



Reports of Cases

Case T-324/10

Firma Léon Van Parys NV
v
European Commission

(Customs union — Imports of bananas from Ecuador — Post-clearance recovery of import duties — Request for remission of import duties — Article 220(2)(b) and Article 239 of Regulation (EEC) No 2913/92 — Error by the customs authorities — Obvious negligence on the part of the interested party)

Summary — Judgment of the General Court (Second Chamber), 19 March 2013

1. *Own resources of the European Union — Post-clearance recovery of import or export duties — Conditions for non-entry of import duties in the accounts set out in Article 220(2)(b) of Regulation No 2913/92*
(Council Regulation No 2913/92, Art. 220(2)(b))
2. *Own resources of the European Union — Post-clearance recovery of import or export duties — Conditions for non-entry of import duties in the accounts set out in Article 220(2)(b) of Regulation No 2913/92 — Error by the competent authorities themselves — Requirement of active conduct*
(Council Regulation No 2913/92, Art. 220(2)(b))
3. *Own resources of the European Union — Post-clearance recovery of import or export duties — Conditions for non-entry of import duties in the accounts set out in Article 220(2)(b) of Regulation No 2913/92*
(Council Regulation No 2913/92, Arts 4, paras 3, 13 and 14, and 220(2)(b))
4. *Own resources of the European Union — Post-clearance recovery of import or export duties — Commission hearing an application for waiver of post-clearance recovery — Notification of objections to the applicant — Access to documents — Scope*
(Council Regulation No 2913/92)
5. *Own resources of the European Union — Repayment or remission of import or export duties — Circumstances not implying 'either deception or obvious negligence' of the person concerned — Concept of obvious negligence — Restrictive interpretation — Obtaining of import licences through an intermediary without carrying out prior checks on their holders — Not included*
(Council Regulation No 2913/92, Art. 239; Commission Regulation No 2454/93, Art. 905)

6. *Own resources of the European Union — Repayment or remission of import or export duties — Fairness clause established by Articles 239 of the Community Customs Code and Article 905 of its implementing regulation No 2454/93 — Discretion of the Commission — Procedures for exercising*

(Council Regulation No 2913/92, Art. 239)

7. *Own resources of the European Union — Repayment or remission of import or export duties — Circumstances not implying ‘either deception or obvious negligence’ of the person concerned — Burden of proof*

(Council Regulation No 2913/92, Art. 239(1))

1. Under Article 220(2)(b) of Regulation No 2913/92, establishing the Community Customs Code, the waiver of post-clearance recovery by the national authorities is subject to three cumulative conditions. Provided those three conditions are fulfilled, the person liable is entitled to a waiver of post-clearance recovery.

First, non-collection of the duties must have been due to an error made by the competent authorities themselves. Secondly, the error they made must be such that the person liable, acting in good faith, could not reasonably have been able to detect it in spite of the professional experience and exercise of due care required of him. Finally, the person liable must have complied with all the provisions laid down by the legislation in force so far as his customs declaration is concerned.

Whether those conditions are satisfied must be assessed in the light of the purpose of Article 220(2)(b) of that regulation, which is to protect the legitimate expectation of the person liable that all the information and criteria on which the decision whether or not to proceed with recovery of customs duties is based are correct.

(see paras 34-36)

2. Only active conduct by the authorities confers entitlement to the waiver of post-clearance recovery of import or export duties under Article 220(2)(b) of Regulation No 2913/92, establishing the Community Customs Code.

(see para. 53)

3. It is apparent from Article 4(3) of that regulation that ‘customs authorities’ means the authorities responsible inter alia for applying customs rules. Accordingly, it follows that this includes the administrative authorities of the Member States and non-Member States which are responsible for ensuring the supervision and control of the customs rules, in accordance with the definition of those tasks provided by Article 4(13) and (14) of Regulation No 2913/92. In that respect, the Commission cannot be regarded as a customs authority for the purposes of that regulation. Accordingly, any errors made by it, in that context, are not capable of conferring entitlement to the waiver of post-clearance recovery under Article 220(2)(b) of the regulation.

(see para. 60)

4. Under the principle of observance of the rights of the defence, it cannot be for the Commission alone to decide which documents are useful to the person concerned for the purposes of the waiver of post-clearance recovery. The administrative file may include documents favourable to the waiver of recovery which the person concerned could use in support of his request even if the Commission has not used them. The applicant must therefore be able to have access to all the non-confidential documents on file including those which have not been used as the basis for the Commission’s objections.

However, where the institution concerned asserts that a particular document to which access has been sought does not exist, there is a presumption that it does not exist. That is, however, a simple presumption which the applicant may rebut in any way by relevant and consistent evidence.

(see paras 70, 72)

5. Repayment of import duties under Article 905 of Regulation No 2454/93 laying down provisions for the implementation of Regulation No 2913/92 establishing the Community Customs Code, is subject to two cumulative conditions, namely, first, the existence of a special situation and, secondly, the absence of deception or obvious negligence on the part of the economic operator. Accordingly, repayment of duties must be refused if either of those conditions is not met.

In that regard, in order to assess whether there is obvious negligence, account must be taken in particular of the complexity of the provisions non-compliance with which resulted in the customs debt being incurred, and the professional experience of, and care taken by, the trader. Moreover, since the repayment or remission of import duties, which may be made only under certain conditions and in cases specifically provided for, constitutes an exception to the normal import and export procedure, the provisions which provide for such repayment or such remission are to be interpreted strictly. In particular, since a lack of obvious negligence is an essential condition of being able to claim repayment or remission of import duties, it follows that that term must be interpreted in such a way that the number of cases of repayment or remission remains limited.

Consequently, it cannot be accepted as a general rule that an economic operator who imports goods into the European Union and who, with that objective, resorts to the use of an intermediary to obtain use of the import licences, is regarded as lacking in prudence or diligence if he does not carry out checks of the holders of the licences. Recourse to the service of such an intermediary comes within the practical methods used to carry out the business of imports within the discretion of the importer and is aimed at facilitating that business, since the importer may consider that, in a particular economic context, the intermediary is a person who is better placed than he is to find newcomer operators who have obtained licences and who wish to transfer use thereof, in particular when the importer requires a large number of licences in a quite short period. In the absence of any other detailed information capable of giving rise to doubts on the part of the operator as to the authenticity of the import licences used, it cannot be considered that contact with the holders of the import licences is indispensable to enable releasing the imported goods into free circulation.

(see paras 77, 79, 80, 102)

6. Although the Commission has some discretion as regards the application of Article 239 of Regulation No 2913/92, establishing the Community Customs Code, it cannot disregard its duty to balance, on the one hand, the European Union interest in full compliance with the provisions of customs legislation, and, on the other hand, the interest of an importer acting in good faith not to suffer harm which goes beyond the normal commercial risk.

(see para. 81)

7. Where the customs authorities have concluded that it could not be established that there was deception or obvious negligence on the economic operator's part, it is for the Commission, when it intends to depart from the position taken by the national authorities, to prove, on the basis of relevant facts, that there was in this case obvious negligence on the part of that operator.

(see para. 86)