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REC 02/2002

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 9-2-2006
C(2006)316

NOT FOR PUBLICATION

COMMISSION DECISION

Of 9-2-2006

finding that post-clearance entry in the accounts of import duties is not justified in a particular case and authorising Belgium to waive post-clearance entry in the accounts in cases involving comparable issues of fact and of law

(Only the Dutch text is authentic)

(request submitted by Belgium)
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**(request submitted by Belgium)
(REC 02/2002)**

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

Having regard to Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92,²

¹ OJ L 302, 19.10.1992, p. 1. Regulation as last amended by Regulation (EC) No 648/2005 (OJ L 117, 4.5.2005, p. 13).

² OJ L 253, 11.10.1993, p. 1. Regulation as last amended by Regulation (EC) No 883/2005 (OJ L 148, 11.6.2005, p. 5).

Whereas:

- (1) By letter of 15 March 2002, received by the Commission on 19 March 2002, Belgium asked the Commission to decide under Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties,³ as last amended by Regulation (EEC) No 1854/89,⁴ whether waiver of post-clearance entry in the accounts of import duties was justified and, in the alternative, under Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties,⁵ as last amended by Regulation (EEC) No 1854/89,⁶ whether remission of import duties was justified in the following circumstances.
- (2) Under the second paragraph of Article 2 of Commission Regulation (EC) No 1335/2003⁷ of 25 July 2003 amending Regulation (EEC) No 2454/93, the provisions of that Regulation do not apply to cases sent to the Commission before 1 August 2003. Therefore the references that follow in this Decision to Regulation (EEC) No 2454/93, which governs the procedural aspects of this case, refer to that Regulation as last amended by Commission Regulation (EC) No 881/2003 of 21 May 2003.⁸
- (3) Between 14 October 1989 and 18 September 1991, a customs agent established in Belgium released 35 consignments of a product declared as preserved bonito from Thailand for free circulation on behalf of an importer also established in Belgium; the customs agent and the importer are hereinafter referred to as “the persons concerned”.

³ OJ L 197, 3.8.1979, p.1

⁴ OJ L 186, 30.6.1989, p.1

⁵ OJ L 175, 12.7.1979, p.1

⁶ OJ L 186, 30.6.1989, p.1

⁷ OJ C 187, 26.7.2003, p.16.

⁸ OJ L 134, 29.5.2003, p. 1.

- (4) Imports into the Community of this type of fishery product originating in Thailand qualified for preferential treatment under the System of Generalised Preferences (GSP). Under Article 7 of Commission Regulation (EEC) No 693/88 of 4 March 1988,⁹ if the products were covered by a Form A certificate issued by the competent Thai authorities, they were eligible for preferential tariff treatment when they were released for free circulation.
- (5) A form A certificate was presented for each declaration for release for free circulation. The Belgian customs authorities accepted the declarations and granted preferential tariff treatment.
- (6) At the time, preserved bonito (CN code 1604 14 90) originating in countries eligible for the GSP was subject to an ad valorem duty of 18% instead of 25% for non-preferential imports.
- (7) Following an investigation in Thailand between 16 September to 4 October 1991 by representatives of several Member States and the Commission into the conditions under which the Thai authorities issued Form A certificates of origin, it was found that 80 certificates issued for exports to Belgium had been wrongly issued since the exported product was not bonito but tuna. The Thai authorities then cancelled those certificates, 14 of which had covered consignments imported by the persons concerned. The certificates for the 21 other imports concerned were refused by the competent Belgian authorities on the basis of Article 27 of Regulation (EEC) No 693/88.
- (8) Since the products concerned were therefore not eligible for preferential tariff treatment, the Belgian authorities demanded payment of import duties of XXXXX; this is the sum for which the persons concerned requested waiver of post-clearance entry in the accounts under Article 5(2) of Regulation (EEC) No 1697/79 and, in the alternative, remission under Article 13 of Regulation (EEC) No 1430/79.
- (9) Under Articles 871 and 905 of Regulation (EEC) No 2454/93, the persons concerned stated that they had seen the dossier sent to the Commission by the Belgian authorities.

⁹ OJ L 77, 22.3.1988, p.1

- (10) By letter of 31 July 2002 the Commission requested further information from the Belgian authorities. This information was provided by letter dated 18 August 2005, received by the Commission on 24 August 2005.
- (11) The administrative procedure was therefore suspended, in accordance with Articles 873 and 907 of Regulation (EEC) No 2454/93, between 1 August 2002 and 24 August 2005.
- (12) By letter dated 10 November 2005, received by the persons concerned on 15 November 2005, the Commission notified the persons concerned of its intention to withhold approval and explained the reasons for this.
- (13) By letter dated 12 December 2005, received by the Commission on the same date, the lawyers of the persons concerned expressed their opinion on the Commission's objections. In particular, they argued that the persons concerned had had no reason to doubt the nature of the imported product.
- (14) In accordance with Articles 873 and 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.
- (15) In accordance with Articles 873 and 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 21 December 2005 within the framework of the Customs Code Committee (Repayment Section) to consider the case.
- (16) Under Article 5(2) of Regulation (EEC) No 1679/79, there can be no post-clearance entry in the accounts of import duties where the amount of duties legally owed was not entered in the accounts as a result of an error on the part of the customs authorities themselves, and this error 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.
- (17) In the case in point, preferential tariff treatment of the imports was subject to presentation of Form A origin certificates. As already explained, some of the certificates were cancelled by the Thai authorities and others were refused by the Belgian authorities under Article 27 of Regulation (EEC) No 693/88.

- (18) 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
- (19) 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.
- (20) In this instance, the exporters declared on the certificates of origin that the goods they referred to met the conditions for obtaining the certificates.
- (21) However, [as the Court has ruled](#),¹⁰ the fact that the exporters submitted incorrect declarations does not rule out the possibility that the competent authorities committed an error. The authorities' behaviour needs to be evaluated in the light of the broader context in which the relevant customs provisions were applied.
- (22) Thus the fact that the exporters confirmed on the Form A certificates that the conditions for obtaining them had been met is not in itself proof that the competent Thai authorities were misled.
- (23) In this case, there is evidence that the competent Thai authorities knew or, at the very least, should reasonably have known that the goods for which they were issuing Form A certificates did not fulfil the conditions laid down for preferential treatment. From the end of the 1980s certain documents showed that the quantities of bonito sarda spp. exported from Thailand were absolutely not compatible with the known reserves of this fish or with recorded catches.
- (24) The circumstances in this case therefore reveal an error on the part of the Thai customs authorities themselves within the meaning of Article 5(2) of Regulation (EEC) No 1697/79.
- (25) As the Court of Justice of the European Communities has consistently ruled, when determining whether the person concerned could reasonably have detected the customs authorities' error, account must be taken of the nature of the error, and the professional experience and diligence of the person concerned.

¹⁰ *Ilumitrónica* judgment of 14 November 2002, Case C-251/00.

- (26) In view of their business, the persons concerned may be considered to be professionals with experience of customs formalities. However, this factor cannot be deemed decisive in this case.
- (27) The following points should be made regarding the error and the diligence shown by the persons concerned.
- (28) The file on the case shows that the imported product was generally described as bonito on the commercial documents (invoices, sale contracts etc.) and certificates of origin. It was occasionally described as “tuna bonito”. None of the documents referred to it simply as tuna.
- (29) The product’s packaging when it was released for free circulation was also marked “bonito”. The same packaging was used for retail sale. It should be stressed that the purchasers never complained about the nature of the product delivered to them.
- (30) On 9 June 1992 the Council adopted Regulation (EEC) No 1536/92 laying down common marketing standards for preserved tuna and bonito.¹¹ Although this Regulation is completely without prejudice to the classification and tariff treatment of these products when imported into the Community, in particular for the granting of preferential arrangements, the fact that it was adopted indicates that there had been serious confusion on the subject for a long time, which it was necessary to put an end to. The provisions of the Regulation show that there was particularly great confusion about the commercial names used.
- (31) Furthermore, there is no evidence that the persons concerned deviated from normal business practice when carrying out the imports concerned.
- (32) The persons concerned cannot therefore be blamed for having failed to discover that the imported goods were not really bonito, but tuna.
- (33) It must therefore be accepted that the error of the competent Thai authorities could not reasonably have been detected by the persons concerned.

¹¹ OJ L 163, 17.6.1992, p.1.

- (34) Moreover, the persons concerned had complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (35) Post-clearance entry in the accounts of import duties is not therefore justified in this case. Under these circumstances there is no need to examine the dossier in the light of Article 13 of Regulation (EEC) No 1430/79.
- (36) Where the circumstances under consideration are such that the duties in question need not be entered in the accounts, Article 875 of Regulation (EEC) No 2454/93 authorises the Commission, under the conditions it determines, to authorise one or more Member States to refrain from post-clearance entry in the accounts in cases involving comparable issues of fact and of law.
- (37) By letter of 15 March 2002, Belgium asked the Commission for authorisation to waive post-clearance entry of import duties in the accounts in cases involving issues of fact and of law comparable to those involved in this case.
- (38) The only requests for waiver of post-clearance entry of customs duties in the accounts which may be considered to involve comparable issues of fact and law to this case are requests submitted within the legal deadlines and relating to imports for which Form A certificates were presented which were issued between 1989 and 8 November 1992, were the subject of the investigation carried out by a Community delegation in Thailand from 16 September to 4 October 1991, and were invalidated by the competent Thai authorities in August 1992 (800 certificates) or refused under Article 27 of Regulation (EEC) No 693/88 (ca. 4500 certificates). The persons concerned must have acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration,

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of XXXXXX which were the subject of Belgium's request of 15 March 2002 shall not be entered in the accounts.

Article 2

Belgium is authorised to refrain from post-clearance entry of import duties in the accounts in cases involving comparable issues of fact and of law to the case cited in its request of 15 March 2002.

Article 3

This decision is addressed to Belgium.

Done at Brussels,

For the Commission

László KÓVACS

Member of the Commission