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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 8-7-2003

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Not for publication

COMMISSION DECISION

of 8-7-2003

finding that remission of import duties in a particular case is justified and authorising the Kingdom of Spain to remit or repay duties in cases involving comparable issues of fact and law

(Only the Spanish text is authentic.)

(Request submitted by Spain)

(REM 10/2002)

FR

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(REM 10/2002)

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 Regulation (EEC) No 2913/92,³ as last amended by Regulation (EC) No 881/2003,⁴ and in particular Article 907 thereof,

¹OJ L 302 of 19.10.1992, p. 1

²OJ L 311 of 12.12.2000, p. 17

³OJ L 253, 11.10.1993, p. 1

⁴OJ L 134 of 29.05.2003, p. 1

Whereas:

- (1) By letter dated 22 May 2002 and received by the Commission on 27 May 2002 the Kingdom of Spain asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether the remission of import duties was justified in the following circumstances.
- (2) In 1999, 2000 and 2001, a Spanish firm imported consignments of fructose originating in Turkey through the Spanish customs offices of Saragossa and Barcelona. It imported the goods duty-free under the preferential arrangements applicable to trade between the European Community and Turkey. The goods were variously declared as "chemically pure fructose", "liquid fructose, according to invoice" or "fructose according to invoice", but always classified in subheading 1702 50 00 of the Combined Nomenclature (CN).
- (3) Following a chemical analysis in February 2001, the competent customs authorities concluded that the fructose should not have been classified in CN subheading 1702 50 00, which is for fructose in the form of a crystalline powder, but in CN subheading 1702 60 95, which is for fructose in liquid form. The rate of customs duty charged for the release of these goods for free circulation should therefore have been that for the latter heading.
- (4) Accordingly, the competent customs authorities demanded payment by the firm of duty amounting to XXXXXX in respect of the goods released for free circulation in 1999 and 2000, this being the amount whose remission the firm requests.
- (5) In their application of 22 May 2002 the Spanish authorities considered this to constitute a special situation for the reasons set out below.

- (6) Before the entry into force on 1 January 1988 of the Combined Nomenclature (CN), which is based on the Customs Cooperation Council's Harmonised Commodity Description and Coding System (HS), all fructose was classified in the same heading, whether it was in the form of a chemically pure solid or a syrup obtained by adding water. However, since the entry into force of the Combined Nomenclature fructose has been classified in CN subheading 1702 50 00 if presented in solid form and in CN subheading 1702 60 95 if presented as a syrup. This would appear to be confirmed by the wording of heading 1702, which read "Other sugars, including ... *and fructose (levulose) chemically pure, in solid form*; sugar syrups not containing added flavouring or colouring matter; artificial honey, whether or not mixed with natural honey; caramel." On the other hand, the German version of CN subheading 1702 60 read "*andere fructose und **anderer Fructosesirup***" (*other fructose and other fructose syrup*) and might justify a different interpretation.
- (7) In support of the application submitted by the competent Spanish authorities the firm indicated that, as required by Article 905 of Regulation (EEC) No 2454/93, it had seen the dossier the Spanish authorities had sent the Commission and had nothing to add.
- (8) By letter of 14 November 2002, the Commission asked the Spanish authorities for further information. This was provided in a letter dated 17 February 2003 and received by the Commission on 24 February 2003. In accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93 the administrative procedure therefore remained in suspension between 15 November 2002 and 24 February 2003.
- (9) In a letter dated 23 April 2003 and received by the firm on 24 April 2003, the Commission informed the firm of its intention to reject the request for remission, and stated its reasons.

- (10) By letter dated 15 May 2003 and received by the Commission on 22 May 2003, the firm set out its position on the Commission's objections. The firm maintained in particular that the circumstances constituted a special situation of the type referred to in Article 239 of Regulation (EEC) n° 2913/92 involving no deception or obvious negligence on its part. It stated that 11 000 tonnes of liquid fructose had been imported into five Member States between August 1999 and February 2001 without the competent authorities of those Member States checking the goods. Classification of the product was very complex. As proof of this contention the firm alleges that, on several occasions, various national and Community experts on the matter had upheld a position identical to its own, namely that the product concerned was to be classified in CN heading 1702 50 00. What was more, the wording in some Community legislation seemed to confirm this point of view.
- (11) 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 11 June 2003 as the Repayment Section of the Customs Code Committee to consider the case.
- (12) 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 the Regulation, resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.
- (13) 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 a trader, who would not otherwise have incurred the costs associated with post-clearance entry of customs duties in the accounts, might find himself compared with other traders carrying out the same activity.

- (14) In this case, the file transmitted by the Spanish authorities to the Commission shows that the firm applied for and unlawfully obtained exemption from duties granted under a preferential arrangement applicable to trade between the Community and Turkey. The fructose in question did not fall within subheading 1702 50 00. It should have been classified in subheading 1702 60 95 which attracts duty at the rate of EUR 0.42 per 100 kg/net per 1% by weight of sucrose in the product.
- (15) It should first be noted that, before the entry into force of the Combined Nomenclature on 1 January 1988, all fructose was classified in one heading of Chapter 29 regardless of the form in which it was presented (whether as a chemically pure solid or as a syrup obtained by adding water). This classification was changed by the entry into force of the CN. Since 1 January 1988 fructose has come under Chapter 17 and is classified in different headings depending on whether it is presented in a solid or liquid form.
- (16) It should also be noted that the wording of subheading 1702 60 in the German version of the Combined Nomenclature in force at the time, which the firm used for reasons relating to the policy of the group of which it is a part, included the phrase "other fructose and other fructose syrup". This could have caused confusion since the wording could suggest that, rather than covering all syrups, the subheading covered only those fructose syrups which were not chemically pure.
- (17) In addition, the duty applicable to products of subheading 1702 50 00 is levied on every "100 kg/net mas", i.e. per one hundred kilograms net of dry matter, but these terms are usually applied only when the product can be presented in liquid form.

- (18) Again, the firm knew and may have been influenced by the fact that, when the proposal for a Regulation amending Regulation (EEC) No 1010/86 drawing up the general rules applicable to the production refund for certain products of sugar used in the chemical industry was being discussed, the Commission rejected an amendment proposed by Parliament to restrict the definition of chemically pure fructose of CN subheading 1702 50 00 to fructose in the form of a crystalline white powder because this definition would exclude chemically pure fructose in liquid form from the heading. The rejection of this amendment, and the reason for rejecting it, could have confirmed the firm's belief that chemically pure fructose in liquid form did in fact belong in the same subheading as chemically pure fructose in solid form.
- (19) Therefore it should be noted that, regarding the classification of this particular type of fructose that was imported by the firm, the attitude of the experts on the matter, was such as to reinforce the view of the firm in its absence of doubts regarding the correct character of the classification it had applied.
- (20) All these factors taken together constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (21) In the circumstances of this case no deception or obvious negligence may be attributed to the firm concerned.
- (22) Remission of import duties is therefore justified in this case.
- (23) Under Article 908 of Regulation (EEC) n° 2454/93, when repayment or remission is found to be justified in a particular situation, the Commission may, under conditions which it shall determine, authorise one or more Member States to repay or remit duties in cases involving comparable issues of fact and of law.
- (24) In its letter of 22 May 2002, received by the Commission on 27 May 2002, Spain requested authorisation to remit or repay duties in cases involving comparable issues of fact and law.

(25) Such authorisation may be granted to Spain on condition that the authorisation is used only in cases that are strictly comparable as to fact and law with the case covered here. The authorisation should therefore be applied to the requests for remission or repayment of duty that were lodged within the legal time-limit and cover goods imported up to February 2001 by the same importer and from the same supplier as those mentioned in the case referred to in Spain's request of 22 May 2002. Furthermore, there may be no deceit or obvious negligence on the part of the firm in question,

HAS ADOPTED THIS DECISION:

Article 1

The remission of import duties amounting to XXXXXX requested by Spain on 22 May 2002 is justified.

Article 2

Spain is authorised to remit or repay the duty due on imports in cases that are comparable in fact and law with the case covered by its request of 22 May 2002.

This authorisation covers the requests for remission or repayment of customs duties lodged within the legal time-limit and relating to goods imported by the same importer and from the same supplier as in the case covered by the request referred to in the previous subparagraph.

Article 3

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 8-7-2003

For the Commission

Frits Bolkestein

Member of the Commission