[2018] UKFTT 538 (TC)

TC06722

Appeal numbers: LON/2009/7020
TC/2010/06962
LON/2009/7026
TC/2010/06963
LON/2009/7028
TC/2010/06965

CUSTOMS DUTY – Importation of garlic – shipped to United Kingdom from Sri Lanka – Whether garlic originated in China or India – Whether Article 220 criteria met for waiver of any customs debt – Whether entitlement for repayment or remission of duty – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) CYPROVEG LIMITED

(2) PUREGOLD ENTERPRISES LIMITED

(3) S&S FRUIT AND VEGETABLES LIMITED **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JOHN BROOKS
SHEMEEM AKHTAR

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1 on 18 – 20 July 2018

Nabil Mohammed Elnagy, director of Puregold Enterprises Limited and S&S Fruit and Vegetables Limited, for the Appellants

Keiron Beal QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This case concerns the origin of garlic and whether, for the purposes of the Community Customs Code, it is Chinese, as HM Revenue and Customs ("HMRC") contend, or, as the appellants' argue, Indian. The issue has arisen because, under the system of import licences, certificates of origin and management of tariff quotas for garlic imported into the European Union ("EU") from third countries, it has been subject to a quota, with any imports outside that quota being liable to a payment of €1,200 per tonne in addition to customs duty of 9.6%.

2. With approximately 77% of the garlic produced worldwide being of Chinese origin, the European Commission found that, to circumvent the quota system, large quantities of garlic originating from China was being brought into the EU via third countries. On 12 August 2005, it published a *Notice to Importers: Imports of Garlic into the Community* in the Official Journal (which was published in the United Kingdom in a Joint Customs Consultative Committee information in September 2005), advising importers to check with their suppliers that the correct origin was being declared (2005/C197/05). This stated:

> "The European Commission informs Community operators that there is reasonable doubt as to the origin of garlic of tariff heading CN 0703 20 00, which is released for free circulation into the Community in order to benefit:
>
> - either from the GATT tariff quota open by Council Decision 2001/404/EC (1),
>
> - or from preferential tariff measures, contained in agreements which the Community has concluded with or arrangements it has adopted unilaterally in respect of certain countries or group of countries.
>
> From various investigations, it results that important quantities of garlic of Chinese origin are declared with another origin and then benefit from the tariff measures mentioned above, beyond the annual quota of 13,200 tonnes allocated to China.
>
> Community operators declaring and/or presenting documentary evidence of origin for garlic of tariff heading CN 0703 20 00 are therefore advised to take all the necessary precautions, since the release of the goods in question for free circulation may give rise to a customs debt and lead to fraud against the Community's financial interests."

3. HMRC say that the significant quantities of garlic imported into the UK between April 20065 and May 2007 by the appellants, Cyproveg Limited ("Cyproveg"), Puregold Enterprises Limited ("Puregold") and S&S Fruit and Vegetables Limited ("S&S"), although declared by each of the appellants to have originated from India was, in fact, of Chinese origin, in excess of the quota and was shipped to the UK from China via Sri Lanka.

4. Cyproveg imported four consignments of garlic between 16 April 2005 and 30 May 2006, one of which was after 12 August 2005. It declared these to have originated in India. On 11 August 2008 HMRC issued Cyproveg with a C18 post clearance demand notice ("C18") in the sum of £91,357.23 on the basis that evidence from the European Commission indicated that the consignments were not of Indian origin. The C18 was confirmed on 23 December 2008 following a review. By letter of 6 April 2009 Cyproveg submitted a claim for repayment/remission of the customs duties it had paid for the release of the garlic. This claim was rejected by HMRC on 5 August 2009. HMRC's decision was upheld on 4 June 2010 following a review notwithstanding the provision of further grounds by Cyproveg on 31 March 2010.

5. Puregold imported 21 consignments of garlic, which was declared to be of Indian origin, between 16 April 2005 and 4 May 2007. All but one of these consignments occurred on or after 12 August 2005. Although HMRC had issued a C18 to Puregold on 6 August 2008 on the grounds that the garlic was not of Indian origin, because duty had been taken on deposit in relation to one of the entries to which it related, a revised C18 in the sum of £464,289.58, which took account of the deposit, was issued on 22 September 2008. The revised C18 was upheld on 23 December 2008 following a review. A claim for repayment/remission of customs duty made by Puregold on 26 March was rejected by HMRC on 5 August 2009 and this was confirmed on 4 June 2010 following a review in which further grounds in support of the claim by Puregold had been considered.

6. Between 28 May 2005 and 2 May 2007 S&S imported 10 consignments of garlic which it declared to have originated from India. Eight of these consignments took place after 12 August 2005. On 15 September 2008 HMRC issue S&S with a revised C18 in the sum of £289,352.61 which took into account duty had been taken on deposit. The revised C18 was upheld on 23 December 2008 following a review. A claim for repayment/remission by S&S made on 26 March 2009 was rejected by HMRC on 5 August 2009 and the decision upheld, following a review and the provision of further grounds by S&S on 4 June 2010.

7. Each of the appellants appealed to the Tribunal against the C18 issued to it on 22 January 2009 and against the rejection of its respective repayment/remission claim on 27 August 2010.

8. In essence, the grounds of appeal on which all of the appellants rely are:

(1) The garlic was correctly declared as being of Indian origin;

(2) Customs duty should be waived as the conditions under Article 220(2)(b) of the Community Customs Code have been satisfied; and

(3) Customs duties should be remitted under Article 239 of the Community Customs Code

9. HMRC were represented by Mr Keiron Beal QC and the appellants by Mr Nabil Mohamed Elnagy the director and shareholder of Puregold and S&S who, it is understood, either operates or controls Cyproveg. However, if that is not the case, as we were satisfied that reasonable steps have been taken to notify Cyproveg of the

hearing and it was in the interests of justice to do so, we considered it appropriate to proceed with the hearing in accordance with rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 even if it was not represented.

Evidence and Facts

10. We heard from Mr Elnagy, Mr Guy Jennes head of Operations of the European Anti-Fraud Office ("OLAF") a representative to the OLAF mission to Sri Lanka in May 2008, Mr Stephen Palmer the Review Officer in HMRC's Customs Reviews and Appeals Team who undertook the Departmental reviews confirming the C18s in these appeals and Mr Robert Redmond an Analytical Chemist for US Customs and Border Protection, US Department of Homeland Security in its Savannah Laboratory who gave his evidence from Georgia, USA, via video link.

11. In addition to the oral evidence we were provided with nine bundles of documentary evidence which included, *inter alia*, correspondence between the parties, correspondence between Mr Elnagy and the appellants' supplier, the C18s giving rise to the appeals, pleadings, an OLAF report on its mission to Sri Lanka, copies of shipping documents, bills of lading, phytosanitary certificates, certificates of origin, an "Event Chart" complied by OLAF and importer's invoices.

Background

12. Mr Elnagy has been involved in the fruit and vegetable business since 1967 and has more recently concentrated his efforts on the import of ginger and garlic. Originally garlic was obtained from Italy, Spain and France in the summer and Argentina, Mexico and Chile in winter. However, because of the competitiveness of China over Spain, France and Italy Mr Elnagy looked to China as a source of garlic for his companies which were able to obtain supplies of Chinese garlic through the Devi Trading Company ("Devi").

13. Devi was described by Mr Elnagy as "a very large company that supplies all kinds of products" with its main office in Hong Kong and other offices in Sri Lanka, India and the USA. Mr Elnagy said that he has had a "very longstanding relationship with Devi enduring for more than 15 years" dealing mainly with a Mr Kumar or a Miss Reena and also with a Mr Venga in its Sri Lanka office and that Mr Kumar was the "main person" he dealt with. Although he had visited its offices in Hong Kong Mr Elnagy was unable, when cross-examined, to remember its location or many other details about the premises.

14. It was around 2005 that Mr Elnagy became aware of the availability of Indian garlic, which he described as "very high quality" and, in the absence of being able to source garlic from India himself, asked Mr Kumar of Devi if he knew of an Indian supplier. He was told that Devi could, in addition to supplying Chinese garlic, supply garlic from India. Mr Elnagy understood that Devi was not a producer of garlic itself but acted as a broker, sourcing garlic from exporters in India who were supplied by local farmers and producers.

15. Although Mr Elnagy was aware that garlic was subject to a quota he did not seek a guarantee from Devi as to the origin of the garlic to be imported but accepted what he was told.

16. Describing the process by which the appellants' acquired the garlic, Mr Elnagy said that once advised by Devi that garlic, either Chinese or Indian, was available a price was agreed and orders placed. Once an order had been placed contracts were exchanged by email or fax and the goods shipped to Felixstowe with Chinese garlic usually being shipped directly from Quingdao Port in China and the Indian garlic transhipped via Colombo, Sri Lanka. Devi would then send a shipping advice and original documents via courier. Such documents always included:

(1) Set of invoices;

(2) Three original bills of lading and two copies;

(3) Original and copy phytosanitary certificates; and

(4) Original and copy certificates of origin.

17. The original documents are required and retained by HMRC for Customs clearance which is administered on behalf of each of the appellants by their clearing agents, B&H Shipping Limited ("B&H") based at Felixstowe. B&H then issues its invoice which include disbursements such as terminal charges, transport, demurrage and Customs examinations and the goods are released and sent to the relevant company's storage facilities in Wembley.

18. Mr Elnagy produced, by way of example, copies of these documents.

19. The invoices he produced were issued by Devi Sri Lanka to Elnagy Trading Company Limited, First Chartered Limited and TMS Fruit and Vegetables Limited in respect of fresh garlic shipped from Colombo to Felixstowe with the price stated in US dollars. On each of the invoices, which other than the pre-printed company name, address and contact details (eg telephone, fax numbers and email address etc) and the words "Invoice" and "Description of Goods") are written in manuscript, is the following certification signed by a "partner" on behalf of Devi that:

> "WE HERE BY CERTIFY THAT THE ABOVE MERCHANDISE ARE OF INDIAN ORIGIN AND ABOVE INVOICE IS TRUE AND CORRECT IN ALL RESPECTS TO THE BEST OF OUR KNOWLEDGE"

20. The bills of lading confirm the garlic was shipped from Colombo to Felixstowe as stated in the invoices.

21. The phytosanitary certificates, all of which were issued by the Sri Lanka Department of Agriculture certify that the plant or plant products, ie the garlic, was "imported into Sri Lanka from India" and that they are:

> "… considered to conform with the current phytosanitary regulations of the importing country, and that during storage in Sri Lanka the

> consignment has not been subjected to the risk of infestation or infection."

22. To obtain a phytosanitary certificate it is necessary, as confirmed to OLAF by the Officer in charge of the Sri Lanka Agriculture Service Plant Quarantine Unit, Mr Noel J Liyanage (and recorded in the report of the Findings and Conclusions of the OLAF mission to Sri Lanka, see below), for the exporter to present an application in which the origin of the cargo which he wishes to tranship is indicated. The exporter has to also provide an original phytosanitary certificate issued by the competent authorities in the country of origin. Once inspected, the original phytosanitary certificate is returned to the exporter and a copy marked with "original seen" is retained by the Plant Quarantine Service. The cargo is then inspected and if satisfied the authorised officer issues a phytosanitary certificate for export stating the country of origin (eg India) and indicating the reference number of the initial phytosanitary certificate.

23. The certificates of origin, stating that the country of origin of the goods was India (which were also signed as being "true and correct" by A Vengadasalam, a partner of Devi) were issued by the Secretary General of the National Chamber of Commerce of Sri Lanka (Ceylon). The certification by the Secretary General of the Sri Lankan Chamber of Commerce states:

> "We hereby certify that evidence has been produced to satisfy us that the goods described specified above [the garlic] are the manufacture or produce of the country [India] as shown above. This certificate is therefore issued and certified to the best of our knowledge and belief to be correct and without any liability on our part."

24. As explained to OLAF by the Manager Administration of the National Chamber of Commerce of Sri Lanka, Mr Tissa Ruberu (and recorded in the OLAF mission report), a certificate of origin is issued on the presentation by the exporter, of the commercial invoices, packing list, bill of lading and certificate of origin from the Indian Chamber of Commerce. Mr Ruberu confirmed to OLAF that as Devi, "is a longstanding member of the National Chamber of Commerce of Sri Lanka no further documents were required from them".

25. Although the National Chamber of Commerce of Sri Lanka, in a letter of 19 March 2008 to the Sri Lankan Deputy Director of Customs, Central Intelligence Unit, confirmed that the certificates of origin were "genuine", the documents presented to it, which were relied on to issue the Certificates of Origin, were forged. This is clear from a letter, dated 20 September 2007 to OLAF from the Sri Lankan Deputy Director of Customs, Central Intelligence Unit, the relevant parts of which state:

> "The phytosanitary certificates referred to Sri Lankan Customs were verified with the relevant Authorities and it was confirmed that [Devi] referred to above has obtained these certificates by submitting forged documents. A set of such forged documents submitted to Sri Lankan Authorities, is annexed herewith, marked as "J".
>
> It was revealed that forged Chamber of Commerce certificate purporting to have been issued by India were submitted to the

> Chamber of Commerce in Sri Lanka in order to obtain he Chamber of Commerce Certificate to verify the country of origin that had been submitted to the EU. A set of such documents submitted to Sri Lankan Authorities to obtain these certificates are annexed herewith, marked as "K".
>
> This matter was taken up with the Directorate of Revenue Intelligence of Chennai India and they clearly informed that the Indian Exporters had not sent a single garlic consignment to [Devi] and/or M/s UN Enterprises for them to re-route same to EU. Therefore, issuing of Phytosanitary Certificates and the Country of Origin Certificates by respective Indian Authorities do not arise."

26. Also, as stated in the OLAF mission report:

> "The Sri Lankan Customs authorities informed OLAF that the Directorate of Revenue Intelligence, India, has confirmed that the Indian phytosanitary certificates and the Indian country of origin certificates submitted to the Sri Lankan authorities were forged. The Indian authorities have confirmed to the Sri Lankan Customs authorities that no garlic shipments were made to Sri Lanka under the MCC (T/S) scheme [the Multi Country Consolidated cargo scheme]"

27. In addition to the documents described above, Mr Elnagy produced various emails between himself and Devi to illustrate how he conducted business with Devi.

28. For example, on 2 August 2006 Mr Elnagy sent an email to "Miss Reena" of Devi:

> "Please find below our new garlic order
>
> From CHINA to UK
>
> two containers PREPAK as follows
>
> one container 2600 cartons 20 x 450 gm
>
> one container 1300 ctn 10 x 900 gm
>
> 1300 ctn 40 x 225 gm
>
> all 6cm up in the name of
>
> TMS FRUIT & VEGETABLES LTD
>
> same address as ELNAGY TRADING and also you can use the same cartons of ELNAGY as you did last season.
>
> From COLOMBO to UK (INDIAN ORIGIN) Taj Mahal cartons as you did last season
>
> 7 containers loose pack 10 kg net
>
> 3 containers loose pack 9 kg net
>
> 2 containers prepak (5200 ctn) 20 c 450 gm
>
> 1 container prepak 1300 ctn 10 x 900 gm

1300 ctn 40 x 225 gm

all 6cm up in the name of FIRST CHARTERED LIMITED using the same cartons of ELNAGY as you did last season.

I hope the above is clear however if it is not very clear please contact me.

Best regards

nabil"

29. The email in response from Devi on 8 August 2008 stated:

"Dear Mr Nabil,

Reference your email order dated 02/08/2006 & 08/08/2006 for the confirmation of the order.

I wish to inform you that it is very difficult right now to cover the cargo due to there is very less cargo anyhow "Raj" is now in the fields and arranging for the cargo after the arrangements are made we shall revert back to you on the prices accordingly.

Thanks and best regards,

Reena Khera"

30. An email from Devi, sent in response to an email order on 26 August 2006 for garlic from "Colombo to UK (Indian origin)", states:

"Dear Mr Nabil,

Reference to your confirmation of the following order.

We would like to check if you could please accept the shipment from China instead of Colombo, please let us know your decision for the same.

Thanks and best regards,

Reena Khera."

31. Mr Elnagy responded to "Miss Reena" by email later that same day as follows:

"Please note that we have import licence for CHINA and import licence for INDIA, we have to use each licence from the country of origin.

So when we ask for INDIAN origing (sic) we cannot replace it with CHINA origin, so we cannot accept the shipment from CHINA instead of COLOMBO.

So if there is no garlic from Colombo (INDIAN ORIGIN) please cancel our order."

32. On 24 June 2009, at his request, Mr Elnagy was sent an email from the Colombo office of Devi which, having referred to particular invoices confirmed that:

"… garlic that was shipped by Devi Trading from Colombo to the Elnagy group of companies in the UK were of Indian origin, the garlic

> shipped was partially purchased from India from different exporters and we already sent you some of the names such SWASTIK IMPEX, of GUJARAT – INDIA and STCL LTD of BANGLORE – INDIA, and some of the garlic was covered in Colombo itself which is of Indian origin to enable us to complete the shipments as per the contract sign with your companies. If there is any more information you need please feel free to contact us."

Inspection, Samples and Analysis

33. Some of the consignments imported into the UK by the appellants were subject to inspection by HMRC. As an example, Mr Elnagy referred us to a CAP Import Inspection Report of such an inspection which took place on 10 June 2005 at Felixstowe of garlic imported by S&S. No sample was taken at that inspection for which the Report noted:

> "12 cartons were randomly selected from all parts of the load. Each carton was marked *Taj Mahal, Finest Garlic, Produce of India 10kg El-Nagy Trading Co Felixstowe UK*.
>
> The 12 cartons were opened and found to contain good quality bulbs of garlic each showing a trimmed stem of about 2″. Each bulb was about 50mm diameter.
>
> A copy of Form C126 was attached to each open package.
>
> As a result of the examination, I am satisfied that there was no other evidence to indicate that the country of origin of the garlic was other than India, as entered, I am also satisfied that the entered quantity is correct."

34. Similarly, a CAP Import Inspection Report of an inspection undertaken on 23 September 2009, again on garlic imported by S&S which as in the previous example a sample was not taken, noted:

> "Packages also bear coloured photographs of Taj Mahal – a building whose image is associated with the state of India.
>
> No evidence to doubt entered country of origin."

35. However, as we have previously observed (at paragraph 2, above), there was concern that Chinese garlic was being imported into the EU via third countries. Therefore, at the request of OLAF, HMRC took samples from the consignments of garlic imported by the appellants. Having taken the samples the goods were released into free circulation on payment of the relevant duties, the total sum of which was according to Mr Elnagy £291,888.21.

36. The appellants, either through themselves or their shipping agents B&H, were clearly aware that samples were being taken by HMRC. For example, a CAP Import Inspection Report dated 21 April 2006, also in respect of garlic imported by S&S in which a sample was taken, states (as do all such reports including those cited above to which Mr Elnagy referred):

> "It is essential that the importer/representative is given the opportunity to attend this inspection. Confirm the method used to provide such an opportunity (IES/System message or phone – if by phone, detail phone number, contact name and position in company) and it trader/representative will/will not attend."

37. In that particular example, as in the case of those to which Mr Elnagy referred, it is recorded that neither the importer or representative wished to attend the inspection. This is made clear by the fax message send by B&H to HMRC which states:

> "As the representative of the importer, we can confirm the importer does not wish to be present at the time of the examination of the above containers.
>
> The importer does not require duplicate samples to be returned after examination, but does require the results of analysis to determine the Origin of product.
>
> S&S Fruit and Vegetables does not require their own duplicate samples."

38. Similar fax messages were sent to HMRC by B&H, on behalf of Puregold and Cyproveg, confirming that a representative of the company was not required to attend an inspection.

39. Of the 53 consignments of garlic imported into the UK and declared by the appellants and other companies operated and/or controlled by Mr Elnagy to have been of Indian origin, 37 consignments were examined by HMRC and samples taken from 23 of these to be analysed by the Savannah Laboratory of the US Customs and Border Protection, Homeland Security. Mr Robert Redmond (who gave evidence before us) explained the method of testing country of origin of garlic as follows:

> "A sample is dried and homogenised. A portion of the sample is weighed and digested with concentrated nitric acid. The resulting solution is analysed using a high resolution inductively coupled plasma mass spectrometer (ICP-MS). A trace metal profile of the sample is produced, and this result is compared to a database containing trace metal profiles from the claimed country of origin and the suspected country of origin. This comparison is conducted along multivariate discriminant analysis. A percent probability of membership in either the claimed or suspected country is generated and reported for the sample in question."

40. Of the samples tested, nine were confirmed as having a 99% probability of being of Chinese origin, four had a 98% probability of being of Chinese origin, two had a 97% probability of being of Chinese origin, one had a 94% probability of being of Chinese origin. Mr Redmond confirmed that any probability under 90% was regarded as inconclusive. However, of the remaining samples two had been between 88% and 89% probability of being of Chinese origin, once was inconclusive, one was lost in transit and no results were returned for the remaining three.

OLAF Mission

41. Between 26 and 28 May 2008 Mr Guy Jennes (who gave evidence before us) and Mr Finn Christiennsen of OLAF together with Mr Adrian Wilson of HMRC, conducted an OLAF mission to Sri Lanka visiting the Sri Lanka Customs Headquarters and their Central Intelligence Department, the Sri Lanka Agriculture Services Plant Quarantine Unit and the National Chamber of Commerce of Sri Lanka. All such visits were conducted under the authority of a representative of the Central Intelligence Department of Sri Lanka Customs.

42. As the mission report states:

> "The mission was organised following the transmission in April 2007 by OLAF of a formal request for assistance to the Sri Lanka authorities channelled through their Embassy in Brussels … The objective of the mission was to establish all particulars of a certain number of consignments of fresh garlic that had been imported into the European Union between 2005 and 2007 with India being the declared country of origin. According to the documents presented at Customs clearance in the UK, those consignments had been transhipped via the port of Colombo. The documents included certificates of origin issued by the National Chamber of Commerce of Sri Lanka indicating India as the country of origin."

43. Under the heading "Findings" the mission report states:

> "By reply dated 20 September 2007, the Sri Lankan Customs authorities provided OLAF with the interim results of their preliminary investigation that was launched upon OLAF's request referred to above.
>
> In the meantime, the Sri Lankan Customs authorities identified the particulars of all the transhipments via Colombo of the fresh garlic subject to the OLAF request.
>
> According to the investigations carried out by them, it was established that all shipments, which arrived in the port of Colombo, were unloaded from vessels coming direct from China.
>
> The Sri Lankan importers concerned applied for the application of the Multi Country Consolidated cargo scheme (MCC), and therefore these consignments were imported from China into Sri Lanka under the MCC by the companies Devi Trading [ie Devi] and UN Enterprises, Colombo. These consignments were transferred to a bonded warehouse (ACE Distripark (Pvt) Ltd), to re-work under MCC (the so-called re-working was solely to move the goods from one container to another).
>
> Copies of all relevant documents collected by the Sri Lankan Customs authorities evidencing this transhipment under Customs control (application of the Multi Country Consolidated cargo scheme) are attached in Annex 1 to this report. The documents provide for every consignment the link between the incoming container (ex China) and the outgoing container after transhipments under Customs clearance in Colombo."

44. The following documents were provided to OLAF by the Sri Lankan authorities (and were also provided to the Tribunal):

(1) Incoming cargo manifest (ex China);

(2) Incoming bills of lading (ex China);

(3) Application for the transfer of transhipment containers in the bonded stores of ACE Distripark (Pvt) Ltd;

(4) Release note for the Containerised cargo issued by Sri Lanka Customs;

(5) Delivery order by the shipping agent to Devi or UN Enterprises, Colombo;

(6) Request by Devi or UN Enterprises, Colombo to apply for MCC operation (Quingdao – Colombo – Felixstowe or Helsingborg);

(7) Application for re-working (outward);

(8) Relevant pages from the custom's bond book held by ACE Distripark (Pvt) Ltd, providing the link between the inward and outward procedure. These pages provide for every transhipment the following details:

INWARD: the date of the incoming container, its number, the vessel, the reference number of the application for transfer of transhipment containers to the bonded stores of ACE Distripark (Pvt) Ltd (Inward), the nature of the goods, the number of cartons,

OUTWARD: the date of the outgoing container its number, the vessel, the reference number of the re-working (outward), the nature of the goods, the number of cartons.

(9) Outgoing cargo manifest.

45. The report, which notes that 24 shipments of garlic were transhipped via Sri Lanka and that 88 containers were consigned to the UK and once container to Sweden concludes:

> "From the information and documentation collected by the Sri Lankan Customs authorities in the course of their investigation, it can be concluded that all consignments of fresh garlic that were transhipped via Colombo and declared at importation in the United Kingdom and Sweden as originating in India were in fact originating in China."

46. An "event chart" attached to the mission report (at Annex 6) describes the key steps in this process as follows:

(1) Shipping of garlic containers from China;

(2) Unloading at Colombo Port;

(3) Processing Inward Documents at Customs Transhipment warehouse for MCC operation;

(4) Transfer the container to ACE Distripark for re-working;

(5) Re-working – destuffing (ie emptying the garlic from the container) and reloading it into a fresh container;

(6) Submitting forged Indian phytosanitary certificate and obtaining a certificate from Plant Quarantine Station;

(7) Submitting forged Indian bills of lading, invoices, and Indian certificate of origin and obtaining certificate of origin from Sri Lanka Chamber of Commerce;

(8) Freight booking for Columbo to UK;

(9) Processing outward documents;

(10) Transfer the container to Colombo Port from ACE container Terminal;

(11) Draft bill of lading to outward shipping agent to prepare bill of lading ignoring pre-carriage details;

(12) Effecting shipment from Colombo to UK; and

(13) Phytosanitary certificate and Chamber of Commerce certificate of origin issued by Sri Lankan authorities sent to consignee in UK (ie the appellants) for presentation to HMRC.

47. Trade statistics provided to OLAF by the Indian Government's Ministry of Commerce and Industry for the relevant exports of fresh Indian garlic showed that only 8.44 tons of garlic were exported to the UK from India in 2004-2005 and 20.74 tons in 2005-2006. The equivalent exports of garlic from India to Sri Lanka was 12 tons 2004-05 and 116.50 tons in 2006-07 which are significantly below the total quantities shipped to the appellants in the relevant consignments

48. A letter, dated 2 July 2008, from OLAF to HMRC enclosing the report of the mission together with supporting documentation states:

> "From the information and documents collected during the course of the mission, it can be concluded that all consignments of fresh garlic that were transhipped via Colombo and declared at importation in the United Kingdom was originating from India were in fact originating in China."

49. The letter continued by asking HMRC to take:

> "… the appropriate measures to ensure full protection of the financial interests of the European Community in this matter. In particular, it is requested that recovery actions be launched in relation to the garlic consignments referred to above and that any further actions deemed appropriate by the UK authorities in this context be undertaken."

50. It was following receipt of this letter that HMRC issued the C18s giving rise to these appeals.

Law

51. As the applicable legal provisions and their construction was not disputed we have adopted the following summary, taken almost in its entirety from Mr Beal's skeleton argument.

The Community Customs Code

52. The Community Customs Code ("CCC") was established under Council Regulation (EEC) No 2913/92 of 12 October 1992 and provides a European Union wide system of rules governing, amongst other matters, the importation of goods from third countries. Article 20 CCC which establishes a Custom Tariff for the application of customs duties on goods within a given nomenclature provides:

> The tariff classification of goods shall be the determination, according to the rules in force, of –
>
> (a) the subheading of the combined nomenclature or the subheading of any other nomenclature referred to in paragraph 3(b);
>
> (b) the subheading of any other nomenclature which is wholly or partly based on the combined nomenclature or which adds any subdivisions to it, and which is established by Community provisions governing specific fields with a view to the application of measures other than tariff measures relating to trade in goods,
>
> under which the aforesaid goods are to be classified.

53. Under Article 40 CCC, as in force at the material time, a person bringing goods into the Community was required to present them to the national customs authority of the Member State to which they were brought. Irrespective of whether the goods were inspected Article 43 CCC requires that person to make a summary declaration in respect of those imports in accordance with Article 44 CCC.

54. Article 59 and subsequent Articles make provision for the placement of goods under a Customs procedure which, under Article 4(16) CCC, includes entry of the goods into free circulation.

55. Articles 73 and 74 CCC provide that the goods shall be released once the customs declaration has been accepted and any customs debt paid. Once the goods have been released for free circulation, they are accorded the status of Community goods in accordance with Article 79 CCC. If, after release of the goods, it is discovered that the clearance was given on incorrect or incomplete information, Article 78(3) CCC obliges national customs authorities to take steps to regularise the position.

56. Article 201 CCC provides that a customs debt on importation shall be incurred through the "release for free circulation of goods liable to import duties" with "import duties" being defined in Article 4(10) as:

> … customs duties and charges having an effect equivalent to customs duties payable on the importation of goods."

57. The customs debt is incurred at the time of acceptance of the customs declaration. As Article 201(3) states:

> "The debtor shall be the declarant. In the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor."

58. Articles 217 to 221 CCC impose obligations on Member States to ensure that customs debts are accounted for and paid within certain time periods and that the amount of the customs debt is communicated to the debtor.

59. Article 220 CCC provides, with limited exceptions, that where a customs debt has been entered in the accounts at a lower level than the amount legally owed, the amount of the duty which remains to be recovered must also be entered in the accounts.

60. Article 221(3) CCC provides for a three year time limit for communication of a customs debt to a debtor.

61. Under Article 236 CCC duties are to be repaid if they were not legally due or where the amount has been entered in the accounts contrary to Article 220(2) CCC which provides:

> Except in the cases referred to in the second and third subparagraphs of Article 217(1), subsequent entry in the accounts shall not occur where:
>
> (a) . . . ;
>
> (b) the amount of duty legally owed was not 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.
>
> Where the preferential status of the goods is established on the basis of a system of administrative cooperation involving the authorities of a third country, the issue of a certificate by those authorities should it prove to be incorrect, shall constitute an error which could not reasonably have been detected within the meaning of the first subparagraph.
>
> The issue of an incorrect certificate shall not, however, constitute an error where the certificate is based on an incorrect account of the facts provided by the exporter, except where, in particular, it is evident that the issuing authorities were aware or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment.
>
> The person liable may plead good faith when he can demonstrate that, during the period of the trading operations concerned he has taken due care to ensure that all the conditions of preferential treatment have been fulfilled.

> The person liable may not, however, plead good faith if the European Commission has published a notice in the *Official Journal of the European Communities*, stating that there are grounds for doubt concerning the preferential arrangements for the beneficiary country.

62. Article 239 CCC provides:

> 1. Import duties … may be repaid or remitted in situations other than those referred to in Articles 236, 237, and 238 –
>
> — to be determined in accordance with the procedure of the committee;
>
> — resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the committee procedure. Repayment or remission may be made subject to special conditions.
>
> 2. Duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office within 12 months from the date on which the amount of the duties was communicated to the debtor.
>
> However, the customs authorities may permit this period to be exceeded in duly justified exceptional cases.

63. Article 243 provides a right of appeal against decisions of national customs authorities in relation to the application of customs legislation.

The Implementing Regulation

64. Provisions for implementing the CCC are contained in Commission Regulation (EEC) No. 2454/93 of 2 July 1993 (the "Implementing Regulation").

65. Article 198 and subsequent provisions are concerned with customs declarations in general with specific provision in Article 199 stating that the lodging of a declaration signed by the declarant renders him responsible for the accuracy of the information provided in the declaration.

66. Articles 254 and following provide for declarations made for release for free circulation and Articles 868 onwards govern entry in the accounts and post-clearance recovery.

67. Article 869 provides that it is for the customs authorities to decide not to enter uncollected duties in the accounts in cases where they consider the provisions of Article 220(2)(b) CCC are fulfilled. However, this is subject to the exception that they shall not do so where the dossier must be transmitted to the Commission under Article 871 (as amended) of the Implementing Regulation.

68. The terms of the Implementing Regulation governing repayment or remission of customs duties lawfully due were amended by Commission Regulation (EC) No 1335/2003 of 25 July 2003.

69. Recital (2) to that Regulation provided as follows:

> Given that under Article 8 of Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the European Communities' own resources the Member States are primarily responsible for collecting traditional own resources, it should therefore primarily be up to the authorities of the Member States to decide whether or not import duties or export duties should be entered subsequently in the accounts under Article 220(2)(b) of Regulation (EEC) No 2913/92 or repaid or remitted under Article 239 of that Regulation."

70. However, recital (3) also identified circumstances in which the matter should continue to be transmitted to the Commission:

> …, in order to ensure uniform treatment of traders and protect the financial interests of the Communities, the obligation to transmit dossiers to the Commission for a decision should remain where Member States consider that the decision should be favourable and either (a) an active error or failing on the part of the Commission is cited, or (b) the circumstances of the case are connected to Community investigations carried out under Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (4), or (c) the amount of duties involved is EUR 500,000 or more.

71. Article 871 of the Implementation Regulation provides:

> "1. The customs authority shall transmit the case to the Commission to be settled under the procedure laid down in Articles 872 to 876 where it considers that the conditions laid down in Article 220(2)(b) of the Code are fulfilled and:
>
> — it considers that the Commission has committed an error within the meaning of Article 220(2)(b) of the Code,
>
> — the circumstances of the case are related to the findings of a Community investigation carried out under Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters or under any other Community legislation or any agreement concluded by the Community with a country or group of countries in which provision is made for carrying out such Community investigations, or

— the amount not collected from the operator concerned in respect of one or more import or export operations but in consequence of a single error is EUR 500,000 or more.

2. However, the cases referred to in paragraph 1 shall not be transmitted where:

— the Commission has already adopted a decision under the procedure provided for in Articles 872 to 876 on a case involving comparable issues of fact and of law,

— the Commission is already considering a case involving comparable issues of fact and of law.

3. The dossier submitted to the Commission shall contain all the information required for full consideration. It shall include detailed information on the behaviour of the operator concerned, and in particular on his professional experience, good faith and diligence. This assessment shall be accompanied by all information that may demonstrate that the operator acted in good faith. The dossier shall also include a statement, signed by the applicant for repayment or remission, certifying that he has read the dossier and either stating that he has nothing to add or listing all the additional information that he considers should be included.

72. Title IV of the Implementing Regulation lays down specific provisions governing the repayment or remission of import and export duties and although Article 878 prescribes a form which must be used for the purposes of an application for repayment or remission it does permit that the same information to be given on plain paper instead.

73. Further relevant provisions are found in Article 883 and following Articles of the Implementing Regulation.

74. Article 899 (as amended) governs the specific case of applications under Article 239 CCC and 899 now provides:

"1. Where the decision-making customs authority establishes that an application for repayment or remission submitted to it under Article 239(2) of the Code:

— is based on grounds corresponding to one of the circumstances referred to in Articles 900 to 903, and that these do not result from deception or obvious negligence on the part of the person concerned, it shall repay or remit the amount of import or export duties concerned,

— is based on grounds corresponding to one of the circumstances referred to in Article 904, it shall not repay or remit the amount of import or export duties concerned.

2. In other cases, except those in which the dossier must be submitted to the Commission pursuant to Article 905, the decision-making customs authority shall itself decide to grant repayment or remission of the import or export duties where there is a special situation resulting

from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

Where Article 905(2), second indent, is applicable, the customs authorities may not decide to authorise repayment or remission of the duties in question until the end of a procedure initiated in accordance with Articles 906 to 909."

75. Article 899(3) of the Implementing Regulation defines the "person concerned" by reference to the persons entitled to make the application (by cross-reference to Article 878) and their representatives, as well as any other person involved in the completion of customs formalities relating to the goods.

76. Conversely, Article 904(c) of the Implementing Regulation provides that the duties shall not be remitted or repaid where the only grounds relied upon are the presentation, for the purpose of obtaining preferential tariff treatment of goods declared for free circulation, of documents subsequently found to be forged, falsified, or not valid for that purpose, even where such documents were presented in good faith. The strict rules in this area must be observed if Member States are to comply with their obligation to use the utmost care to prevent any fraud or irregularity liable to affect adversely the General Budget of the European Communities (see the Eighth Recital to the CCC in the Preamble to the Code).

77. Article 905 of the Implementing Regulation effectively provides for a reference procedure to the Commission of the European Communities, in certain defined circumstances. It now provides as follows:

1. Where the application for repayment or remission submitted under Article 239(2) of the Code is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the Member State to which the decision-making customs authority belongs shall transmit the case to the Commission to be settled under the procedure laid down in Articles 906 to 909 where:

— the authority considers that a special situation is the result of the Commission failing in its obligations,

— the circumstances of the case are related to the findings of a Community investigation carried out under Regulation (EC) No 515/97, or under any other Community legislation or any agreement concluded by the Community with countries or groups of countries in which provision is made for carrying out such Community investigations, or

— the amount for which the person concerned may be liable in respect of one or more import or export operations but in consequence of a single special situation is EUR 500 000 or more.

The term "the person concerned" shall be interpreted in the same way as in Article 899.

2. However, the cases referred to in paragraph 1 shall not be transmitted where:

— the Commission has already adopted a decision under the procedure provided for in Articles 906 to 909 on a case involving comparable issues of fact and of law,

— the Commission is already considering a case involving comparable issues of fact and of law.

3. The dossier submitted to the Commission shall contain all the information required for full consideration. It shall include detailed information on the behaviour of the operator concerned, and in particular on his professional experience, good faith and diligence. This assessment shall be accompanied by all information that may demonstrate that the operator acted in good faith. The dossier shall also include a statement, signed by the applicant for repayment or remission, certifying that he has read the dossier and either stating that he has nothing to add or listing all the additional information that he considers should be included.

The Common Tariff Regulation

78. The proper classification of goods entering the European Union is governed by the provisions of Council Regulation (EEC) No. 2658/87 of 23 July 1987 ('the Tariff Regulation').

79. Annex 1 to that Regulation, which is amended each year with effect from 1 January, sets out the Combined Nomenclature ("CN"). The CN provides a systematic classification of all goods in international trade and states out the duty payable in relation to each category of goods. The CNs applicable at the material time in 2005, 2006 and 2007 were Commission Regulation (EC) No. 1810/2004; Commission Regulation (EC) No. 1719/2005; and Commission Regulation (EC) No. 1549/2006.

80. The CN at all material times contained the following heading for CN 07.03, namely:

> "Onions, shallots, garlic, leeks and other alliaceous vegetables, fresh or chilled".

81. Duty was payable at 9.6% plus a separate charge of €120 per 100 kg net. The European Union has also adopted Explanatory Notes to the CN (pursuant to Article 9(1)(a) of Council Regulation 2658/87), known as "CNENs". The CNENs now in force for CN heading 0703 20 00 state that:

> This subheading covers all varieties of garlic (*Allium sativum*) which are suitable for human consumption.

Garlic Quotas

82. By Council Decision 2001/404/EC of 28 May 2001 the EU opened tariff quotas for the importation of garlic from various third countries into the EU. A range of duties were imposed on importations of garlic depending on which country they were imported from and whether or not they were brought in pursuant to the quota arrangements under Commission Regulation (EC) No. 2031/2001 of 6 August 2001

(amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff).

83. An additional, transitional quota was opened up for a limited period to cater for the accession of ten new Member States in 2004, by means of Commission Regulation (EC) No. 218/2005 which provided for the administration of an autonomous tariff quota for garlic from 1 January 2005.

84. The tariff quota details were amended by Council Decision 2006/398/EC on the conclusion of an Agreement in the form of an Exchange of Letters between the European Community and the People's Republic of China pursuant to Article XXIV:6 and Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions in the schedules 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 in the course of their accession to the European Union.

85. By Commission Regulation (EC) No. 1047/2001 of 30 May 2001 a system of import licences and certificates of origin was introduced and a method and establishing the method for managing tariff quotas for garlic imported from third countries established under which the EU put in place a licensing system for Member States to apply to importers seeking to import garlic into the EU from third countries.

86. On 2 April 2002, Commission Regulation (EC) No. 565/2002 imposed a quota on imports of garlic, with imports outside the quota liable to a payment of €1,200 per net tonne in addition to customs duty of 9.6%.

87. Article 3 provided that imports under quotas were subject to the presentation of a non-transferable import licence. Article 3(3) provided that rights accruing from a licence were not transferrable.

88. Pursuant to Article 4(1), licences were valid only for the products originating in the country identified in the licence.

89. Certificates of origin under Article 9 were only required for countries falling within the list given in Annex II which did not include India.

90. Regulation (EC) No. 565/2002 was repealed and replaced by Commission Regulation (EC) No. 1870/2005 of 16 November 2005 opening and providing for the administration of tariff quotas and introducing a system of import licences and certificates of origin for garlic imported from third countries.

91. The new provisions applied from 1 April 2006 in respect of "A" licences. Its aim was to simplify and clarify aspects of the existing licensing system put in place by Regulation 565/2002, while noting in recital (5) that the existence of a non-preferential specific duty imposed on garlic brought into the EU outside the quota meant that detailed monitoring of garlic imports would be necessary. Recital (6) stated:

> "In order to monitor all imports as closely as possible, in particular following recent incidents involving fraud, two categories of import licences should also be introduced for all imports of garlic. Experience shows that fraud is typically carried out by transhipping Chinese garlic through third countries having preferential trade agreements with the European Community. The garlic enters the EU with false documents."

92. Article 5(3) of Regulation 1870/2005 introduced a system of security for payment of duty due on imports of garlic.

93. Article 5(4) reiterated that import licences were only valid for "imports originating in the country indicated" in the licence and Article 5(5) confirmed that rights arising under such licences were not transferrable. Certificates of origin under Article 13 were only needed for countries falling within the list given in Annex IV, which again did not include India.

94. Although Regulation (EC) No. 1870/2005 was repealed and replaced by Regulation 341/2007 from 1 April 2007 the provisions of Regulation 1870/2005 continued to apply for existing licences until the end of quota period 31 May 2007.

95. Therefore, for the purposes of this appeal it is that Regulation (ie Regulation 1870/2005) that is applicable. The result of these various measures was that at all material times from 2004 to 2007 imports outside the quota were liable to a payment of €1,200 per net tonne in addition to customs duty of 9.6%.

Relevant Authorities

96. It is for the importer to ensure that the correct customs classification is entered on any customs declaration at the time of importing a consignment of goods and from the time of publication in the Official Journal, no person is deemed to be unaware of the nature and extent of charges to customs duty (see Case 161/88 *Binder v Hauptzollamt Bad Reichenhall* [1989] ECR 2415, CJEU at [19]).

97. The importer of goods is responsible both for payment of the import duties and for the regularity of the documents presented by him to the customs authorities (see Case T-239/00 *SCI UK Ltd v Commission* [2002] ECR II-2957, GCEU at [55]; and Case C-97/95 *Pascoal & Filhos* [1997] ECR I-4209, CJEU at [59]).

98. It is the responsibility of traders to make the necessary arrangements in their contractual relationships to guard against the risks of an action for post-clearance payments (see Joined Cases C-153/94 and C-204/94 *Faroe Seafood and Others* [1996] ECR. I-2465, at [114]).

99. By virtue of the provisions of the CCC and the Implementing Regulation set out above, HMRC are obliged – as a matter of EU law – to enter the correct CN classification for goods imported into the United Kingdom (see Case C-413/96 *Skatteministeriet v Sportsgoods A/S* [1998] ECR I-5285 at [23] to [25] and [36] to [37]).

100. It therefore follows that, in principle, when HMRC discover an error in the tariff classification of goods indicated in a declaration of release for free circulation, they must recalculate, in the light of the new information at their disposal, the amount of customs duties legally due at the date when that declaration was accepted (see Case C-413/96 *Sportsgoods* at [25] and [38]).

101. The recovery of post-clearance payment of import duties complies with the principle of legitimate expectations recognised as a general principle of EU law by virtue of the mechanism for waiver and/or remission of the duty if certain conditions are met (see Case C-250/91 *Hewlett Packard France v. Directeur Général des Douanes* [1993] ECR I-1819, at [12], [13] and [44] to [46]; and Case C-370/96 *Covita AVE v Greece* [1998] ECR I-7711, CJEU at [30]).

102. Much of the older EU case law on waiver and remission relates to provisions under Article 5(2) of Regulation No. 1697/99 and Article 13 of Regulation No. 1430/79. Both provisions were repealed by Article 251 of the CCC, which has applied since 1 January 1994. In Case C-250/00 *Ilumitrónica v Chefe da Dvisião de Procedimentos Aduaneiros e Fiscais* [2002] ECR I-10433, at [33], the Court of Justice of the European Union ("CJEU") noted that:

> "The circumstance that the declarant [on importation] acted in good faith and with care, unaware of an irregularity which prevented the collection of duties which he should have paid if that irregularity had not been committed, has no bearing on his capacity as the person liable, which results exclusively from the legal effects associated with the formality of declaration."

103. However, at [34] and [35] the CJEU identified to separate exceptions: first, waiver of post-clearance recovery by the national authorities, subject to three cumulative conditions under Article 220(2)(b) CCC (formerly Article 5(2) of Regulation No. 1697/97); and secondly, Remission or repayment of duties under Article 239 CCC (formerly Article 13(1) of Regulation No. 1430/79).

104. The three conditions to be fulfilled under Article 220(2)(b) were set by the CJEU (albeit in in relation to Article 5(2) of Regulation No. 1697/97 the statutory predecessor to Article 220(2)(b)) in Case C-370/96 *Covita* [1998] ECR I-7711 at [24] to [28] and summarised by the Court in *Ilumitrónica* in the following terms:

> "38. First, non-collection of the duties must have been due to an error made by the competent authorities themselves. Second, the error they made must be such that the person competent, 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, he must have complied with all the provisions laid down by the legislation in force so far as his customs declaration is concerned (see, in particular, *Hewlett Packard France*, paragraph 13, *Faroe Seafood*, paragraph 83, and Case C-370/96 *Covita* [1998] ECR I-7711, paragraphs 25 to 28).
>
> 39. The fulfilment of those conditions must be assessed in the light of the purpose of Article 5(2) of Regulation No 1697/79, 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, in particular, Case C-348/89 *Mecanarte* [1991] ECR I-3277, paragraph 19, and *Faroe Seafood*, paragraph 87)."

105. It is clear from *Faroe Seafoods* (at [89] to [92]) that the term "competent authorities" is not confined to the customs authorities determining the application for waiver of the post-clearance recovery but also includes customs authorities entrusted by the EU with the task of furnishing relevant information.

106. However, it is only errors that are attributable to acts of the competent authorities that confer entitlement to the waiver of post-clearance recovery of customs duties (see Case C-348/89 *Mecanarte v Chefe do Serviço da Conferência Final da Alfândega* [1991] ECR I-3277, CJEU at [23]; and *Ilumitrónica* at [42]).

107. Those customs authorities must have created a legitimate expectation on the part of the importer (see *Faroe Seafoods* at [91]). The competent authorities cannot be regarded as having made an error if they have been misled in relation to the goods by incorrect declarations on the part of the exporter, whose validity they are not obliged to check or assess. In such circumstances, it is the person liable who must bear the risks arising from a commercial document which is found to be false when subsequently checked (see *Faroe Seafood* at [92]).

108. In Case C-499/03 *P Peter Biegi Nahrungsmittel GmbH v Commission of the European Communities* [2005] ECR I-1751, the CJEU held at [47] that:

> "With respect to the second of those conditions, which is the only one at issue in the present appeal, it should be recalled that, according to settled case-law, whether an error of the competent customs authorities was detectable must be assessed having regard to the nature of the error, the professional experience of the operators concerned and the care which they exercised (*Faroe Seafood and Others*, paragraph 99, and *Ilumitrónica*, paragraph 54)."

109. In relation to the nature of the error, the CJEU has held that it is to be determined in the light of the complexity or otherwise of the rules concerned (see *Faroe Seafoods* at [100]). It is also relevant to consider the period of time during which the authorities persisted in their error (see *Ilumitrónica* at [56]).

110. A trader who has not consulted the relevant issues of the Official Journal to ascertain the provisions of EU law applicable to his transaction will be considered negligent and will not comply with the conditions (See Case 161/88 *Binder v Hauptzollamt Bad Reichenhall* [1989] at [19], [22] and [23]).

111. The importer is also responsible for the regularity of the documents presented by him to the customs authorities. The adverse consequences of wrongful acts of an importer's contractual partners cannot be borne by the EU but fall on the importer (see Case T-239/00 *SCI UK Ltd v Commission* at [55]; and Case C-97/95 *Pascoal & Filhos* at [59]). It is the responsibility of traders to make the necessary arrangements

in their contractual relationships to guard against the risks of an action for post-clearance payments (see *Faroe Seafoods* at [114]).

112. The requirements of what is now Article 239 CCC were also addressed by the CJEU in *Covita*, which stated:

> "29. So far as concerns the interpretation of Article 13 of Regulation No 1430/79, it follows from the wording of that provision that repayment or remission of import duties is subject to two cumulative conditions, namely the existence of a special situation and the absence of deception or obvious negligence on the part of the trader.
>
> 30. Furthermore, Article 13 of Regulation No 1430/79 and Article 5(2) of Regulation No 1697/79 pursue the same aim, namely to limit the post-clearance payment of import and export duties to cases where such payment is justified and is compatible with a fundamental principle such as that of the protection of legitimate expectations (*Hewlett Packard France*, cited above, paragraph 46).
>
> 31. From that point of view, the fact that a trader places his trust in erroneous information provided by the competent authorities could, in certain circumstances, be regarded as a special situation within the meaning of Article 13 of Regulation No 1430/79, despite the fact that that situation is not provided for in Regulation No 3799/86. The list of special situations within the meaning of Article 13 of Regulation No 1430/79 which Article 4 of Regulation No 3799/86 provides is not exhaustive (see to that effect *Hewlett Packard France*, cited above, paragraphs 39 and 43).
>
> 32. None the less, so far as concerns the second condition laid down by Article 13 of Regulation No 1430/79, it should be borne in mind that the question whether the error was detectable, within the meaning of Article 5(2) of Regulation No 1697/79, is linked to the existence of obvious negligence or deception within the meaning of Article 13 of Regulation No 1430/79 (*Hewlett Packard France*, cited above, paragraph 46)."

113. The General Court of the European Union ("GCEU") in Case T-330/99 *Spedition Wilhelm Rotermund GmbH v Commission of the European Communities* [2001] ECR II-1619, held that Article 905 of the Implementing Resolution contained an equitable provision intended to deal with exceptional situations faced by an operator and was intended to apply, *inter alia*, where the circumstances of the relationship between a trader and administrator was such that it would be inequitable to require the trader to bear a loss which, in normal circumstances, it would not have incurred.

114. In deciding whether a "special situation" existed, the Commission must balance the Union interest against the interests of a trader who had acted in good faith and to assess whether a trader is in a "special situation", it is necessary to consider whether he is in an exceptional situation as compared with other operators engaged in the same business (see Case C-61/98 *De Haan Beheer BV v Inspecteur der Invoerrechten en Accunzen te Rotterdam* [1999] ECR I-5003 at [52] and [53])

115. Remission or repayment will be refused if either of the two cumulative conditions is not met. In Case T-290/97 *Mehibas Dordtseelan v Commission* [2000] ECR II-15, GCEU at [87]. At [83], the GCEU in that case noted that:

> "It is settled case-law that submitting documents subsequently found to be falsified or inaccurate does not in itself constitute a special situation justifying the remission or repayment of import duties, even where such documents were presented in good faith (*Eyckeler & Malt*, paragraph 162). A customs agent, by the very nature of his work, assumes liability for the payment of import duties and for the validity of the documents which he presents to the customs authorities (*Van Gend & Loos*, paragraph 16), and any loss caused by wrongful conduct on the part of his clients cannot be borne by the Community. For that reason, it has been held that the fact that certificates of origin which were subsequently found not to be valid were delivered by the customs authorities of the countries mentioned on them does not amount to a special situation. It is one of the trade risks assumed by customs agents."

116. In Case T-332/02 *Nordspeizionieri* [2004] ECR II-4405, the GCEU recognised at [78] that national customs authorities could not be expected to carry out a physical inspection of all cargoes entering the EU and were entitled to rely upon subsequent checks.

117. In Case T-239/00 *SCI UK Ltd v Commission* at [57] the GCEU indicated that a special situation would only be shown in the event that there had been "serious failures by the Commission or the customs authorities, facilitating the use of [false documents]."

Finance Act 1994

118. Section 14(1) and (2) of the Finance Act 1994 ("FA 1994") provide for a review of the decision by HMRC to issue a post-clearance demand. A person affected by such a decision may require that it be reviewed in accordance with the rest of that section and with section 15. Upon a review taking place, the decision may be either confirmed, withdrawn or varied and appropriate consequential steps taken.

119. The jurisdiction of the Tribunal in the present case is conferred by section 16 FA 1994. The powers of the Tribunal are contained in section 16 which, insofar as applicable in the present case provides:

> (5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.
>
> (6) On an appeal under this section the burden of proof as to—
>
> (a) – (c) . . .

> shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established."

Discussion and Conclusion

120. Having set out the factual background and relevant legislation we now turn to the following issues raised by the grounds of appeal, identified in paragraph 8, above:

(1) Whether the garlic imported by the appellants was correctly declared as being of Indian origin;

(2) Whether customs duty should be waived under Article 220(2)(b) CCC; and

(3) Whether customs duties should be remitted under Article 239 CCC.

121. Although carefully considered, it has not been necessary to refer to every argument advanced by or on behalf of the parties in arriving at our conclusions.

Whether origin of garlic India or China

122. For HMRC, Mr Beal contends that the report of the OLAF mission to Sri Lanka and the shipping documentation annexed to it, as confirmed by Mr Jennes, provides very clear evidence that the garlic, transhipped to the UK via Sri Lanka, was of Chinese origin. Moreover, he contends that this is supported by the evidence of Mr Redmond and his analysis of the samples taken by HMRC.

123. Mr Elnagy however, maintains that the garlic originates from India. He relies on what he was told by Devi, as stated on its invoices and its email, that the garlic originated from India (see paragraphs 19 and 32, above) given its reputation was such that the Chamber of Commerce of Sri Lanka stated no further documents "were required of them" (see paragraph 24, above). He also points to the fact that when the Sri Lankan Chamber of Commerce issued the certificates of origin, which it confirmed were "genuine" (see paragraph 23, above) it was stated the garlic was of Indian origin. These certificates of origin, he says, would have been checked by the relevant customs authorities and therefore must be genuine.

124. He also relies on the physical inspection of the goods that is necessary to obtain a phytosanitary certificate (see paragraph 22, above) as evidence that the garlic was of Indian origin notwithstanding the purpose of such a certificate is to confirm the plants or products conform to the phytosanitary regulations of the importing country and have not been subjected to the risk of infestation or infection rather than confirm the origin of the product certified.

125. Mr Elnagy dismissed the OLAF mission report as consisting of "hearsay and unsubstantiated evidence" and contends that insofar as it relies on information from the Sri Lanka authorities he is also entitled to rely on similar documents, eg, those issued by the Sri Lankan Chamber of Commerce. However, this does not take into

account the fact that the certificates of origin were themselves issued on the basis of forged documents.

126. Additionally, Mr Elnagy questions the procedure by which the samples were taken from consignments imported by the appellants and their subsequent analysis by the US laboratory.

127. We do not accept that Mr Elnagy was not aware, as he claimed, that samples had been taken until sometime afterwards when it was too late to challenge the test results. It is clear from the CAP Import Inspection Reports and correspondence with the shipping agent, B&H, that this could not have been the case (see paragraphs 36 and 37, above).

128. We also do not accept the attack by Mr Elnagy on the conclusions reached on the analysis of those samples on the basis that garlic would retain the characteristics of its first generation so that an analysis of garlic grown in India but from a Chinese bulb would appear to have originated in China. Mr Redmond's evidence, which we accept, was that garlic would take on the characteristic of the environment in which it was grown rather than retain the genetic characteristics of its parent.

129. Although Mr Redmond was unable, for security reasons, to discuss the database to which the samples were compared we accept his categorical assurance that the database was of sufficient size to undertake the relevant tests. Notwithstanding the lack of disclosure of such information it is clear from the decision of the CJEU in Case C-437/13 *Unitrading Ltd v Staatssecretaris van Financiën* [2014] ECLI:EU:C2014:2318, which concerned samples sent to the same US Department of Homeland Security as in the present case, that it is permissible to rely on this evidence.

130. In our judgment, given the overwhelming weight of the evidence to the contrary, Mr Elnagy's position that the garlic is of Indian origin is hopeless and cannot succeed.

131. We consider the only conclusion that can be drawn from the evidence, particularly the OLAF mission report, the shipping documentation and the conclusions of the analysis undertaken by Mr Redmond at the Savannah Laboratory of the US Customs and Border Protection, US Department of Homeland Security, is that the garlic was of Chinese origin.

Whether Article 220(2)(b) conditions satisfied

132. The conditions to satisfy a waiver of a customs debt under Article 220(2)(b) CCC as set out in *Covita* and summarised by the Court in *Ilumitrónica* (see paragraph 104, above) are:

> (1) Non-collection of the duties must have been due to an error made by the competent authorities themselves;

(2) The error 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; and

(3) 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.

133. Insofar as there was an "error" in the present case it is that of the Chamber of Commerce of Sri Lanka which, on the basis of information provided to it which had been obtained by fraud, issued certificates of origin stating the garlic in question originated in India. Although, as we have previously observed (at paragraph 105, above) the term "competent authorities" is not confined to the customs authorities determining the application for waiver of the post-clearance recovery but includes customs authorities entrusted by the EU with the task of furnishing relevant information it does not include the Sri Lankan Chamber of Commerce, which, in any event, cannot properly certify the origin of goods to be India, which is the preserve of the Indian authorities.

134. Even if that were not the case it is clear from Article 220(2)(b) that the issue of a certificate from a third country can only amount to an official error where there is a system of administrative cooperation in place between that country and the EU which is not the position in the present case.

135. Additionally, we do not consider that the appellants have established that, acting in good faith, they could not reasonably have been able to detect the error in spite of the professional experience and exercise of due care required. We have already noted Mr Elnagy's experience, having been involved in this business since 1967 (see paragraph 12, above). As such he should have known not to rely on certificates of origin from a county other than that from which the product was said to have originated. He should also have known that phytosanitary certificates issued in Sri Lanka cannot be evidence of Indian origin. Moreover, his acceptance, apparently without question, of what he was told by Devi is also indicative of the failure of the appellants to undertake the necessary enquiries to satisfy themselves as to the origin of the garlic.

136. Accordingly, we are unable to find that the conditions to satisfy a waiver of a customs debt under Article 220(2)(b) CCC have been satisfied.

Whether entitled to claim remission under Article 239

137. Import duties may be remitted under Article 239 CCC in situations resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. In this case Mr Beal contends that there is obvious negligence on the part of the appellants relying on the absence of appropriate enquiries by the appellants as to the origin of the garlic.

138. However, even in the absence of fraud or obvious negligence, as the Tribunal (Judge Aleksander and Mr Baker) recognised in *FMX Food Merchants Import Export*

Co Ltd v HMRC [2011] UKFTT 20 (TC), at [74] when holding that any application for remission under Article 239 "must be bound to fail" as:

> "… Article 904(c) of the Implementing Regulations provides that the duties shall not be remitted or repaid where the only grounds relied upon are the presentation, for the purposes of obtaining preferential tariff treatment of goods declared for free circulation, of documents subsequently found to be forged, falsified or not valid for that purpose – even where such documents were presented in good faith. In this case as the relevant documents were found to be forged, falsified or not valid for that purpose, remission or repayment is not permitted, even if the documents had been presented in "good faith".

The Tribunal continued, at [75]:

> "… the submission of documents subsequently found to be falsified or inaccurate does not of itself constitute a "special situation" justifying remission or repayment of import duties. This is a trade risk assumed by importers. See the decision of the General Court in Case T-290/97 *Mehibas Dortseelan v Commission* [2000] ECR II-15 at [83]"

139. As in the present case, the garlic imported in *FMX* originated from China and certificates of origin were issued on the basis of forged documentation being presented to the relevant authorities (Cambodian in that case) by the exporter. Accordingly, given that the certificates of origin in the present case were issued on the basis of forged documents being provided by the exporter, Devi, as in *FMX*, any application made under Article 239 "must be bound to fail".

Conclusion

140. Therefore, for the above reasons the appeal is dismissed

Appeal Rights

141. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 18 SEPTEMBER 2018