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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28-12-2004
C(2004)5358

NOT TO BE PUBLISHED

COMMISSION DECISION

Of 28-12-2004

**finding that it is justified to waive post-clearance entry in the accounts of import duties
in a particular case**

(Only the Italian text is authentic)

(Request submitted by Italy)

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(REC 03/2004)

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 the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded,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 (EC) No 2286/2003,⁴

¹ OJ L 302, 19.10.1992, p. 1.

² OJ L 236, 23.9.2003, p. 33.

³ OJ L 253, 11.10.1993, p. 1.

⁴ OJ L 343, 31.12.2003, p. 1.

Whereas:

- (1) By letter dated 7 June 2004, received by the Commission on 14 June 2004, Italy asked the Commission to decide whether it was justified in the following circumstances to waive post-clearance entry in the accounts of import duties under Article 220(2)(b) in conjunction with Article 236 of Regulation (EEC) No 2913/92 or, in the alternative, to remit import duties under Article 239 of that Regulation.
- (2) On 1 April 1999 an Italian firm released for free circulation 41 unwrought non-alloy aluminium bars.
- (3) Before they were imported into the Community the goods had been shipped to Anguilla and released for free circulation there, as attested by an “EXP” certificate issued by the local authorities. The goods were then re-exported to the Community.
- (4) Under Article 101(2) of Council Decision No 91/482/EEC on the association of the overseas countries and territories with the European Economic Community⁵ (hereinafter the “OCT Decision”), products not originating in the overseas countries and territories (OCT) but which are in free circulation in an OCT and are re-exported as such to the Community are to be accepted for import into the Community free of customs duties and taxes having equivalent effect provided that: customs duties or taxes having equivalent effect of a level equal to, or higher than, the customs duties applicable in the Community on import of these same products originating in third countries eligible for the most-favoured-nation clause have been paid in the OCT concerned; they have not been the subject, in whole or in part, of an exemption from, or a refund of customs duties or taxes having equivalent effect; they are accompanied by an export certificate.
- (5) The firm concerned presented an EXP certificate issued by Anguilla’s authorities in support of its customs declarations. The Italian customs authorities accepted the declarations and granted exemption from customs duties.
- (6) In July 1998 the Commission learned that aluminium from Canada and Brazil was being imported into the Community at a price lower than the international market rate

with duties paid; it thereupon conducted an investigation, which showed the aluminium to have been imported into the Community after release for free circulation in Anguilla.

- (7) In February 1999 a number of Member States were asked to conduct further investigations.
- (8) It was found that traders releasing goods for free circulation in Anguilla were eligible for “transport aid”. This aid was paid at a rate of USD 25 a tonne on the basis of ad hoc decisions by Anguilla's local authorities.
- (9) After examining Anguilla’s application of Article 101(2) of the OCT Decision, the Commission concluded that there was a link between the payment of the customs duties and the subsequent transport aid, that the system established in the OCT (collection of customs duties followed by payment of transport aid) did not comply with Article 101(2) and that the transport aid should therefore be considered a partial refund of customs duties. The goods were not therefore eligible for duty-free import into the Community.
- (10) Accordingly, on 17 March 2003 the competent Italian authorities claimed duties in the sum of EUR XXXX from the firm.
- (11) The firm applied for the waiving of entry in the accounts or, in the alternative, remission of the import duties concerned, citing its good faith and, on the part of the competent authorities, errors which it could not have detected and failings.
- (12) The firm argued that Anguilla’s authorities had committed an error by issuing EXP certificates for the goods concerned when they knew or should reasonably have known that these goods did not meet the conditions laid down for favourable treatment on import into the Community. It also argued that the recovery procedure was vitiated by the failure to apply the dispute-settlement arrangements in Article 7(7) of Annex III to the OCT Decision. It argued that there had been no deception or obvious negligence on its part. It explained that it was not a dealer and therefore did not handle the

⁵ OJ L 263, 19.9.1991, p. 1. Decision as last amended by Decision 2001/161/EC (OJ L 58, 28.2.2001, p. 21).

shipment of the goods from the country of export to Italy via Anguilla; it had purchased the goods on a DDP (delivered duty paid) basis.

- (13) In support of the request made by the Italian authorities, the firm concerned stated, in accordance with Articles 871(3) and 905(3) of Regulation (EEC) No 2454/93, that it had seen the dossier submitted to the Commission by the Italian authorities and had nothing to add.
- (14) In accordance with Articles 873 and 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 1 December 2004 within the framework of the Customs Code Committee (Repayment Section) to consider the case.
- (15) Under Article 220(2)(b) of Regulation (EEC) No 2913/92, post-clearance entry in the accounts is waived where the amount of duties 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.
- (16) As regards the argument that the recovery procedure was vitiated by the Commission's failure to implement the procedure laid down in Article 7 of Annex III to the OCT Decision for the verification of EXP certificates, which the firm considers a prerequisite for recovery to be valid, the following point should be made.
- (17) With this argument, the firm contests the way in which the competent Italian authorities initiated recovery proceedings. It is, however, settled case-law that requests to the Commission under Articles 220(2)(b) or 239 of Regulation (EEC) No 2913/92 are not a means of contesting whether a customs debt is due in principle. The national customs authorities have sole competence for matters relating to the existence of the customs debt and the calculation of the amount due, and decisions adopted by these authorities, including demands for the post-clearance payment of unpaid customs duties, must be contested through the competent national courts, which may refer the case to the [Court of Justice](#).⁶ This fact cannot therefore be held to constitute an error

⁶ See cases *Kia Motors* (case T-195/97, 16.7.1998) and *Hyper Srl* (case T-205/99, 11.7.2002).

on the part of the competent authorities within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

- (18) As regards the behaviour of Anguilla's authorities, the following point should be made.
- (19) According to the Court's recent [case-law](#),⁷ the fact that Anguilla's competent authorities may have been misled by exporters is not sufficient to exclude any possibility of an error on the part of the competent authorities within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92. The authorities' behaviour has to be examined in the broader context in which the relevant provisions were applied.
- (20) In any case, the fact that the exporter confirmed on the EXP certificates that the conditions for obtaining them had been met is not in itself proof that Anguilla's competent authorities were misled. It is necessary to ascertain whether the exporters made these declarations on the assumption that the competent authorities were acquainted with all the facts necessary to apply the rules in question and whether the authorities, despite that knowledge, raised no objection to the declarations.
- (21) In the case in point, there is evidence to suggest that Anguilla's competent authorities knew or, at the very least, should have known that the goods for which they were issuing EXP certificates did not fulfil the conditions laid down for favourable treatment on import into the Community.
- (22) Furthermore, Anguilla's authorities could not have been unaware of the relationship between the considerable increase in aluminium exports from Anguilla to the EU in 1998 and 1999 and the granting of transport aid, even if that aid was paid by a different department to the one responsible for collecting customs duties on goods released for free circulation in Anguilla and for issuing EXP certificates.
- (23) It follows from the above that Anguilla's authorities knew or should reasonably have known that the system they had established did not comply with Article 101(2) of the OCT Decision. The fact that they delivered EXP certificates when they knew or, at the very least, should reasonably have known that such certificates would confer an undue advantage when the goods were subsequently imported into the Community must

therefore be considered to constitute an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

- (24) The circumstances of this case therefore point to an error on the part of Anguilla's authorities which could not reasonably have been detected by an operator acting in good faith, within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (25) As the Court of Justice of the European Communities has consistently ruled, when determining whether the firm could reasonably have detected the customs authorities' error, account must be taken of the nature of the error, the firm's professional experience and the diligence it showed.
- (26) In this case, the firm was not itself a dealer but bought the goods directly from its supplier. The goods were, moreover, purchased DDP, meaning that they were delivered duty paid. Lastly, the firm's lawyer explains that the firm was legally and economically independent of its supplier.
- (27) It must therefore be acknowledged that the firm was not obviously negligent.
- (28) Moreover, the firm acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (29) Post-clearance entry in the accounts of import duties is not therefore justified in this case. Under these circumstances there is no need to examine the dossier in the light of Article 239 of Regulation (EEC) No 2913/92.
- (30) Under Article 876 of Regulation (EEC) No 2454/93, where the circumstances under consideration are such that the duties need not be entered in the accounts, the Commission may determine the conditions under which the Member States may refrain from post-clearance entry of duties in the accounts in cases involving comparable issues of fact and of law.
- (31) Cases comparable in fact and law to this one are requests to waive post-clearance entry in the accounts lodged within the legal time limits in respect of imports into the Community from Anguilla, where those import operations were carried out in

⁷ Ilumitrónica judgment of 14 November 2002 (Case C-251/00).

circumstances comparable in fact and law to those which gave rise to this case. The persons concerned must in no way have been involved in the shipment of the goods from the country of export, via Anguilla, to the point of entry in the Community customs territory. They must have purchased the goods under a DDP (delivered duty paid) contract. They must not have been involved as the importer of the goods into the Community or as the importer's representative. Lastly, they must not be deemed related persons to their supplier, the exporter to Anguilla, persons involved in the shipment of the goods from the country of export to the Community or the Government of Anguilla. The criteria used to examine whether this condition is met shall be those set out in letters (a) to (h) of Article 143 of Regulation (EEC) No 2454/93. There must have been no deception or obvious negligence on the part of the firms concerned,

HAS ADOPTED THIS DECISION:

Article 1

The import duties in the sum of EUR XXXX which are the subject of the request from Italy of 7 June 2004 shall not be entered in the accounts.

Article 2

This Decision is addressed to the Italian Republic.

Done at Brussels, 28-12-2004

For the Commission
László KOVÁCS
Member of the Commission