

## COMMISSION DECISION

**C(2013) 7709 final**

**of 18.11.2013**

**on finding that waiver of post-clearance entry in the accounts of import duties is justified and that remission of duties is justified in a particular case**

(only the Danish 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<sup>1</sup>, and in particular Articles 220 and 239 thereof,

Whereas:

- (1) A Danish company ('the party concerned') imported lactoglobulin concentrates (LGCs) from New Zealand between 1 September 1997 and 2 August 2000. LGCs consist of a mixture of whey proteins in different combinations and at varying concentrations. They are used in the production of food and pharmaceutical products.
- (2) In 1993 and 1994, the party concerned had requested binding tariff information (BTI) for certain LGCs, amongst which LGCs 312, 392 and 472. On the basis of the information received by the party concerned, but without carrying out analyses of the products, the Danish authorities issued BTIs for the products in question, classifying them under heading 3504 of the Combined Nomenclature (CN). The BTIs were valid from 13 April 1994 to 12 April 2000.
- (3) In 1995, on request of the party concerned, the Danish authorities received a BTI request for LGC 450 which, according to the information provided by the party concerned, was identical to LGC 472, for which a BTI had already been issued. The Danish authorities informed the party concerned that LGC 450 should be classified under the same heading as LGC 472 and that it was therefore not necessary to issue a BTI for LGC 450.
- (4) In 1996, on request of the party concerned, the Danish authorities issued BTIs for three other products, namely LGC 310, 474 and 860, which were valid from 21 November 1996 to 20 November 2002. The products were also classified under heading 3504.
- (5) The party concerned had not applied for BTIs for the products LGC 131 and 8471.
- (6) In February and March 2000, the party concerned applied for the renewal of the BTIs for LGC 312, 392 and 472, all of which were due to expire on 12 April 2000. The party concerned continued to import LGC products after the expiry of the BTIs, without waiting for them to be renewed.

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

- (7) As of 1998, however, the Danish authorities started to analyse samples of LGC products. On the basis of these results, the Danish authorities classified products LGC 131 and 8471 (for which no BTIs had been issued), 312 and 392 (BTI expiring 12 April 2000) and 450 (product identical to LGC 472 but for which no BTI had been issued) under CN heading 0404.
- (8) In 2000, the Danish authorities initiated recovery proceedings. Since the party concerned challenged the tariff classification and the method of analysis used, the Danish authorities re-examined the tariff classification and decided that the correct classification was in fact CN heading 3502 and that the amount of import duties to be recovered was EUR 1 548 583.33 (DKK 11 552 431.63).
- (9) In 2005, the party concerned requested remission pursuant to Article 220(2) (b) read in conjunction with Article 236 and Article 239 of Regulation (EEC) No 2913/92 of 13 June 2005 ('the Customs Code'). The request was rejected by the Danish authorities by decision of 1 August 2005. However, the competent Danish court (Landsskatteretten) asked the Danish authorities to submit the request to the Commission for a decision, taking the view that the conditions for such a remission might be met.
- (10) By letter dated 6 October 2008, received by the Commission on 9 October 2008, Denmark asked the Commission to decide whether waiver of the post-clearance entry of import duties in the accounts was justified under Article 220(2) (b) of the Customs Code or, in the alternative, whether remission of those duties was justified under Article 239 of the Customs Code. The application submitted by Denmark concerned the importation between 1 September 1997 and 2 August 2000 of products for which either no BTIs had ever been issued (LGC 131 and 8471) or the BTIs previously issued had expired and were no longer valid at the time of importation (LGC 312 and 392) or no BTI had been issued due to the presume similarity to another LGC but the BTI for the other LGC expired in the course of the imports (LGC 450).
- (11) With Decision C (2010)7692 final of 12 November 2010, the Commission decided on the waiver of the post-clearance entry of import duties in the accounts.
- (12) As regards the duties for imports of LGC 450 prior to 13 April 2000, the Commission held in Article 1(1) of Decision C (2010)7692 final that pursuant to Article 220(2) (b) of the Customs Code it was justified not to enter these duties into the accounts, since the Danish authorities committed an error in confirming that LGC 450 should be classified under the same heading as LGC 472 and that it was therefore not necessary to issue a BTI for LGC 450.
- (13) As regards the duties for imports of LGCs 131, 312, 392 and 8471 and LGC 450 after 13 April 2000, the Commission held in Article 1(2) of Decision C(2010)7692 final that pursuant to Article 220(2)(b) of the Customs Code it was justified to recover these duties, since the Danish authorities did not commit an error, because either no BTIs had ever been issued (LGCs 131 and 8471) or the BTIs previously issued had expired and were no longer valid at the time of importation (LGCs 312 and 392) or the BTIs had been issued due to the presume similarity to another LGC but the BTI for the other LGC expired in the course of the imports (LGCs 450).
- (14) The Commission found in Decision C (2010)7692 final that for all situations to be considered under Article 220(2)(b) of the Customs Code, the party concerned has acted in good faith and complied with all the provisions in force regarding the customs declaration.

- (15) Within the amount, for which the Commission found that post-clearance recovery was justified, the Commission took in Article 1(3) of Decision C (2010)7692 final, the view that remission is justified pursuant to Article 239 of the Customs Code with regard to the duties for imports of LGCs 312, 392 and LGC 450 after 13 April 2000, since the party concerned was considered to be in a special situation by holding BTIs that were previously valid.
- (16) For the remaining amount within the sum for which the Commission found that post-clearance recovery was justified, in Article 1(4) of Decision C (2010)7692 final the Commission stated that remission pursuant to Article 239 of the Customs Code was to be denied for imports of LGCs 131 and 8471, since the party concerned was in no special situation. The party concerned never asked for a BTI and could thus have no legitimate expectations that the classification of these LGCs given in the customs declarations was valid.
- (17) The Commission found in Decision C (2010)7692 final that for all situations to be considered under Article 239 of the Customs Code, the party concerned was not engaged in deception or obvious negligence.
- (18) The party concerned brought an action before the General Court of the European Union for annulment of Articles 1(2) and (4) of Decision C(2010)7692 final as regards the imports of products for which no BTIs had ever been issued (LGCs 131 and 8471).
- (19) On 5 June 2013, the General Court ruled in case T-65/11 to annul Articles 1(2) and (4) of Decision C(2010)7692 final as regards the imports of LGCs 131 and 8471. The General Court held that the Danish customs authorities committed an error within the meaning of Article 220 (2) (b) as regards the tariff classifications of LGCs 131 and 8471. According to the ruling of the General Court, Decision C(2010)7692 final is unlawful in so far as it is based on the absence of an error of the the Danish authorities pursuant to Article 220(2)(b) of the Customs Code.
- (20) Pursuant to Article 266 of the Treaty on the Functioning of the European Union, the Commission must re-examine the application of Denmark under Article 220(2) (b) or, in the alternative, Article 239 of the Customs Code, concerning the importation between 1 September 1997 and 2 August 2000 of products for which no BTIs had ever been issued (LGCs 131 and 8471) in the light of the General Court's judgment.
- (21) Since the other parts of Decision C (2010)7692 final are not affected by the General Court's judgment, the re-examination of the application of Denmark concerning LGCs 131 and 8471 may not alter the result on the duties for imports of LGCs 312, 392 and LGC 450.
- (22) In accordance with Article 873 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met to examine the case on 15 October 2013 within the framework of the Customs Code Committee, Debt and Guarantees Section.
- (23) Articles 873 and 876 of Regulation (EEC) No 2454/93 run from the date of that judgment.
- (24) Under Article 220(2) (b) of the Customs Code, post-clearance entry in the accounts is waived where the amount of duties legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

- (25) In the light of the General Court's judgment in case T-65/11, it must be admitted that the Danish customs authorities committed an error as to the tariff classification of LGCs 131 and 8471.
- (26) Firstly, the fact that the applicant did not request a BTI for the products concerned does not mean, however, that the customs authorities have not committed an error. Furthermore, the case-law recognizes that the customs authorities could have committed an error in situations in which the applicant was not the holder of or had not requested BTIs<sup>2</sup>.
- (27) Secondly, the Danish authorities always classified LGCs under the same CN heading, when issuing BTIs as well as when initiating recovery, so that all LGCs must be considered as identical for classification purposes; thus the party concerned could take the view that the Danish authorities would have classified LGCs 131 and 8471 in the same way as all other LGCs, which turned out to be erroneous only after the analysis.
- (28) In view of the above, the first condition laid down in Article 220(2) (b) of the Customs Code is fulfilled for as regards the imports of LGCs 131 and 8471.
- (29) As already stated in Decision C (2010)7692 final, all other conditions under Article 220(2) (b) of the Customs Code are fulfilled, because the party concerned has acted in good faith and complied with all the provisions in force regarding the customs declaration.
- (30) In the light of the above, waiver of post-clearance entry into accounts has to be granted to LGCs 131 and 8471.
- (31) The waiver of post-clearance entry into accounts for the imports of LGCs 131 and 8471 is in addition to the waiver already granted in relation to imports of LGC 450 prior to 13 April 2000. Therefore, the present decision has to revise the amounts expressed in Article 1(1) of Decision C(2010)7692 final, although not annulled by the General Court's judgment in case T-65/11.
- (32) The waiver of post-clearance entry into accounts to be granted to LGCs 131 and 8471 requires a revision of the amounts expressed in Article 1(2) of Decision C(2010)7692 final, annulled by the General Court's judgment in case T-65/11. Since neither the action nor the judgement touched on the imports of LGCs 312, 392 and LGC 450 after 13 April 2000, Decision C(2010)7692 final has remained lawful when it states that, pursuant to Article 220(2)(b) of the Customs Code, it was justified to recover these duties. A provision to this end has to be foreseen in the present decision.
- (33) Article 1(3) of Decision C(2010)7692 final has to remain unaltered in that it was neither challenged nor annulled by the General Court's judgment in case T-65/11. However, for ease of reference, it appears useful to restate in the present decision the amounts for which remission is justified pursuant to Article 239 of the Customs Code with regard to the the duties for imports of LGCs 312, 392 and LGC 450 after 13 April 2000.
- (34) Since the present decision finds it justified not entering into the accounts the duties for the imports of LGCs 131 and 8471 pursuant to Article 220(2) (b) of the Customs Code, there is no reason to examine the duties due for these imports pursuant Article 239 of the Customs Code. Therefore, a provision corresponding to Article 1(4) of Decision C(2010)7692 final, as annulled by the General Court's judgment in case T-65/11, becomes superfluous,

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<sup>2</sup> Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

HAS ADOPTED THIS DECISION:

*Article 1*

Article 1 of Decision C (2010)7692 final is hereby replaced by the following:

"(1) The import duties of EUR XXXX (DKK XXXX) which are the subject of the request by the Kingdom of Denmark of 6 October 2008 shall not be entered in the accounts.

(2) The import duties of EUR XXXX (DKK XXXX) which are the subject of the request by the Kingdom of Denmark of 6 October 2008 shall be entered in the accounts.

(3) Remission of the import duties of EUR XXXX (DKK XXXX), requested by the Kingdom of Denmark on 6 October 2008, is justified."

*Article 2*

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels,

*For the Commission*  
*Algirdas Šemeta*  
*Member of the Commission*