**COMMISSION DECISION**

**C(2015)786**

**of 18.2.2015**

**finding that repayment of import duties is not justified in a particular case (REM 06/2013)**

(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[1], and in particular Article 239 thereof,

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

Whereas:

(1) By letter dated 2 September 2013, received by the Commission on 18 September 2013, SKAT (the Danish Customs and Tax Administration), following a decision by the Danish National Tax Tribunal, asked the Commission to assess whether a repayment of customs duty may be offered under Article 239 of the Community Customs Code, in connection with Article 905(1) and (2) of the Implementing Regulation, under the circumstances below.

(2) Between 15 May 2007 and 7 July 2008, an importer (hereinafter "the Applicant") submitted 12 consignments of bicycles from Cambodia for customs clearance and was granted preferential tariff treatment at a tariff rate of 0 %, according to the generalised scheme of preference (GSP), upon presentation of Certificate of Origin Form A stating the place of origin as Cambodia.

(3) In a newsletter to import enterprises dated 24 June 2008, SKAT highlighted the risk of irregularities in connection with the import of bicycles from a company in Cambodia, suspecting tariff-based duties and anti-dumping duties have been evaded. Through the newsletter, Danish importers of bicycles from Cambodia were asked to verify the Cambodian origin of the bicycles.

(4) Between 19 June and 2 July 2009, a joint investigation team composed of members of the European Anti-Fraud Office (OLAF) and of representatives of some Member States visited the premises of the Cambodian firm and made the following findings:

(5) During the visit, the Cambodian authorities stated that, in relation to the application for GSP form A certificates received from the two Cambodian exporters subject to verification, they rarely received GSP Form A covering the origin of the parts

[1] OJ L 302 19.10.1992, p. 1

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

imported from other ASEAN countries, Forms B and D being used more frequently as proof of origin. The Cambodian companies explained that it was impossible to obtain GSP Form A certificate for parts imported from another ASEAN country, without offering any other detail. One of the two exporters was the exporter used by the Applicant for the 12 consignments under scrutiny;

(6) The bicycles concerned were supplied to the Applicant by the exporter in Cambodia. The exporter from Cambodia was a subsidiary of a Taiwan-based firm (the mother-company) which has another subsidiary manufacturing firm in Vietnam. A different company of the group, which is registered in the British Virgin Islands and operates from the same address in Taiwan as the mother-company, is in charge with sales negotiation and invoicing to the EU customers. The company registered in the British Virgin Islands has also two related companies dealing with purchase of parts for the bicycle production in Cambodia;

(7) The reasons offered by the exporter in Cambodia for opening a factory were the favourable tax conditions in Cambodia and the proximity to the Vietnamese infrastructure (Ho Chi Minh City Port);

(8) All payments were received by the company registered in the British Virgin Islands, which only paid a monthly lump sum to the exporter. Although there was no profit generated by the Cambodian factories, they used profit margins in their cost break-down which were well above the overall profit declared in the tax returns to the Cambodian authorities. The exporter applied for GSP certificates, but the invoice was produced to satisfy Cambodian Customs requirements and was never sent to the final customer in the EU, the latter receiving an invoice from the company registered in the British Virgin Islands;

(9) In the customs declarations covered by the SKAT control, the Applicant declared the exporter to be a different exporter than the actual one. The Applicant acknowledged this to be an error and further on, in a letter from 19 October 2010, explained that the erroneously declared exporter was its representative/agent in relation with the actual exporter and the mother-company;

(10) The purchase of bicycle parts was dealt with solely by the Taiwanese companies and therefore the real cost purchase of the parts used in the Cambodian factories was not available in those factories. Therefore, the investigation team concluded that the cost of bicycles stated in the cost break-downs prepared by the Cambodian factories did not reflect the real cost of producing the bicycles.

(11) The Commission's joint investigation team, in accordance with Article 72a(4) of Regulation 2454/93 implementing the Community Customs Code, considered that the Cambodian authorities made an error in accepting as proof of origin documents other than Form A and that the certificates should be considered as invalid, being issued on the basis of incorrect and misleading information. Member States were asked to initiate administrative duty recovery proceedings.

(12) Consequently, the Applicant was asked to pay the difference between the rate of duty according to the tariff (14 %) and the preferential rate of duty (0 %) for the 12 declarations in respect of which it has obtained preferential treatment.

(13) Following a final decision made by SKAT on 10 May 2010, total duties amounting to DKK 908 337 have been collected corresponding to the period 15 May 2007 – 7 July 2008.

(14) The Applicant subsequently appealed against SKAT's decision to the Danish National Tax Tribunal on 19 August 2010. The Applicant claimed alternatively: a) SKAT's decision to be invalid; b) there should be a waiver of post-clearance entry of the duty owed (see Article 236 of the Community Customs Code); and c) repayment of the customs duty (see Article 239 of the Community Customs Code).

(15) The Danish National Tax Tribunal found, in its judgement from 12 December 2012, that: a) there is no basis for the appealed decision to be considered invalid; b) it is justified that SKAT has been unable to find a basis for waiving post-clearance entry of the customs amount due into the accounts in accordance with Article 236 of the Community Customs Code; and c) erroneous application of the regional cumulation rules by the Cambodian authorities may be regarded as constituting a special situation, the Applicant's behaviour neither causing nor contributing to this situation.

(16) Concerning point c) above, the Danish National Tax Tribunal has found that the conditions have been fulfilled for submitting the case to the European Commission under Article 239 of the Community Customs Code, acknowledging that the circumstances of the case have a connection with the results of a Community inquiry. Consequently, the Danish National Tax Tribunal ordered SKAT to transmit the case to the European Commission in order for it to assess whether a repayment of customs duty may be offered under Article 239 of the Community Customs Code.

(17) Following the judgement from The Danish National Tax Tribunal, it is for the Commission to consider the possibility of granting repayment of customs duties under Article 239 of the Community Customs Code (claim c), taking into account that the questions regarding the validity of SKAT's decision (claim a) and the waiver of post-clearance entry of the duty owed in accordance with Articles 236 and 220(2)(b)of the Community Customs Code (claim b) have been decided upon by the Danish National Tax Tribunal.

(18) The applicant confirmed that it had read the dossier that the Danish authorities proposed to submit and made comments on the information that it considered should be included.

(19) By letter dated 18 October 2013, the Commission asked the Danish authorities for additional information. This information was received by the Commission on 26 May 2014.

(20) In accordance with Articles 873 and 907 of Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of the Community Customs Code, the period of nine months for the decision by the Commission has been suspended between the date of request for additional information and the date of receipt of the additional information. The administrative procedure was accordingly suspended between 19 October 2013 and 26 May 2014.

(21) Before adopting its final decision, in the interest of guaranteeing the applicant a fair hearing, and in accordance with Article 906a of Commission Regulation (EEC) No 2454/93, the Commission asked the applicant by letter dated 30 July 2014 to comment on any issues of fact or law which might lead to the application being refused. The applicant has replied with the letter dated 19 August 2014.

(22) According to Article 907 of Commission Regulation (EEC) No 2454/93, the period of nine months within which the Commission must take a decision has been extended by one month.

(23) In accordance with Article 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States has met on 17 October 2014 within the framework of the Customs Code Committee (Debts and Guarantee section) to consider the case.

**Examination of the request under Article 239 of Council Regulation (EEC) No 2913/92**

(24) Article 239 of Regulation (EC) No 2913/92 allows import duties to be repaid or remitted in situations other than those referred to in Articles 236, 237 and 238 of that Regulation when two conditions are met: a. special situation exists; and b. the situation arises from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

(25) The Court of Justice of the European Union ("the Court") has ruled that the provisions of Article 239 represent 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, he would not have suffered the disadvantage caused by the post-clearance entry in the accounts of customs duties[3].

(26) At the same time, the Court also considered that, while an operator can be in the same situation as other operators from the same country that does not, however, preclude the view from being taken that the operators in one country may be in an exceptional situation vis-à-vis operators established in other countries[4]. The Court has taken this view regarding operators inside the EU, but it can also be applicable, *mutatis mutandis*, to operators in third countries having to comply with the EU legislation referring to the common customs territory, equally affecting importers concerned throughout the EU.

(27) The Commission considers that that the Cambodian authorities should have known the conditions for the bicycles to benefit from preferential customs treatment, even though the exporter submitted the wrong certificates. The authorities should have been in a position to request the Form A certificates that were required in order to comply with the rules on preferential treatment.

(28) In view of the above, the Commission takes the view that the first condition referred to in Article 239 of Regulation (EEC) No 2913/92, regarding the existence of a special situation, is met.

(29) While the conduct of the Cambodian authorities can in itself, under the present conditions, represent an argument for the existence of a special situation, it cannot be deemed enough to justify repayment under Article 239, as the absence of deception or obvious negligence has also to be proven.

(30) Even if the Cambodian authorities persisted in the error for a long period of time, this alone cannot be evidence enough to apply Article 239 of Regulation (EEC) No 2913/92 and to release the Applicant from its obligation to respect the legislation in force. The Court has repeatedly stressed that the error on the part of the customs authorities cannot, as a rule, release an operator from the consequences of its own negligence. It is therefore necessary to assess, for example, whether or not a simple

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[3] See C-204/07 *C.A.S.* v *Commission*, paragraph 82; Case C-230/06 *Militzer & Münch*, paragraph 50 (see also, to that effect, Case C-86/97 *Trans-Ex-Import*, paragraphs 21 and 22, and Case C-61/98 *De Haan*, paragraphs 52 and 53

[4] See Case C-494/09 *Bolton Alimentari Spa*, para. 61

examinations of the facts could have allowed the disclosure of the error from the part of the Cambodian authorities and whether the legislation that had to be followed is complex or not[5].

(31) Therefore, according to established case-law, when examining whether there has been deception or obvious negligence, account must be taken, in particular, of the complexity of the legislation and the operator's professional experience and diligence[6].

(32) Regarding the complexity of the legislation, the Commission considers that the rules concerned cannot be judged as complex, since they are clearly detailed in the Implementing Regulation of the Community Customs Code. Article 72a(4) of the Implementing Regulation stated that the proof in order to attest the origin of the parts used for the finished bicycles in Cambodia is a Certificate of origin Form A issued in the country where the bicycle parts originated. Such provisions are easy to understand even by an inexperienced trader. Moreover, once a regulation is published in the Official Journal of the EC/EU, it constitutes the sole relevant positive law and everyone is deemed to be aware of that law[7]. Therefore, the Applicant cannot claim, in good faith, that the law was not clear or accessible.

(33) The Applicant is a very experienced trader, Denmark's largest retail group and one of its biggest importers from third countries and with considerable experience in importing bicycles, including from Vietnam, the Philippines and Cambodia. The Commission, in order to assess whether there is a case of "obvious negligence" within the meaning or Article 239, reached the conclusion that the Applicant is an operator whose business activities consist mainly in import transactions, in which it has gained extensive experience. Furthermore, the Applicant's outstanding professional experience has been thoroughly documented in SKAT's argumentation and in the judgement pronounced by the Danish National Tax Tribunal and represents a strong argument for a deliberate conduct when it comes to the Applicant's import activities. The Applicant himself has acknowledged in his letter to the Commission dated 19 August 2014 that he has a high degree of experience in importation of goods and is obliged to act as a very experienced importer.

(34) As regards the diligence shown by the Applicant, it must be noted that, even when doubts exist as to the applicable regime, 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 he does not infringe those provisions[8].

(35) According to the evidence presented to SKAT and the Danish National Tax Tribunal, the Applicant has not demonstrated it made an effort to ensure that the bicycles complied with the conditions for eligibility for preferential treatment in Cambodia. The Applicant has accepted, in its letter dated 19 August 2014, that the actual contract and correspondence with the agent do not include clauses or requirements about origin. The explanation given was that the Applicant has most of its expertise on origin of goods and documentation of origin in-house. This, however, has not lead to better compliance, although the Applicant declares itself knowledgeable concerning the rules of origin.

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5 See Cases C-250/91 *Hewlett-Packard*, para. 23; C-204/94 *Faroe Seafood*, para. 100; Case C-64/89 *Deutsche Fernsprecher GmbH*, para. 20

6 See Case C-38/07 *Heuschen & Schrouff*, para. 19

7 See, for example, Case C-161/88 *Binder*, para. 59

8 See Cases C-48/98 *Söhl & Söhlke*, para. 58; C-38/07 Heuschen & Schrouff, para. 59

(36) Moreover, the Applicant has acknowledged, including in its letters dated 19 October 2010 and 19 August 2014, that the wrongful declaration of another company (the Applicant's agent) instead of the actual exporter generated erroneous declarations. This situation can be considered as a proof of negligence, as it could have been prevented through communication with the appropriate authorities. Also taking into account the period of time in which the company wrongfully declared as exporter acted as an agent of the Applicant, which allowed the Applicant the necessary time to adjust possible failures in relation with its agent, the Commission has to acknowledge the Applicant's lack of diligence.

(37) In order to benefit from the preferential treatment, all operators are asked to use the necessary Form A. When issuing Form A certificates for finished bicycles, the parts included in the finished bicycles which are subject to regional cumulation must be accompanied by a Form A certificate. This did not happen in the present case, since the parts included in the finished bicycles were accompanied by other documents used between ASEAN countries. The Applicant argued that these aspects are "exclusively formal in nature and have not actually led to any preferential treatment", the documents submitted as a basis for the issue of Form A certificates for the finished bicycles allegedly being covered by the same rules as those that apply to the issue of Form A certificates. The Commission would like to stress that, even if the rules on preference between ASEAN countries and the EU's GSP agreements are similar, the EU cannot verify an ASEAN certificate/document, or check whether such a certificate meets the requirements for preferential customs treatment, since the EU's control powers are linked to the GSP agreements and the issuing of Form A certificates.

(38) In conclusion, the absence of Form A certificates represents in itself a breach of the rules applicable, the verification of the real origin of the goods or of the conditions for issuing of the certificates used in practice (Forms B or D) falling outside the scope of the GSP regime.

(39) To allow imports without the respect of the legislation in force, only because the authorities have accepted them even in such conditions, would mean allowing a negligence which would encourage operators to benefit from errors from their customs authorities[9].

(40) The lack of the necessary due care on the part of the Applicant has also been found by the Danish National Tax Tribunal in relation with the application of Article 220(2)(b) of the Community Customs Code, which is also relevant for the application of Article 239 of the Community Customs Code.[10]

(41) The second condition referred to in Article 239 of Regulation (EEC) No 2913/92 is, therefore, not fulfilled,

HAS ADOPTED THIS DECISION:

*Article 1*

Repayment of the import duties in the sum of DKK XXXXX, requested by the Kingdom of Denmark on 2 September 2013, is not justified.

[9] See Case C-38/07 *Heuschen & Schrouff*, para. 64

[10] See case C-250/91 *Hewlett Packard*, para. 46

*Article 2*

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 18.2.2015

*For the Commission*
*Pierre MOSCOVICI*
*Member of the Commission*