EUROPEAN COMMISSION

Brussels, 31-3-2010
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COMMISSION DECISION

Of 31-3-2010

finding that post-clearance entry in the accounts of import duties is justified and that remission of those duties is not justified in a particular case
(REC 01/09)

(only the Dutch text is authentic)

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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[1], and in particular Articles 220 and 239 thereof,

Whereas:

(1) By letter dated 4 June 2009, received by the European Commission on 8 June 2009, the Dutch authorities asked the Commission to decide whether waiving the entry of import duties in the accounts under Article 220(2)(b) of Regulation (EEC) No 2913/92 is justified in the following circumstances.

(2) Between October 2002 and May 2004 a Dutch firm imported frozen shrimp declared as originating in Malaysia for release into free circulation.

(3) At the time in question, imports into the Union of this type of product originating in Malaysia qualified for preferential treatment under the System of Generalised Preferences[2] (GSP). Under Article 80 of the version of 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[3] in force at the time, products covered by Form A origin certificates issued by Malaysia's competent authorities were eligible for preferential tariff treatment on their release for free circulation.

(4) In the case in point, the firm presented a Form A origin certificate in support of each customs declaration for release into free circulation. The Dutch customs authorities accepted the declarations and granted preferential tariff treatment.

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1 OJ L 302, 19.10.1992, p. 1.

2 Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004 (OJ L 346, 31.12.2001, p. 1).

3 OJ L 253, 11.10.1993, p. 1.

(5) A joint administrative cooperation mission comprising representatives of the European Anti-Fraud Office (OLAF) and some Member States visited Malaysia from 3 to 17 June 2004 to investigate exports to the Union of frozen shrimp declared as originating in Malaysia. It was suspected that some quantities of shrimp imported into the Union from Malaysia under Form A certificates issued by the Malaysian authorities actually originated in third countries and that the purpose of this fraud might be to circumvent a ban on imports into the Union of shrimp from China for health reasons. The mission found that there was no proof of preferential origin for some quantities of shrimp exported from Malaysia to the Union under Form A origin certificates, in particular by the firm's supplier.

(6) As it had been established that the shrimp exported by this supplier did not satisfy the rules of origin and was not therefore eligible for the GSP preferential rate, the Dutch customs authorities initiated proceedings against the firm for the post-clearance recovery of EUR XXXXXX in import duties.

(7) It is this amount that is the subject of the request sent by the Dutch authorities.

(8) In support of this request the firm stated that, in accordance with Article 871(3) of Regulation (EEC) No 2454/93, it had seen the file the Dutch authorities had sent to the Commission and had nothing to add.

(9) By letter dated 12 January 2010, received by the firm on 13 January 2010, the Commission notified the firm of its intention to withhold approval and explained the grounds for its decision.

(10) By letter of 5 February 2010, received by the Commission on the same day, the firm expressed its opinion on the Commission's objections.

(11) In accordance with Article 873 of Regulation (EEC) No 2454/93, the period of nine months within which the Commission decision must be taken was extended by one month.

(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 to examine the case on 9 March 2010 within the framework of the Customs Code Committee - Customs Debt and Guarantees Section.

(13) According to the request sent to the Commission by the Dutch authorities, waiving recovery is justified for the following reasons:.

- a laboratory test on random samples showed that the firm did not have contaminated shrimp;

- the conclusions of the joint mission report were premature and overhasty: they were based on the notion that the firm's supplier could not prove from whom and in which country the quantities of shrimp concerned had been purchased and could not therefore prove that the goods were actually eligible for preferential status under the GSP. According to the firm, the failure to present the administrative documents concerned during the OLAF visit was attributable to the fact that the joint mission's visit had been unexpected. If the firm's supplier had had the time to prepare for the visit, it would have been able to present the documents;

- the Malaysian authorities failed to comply with their inspection obligations under Article 83 of Regulation (EEC) No 2454/93; they reinforced the preliminary checks inspections preceding the issue of Form A origin certificates only after the joint administrative cooperation mission's visit;

- the firm considers that it had a legitimate expectation that the Form A origin certificates issued by the Malaysian authorities were valid, as those authorities had been issuing such certificates at the request of the firm's supplier since about 1975 and the shrimp's Malaysian origin had never been contested.

- the circumstances of this case are comparable with those of case REC 05/00.

I – Examination of the request under Article 220(2)(b) of Regulation (EEC) No 2913/92

(14) Under Article 220(2)(b) of Regulation (EEC) No 2913/92, post-clearance entry in the accounts is waived where the amount of duty 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.

A - Condition concerning an error on the part of the customs authorities

(15) In the case under consideration, the granting of preferential tariff treatment was subject to the presentation of Form A origin certificates. As already indicated, in the absence of all proof of the shrimp's preferential origin, the certificates in question were invalid.

(16) Under Article 220(2)(b) of Regulation (EEC) No 2913/92, post-clearance entry in the accounts is waived where the amount of duty 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 having complied with all the provisions laid down by the legislation in force as regards the customs declaration.

(17) 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.

(18) The Court of Justice has consistently ruled[4] 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 waiving post-clearance recovery of duties.

(19) This condition cannot be considered to be fulfilled where the competent authorities have been misled by inaccurate declarations submitted by the exporter.

[4] Mecanarte judgment of 27 June 1991 (Case C-348/89) and Faroe Seafood judgment of 14 May 1989 (Cases C-153/94 and C-204/94).

(20) In the case of fishery products, the only products eligible for preferences under the GSP are products wholly obtained in the beneficiary country, in its territorial waters, or outside its territorial waters but fished by vessels fulfilling the criteria that establish the origin of the products in that country or in the European Union on the basis of bilateral cumulation.

(21) During the above joint mission, the conclusions of which were approved by the relevant Malaysian authorities, it was found that firm's supplier obtained its shrimp partly from local brokers who themselves bought the shrimp from Malaysian fish farmers and fishermen and partly by importing some quantities of shrimp from Indonesia, Thailand and China. The locally bought shrimp were mixed with the imported shrimp before processing (shelling, cooking). According to the mission report, the manager of the firm's supplier explained that his company's records did not enable it to state whether the Form A origin certificates covering its exports were actually applicable to the shrimp exported to the Union, as all the raw materials (Malaysian and other) were mixed during processing.

(22) So, when the exporter concerned asked the Malaysian customs authorities to issue a Form A certificate of origin containing the letter "P" in box 8 to show that the products had been wholly obtained in Malaysia, it was in fact unable to prove that the shrimp covered by that certificate did actually originate from that country and fulfil the GSP requirements.

(23) Thus, the arguments put forward by the Netherlands about the obligation to keep documents are not relevant in this case because the firm's supplier mixed Malaysian goods with imported goods and had no means of distinguishing between local purchases and imports. The firm's supplier simply did not know whether the goods it was exporting were eligible for the GSP. The fact, claimed by the firm though not substantiated by the file, that the supplier did not have time to prepare for the inspection by the joint mission does not change this conclusion: the firm's supplier was simply not in a position to substantiate the origin of the goods it was exporting.

(24) Moreover, the mission found that one shrimp shipment exported by the firm's supplier to the Netherlands under Form A origin certificates had the same invoice number as an earlier shipment imported into Malaysia from China. The report also notes that the supplier used a similar code for other shipments to the Union. This reference implies that the goods in question had in fact been previously imported from China; the firm's supplier could not provide any explanation in this respect.

(25) It follows from the above that the exporter concerned misrepresented the facts with a view to obtaining Form A certificates.

(26) Moreover, the fact that a laboratory test on random samples has shown that the firm did not have contaminated shrimp in no way proves the origin of the shrimp imported by the firm under Form A origin certificates. The absence of contamination has no bearing on the question of the origin of the goods.

(27) Lastly, the argument that the firm's supplier had bought sufficient quantities of shrimp in Malaysia to cover most of its exports shipped to the firm cannot be accepted: such an argument contests the very existence of the customs debt. Contesting the debt in this way falls outside the scope of the procedure for waiving post-clearance recovery

of duties under Article 220(2)(b) and the procedure for remission or repayment under Article 239 of Regulation (EEC) No 2913/92. It is for the Member States, not the Commission, to determine whether a debt has been incurred and, if so, the amount of the debt. Furthermore, the Court of Justice has consistently ruled[5] that the purpose of Commission decisions in proceedings for waiving post-clearance entry in the accounts or remission/repayment is not to determine whether a customs debt has been incurred or the size of the debt. An operator who does not recognise the existence of a customs debt must challenge the decision establishing that debt before the national courts in accordance with Article 243 of Regulation (EEC) No 2913/92.

(28) In view of the above, it must be concluded that the issue of incorrect certificates by the Malaysian authorities does not constitute an error on the part of those authorities and it may therefore be presumed that the authorities concerned did not commit an error within the meaning of Article 220(2)(b) of the Code.

(29) Under Article 220(2)(b), there would only have been an error if it was clear that the issuing authorities knew or should have known that the goods did not satisfy the conditions laid down for preferential treatment.

(30) Therefore, in order to establish an error on the part of the Malaysian authorities, it is up to the firm to prove that it was evident that the authorities which issued the certificate were aware or should have been aware that the goods did not satisfy the conditions for entitlement to preferential treatment[6].

(31) The Commission does not consider that the firm has proven that the Malaysian authorities were aware or should have been aware that the goods did not satisfy the conditions for entitlement to preferential treatment.

(32) The file, and in particular the above-mentioned mission report, suggests that the exporter obtained most of its supplies locally and therefore had indeed bought Malaysian shrimp for processing; the competent authorities therefore had no reason to question the information provided by the exporter when it certified the Malaysian origin of the shrimp.

(33) Moreover, the file does not show that from 1975 to May 2004, the end of the period of the imports at issue, the firm's supplier obtained its supplies not only locally but also from other countries, nor the quantities involved.

(34) Furthermore, the applicable legislation does not require the Malaysian authorities to conduct physical or accounting checks at the company's premises before issuing a Form A origin certificate.

(35) In view of the above, the Commission believes that there is nothing in the file to show that the Malaysian authorities knew or should have known that the goods in question did not fulfil the conditions for the GSP. The authorities did not therefore commit an error within the meaning of Article 220(2)(b) of the Code.

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5 See judgments in cases C-413/96 (Sportgoods), 24.9.1998, T-195/97 (Kia Motors), 16.8.1998 and T-205/99, (Hyper Srl), 11.8.2002.

6 Judgment of 9.3.2006 in Case C-293/04 (Beemsterboer), paragraph 45.

B - Conditions regarding the good faith of the firm and compliance with the rules in force as regards customs declarations

(36) The file shows that the firm acted in good faith and complied with all the provisions in force regarding its declaration

(37) However, since the existence of an error on the part of the Malaysian authorities has not been established, remission under Article 236 in conjunction with Article 220(2)(b) of the Code cannot be granted.

II – Examination of the request under Article 239 of Regulation (EEC) No 2913/92

(38) Under Article 239 of Regulation (EEC) No 2913/92, import duties may be remitted in situations other than those referred to in Articles 236, 237 and 238 of that Regulation if they result from circumstances in which no deception or obvious negligence can be attributed to the person concerned.

A. The condition concerning the existence of a special situation

(39) The Court of Justice of the European Union has ruled that this provision represents a general principle of equity designed to cover an exceptional situation in which an operator, which would not otherwise have incurred the costs associated with post-clearance entry in the accounts of customs duties, might find itself compared with other operators carrying out the same activity.

(40) It is necessary to check whether the firm's situation should be considered exceptional in comparison with the other operators engaged in the same business.

(41) For the reasons set out in point I.A, the Commission believes that the Malaysian authorities' issuing of Form A certificates that were subsequently shown to be incorrect cannot have placed the firm in a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(42) As regards the argument that the circumstances of this case are comparable with those which resulted in the Commission's decision in case REC 05/00,[7] the Commission has the following observation.

(43) The Commission considers this argument to be erroneous. Case REC 05/00 related to exports by Norwegian approved exporters on the basis of invoice declarations of origin. In such cases the approved exporters complete the formalities that are normally the responsibility of the customs authorities; this requires the exporters to be fully able to complete the formalities in an appropriate manner and to be fully informed of their obligations (for example, the obligation to keep documents). This case is not about a misunderstanding of the rules on document keeping but about the impossibility of proving the real origin of the exported shrimp. This impossibility is not attributable to non-compliance with the obligation to keep documents but to the fact that there was neither a physical separation during processing nor records that could be used to trace the true origin of the products. This fact cannot constitute a special situation.

[7] Commission Decision C(2003)2756, 31.7.2003.

(44) Furthermore, the Commission has not identified any other factors likely to constitute a special situation.

(45) The first condition referred to in Article 239 of Regulation (EEC) No 2913/92 is therefore not fulfilled.

B. Absence of deception or obvious negligence

(46) The Dutch authorities' request and letter to the Commission of 4 June 2009 show that no obvious negligence or deception may be attributed to the firm. However, since the existence of a special situation has not been established, remission on the basis of Article 239 of the Code may not be granted.

(47) The remission of import duties requested is therefore not justified,

HAS ADOPTED THIS DECISION:

Article 1

1. The import duties of EUR XXXXXX which are the subject of the Netherlands' request of 4 June 2009 shall be entered in the accounts.

2. Remission of the import duties in the sum of EUR XXXX, requested by the Netherlands on 4 June 2009, is not justified.

Article 2

This Decision is addressed to the Netherlands.

Done at Brussels, 31-3-2010

For the Commission
Algirdas Šemeta
Member of the Commission