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REC 06/05

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 17.1.2007
C(2007)64

NOT FOR PUBLICATION

COMMISSION DECISION

Of 17.1.2007

**finding that it is justified to waive post-clearance entry in the accounts of import duties
in a particular case.(Only the Portuguese text is authentic)**

(Request submitted by the Portuguese Republic)

(REC 06/05)

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

(Only the Portuguese text is authentic)

(Request submitted by the Portuguese Republic)

(REC 06/05)

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 Code¹, as last amended by Regulation (EC) No 1791/2006²,

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92³, as last amended by Regulation (EC) No 1875/2006⁴,

¹ OJ L 302, 19.10.1992, p. 1.

² OJ L 363, 20.12.2006, p. 1.

³ OJ L 253, 11.10.1993, p. 1.

⁴ OJ L 360, 19.12.2006, p. 64.

Whereas:

- (1) In letters dated 23 December 2005, received by the Commission on 4 January 2006, the Portuguese Republic asked the Commission to decide, under Article 220(2)(b) of Regulation (EEC) No 2913/92, whether it was justified to waive post-clearance entry of import duties in the accounts or, alternatively, if the remission or reimbursement of those duties was justified under Article 239 of that Regulation, in the following circumstances.
- (2) On 18 October 2002, 13 January 2003 and 11 June 2003 a Portuguese operator (hereinafter 'A') imported consignments of frozen bovine meat classified under heading 0202 30 90 90 originating in and coming from Brazil. On 13 January and 3 April 2003 a different Portuguese operator (hereinafter 'B') imported the same type of products, also originating in and coming from Brazil. The declarations made by importers A and B (hereinafter 'the interested parties') were accepted by the Portuguese competent authorities.
- (3) An import licence was presented when the goods were imported and they were therefore eligible for the tariff quota (subquota II) provided for in Commission Regulation (EC) No 954/2002 of 4 June 2002 opening and providing for the administration of a tariff quota for frozen meat of bovine animals covered by CN code 0202 and products covered by CN code 0206 29 91⁵.
- (4) In April 2003 the European Anti-Fraud Office (OLAF) asked the customs authorities of the Member States to carry out checks on applications for eligibility under the above quota (subquota II) as it suspected that a large number of operators apparently related within the meaning of Article 143 of the aforementioned Regulation (EEC) No 2454/93 referred to in Article 9(4) of Regulation (EC) No 954/2002 may in fact be ineligible.
- (5) Regulation (EC) No 954/2002 states that, as in the past the quota had been characterised by an increasing level of speculation, it should no longer be administered using the "traditional importers/new arrivals" method but by the "simultaneous examination" method, and, at the same time, provides for stricter criteria for

⁵ OJ L 147, 5.6.2002, p. 8.

participation, so as to avoid, in particular, registration of fictitious operators (recitals 2 and 5 to 10 of Regulation (EC) No 954/2002).

- (6) Article 9 of the Regulation sets out the eligibility criteria for subquota II as well as the conditions under which eligibility may be withdrawn. Thus, under paragraph 4, Member States must verify that the various applicants are not related to one another within the meaning of Article 143 of Commission Regulation (EEC) No 2454/93 and, if they are, must reject all applications concerned.
- (7) Operators A and B were in fact related, which is why the Portuguese authorities notified them that they owed a customs debt, in the case of operator A, of €XXXX for the operations of 18 October 2002 and 13 January 2003 and of €XXXX for the goods imported on 11 June 2003 and, in the case of operator B, a debt of €XXXX. Operator A has not paid the requested amounts, whereas operator B has.
- (8) The interested parties asked for the post-clearance entry of duties in the accounts to be waived or, alternatively, the remission or reimbursement of these duties due to the fact that the Portuguese version of Regulation (EC) No 954/2002 contained an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92. Instead of stating, as in the French and English versions, that the Member States must verify that "such applicants are not related to one another within the meaning of Article 143 of Commission Regulation (EEC) No 2454/93", the first indent of the Portuguese version of Article 9(4) stated that they should verify whether the applicants were "members of the same family under Article 143 of Regulation...". The interested parties were not members of the same family. The Portuguese authorities therefore transferred the file to the Commission on the basis of Article 871(1), first indent and, subsidiarily, Article 905(1), first indent, of Regulation (EEC) No 2454/93.
- (9) In accordance with Articles 871 and 905 of Regulation (EEC) No 2454/93, the interested parties stated that they had been informed of the file that the Portuguese authorities intended to send to the Commission and that they had nothing to add.
- (10) By letter dated 24 February 2006 the Commission requested additional information from the Portuguese authorities. This information was provided by letter received by the Commission on 20 June 2006. The administrative procedure was therefore

suspended, in accordance with Articles 873 and 907 of Regulation (EEC) No 2454/93, between 25 February and 20 June 2006.

- (11) 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 20 December 2006 within the framework of the Customs Code Committee (Repayment Section) to consider the case.
- (12) Under Article 220(2)(b) of Regulation (EEC) No 2913/92, there can be no post-clearance entry in the accounts 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.
- (13) It is established that the Portuguese version of *Official Journal* L 147 contained an error in Article 9(4), first indent, of Regulation (EC) No 954/2002. However, no corrigendum has been published. It should be concluded that the Commission committed an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.
- (14) The Court of Justice of the European Communities has consistently ruled that, in determining whether the applicant could reasonably have detected the customs authorities' error, account must be taken of the nature of the error, the applicant's professional experience and the diligence it showed.
- (15) As regards the experience of the interested parties, it is established that operator A had already had recourse to the quota in question; however, the contentious provision was introduced into the rules only through Regulation (EC) No 954/2002. Operator B had never imported goods under this quota.
- (16) As regards the detectability of the error, it should be noted that operators cannot be required to compare the two linguistic versions of a regulation published in the *Official Journal*. This particular error must therefore be considered undetectable by an operator acting in good faith.

- (17) The request submitted by the Portuguese authorities also shows that it must be accepted that the interested parties acted in good faith.
- (18) The circumstances of the case therefore point to an error on the part of the customs authorities themselves 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.
- (19) Moreover, the interested parties had complied with all the provisions laid down by the legislation in force as regards the customs declaration.
- (20) Post-clearance entry in the accounts of import duties is therefore not 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.
- (21) Where special circumstances warrant waiver of post-clearance entry of duties in the accounts, Article 875 of Regulation (EEC) No 2454/93 authorises the Commission to determine the conditions under which the Member States may waive post-clearance entry of duties in the accounts in cases involving comparable issues of fact and law.
- (22) In this particular case, only the requests for waiver of post-clearance of entry of duties in the accounts, lodged within the legal deadline, for import operations carried out by operators who could legitimately base their understanding of the operating terms of subquota II on the Portuguese version of Regulation (EC) No 954/2002 can be considered comparable issues of fact and law. The operators must have acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration,

HAS ADOPTED THIS DECISION:

Article 1

The import duties of €XXX which are the subject of the Portuguese Republic's request of 23 December 2005 (note No 3007) shall not be entered in the accounts.

The import duties of €XXX which are the subject of the Portuguese Republic's request of 23 December 2005 (note No 3008) shall not be entered in the accounts.

The import duties of €XXX which are the subject of the Portuguese Republic's request of 23 December 2005 (note No 3009) shall not be entered in the accounts.

Article 2

This Decision is addressed to the Portuguese Republic.

Done at Brussels, 17.1.2007

For the Commission

László KOVÁCS

Member of the Commission