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REM 23/99

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 23/02/2000

NOT FOR PUBLICATION

COMMISSION DECISION

of 23/02/2000

finding that a request for remission of import duties is inadmissible in respect of one amount and that the remission of import duties is not justified in respect of another amount in a particular case

(request submitted by the Netherlands)

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FR

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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 (EEC) No 955/1999,[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 (EEC) No 1662/1999,[4] and in particular Article 907 thereof,

1 OJ L 302, 19.10.1992, p.1.
2 OJ L 119, 7.5.1999, p. 1.
3 OJ L 253, 11.10.1993, p.1.
4 OJ L 197, 29.7.1999, p. 25.

Whereas:

(1) By letter dated 22 April 1999, received by the Commission on 30 April 1999, the Netherlands asked the Commission to decide, under Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties,[5] as last amended by Regulation (EEC) No 1854/89,[6] and under Article 239 of Regulation (EEC) No 2913/92, referred to above, whether the remission of import duties is justified in the following circumstances.

(2) Between 1992 and 1994, a Dutch company placed 65 000 tonnes of maize under the inward processing procedure. The maize was for processing into glucose (main compensating product) and various secondary compensating products, namely residues from the manufacture of starch falling within code 2303 10 11 of the Combined Nomenclature (CN) and maize gluten feed falling within CN code 2303 10 19. The company possessed the necessary authorisations for the system of equivalent compensation and prior exportation.

(3) The main and secondary compensating products were exported (or placed under another customs arrangement) according to the standard yields within the time limits set.

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5 OJ L 175, 12.07.1979, p.1.
6 OJ L 186, 30.6.1989, p.1.

(4) Checks carried out by the competent Dutch authorities in 1994 and 1995 revealed that the main compensating product exported by the company was not entirely obtained from maize but that some 75% had been derived from wheat obtained on the Community market. In the production of the main compensating product, an intermediate product derived from wheat (wheat starch slurry) had been mixed with an intermediate product derived from maize (maize starch slurry). The mixture had then been refined into glucose (the main compensating product). Whether manufactured from maize or from wheat, glucose falls within CN code 1702 30 99, the wording of which makes no distinction between the raw materials used.

(5) The competent Dutch authorities therefore concluded that only part of the main compensating product exported under the inward processing procedure could be considered as having been processed from maize and that the company had fallen short of its obligations under the inward processing procedure in respect of 48 400 tonnes of the goods placed under the procedure between 1992 and 1994.

(6) On 3 December 1996 therefore, the competent Dutch authorities claimed the amount of the import duties from the company plus compensatory interest due under Article 62 of Commission Regulation (EEC) No 2228/91 of 26 June 1991, laying down provisions for the implementation of Council Regulation (EEC) No 1999/85 on inward processing relief arrangements,[7] as last amended by Regulation (EEC) No 3709/92[8] and Article 589 of Regulation (EEC) No 2454/93, i.e. a total of XXXXX, for which remission was requested in this case.

[7] OJ L 210, 31.7.1991, p. 1.
[8] OJ L 378, 21.12.1992, p. 6.

(7) In support of the request submitted by the Dutch authorities, the company stated, pursuant to Article 905 of Regulation (EEC) No 2454/93, that it had seen the file sent to the Commission by the Dutch authorities and had nothing to add.

(8) By letter dated 26 November 1999, sent on 30 November 1999, the Commission informed the company that it intended to withhold approval of the request, giving grounds for its objections.

(9) By letter of 23 December 1999, received by the Commission on 24 December 1999, the company set out its position on the Commission's objections. In particular it continued to argue that the circumstances of this case were such as to constitute a situation which involved no deception or obvious negligence on the company's part, within the meaning of Article 13 of Regulation (EEC) No 1430/79 and Article 239 of Regulation (EEC) No 2913/92. In particular it considered that it had not shown obvious negligence. It argued that the inward processing authorisation it held entitled it to use the equivalent compensation system, and that mixing maize- and wheat-starch slurries in the course of processing before refining them into glucose was a standard procedure in the industry. The manufactured glucose, as main compensating product resulting from the operation, fell within the same eight-digit subheading, had the same technical characteristics and was of the same commercial quality whether it was manufactured from maize or wheat. It also considered that it had not been obviously negligent in that the competent authorities themselves had had some trouble deciding whether there was any irregularity in this case. It pointed out that the maize imported under the inward processing procedure had always been processed into glucose on time and a corresponding quantity of glucose exported from the Community in accordance with the time limit set.

(10) The administrative procedure was therefore suspended under Article 907 of Regulation (EEC) No 2454/93 for the period between 30 November and 24 December 1999.

(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 31 January 2000 within the framework of the Customs Code Committee (Section for General Customs Rules/Repayment) to consider the case.

(12) Under Article 13(1) of Regulation (EEC) No 1430/79, which is applicable to customs debts incurred before 1 January 1994, import duties may be repaid or remitted in special situations, other than those laid down in sections A to D of that Regulation, resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

(13) Under Article 239 of Regulation (EEC) No 2913/92, which is applicable to customs debts incurred from 1 January 1994 onwards, import duties may be repaid or remitted in special situations, other than those laid down 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.

(14) The request for remission submitted to the Dutch authorities by letter of 22 April 1999 was for the sum of XXXXX. This amount included compensatory interest due under the above Article 62 of Regulation (EEC) No 2228/91 and Article 589 of Regulation (EEC) No 2454/93 (XXXXXX). Such compensatory interest, as a financial imposition resulting from national law, does not form part of the customs debt and therefore the Commission cannot take any decision on its remission. It is for the national authorities to decide on the issue. The part of the request for remission relating to compensatory interest is therefore inadmissible.

(15) Furthermore, the Dutch authorities informed the company of the amount of the debt on 3 December 1996. Hence, under Article 221(3) of Regulation (EEC) No 2913/92, the prescription period for the import duties due for the period prior to 3 December 1993 has expired and they can no longer be claimed from the company. The request for remission of those duties, i.e. XXXXXXX, is therefore inadmissible.

(16) Consequently, the application for remission can only be considered with reference to the amount of the customs debt that is not time-barred, i.e. XXXXXX.

(17) The Court of Justice of the European Communities has consistently ruled that Article 13 of Regulation (EEC) No 1430/79 and Article 239 of Regulation (EEC) No 2913/92 represent a general principle of equity designed to cover an exceptional situation in which an operator might find himself compared with other operators carrying out the same activity.

(18) In this case, it was established, that the practice of the company did not comply with the regulations in force nor with the terms of the inward processing authorisation which it held. It was not permitted to use wheat as equivalent compensation under an inward processing authorisation issued for processing maize into glucose.

(19) That practice caused it to incur a customs debt, under Article 2, paragraph 1, point d of Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt[9], as last amended by Regulation (EEC) No 4108/88[10] and Article 204 of Regulation (EEC) No 2913/92, because of its irregular use of wheat obtained on the Community market in the process of manufacturing the glucose exported under the inward processing authorisation.

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9 OJ L 201, 22.7.1987, p. 15

10 OJ L 361, 29.12.1988, p. 2

(20) At the same time, in this case, the company complied with the various rules of the customs procedure, except in terms of the products used for equivalent compensation under the inward processing authorisation held by it. For example, all the maize imported for inward processing was processed into glucose, and the company fulfilled its obligations to export the main compensating product, i.e. glucose, within the prescribed time limit.

(21) In addition, among Community starch manufacturers that use both maize and wheat as raw materials for the manufacture of glucose, the manufacturing process used in this case, which involves refining the intermediary products of maize and wheat together, is standard practice.

(22) Lastly, for several years, despite the large quantities of products processed, the competent customs authorities did not challenge the practice adopted by the company. That circumstance is such as to constitute an error on the part of those authorities.

(23) Consequently, the circumstances as a whole are such as to constitute a special situation within the meaning of Article 13 of Regulation (EEC) No 1430/79 and Article 239 of Regulation (EEC) No 2913/92.

(24) However, such a special situation may only give rise to remission of import duties on condition that there was no deception or obvious negligence on the part of the company concerned.

(25) In this case, it results from the file sent by the Dutch authorities to the Commission, that the company has not practised any deception. In particular, as it pointed out itself in a letter of 23 December 1999, the financial advantage which it obtained from the incorrect application of the inward processing arrangement, which far exceeded the normal financial advantage derived from the arrangement, is explained by price fluctuations. The report drafted on 19 July 1996 by the accounting service of the Dutch Ministry of Agriculture, Nature Management and Fisheries showed that the practice adopted by the company could equally have led to financial losses. Nevertheless no competent authority has established a fraud committed by the company.

(26) However, the company did show obvious negligence in this case. It must be considered a large enterprise with extensive professional experience in the field in question. The letter sent by the Dutch authorities to the Commission on 22 April 1999 shows that the company takes part, or has taken part, in many arrangements, including customs arrangements, under the common agricultural policy. In view of the sums of money involved and its familiarity with customs procedures, it could be expected to show greater diligence than a less experienced company.

(27) In this case the inward processing authorisation which the company held was clear and referred only to maize as the product to be processed. According to Article 9 of Regulation (EEC) No 2228/91 and Article 569 of Regulation (EEC) No 2454/93, where use is to be made of equivalent compensation, the equivalent goods must fall within the same eight-digit subheading of the CN code, be of the same commercial quality and have the same technical characteristics as the import goods. It is clear that in this case, that was not so.

(28) The only exceptions provided for are listed in full in Annex IV to Regulation (EEC) No 2228/91 and Annex 78 to Regulation (EEC) No 2454/93. The said Annexes did not include the goods in question.

(29) The above Community Regulations were published in the Official Journal of the European Communities. The Court of Justice of the European Communities has consistently ruled that the Community provisions applicable are, as of their publication in the Official Journal of the European Communities, the only substantive law in the matter. All are deemed to know that law. A professional economic operator must therefore keep abreast of the Community law applicable to its operations by reading the relevant official journals.

(30) In view of the sums involved for the company and the fundamental importance of the equivalent compensation rules in the inward processing procedure, an experienced and normally diligent operator could not reasonably be ignorant of the fact that it was not allowed under the terms of its inward processing authorisation to use wheat instead of maize to produce the glucose it exported.

(31) The fact that the manufacturing process in question, which involves refining intermediate products of maize and wheat together, is standard procedure in Community starch companies which use maize and wheat as raw material for producing glucose does not excuse the company from showing the diligence which experienced operators should show with regard to the Community legislation in force. The same applies to the argument that the exported glucose in this case falls within the same tariff subheading whether it is obtained from wheat or maize.

(32) Even if the competent national authorities may have had some doubts as to whether the practice followed meant that the company had incurred a customs debt, this has no bearing on the diligence which the company should have shown in the course of the operations in question, since these doubts incidentally arose only after the operations which were subject to checks.

(33) With reference to the argument put forward by the company that the *Hoofdproductschap voor Akkerbouwproducten* (Commodity Board for Arable Products) had confirmed, by letter of 29 June 1994, that equivalent compensation was possible between maize and wheat under the inward processing authorisation which the company held, it should be stated that that letter, which post-dated the operations in question and which was addressed to the national inspection authority, did not expressly state that the equivalent compensation covered wheat. It merely detailed the implementing arrangements for the inward processing authorisation for the "maize" component of glucose production.

(34) With reference to the argument put forward by the company that reports drafted in 1992 and 1993 by the inspection authorities explicitly stated that it had complied with its obligations under the inward processing authorisation, it should be stated that those checks only ensured that the quantities of products imported for processing correlated with the quantities of compensating products exported, and that the time limit set for re-export had been complied with. The company cannot conclude from those reports that the inspection authority expressly considered the use of equivalent compensation between maize and wheat to be correct in this case.

(35) Therefore the remission of import duties requested is not justified in this case,

HAS ADOPTED THIS DECISION:

Article premier

1. The remission application of 22 April 1999 submitted by the Kingdom of the Netherlands for the sum of XXXXXX is inadmissible.

2. The remission of import duties in the sum of XXXXXX requested by the Kingdom of the Netherlands on 22 April 1999 is hereby found not to be justified.

Article 2

This Decision is addressed to the Netherlands.

Done at Brussels, 23/02/2000

For the Commission

Member of the Commission