

EN

REC 03/03



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28-10-2003
C(2003)3906

NOT FOR PUBLICATION

COMMISSION DECISION

Of 28-10-2003

finding that post-clearance entry in the accounts of import duties is not justified in a particular case and authorising the Member States to waive post-clearance entry in the accounts in cases involving comparable issues of fact and of law

(Request submitted by France)

(REC 03/03)

FR

COMMISSION DECISION

Of 28-10-2003

finding that post-clearance entry in the accounts of import duties is not justified in a particular case and authorising the Member States to waive post-clearance entry in the accounts in cases involving comparable issues of fact and of law

(Request submitted by France)

(REC 03/03)

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 2913/92³ 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 25 April 2003, received by the Commission on 28 April 2003, France asked the Commission to decide, under Article 220(2)(b) of Regulation (EEC) No 2913/92, whether waiving the entry of import duties in the accounts was justified in the following circumstances.
- (2) Under the second paragraph 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) A French firm engages in the re-sale of items of clothing to publicity companies for use in their advertising. From 1994 the firm decided to draw supplies from Bangladesh. Thus between April 1995 and February 1996 it imported textile products of Chapter 61 of the common customs tariff (clothing and clothing accessories, knitted or crocheted) from Bangladesh.
- (4) Imports into the Community of this type of product originating in Bangladesh qualified for preferential arrangements under the Generalised System of Preferences. This meant that if the products were covered by a form A certificate issued by the Bangladesh authorities in accordance with Article 77 of the version of Regulation (EEC) No 2454/93 in force during that period, they were eligible for preferential tariff treatment when they were released for free circulation.
- (5) In the case in point, the firm 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.
- (6) Following an investigation into the conditions under which the Bangladesh authorities issued form A certificates of origin, carried out in Bangladesh between 13 November and 5 December 1996 by representatives of several Member States and the Commission, it was found that a very large number of the certificates issued for

⁵ OJ L 134, 29.5.2003, p. 1

textiles products were false or should not have been issued because the rules of origin had not been observed. The Bangladesh authorities therefore cancelled the said certificates. The false certificates are listed in "List A", the wrongly issued certificates in Lists "B" and "C".

- (7) The firm used certificates which were later included in lists B and C and were therefore withdrawn by the competent Bangladesh authorities.
- (8) Since the textile products imported into France were therefore not eligible for preferential tariff treatment, the French authorities required the firm to pay import duties of XXXXXXXX.
- (9) The company applied for non-recovery of the import duties concerned, citing its good faith, the mistakes made by the competent authorities, which it could not have detected, and failures on the part of the competent authorities.
- (10) In particular, the firm stated that the competent Bangladesh authorities had committed an error in issuing the certificates when they knew that the origin conditions were not fulfilled.
- (11) Pursuant to Article 871 of Regulation (EEC) No 2454/93, the company stated that it had seen the dossier submitted by the French authorities and had nothing to add.
- (12) 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 12 September 2003 within the framework of the Customs Code Committee (repayment section) to consider the case.
- (13) 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 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 expectation.
- (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](#),⁶ 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. 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 that 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 should be borne in mind that from the mid 1990s there had been a very substantial increase in exports of textile products from Bangladesh to the European Union, while the production capacity for yarn originating in Bangladesh had not increased on the same scale.

- (23) It appears, moreover, 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.
- (24) 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 clothing exported with form A certificates issued in Bangladesh did not satisfy the criteria for origin.
- (25) 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 products for export.
- (26) The circumstances of the case in question therefore point to an error on the part of the Bangladesh customs authorities themselves which could not reasonably have been detected by an operator acting in good faith, within the meaning of Article 220 (2)(b) of Regulation (EEC) No 2913/92.
- (27) As the Court of Justice of the European Communities has consistently ruled, when determining whether the firm could reasonably have detected the customs authorities' error, account must be taken of the nature of the error, the firm's professional experience and the diligence it showed.
- (28) In the case in point, the competent Bangladesh authorities issued form A origin certificates for goods that did not qualify for such certificates for at least the three-year period (end of 1993 to 1996) covered by the investigation of 13 November to 5 December 1996. This behaviour confirmed the legitimate expectations of the firm that the certificates issued by the authorities were valid.

⁶ *Ilumitrónica* judgment of 14 November 2002, Case C-251/00.

- (29) Furthermore, the importers were neither informed of the Bangladesh authorities' failures 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 1997.⁷
- (30) Lastly, as regards the diligence shown by the firm, there is nothing in the dossier to indicate that the way the firm concluded its contracts or carried out the imports in question departed from normal commercial practice.
- (31) It must therefore be acknowledged that the firm was not obviously negligent.
- (32) Moreover, the firm 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.
- (34) Under Article 875 of Regulation (EEC) No 2454/93, where the circumstances under consideration are such that the duties need not be entered in the accounts, the Commission can, under conditions which it is to determine, authorise one or more Member States to refrain from post-clearance entry of import duties in the accounts in cases involving comparable issues of fact and of law.

⁷ OJ C 107, 5.4.1997, p.16.

- (35) At its meeting held on 12 September 2003 within the framework of the Customs Code Committee (repayment section), the group of experts composed of representatives of all the Member States provided for in Article 873 of Regulation (EEC) No 2454/93 asked that all Member States be authorised to waive post clearance entry of import duties in the accounts in cases involving comparable issues of fact and law.
- (36) Such authorisation may be granted to the Member States on condition that it is used only in cases strictly comparable in fact and law to the case in question. The authorisation should nevertheless also cover requests for waiver of post clearance entry in the accounts lodged within the legal time limits in respect of import operations carried out between 1994 and 5 April 1997, the date of publication of the Notice to importers (No C1997/107/05) - *Textile products imported into the Community from Bangladesh under the generalised system of preferences* - where such import operations during that period were carried out in circumstances comparable in fact and law to those which gave rise to this case (certificates included in List B or C). In such cases the importers must have acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration,

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of XXXXXX which are the subject of France's request of 25 April 2003 shall not be entered in the accounts.

Article 2

The Member States are authorised to waive post-clearance entry of import duties in the accounts in cases involving issues of fact and of law comparable to the case cited in France's request of 25 April 2003.

The authorisation shall cover requests for waiver of entry of import duties in the accounts lodged within the legal time limits in respect of import operations carried out between 1994 and 5 April 1997 where such operations were carried out in circumstances comparable in fact and law to those which gave rise to the request referred to in the previous subparagraph.

Article 3

This Decision is addressed to the Member States.

Done at Brussels, 28-10-2003

*For the Commission
Frits Bolkestein
Member of the Commission*