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REM 02/04

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 24-9-2004
C(2004)3493

NOT FOR PUBLICATION

COMMISSION DECISION

Of 24-9-2004

finding that the repayment of import duties in a particular case is justified

(Only the Danish text is authentic)

(Request submitted by Denmark)
(REM 02/04)

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**(Request submitted by Denmark)
(REM 02/04)**

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 2913/92,³ as last amended by Regulation (EC) No 2286/2003,⁴

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 343, 31.12.2003, p. 1.

Whereas:

- (1) By letter dated 24 March 2004, received by the Commission on 26 March, Denmark asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether the repayment of import duties is justified in the following circumstances.
- (2) A firm established in Denmark imported several consignments of tuna from Ghana in the period from 7 August 1998 to 19 February 1999.
- (3) Products of this type originating in Ghana could be imported into the Community under the preferential arrangements applicable to the African, Caribbean and Pacific countries provided for by the Fourth ACP-EC Lomé Convention,⁵ as revised by the Agreement signed in Mauritius on 4 November 1995,⁶ hereinafter referred to as the “Fourth Lomé Convention”. In accordance with Article 12 of the Fourth Lomé Convention's Protocol 1 concerning the definition of the concept of “originating products” and administrative cooperation methods, products covered by an EUR.1 certificate of origin issued by Ghana’s competent authorities were eligible for preferential tariff treatment when released for free circulation in the Community.
- (4) In the case in point, the firm presented EUR.1 origin certificates issued by the competent Ghanaian authorities in support of its customs declarations for release for free circulation. The Danish customs authorities accepted the declarations and granted preferential tariff treatment.
- (5) Following an investigation into the conditions under which the Ghanaian authorities issued EUR.1 certificates of origin, carried out in Ghana by representatives of several Member States and the Commission in February 2000, it was found that a number of fishing vessels (and vessel-owners) that had supplied tuna to the firm’s supplier did not meet the origin criteria laid down in Article 2 of Protocol 1 to the Fourth Lomé Convention and that the tuna caught by these vessels did not therefore qualify under the ACP preferential rules of origin.

⁵ OJ L 229, 17.08.1991, p. 3.

⁶ OJ L 156, 29.05.1998, p. 3.

- (6) On the basis of the findings from this mission, it was established that, in this case, the firm had used EUR.1 certificates of origin that should not have been issued. Since the products imported to Denmark were not therefore eligible for preferential tariff treatment, the Danish authorities demanded that the firm pay import duties in the sum of XXXXXXXX.
- (7) The firm appealed to the Danish national tax tribunal against this decision by the Danish authorities. In a judgment of 28 January 2004 the tax tribunal ruled, on the basis of the conclusions of the investigation by the Commission and the Member States, that the imports in question were not eligible for the preferential tariff arrangements. However, referring to Commission decision No C(2002) 3627 of 3 October 2002, the tax tribunal asked the Danish authorities to forward the dossier to the Commission for examination of whether repayment of duties was justified on the basis of Article 239 of Regulation (EEC) No 2913/92.
- (8) The competent Danish authorities forwarded the request to the Commission on 24 March 2004. They argue that this case involves a special situation by virtue of the complexity of the preferential rules of origin for fishery products under the Fourth Lomé Convention, and in particular the provisions of Article 2 of Protocol 1 to the Convention. It is further claimed that, in issuing certificates of origin which later proved to be invalid, Ghana's competent authorities made an error constituting a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92. It is also argued that this case is comparable in fact and law to the case that led to Commission Decision No C(2002) 3627 of 3 October 2002, in which the Commission decided that it was justified to remit duties.
- (9) The Danish authorities also point out in their letter of 24 March 2004 that there was no deceit or obvious negligence on the part of the firm in question.
- (10) Under Article 905 of Regulation (EEC) No 2454/93, and in support of the request made by the competent Danish authorities, the firm concerned indicated that it had seen the dossier submitted to the Commission by the Danish authorities and had nothing to add.

- (11) In accordance with Article 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 17 June 2004 within the framework of the Customs Code Committee (Repayment Section) to consider the case.
- (12) In accordance with Article 239 of Regulation (EEC) No 2913/92 import duties may be repaid or remitted in special situations (other than those laid down in Articles 236, 237 and 238 of the said Regulation) resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.
- (13) The Court of Justice of the European Communities has consistently taken the view that these provisions represent a general principle of equity designed to cover a special 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.
- (14) In the case in point, the granting of preferential tariff treatment for the imports was subject to presentation of EUR.1 certificates of origin issued by the relevant Ghanaian authorities.
- (15) Following the investigation into the conditions under which the Ghanaian authorities issued EUR.1 certificates of origin, carried out in Ghana by representatives of several Member States and the Commission in February 2000, the competent Danish authorities viewed the certificates of origin presented when the products in question were imported as invalid because they failed to meet some of the origin criteria provided for in Article 2 of Protocol 1. More specifically, the fishing vessels that had caught the fish and the firms that owned them did not meet the conditions laid down in the third indent of Article 2(2) of the Protocol.
- (16) Under Article 904(c) of Regulation (EEC) No 2454/93, reliance on the validity of certificates of preferential origin 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) However, 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 expectations. Consequently, when the authorities' error is due to inaccurate declarations from exporters, reliance on the validity of the certificates of origin is no longer protected.
- (18) In this instance, the exporters declared on the certificates of origin that the goods they referred to met the conditions for obtaining the certificates.
- (19) However, in the light of [recent rulings](#) of the Court of First Instance of the European Communities,⁷ the fact that the relevant Ghanaian authorities might have been misled by the exporters did not necessarily mean that the circumstances of the case could not constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (20) In the case in point a number of factors can be considered as constituting a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (21) The fact that the relevant authorities in Ghana had issued certificates later shown to be invalid over a long period and the firm had therefore benefited from preferential arrangements over that same period could have lead the firm to believe that its imports complied with the regulations.
- (22) Moreover, until 28 August 2002, the competent Ghanaian authorities had refused to sign the report written after the Community investigation in 2000. Since signing a joint document concerning the findings of the Community investigation on 28 August 2002, the Ghanaian authorities have finally recognised that the fishing vessels belonging to the three exporters concerned did not meet the origin criteria laid down in Article 2 of Protocol 1 to the Fourth Lomé Convention. Nevertheless, they have not as yet withdrawn the origin certificates which they issued.
- (23) The above facts were bound to make the importer wonder whether duties were really due. These factors must count in favour of an importer acting in good faith.

⁷ “Turkish televisions” judgment of 10 May 2001, 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 ([2001] ECR II-1337).

- (24) The circumstances of this case are therefore such as to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (25) However, such a situation can give rise to the remission of duties only if no deception or obvious negligence can be attributed to the person concerned.
- (26) The Court of Justice of the European Communities has consistently taken the view that account must be taken, in particular, of the operator's experience and diligence when examining whether there has been obvious negligence.
- (27) In this case the firm had no reason to doubt that everything was in order.
- (28) The certificates of origin were issued by the Ghanaian authorities over a number of years and the firm was granted preferential tariff arrangements over the same period. Over time, this situation could only have reinforced the firm's feeling that the goods were being imported in accordance with the relevant regulations.
- (29) Furthermore, there is no evidence that the firm deviated from normal business practice when carrying out the imports concerned.
- (30) Lastly, the Danish authorities consider that the firm acted in good faith.
- (31) The firm concerned must therefore be considered to have acted without deception or obvious negligence.
- (32) Repayment of the import duties is therefore justified in this case.
- (33) Where special circumstances warrant repayment or remission, Article 908 of Regulation (EEC) No 2454/93 authorises the Commission to determine the conditions under which the Member States may repay or remit duties in cases involving comparable issues of fact and law.

(34) Cases comparable in fact and law to this one are requests for repayment or remission lodged within the legal time limits in respect of import operations covered by EUR.1 certificates issued by Ghana's competent authorities in the period investigated by the Community mission in question (1997-2000), where the goods were fished by the same vessels as in this case and where those operations were carried out in circumstances comparable in fact and law to those which gave rise to this case. There must have been no deception or obvious negligence on the part of the importers,

HAS ADOPTED THIS DECISION:

Article 1

The remission of import duties in the sum of XXXXXXXX referred to in the request from Denmark dated 24 March 2004 is justified.

Article 2

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 24-9-2004

For the Commission

Frits Bolkestein

Member of the Commission