C(2012)18

COMMISSION DECISION

of 20-1-2012

finding that the remission/repayment of import duties is not justified in a particular case (REM 05/2010)

(only the Dutch 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 Code[1],

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 Code[2],

Whereas:

(1) By letter of 27 July 2010, received by the Commission on 28 July 2010, the Dutch authorities asked the Commission to decide whether, under Article 239 of Regulation (EEC) No 2913/92, the remission/repayment of import duties was justified in the following circumstances.

(2) Between 25 February 1997 and 25 August 1997 a Dutch company, hereafter referred to as the applicant, declared 85 consignments of shoes from Vietnam for release for free circulation. The shoes were declared to originate in Vietnam. Origin certificates issued by the Vietnamese Chambers of Commerce attesting to the Vietnamese origin of the goods were attached to these declarations.

(3) At the time in question, imports into the Union of this type of product originating in Vietnam qualified for preferential treatment under the Generalised System of Preferences[3]. In accordance with Article 80 of the version of Regulation (EEC) No 2454/93 in force at the time, products covered by a certificate of origin Form A

[1] OJ L 302, 19.10.1992, p. 1.
[2] OJ L 253, 11.10.1993, p. 1.
[3] Council Regulation (EC) No 3281/94 of 19 December 1994 applying a four-year scheme of generalized tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries (OJ L348, 31.12.1994, p. 1).

(hereafter "Form A certificate") issued by the competent authorities in Vietnam were eligible for preferential tariff treatment on their release for free circulation.

(4) The Dutch customs authorities accepted the declarations and granted preferential tariff treatment.

(5) A joint administrative cooperation mission comprising representatives of the European Anti-Fraud Office (OLAF) and two Member States visited Vietnam between 23 November 1998 and 9 December 1998 to investigate on frauds and irregularities. Both in this framework and through subsequent verifications, it was found that the Form A certificates concerned in the present case were false and had not been issued by the competent Vietnamese authorities. During a subsequent joint administrative cooperation mission in Hong Kong, which took place in April 1999, it was established that the real origin of the goods was China.

(6) Given that the goods did therefore not qualify for the preferential treatment under the Generalised System of Preferences, the Dutch customs authorities initiated proceedings against the applicant for the post-clearance recovery of EUR 82.498,40 (HFL 181.802,70) in regular import duties.

(7) At the same time the Dutch authorities initiated proceedings against the applicant for the post clearance recovery of antidumping duties given that as of 1 February 1997 a provisional antidumping duty was imposed on the footwear in question of subheading 6404 19 90 of the Combined Nomenclature, by Commission Regulation (EC) No 165/97 of 28 January 1997[4]. The antidumping duty became a definitive antidumping duty on 1 November 1997[5].

(8) The applicant lodged applications for remission/repayment of the regular import duties and of the antidumping duties on 18 December 2000. The Dutch authorities rejected the applications for remission/repayment by decision of 4 November 2003. The applicant appealed against this decision on 12 December 2003; the Dutch authorities confirmed their position by decision of 29 November 2004. The applicant appealed against this decision to the Amsterdam Court on 6 January 2005 and to the College of Appeal for Trade and Industry on 3 January 2005. The College confirmed the decision of the authorities with regard to the antidumping duties on 1 February 2006, but the Court annulled the decision of the authorities on 16 April 2009 with regard to the regular import duties and ordered the authorities to forward the file to the Commission for a decision.

(9) By letter dated 23 November 2010, the Commission asked the Dutch authorities for additional information. The authorities replied by letter dated 13 July 2011, which the Commission received on 18 July 2011. Examination of the request for remission/repayment was therefore suspended between 24 November 2010 and 18 July 2011.

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4 Commission Regulation (EC) No 165/97 of 28 January 1997 imposing a provisional antidumping duty on imports of certain footwear with textile uppers originating in the People's Republic of China and Indonesia (OJ L 029, 31.1.1997, p.3).

5 Council Regulation (EC) No 2155/97 of 29 October 1997 imposing a definitive anti-dumping duty on imports of certain footwear with textile uppers originating in the People's Republic of China and Indonesia and collecting definitively the provisional duty imposed (OJ L 298, 1.11.1997, p. 1).

(10) By letter dated 20 October 2011, received by the applicant on 21 October, the Commission notified the applicant of its intention to withhold approval and explained the reasons for this.

(11) The applicant did not make use of its right of defence.

(12) In accordance with Article 907 of Regulation (EEC) No 2454/93, the nine-month period within which a decision has to be taken by the Commission was, therefore, extended by one month.

(13) 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 9 December 2011 within the framework of the Customs Code Committee - Customs Debt and Guarantees Section.

(14) 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 resulting from circumstances in which no deception or obvious negligence may be attributed to the applicant.

(15) According to the request sent by the Dutch authorities to the Commission, remission/repayment was justified for the following reasons.

(16) The applicant was in a special situation for the following reasons:

- shortcomings of the Vietnamese authorities;
- shortcomings of the European Commission;
- shortcomings of the Dutch authorities.

(17) There would be no deception or obvious negligence on the part of the applicant.

I. Existence of a special situation

(18) The Court of Justice of the European Union has ruled that Article 239 of Regulation (EEC) No 2913/92 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[6].

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

(20) In the case under consideration, granting preferential tariff treatment was subject to the presentation of Form A certificates. As already mentioned, the certificates presented were forged.

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[6] See judgment of 10 May 2001 in joined cases T-186/97, T-190/97 to T-192/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99) *Kaufring AG and Others* v *Commission* [2001] ECR II–1337.

(21) It follows from Article 904(c) of Commission Regulation (EEC) No 2454/93 that the presentation of a document subsequently found to be forged, falsified or incorrect, even if it is presented in good faith by the person liable for payment, cannot in itself constitute a justification for repayment or remission.

A. Existence of a special situation because of shortcomings of the Vietnamese authorities

(22) The Commission considers that these arguments do not allow acknowledging the existence of a special situation as in the present case the certificates were forged; as the Vietnamese authorities did not issue the certificates concerned, no special situation can result from the behaviour of those authorities.

(23) However, the applicant considers that the fact that the Form A certificates were forged is not well established and that they were in fact issued by the Vietnamese authorities and were invalid. He therefore invokes different arguments which, according to him, would demonstrate the existence of shortcomings on the part of the Vietnamese authorities liable to have placed the applicant in a special situation within the meaning of Article 239 of the code compared with other economic operators. These arguments are the following:

- the reliability of the information received from the Vietnamese authorities as regards the stamps affixed on the certificates;
- the reliability of the computer records of the Vietnamese Chamber of Commerce;
- the lack of knowledge of the applicable provisions on the part of the Vietnamese authorities.

(24) As a preliminary remark, it is worth recalling, as repeatedly ruled by the Court that determination of the origin of goods is based on a division of responsibilities between the authorities of the exporting country and those of the importing country, inasmuch as origin is established by the authorities of the exporting country and the proper working of the system is monitored jointly by the competent authorities on both sides. The Court has expressed the view that the administrative cooperation mechanism can function only if the customs authorities of the importing country accept the determinations legally made by the authorities of the exporting country[7].

(25) As regards the reliability of the information received from the Vietnamese authorities concerning the stamps affixed on the certificates (point *2.1.1.b of the above mentioned letter of 15 January 2003*), the following comments must be made. As indicated by the applicant the stamps on documents 18 and 19 were valid only as of 1 April 1998 and therefore the stamps used on the certificates submitted by the exporter before April 1998 could not bear these stamps. This is not challenged but that does not change the fact that the certificates concerned were forged. In addition, it is worth noting that a specimen of the stamps used before 1998 was available at the Commission.

[7] See, inter alia, judgments of 12 July 1984 in *'Les rapides savoyards'* (C-218/83), of 17 July 1997 in *'Pascoal & Filhos'* (C-97/95) and of 1 July 2010 in *'DSV Road' (C-358/09).*

(26) In order to support his conclusion that the certificates concerned were in fact invalid but issued by the competent Vietnamese authorities, the applicant provides a "report" by a graphologist. However, the Commission services consider that this report cannot constitute evidence that the stamps and signatures on the certificates were issued by the competent authorities. This "report" does not bear any name or date. In addition, it is acknowledged in the report itself that it cannot constitute a proof as the check was done on the basis of copies of documents; for this reason, the drafter makes an explicit reservation on the validity of the conclusions. Moreover in the report itself it is indicated that the compared stamps are not identical.

(27) As regards the reliability of the computer records kept by the Vietnamese authorities, it has to be noticed that, as mentioned by the applicant himself, at the same time a manual database still existed. Moreover the argument of the applicant is not substantiated at all.

(28) As regards the issue of a shortage of well trained officials to deal with post clearance verifications, the following has to be noticed. First of all, it has to be underlined that a lack of knowledge regarding the issue of certificates by the Vietnamese officials is not relevant in this case as the certificates where forged and therefore not issued by the Vietnamese authorities. In addition, as indicated in the OLAF report under point 4.4, a high degree of technical knowledge was exhibited by the officials and a comprehensive publication by the Vietnamese Chamber of Commerce and Industry concerning GSP and the rules of origin was available to the exporters.

(29) Moreover, the fact that a provision on the organisation and operation for issuing certificates of origin of the Vietnam Chamber of Commerce and Industry was issued in 1998 cannot be considered as proof that the authorities were not aware of these rules before that date. It can only underline that the Vietnamese authorities still worked on possible improvements of the applicable procedure.

(30) The fact that no reliable statistical information would have been available concerning imported raw materials or exported finished products has no relation with the falsification of the certificates.

(31) The applicant puts into doubt the declaration made by several exporters that they had not asked for the certificates to be issued which in general was explained by the fact that they were working in a different branch of business. However this doubt expressed by applicant is not substantiated at all.

(32) According to the applicant the Vice President of the Vietnam Chamber of Commerce would have declared in a letter that Mr X was not competent to sign certificates. However, according to the applicant the signature of this person appears both on valid and on false certificates. It is not clear which letter is meant by the applicant. On the contrary, in a letter by the vice president of the Chamber of Commerce of 1 December 1998 a number of falsified certificates is listed. One of the reasons mentioned is that the signature in the Box 11 of these certificates is not the signature of the person authorised to sign on these certificates. In another letter of 3 December 1998 it is indicated that no person authorised to sign on certificates has the name of Mr. Y. The first letter is to be understood as meaning that the signature was falsified; it does not indicate that the person indicated on the certificate was not competent, this contrary to

the second letter where it is clearly indicated that no person authorised to sign on certificates has the name of Mr. Y.

(33) As a conclusion, the Commission services consider that the applicant has not established that there were shortcomings on the part of the Vietnamese authorities which could have placed the applicant in a special situation.

B. Existence of a special situation because of shortcomings of the European Commission

(34) The Amsterdam Court ordered the Dutch authorities to forward the file to the Commission on the basis that the conclusions of the "C.A.S." judgment[8] might also be applicable to this case. In this connection, the following points should be made.

(35) In this judgment the Court took the view that the applicant had been placed in a special situation as a result of serious failures on the part of the Turkish authorities and of the Commission in the context of the Association Agreement between the EU and Turkey. The Court pointed out that the Commission, as guardian of the EC Treaty and of the agreements concluded under it, must ensure the correct implementation by a third country of the obligations it has assumed under an agreement concluded with the Community, using the means provided for by the agreement or by the decisions taken pursuant thereto.

(36) After listing a series of shortcomings of the Commission in particular, but also of the Turkish authorities (including i.e. confusion because of the variety of terms they used to indicate false and invalid certificates, the fact that the investigation by Uclaf (predecessor of OLAF) did not include the customs office from where the products were exported to the EU, not requesting for specimen impressions of stamps used in the customs office, the lack of registration of issued certificates), the Court of Justice concluded that the falsifications of the certificates to the first imports into the Community could have been detected if the Commission's obligation to supervise and monitor the proper implementation of the Association Agreement had been fulfilled. The extent of the losses for the Community and C.A.S. SpA could then have been reduced.

(37) The circumstances of the present case are not comparable. There is no indication that the Commission should have acted in a different way or at an earlier stage. The Commission after having received information from 2 Member States regarding the raise of import of shoes from Vietnam, requested the Member States in June 1997 to inform the Commission on past imports of this product. At the same time the Commission indicated that the raise could be explained because Vietnam was becoming one of the largest shoe producers. During 1997 and beginning of 1998 an exchange of information took place both between the Commission and the Member States and the Commission and the competent authorities of Vietnam. This resulted in an invitation by the Vietnamese authorities to representatives of the Commission services to visit Vietnam in order to conduct joint enquiries and to obtain evidence on the origin of the goods. During the visit that took place between 23 November and 9 December 1998 full cooperation was given by the Vietnamese authorities and the companies visited.

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[8] See judgement of 25 July 2008 in case C-204/07 P (*C.A.S. SpA*).

(38) Lastly, with regard to the presumed violation of ex Article 211 of the EC Treaty (*repealed but replaced, in substance, by Article 17, paragraph 1 of the Treaty on European Union*) , EU law does not require the Commission to notify importers when it has doubts about the validity of customs transactions carried out by those importers. The fifth paragraph of Article 220(2)(b) of the Code merely states, solely in respect of preferential agreements, that the person liable may not plead good faith if the Commission has published a notice in the Official Journal of the European Communities stating that there are grounds for doubt concerning the proper application of the preferential arrangements by the beneficiary country. Moreover since the present case concerns false certificates there was no reason for doubt concerning the proper application of the preferential arrangements by the beneficiary country[9].

(39) As regards the need to promote trade between the Member States and Vietnam, this can in no way be explained as a need to accept that non originating goods can be imported with false certificates of origin as originating in Vietnam. By Council Decision of 28 May 1996 on the post-clearance recovery of the customs debt[10], cited by the applicant, the Council requested the Commission to carry out a study with a view to finding an overall solution to the recovery problems with regard to Community traders who could not reasonably detect irregularities in the acts of third-country authorities. This led to more detailed provisions in that respect under Article 220 of the Customs Code[11]. However, there is no question in the present case of irregularities by the Vietnamese authorities. As emphasized several times above the certificates were false and therefore the consequences are completely different from those where a possible recovery of duties is due to irregularities committed by the third-country authorities themselves.

(40) The applicant invokes in his letter of 15 January 2003 (points 89 and 90) the regulation of the import of shoes from Vietnam and the fact that the Vietnamese authorities would have refused to cooperate with the Commission in this respect. It is not clear what this has to do with the present case and what rules the Commission would have violated.

(41) Finally the observations made by the applicant as regards the introduction of a double checking system cannot be taken into account because this was agreed on after the imports in question and has no bearing on the imports made in 1997 with false certificates.

(42) As regards in particular OLAF, the applicant puts into question the way this service prepared and performed its investigations in general and in particular the investigation performed in Vietnam. Since the applicant does not support this allegation with any evidence these presumptions cannot be taken into account.

C. Existence of a special situation because of shortcomings of the Dutch authorities

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9 See judgment of 16 December 2010 in case T-191/09 (*Hit Trading*).

10 OJ C 170 of 14 June 1996 p.1.

11 Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 amending Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ L 311 of 12.12.2000, p. 17).

(43) The applicant invokes shortcomings of the Dutch authorities with regard to the notification of the debt to other actors. Applications for the repayment or remission of import duties on equity grounds, which are submitted to the Commission pursuant to Article 239 of Regulation (EEC) No 2913/92, in conjunction with Article 905 of Regulation (EEC) No 2454/93, are not concerned with whether or not the provisions of substantive customs law have been correctly applied by the national customs authorities. Such a question falls within the exclusive competence of the national authorities, whose decisions may be challenged before the national courts pursuant to Article 243 of the Customs Code; those courts may make a reference to the Court of Justice pursuant to Article 267 of the Treaty on the Functioning of the European Union (ex Article 234 of the EC Treaty)[12].

(44) The same comment is equally valid as regards the argument raised by the applicant that the national authorities would have failed to respect the rights of defence.

(45) The applicant is of the opinion that the Dutch authorities should have warned the operators of their doubts with regard to the validity of the certificates form A.

(46) However it was only in June 1997 that the Commission requested the Member States to collect information on past imports of shoes from Vietnam. At that moment there was no proof of an ongoing fraud yet. As mentioned before, the Commission indicated that the raise could be explained because Vietnam was becoming one of the largest shoe producers.

(47) The fraud could only be confirmed after the mission to Vietnam between 23 November 1998 and 9 December 1998.

(48) The imports subject of the present case took place between February and August 1997. Consequently, in the Commission's view, it has not been established that the Dutch authorities were aware of the fraud before the imports in question even took place, and therefore the applicant was not placed in a special situation due to the behaviour of the Dutch authorities.

(49) Moreover the applicant insists that the Dutch authorities could not rely on the outcome of the joint administrative cooperation mission but should have performed their own investigation. However, in its Judgement in joined cases C-153/94 and C-204/94[13], the Court ruled that "the customs authorities of a Member State may, on the basis of the conclusions of a Community mission of enquiry, proceed with the post-clearance recovery of customs duties on goods imported from the Faroe Islands, even if, in reliance on EUR.1 certificates issued in good faith by the competent Faroese authorities, they did not levy customs duties at the time of importation"; the Commission service consider that the conclusions of the Court in these cases may be applied in the present case.

(50) Finally the applicant insists that he would be placed in a special situation because the authorities of several other Member States would not have taken action following the findings in Vietnam.

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12 See judgment of 16-7-1998 in case T-195/97 ("Kia Motors Nederland BV")

13 See judgment in joined cases C-153/94 and C-204/94 ("Faroe Seafood")j

(51) On this point, the applicant does not submit any proof that other Member States would not have recovered the duties under identical circumstances. Moreover even if it were established, that fact cannot properly be put forward by the applicant, because the principle of equal treatment must be reconciled with the principle of legality, according to which no one may rely, to his own benefit, on an unlawful act committed in favour of another (see, to that effect, in other fields of legislation[14]).

(52) The Commission has found no other elements that may justify consideration of the case under Article 239.

(53) In view of the above, the Commission takes the view that the first condition referred to in Article 239 of Regulation (EC) No 2913/92 is not met.

II. Condition concerning the absence of deception or obvious negligence

(54) The Court has consistently ruled that when examining whether there has been deception or obvious negligence account must be taken, in particular, of the complexity of the legislation and the operator's experience and diligence.

(55) Regarding the criterion of the rules' complexity, it should be pointed out that the rules determining the origin of goods cannot as such be considered complex. In any event, since this is a proven case of fraud, this condition is not really relevant in this case.

(56) The applicant is an experienced trader whose business activities consist mainly in import and export transactions.

(57) It follows from the file that the applicant submitted with a declaration for release for free circulation dated 26 March 1997 an invoice on which it was indicated that the products had the Chinese origin. At the same time applicant indicated on the declaration that the goods had the Vietnamese origin. Although this declaration is not part of the present file because applicant did not request to apply the preferential tariff, applicant should have had doubts regarding the true origin of the imported products. However applicant did not seek any information and therefore cannot be considered to have acted with diligence as of 26 March 1997; that is to say with regard to 62 declarations concerned in the present file which were submitted after this date[15].

(58) In view of the above, the Commission takes the view that the second condition referred to in Article 239 of Regulation (EC) No 2913/92 is not met for the imports made as of 26 March 1997. However, since no special situation could be established for the total period, the fact that this second condition is met or not is irrelevant for the purpose of this decision.

(59) The remission/repayment of import duties requested is therefore not justified,

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[14] Case T-327/94 SCA Holding v Commission [1998] ECR II-1373, paragraph 160; Case T-106/00 Streamserve v OHIM (STREAMSERVE) [2002] ECR II-723, paragraph 67; and Case T-23/99 LR AF 1998 v Commission [2002] ECR II-1705, paragraph 367

[15] See judgment of 10 June 2010 in case C-498/09 ("Thomson").

HAS ADOPTED THIS DECISION:

Article 1

Remission/repayment of the import duties in the sum of 82,498.40 EUR, requested by the Netherlands on 27 July 2010, is not justified.

Article 2

This Decision is addressed to the Netherlands.

Done at Brussels, 20-1-2012

For the Commission
Algirdas ŠEMETA
Member of the Commission