EUROPEAN COMMISSION

Brussels, 20.4.2012
C(2012) 2476 final

COMMISSION DECISION

of 20.4.2012

finding that the remission of import duties is not justified in a particular case (REM 02/2010)

(only the English text is authentic)

COMMISSION DECISION

of 20.4.2012

finding that the remission of import duties is not justified in a particular case (REM 02/2010)

(only the English text is 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[1],

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[2],

Whereas:

(1) By letter of 16 March 2010, received at the Commission on 24 March 2010 the UK administration asked the Commission to consider whether remission of customs duties and anti-dumping duties was justified in this case under Article 239 of Council Regulation (EEC) No 2913/92 and Article 905 of Commission Regulation (EEC) No 2454/93 under the following circumstances:

(2) Between 24 April 2006 and 24 January 2008, a company established in the UK, hereafter referred to as the applicant, imported from China, Brazil and India Silicon metal of TARIC code 2804 69 00 90 under the Inward Processing Procedure for the production of Silicone, which was the compensating product that was re-exported.

(3) At the time in question, imports into the European Union of this type of product originating in China if declared for release for free circulation were subject to definitive anti-dumping duty rate of 49% in addition to the standard customs duty rate of 5.5%, so the total customs duty rate was 54.5%. The imports in question were all declared to Inward Processing Procedure, so duties were suspended, provided that certain conditions were fulfilled.

(4) The main waste products from the manufacturing process containing Silicon metal are Spent Bed (primarily), DPR gels and other wastes classified under Nomenclature Code

[1] OJ L 302, 19.10.1992, p. 1.
[2] OJ L 253, 11.10.1993, p. 1.

3910 0009. This waste was not sold or further used and it required disposal at landfill sites or incinerators.

(5) In an audit visit to the company in March 2006, the United Kingdom Customs authorities identified some irregularities. Following that, those authorities made recommendations to the applicant including remarks on the reporting of Main Compensating Products and Secondary Compensating Products. However, the reporting on the quarterly Inward Processing returns of disposal of waste and by products produced in the manufacture of Silicone, as part of the authorization, to customs, was not addressed at that time.

(6) During audit visits by the United Kingdom Administration in June and September 2007 it was established that the waste, to be considered as a Secondary Compensating Product, had been disposed of in an unauthorised way at landfill sites or incinerators in the United Kingdom and Belgium.

(7) Given that the applicant disposed of the waste without the customs authorities having been informed in advance, a customs debt had been incurred under Council Regulation (EEC) No 2913/92.

(8) Consequently, the United Kingdom customs authorities initiated proceedings on 4 February 2008 for the post-clearance recovery of a total amount of EUR XXXX consisting of GBP XXXX (customs duties) and GBP XXXX (anti-dumping duties). This equates to XXXX Euros and XXXX Euros respectively. The debt covers imports in the period 24 April 2006 to 24 January 2008. These are the sums for which the applicant has requested remission.

(9) In support of the request made by the United Kingdom authorities, the applicant stated that it had seen the dossier that the United Kingdom Customs authorities proposed to submit to the Commission and had nothing to add.

(10) By letter dated 24 June 2010, the Commission asked the United Kingdom authorities for additional information. These authorities replied by letter dated 9 March 2011, which the Commission received on 24 March 2011. Examination of the request for remission was therefore suspended between 25 June 2010 and 24 March 2011.

(11) The Commission sent an additional request for information to the United Kingdom authorities on 23 May 2011. The reply was provided by letter of 4 November 2011, received by the Commission on 21 November 2011. Examination of the request for remission was therefore suspended between 24 May 2011 and 21 November 2011.

(12) By letter dated 7 February 2012, received by the applicant on 8 February 2012, the Commission notified the applicant of its intention to withhold approval and explained the reasons for this.

(13) 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.

(14) The applicant did not make use of its right of defence.

(15) 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.

(16) Under Article 239 of Council 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 applicant.

(17) According to the request sent by the United Kingdom authorities to the Commission, remission would be justified as the applicant was in a special situation compared to other operators engaged in the same business for the following reasons:

– The applicant has applied the Inward Processing Procedure for 20 years without Customs having questioned the way the procedure was applied.

– The customs authority was aware of the production of this waste.

– During audits in 2006 and 2007, the applicant provided an overview of the manufacturing process including the production and disposal of waste but it was not informed that its system for reporting the disposal of waste was inadequate.

(18) Also, according to the request sent by the United Kingdom to the Commission, there would be no deception or obvious negligence on the part of the applicant for the following reasons:

– The applicant acted in good faith and complied with the legislation in force as regards the customs procedure.

– The applicant worked in close cooperation with its local customs office and sought its advice to ensure compliance with the procedural requirements of its Inward Processing Procedure authorization.

– The applicant can demonstrate the full usage of the Silicon metal, imported and processed under the Inward Processing Procedure.

– The waste, which has no commercial value, was not released for free circulation and had been adequately disposed of in landfill sites or incinerators in the EU.

– The destruction of the waste can be proven for each imported consignment.

I. Existence of a special situation

(19) The Court of Justice of the European Union has ruled that Article 239 of Council 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 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[3].

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

(21) The applicant invokes shortcomings of the United Kingdom authorities: For a long period United Kingdom Customs authorities did not object to the procedure applied by the company despite the fact that they knew that there was waste derived from the production process and that the waste was not reported to customs. This error would have placed the applicant in a special situation.

(22) In view of the above, the Commission takes the view that a special situation results from the behaviour of the United Kingdom authorities and that the first condition referred to in Article 239 of Council Regulation (EEC) No 2913/92 is met.

(23) However, the existence of a failing on the part of the competent authorities does not in itself confer entitlement to remission under Article 239 of Council Regulation (EEC) No 2913/92. For that entitlement, it is also necessary to prove that there was no deception or obvious negligence.

II. Condition concerning the absence of deception or obvious negligence

(24) The Court has consistently ruled that when examining whether there has been obvious negligence account must be taken, in particular, of the complexity of the legislation and the operator's experience and diligence.

(25) Regarding the criterion of the rules' complexity, the Commission considers that Community Customs provisions, in particular Article 182 (3) of Regulation (EEC) No 2913/92 and Article 842 of Regulation (EEC) 2454/93 are unambiguous and cannot be deemed as complex.

(26) It should also be pointed out that the rules concerning Customs Procedures with Economic Impact (in this case, Inward Processing Procedure) cannot be considered as complex: Both Article 114 (2) (d) of Council Regulation (EEC) No 2913/92 and Article 496 (l) of Commission Regulation (EEC) No 2454/93 are known and used by the traders and there is no particular difficulty in interpreting them. If the applicant after having read these provisions had doubts on whether the waste had to be considered as a Secondary Compensating Product or not, it should have expressed its concern to the United Kingdom Customs authorities.

(27) As regards the condition relating to the applicant's professional experience, the Court of Justice has ruled[4] that it must be verified whether the trader is professionally engaged in an activity consisting essentially in import and export operations, and whether it already had some experience of trading in the goods in question, that is to

---

[3] 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.

[4] Case C-250/91, Hewlett Packard, paragraph 26; Case C-48/98 Söhl & Söhlke, paragraph 57, and Case C-443/05P Common Market Fertilizers v Commission, paragraph 188.

say whether in the past it had carried out similar transactions on which customs duties had been correctly calculated.

(28) The applicant is part of a multinational company considered as a global leader in the sector of Silicon metal and Silicone-based technology. It is an experienced trader whose business activities consist mainly in import and manufacturing transactions and has applied the Inward Processing Procedure for more than twenty years.

(29) Therefore, it can be concluded that the applicant is to be considered as experienced as regards the operations in question.

(30) About the degree of care, the Court of Justice has ruled that an economic operator, in particular an experienced one, can be expected to be aware of the customs legislation to be applied[5]. The Commission considers that this principle has to be applied for all EU legislation, national legislation and instructions as well insofar as they are available to the operator.

(31) To prove its diligence, it does not appear unreasonable to expect from a commercial trader whose activity consists of import and manufacturing operations to have ascertained whether the waste produced was to be considered as a Secondary Compensating Product or not, since the beneficiaries of the regime are required to comply strictly with the obligations resulting from it.

(32) In view of the above, the Commission takes the view that the applicant did not act with the diligence to be expected and therefore the second condition referred to in Article 239 of Regulation (EEC) No 2913/92 is not met.

(33) The remission of customs duties and anti-dumping duties requested is therefore not justified,

HAS ADOPTED THIS DECISION:

Article 1

Remission of the customs duties in the sum of GBP XXXX and remission of anti-dumping duties in the sum of GBP XXXX requested by the United Kingdom on 16 March 2010, is not justified.

[5] Case 161/88 Firma Binder v Hauptzollamt Bad Reichenhall [1989] paragraph 22.

Article 2

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 20.4.2012

For the Commission
Algirdas ŠEMETA
Member of the Commission

CERTIFIED COPY
For the Secretary - General

Jordi AYET PUIGARNAU
Director of the Registry