

COMMISSION DECISION

C(2014) 4931

of 17/07/2014

**finding that the import duties shall not be entered in the accounts in a particular case
(REC 01/2013)**

(only the Dutch and 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 1992¹ establishing the Community Customs Code, and in particular Article 220(2) (b) and Article 239(1) thereof,

Having regard to Regulation (EEC) No 2454/93 of 2 July 1993² laying down provisions for implementation of Council Regulation (EEC) No 2913/92,

Whereas:

- (1) By letter dated 8 May 2013, received by the Commission on 13 May 2013, the Kingdom of Belgium asked the Commission to decide under Article 5(2) of Council Regulation (EEC) 1697/79 of 24 July 1979³ on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties, whether waiving of post clearance entry in the accounts of import duties was justified and in the alternative, to consider under Article 13 of Council Regulation (EEC) No 1430/79⁴ on the repayment or remission of import duties⁵, whether remission of import duties was justified in the following circumstances.
- (2) Between 22 May and 12 June 1992, a Belgian importer, (hereinafter: the applicant) submitted six import declarations to the customs office in Antwerp for the import of tinned bonito from the Philippines.

¹ OJ L 302, 19.10.1992, p. 1.

² OJ L 253, 11.10.1993, p. 1.

³ OJ L 197, 3.8.1979, p.1

⁴ OJ L 175, 12.7.1979, p.1

⁵ Council Regulation (EEC) No 1430/79 of 2 July 1979 and Council Regulation (EEC) No 1430/79 have been repealed by Council Regulation (EEC) No 2913/92 of 12 October 1992. The relevant provisions of those two repealed Regulations were replaced by almost identical provisions of Council Regulation (EEC) No 2913/92 of 12 October 1992 (article 220 (2) (b) and article 239 of the Community Customs Code).

- (3) At the time of operations, imports into the Community of this type of fishery products originating in the Philippines qualified for preferential treatment under the System of Generalised Preferences (GSP). Under Article 7 of Commission Regulation (EEC) N° 693/88 of 4 March 1988⁶ imports of bonito (CN code 16 04 14 90) originating in the Philippines were eligible for a preferential tariff treatment (*ad valorem* duty of 18% instead of the regular 25% duty rate) upon the release for free circulation in the Community if they were covered by a Form A certificate of origin issued by the competent authorities in the Philippines.
- (4) A Form A certificate of origin, issued by the Philippine competent authorities was presented for each declaration for release for free circulation. The Belgian customs authorities granted preferential tariff treatment for the operations in question.
- (5) Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, hereinafter 'the Customs Code'), which consolidated the provisions of customs law previously scattered across a multitude of Community regulations and directives, was the subject of implementing provisions contained in Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 (OJ 1993 L 253, p. 1). Both regulations became applicable on 1 January 1994.
- (6) In the present case, the facts in the main proceedings to which the customs debt relates occurred before the Customs Code became applicable.
- (7) According to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force⁷, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force⁸.
- (8) It is therefore appropriate to refer, on the one hand, to the substantive rules contained in the legislation in force prior to implementation of the Customs Code and, on the other hand, to the procedural rules contained in the Customs Code.
- (9) Following an investigation in the Philippines between 22 March and 1 April 1993 by representatives of Member States and the Commission into the conditions under which the Philippine authorities issued Form A certificates of origin, it was found that Form A certificates issued by the Philippine authorities for exports to the Community had been wrongly issued since the exported product was not bonito but tuna and as such not eligible for the preferential rate of customs duty rate at importation to the Community. The inquiries were conducted with the assistance of the Philippine

⁶ OJ L 77, 22.3.1988, p.1 on the definition of the concept of originating products for the purposes of the application of tariff preferences granted by the European Economic Community in respect of certain products from developing countries and Council Regulation (EEC) N° 3587/90 of 3 December 1991 extending into 1992 the application of Regulations (EEC) N° 3831/90, (EEC) N° 3832/90, (EEC) N° 3833/90 and (EEC) N° 3835/90, applying generalized tariff preferences for 1991 in respect of certain products originating in developing countries.

⁷ Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux v Commission*, paragraph 22; Case C-61/98 *De Haan* paragraph 13; Case C-251/00 *Ilumitrónica*, paragraph 29; and Joined Cases C-361/02 and C-362/02 *Tsapalos and Diamantakis* paragraph 19.

⁸ Joined Cases 212/80 to 217/80 *Salumi and Others*, paragraph 9, and Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux v Commission* paragraph 22

authorities (Department of Trade and Industry, Bureau of Fisheries and Aquatic Resources-BFAR-, National Statistics Office and the Bureau of Customs).

- (10) Since the products concerned were not eligible for preferential tariff treatment, Member States of the European Community were asked to start the recovery of customs duties on consignments of tinned fish declared as bonito, previously imported from the Philippines.
- (11) In consequence, on 26 July 1993, the Belgian customs administration requested that the applicant pay the customs duties in the amount of EUR XXXX (BEF XXXX). This is the sum for which the applicant requested waiver of post-clearance entry in the accounts and, in the alternative, remission of import duties.
- (12) The applicant lodged an appeal against the decision before the Belgian Court. The national proceedings were stayed, pending the decision to be adopted by the European Commission on this file.
- (13) Under Articles 871 and 905 of Regulation (EEC) No 2454/93, the applicant took note of the application that the Belgian customs administration submitted to the Commission, which was registered under reference number REC 01/2013.
- (14) By letter dated 7 June 2013, the Commission asked the Belgian authorities for additional information. This information was provided by letter dated 18 February 2014, received by the Commission on the same date.
- (15) The applicant confirmed that it had seen the letter from the Commission and the reply which the Belgian authorities proposed to submit.
- (16) The administrative procedure was therefore suspended between 8 June 2013 and 18 February 2014.
- (17) In accordance with Articles 873 and 907 of Regulation (EEC) 2454/93, a group of experts composed of representatives of the Member States met on 15 July 2014 within the framework of the Customs Code Committee (Customs Debt and Guarantees Section).
- (18) Under Article 5(2) of Regulation (EEC) No 1679/79, there can be no post-clearance entry in the accounts of import duties where the amount of duties legally owed was not entered in the accounts as a result of an error of the customs authorities themselves, and this error could not reasonably have been detected by the person liable for payment, the latter for its part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (19) In the case in point, preferential tariff treatment of the imports was subject to presentation of Form A origin certificates issued by the Philippine authorities. 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.
- (20) The European Union 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 expectations.
- (21) In this instance, the exporters declared on the certificates of origin that the goods they referred to, met the conditions for obtaining the certificates. However, as the Court has

ruled⁹, the fact that the exporters submitted incorrect declarations does not rule out the possibility that the competent authorities committed an error. The authorities' behaviour needs to be evaluated in the light of the broader context in which the relevant customs provisions were applied in this case, there is supporting evidence from the Indo-Pacific Tuna Development Programme – a body funded jointly by United Nations and the European Community to monitor the tuna fishing in Indian and Pacific Oceans – that the quantities of "bonito sarda spp" did not match the declared catches of this type of fish. At the same time, Thailand, Philippines and Indonesia were, in that order, the main exporting countries of this product.

- (22) In the Joint Report on Findings and Conclusions of the European Commission's mission to Philippines, BFAR stated that, upon the scientific evidence, this group of fish, including "bonito sarda spp" is not available in Philippine waters in commercial quantities and represents barely two per cent of total tuna sample taken. Therefore, the "bonito sarda spp" could not have been fished in Philippine waters and was not eligible for preferential tariff treatment.
- (23) The Philippine population, tinning companies included, considered small tunas (frigate, bullet and little tinny tuna) as "bonito", using the name "tulingan". Only the scientific laboratory tests confirmed that the product imported was tuna and not bonito.
- (24) On 9 June 1992 the Council adopted Regulation (EEC) No 1536/92 laying down common marketing standards for preserved tuna and bonito¹⁰. Although this Regulation is completely without prejudice to the classification and tariff treatment of these products when imported into the Community, in particular for the granting of preferential arrangements, the fact that it was adopted indicates that there had been serious confusion on the subject for a long time, which it was necessary to put an end to. The provisions of the Regulation show that there was particularly great confusion about the commercial names used.
- (25) The circumstances in this case reveal an error of the competent Philippine authorities, within the meaning of Article 5(2) of Regulation (EEC) No 1697/79 and within the meaning of the EUCJ jurisprudence¹¹.
- (26) As the EUCJ has consistently ruled, when determining whether the debtor could reasonably have detected the competent authorities' error, the nature of the error, the professional experience of the debtor and its diligence must be taken into account.
- (27) At the time in question, the applicant had no reason to doubt the correctness of the commercial documents or the certificates or what was written on the imported tins. The name 'bonito' appeared on the commercial documents, the tins delivered and the certificates of origin. The applicant has consistently stated that each time it ordered, paid for and imported 'bonito (sarda spp). Furthermore, it would be very difficult in practice to distinguish bonito from other types of tuna after it had been tinned.
- (28) The applicant cannot therefore be blamed for having failed to discover that the imported goods were not really bonito, but tuna. Should the nature of the error be defined as such, it can lead to the conclusion that the applicant could have not reasonably detected this error as it consists on confusion based upon the linguistic

⁹ Ilumitrónica judgment of 14 November 2002, Case C-251/00

¹⁰ OJ L 163, 17.6.1992, p.1.

¹¹ EUCJ Judgement in case C348/89, par. 20, Mecanarte.

habits of the population of the exporting country. It must therefore be accepted that the error of the competent Philippine authorities could not reasonably have been detected by the applicant.

- (29) The applicant concerned may be considered to be a professional with experience of customs formalities including in importing bonito from the Philippines. However, this factor cannot be decisive in this case.
- (30) The file does not show any evidence which would cast doubt on the fact that the applicant acted in good faith.
- (31) Moreover, the applicant complied with all the provisions laid down by legislation in force and did not deviate from the standard practise for this kind of operations.
- (32) Post-clearance entry in the accounts is therefore not justified.
- (33) Where special circumstances warrant waiver of entry in the accounts, Article 875 of Article Regulation (EEC) No 2454/93 authorises the Commission to determine the conditions under which the Member States may waive the entry in the accounts in situations involving comparable issues of fact and law.
- (34) Cases comparable in fact and law to this one are requests lodged within the legal time limits in respect of goods covered by certificates of origin Form A issued by the Philippine competent authorities in the period covered by the OLAF investigation in question, where the goods declared were tinned bonito products originating in the Philippines and where those import operations were carried out in circumstances comparable in fact and law to those which gave rise to this case. The operators concerned 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 EUR XXXX (BEF XXXX) which were the subject of the Kingdom of Belgium's request of 8 May 2013 in the particular case REC 01/13 shall not be entered in the accounts.

Article 2

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels,

For the Commission
Algirdas ŠEMETA
Member of the Commission