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REC 09/02



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 4-7-2003
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NOT TO BE PUBLISHED

COMMISSION DECISION

of 4-7-2003

**finding that post-clearance entry in the accounts of import duties is not justified in a particular case and authorising the Member States to refrain from post-clearance entry in the accounts in cases involving comparable issues of fact and of law
(Request submitted by Italy)**

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(Request submitted by Italy)

(REC 09/02)

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 Regulation (EEC) No 2913/92,³ as last amended by Regulation (EC) No 881/2003,⁴ and in particular Article 873 thereof,

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 134, 29.5.2003, p. 1

Whereas:

- (1) By letter dated 11 October 2002, received by the Commission on 4 November 2002, supplemented by a memo of 13 January 2003, received by the Commission on the same day, Italy 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 in the accounts in the following circumstances.
- (2) The dossier sent to the Commission by the Italian authorities shows that between 19 May 1997 and 20 December 1997 an Italian firm released processed tuna from Turkey for free circulation.
- (3) Imports into the Community of processed tuna originating in Turkey qualified for preferential arrangements for fisheries products under Decision No 1/80 of the EEC-Turkey Association Council. Under that Decision, if they were covered by an A.TR 1 certificate issued by the competent Turkish authorities in accordance with the provisions of Decision No 5/72 of the EEC-Turkey Association Council,⁵ they could be imported into the European Community duty free.
- (4) The products were considered to originate in Turkey if they fulfilled the conditions of origin set out in Decision No 4/72 of the EEC-Turkey Association Council,⁶ as amended by Decision No 1/75.⁷
- (5) In the case in point, the firm presented A.TR certificates issued by the competent Turkish authorities in support of its customs declarations for release for free circulation. The certificates were not contested by customs and preferential tariff treatment was granted.

⁵ OJ L 59, 5.3.1973, p.74 (Joint Decision annexed to Council Regulation (EEC) No 428/73 of 5 February 1973 on the application of Decisions Nos 5/72 and 4/72 of the Association Council provided for by the Agreement establishing the Association between the European Economic Community and Turkey).

⁶ OJ L 59, 5.3.1973, p.83 (Joint Decision annexed to Council Regulation (EEC) No 428/73 of 5 February 1973 on the application of Decisions Nos 5/72 and 4/72 of the Association Council provided for by the Agreement establishing the Association between the European Economic Community and Turkey).

⁷ OJ L 142, 4.6.1975, p. 2 (Joint Decision annexed to Council Regulation (EEC) No 1431/75 of 26.5.1975 on the application of Decisions Nos 5/72 and 4/72 of the Association Council provided for by the Agreement establishing the Association between the European Economic Community and Turkey).

- (6) Following an investigation of the status of processed tuna imported into the Community since 1993 carried out in Turkey by the representatives of a number of Member States and the European Commission from 3 to 20 June 1996, it was found that a large proportion of the raw materials used for the production of the products exported to the Community had been imported into the European Community and Turkey from other countries. Moreover, the failure to store goods of third country origin separately from those of Community or Turkish origin meant that the end product could not be deemed to originate in Turkey. A second investigation carried out in Turkey from 15 June to 3 July 1998 found that the goods exported to the European Community in the period from June 1996 to June 1998 were not entitled to preferential tariff treatment since they did not comply with the origin criteria.
- (7) Since the A.TR.1 movement certificates issued by the competent Turkish authorities and presented upon import into Italy were not therefore valid, the competent Italian authorities did not consider that the goods concerned were eligible for preferential tariff treatment and asked the firm to pay the import duties owed, totalling XXXXX.
- (8) Pursuant to Article 871 of Regulation (EEC) No 2454/93, the firm stated that it had seen the dossier submitted to the Commission by the Italian authorities and had nothing to add.
- (9) In accordance with Article 873 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met to examine the case on 7 May 2003 within the framework of the Customs Code Committee - Section for Repayment.
- (10) 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.

- (11) The dossier submitted to the Commission on 11 October 2002 by the Italian authorities shows that the facts giving rise to this procedure are identical in fact and law to the case in respect of which the Commission adopted Decision No 1612 of 19 June 2000 (REC 8/99). In its Decision No 4569 of 20 December 2001, the Commission withdrew Decision No 161 and decided that remission of duties was justified.
- (12) Following the judgment of the Court of First Instance of the European Communities of [10 May 2001](#) (“Turkish televisions” case)⁸ and given the similarities between that case and a number of cases relating to imports of processed tuna from Turkey, the Commission decided to withdraw the decisions refusing remission of duties which it had already adopted and which were being contested before a Member State or Community judge, and to adopt decisions favourable to the traders for these cases in future.
- (13) In case [C-251/00](#) (Ilumitrónica),⁹ the Court of Justice of the European Communities was asked for a preliminary ruling on the applicability of Article 5(2) of Commission Regulation (EEC) No 1697/79, transposed as Article 220(2)(b) of Regulation (EEC) No 2913/92, to requests for repayment or remission relating to the “Turkish television cases”.
- (14) In its judgment of 14 November 2002, the Court found that in the light of the information at its disposal the conditions of Article 5(2) of Regulation (EEC) No 1697/79 were indeed fulfilled.
- (15) In the case under consideration here, the granting of preferential tariff treatment for the imports was subject to presentation of A.TR origin certificates.
- (16) As already pointed out, the Community investigations conducted in Turkey found that the processed tuna could not be deemed to be of Turkish origin and was therefore ineligible for preferential treatment.

⁸ Joined cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 – Kaufring AG et al vs. Commission of the European Communities.

⁹ Case C-251/00 – Ilumitrónica – Iluminação e Electronica Lda

- (17) The certificates issued by the Turkish authorities during the years covered by the investigations were therefore invalid.
- (18) However, reliance on the validity of such certificates is not as a rule protected, as this is considered a normal commercial risk and therefore the responsibility of the person liable for payment.
- (19) 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 those expectations. Thus only errors attributable to the active behaviour of those authorities are grounds for granting waiver of post-clearance recovery of duties.
- (20) In the case in point, there is evidence to suggest that the competent Turkish authorities knew or, at the very least, should have known that the goods for which they were issuing A.TR certificates did not fulfil the conditions laid down for preferential treatment.
- (21) The evidence gathered during the two Community investigations of 1996 and 1998 shows that the Turkish authorities failed to take all due precautions to ensure the proper implementation of the provisions applicable to the exports in question.
- (22) The Turkish authorities therefore did commit an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (23) As the Court of Justice of the European Communities has consistently ruled, when determining whether the company could reasonably have detected the customs authorities' error, account must be taken of the nature of the error, the company's professional experience and the diligence shown by it.
- (24) In this case the competent Turkish authorities issued A.TR certificates for goods which did not satisfy the conditions of issue for a number of years. This behaviour confirmed the legitimate expectations of the firm that the certificates issued by the authorities were valid.

- (25) At the time of the events, no notice had been published in the Official Journal of the European Communities advising importers to take precautions with A.TR certificates of origin issued for these products by the Turkish authorities. Such a notice was only published on 20 December 2000.¹⁰
- (26) The circumstances of the case therefore point to an error on the part of the 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) Moreover, the company acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (28) Post-clearance entry of the import duties in the accounts in therefore not justified in this case.
- (29) 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 duties in the accounts in cases involving comparable issues of fact and of law.
- (30) At its meeting on 7 May 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.

¹⁰ OJ C 366, 20.12.2000, p. 16

(31) 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 present case. The authorisation should nevertheless also cover requests for waiver of post-clearance entry of duties in the accounts lodged within the legal time limits in respect of import operations carried out between June 1993 and the publication date of notice to importers 2000/C 366/09, where such import operations were carried out in circumstances comparable in fact and law to those which gave rise to this case. 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 the request from Italy of 11 October 2002 shall not be entered in the accounts.

Article 2

The Member States are authorised to refrain from post-clearance entry of import duties in the accounts in cases involving comparable issues of fact and of law to the case cited in Italy's request of 11 October 2002.

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 June 1993 and the publication date of notice to importers 2000/C 366/09, where such operations were carried out in circumstances comparable in fact and law to those which gave rise to the requests referred to in the previous subparagraph.

Article 3

This Decision is addressed to the Member States.

Done at Brussels, 4-7-2003

For the Commission
Frits Bolkestein
Member of the Commission