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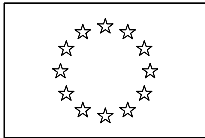
REM 15/02



COMMISSION OF THE EUROPEAN COMMUNITIES,

Brussels, 1-10-2004
C(2004)3612

NOT FOR PUBLICATION

COMMISSION DECISION

Of 1-10-2004

finding that repayment of import duties is not justified in a particular case.

(Only the German text is authentic.)

(Request submitted by Germany)
(REM 15/02)

FR

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Of 1-10-2004

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(Request submitted by Germany)
(REM 15/02)

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] as last amended by Regulation (EC) No 2700/2000,[2]

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,[3] as last amended by Regulation (EC) No 2286/2003,[4]

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1 OJ L 302, 19.10.1992, p.1.

2 OJ No L 311 of 12.12.2000, p.17

3 OJ L 253, 11.10.1993, p. 1.

4 OJ L 343, 31.12.2003, p. 1.

Whereas:

(1) By letter dated 13 June 2002, received by the Commission on 24 June 2002, Germany asked the Commission to decide, under Article 239 of Council Regulation (EEC) No 2913/92, whether the repayment of import duties was justified in the following circumstances.

(2) Under the second paragraph of Article 2 of Regulation (EC) No 1335/2003 of 25 July 2003 amending Regulation (EEC) No 2454/93,[5] 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 refer to that Regulation as last amended by Commission Regulation (EC) No 881/2003 of 21 May 2003.[6]

(3) A customs agent established in Germany, hereinafter the applicant, imported fishery products from Norway on behalf of his clients, Norwegian exporters.

(4) From 1 July 1995 the goods were eligible for release for free circulation duty free under the tariff quotas provided for in Council Decision 95/312/EC of 24 July 1995 on the conclusion of an Additional Protocol to the Agreement between the European Economic Community and the Kingdom of Norway consequent on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union.[7] The tariff quotas were opened by Council Regulation (EC) No 3061/95 of 22 December 1995 amending Regulation (EC) No 992/95 opening and providing for the administration of Community tariff quotas for certain agricultural and fishery products originating in Norway.[8]

(5) The German Federal Finance Ministry first, in a note of 31 August 1995, informed the customs offices that the tariff quotas under the Additional Protocol to the Agreement between the European Economic Community and the Kingdom of Norway would be open from 1 September 1995. Then, in a note of 4 October 1995, it informed the customs offices that the tariff quotas had been opened with retroactive effect from 1 July 1995.

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[5] OJ L 187, 26.7.2003, p. 16.
[6] OJ L 134, 29.5.2003, p. 1.

(6) From 1 September 1995 the applicant applied for release for free circulation of the goods duty free under the tariff quotas provided for in Decision 95/312/EC and opened by Regulation (EC) No 3061/95. He submitted EUR 1 certificates of origin with the declarations so that the goods could be exempted from duty under the tariff quota.

(7) As soon as the tariff quotas had been officially opened, applications to draw from the quota were sent to the Central Tariff Quota Office in Düsseldorf .

(8) The competent customs office subsequently found that the exemption from duty under the tariff quotas requested by the applicant from 1 September 1995 could not be granted for some of the imports, to which the normal rate of duty therefore had to be applied. On 8 March 1996 it therefore issued the applicant with a post-clearance claim for XXXXX, the amount of import duties applicable at the normal rate for the goods concerned.

(9) The competent authorities made a post-clearance allocation from the quotas for the imports carried out by the applicant in July and August 1995 for which proof of eligibility for preferential treatment had been submitted or was submitted on request. This was possible because of the dates on which the consignments were imported. The post-clearance allocation from the quotas gave rise to repayment of duties in the amount of XXXXX. The German authorities therefore considered that the applicant still owed customs duties of XXXXX, later reduced to XXXXX.

(10) The applicant appealed against this decision in various ways, and in particular applied for repayment of duties under Article 236 of Regulation (EEC) No 2913/92. The Bundesfinanzhof found that repayment under that Article was not justified but considered that the dossier should be sent to the Commission to be examined under Article 239 of the same Regulation, as the circumstances of the case might constitute a special situation if tariff quotas had been allocated in other Member States before the Regulation opening them was even published, in which case the applicant would have been excluded from access to the tariff quotas and would have no legal means of effectively contesting this anticipated and illicit distribution of quotas.

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[7] OJ L 187, 8.8.1995, p. 1.

[8] OJ L 327, 30.12.1995, p. 1.

(11) The German authorities forwarded the dossier to the Commission, asking it to decided whether repayment of duties in the amount of XXXXXX was justified under Article 239 of Regulation (EEC) No 2913/92.

(12) In support of the application submitted by the competent German authorities and in accordance with Article 905 of Regulation (EEC) No 2454/93, the applicant's lawyer stated that he had seen the dossier and added a number of comments which were annexed to the dossier sent to the Commission.

(13) By letter of 28 November 2002 the Commission asked the German authorities for additional information. By letter of 4 May 2004, received at the Commission on 10 May 2004, the German authorities supplied this information.

(14) The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93, between 28 November 2002 and 10 May 2004.

(15) By letter dated 25 June 2004, received by the applicant on 30 June 2004, the Commission notified the applicant of its intention to withhold approval and explained the reasons for its decision.

(16) By letter dated 21 July 2004, received by the Commission on 22 July 2004, the applicant's lawyer stated his position regarding the Commission's objections. His main argument is that the applicant, along with all German importers, was deprived of the possibility of benefiting from preferential customs arrangements and the principle of equal opportunities was therefore infringed. This assertion is essentially based on the conditions of entry into force and publication of the relevant legislation and what is argued to be the resulting situation, namely the exhaustion of the tariff quotas before 1 September 1995, i.e. before the applicant had any chance of access to the quotas.

(17) In accordance with Article 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.

(18) 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 7 September 2004 within

the framework of the Customs Code Committee (repayments section) to consider the case.

(19) Article 239 of Regulation (EEC) 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 resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

(20) The Court of Justice of the European Communities has consistently taken the view that these provisions represent 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.

(21) The Courts have consistently ruled[9] that in using its discretion to assess whether the conditions for granting remission or repayment have been fulfilled, the Commission must balance the Community interest in ensuring that the customs provisions are respected against the interest of the importer acting in good faith not to suffer harm beyond normal commercial risk.

(22) In this case when the applicant released the goods for free circulation he applied for exemption from duties under the tariff quotas. However, he says, at this point the quotas had been exhausted. Since the exemption from duties could not therefore be granted, the competent authorities initiated recovery of import duties at the normal rate.

(23) The fact that the applicant acted in good faith, as the German authorities believe, does not in itself constitute an exceptional situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(24) Firstly, the applicant considers that Regulation (EC) No 3061/95, which opened the tariff quotas concerned, was "structurally deficient" because of its retroactive effect and some of its provisions. In thus arguing the applicant is contesting the validity of

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9 See inter alia the *Kaufring* judgment of 10 May 2001 (Joined cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99).

the Regulation, affirming that the provisions for its implementation led to widespread discrimination between importers.

(25) However, if a Community Regulation were invalid, it would not constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92, and traders who consider that they are the victims of erroneous Community Regulations should have recourse to other legal means available to them to contest any such Regulations.

(26) The applicant also considers that the duties recovered post clearance relate to quantities which, from 1 September 1995, were initially granted exemption from duty but then, because the dates of opening of the tariff quotas were brought forward, could not draw on the quotas; the post-clearance recovery was therefore the result of the retroactive application of the tariff quotas, of which the applicant was informed too late. Furthermore, the applicant argues, some tariff quotas, in particular Nos 09.0716, 09.0718, 09.0726 and 09.0729, had already been exhausted shortly after 1 September 1995, and in some cases even before that date.

(27) In this connection it should be noted that Decision 95/312/EC is purely declarative, announcing that the enlarged Community, with its new members Austria, Finland and Sweden, grants tariff quotas to certain products originating in Norway. The provisions of the text are not sufficiently precise and unconditional to directly govern the quota system. In this case the tariff quotas concerned were opened by Regulation (EC) No 3061/95. Article 2 of that Regulation provides that "Annex I shall apply from 1 January 1995 or during the periods indicated in Annex I". The amounts available for quota Nos 09.0716, 09.0718, 09.0726 and 09.0729 applied from 1 July to 31 December 1995. Regulation (EC) No 3061/95 entered into force 7 days after is publication, i.e. on 6 January 1996. Until that date requests for allocations were stored up and allocations could not be made until after that date. There was no allocation against these tariff quotas before that date.

(28) It should also be noted that under Regulation (EC) No 992/1995 of 10 April 1995,[10] allocations from tariff quotas of the kind concerned in this case are made by the Commission in response to requests to draw on the quotas submitted by the Member States. In this case the Regulation opening the quotas was published on 30 December 1995 but was not available until mid-January 1996. The Commission informed the Member States directly of the opening of the tariff quotas. Member States could submit their drawing requests up to 5 February 1996, on which date the tariff quotas provided for in the Additional Protocol to the Agreement with Norway of 24 July 1995 were allocated. Therefore no Member State could grant access to the quotas before that date. Therefore the applicant's assertion that the customs authorities in Member States other than Germany had awarded allocations from the quotas before 1 September 1995 is incorrect.

(29) The applicant further argues that after the first consignments were admitted duty-free under a tariff quota granted by the competent authorities from 1 September 1995, the applicant's clients placed a greater number of orders with him for the import of goods under quotas. That is why he carried out the imports concerned from 1 September 1995; however, he could not in fact draw on the quota and could not pass on the amount of the duties to all his clients as a large proportion of them refused to pay, saying that they had placed their orders because of the possibility of importing under quotas from 1 September 1995; this placed the applicant in a difficult financial situation.

(30) However, this fact could not constitute a special situation as, in the first place, these matters are part of his contractual relations with his clients and, in the second place, the Courts have consistently ruled[11] that it is up to traders to take the necessary measures to equip them to deal with the risks of post-clearance recovery and the fact that the cost cannot be passed on to their clients.

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10 OJ L 101, 4.5.1995, p. 1.

11 *Méhibas* judgment of 18 January 2000 (case T-290/97).

(31) The applicant also takes issue with the behaviour of the German authorities, asserting that, firstly, they informed their traders that the tariff quotas were open from 1 July 1995 well after the authorities in other Member States had informed their traders of this fact. He argues that if he had known that the quotas were open from 1 July 1995 he would have carried out a greater number of imports from that date, applying for the preferential tariff. The applicant considers that this also meant that declarants in other Member States were able to exhaust the tariff quota unaffected by competition with the himself, an unfair advantage in relation to the subject and purpose of the quota. Secondly, he argues, the German authorities applied the provisions of Regulation (EC) No 3061/95 more strictly than the customs administrations in other Member States, and applied more inflexible procedures as regards allowing goods to benefit from tariff quotas before they had even been opened. Thirdly, he avers, they informed him of the amount of the debt (resulting from the exhaustion of the quotas) much later than the authorities in other Member States informed their traders.

(32) Regarding the argument that the German authorities informed traders that the quotas were open from 1 July 1995 later than the authorities of other Member States, it should be recalled that the only text authorising drawing on the tariff quotas is the Regulation opening them, Regulation (EC) No 3061/95. Furthermore, the dossier submitted by the German authorities shows that the applicant already knew in June 1995, before Decision 95/312/EC had even been published, that a tariff quota would be opened for fish from Norway under the Additional Protocol to the Agreement with Norway. He was therefore in a position to ask his clients to provide the documentary evidence needed to apply to draw on the quotas. This does not therefore constitute a special situation.

(33) If, as alleged, the German authorities applied Regulation (EC) No 3061/95 more strictly than the customs authorities in certain other Member States, this would also not constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92. Apart from the fact that this allegation has not been proven, since the German authorities complied with the applicable Community law, it should be stressed that such a situation would not in any case justify a finding for the applicant on the grounds of a special situation. Nor can any incorrect application of customs law by other Member States constitute a special situation for the customs debtor within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(34) It should also be noted that, for the tariff quotas in question, the facts (the ratio of the total applications for allocations to the applications submitted by Germany) the competent German authorities submitted applications for allocations representing on average half of all the applications. There thus seems to be no foundation for the claim that the administrative practice of the competent authorities prevented the applicant from applying in time for allocations from tariff quotas for traders who had carried out customs clearance in Germany and met the criteria to benefit from the quotas.

(35) It should also be emphasised that the German authorities showed diligence in ensuring that the declarations submitted by the applicant during July and August 1995, for which he had made no application for access to the quota, nevertheless did gain allocations where the applicant could provide the necessary documents. This meant that the applicant obtained repayment of duties in the amount of XXXX.

(36) As a general point it should also be recalled that it is entirely up to the declarant (in this case the applicant) to decide when to submit a declaration for release for free circulation. It is also up to him to produce in time the documents allowing him to draw on the tariff quota, failing which he risks being unable to draw on the quota.

(37) Lastly, in invoking the argument regarding notification of the debt by the competent authorities, the applicant is contesting the competent authorities' customs debt recovery procedures. This is beyond the scope of the procedure for remission or repayment on the grounds of equity. When the Commission takes a decision on a request for remission or repayment of import duties submitted by a Member State, its duty is to examine that request as it stands, and it cannot challenge the timing of the recovery procedure by that Member State's authorities.[12]

(38) In the opinion of the Commission the circumstances referred to by the applicant and set out above do not represent a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(39) Nor has the Commission found any other factors constituting a special situation.

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[12] See *Kia Motors* judgment of 16 July 1998 (case T-195/97), *Hyper Srl* judgment of 11 July 2002 (case T-250/99) and *Cargill* judgment of 13 March 2003 (case C-156/00).

(40) The repayment of import duties requested is not therefore justified in this particular case,

HAS ADOPTED THIS DECISION :

Article 1

Repayment of import duties in the sum of XXXXX requested by Germany on 13 June 2002 is not justified.

Article 2

This Decision is addressed to Germany.

Done at Brussels, 1-10-2004

For the Commission
Frits Bolkestein
Member of the Commission