EUROPEAN COMMISSION

Brussels, 1-10-2010
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COMMISSION DECISION

Of 1-10-2010

finding that post-clearance entry in the accounts of import duties is justified and that remission of those duties is not justified in a particular case
(REC 02/09)

(only the Dutch text is authentic)

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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 Articles 220 and 239 thereof,

Whereas:

(1) On 2 December 2009, the Dutch authorities asked the Commission to decide whether waiving the entry of import duties in the accounts under Article 220(2)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (hereinafter 'the Code') is justified in the following circumstances.

(2) Between 13 August 1997 and 10 December 1997 a Dutch firm declared six consignments of raw cane sugar as originating in the Netherlands Antilles (Curacao) for release into free circulation.

(3) At the time in question imports into the European Union of this type of product originating in the Netherlands Antilles (Curacao) could be imported into the European Union free of import duty under Article 101 of Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community (hereinafter 'OCT Decision')[2], on presentation of an EUR.1 movement certificate (hereinafter 'EUR.1 certificate') or an invoice declaration issued by the exporter.

(4) In the case in point, the firm presented EUR.1 certificates issued by the Curacao authorities in support of its customs import declarations. The Dutch customs authorities accepted the declarations and granted exemption from customs duties.

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1 OJ L 302, 19.10.1992, p. 1.
2 OJ L 263, 19.9.1991, p.1.

(5) A joint administrative cooperation mission comprising representatives of the European Anti-Fraud Office (OLAF) and one Member State visited the Netherlands Antilles between 26 May 1999 and 13 June 1999 to investigate on frauds and irregularities. The purpose of that mission was to determine the actual origin of sugar and other products processed in the Netherlands Antilles. In this framework, it was found that the sugar imported by the firm concerned in the present case had been obtained from sugar imported from Colombia and processed in Curacao.

(6) Article 1 of Annex II to the OCT Decision on the definition of 'originating products' and the methods of administrative cooperation provides that for the purpose of implementing the trade cooperation provisions of the Decision (including Article 101 above), a product is considered to be originating in the OCTs, the Community or the ACP (African, Caribbean and Pacific) States if it has been either wholly obtained or sufficiently worked or processed there. In accordance with Article 3 of the same Annex, non-originating materials are considered to be sufficiently worked or processed when the product obtained is classified in a heading which is different from those in which all the non-originating materials used in its manufacture are classified. Cane sugar comes under tariff heading 1701 of the Combined Nomenclature (CN). Cane sugar mixed with liquid molasses and then dried and packaged in 1 kg quantities or in small sachets or pressed to form sugar lumps is classified in CN heading 1701 too; such processing is therefore not sufficient to confer preferential OCT origin on sugar originating in a third country. Therefore, the goods concerned could not benefit from the cumulation rules of Annex II to the OCT Decision and the EUR.1 certificates were invalid (either totally invalid or, in the case of one certificate, partly invalid).

(7) As it had been established that the sugar was not eligible for duty-free importation into the EU the Dutch customs authorities initiated proceedings against the firm for the post-clearance recovery of EUR XXXX in import duties.

(8) It is this amount that is the subject of the request sent by the Dutch authorities.

(9) In support of this request the firm stated that, in accordance with Article 871(3) of 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 Code[3], it had seen the file the Dutch authorities had sent to the Commission and had nothing to add.

(10) By letter dated 18 June 2010, received by the firm on 21 June 2010, the Commission notified the firm of its intention to withhold approval and explained the grounds for its decision.

(11) By letter of 13 July 2010, received by the Commission on the same day, the firm expressed its opinion on the Commission's objections.

(12) In accordance with Article 873 of Regulation (EEC) No 2454/93, the period of nine months within which the Commission decision must be taken was extended by one month.

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

(13) In accordance with Article 873 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met to examine the case on 24 September 2010 within the framework of the Customs Code Committee - Customs Debt and Guarantees Section.

(14) According to the request sent to the Commission by the Dutch authorities, waiving recovery is justified for the following reasons:

- the Curacao authorities made an error within the meaning of Article 220(2)(b) of the Code in that (a) they issued certificates on the basis of a certificate of origin Form A, whereas such certificates can never serve as a basis for issuing EUR.1 certificates, and (b) just before the Community mission, the authorities again confirmed the validity of a number of certificates;

- moreover, due to a fire in the Curacao authority archives, it is no longer possible to establish which documents were submitted with the application for the issuing of the EUR.1 certificates concerned;

- the Curacao authorities were aware of the true origin of the sugar and therefore knew or should have known that they could not issue the certificates;

- the Dutch authorities did not take all the information at their disposal into account (data on fraud involving consignments of Netherlands Antilles sugar to Greece, in particular) and based themselves exclusively on the conclusions of the report of the Community mission.

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

(15) Under Article 220(2)(b) of the Code, post-clearance entry in the accounts is waived 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

(16) In the case under consideration, granting preferential tariff treatment was subject to the presentation of EUR.1 certificates. As already mentioned, the certificates in this case were found to be partially (certificate A14660) or totally incorrect.

(17) Under Article 220(2)(b) of the Code, post-clearance entry in the accounts is waived 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 having complied with all the provisions laid down by the legislation in force as regards the customs declaration.

(18) However, reliance on the validity of such certificates is not as a rule protected, as this is considered a normal commercial risk and therefore the responsibility of the person liable for payment.

(19) The Court of Justice of the European Union has consistently ruled[4] that the legitimate expectations of a trader are protected only if the competent authorities themselves gave rise to those expectations. Thus only errors attributable to the active behaviour of those authorities are grounds for waiving post-clearance recovery of duties.

(20) This condition cannot be considered to be fulfilled where the competent authorities have been misled by inaccurate declarations submitted by the exporter.

(21) During the joint mission referred to above, the conclusions of which have been approved by the competent Curacao authorities, it was found that sugar had been imported from Colombia in order to be processed in the Netherlands Antilles. The sugar was processed by a Curacao company (hereinafter 'company A').. In January 1997, company A had taken over the activities of another Curacao company (hereinafter 'company B') after it was wound up. In September 1998, company A was wound up as well. In its application to the Curacao authorities for the issuing of the EUR.1 certificates in question, the exporter (company A)referred, in box 7 of the certificates, to Article 6 of Annex II to the OCT Decision. Article 6 concerns cumulation of origin between the Community, the ACP States and the OCTs; it cannot apply in this case as Colombia is a third country.

(22) The exporter failed to inform the Curacao authorities that sugar from Colombia had been used in the processing. Indeed, in letters sent to the Curacao authorities dated 23 January 1995 and 6 February 1995 company B refers to sugar imported from ACP States (at that moment only from the Dominican Republic, i.e. an ACP State). In a letter dated 15 January 1997, company A informed the Curacao authorities that it had taken over the activities of company B as of 1 January 1997 and that the production process remained the same and therefore they asked to continue issuing EUR.1 certificates. The competent authorities therefore had no reason to doubt that the processed cane sugar was still being imported from the Dominican Republic or in any case from an ACP State.

(23) It follows from the above that the exporter concerned presented the facts incorrectly with a view to obtaining EUR.1 certificates.

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[4] Mecanarte Judgment of 27 June 1991 (Case C-348/89) and Faroe Seafood Judgment of 14 May 1989 (Cases C-153/94 and C-204/94).

(24) In view of the above, it must be concluded that the issue of incorrect certificates by the Curacao authorities does not constitute an error on the part of those authorities and it may therefore be presumed that the authorities concerned did not commit an error within the meaning of Article 220(2)(b) of the Code.

(25) Under Article 220(2)(b) of the Code, there would only have been an error if it was clear that the issuing authorities knew or should have known that the goods did not satisfy the conditions laid down for preferential treatment.

(26) In order to establish an error on the part of the Curacao authorities, it is up to the firm to prove that it was evident that the authorities which issued the certificates were aware or should have been aware that the goods did not satisfy the conditions for entitlement to preferential treatment[5].

(27) The Commission does not consider that the firm has proven that the Curacao authorities were aware or should have been aware that the goods did not satisfy the conditions for entitlement to preferential treatment.

(28) In this respect, the firm argues on the one hand that the Netherlands Antilles authorities issued EUR.1 certificates on the basis of certificates of origin Form A, and on the other hand that, because of a fire in the Curacao archives, it is not possible to establish which documents were actually presented by the exporter when applying for EUR.1 certificates.

(29) As regards the reference to certificates of origin Form A in the mission report, it should be noted that, in fact, it is not apparent from the report that the EUR.1 certificates concerned were issued on the basis of certificates of origin Form A. The report merely states in general terms that EUR.1 certificates are issued on the basis of the data in the documents available, such as certificates of origin Form A (used under the Generalised System of Preferences), certificates issued by a Chamber of Commerce or statements by the supplier. It is wrong to conclude, based on these general considerations, that the certificates in question were issued on the basis of certificates of origin Form A.

(30) Moreover and contrary to other parts of the report dealing with other cases (imports of sugar in the Netherlands Antilles by a company other than companies A or B or imports of other products), the part of the report dealing with the exports concerned makes no reference to certificates of origin Form A.

[5] Judgment of 9 March 2006 in *Beemsterboer* (Case C-293/04), paragraph 45.

(31) In addition, it is useful to notice that no certificates of origin Form A were presented to the mission by the curators of company A. If certificates of origin Form A had been presented on export, the original documents or copies of them should have been among the documents presented. In this respect, it should be recalled that Article 12(5) of Annex II to the OCT Decision provides that: "5. The exporter or his representative shall submit with his request any appropriate supporting document proving that the products to be exported are such as to qualify for the issue of a movement certificate EUR.1. He shall undertake to submit, at the request of the competent authorities, any supplementary evidence they may require for the purpose of establishing the correctness of the originating status of the products eligible for preferential treatment and shall undertake to agree to any inspection of their accounts and to any check by the said authorities on the circumstances in which the products were obtained. Exporters are required to keep the supporting documents referred to in this paragraph for at least two years."

(32) It is to be concluded from the failure to present the documents less than two years after exportation, during the Community mission of May-June 1999 that such certificates were not presented on export. The fact that a fire destroyed the customs archives on 11 October 1997 in no way invalidates this conclusion.

(33) Lastly, with regard to the fraud mentioned by the firm concerning consignments of sugar sent from the Netherlands Antilles to Greece, it should be pointed out that the fraud mechanism was quite different: in that case the sugar originated in Brazil. It was exported to Trinidad and Tobago where EUR.1 certificates were issued by the competent authorities. As can be seen from the mission report, the facts of that case are therefore not comparable to the circumstances of the case in hand. The argument put forward by the firm that the Dutch authorities had not taken account of all the information at their disposal cannot therefore be accepted.

(34) The firm also argued that the Curacao authorities had confirmed the validity of the EUR.1 certificates a few weeks before the mission. But there is no evidence on file that the Curacao authorities gave any such response in relation to the certificates concerned. Moreover, the fact that authorities in the Netherlands Antilles confirmed the authenticity of EUR.1 certificates long after they were issued is no justification for concluding that when the certificates were issued, namely in 1997, the competent authorities were aware or should have been aware that the goods for which they were issuing the certificates did not fulfil the conditions set out in the OCT Decision. The mere expression of that opinion long after the certificates in question were issued does not support the conclusion that, when the certificates were issued, the authorities were aware or should have been aware that they were not entitled to issue them.

(35) In view of the above, the Commission believes that there is nothing in the file to show that the Curacao authorities knew or should have known that the goods in question did not satisfy the conditions for entitlement to preferential treatment.

(36) The authorities did not therefore commit an error within the meaning of Article 220(2)(b) of the Code.

B - Conditions regarding the good faith of the firm and compliance with the rules in force as regards customs declarations

(37) The file shows that the firm acted in good faith and complied with all the provisions in force regarding its declaration.

(38) However, since the existence of an error on the part of the Curacao authorities has not been established, remission under Article 236 in conjunction with Article 220(2)(b) of the Code cannot be granted.

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

(39) Under Article 239 of Regulation (EEC) No 2913/92, import duties may be remitted in situations other than those referred to in Articles 236, 237 and 238 of that Regulation if they result from circumstances in which no deception or obvious negligence can be attributed to the person concerned.

A. The condition concerning the existence of a special situation

(40) The Court of Justice of the European Union 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 activity.

(41) It is necessary to check whether the firm's situation should be considered exceptional in comparison with the other operators engaged in the same business.

(42) For the reasons set out in point I.A, the Commission believes that the Curacao authorities' issuing of EUR.1 certificates that were subsequently shown to be incorrect cannot have placed the firm in a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(43) Furthermore, the Commission has not identified any other factors likely to constitute a special situation.

(44) The first condition referred to in Article 239 of Regulation (EEC) No 2913/92 is therefore not fulfilled.

B. Absence of deception or obvious negligence

(45) The Dutch authorities' request and letter to the Commission of 4 June 2009 show that no obvious negligence or deception may be attributed to the firm. However, since the existence of a special situation has not been established, remission on the basis of Article 239 of the Code may not be granted.

(46) The remission of import duties requested is therefore not justified,

HAS ADOPTED THIS DECISION:

Article 1

1. The import duties of EUR XXXX which are the subject of the Netherlands' request of 2 December 2009 shall be entered in the accounts.

2. Remission of the import duties in the sum of EUR XXXX, requested by the Netherlands on 2 December 2009, is not justified.

Article 2

This Decision is addressed to the Netherlands.

Done at Brussels, 1-10-2010

For the Commission
Algirdas Šemeta
Member of the Commission