

COMMISSION DECISION

C(2014) 2364

of 14/04/2014

on finding that the remission of import duties under Article 239 of the Community Customs Code (Regulation (EEC) No 2913/92) is justified for a certain amount and it is not justified for another amount in a particular case (REM 01/2013)

(only the Italian version 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 Code¹,

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92², establishing the Community Customs Code,

Whereas:

- (1) By letter of 28 December 2012, received by the Commission on 7 January 2013, Italian customs authorities asked the Commission to decide whether the remission of import duties was justified under Article 239 of Regulation (EEC) No 2913/92 and article 905 of Regulation 2454/93 in the following circumstances.
- (2) Between 12 October 1998 and 7 April 2000, an Italian operator submitted to the Italian customs authorities twenty three import declarations of bananas originating in Central and South American non ACP³-countries.
- (3) At the time of the events, imports into the Community of bananas originating in non-ACP third countries, benefited from a preferential tariff treatment on release for free circulation, within the framework of the tariff quota envisaged by Council Regulation (EEC) n° 404/93 of 13 February 1993⁴ concerning the common organisation of the market in bananas, replaced as of 1st January 2009 by Commission Regulation (EC) No 2362/98 of 28 October 1998⁵.
- (4) Those Regulations provided quotas for banana imports at reduced customs duty determined annually by the Community and divided between registered traders in different Member States on the basis of import licenses issued by the competent authorities of the Member States.

¹ OJ L 302, 19.10.1992 p. 1.

² OJ L 253, 11.10.1993, p.1.

³ ACP: African, Caribbean and Pacific Group of States

⁴ OJ L 47, 25.02.1993, p. 1.

⁵ OJ L 293, 31.10.1998 p. 32

- (5) As the bananas were covered in accordance with the provisions of those Regulations, by an import licence issued by the Member States, the preferential tariff treatment could be granted at the time of the release for free circulation of the aforesaid products, within the limits of the tariff quota concerned.
- (6) Under Article 13 of Commission Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community, the rights accruing from import licences could be transferred to a single transferee.
- (7) Under the 1993 Regulation, the tariff quota was divided among three categories of operators (A, B and C); category A and B operators obtained licences on the basis of the average quantities of bananas that they had marketed over the three previous years. The Regulation also laid down certain rules and prohibitions concerning transfers between operators of different categories. In particular, transfers of rights by Category C operators to operators in Categories A and/or B were not permitted.
- (8) In the case in question, the firm applying for the remission of duties belonged to 'Category A' of Regulation (EEC) n° 1442/93. It had obtained the rights to use Spanish licenses apparently issued by the Spanish authorities by buying almost exclusively from another Italian company which, in turn, as in other cases examined by the Commission, had obtained these rights through intermediaries.
- (9) As of 1 January 1999, according to Regulation (EEC) No 2362/98 of 28 October 1998, the quota has been shared between "traditional" operators and "newcomers". The applicant was a category A operator.
- (10) Article 21 of Commission Regulation (EEC) No 2362/98 of 28 October 1998 laid down certain rules and prohibitions concerning transfers between operators of different categories. In particular, rights cannot be transferred from newcomers to traditional operators.
- (11) The Italian customs authorities accepted the declarations and granted favourable tariff treatment.
- (12) Investigations conducted by the Member States and coordinated by the Commission found that forged import licences had been presented for release for free circulation in several Member States, including the licences presented by the Italian operator for the imports in question.
- (13) Since the imported goods were not therefore eligible for favourable tariff treatment, the Italian customs authorities initiated proceedings for the recovery of the import duties owed on 3 September 2001, totalling EUR XXXX, from the Italian company. This is the amount in respect of which the applicant has requested remission of import duties.
- (14) The company appealed against this assessment. In parallel there were criminal proceedings held in national courts and later the trader was acquitted in criminal proceedings.
- (15) Under Article 905(2) of Regulation 2454/93, files are not sent to the Commission for decision where the Commission has already adopted a decision in a case involving comparable issues of fact and law or where the Commission is already considering a case involving comparable issues of fact and of law. As this case is similar to other

Commissions decisions on tariff quota on imports of bananas,⁶ in principle it would not have been necessary to submit this application to the Commission.

- (16) However, in correspondence with the Italian authorities, the Commission stated that the Italian authorities could not grant waiver, remission or repayment of duties without submitting the case to the Commission for decision if the request had been submitted by one of the two Italian firms that entered as transferee on the licences presented in another Commission file⁷. To comply with the Commission's request, the Italian authorities sent a file to the Commission.
- (17) The Italian customs authorities deem that the applicant could be granted remission of duties as in the current request there is sufficient evidence to recognize a special situation within the meaning of Article 239 of the Community Customs Code.
- (18) In support of the request submitted by the Italian authorities the applicant stated, in accordance with Article 905(3) of 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, that it had seen the dossier which the Italian authorities had sent to the Commission, and made comments which were annexed to the request.
- (19) By letters of 8 March 2013 and 13 June 2013, the Commission asked the Italian authorities to supply additional information. The Italian authorities replied by letter of 28 August 2013, received by the Commission on 10 September 2013.
- (20) Examination of the request was therefore suspended between 9 March 2013 and 10 September 2013.
- (21) In all those cases, the company confirmed that it had seen that letter from the Commission and the replies which the Italian authorities proposed to submit.
- (22) In the interest of guaranteeing applicants a fair hearing, and in accordance with Article 906a of Commission Regulation (EEC) No 2454/93, the Commission asked the applicant by letter of 8 January 2014 to comment on any issues of fact or law which it feels might lead to the application being refused.
- (23) By letter of 3 February 2014, received by the Commission on 4 February 2014, the company concerned commented on the Commission's objections.
- (24) In accordance with Article 907 of Regulation (EEC) No 2454/93, the time limit of nine months for the Commission to take a decision was therefore extended for one month.
- (25) Under Article 907 of Commission Regulation (EEC) No 2454/93, where the Commission notifies the person applying for remission of its reasons for intending to refuse the applicant's request, the period of nine months within which the Commission must take a decision is extended by one month.
- (26) 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 February 2014 within the framework of the Customs Code Committee (Debts and Guarantee section) to consider the case.
- (27) The file sets out the following arguments suggesting that the remission of duties is justified.

⁶ REC 06/07, REC 07/07 and REC 08/07.

⁷ REC 06/07

- (28) The Commission failed in monitoring the application of the tariff quota for banana imports and should have been able to detect on the basis of information provided by the Member States that the quota been exceeded.
- (29) Member States had a number of obligations⁸ to provide the Commission with certain information concerning banana imports and the use of import licenses they did not comply with.
- (30) The forgeries were extremely professional and there is no clear evidence to suggest that the applicant should have realized that the licenses were counterfeited.
- (31) The certificates had been paid for at appropriate prices corresponding to their market value, had been returned to the intermediary and the firm in question had taken a copy and filed it in their accounts, for inspection by the relevant audit authorities.
- (32) The applicant did not deviate from the standard practice in the use of licenses and behaved in a manner altogether comparable to other operators in the bananas sector.
- (33) There is no evidence that the firm in question could have realised that the quota had been exceeded, especially given the negligible impact of the operations at a reduced rate.
- (34) It was not possible for the person concerned to verify whether the operators to which the licenses were issued by the Member States were in fact registered operators.
- (35) The transferee of an import licence was not in a position to check whether the licence transferred to him by a Spanish licence holder, via the intermediary of another operator, was legal and authentic.
- (36) In the current file, the applicant firm's legal representative purchased almost all of the import licences by way of another Italian importer (namely the legal representative of another Italian firm) and paid the normal market price.
- (37) The Spanish broker managed personally all relations between the Italian firm and the Spanish firms to whom the AGRIM licences allegedly belonged, avoiding thus any direct contact between the former and the latter, so as to avoid anyone realising that the licences were falsified.
- (38) In accordance with Article 239 of the aforementioned Regulation (EEC) n° 2913/92, the repayment or the remission of the import duties is possible in situations other than those referred to in Articles 236, 237 and 238 of the said regulation when two conditions are met:
- in the case of an exceptional situation;
 - resulting from circumstances involving neither deception nor obvious negligence by the interested party.
- (39) According to the case law of the Court of Justice of the European Union, this provision represents a general principle of equity and that the existence of a special situation is established where it is clear from the circumstances of the case that the person liable is in an exceptional situation as compared with other operators engaged in the same business and that, in the absence of such circumstances, it would not have

⁸ In particular, under Article 29 of Regulation (EEC) n° 404/93, under Articles 17 and 21 of Regulation (EEC) No 1442/93 and under Article 27 of Regulation (EEC) N° 2362/98.

suffered the disadvantage caused by the post-clearance entry in the accounts of customs duties⁹.

- (40) The Commission must therefore assess all the facts in order to determine whether they constitute a special situation within the meaning of that provision¹⁰. Although it enjoys a margin of assessment in that respect, it is required to exercise that power by actually balancing, on the one hand, the Union interest in ensuring that the customs provisions are respected and, on the other, the interest of the importers acting in good faith not to suffer harm beyond normal commercial risk.
- (41) In the context of preferential arrangements, according to the relevant rules (Article 904 of Regulation (EEC) No 2454/93) and settled case-law¹¹, the presentation, for the purpose of obtaining preferential tariff treatment of goods declared for free circulation of documents subsequently found to be forged should not be considered a special situation justifying remission of import duties even where such documents were presented in good faith. By analogy, the presentation of forged import licences for the purpose of obtaining favourable tariff treatment under a tariff quota cannot be considered to constitute a special situation either.
- (42) The EU law does not normally protect the expectations of a person liable for payment as to the validity of an import licence which is found to have been forged when subsequently checked, since such a situation forms part of commercial risk. In this case the forgeries which were highly professional may have resulted in large quantities of non-tariff-quota bananas being imported at a reduced tariff because of the situation described above.
- (43) It was not possible for traders to check whether the operators to whom the licences had been issued by the Member States were registered operators and whether the licenses and the stamps they bore were authentic. In particular, they did not notify the changes made to the model of the stamp used by the authorities responsible for the issue of import licences.
- (44) Additionally, the Commission failed in monitoring the application of the tariff quota for banana imports: Under Article 211 of the Treaty establishing the European Community¹², which was applicable at the time of the facts, and in accordance with the principle of sound administration, the Commission is required to ensure the application of measures adopted by the European institutions. In this particular case, this means ensuring that the banana tariff import quota is correctly applied and is not exceeded¹³.
- (45) The factual and legal circumstances of this application are comparable to those of decisions REC 06/07 and REC 07/07, in which the Commission established a number of circumstances that exceeded the normal commercial risk which an operator had to bear and that constituted a special situation covered by Article 239 of Council Regulation n° 2913/92.

⁹ 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*.

¹⁰ See, to that effect, Case 160/84 *Oryzomyli Kavallas and Others v Commission*, paragraph 16.

¹¹ Cases C-98/83 and C-230/83 *Van Gend & Loos and Wim Bosboom v Commission*; Case 827/79 *Amministrazione delle finanze dello Stato v Entrepise Ciro Acampora* ; Case C-97/95 *Pascoal & Filhos Lda v Fazenda Pública* and Case T-50/96 *Primex et al. v Commission*.

¹² Replaced by Article 17 of the Treaty of the European Union

¹³ Case T-50/96 *Primex*

- (46) In view of the above, the Commission is of the opinion that the circumstances of the case must be also considered as a special situation covered by Article 239 of Regulation (EEC) No 2913/92.
- (47) However, as the existence of a special situation is not sufficient for remission of import duties, it is necessary to examine whether the second condition set by Article 239 of Council Regulation n° 2913/92 with regard to the absence of negligence had been satisfied.
- (48) According to the established case law of the Court of Justice of the European Union¹⁴, the condition governing the absence of deception or obvious negligence has to be assessed by taking account in particular of the complexity of the legislation, of the experience of the applicant and the care taken by the trader.
- (49) For imports made in 1998 in application of Regulation n°1442/93, there were shortcomings in the legal arrangements concerning the registration of operators, the notifications for administering the tariff quota, the keeping of documents, the checks on the authenticity and regularity of documents and the conformity of their use by the competent authorities of the Member State issuing the licenses. This fact was mentioned in the recitals of the 1998 Regulation which recognised that the lack of precision of the 1993 legal text led to practical difficulties in its application. On that basis, the Regulation of 1993 can be considered as complex.
- (50) In contrast, Regulation n° 2362/98, applicable for imports carried out by the operator between 1 January 1999 and 7 April 2000 was not difficult to understand or implement: In particular, the definition of traditional operators (Article 3) and newcomers (Article 7), the system for attesting actual imports (Article 5.3) the definition of the type of operators to which the rights may be transferred and the prohibition to transfer of rights from newcomers to traditional operators (Article 21) was neither ambiguous nor complex.
- (51) A simple reading of the 1998 rules should have attracted the attention of the interested party, who was familiarised with the use of licenses to apply correctly the above mentioned provisions. However, the applicant, deliberately used certificates which indicated to have been issued to newcomers. It follows that the alleged complexity of the above mentioned provisions for imports made in 1999 and 2000 is not founded.
- (52) Regarding the condition relating to the professional experience of the applicant, the Court of Justice has ruled that according to the case law there is a need to check if this involves a professional business operator, whose activity primarily consists of import and export operations, and if the operator already has some commercial experience with the goods in question, i.e. if the operator had carried out such operations in the past for which duties to be collected had been duly calculated.
- (53) According to the Italian authorities, the Italian company is a major traditional trader, experienced in trading in and importing bananas since 1991. The Commission therefore considers that the applicant is very experienced in the operations in question.
- (54) As regards the firm's diligence, the person liable for payment may plead good faith if he can demonstrate that, during the period in which the transactions concerned took place, he took due care to ensure that all the conditions for favourable treatment were fulfilled.

¹⁴ Case C-250/91 Hewlett Packard

- (55) This condition implies that the declarant is obliged to supply the customs authorities with all the necessary information as required by the Union rules, and any national provisions which supplement or transpose them, in relation to the customs treatment requested for the goods in question.
- (56) In 1998 the applicant made imports amounting to EUR XXXX. Considering the lack of clarity of the legal framework existing at the time, it is not possible to establish that the applicant was not diligent during that period.
- (57) With regard to imports made in 1999 and 2000 for an amount of EUR XXXX a distinction has to be made between the licenses, issued to traditional operators, and those issued to newcomers.
- (58) The applicant's lack of diligence is not sufficiently proven concerning the use of traditional operators' licenses which in the current application amount to EUR XXXX.
- (59) The situation differs in the case of newcomers' licenses used by the applicant.
- (60) The applicant claims that Regulation 2362/98 did not prohibit traditional operators from using licences issued to newcomer operators. He claims that there were no transfers of the rights arising under the licences in question, but only an informal granting of the use of the licences, without any effects on the reference quantities of the operators concerned.
- (61) However, the intention of the new system was to avoid the use of licenses issued to newcomers and the fact that Regulation (EC) n° 2362/98 explicitly forbids the transferral of the rights arising from import licences by newcomers for the benefit of a traditional operator should have attracted the attention of an operator as experienced as the applicant.
- (62) The Italian company entered as the transferee in box 6 of the licences was a traditional operator known on the market. The person concerned should therefore have noticed the incompatibility between the different entries on the licences.
- (63) The applicant constantly violated the provisions of Regulation 2362/98 and did not therefore demonstrate all the diligence that can be expected of experienced operators. Therefore the second condition set out in Article 239 of Regulation (EEC) No 2913/92 concerning newcomers' licenses is not fulfilled.
- (64) On the basis of this assessment, the Commission deems that remission of duties in the amount of EUR XXXX corresponding to newcomers' licenses used by the applicant between 1 January 1999 and 7 April 2000 is not justified under Article 239 of Council Regulation (EEC) No 2913/92.

HAS ADOPTED THIS DECISION:

Article 1

Remission of import duties in the sum of EUR XXXX requested by Italy on 28 December 2012 is justified.

Remission of import duties in the sum of EUR XXXX requested by Italy on 28 December 2012 is not justified.

Article 2

This Decision is addressed to the Italian Republic.

Done at Brussels,

For the Commission
Algirdas SEMETA
Member of the Commission