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REM 05/01



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 1-8-2002

NOT FOR PUBLICATION

COMMISSION DECISION

of 1-8-2002

finding that repayment of import duties in a particular case is justified for a certain amount and authorising the Member States to repay or remit duties in cases involving comparable issues of fact and law, and finding that repayment is not justified for another amount

(only the German text is authentic)

(Request submitted by Germany)

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(REM 05/01)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1430/79 of 2 July 1979¹ on the repayment or remission of import or export duties, as last amended by Regulation (EEC) No 1854/89,²

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation (EEC) No 2913/92,³ as last amended by Regulation (EC) No 444/2002,⁴ and in particular Article 907 thereof,

¹ OJ L 175, 12.7.1979, p.1.

² OJ L 186, 30.6.1989, p.1.

³ OJ L 253, 11.10.1993, p.1.

⁴ OJ L 141, 11.03.2002, p.11.

Whereas:

- (1) By letter dated 17 January 2001, received by the Commission on 6 February 2001, Germany asked the Commission to decide, under Article 13 of Council Regulation (EEC) No 1430/79 and under Article 239 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code⁵, as last amended by Regulation (EC) No 2700/2000⁶, whether repayment of duties was justified in the following circumstances.
- (2) Between 1993 and 1995 a German firm imported textile products into the Community from Laos.
- (3) Imports into the Community of this type of product originating in Laos qualified for preferential arrangements under the Generalised System of Preferences. In accordance with Article 7 of Commission Regulation (EEC) No 693/88 of 4 March 1988⁷ and Article 80 of the version of Regulation (EEC) No 2454/93 in force at the time, if the products were covered by a Form A certificate issued by the Laos authorities they were eligible for preferential tariff treatment when they were released for free circulation.
- (4) In the case in point, the firm presented Form A certificates issued by the competent Laos authorities in support of its customs declarations for release for free circulation. The German customs authorities accepted the declarations and granted preferential tariff treatment.

⁵ OJ L 302, 19.10.1992, p. 1.

⁶ OJ L 311, 12.12.2000, p. 17.

⁷ OJ L 77, 22.3.1988, p.1.

- (5) Following an investigation into the conditions under which the Laos authorities issued Form A certificates of origin, carried out in Laos between 13 November and 30 November 1995 by representatives of several Member States and the Commission, it was found that 300 certificates issued for textiles had not been issued by the Laos authorities and 2 700 certificates should not have been issued because the rules of origin had not been complied with. The Laos authorities therefore nullified the said certificates. The list of false certificates is called List A and the lists of wrongly issued certificates are Lists B, B1 and B2.
- (6) On the basis of the findings of the investigation, it was found that in the case in point the firm had used one false Form A origin certificate (dated February 1994), which was later included on List A, and several certificates that had been wrongly issued, which were later placed on Lists B and B1 and were consequently nullified by the Laos authorities.
- (7) As the textile products imported into Germany were therefore not entitled to preferential tariff treatment, the German authorities requested payment of import duties in the sum of *XXXXXX for the part of the debt relating to the wrongly issued certificates and XXXXXX for the part of the debt relating to the forged certificate*), repayment of which is requested by the firm.
- (8) In their application of 17 January 2001 the German authorities said that they considered that a special situation existed for the following reasons.

- (9) The Laos authorities failed in its obligations by issuing certificates when they knew the origin conditions were not met. likewise, the Commission failed to fulfil its obligations by not alerting European firms to the fact that the Laos authorities were issuing origin certificates even though the necessary conditions were not met. The firm points out that the revocation of customs preferences occurred when it had already re-sold the goods and hence could no longer send them back to the exporter.
- (10) The firm asserts that no obvious negligence can be attributed to it, since firstly it checked by going to Laos that the goods it had ordered were indeed manufactured there, and secondly it had no reason to doubt the validity of the certificates concerned.
- (11) In support of the request submitted by the competent German authorities, the firm, pursuant to Article 905 of Regulation (EEC) No 2454/93, stated that it had taken note of the file sent to the Commission by the German authorities and that it had nothing to add.
- (12) By letter dated 26 June 2001 the Commission requested further information from the German authorities. This information was provided by letter dated 12 February 2002, received by the Commission on 19 February 2002. The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93, between 27 June 2001 and 19 February 2002.
- (13) By letter dated 6 May 2002, received by the firm on 8 May 2002, the Commission informed the firm that it intended rejecting the application for repayment of the debt relating to invalid certificates and the debt relating to the false certificate, and gave the firm the reasons for its objections.

- (14) By letter dated 11 June 2002, received by the Commission on the same date, the firm expressed its opinion regarding the Commission's objections. It asserted that the circumstances of the case constituted, for all the imports, a special situation under Article 13 of Regulation 1430/79 and Article 239 of Regulation (EEC) No 2913/92 involving no deception or obvious negligence on its part. It claimed that the Commission had failed to meet its obligations both in regard to the invalid certificates and the false certificate, in that it had not informed the importers in good time of the Community's mission in Laos in November 1995.
- (15) The firm also said it considered that it had not acted with obvious negligence, in regard either to the part of the debt relating to the invalid certificates or to the part relating to the false certificate. It claimed that it had not contracted an excessive risk in carrying out the import operations concerned. Moreover, in the absence of information which could have led it to doubt the origin of the products it was importing, the firm considered that it was not obliged to have acted with more diligence than it had shown. It stated that as far as it knew there was no insurance that covered the risks connected with the generalised system of preferences.
- (16) Under the third subparagraph of Article 907 of Regulation (EEC) No 2454/93, the administrative procedure was suspended for one month.
- (17) 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 12 July 2002 within the framework of the Customs Code Committee (Section for General Customs Rules/Repayment).
- (18) In accordance with Article 13(1) of Regulation (EEC) No 1430/79, import duties may be repaid or remitted in special situations other than those laid down in sections A to D of that Regulation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

- (19) Under 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 that Regulation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.
- (20) 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 an exceptional situation in which an operator finds itself, compared with other operators engaged in the same business, and that in the absence of such circumstances, he would not have suffered the disadvantage caused by the post-clearance entry in the accounts.
- (21) In the cases in point, the granting of preferential tariff treatment for the imports was subject to presentation of Form A origin certificates.
- (22) As already noted, the certificates in the case in point were nullified by the Laos authorities.
- (23) 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.
- (24) 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 expectation.
- (25) In this instance, in regard to the wrongly issued certificates the exporters declared on the certificates of origin that the goods they referred to met the conditions for obtaining the certificates.

- (26) However, it is plain from recent rulings of the Court of First Instance of the European Communities that even if the exporters had misled the Laos authorities that does not necessarily rule out the existence of a special situation in this case within the meaning of Article 13 of Regulation (EEC) No 1430/79 or of Article 239 of Regulation (EEC) No 2913/92.
- (27) In any event, the fact that the exporters had confirmed on the Form A certificates that the conditions for obtaining them had been met was not in itself proof that the competent Laos authorities had been misled. It is necessary to ascertain whether the exporters made these declarations on the assumption that the competent authorities were acquainted with all the facts necessary to apply the rules in question and whether the authorities, despite their knowledge, raised no objection to the declarations.
- (28) In the case in point, there is evidence to suggest that the competent Laos authorities knew or, at the very least, should have known that the goods for which they were issuing Form A certificates did not fulfil the conditions laid down for preferential treatment.
- (29) Furthermore, the Laos authorities did not make any checks on the exporting firms and placed endorsements on the export certificates after the goods concerned were exported.
- (30) These lapses by the competent Laos authorities constitute a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79 and Article 239 of Regulation (EEC) No 2913/92.

- (31) The circumstances in regard to the debt arising as a result of the wrongly issued certificates are therefore such as to constitute a special situation within the meaning of Article 13 of Regulation (EEC) 1430/79 and Article 239 of Regulation (EEC) No 2913/92.
- (32) The false certificate was not issued by the Laos authorities, as pointed out in their letter of 28 November 1995 relating to the certificates mentioned in List A sent to the European Commission. The making out of the certificate is thus an event which has nothing to do with the behaviour of the Laos authorities and has no relationship with the procedure governing the management of the generalised system of preferences. Reliance on the validity of such certificates is consequently not protected, since the Laos authorities did not draw up the certificate; the fact that it proved to be false is part of the normal commercial risk run by importers of goods eligible for preferential tariff treatment.
- (33) Neither did the Commission have any part in the issue of the false certificate. The Court, in its [judgment of 19 February 1998](#),⁸ ruled that in the case before it the forgeries of certificates, carried out in a very professional manner, lay outside the normal commercial risk the operator had to bear since the Commission had seriously failed in its obligation to monitor and check the application of the "Hilton beef" quota.

⁸ Judgment of 19 February 1998, Eyckeler & Malt (Case T-42/96).

- (34) In the case in point, unlike in the "Hilton beef" case, the Commission did not carry out a management mission but an administrative cooperation mission for the purpose of checking, jointly with the Laos authorities, the conformity of a large number of GSP certificates presented in Member States on the import of textile products. It was the mission to Laos that revealed that the origin certificate was false.
- (35) Furthermore, traders are not normally informed of checks planned or carried out by the Commission in countries eligible for preferential tariff treatment. Traders cannot therefore have legitimate expectations in this regard.
- (36) In the light of the foregoing, for the portion of the debt relating to the false certificate the Commission cannot be accused of failing in its monitoring obligation and therefore no special situation exists within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (37) Moreover, the Community mission concerned took place from 13 to 30 November 1995. The Laos authorities sent the lists of false and invalid certificates to the Commission in communications dated 28 November 1995. The import operations concerned in the case in point took place between 1993 and 1995. To accuse the Commission of not having informed the firm of the mission's findings is thus irrelevant when most of the import operations in question took place prior to the mission or at the latest in the month following the mission.

- (38) In the light of the foregoing, the behaviour for which the firm criticises both the Laos and the Community authorities does not constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92 in regard to the debt relating to the false certificate.
- (39) As to the fact that the firm could not subsequently pass the cost of the full-rate customs duties on to its customers, the Courts have consistently [ruled](#)⁹ that it is the responsibility of traders to take the necessary measures in the context of their contractual relations to protect themselves against the risks of post-clearance collection of duties and of being unable to pass the cost of such duties on to their customers. This fact does not, therefore, constitute a special situation.
- (40) In the light of these facts, the Commission considers that there is nothing to constitute a special situation within the meaning of Article 239 of Council Regulation (EEC) No 2913/92 for the part of the debt relating to the false certificate.
- (41) Nor has the Commission found any other circumstances constituting a special situation in regard to the part of the debt relating to the false certificate.
- (42) The circumstances involved do not involve deception or obvious negligence on the part of the firm in regard either to the debt relating to the wrongly issued certificates or to the debt relating to the false certificate.

⁹ Judgment of 18 January 2000, Méhibas (case C-290/97).

- (43) As stated by the German authorities in their application of 17 January 2001, the criminal proceedings instituted against the firm for tax evasion have been dropped.
- (44) In regard to the debt relating to the invalid certificates, the Court of Justice has ruled that the negligence of importers has to be measured *inter alia* against the period of time during which the competent authorities persisted in their behaviour. In the case in point, the competent Laos authorities issued Form A origin certificates for goods that did not qualify for such certificates for at least the three-year period (end of 1992 to 1996) covered by the investigation of 13 November to 30 November 1995.
- (45) In regard to the debt relating to the invalid certificates and the debt relating to the false certificate, the firm can also be absolved of any obvious negligence on the grounds that there is no evidence that it deviated from normal business practice when concluding its purchase contract and carrying out the import operations concerned.
- (46) The firm concerned therefore acted in good faith and was guilty of no deception or obvious negligence where any of the imports in the case in question were concerned.
- (47) Repayment of the import duties relating to the invalid certificates XXXXXX is therefore justified.
- (48) However, repayment of the import duties relating to the false certificate XXXXXX is not justified.

- (49) Where special circumstances warrant repayment or remission, Article 908 of Regulation (EEC) No 2454/93 allows the Commission, under conditions that it may determine, to authorise one or more Member States to repay or remit duties in cases involving comparable issues of fact and law.
- (50) At its meeting on 12 July 2002 within the framework of the Customs Code Committee (Section for General Customs Rules/Repayment), the group of experts composed of representatives of all the Member States provided for in Article 907 of Regulation (EEC) No 2454/93 asked that all Member States be authorised to repay or remit import duties in cases involving comparable issues of fact and law.
- (51) Such authorisation may be granted to the Member States on condition that it is used only in cases strictly comparable in fact and law to the case in question for the part of the debt relating to the invalid certificates. However, authorisation should also cover applications for repayment or remission of duties lodged within the legal time limits and concerning import operations relating to Form A certificates issued from the first of November 1992 to 28 November 1995, the date on which the letter was sent by the Laos authorities to the Commission giving the list of invalid certificates, where the circumstances in which the import operations were carried out during that period are comparable in fact and law to those that gave rise to the case in point (certificates listed in Lists B, B1 or B2). In such cases the behaviour of the importers must involve no deception or obvious negligence,

HAS ADOPTED THIS DECISION:

Article 1

The repayment of import duties in the sum of XXXXXXXX requested by Germany on 17 January 2001 is hereby found to be justified.

Article 2

The repayment of import duties in the sum of XXXXXXXXX requested by Germany on 17 January 2001 is hereby found not to be justified.

Article 3

The Member States are hereby authorised to repay or remit import duties in cases involving issues of fact and law comparable to the case referred to by Germany's application of 17 January 2001 for the portion of the debt relating to invalid certificates.

Article 4

This Decision is addressed to the Member States.

Done at Brussels, 1-8-2002

For the Commission

Member of the Commission