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**REC 7/01**



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 24-4-2003

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NOT TO BE PUBLISHED

**COMMISSION DECISION**

**of 24-4-2003**

**finding that post-clearance entry of import duties in the accounts is not justified in a particular case, withdrawing decision C(99) 1441 final of 1 June 1999, finding that post-clearance entry of import duties in the accounts is not justified in a particular case and authorising Italy and Spain to refrain from post-clearance entry in the accounts, to remit or repay import duties in cases involving comparable issues of fact and of law**  
(only the Portuguese, Italian and Spanish texts are authentic)

**(Request submitted by Portugal)**

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**finding that post-clearance entry of import duties in the accounts is not justified in a particular case, withdrawing decision C(99) 1441 final of 1 June 1999, finding that post-clearance entry of import duties in the accounts is not justified in a particular case and authorising Italy and Spain to refrain from post-clearance entry in the accounts, to remit or repay import duties in cases involving comparable issues of fact and of law**  
(only the Portuguese, Italian and Spanish texts are authentic)

**(Request submitted by Portugal)**

**(REC 7/01)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Communities,

Having regard to Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code,<sup>1</sup> as last amended by Regulation (EC) No 2700/2000,<sup>2</sup>

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 1993<sup>3</sup> laying down provisions for the implementation of Council Regulation (EEC) No 2913/92, as last amended by Regulation (EC) No 444/2002,<sup>4</sup> and in particular Articles 873 and 907 thereof,

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1 OJ L 302, 19.10.1992, p. 1.

2 OJ L 311, 12.12.2000, p. 17.

3 OJ L 253, 11.10.1993, p. 1.

4 OJ L 68, 12.03.2002, p. 11.

Whereas:

- (1) In a letter dated 11 October 2001, received by the Commission on 29 October 2001, Portugal asked the Commission to decide, under Article 220(2)(b) of Regulation (EEC) No 2913/92, whether it was justified to waive post-clearance entry of import duties in the accounts or, in the alternative, if the remission of duties was justified under Article 239 of the same Regulation, in the following circumstances.
- (2) In the first half of 1995 a Portuguese firm released consignments of pre-cooked, frozen tuna fillets from Costa Rica for free circulation.
- (3) At the time, imports into the Community of this type of product originating in Costa Rica qualified for special treatment under the Generalised System of Preferences (GSP). By virtue of being accompanied by a Form A certificate of origin issued by the competent Costa Rican authorities, the products enjoyed preferential tariff treatment when released for free circulation.
- (4) In the case in point the firm attached to its customs declarations the relevant Form A certificates of origin issued by the competent Costa Rican authorities. The Portuguese customs authorities accepted the declarations and granted preferential tariff treatment.
- (5) However, the Portuguese authorities subsequently asked the Costa Rican authorities to carry out post-clearance spot checks of the Form A certificates of origin presented with the consignments.
- (6) On the basis of the checks, the Costa Rican authorities confirmed the authenticity of the certificates of origin and the accuracy of the origin information they contained.

- (7) Following an investigation carried out by representatives of several Member States and the Commission in Costa Rica in March 1996, it was found that the Form A certificates of origin presented had been issued for fish preparations produced from tuna fished outside the Costa Rica's territorial waters by vessels that did not fulfil the conditions required for them to be considered vessels of the beneficiary country. The Costa Rican authorities had in fact misinterpreted "territorial waters" as meaning the zone extending 200 nautical miles from the coast although territorial waters should extend only 12 nautical miles from the coast.
- (8) The investigation concluded that during the period under consideration, the fish preparations did not meet GSP conditions and consequently that the Form A certificates of origin, issued by the competent Costa Rican authorities and presented on importation into Portugal, were not valid. The Portuguese authorities accepted this finding and countersigned the final report drawn up on completion of the investigation.
- (9) As the imported goods had enjoyed preferential tariff treatment for which they were not in fact eligible, the competent customs office launched the post-clearance recovery of import duties amounting to XXXXXXXX.
- (10) On the basis that it had acted in good faith and that the Costa Rican authorities had committed an error it could not have detected, the firm requested that the import duties be waived.
- (11) In accordance with Article 871 of Regulation (EEC) No 2454/93, the firm stated that it had seen the file sent by the Portuguese authorities to the Commission and had nothing to add.
- (12) By letter dated 10 April 2002 the Commission requested additional information from the Portuguese authorities. The Portuguese authorities provided the information by letter dated 31 January 2003, received by the Commission on 4 February 2003.
- (13) The administrative procedure was accordingly suspended between 11 April 2002 and 4 February 2003 under Article 873 of Regulation (EEC) No 2454/93.

- (14) In accordance with Article 873 of Regulation (EEC) No 2454/93, a group of experts comprising representatives of all the Member States met on 5 March 2003 within the framework of the Customs Code Committee (Section for General Customs Rules/Repayment) to consider the case.
- (15) Under Article 220 (2)(b) of Regulation (EEC) No 2913/92, there can be no post-clearance entry in the accounts 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.
- (16) In the case in point, preferential tariff treatment for the imports in question was conditional on presentation of Form A certificates of origin.
- (17) Following the investigation carried out by the representatives of several Member States and the Commission in March 1996, the Costa Rican authorities acknowledged that the certificates they had issued were not valid given that certification of the origin of the fish from which the preparations had been manufactured was based on an incorrect interpretation of “territorial waters”.
- (18) However, reliance on the validity of such certificates is not normally protected, as this is considered a normal commercial risk and therefore the responsibility of the person liable for payment.
- (19) The European 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 the case in question the competent Costa Rican authorities were not misled by the exporter’s declarations but themselves misinterpreted the legal rules applicable, such behaviour constituting an error by the customs authorities themselves within the meaning of Article 220 (2)(b) of Regulation (EEC) No 2913/92.
- (21) This view is supported by the fact that the Costa Rican authorities initially confirmed the origin of the goods and the validity of the certificates of origin in question when they replied to Portuguese customs’ request for post-clearance checks.

- (22) The competent Costa Rican authorities therefore committed an error within the meaning of Article 220 (2)(b) of Regulation (EEC) No 2913/92 and were not misled by the exporter.
- (23) With regard to second condition laid down by Article 220(2)(b) of Regulation (EEC) No 2913/92, [case law](#) of the European Court of Justice has established that regard must be had to the nature of the error, the professional experience of the trader concerned and the degree of care which he exercised.<sup>5</sup>
- (24) Concerning the nature of the error, the [Court](#) has repeatedly said the complexity of the legislation in question must be considered.<sup>6</sup>
- (25) The Portuguese customs authorities consider the relevant legislation to be complex in that it refers to a concept which is itself complex, namely that of “territorial waters”: the UN Convention on the Law of the Sea of 10 December 1982, while clearly specifying the limit as 12 nautical miles, employs the term “territorial sea” and not “territorial waters”.
- (26) This view seems difficult to support, since the misinterpretation by the Costa Rican authorities was based on a confusion between two intrinsically clear and unambiguous concepts: the area of 200 nautical miles and the area of 12 nautical miles.
- (27) However, if the foregoing is examined in the light of [recent case law](#),<sup>7</sup> the fact that the said Convention was not published in the Official Journal of the European Communities until 23 June 1998<sup>8</sup> and that the exporting country’s competent authorities persisted in their misinterpretation for a number of years seems to warrant the view that the error was not one that could reasonably have been detected by the person liable.

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<sup>5</sup> Deutsche Fernsprecher GmbH judgment of 26 June 1990, Case C-64/89.

<sup>6</sup> Foods Import srl. judgment of 12 December 1996, Case C-38/95.

<sup>7</sup> Ilumitrónica judgment of 14 November 2002, Case C-251/00.

<sup>8</sup> OJ L 179, 23.6.1998, p. 3.

- (28) Throughout the period when the Costa Rican authorities themselves misinterpreted the concept of territorial waters, published Community legislation gave the firm no reason to doubt that the fish used by its supplier fulfilled the GSP conditions relating to the place of capture. In particular, on the basis of the regulatory information available to it, the firm had no reason to question its supplier as to whether the fish used by it had been caught within the 12 nautical mile area or beyond it, e.g. within the limit of 200 miles.
- (29) At the time of the events, no notice asking importers to take precautions in the use of Form A certificates of origin issued by the Costa Rican authorities for the products had been published in the Official Journal of the European Communities.
- (30) It is clear from the foregoing that the firm in question acted in good faith and could not reasonably have detected the error committed by the Costa Rican authorities.
- (31) The firm also complied with all the provisions laid down by the regulations in force as regards its customs declarations.
- (32) The circumstances of the case in question therefore point to an error on the part of the customs authorities themselves which could not reasonably have been detected by an operator acting in good faith, within the meaning of Article 220 (2)(b) of Regulation (EEC) No 2913/92.
- (33) Post-clearance entry of the import duties in the accounts is therefore not justified in this case.
- (34) As entry of import duties in the accounts is not justified in this case, there is no need to examine the request that it be determined in the alternative whether or not the provisions of Article 239 of Regulation (EEC) No 2913/92 apply.
- (35) By Decision C(99) 1441 final of 1 June 1999, the Commission considered under Article 220 (2)(b) of Regulation (EEC) No 2913/92 and, in the alternative, under of Article 239 of Regulation (EEC) No 2913/92 that the entry of import duties in the accounts was justified and that the remission of import duties was not justified in REC 08/97 submitted by Italy. This decision concerned pre-cooked frozen tuna fillets from Costa Rica imported into the Community on 16 and 18 November 1994.



- (36) While that decision accepted that the error of interpretation committed by the competent Costa Rican authorities was an error on the part of the competent authorities within the meaning of Article 220 (2)(b) of Regulation (EEC) No 2913/92, it was based on the view that the firm in question failed to exercise enough diligence to detect the error committed by the Costa Rican authorities.
- (37) In the light of recent case law, this view cannot now be maintained. As in REC 07/01, throughout the period in which the Costa Rican authorities themselves had misinterpreted the concept of territorial waters, published Community legislation did not give the firm concerned in REC 08/97 any reason to doubt that the fish used by its supplier did not fulfil the GSP conditions relating to the place of capture.
- (38) In particular, on the basis of the regulatory information available to it, the firm concerned in REC 08/97 likewise had no good reason to question his supplier as to whether the fish used by it had been caught within the area of 12 nautical miles or beyond, e.g. within the 200-mile zone.
- (39) There is nothing in file REC 08/97 that could cast doubt on the fact that the firm acted in good faith or complied with all the provisions laid down by the rules as regards its customs declarations.
- (40) In the light of the foregoing and since the validity of Decision C(99) 1441 final of 1 June 1999 and the validity of its implementing measures has been the subject, within the legal time limits, of appeals before national courts, the said decision should be withdrawn and the import duties in the case in question should not be entered in the accounts.
- (41) 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.
- (42) Italy and Spain have requested authorisation from the Commission to refrain from post-clearance entry in the accounts or to remit or repay import duties in cases involving comparable issues of fact and of law to this one.

(43) Such authorisation may be granted to the Member States on the condition that it is used only in cases strictly comparable in fact and law to the case in question. Authorisation should therefore cover requests for the waiver of post-clearance entry of import duties in the accounts or for the remission or repayment of import duties, lodged within the legal time limits in respect of import operations carried out under cover of Form A certificates of origin issued by the Costa Rican authorities on 31 March 1996 at the latest, i.e. the last day of the month during which the representatives of several Member States and of the Commission carried out the investigation in Costa Rica that revealed the irregularities in the case in question. Above all, the behaviour of the importers must involve no deception or obvious negligence,

HAS ADOPTED THIS DECISION:

*Article 1*

The import duties in the sum of XXXXXX which are the subject of Portugal's request of 11 October 2001 need not be entered in the accounts.

*Article 2*

Decision No C(99) 1441 final of 1 June 1999 (REC 8/97) is withdrawn.

*Article 3*

Import duties in the sum of XXXXXXXX which are the subject of Italy's request of 14 November 1997 need not be taken into account.

*Article 4*

Italy and Spain are authorised to waive post-clearance entry of import duties in the accounts or to remit or repay import duties in cases involving strictly comparable issues of fact and of law to those corresponding to Portugal's request of 11 October 2001 or to Italy's request of 14 November 1997.

The authorisation covers requests for the waiver of post-clearance entry of import duties in the accounts or for the remission or repayment of import duties, lodged within the legal time limits and concerning import operations carried out under cover of Form A certificates of origin issued by the Costa Rican authorities on 31 March 1996 at the latest.

*Article 5*

This Decision is addressed to Portugal, Italy and Spain.

Done at Brussels, 24-4-2003

*For the Commission*  
Frits Bolkestein  
*Member of the Commission*