

COMMISSION DECISION

C(2012) 7574

of 30 October 2012

finding that remission of import duties for a certain amount is justified and that repayment of import duties for one amount is justified and for the other amount is not justified in a particular case (REM 04/2010)

(only the English text is authentic)

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 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 2 July 2010, received by the Commission on 20 July 2010, the United Kingdom asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether remission and repayment of import duties was justified in the following circumstances.
- (2) Between 9 November 2004 and 24 July 2007 a British company imported in the United Kingdom consignments of frozen fish fillets from China, where it had been obtained through processing of fish exported from Norway to China.
- (3) The UK company had historically sourced raw materials (whole frozen fish) primarily from Norway and imported the fish in the UK free of import duty on presentation of an EUR.1 movement certificate (hereinafter 'EUR.1 certificate') issued in Norway. In 2004 the firm made a decision to process the fish in China. The processed frozen fillets would be brought into the UK for sale or further processing.
- (4) Before starting the processing of fish in China in November 2004, on 5 October 2004 the forwarding agent of the company held a meeting with the local HM Customs & Excise (HMRC) officers to explain the proposed procedure and to discuss what duties would have to be paid on the processed fish. Some other meetings between the operator and HMRC took place in 2005 and 2006.
- (5) In none of those meetings the company was explained that it had to declare the raw fish from Norway for free circulation prior to its export to China. It was only told to

¹ OJ L 302, 19.10.1992, p. 1.

² OJ L 253, 11.10.1993, p. 1.

use the Customs Procedure Code (CPC) 40 00 65, which is the customs procedure code to be used for re-importation after processing.

- (6) The officer advised that the declared customs value for the processed fish could be based on the cost of the processing and did not need to include the value of the Norwegian raw materials, as long as each original consignment of raw whole frozen fish was covered by a EUR.1 certificate, issued by the Norwegian authorities. This EUR. 1 certificate should prove that the fish exported to China for processing was originating in an EFTA country.
- (7) Following the Customs advice, the frozen raw fish was exported from Norway via Rotterdam and Hamburg to China to be processed between November 2004 and July 2007. Each shipment was covered by a EUR.1 certificate, issued by the Norwegian customs authorities. The consignments were not declared for release for free circulation or for any other customs procedure within the EU prior to the export to China. The declared customs value of the processed fish at import in the EU was based on the value of the processing operations and transport costs, in line with the provisions of CPC 40 00 65. The customs value did not include the value of the Norwegian raw materials.
- (8) In March 2006 one import declaration was selected for query by the UK's customs authority. The goods had been declared to CPC 40 00 65. The operator was asked for evidence of prior export from the EU and confirmation that the exported fish was in free circulation within the EU. This evidence could not be produced and the declaration was amended to CPC 40 00 00 (covering release for free circulation). Subsequent imports were declared to CPC 40 00 00. However, there was no challenge regarding the valuation of the goods.
- (9) On 8 November 2006 the company was visited by HM Revenue & Customs officers. They advised that the forwarding agent might not be using the correct procedure for clearance and that it should potentially require authorisation to use the outward processing relief (OPR) procedure.
- (10) Following a further meeting on 30 November 2006 with the company and its forwarding agent, one of the visiting customs officers sent an email advising the company that the most appropriate procedure for declaring the goods could be the OPR procedure. He would consult with colleagues whether the company should indeed use the OPR procedure or could continue to use Norwegian EUR. 1 certificates. In the meantime, the company should pay customs duty at the full rate on the fish pending the outcome of the discussions and later claim it back. It was indicated in the mail that an OPR authorisation would require the goods involved to be cleared for free circulation in the EU prior to export to China.
- (11) As a consequence, the operator applied for an OPR authorisation. The authorisation was granted in July 2007 in respect of fish for processing. However, the application for a retrospective authorisation was refused since the raw fish had not been declared for release for free circulation in the EU prior to its export to China.
- (12) HM Revenue & Customs officers issued during 2007 and 2008 post clearance demand notes due to the incorrect valuation of the fish between November 2004 and 30 November 2006 for a total amount of GBP XXXX (XXXX €). This amount is the subject of the request for remission submitted by the UK authorities.
- (13) The operator had submitted also an application for partial repayment of import duties paid for imports during the period 1 December 2006 to 24 July 2007, period falling

between the email from the officer following the meeting on 30 November and the date of issue of the outward processing authorisation. These particular imports had been declared to free circulation and duties were paid on the full value of the goods (including the value of the raw material). The UK authorities requested a repayment of import duties for the amount of GBP XXXX (XXXX €).

- (14) In support of the application submitted by the UK authorities the company indicated that, in accordance with Article 905 of Regulation (EEC) No 2454/93, it had seen the dossier the authorities had sent to the Commission.
- (15) By letter dated 22 November 2010, the Commission asked the UK authorities for additional information. A reply was provided by letter dated 23 March 2011, received by the Commission on 29 March 2011. Examination of the application for repayment or remission of duties was therefore suspended between 23 November 2010 and 29 March 2011.
- (16) The Commission sent an additional request for additional information to the UK authorities on 23 May 2011. The reply provided by letter of 22 June 2011, received by the Commission on 13 July 2011, did not contain any additional information.
- (17) Examination of the application for repayment or remission of duties was suspended between 24 May 2011 and 13 July 2011.
- (18) In the interest of guaranteeing applicants a fair hearing, and in accordance with Article 906a of Regulation (EEC) No 2454/93, the Commission asked the firm to comment on any issues of fact or law which it feels might lead to their application being refused. By letter of 24 August 2011 received by the company on 26 August 2011, the Commission notified the company of its intention to withhold approval and its grounds for its decision.
- (19) In the letter to the Commission of 21 September 2011, the company expressed its opinion on the Commission's objections. It maintained its position that the amount of duty legally owed was not entered into the accounts as a result of an error on the part of the UK customs authorities, which could not have been detected by the company and that it acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (20) 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.
- (21) In accordance with Article 907 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 October 2011 within the framework of the Customs Code Committee - Customs Debt and Guarantees Section.
- (22) According to the request sent to the Commission by the UK authorities, repayment and remission would be justified because the company consulted the UK authorities and received erroneous advice at several occasions. None of the import declarations were challenged by the customs authorities until an audit visit in November 2006. In November 2006 the company was informed that it should pay the full rate of duty but that it would be able to reclaim part of the import duties paid once the authorisation for outward processing had been issued.
- (23) On the basis of information provided by the operator during the course of proceedings, the Commission has verified the operations that have been made prior

to 1 December 2006. Therefore, the Commission found that the amount requested for repayment should be decreased by the amount of GBP XXXX (XXXX €)– which corresponds to the operations that have been initiated prior to 1 December 2006.

- (24) Since the main reason justifying repayment or remission would be an error committed by the UK authorities the Commission has decided to examine the request first on the basis of Article 236 in combination with Article 220(2)(b) of Regulation (EEC) No 2913/92 and in the alternative on the basis of Article 239 of the same Regulation.

I – Examination of the request under Article 236 in combination with Article 220(2)(b) of Regulation (EEC) No 2913/92

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

- (25) Under Article 236 of Regulation (EEC) No 2913/92 import duties shall be repaid or remitted if it is established that when they were paid or entered in the accounts the amount had been entered in the accounts contrary to Article 220(2) of that same Regulation. Under Article 220(2)(b) of Regulation (EEC) No 2913/92, post-clearance entry in the accounts shall be waived where the amount of duty legally owed was not entered in the accounts as a result of an error on the part of the customs authorities themselves that could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and observed all the provisions laid down by the legislation in force as regards the customs declaration.
- (26) The UK competent authorities committed a gross error as they have repeatedly provided incorrect or insufficient information as regards the correct import procedure to be applied. Neither in the several meetings with the HMRC authorities nor even during the query was the company informed in a correct way. However by email of 30 November 2006 the UK authorities informed the company that it should pay full duties and should request an OPR authorisation. In the email it was clearly indicated that in order to apply OPR the goods should have to be declared for release for free circulation before being exported to be processed.
- (27) In view of the above, the Commission believes that UK authorities committed an error with regard to the operations that started prior to 1 December 2006. Conversely, there is no error of the UK customs authorities as regards the operations made from 1 December 2006 to 24 July 2007.

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

- (28) It follows from the file that this error could not have been detected by the company which acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (29) The remission and repayment of import duties is therefore justified inasmuch as operations started prior to 1 December 2006.

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

- (30) 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.

- (31) 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.
- (32) It is therefore necessary to examine whether this provision can be applied to operations that started on 1 December 2006 onwards.

A. The condition concerning the existence of a special situation

- (33) It is necessary to check first whether the firm's situation should be considered exceptional in comparison with the other operators engaged in the same business with regard to the operations initiated from 1 December 2006 to 24 July 2007.
- (34) The company was informed by the UK authorities on 30 November 2006 that, in the absence of an OPR authorisation, on import of the fish fillets it had to pay the duties based on the full value of the goods (*value of the raw fish, transport costs, plus processing costs*).
- (35) Although it is indicated in the email that it might claim the duties back once the final outcome was agreed on, it follows clearly from the email that in order to apply OPR the goods should be declared for release for free circulation before being exported to China. The company should therefore have known that there was a risk that the OPR authorisation to be issued would have no retro-active effect.
- (36) The Commission has not identified any other factors likely to constitute a special situation.
- (37) 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

- (38) The UK authorities' request shows that no obvious negligence or deception may be attributed to the company. However, since the existence of a special situation has not been established, repayment on the basis of Article 239 of the Code may not be granted.
- (39) The repayment of import duties requested is therefore not justified inasmuch as it concerns the operations made from 1 December 2006 to 24 July 2007,

HAS ADOPTED THIS DECISION:

Article 1

The remission of the import duties amounting to GBP XXXX (XXXX€) requested by the United Kingdom of Great Britain and Northern Ireland on 2 July 2010 is justified.

The repayment of the import duties amounting to GBP XXXX (XXXX€) requested by the United Kingdom of Great Britain and Northern Ireland on 2 July 2010 is justified.

The repayment of the import duties amounting to GBP XXXX (XXXX€) requested by the United Kingdom of Great Britain and Northern Ireland on 2 July 2010 is not justified.

Article 2

This Decision supersedes the decision of 15 November 2011.

Article 3

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.
Done at Brussels,

For the Commission
Algirdas ŠEMETA
Member of the Commission