COMMISSION DECISION

C(2014) 2376

of 15/04/2014

finding that the remission of import duties under Article 239 of the Community Customs Code (Regulation (EEC) No 2913/92) is not justified in a particular case (REM 02/2012)

(only the Spanish 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[2], establishing the Community Customs Code,

Whereas:

(1) By letter of 30 July 2012, received at the European Commission on 30 August 2012, the Spanish authorities asked whether the remission payment of import duties was justified in the present case under Article 239 of Council Regulation (EEC) No 2913/92 of 12 October 1992 in connection with Article 905 of Commission Regulation (EEC) No 2454/93.

(2) Between 5 May and 29 December 2008 a customs agent established in Spain, (hereafter referred to as the applicant), re-imported in the EU "sugar syrup" which was the result of transformations made in Andorra of concentrates of fruit juices, sugar and water.

(3) At the time in question, imports into the European Union of this type of products originating in Andorra if declared for release for free circulation under EUR-1 certificates were subject to a preferential import duty in accordance with the Decision 1/99 of the EEC-Andorra Joint Committee on condition that all the elements necessary for obtaining the final product had been produced in Andorra.

(4) In addition, according to Article 3 of Decision 1/99, materials originating in the EU shall be considered as originating in Andorra when incorporating into a product obtained there. It shall not be necessary that such materials have undergone sufficient working or processing, provided that they have undergone working or processing going beyond that referred to in Decision 1/99 amending the Appendix to the Agreement concerning the definition of the concept 'originating products' and administrative cooperation.

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

(5) The declarations (SADs) submitted by the applicant were based on EUR-1 certificates issued by the Andorran authorities.

(6) In this case, the production process consisted in the export to Andorra of 'juice concentrates' originating in Spain, continued with the mixing there of that ingredient with water and sugar and was finalised in Spain after the import of the transformed product.

(7) The final "sugar syrup" obtained was imported in the EU by the applicant and was initially classified in tariff heading 21.06 or 20.09 depending on the percentages of the ingredients used.

(8) The applicant, established in the EU, was a customs broker acting on indirect representation on behalf of the importer. The applicant did not participate in the previous export of juice concentrates from Spain to Andorra and had no previous professional relations with the exporting company or the importer.

(9) The importer participated in the export of juice concentrates to Andorra and was fully aware of the whole process and of the nature of the operations carried out in that country given its relationship with the Andorran exporting company.

(10) The EUR 1 certificates were issued on the basis of inaccurate information supplied by the Andorran exporter in relation to the process followed and the composition of the product. The information was also incorrect as regards the tariff heading for the finished product and for the raw material exported from Spain. That information resulted in the wrong tariff heading of the product imported.

(11) The Spanish Customs authorities suspected from the beginning of the operations some irregularities in the EUR-1 certificates issued for these operations and in accordance with Decision 1/99, they contacted the Andorran authorities to clarify the matter.

(12) The Andorran authorities in their two first replies to requests made by the Spanish authorities confirmed the Andorran origin for the final product obtained.

(13) Despite those replies, Spain sent requests for Administrative Assistance to Andorra in 2009 and 2010. The answers provided by the Andorran authorities highlighted that the ingredients used were essentially water, fruit concentrate from Spain and sugar and the percentages of these ingredients used in the process as well as a generic description of the process.

(14) In addition, the Spanish customs authorities' Regional Laboratory carried out some analyses in 2008 and decided that the tariff heading to be applied was 21.06 or 20.09, depending on the case.

(15) In April 2010, following a new analysis conducted by the Spanish Central Laboratory of Customs and a report by the Customs Department's Tariff Service, Spain issued a BTI and concluded that the tariff heading to be applied was 17.02.

(16) In June 2011 the Regional Customs Office on the basis of analyses carried out by the Spanish Central Customs Laboratory assessed that the goods imported into the EU in accordance with the corresponding EUR-1 certificates issued by the Andorran customs authorities, declared as "flavoured or coloured sugar syrups" corresponded to tariff heading 17.02.90.95 and could not be regarded as preferential goods Products under that heading are not included in Annex II of Decision 1/99 concerning the list of working or processing required to be carried out on non-originating materials in order that the product manufactured can obtain originating status in the EU or in Andorra.

(17) After several requests, the Andorran authorities established that the water was the only ingredient from Andorran origin used in the production of the processed goods imported into the EU, that the fruit concentrate originating in Spain for processing in Andorra was insufficiently transformed under the terms of Decision 1/99 to obtain Andorran origin and confirmed that the sugar used originated in Brazil.

(18) Regarding the rule applying for the heading 17.02 (sugar other than in solid form) in the Agreement between Andorra and the EU, no materials could be sourced outside Andorra or partners participating in a cumulation zone. As Brazil (source of the sugar) is considered as a third country, the list rule is not respected. The final product could not claim for preferential treatment.

(19) On 28 June 2011, the Regional Customs office notified this assessment and the consequent regularisation of the import duties in the amount of EUR 2.259.694,08 to the applicant.

(20) On 1 July 2011 the applicant lodged a request for repayment of these amounts under the procedure laid down in Article 236 in connection with Article 220 (2) (b) and Article 239 of Regulation (EEC) 2913/1992.

(21) On 30 July 2012 the Spanish authorities referred the matter to the Commission for a decision in accordance with the terms of Article 239 of Regulation (EEC) No 2913/92, as they assessed that the conditions for applying Article 220 (2) (b) of the Regulation had not been met.

(22) By letters dated 8 October 2012, 21 November 2012 and 4 February 2013 the Commission requested additional information from the Spanish authorities. The Spanish authorities provided the information by letter dated 17 April 2013, received by the Commission on 20 April 2013. The Commission requested additional information by letter of 27 May 2013, replied by the Spanish authorities on 16 September 2013 and received by the Commission on 2 October 2013.

(23) In all those cases, the company confirmed that it had seen those letters from the Commission and made comments to the replies which the Spanish authorities proposed to submit.

(24) The administrative procedure was accordingly suspended between 9 October 2012 and 20 April 2013 and between 28 May and 2 October 2013 under Article 905 of Commission Regulation (EEC) No 2454/93.

(25) 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 22 October 2013 to comment on any issues of fact or law which it feels might lead to the application being refused. At that moment, the Commission informed that if the applicant does not give its point of view within one month from the date on which the objections were sent, the applicant would be deemed to have waived its right to express a position.

(26) By letter dated 28 November 2013, received at the Commission on 3 December 2013, the firm stated its position on the Commission's objections.

(27) 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.

(28) 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 (Customs Debt and Guarantees section) to consider the case.

(29) The request sent to the Commission by the Spanish authorities suggests that remission is justified because the applicant could not have been aware of the scheme of the importer and the producer, acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

(30) Under Article 239 of Council Regulation (EEC) No 2913/92 import duties may be repaid or remitted in situations other than those referred to in Articles 236, 237 and 238 of that Regulation on two conditions:

- that a special situation exists and that
- the situation results from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

(31) The Court of Justice of the European Union has consistently taken the view that this provision represents a general principle of equity designed to cover a special 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. In this respect, it is to be taken into account the conduct of the operators but also the conduct of the customs authorities concerned.[3]

(32) Before deciding whether to grant repayment or remission of the duties to the person liable for payment, the competent authority must take into account all the relevant factual data and circumstances.

(33) The Commission must therefore assess all the facts in order to determine whether they constitute a special situation within the meaning of that provision[4]. Although it enjoys a margin of assessment in that respect[5], 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 importer acting in good faith not to suffer harm beyond normal commercial risk.

(34) The applicant claims that the tariff classification made by Customs was based on incorrect information provided by the importer and that this wrong information triggered the applicant's 'special situation'.

(35) Even assuming that there was an error on the part of the customs authorities with regard to the tariff classification, this circumstance which was deliberately caused by the importer cannot benefit the applicant and cannot create a special situation[6].

(36) The importer obtained EUR-1 certificates from the Andorran authorities by providing these authorities with wrong information that resulted in the wrong tariff heading of the product imported. The issuance of certificates EUR-1 not coinciding with the

[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

[4] See, to that effect, Case 160/84 Oryzomyli Kavallas and Others v Commission paragraph 16

[5] T-346/94,France-Aviation v Commission, paragraph 34

[6] Case T-42/96, Eyckeler § Malt, paragraph 162; Case 32/84 Van Gend & Loos, paragraph 16; Case C-827/79 Amministrazione delle Finanze v Acampora paragraph 8, and Case C-97/95 Pascoal & Filhos, paragraphs 57 to 60

factual circumstances for preferential origin cannot give rise to a special situation, even where the applicant claims not to have known thereof. In fact, exposure to possible fraudulent acts by other economic operators is a normal risk for economic operators[7].

(37) A customs agent acting on indirect representation by the very nature of his work assumes liability for the payment of import duties and for the validity of the documents he presents to the customs authorities and any loss caused by wrongful conduct on the part of his clients cannot be borne by the European Union. To allow such negligence would be tantamount to encouraging operators to benefit from the errors of their customs authorities. Such a persistent error does not constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.[8]

(38) The applicant's claim that there was no recourse to the Joint Committee laid down by Article 30 of Decision 1/99 cannot have an influence on the assessment of the file. From the very beginning of the operations, the Spanish authorities, having reasonable doubts about the origin of the goods, carried out verifications of the proof of origin within the framework of the Administrative Cooperation scheme laid down in that Decision. In fact, the Spanish authorities received responses from the Andorran authorities and there was no dispute within the meaning of Article 30 of Decision 1/99.

(39) In this respect, the behaviour of the Spanish authorities that suspected irregularities in the lack of respect to the conditions for preferential treatment from the very beginning of the imports was very diligent and cannot give rise to a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(40) . The applicant's economic difficulty such as the risk of bankruptcy or liquidation cannot be considered as a special circumstance for the purpose of repayment or remission of the duties within Article 239 of the Code.

(41) The Commission has not identified any other factors likely to constitute a special situation.

(42) In principle, as no special situation could be established it would not be necessary to examine if the other conditions under Article 239 have been complied with. Nevertheless, the Commission has also assessed the second condition of Article 239 of Council Regulation (EEC) 2913/92 relating to absence of deception and obvious negligence on the part of the applicant. For the purposes of determining whether or not there was obvious negligence on the part of the applicant, account had to be taken in particular of the complexity of the provisions non-compliance with which had resulted in the customs debt being incurred, the professional experience of, and care taken by the trader[9].

(43) In the present case the question to be determined is whether the rules concerned are complex or simple enough for an examination of the facts to make an error easily detectable.

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7 Case C-97/95 Pascoal & Filhos, paragraph 55.

8 Case T-290/97, Mehibas Dordtselaan BV paragraph 83.

9 Case C-371/90 Beirafrio paragraph 21; Case C-187/91 Belovo, paragraph 17, Case C-250/91 Hewlet Packard France, paragraph 22 and Case C-64/89 Deutsche Fernsprecher, paragraph 24.

(44) The applicant seeks remission of the customs debt on the grounds that there was an incorrect tariff heading provided by the Spanish Customs authorities to the imported product. In this regard, it should be stated that the initial classification of the product made by the Spanish Regional Customs Laboratory in a wrong tariff heading was due not to the difficulty of classifying correctly but due to the wrong information provided by the importer. The legislation as such cannot be deemed as complex.

(45) The applicant could have gathered information concerning the export of fruit concentrates originating in the EU to Andorra and could have inquired its client about the nature of the transformation process in that country such as to have doubts on whether or not the certificate had been correctly issued by the Andorran authorities.

(46) The requirements laid down in the Decision 1/99 in particular the provisions on the definition of the concept of 'originating products', are straightforward and cannot be considered as complex.

(47) As regards the condition relating to the applicant's professional experience, the Court of Justice has ruled that it must be verified whether the applicant is professionally engaged in an activity consisting essentially in import and export operations and whether it already has some experience of trading in the goods in question in particular whether he had in the past carried out similar operations on which duties had been correctly calculated.

(48) The applicant is a family business established in 1920 and it considers itself as a leader in the field of customs and transit between Spain and Andorra. It follows that the applicant is to be considered as very experienced.

(49) About the degree of care, the Court of Justice has ruled that an economic operator could be expected to be aware of the customs legislation to be applied. As regards the diligence shown by the applicant it must be noted that, where doubts exist as to the exact application of the provisions, non-compliance with which may result in a customs debt being incurred, the onus is on the trader to make inquiries and seek all possible clarification to ensure that it does not infringe those provisions.

(50) 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.

(51) Although the applicant claims that it could not be aware of the fact that the importer concealed information and could not have reasonably obtained it, in a professional relation, the customs agent could have reasonably gathered information from the importer, who was its client. By not asking the importer or the customs authorities for more complete information about the processing operations in Andorra and the origin of the raw materials used in Andorra to obtain the final product, the customs agent failed to display the care required by Article 239 of Council Regulation (EEC) No 2913/92.

(52) Insofar as the agent acted under indirect representation on behalf of the importer, the information concerning possible negligence on the part of the agent, including the level of its professional experience, has to be taken into account for the purpose of assessing its negligence.

(53) Accordingly, considering the lack of complexity of the legislation at stake, the applicant's professional experience and its lack of diligence, the Commission considers

that the second condition referred to in Article 239 of Council Regulation (EEC) No 2913/92 for the requested remission of duties is not fulfilled.

(54) On the basis of this assessment, the Commission deems that remission of duties in the amount of EUR XXXX 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 the Kingdom of Spain on 30 July 2012 is not justified.

Article 2

This Decision is addressed to the Kingdom of Spain.

Done at Brussels,

For the Commission
Algirdas Šemeta
Member of the Commission