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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 4-7-2008
COM(2008) 3262 final

COMMISSION DECISION

Of 4-7-2008

**finding that post-clearance entry in the accounts of import duties is justified and
remission of those duties is not justified in a particular case**

(Only the English text is authentic)

(Request submitted by the United Kingdom)

(REC 01/07)

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(Request submitted by the United Kingdom)

(REC 01/07)

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 Code¹,

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 establishing the Community Customs Code²,

Whereas:

- (1) By letter dated 28 February 2007, received by the Commission on 12 March 2007, the United Kingdom asked the Commission to decide whether, under Article 220(2)(b) of Regulation (EEC) No 2913/92, waiving post-clearance entry in the accounts of import duties or, in the alternative, remission of those duties, was justified in the following circumstances.
- (2) Between 4 February 2003 and 1 September 2004 a British firm imported integrated electronic compact fluorescent lamps (CFL-i) of tariff heading 8539 31 90 from Pakistan for release for free circulation.
- (3) At the time in question, imports into the Community of this type of product originating in Pakistan qualified for preferential treatment under the system of generalised preferences. In accordance with Article 80 of the version of Regulation (EEC) No 2454/93 in force at the time, products covered by a Form A certificate of origin

¹ OJ L 302, 19.10.1992, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1.)

² OJ L 253, 11.10.1993, p. 1. Regulation as last amended by Regulation (EC) No 214/2007 (OJ L 62, 1.3.2007, p. 6.).

issued by the competent authorities in Pakistan were eligible for preferential tariff treatment on their release for free circulation.

- (4) In the case in point, the firm presented a Form A certificate in support of each customs declaration for release for free circulation. The UK customs authorities accepted the declarations and granted preferential tariff treatment.
- (5) Following a complaint lodged on 4 April 2000 by the European Lighting Companies Federation on behalf of Community producers representing a major proportion of Community production of CFL-i, the Commission announced, by a notice published in the Official Journal of the European Communities³, the initiation of an anti-dumping procedure with regard to imports into the Community of CFL-i originating in the People's Republic of China.
- (6) Commission Regulation (EC) No 255/2001 of 7 February 2001⁴ imposed a provisional anti-dumping duty on imports into the Community of CFL-i originating in the People's Republic of China. The anti-dumping duty was made definitive by Council Regulation (EC) No 1470/2001 of 16 July 2001 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of integrated electronic compact fluorescent lamps (CFL-i) originating in the People's Republic of China⁵.
- (7) On 16 August 2004 the Commission received a request to open an investigation concerning the possible circumvention of anti-dumping measures on imports of CFL-i originating in the People's Republic of China. The request contained sufficient *prima facie* evidence that the anti-dumping measures on the product concerned originating in the People's Republic of China were being circumvented by means of transhipment via Vietnam, Pakistan or the Philippines and/or by assembly in Vietnam, Pakistan or the Philippines of the product under investigation.
- (8) Therefore Commission Regulation (EC) No 1582/2004 of 8 September 2004⁶ initiated an investigation concerning the possible circumvention of anti-dumping measures imposed by Council Regulation (EC) No 1470/2001 on imports of CFL-i originating in the People's Republic of China by imports of (CFL-i) consigned from Vietnam, Pakistan or the Philippines, whether declared as originating in Vietnam, Pakistan or the Philippines or not, and made such imports subject to registration.
- (9) Lastly, Council Regulation (EC) No 866/2005 of 6 June 2005⁷ extended the definitive anti-dumping measures imposed by Regulation (EC) No 1470/2001 on imports of CFL-i originating in the People's Republic of China to imports of the same product consigned from the Socialist Republic of Vietnam, the Islamic Republic of Pakistan and the Republic of the Philippines. The duties extended under Regulation (EC) No 866/2005 were also charged retroactively from 11 September 2004 on imports registered in accordance with Regulation No 1582/2004.

³ OJ C 138, 17.5.2000, p. 8.

⁴ OJ L 38, 8.2.2001, p. 8.

⁵ OJ L 195, 19.7.2001, p. 8. Regulation as last amended by Council Regulation (EC, Euratom) No 1322/2006 of 1 September 2006 (OJ L 244, 7.9.2006, p. 1).

⁶ OJ L 289, 10.9.2004, p. 54.

⁷ OJ L 145, 9.6.2005, p. 1. Regulation as last amended by Council Regulation (EC, Euratom) No 1322/2006 of 1 September 2006 (OJ L 244, 7.9.2006, p. 1).

- (10) At the same time, an administrative cooperation mission comprising representatives of the European Anti-Fraud Office (OLAF) and some Member States travelled to Pakistan from 18 to 27 April 2005 to investigate exports to the Community of CFL-i declared as originating in Pakistan. The conclusion of this investigation was that the CFL-i declared as originating in Pakistan were actually of Chinese origin, meaning that they were not eligible for preferential treatment under the system of generalised preferences when imported into the Community and were subject to anti-dumping duties under Regulation (EC) No 1470/2001.
- (11) Accordingly, the UK customs authorities initiated proceedings against the firm to recover a total of GBPXXXXX); this is the amount for which the firm has requested waiver of post-clearance entry in the accounts or, in the alternative, remission.
- (12) In support of the request made by the UK authorities, the firm stated, in accordance with Articles 871(3) and 905(3) of Regulation (EEC) No 2454/93, that it had seen the dossier submitted to the Commission by the UK authorities and had nothing to add.
- (13) By letter dated 25 May 2007, the Commission asked the UK authorities for additional information. The UK authorities replied by letter of 22 November 2007, received at the Commission on 27 November 2007. Examination of the request was therefore suspended between 26 May 2007 and 27 November 2007.
- (14) By letter dated 26 March 2008, received by the firm on 27 March 2008, the Commission notified the firm of its intention to withhold approval and explained the reasons for this.
- (15) By letter dated 24 April 2008, received at the Commission on the same date, the firm made known its views on the Commission's objections.
- (16) 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.
- (17) 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 23 May 2008 within the framework of the Customs Code Committee (Repayment Section) to consider the case.
- (18) The request sent to the Commission by the UK authorities and the letter from the firm dated 24 April 2008 suggest that waiving entry in the accounts and remission are justified for the following reasons:
 - (19) Pakistan's authorities committed an error that could not have been detected by an operator acting in good faith, by issuing over a prolonged period Form A certificates of origin for goods that did not fulfil the conditions laid down by the system of generalised preferences. This error should also be acknowledged in respect of the anti-dumping duties since by agreeing to issue the Form A certificates of origin for the goods concerned Pakistan's authorities accepted that the conditions for benefiting from non-preferential Pakistani origin were fulfilled.

- (20) Furthermore, the Commission committed an error by not informing the importers that there were doubts about the validity of the Form A certificates of origin issued by the Pakistani authorities.
- (21) In their letter of 28 February 2007 the UK authorities suggested that remission was justified because the rules of preferential origin were more difficult to comply with than the rules of non-preferential origin applicable in the case of anti-dumping duties. The firm therefore had a legitimate expectation that the goods were indeed of Pakistani origin for the purposes of both preferential and non-preferential origin. The assurances received by the firm (in the form of a written undertaking) that the goods originated in Pakistan bore out this legitimate expectation.
- (22) Lastly, the firm acted in good faith throughout and no obvious negligence could be attributed to it.
- (23) Firstly, the argument raised by the firm in its letter of 2 November 2007, annexed to the letter of 22 November 2007 from the British authorities, and in its letter to the Commission of 24 April 2008, that the customs debt does not exist, as well as the argument attesting that the imported goods were indeed of Pakistani origin, contest the very existence of the customs debt. Contesting the debt in this way falls outside the scope of the procedure for waiving post-clearance recovery of duties under Article 220(2)(b) and the procedure for remission or repayment under Article 239 of Regulation (EEC) No 2913/92. It is for the Member States, not the Commission, to determine whether a debt has been incurred and, if so, the amount of the debt. Furthermore, the Court of Justice has consistently ruled that the purpose of Commission decisions under the procedures for waiving post-clearance entry in the accounts or remission/repayment on an equitable basis is not to determine whether a customs debt has been incurred or the size of the debt⁸. An operator who does not recognise the existence of a customs debt must challenge the decision establishing that debt before the national courts in accordance with Article 243 of Regulation (EEC) No 2913/92.

I. Examination of the request under Article 220(2)(b) of Regulation (EEC) No 2913/92

- (24) 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 duty 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.

A - Condition concerning an error on the part of the customs authorities

- (25) The firm's arguments concerning an error on the part of the Pakistani authorities, and then those concerning an error on the part of the Commission, must be examined consecutively.

⁸ See judgments in *Sportgoods* (C-413/96; 24.9.1998), *Kia Motors* (T-195/97; 16.7.1998) and *Hyper Srl* (T-205/99 – 11.7.2002).

1. Error on the part of the Pakistani authorities

- (26) The request concerning the customs debt resulting from the goods' ineligibility for preferential tariff treatment (normal customs duties) and that concerning the debt resulting from a finding of non-preferential Chinese origin of the goods (anti-dumping duties) must be examined separately.
- (a) Normal customs duties
- (27) In the case under consideration, preferential tariff treatment was subject to the submission of Form A certificates. The provisions applicable to products not wholly obtained in a country eligible for preferences are Articles 67(1) and 69 of Regulation (EEC) No 2454/93 and Annex 15 thereto.
- (28) To be eligible for preferential origin, products of heading 8539, which covers CFL-i, must satisfy one of the following two conditions (Annex 15 to Regulation (EEC) No 2454/93):

"Manufacture:

- from materials of any heading, except that of the product, and
- in which the value of all the materials used does not exceed 40% of the ex-works price of the product."

or

"Manufacture in which the value of all the materials used does not exceed 30% of the ex-works price of the product."

- (29) The goods exported by the firm's supplier met neither of these conditions; furthermore, the report of the joint mission shows that the information presented by the exporter to the authorities responsible for issuing Form A certificates of origin in Pakistan was inaccurate. However, even on the basis of this inaccurate information, Pakistan's competent authorities should have realised that the goods did not meet the conditions for eligibility for the preferential arrangements of the system of generalised preferences. Pakistan's competent authorities therefore committed an active error when issuing the Form A certificates of origin.
- (30) According to Article 220(2)(b), the issue of a certificate by the authorities of a third country, should it prove to be incorrect, shall constitute an error which could not reasonably have been detected by a liable person acting in good faith. The first condition of Article 220(2)(b) is therefore fulfilled in respect of normal customs duties.
- (b) Anti-dumping duties
- (31) The firm argues that it must be accepted that the Pakistani authorities also committed an error regarding the non-preferential origin of the goods as, firstly, it is more difficult to comply with the non-preferential origin rules than with the preferential origin rules and, secondly, the Pakistani authorities issuing the Form A certificates of

origin had accepted that the rules of non-preferential origin had also been complied with.

- (32) The Commission does not consider that the line of reasoning followed for the normal customs duties is relevant in respect of the anti-dumping duties for the following reasons:
- (33) In the case of anti-dumping duties, it is the non-preferential origin rules that apply.
- (34) In terms of the principles, it should first be noted that the preferential rules in the system of generalised preferences and the rules of origin applicable under commercial policy, including anti-dumping measures, are independent of each other and pursue completely different objectives. The former are aimed at fostering the economic development of certain countries, whereas the latter are aimed at countering certain unfair trading practices.
- (35) Nor is it accurate to maintain that "GSP preferential rules are - by their nature - harder to meet than the non-preferential rules which apply when assessing anti-dumping duties." In order to foster regional economic integration, the rules determining origin under the system of generalised preferences have been gradually relaxed. Such is the purpose *inter alia* of the rules on regional cumulation in Articles 72 to 72b of Regulation (EEC) No 2454/93. Article 72(3) stipulates that regional cumulation applies to three regional groups: Pakistan belongs in group III, along with Bangladesh, Bhutan, India, the Maldives and Sri Lanka. Thanks to the regional cumulation rules, materials originating in one country of the regional group are considered as originating in the beneficiary country when determining the originating status of the final product. These rules therefore permit imported materials originating in partner countries (countries belonging to the same group) to be used in a country without their being subject to the obligation of sufficient processing. These rules mean that the provisions on determining preferential origin cannot in all cases be considered more demanding than those on determining non-preferential origin.
- (36) Firstly, as regards the application of the rules of origin, it is common knowledge that one factor systematically taken into account when imposing an anti-dumping duty on a third-country product is the product's origin, as determined on the basis of the rules on non-preferential origin.
- (37) The procedures and mechanisms applied to determine preferential origin and those used to determine non-preferential origin are independent of each other. When a declaration is submitted for the release for free circulation of goods subject to anti-dumping duties, no certificate of origin is required, and there is no administrative cooperation procedure in the context of non-preferential origin, as there is under the system of generalised preferences. Since Pakistan's authorities played and could have played no part in determining non-preferential origin, they cannot be held to have committed an error in this respect.
- (38) The Commission therefore considers that Pakistan's customs authorities did not commit an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92 in respect of that part of the customs debt relating to the anti-dumping duties.

2. Error on the part of the Commission

- (39) The firm considers that waiver of post-clearance entry in the accounts is also justified because the Commission committed an error in not informing Community importers of its doubts concerning the validity of certain Form A certificates of origin issued by the Pakistani authorities for the products concerned.
- (40) In this respect it should first be noted that Community law contains no provision expressly requiring the Commission to notify importers when it has doubts about the validity of customs transactions carried out by those importers under preferential arrangements⁹.
- (41) Furthermore, the courts have ruled that the Commission can be obliged, by virtue of its duty of diligence, to issue a general warning to Community importers only when it has serious doubts as to the legality of a large number of exports effected under a system of preferential treatment¹⁰. At the time of the disputed imports, it had not been established that the CFL-i imported from Pakistan in fact originated in China. As stated in the OLAF report on the mission to Pakistan in April 2005, information submitted by the Belgian customs authorities indicated that it was "not very likely" that the lamps exported by the firm's supplier met the conditions for acceptance as originating in Pakistan. However, these suspicions had to be addressed through more thorough investigations, which were carried out following the publication of Regulation (EC) No 1582/2004 and during the joint mission of April 2005.
- (42) Consequently no error can be imputed to the Commission for having failed to inform importers.
- (43) It may be concluded from the foregoing that the Pakistani authorities committed an error within the meaning of Article 22(2)(b) of Regulation (EEC) No 2913/92 in respect of preferential origin and no other error has been committed in the case under consideration.

B - Conditions regarding the good faith of the person concerned and compliance with the rules in force as regards the customs declaration

- (44) According to the UK authorities, the firm acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (45) The following points should be made regarding compliance with all the rules in force as regards the customs declaration.
- (46) The request shows that the goods concerned were never declared under the correct tariff heading (8539 31 90 91) but always under another heading (8539 31 90 99, 8539 21 98 90, 9539 22 90 90, 8539 29 98 90). In its letter of 2 November 2007, the firm stated that had relied on its customs agent and had given its agent no confirmation of the tariff heading to be used.
- (47) This cannot be considered a valid argument. The fact that the firm employed a customs agent to carry out the customs formalities does not relieve it of its responsibility; the fact that the agent acted as a direct representative (*in the name and on behalf of the*

⁹ See *Hyper Srl* judgment of 11.7.2002 (Case T-205/99).

¹⁰ See CAS judgment of 6.2.2007 (Case T-23/03).

firm), as attested by the customs declarations concerned, suggests that it was only acting under the responsibility of the firm, which must therefore be held accountable for the particulars in the declaration. Moreover, the file does not suggest that the firm was concerned about the tariff classification of the goods it was importing although, as it says, the product was a new one.

- (48) Furthermore, the firm states in its letter to the Commission of 24 April 2008 that it stopped its imports from China in 2001 because of the anti-dumping duty on CFL-i originating in China. This means that it was aware of the legislation in force. Commission Regulation (EC) 255/2001 and Council Regulation (EC) 1470/2001 very clearly indicate the tariff heading for CFL-i. It must therefore be found that the firm, which could have reasonably been expected to know the correct tariff heading, failed to comply with all the rules in force as regards its customs declaration. Since this condition was not fulfilled, it is not necessary to examine whether the firm acted in good faith.
- (49) In the light of the foregoing, entry in the accounts of the customs debt in respect of normal customs duties is justified because the firm did not comply with all the provisions provided for by the legislation in force as regards the customs declaration. Entry in the accounts of the customs debt in respect of anti-dumping duties is justified because no error has been found in this respect and, moreover, the firm did not comply with all the legislation in force as regards the customs declaration. The question must therefore be examined of whether the firm was placed in a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92 as regards the part of the customs debt relating to anti-dumping duties.

II - Examination of the request under Article 239 of Regulation (EEC) No 2913/92

- (50) Under Article 239 of Regulation (EEC) No 2913/92, import duties may be repaid in situations other than those referred to in Articles 236, 237 and 238 resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.
- (51) The Court of Justice of the European Communities has ruled that this provision represents a general principle of equity designed to cover an exceptional 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 activity¹¹.
- (52) For the reasons given in paragraphs 33 to 38 and 40 to 42 above, the Commission considers that neither the fact that the Pakistani authorities wrongly issued Form A certificates of origin for the application of the system of generalised preferences nor the fact that the Commission did not inform importers of its doubts about the Pakistani origin of the imported goods could have placed the firm in an exceptional situation compared with other operators carrying out the same activity. The first condition referred to in Article 239 of Regulation (EEC) No 2913/92 is not therefore fulfilled.

¹¹ *Kaufring* judgment of 10 May 2001 (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), ECR, II - 01337.

- (53) Furthermore, for the reasons given in paragraphs 46 to 48 above, the Commission considers that the second condition referred to in Article 239 of Regulation (EEC) No 2913/92 for the requested remission of duties is not fulfilled either.
- (54) The remission of import duties requested is therefore not justified,

HAS ADOPTED THIS DECISION:

Article 1

1. The import duties in the sum of GBP XXXX (EUR XXXX) which were the subject of the request from the United Kingdom of Great Britain and Northern Ireland of 28 February 2007 must be entered in the accounts.
2. The remission of the import duties in the sum of GBP XXXX (EUR XXXX) requested by the United Kingdom of Great Britain and Northern Ireland on 28 February 2007 is not justified.

Article [2]

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

This Decision is addressed to the Member States.

Done at Brussels, 4-7-2008

*For the Commission
László KOVÁCS
Member of the Commission*