that it enters into force on 1 January 1996. In such a case, unlike when a BTI is withdrawn or revised, the relevant provisions do not specify that the authorities should notify the firm of the end of the validity of the BTI. Consequently, no special situation can arise from the fact that the authorities did not inform the firm of the fact that the BTI for Alacen 132 was no longer valid.

(37) The Commission has investigated whether the number of erroneous declarations accepted by the authorities without objection was sufficient to give rise to a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92. For this reason the Commission asked the UK authorities, by letter of 24 January 2006, for the number of declarations made by the firm between 1 January 1996 and 7 March 2001 and the number of checks carried out.

[7] OJ L 259, 30.10.1995, p. 1.

(38) The UK authorities were able to indicate only the number of declarations covered by the post-clearance recovery notice (87 declarations, including those which were withdrawn from the request subsequent to the letters from the Commission of 14 July 2006 and 26 June 2007). The authorities were unable to produce copies of the declarations covered by the post-clearance demand themselves. However, they were able to produce the copy of one declaration they considered typical for the firm's declarations as a whole ("entry No.150-000911L" of 2 August 2000). The products released for free circulation under this declaration were Alacen 312 and Alacen 392. Only the case of Alacen 392 can be considered relevant, since Alacen 312 was covered by a BTI. The invoice, which explicitly mentioned the nature of the product ("whey protein concentrate"), was annexed to the declaration. The authorities were therefore in a position to compare the tariff heading used in the declaration with the explicit description of the goods given in accordance with the specifications of the nomenclature. Doing so would have revealed that the firm was using the wrong tariff heading, which should have led the authorities to challenge the classification used for the remainder of the whey protein preparations imported by the firm and declared under heading 3502 90 70[8].

(39) In view of the above, the Commission feels that for all the import operations under consideration, with the exception of the one that took place on 10 June 2000, the circumstances of the case give rise to a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92 and that the first condition of Article 239 of Regulation (EEC) No 2913/92 has been met.

(40) Consequently it must be examined whether, for the import operations other than the one that took place on 10 June 2000, the second condition laid down in Article 239 of Regulation (EEC) No 2913/92 has been met.

(41) The Court of Justice of the European Communities 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. It is accepted from the outset that the firm, as emphasised by the UK authorities, has not committed deception.

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[8] See judgment of the Court of 1 April 1993, "Hewlett Packard" in Case C-250/91.

(42) The question of the complexity of the legislation calls for the following remarks.

(43) The firm maintains that the classification of whey proteins was in fact very complex. To corroborate its position, the firm raises a number of questions. However, as becomes apparent from the documents annexed to the letter of 10 January 2007 and those annexed to the letter from the UK authorities of 25 May 2007, these questions indicate that the difficulty is rather in deciding whether to apply heading 3502 or 3504.

(44) The firm also points to the discussions it had with the UK authorities about the BTIs issued in 1997 for LGG 342 and LGC 472 – two products similar to those under consideration – which gave the correct heading: 3502 20 91.

(45) In spite of these discussions and of the firm's lodging an appeal, the UK authorities maintained their position that the products must be classified under heading 3502 20 91. These discussions therefore did not make the legislation appear more complex than it was. On the contrary, they should have led the firm to question the correctness of importing preparations under headings other than 3502 20 91.

(46) Finally, the description given in the Combined Nomenclature makes it clear that CN code 3502 90 70 does not cover the products imported by the firm and that, on the contrary, whey protein concentrates are clearly covered by CN code 3502 20:

3502 - Albumins (including concentrates of two or more whey proteins, containing by weight more than 80 % whey proteins, calculated on the dry matter), albuminates and other albumin derivatives

- 3502 11 - Egg albumin

- 3502 20 - Milk albumin, including concentrates of two or more whey proteins

- - 3502 20 10 - - Unfit, or to be rendered unfit, for human consumption

- - 3502 20 91 - - Other

- - - 3502 20 91 - - - Dried (for example, in sheets, scales, flakes, powder)

- - - 3502 20 99 - - Other

- 3502 90 - Other

- - 3502 90 20 - - Albumins, other than egg albumin and milk albumin

- - - 3502 90 20 - - - Unfit, or to be rendered unfit, for human consumption

- - - 3502 90 70 - - - - Other

- - 3502 90 90 - - Albuminates and other albumin derivatives

(47) The legislation cannot therefore be considered complex.

(48) As regards the level of the firm's experience, the Commission considers the firm to be an experienced operator. It acknowledges the point of view taken in this regard by the UK authorities in point 4.2 of the request annexed to their letter of 15 December 2005 and shared by the firm (see its letter of 8 December 2006).

(49) As regards the diligence required of the firm, the following remarks can be made.

(50) First of all, the Court of Justice has indicated that it is not unreasonable to expect an experienced economic operator such as the firm under consideration to keep abreast of the Community law applicable to its transactions by reading the relevant Official Journals[9]. Had the firm done so, it would have known that the nomenclature changed as from 1 January 1996.

(51) Moreover, it is not and cannot be the aim of BTIs to guarantee operators that the tariff headings given in them will not be changed in the future by the Community legislator. As a consequence, holding a BTI for a particular tariff heading does not confer on a trader a legitimate expectation that this tariff heading will not subsequently be modified by an act of the Community legislator[10].

(52) The firm should have asked itself why proteins which it knew to have the same properties had been classified in one case under heading 3502 90 70, in another under heading 3502 20 91 and in yet another under heading 3504. It did not do so. The file, in particular the documents submitted by the firm in December 2006 and January 2007 and those submitted by the UK authorities in May 2007, shows that the firm challenged only the classification of certain whey proteins under heading 3502, arguing that they should instead be classified under heading 3504. However, it never questioned the classification under heading 3502 90 70 even though, despite the error by the UK authorities, it ought to have been clear from the wording of the Combined Nomenclature (see paragraph 46) that heading 3502 90 70 was the wrong one for the whey proteins it imported.

(53) Moreover, following its discussions with the UK authorities in 1998 about the BTIs for Alacen 342 and Alacen 472, the firm should have asked itself whether the products for which it did not have BTIs should not also be classified under heading 3502 20 91. It should certainly have done so in April 1998, when it was informed of the authorities' decision to maintain their BTI for these two products.

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9 Case 161/88 "Binder" (judgment given on 17 July 1989).

10 Case C-315/96 "Lopex Export" (judgment given on 29 January 1998).

(54) The documents submitted by the UK authorities by letter of 27 September 2007 do not contradict this analysis. Indeed, in its letter of 6 March 2001 to the UK authorities the firm stressed that it wished to discuss the tariff classification of the proteins which it was importing because it held contradictory BTIs. It is therefore clear that at that point the firm was aware that there might be post-clearance recovery of import duties on the goods it was importing when it declared them under heading 3502 90 70.

(55) In view of the above, the firm's conduct must be considered as obviously negligent. The second condition referred to in Article 239 of Regulation (EEC) No 2913/92 is not therefore met.

(56) 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 XXXX requested by the United Kingdom of Great Britain and Northern Ireland on 15 December 2005 is not justified.

Article 2

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 26/XI/2007.

By the Commission
László KOVÁCS
Member of the Commission