

## COMMISSION DECISION

of 13.7.2012

**finding that remission of import duties is not justified in a particular case (REM 01/2012)**

(only the Dutch and the French texts are authentic)

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<sup>1</sup>,

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 establishing the Community Customs Code<sup>2</sup>,

Whereas:

- (1) By letter of 16 January 2012, received at the Commission on 19 January 2012, the Belgian authorities asked the Commission to decide whether remission of antidumping duties was justified in this case under Article 239 of Council Regulation (EEC) No 2913/92 of 12 October 1992 and Article 905 of Commission Regulation (EEC) No 2454/93 of 2 July 1993.
- (2) On 15 February 2006 a Belgian company, hereafter referred to as the applicant, imported 1050 cartons of gas fuelled pocket lighters under subheading 9613 2090 (TARIC code: 9613 20 90 \* 29) of the Combined Nomenclature (CN). The lighters were declared for release for free circulation by a customs agent, on behalf of the applicant, and were declared to originate in Laos. A non preferential origin certificate issued by the Laotian Chamber of Commerce, attesting to the Laotian origin of the goods was attached to the declaration.
- (3) The Commission, by Regulation (EEC) No 1386/91<sup>3</sup>, imposed a provisional anti-dumping duty on imports into the European Union of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand and falling within CN code ex 9613 10 00 (TARIC code: 9613

---

<sup>1</sup> OJ L 302, 19.10.1992, p. 1.

<sup>2</sup> OJ L 253, 11.10.1993, p. 1.

<sup>3</sup> OJ L 133, 28. 5. 1991, p. 20.

10 00 \* 10). The Council, by Regulation (EEC) No 2832/91<sup>4</sup>, extended this duty for a period not exceeding two months.

- (4) A definitive anti-dumping duty was imposed by Council Regulation (EEC) No 3433/91 of 25 November 1991<sup>5</sup> on imports into the European Union of gas-fuelled, non-refillable pocket flint lighters falling within CN code 9613 10 00 (TARIC code 9613 10 00\*10) originating in Japan, the People's Republic of China, the Republic of Korea and Thailand.
- (5) In 1995, by Council Regulation (EC) No 1006/95<sup>6</sup>, the original ad valorem duty was replaced by a specific duty of ECU 0,065 per lighter.
- (6) By Commission Regulation (EC) No 971/98 of 7 May 1998<sup>7</sup> an investigation was initiated concerning the alleged circumvention of the anti-dumping duty imposed by Regulation (EEC) No 3433/91 on imports of gas-fuelled, non-refillable pocket flint lighters originating in the People's Republic of China by imports of the same lighters consigned from Hong Kong, Macao and Taiwan and by imports of certain disposable refillable pocket flint lighters originating in the People's Republic of China
- (7) By Council Regulation (EC) No 192/1999 of 25 January 1999<sup>8</sup> the definitive anti-dumping duty, imposed by Regulation (EEC) No 3433/91 on imports of gas-fuelled, non-refillable pocket flint lighters originating in the People's Republic of China was extended to imports of certain disposable refillable pocket flint lighters originating in the People's Republic of China or consigned from or originating in Taiwan (TARIC code 9613 20 90\*21) and to imports of non-refillable lighters consigned from or originating in Taiwan, and the proceeding in respect of imports of non-refillable lighters consigned from Hong Kong and Macao was terminated.
- (8) Following the publication of a notice of impending expiry of the anti-dumping duties imposed by Council Regulation (EC) No 1006/95 as extended by Council Regulation (EC) No 192/1999 ("existing measures"), the Commission received a request to review the existing measures pursuant to Article 11(2) of Council Regulation (EC) No 384/96<sup>9</sup> ("the basic Regulation").
- (9) By Council Regulation (EC) No 1824/2001 of 12 September 2001<sup>10</sup>, it was decided to impose definitive anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters falling within CN code 9613 10 00 (TARIC code 9613 10 00\*19 ) originating in the People's Republic of China and to maintain the anti-dumping duties extended by Regulation (EC) No 192/1999 on imports of certain refillable pocket flint lighters originating in the People's Republic of China or consigned from or originating in Taiwan, falling within CN code ex 9613 20 90 (TARIC codes 9613 20 90\*21 and 9613 20 90\*29) and to imports of non-refillable lighters consigned from Taiwan and falling within CN code 9613 10 00 (TARIC code 9613 10 00\*11) or originating in Taiwan and falling within CN code 9613 10 00 (TARIC code 9613 10 00\*19 ).

---

<sup>4</sup> OJ L 272, 28. 9. 1991, p. 1.

<sup>5</sup> OJ L 326, 28.11.1991, p. 1

<sup>6</sup> OJ L 101, 4.5.1995, p. 38

<sup>7</sup> OJ L 135, 8.5.1998, p. 38

<sup>8</sup> OJ L 22, 29.01.1999, p. 1

<sup>9</sup> OJ L 56, 6.3.1996, p. 1

<sup>10</sup> OJ L 248, 18.9.2001, p. 1

- (10) At the moment of import of the lighters the Belgian authorities expressed their doubts on the declared non preferential origin of the goods and asked the applicant to submit a security for an amount of XXXX EUR of antidumping duties that might become due.
- (11) A joint inquiry mission comprising representatives of the European Anti-Fraud Office (OLAF) and three Member States visited Laos between 2 and 26 November 2007 to investigate the alleged circumvention of antidumping duties on flint operated lighters imported from Laos into European Union in the period 2004-2007.
- (12) The investigation found that the exporting company imported finished flint lighters from China into Laos and re-exported them via Thailand to the EU. The lighters imported by applicant were part of this traffic.
- (13) In the event that the lighters which originated in China were solely transshipped through Laos the lighters retained their Chinese origin.
- (14) The Belgian customs authorities found that the lighters should have been classified under TARIC code 9613 10 00 19. Lighters classified under this subheading and originating in China were subject to the antidumping duties provided for by Council Regulation (EC) Council Regulation (EC) No 1824/2001.
- (15) Accordingly, by decision of 4 March 2009, they initiated proceedings against the applicant to recover a total of XXXX EUR in antidumping duties, the sum for which the applicant has requested remission.
- (16) The applicant appealed the recovery of the above mentioned antidumping duties on 19 March 2009, but the recovery was confirmed by decision of the Belgian authorities of 17 December 2009. Then, a request for remission was submitted by the applicant on 23 February 2010 to the Belgian authorities. This request was denied by decision of 12 March 2010, which the applicant appealed on 3 June 2010. The Belgian administration decided to submit the request for decision to the Commission.
- (17) In support of the request made by the Belgian authorities, the company stated on 27 December 2011, in accordance with Article 905(3) of Regulation (EEC) No 2454/93, that it had seen the file that the Belgian authorities proposed to submit to the Commission and had made comments which were attached to the request.
- (18) By letter dated 6 March 2012, received by the company on 7 March, the Commission notified the company of its intention to withhold approval and explained the reasons for this.
- (19) By letter dated 3 April 2011, the company made known its views on the Commission's objections.
- (20) In accordance with Article 907 of Regulation (EEC) No 2454/93, the nine-month period within which a decision has to be taken by the Commission was, therefore, extended by one month.
- (21) 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

11 April 2012 within the framework of the Customs Code Committee - Customs Debt and Guarantees Section.

- (22) 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 resulting from circumstances in which no deception or obvious negligence may be attributed to the company.
- (23) According to the request sent by the Belgian authorities to the Commission on 16 January 2012 and the letter from the company dated 3 April 2012, remission would be justified for the following reasons:
- the Laotian authorities issued a certificate of origin for goods which were of Chinese origin;
  - the applicant acted in good faith;
  - on all documents it was indicated that the goods were of Laotian origin;
  - the Chamber of Commerce of Laos confirmed that the exporting company was a Laotian company;
  - the Belgian authorities would have communicated the customs debt after expiry of the period of 3 years mentioned in Article 221(3) of Council Regulation (EEC) No 2913/92.
- (24) Firstly, the arguments raised by the company in support of its claim that the communication of the debt had not taken place within the legal deadline calls into question the existence of the customs debt. Disputing the debt in this way falls outside the scope of the procedure for remission or repayment under Article 239 of Regulation (EEC) No 2913/92. It is for the Member States, and not for the Commission, to determine whether a debt has been extinguished. Furthermore, the Court of Justice has consistently ruled<sup>11</sup> that the purpose of Commission decisions under the procedures for waiving post-clearance entry in the accounts or remission/repayment on an equitable basis is not to determine whether a customs debt has been extinguished. 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 the Regulation (EEC) No 2913/92. The applicant in its letter of 3 April 2012 (point 4.1) agreed on this issue, therefore this argument is no longer examined in the framework of the procedure for remission under Article 239 of Regulation (EEC) No 2913/92.

#### **I. Existence of a special situation**

- (25) The Court of Justice of the European Union has ruled that Article 239 of Regulation (EEC) No 2913/92 represents a general principle of equity designed to cover an exceptional situation in which an operator, which would not otherwise have incurred

---

<sup>11</sup> See judgments in Cases C-413/96 *Skatteministeriet v Sportgoods A/S* [1998] ECR I-05285, T-195/97 *Kia Motors Nederland BV and Broekman Motorships BV v Commission of the European Communities* [1998] ECR II-02907 and T-205/99 *Hyper Srl v Commission of the European Communities* [2002] ECR II-03141.

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<sup>12</sup>.

- (26) For the application of all EU trade policy measures, including antidumping duties, the non preferential origin rules are used to determine whether a product is originating or not.
- (27) Article 24 of Regulation (EEC) No 2913/92 sets out the non-preferential origin rules for goods whose production involves more than one country. Goods whose production involved more than one country shall be deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture.
- (28) In the event that the lighters were originating in China and solely transhipped via Laos the lighters retained their Chinese origin and are liable to antidumping duties.
- (29) The third country authorities play no part in determining the non preferential origin of the goods for the purposes of the EU antidumping rules. They have no competence in this and therefore any declaration by them with regard to the non preferential origin of the goods cannot give rise to any legitimate expectation by the applicant.
- (30) In addition, even if it should be acknowledged that the certificate issued by the Laotian Chamber of Commerce was inaccurate, the fact that this Chamber of Commerce made an error cannot have put the company in a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92, because for that to be the case it would have to have been committed, as the Court stated, by 'any authority which, acting within the scope of its powers, furnishes information relevant to the recovery of customs duties and which may thus cause the person liable to entertain legitimate expectations'<sup>13</sup>.
- (31) Yet in this instance the application of Council Regulation (EC) No 1824/2001 and of the rules on non preferential origin is not within the scope of the powers of the Laotian Chamber of Commerce. As such, the company could derive no legitimate expectation from the fact that it held an origin certificate issued by the Laotian Chamber of Commerce. It is the responsibility of the importer into the EU to establish and declare the non preferential origin of imported goods so that they are subject to the EU measures applicable to that origin. In addition, checking that this non preferential origin has been correctly established and that the relevant legislation as published in the Official Journal has been correctly applied is the exclusive responsibility of the EU customs authorities.
- (32) As such, the error made by the Laotian Chamber of Commerce cannot have put the company in a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

---

<sup>12</sup> See judgment of 10 May 2001 in joined cases T-186/97, T-190/97 to T-192/97, 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 and Others v Commission* [2001] ECR II-1337.

<sup>13</sup> See judgement of 27 June 1991 in case C-348/89 *Mecanarte - Metalúrgica da Lagoa Lda v Chefe do Serviço da Conferência Final da Alfândega do Porto*, paragraph 22.

- (33) The indication of a certain origin on the commercial papers, such as invoices and bills of lading forms, which afterwards is found to be incorrect is a normal commercial risk for an operator.
- (34) The fact that the applicant was inexperienced cannot be constitutive of a special situation, but is an element to take into account when examining the second condition regarding the absence of deception or obvious negligence.
- (35) The Commission has found no other elements that may justify consideration of the case under Article 239 of Regulation (EEC) No 2913/92.
- (36) In view of the above, the Commission takes the view that the first condition referred to in Article 239 of Regulation (EEC) No 2913/92 is not met.

## **II. Absence of deception or obvious negligence**

- (37) According to established case-law, 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.
- (38) Regarding the criterion of the rules' complexity, it should be pointed out that the indication in TARIC that antidumping measures were imposed to flint lighters originating in the People's Republic of China and Taiwan, cannot be considered to have led the applicant to doubt the application of anti-dumping duties, but rather to have served the applicant to be more aware of the need to pay attention to the actual origin of the goods.
- (39) With regard to the criterion concerning the applicant's experience, it is necessary to examine whether or not the applicant is a trader whose business activities consists mainly in import and export transactions. It should be noted that, based on the information provided in the file, the business activity of the applicant consists mainly in the printing of advertising material such as lighters, ballpoints, agendas, etc. Therefore, the applicant cannot be deemed as experienced. However, although the applicant was inexperienced, he made use of the services of a customs agent. An operator who uses the services of a customs agent cannot invoke his inexperience with regard to customs formalities.<sup>14</sup>
- (40) As regards the diligence shown by the applicant it must be noted that, where doubts exist as to the exact application of the provisions, non-compliance with which may result in a customs debt being incurred, the onus is on the trader to make inquiries and seek all possible clarification to ensure that he does not infringe those provisions. In this case, the applicant knew that lighters imported from China were charged with antidumping duties, searched the Internet to find a producer in another country and decided to import lighters from Laos. To do so, the applicant relied completely on a third person to negotiate the price and to place the order with the German branch of the exporting company. There is no indication that the applicant informed himself before the import, on the production process of the lighters and on the rules to be

---

<sup>14</sup> See judgment of 20-11-2008 in case C38/07 *Heuschen & Schrouff Oriental Foods Trading BV. v Commission*.

complied with for the lighters to obtain the Laotian non preferential origin. Consequently, it appears that the applicant did not act with due diligence.

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

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

HAS ADOPTED THIS DECISION:

*Article 1*

Remission of the import duties in the sum of XXXX EUR, requested by Belgium on 16 January 2012, is not justified.

*Article 2*

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 13.7.2012

*For the Commission*  
*Algirdas ŠEMETA*  
*Member of the Commission*

