EUROPEAN
COMMISSION

Brussels, 15.5.2014
C(2014) 3007 final

COMMISSION DECISION

of 15.5.2014

finding that the remission of import duties is justified for a certain amount and that remission of import duties is not justified for another amount in a particular case (REM 03/2013)

(only the Spanish text is authentic)

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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,

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,

Whereas:

(1) By letter of 18 April 2013, received by the Commission on 2 May 2013, the Spanish authorities asked the Commission to decide whether remission of import duties was justified under Article 236 in connection with Article 220 (2) (b) of Council Regulation (EEC) No 2913/92[1] and with Articles 869, 871 of Commission Regulation (EEC) No 2454/93 of 2 July 1993[2] or in the alternative under Article 239 of Council Regulation (EEC) No 2913/92 and 905 of 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) Between 30 June 2009 and 24 September 2010, a firm (hereafter referred to as the "applicant") established in Spain, imported certain processed tuna products classified under the TARIC code 16.04.14.16.45 declared as originating in Ecuador, to the EU.

(3) At the time of the facts, the rules and conditions for applying a scheme of generalised tariff preferences for imports into the EU of those products originating in Ecuador was Council Regulation (EEC) 732/2008, which provided for suspension of Common Customs Tariff ad valorem duties instead of the regular 24% duty for imports of countries under the EU's Generalised System of Preferences (GSP) or a reduced 5% rate of duty for imports of Panamá.[3]

(4) In application of Regulation 732/2008, the only products entitled to benefit from the preferential rate of duty on export of fishery products were those resulting from raw materials of Chapter 03 of the Harmonised System (HS) wholly obtained in the beneficiary country, in its territorial waters or caught by its vessels outside those

[1] OJ L 302 19.10.1992, p. 1

[2] OJ L 253, 11.10.1993, p. 1.

[3] By Commission Decision of 9 June2010 (L 142/10) Panama joined again the GSP plus system for the period 1st July 2010-31 December 2011.

waters with the addition, where applicable, of cumulation of origin with other Member States of the same regional group and or the European Union.

(5) In the framework of the rules of cumulation, the mechanism for determining which member of the regional group is to be considered as the country of origin of the final product is laid down in Article 72 a of Regulation 2454/93[4].

(6) According to this provision, the final product exported to the EU has the origin of the country of last working or processing if more than a minimal operation takes place there and the working or processing carried out in the last processing country exceeds the operations set out in article 70 of Regulation 2454/1993 (the value added is greater than the highest customs value of all the products used originating in any one of the other countries of the regional group). If those two criteria are not fulfilled, the final product has the origin of the country of the regional group which accounts for the highest customs value of the originating products used coming from the other countries of the regional group.

(7) The issue of a Form A certificate of origin by the Ecuadorian authority was based on the submission of an application form by the exporter, in which the exporter declared that the origin of the goods was Ecuador and that the goods they referred to meet the conditions for obtaining the certificates of origin.

(8) In the case under consideration, the applicant presented Form A certificates of origin issued by the relevant authorities of Ecuador in support of its customs declarations for release for free circulation. The Spanish customs authorities accepted the declarations and granted preferential tariff treatment.

(9) From 14 to 30 September 2010 a joint administrative cooperation mission comprising representatives of the European Anti-Fraud Office (OLAF) and some Member States travelled to Ecuador to investigate the origin of raw materials used in Ecuador in the production of processed tuna products exported to the EU covered by certificates of origin Form A issued in Ecuador in order to benefit from the tariff preferences under the GSP scheme.

(10) The joint mission found that the Ecuadorian authorities had wrongly issued certificates of origin Form A for tuna products processed in this country from raw material caught by Salvadorian and Panamanian fishing vessels without having complied with the rules for considering the goods as of Ecuadorian origin.

(11) For the raw fish caught by vessels registered in El Salvador and which sailed under Salvadorian flag, even though El Salvador was a GSP beneficiary country, the goods from that country were not eligible for cumulation in order to benefit from the tariff preferences because the Salvadorian authorities did not prove the origin of the fish as required by Article 72 a and Article 80 of Regulation n° 2454/93.

(12) In the case of raw fish caught by Panamanian vessels, Form A certificates had been issued by Panama to prove the originating status of the raw material originated in Panama, but the value added rule set out in article 70 of Regulation 2454/1993 had not been respected.

(13) Since the processed tuna products declared as of Ecuadorian origin and imported into the EU were not eligible for preferential tariff treatment, on the basis of the final report

[4] References to Chapter 2 of Title IV of Regulation 2454/1993 are made to the provisions in force at the time of the facts

of the OLAF joint mission, the Spanish customs authorities initiated in 2012 proceedings for the post-clearance recovery of a total amount of EUR XXXXX in regular import duties. This is the amount for which remission is being requested in this case.

(14) The Spanish authorities considered that remission of duties is justified because there was an error on the part of the Ecuadorian authorities which misinterpreted and misapplied the rules for determining the origin of fishery products for GSP purposes, the certificates that OLAF found to be incorrect were issued on the basis of a correct presentation of the facts by the exporter and the error could not have been detected by the applicant despite its professional experience.

(15) The applicant confirmed that it had read the dossier that the Spanish authorities proposed to submit and made comments on the information that it considered should be included.

(16) By letter dated 8 May 2013, the Commission asked the Spanish authorities for additional information. This information was provided by letter dated 28 May 2013, received by the Commission on 11 June 2013.

(17) The Commission asked again for additional information on 17 September 2013. The new information was sent by letter of 21 October 2013, received by the Commission on 5 November 2013.

(18) In all those cases the applicant confirmed that it had seen the letters from the Commission and made comments to the replies which the Spanish authorities proposed to submit.

(19) The administrative procedure was accordingly suspended between 9 May 2013 and 11 June 2013 and again between 18 September 2013 and 5 November 2013 under Articles 873 and 907of Commission Regulation (EEC) No 2454/93.

(20) In accordance with Articles 873 and 906a of Regulation (EEC) No 2454/93, the Commission invited the debtor by letter dated 12 February 2014 received by the firm on 17 February 2014 to comment in writing on the objections on any issues of fact or law which might lead to the refusal of the application.

(21) In its letter of reply to the Commission of 5 March 2014 received on 10 March 2014, the applicant expressed its opinion on the Commission's objections and claimed that it should not be held responsible for a malfunction of the preferential system in case of an error made by the authorities of a third country. It held also that it acted in good faith and expressed its disagreement with the interpretation made by the Commission on the trader’s lack of diligence for imports it carried out between 21 May and 24 September 2010.

(22) In accordance with Articles 873 and 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.

(23) 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 8 May 2014 within the framework of the Customs Code Committee (Debts and Guarantees section) to consider the case.

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

(24) According to Article 220 (2) (b) of Regulation (EEC) 2913/92, the issue of a certificate by the authorities of a third country, should it prove to be incorrect, shall constitute an error which could not reasonably have been detected by the person liable for payment, the latter for its part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

(25) The Court of Justice of the European Union has consistently ruled that the legitimate expectations of a trader are protected only if the competent authorities themselves gave rise to the expectations. Therefore, only errors attributable to acts of those authorities confer entitlement to the waiver of post-clearance recovery of customs duties[5]. It is therefore a matter of determining whether, in this particular case, the competent authorities committed an error. At the same time, the applicant can benefit from the principle of legitimate expectation only as long as the applicant itself has acted in respect of the legislation in force.

(26) The circumstances of the case reveal that the Ecuadorian authorities misinterpreted and misapplied the rules for the issue of certificates Form A and did not comply with the relevant provisions of Regulation 2454/93. As the Court has ruled[6], the fact that the exporters submitted incorrect applications does not in itself prove that the competent Ecuadorian authorities did not commit an error within the meaning of Article 220(2) (b) of Regulation (EEC) No 2913/92. It is necessary to ascertain whether the error could not reasonably have been detected by the applicant.

(27) In order to determine whether the debtor could have detected the error committed by the Ecuadorian authorities, the Commission takes into account all the circumstances of the case, the nature of the error, the debtor's experience and its diligence.

(28) The fact that the relevant authorities in Ecuador had wrongly issued Form A certificates over a long period of time and the firm had therefore benefited from preferential arrangements over that same period could have led the importing firm to believe that its imports complied with the regulations. The recurrence of the error counts in favour of the importer acting in good faith. On the other hand, however, standard audits are carried out in third countries processing plants by importers of fishery products in order to give guarantees with regard to the origin of the fish. It follows from the file that it is not possible to establish whether the error committed by the Ecuadorian authorities could have been detected by the importing company for imports carried out before 21 May 2010.

(29) As regards the applicant's professional experience, the firm is engaged in import export and trading of fishery products from American, African and East Asian countries. It follows that the applicant is to be considered as very experienced.

(30) The Commission published a notice to importers in the Official Journal C 132 of 21 May 2010, page 15[7], "Imports of tuna from Colombia and El Salvador into the EU", (2010/C 132/05). In that notice to importers, the Commission signalled that "it could not be excluded that consignments are imported from other countries benefitting from the generalized system of preferences GSP without fulfilling requirements of GSP rules of origin concerning cumulation of origin".

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5 Case C-348/89 Mecanarte, paragraphs 22- 23; Case C-173/06 Agrover paragraph 31, and Joined Cases C-153/94 and C-204/94 Faroe Seafood and Others, paragraph 91.

6 Ilumitrónica judgment of 14 November 2002, Case C-251/00.

7 OJEU C (2010/C 132/05.

(31) Concerning the applicant's care, for imports made before 21 May 2010, there is no evidence that the firm deviated from normal business practice when carrying out imports of tuna declared as originating in Ecuador.

(32) However, the debtor could not be considered as acting in good faith and taking due care to ensure that all the conditions for the preferential treatment were fulfilled when importing tuna from Ecuador into the EU after 21.5.2010, the date of publication of the "Notice to importers on imports of tuna from Colombia and El Salvador into the EU"

(33) As from that date, taking into account the applicant's long professional experience and the fact that it operates in different regions of the world subject to different rules of origin, it could and should have taken necessary precautions to ensure a proper control on the evidence of origin presented for the correct application of GSP preferential treatment for regional cumulation Group II. The debtor should have checked the applicability of the evidence of origin presented in the European Union for canned tuna and frozen tuna loins of HS subheading 16.04.14 imported from other countries of the region.

(34) In support of this position is the fact that the Notice to importers specifically indicated that fulfilling cumulation requirements for tuna products of the same HS tariff sub heading could be problematic and Ecuador belongs to the same regional group of countries for cumulation as Colombia and El Salvador. Moreover, the notice to importers mentioned "other countries benefitting from the GSP" and it advised importers to take all necessary measures since the release for free circulation of those goods may give rise to a customs debt and go against the EU' financial interests.

(35) In addition to that, the Court has stated several times in judgments on repayment and remission cases[8], that the EU should not bear the adverse consequences of the wrongful acts of suppliers. The Court confirmed that the term “obvious negligence” should be interpreted in such a way that the repayment and remission cases are limited and underlined that in case of doubts the onus is on the trader to seek all possible clarification how provisions should be correctly applied[9].

(36) Since imports made after 21 May 2010 are covered by the provisions of the fifth subparagraph of Article 220(2)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992, after that date the trader cannot plead good faith.

(37) In view of the above, the Commission considers that the remission of duties corresponding to imports made from 21 May to 24 September 2010 is not justified on the basis of Article 236 in connection with Article 220 (2) (b) of Council Regulation (EEC) No 2913/92.

Examination under Article 239 of Regulation (EEC) No 2913/92.

(38) Under Article 239 of Council Regulation (EEC) 2913/92, import duties may be repaid or remitted in situations other than those referred to in Articles 236, 237 and 238 resulting from circumstances in which a special situation exists and no deception or obvious negligence may be attributed to the person concerned.

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8 See in this regard Case C 438/11 Lagura, paragraph. 33

9 Case C-48/98 Söhl & Söhlke, paragraphs 52 and 58

(39) It is necessary to check whether as of 21 May 2010 the applicant's situation should be considered exceptional in comparison with other operators engaged in the same business.

(40) It is settled case-law that reliance on the validity of certificates of origin which proves to be invalid does not, of itself, constitute a special situation[10].

(41) In the 2005 Commission Communication on rules of origin[11] it has been established that the importer bears the responsibility with regard to the particulars of its customs declaration and the possible customs debt incurred. The Communication underlines that the wrong statement on the originating status of products for which preferences are claimed would be part of the commercial risk borne by the importer. In the same vein, the Court[12] has stated repeatedly that a prudent trader must accept the risks linked to the use of tariff preferences as normal trade risks.

(42) The Commission has not identified any factors likely to constitute a special situation.

(43) The first condition referred to in Article 239 of Regulation (EEC) No 2913/92 is therefore not fulfilled.

(44) In principle, as no special situation could be established it would not be necessary to examine if the other conditions under Article 239 have been complied with. Nevertheless, the Commission has also assessed the second condition of this provision.

(45) On the basis of the aforementioned assessment of Article 220 (2)(b), and taking into account the applicant's long professional experience and the care to be expected from a trader operating in several continents and used to applying different rules on origin, the Commission concludes that the applicant did not act with diligence and therefore the second condition referred to in Article 239 of Regulation (EC) No 2913/92 has not been met.

(46) Where special circumstances warrant waiver of entry in the accounts, Article 875 of Regulation (EEC) No 2454/93 authorizes the Commission to determine the conditions under which the Member States may waive the entry in the accounts in situations involving comparable issues of fact and law.

(47) Cases comparable in fact and law to this one are requests lodged within the legal time limits in respect of tuna products declared as originating in Ecuador covered by certificates of origin Form A issued by the Ecuadorian competent authorities in the period and for the companies covered by the OLAF investigation in question (2008-2010). The declarations for release for free circulation must have been submitted before the 21st of May 2010, date of publication in the Official Journal of the European Union of the notice to importers (2010/C 132/05).

(48) It corresponds to the national customs authorities to control that those import operations were carried out in circumstances strictly comparable in fact and law to those which gave rise to this case. The operators concerned must have acted in good

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10 Case T-205/99 Hyper, paragraph. 102

11 Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on rules of origin in preferential trade arrangements of 16.03.2005, Commission (2005) 100 final

12 Case C-438/11 Lagura, paragraph 40

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 in the sum of XXXXX EUR for imports made between 1 January 2009 and 20 May 2010 which are the subject of the request from the Kingdom of Spain on 18 April 2013 shall be remitted.

Article 2

The import duties in the sum of EUR XXXXX which are the subject of the request from the Kingdom of Spain on 18 April 2013 for imports made between 21 May 2010 and 24 September 2010 shall not be remitted.

Article 3

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 15.5.2014

For the Commission
Algirdas ŠEMETA
Member of the Commission