



[2013]UKUT 0450 (TCC)
Appeal number: FTC/06/2012

CUSTOMS DUTY-post clearance demands-whether goods eligible for reduced rate of duty under Generalised System of Preferences-whether sufficient evidence to conclude that direct transport rule satisfied-no-whether substantiating documents produced-no-whether duty may be remitted-whether a special situation existed-no- Article 78 Commission Regulation (EEC)2454/93, Article 239 Council regulation 2913/92/EEC-appeal allowed

**IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	Appellants
- and -	
MARCO TRADING COMPANY LIMITED	Respondent

**TRIBUNAL: Judge Timothy Herrington
Judge Charles Hellier**

**Sitting in public at 45 Bedford Square, London WC1B 3DN on 26, 27 and 28
February 2013**

**Owain Thomas, counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Appellants (“HMRC”)**

**David Southern, counsel, instructed by T Nawaz & Co, for the Respondent
 (“Marco”)**

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DECISION

Introduction

1. Goods imported into the EU are liable to customs duties. The duty is generally payable by the importer. The rules for the calculation and implementation of the duty are set out in the Community Customs Code (Council Regulation 2913/92/EEC) and the Implementing Regulations (Commission Regulation 2454/93/EEC). Goods originating from certain developing countries ("beneficiary countries") are eligible for reduced rates of duty under the Generalised System of Preferences. Clothes manufactured in Bangladesh may benefit from such a preferential tariff. The preferential rate for such imports, if they qualify under the rules, is nil.

2. Between September 2005 and January 2007 Marco imported into the UK 63 consignments of clothes. Documentary evidence was provided to HMRC that they were imported from Bangladesh and had passed through Singapore. No customs duty was paid on import. HMRC later came to the conclusion that the imports did not qualify for the preferential rate and issued "post-clearance demands" to Marco requiring payment of duty at the full rate. There were two such demands: the first in relation to 29 consignments and the second in relation to 34. After some correspondence there was eventually an appeal to the First-tier Tribunal (Tax Chamber) ("FTT"). The FTT allowed the appeal in relation to all the consignments save three. HMRC now appeal against that decision.

The legislative provisions relevant to the appeal

3. Articles 66 to 123 of the Implementing Regulations deal with the rules for preferential origin. So far as relevant they provide:

Article 78

1. The following shall be considered as transported direct from the beneficiary country to the Community or from the Community to the beneficiary country --

(a) [applies to products which do not pass through a third country];

(b) products constituting one single consignment transported through the territory of countries other than the beneficiary country or the Community, with, should the occasion arise, trans-shipment or temporary warehousing and those countries, provided that the products remain under the surveillance of the customs authorities in the country of transit or of warehousing and do not undergo operations other than unloading, reloading, or any operation designed to preserve them in good condition;

...

2. Evidence that the conditions specified in paragraph 1 (b) and (c) have been fulfilled shall be supplied to the competent customs authorities by the production of -

(a) a single transport document covering a passage from the exporting country through the country of transit;

- (b) a certificate issued by the customs authority of the country of transit -
 - giving an exact description of the products,
 - stating the dates of unloading and reloading of the products and, where applicable, the names of the ships, or the other means of transport used, and
 - certifying the conditions under which the products remained in the country of transit,
- (c) or, failing these, any substantiating documents.

Article 80

- 10 Products originating in the beneficiary countries shall benefit from the tariff preferences referred to in article 67, on submission of either --
- (a) a certificate of origin Form A, a specimen of which appears that Annex 17; or ...

Article 81

- 15 1. Originating products within the meaning of this section [that is to say Articles 66 to 123] shall be eligible, on importation into the community, to benefit from the tariff preferences referred to in Article 67, provided that they have been transported directly within the meaning of Article 78, on submission of a
- 20 certificate of origin Form A, issued by the customs authorities or by other competent governmental authorities of the beneficiary country provided that the latter country -
- has communicated to the Commission the information required by Article 93 and
 - assists the Community by allowing the customs authorities of Member
- 25 States to verify the authenticity of the document or the accuracy of the information regarding the true origin of the products in question.
2. A certificate of origin Form A may be issued only where it can serve as the documentary evidence required for the purposes of the tariff preferences referred to in Article 67.
- 30 3. A certificate of origin Form A shall be issued only on an application from the exporter or his authorised representative....
4. It was therefore common ground that in order for a consignment to qualify for the preferential rate Marco needed:
- (i) a Form A, duly completed by the Bangladeshi authorities; and
 - 35 (ii) to show that the clothes had been transported directly from Bangladesh to the EU within the meaning of Article 78. This was called the Direct Transport Rule.

5. Where duty is chargeable the regulations provide two routes whereby the taxpayer may avoid liability for duty. These are the "waiver" provisions of Article 220 (2) (B) of the Code, and the "remission" provisions of Article 239 of the Code. Article 220 is no longer in issue in this appeal and we set out the detail of the relevant provisions of Article 239 later when we discuss their operation.

6. Section 16 of the Finance Act 1994 provides for an appeal to the FTT against a decision of HMRC in relation to the rate or amount of any customs duty. It was under that provision that the appeal was brought to the FTT in this case. Subsection (6) of that section provides:

10 "(6) On an appeal under this section the burden of proof as to --

- (a) [penalties];
- (b) [liquor contraventions];
- (c) [certain hydrocarbon duty penalty provisions]

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

7. Marco's appeal to the FTT did not relate to matters within (a), (b) or (c); it was thus for Marco to show that the requirements for the preferential tariff were established.

8. We should also mention another customs document, the Certificate of Origin. This is different from Form A. Its form and content is prescribed by Article 48 of the Implementing Regulations, but it plays no part in the rules for the system of general preferential tariffs.

The hearing before the FTT and its decision.

9. There was no dispute about the following findings of the FTT. Marco had been trading for some 40 years, initially buying within the UK but for the last 20 years increasingly importing goods: initially from Turkey and latterly from Asia. It used import agents, Gateship, to deal with the administration and mechanics of importation. From 2003 Marco had placed orders with a UAE company, Mian, which had organised the supply (from itself or others) of Marco's purchases. It seemed that the shipping of the consignments under appeal had been organised by Mian.

10. Before the FTT Marco's case was that:

- (i) the goods had been manufactured in Bangladesh [by M/S Anowara Styles limited (60 consignments), M/S Agami Fashions Ltd (2 consignments) or La belle Apparels (PDT) Limited (1 consignment)];
- (ii) the goods were loaded into containers in Bangladesh; the containers were sealed and put aboard ships at the port of Chittagong in Bangladesh. This was a shallow port which could accommodate only smaller ships;

- (iii) the containers were then carried to Singapore where they were unloaded and transferred to much larger oceangoing ships which took them to English ports where they were unloaded;
- 5 (iv) a "pre-carriage" bill of lading was prepared by the shipper in Bangladesh identifying inter-alia the ship which would transport the container from Chittagong to Singapore and the oceangoing vessel which would take it thence to the UK;
- 10 (v) the supplier's shipping agent in Singapore (WPC Ocean or Speedier) prepared for each consignment a new bill of lading which showed the oceangoing vessel only and the other details of the shipments; that bill of lading was then given to the supplier;
- 15 (vi) the supplier took each ocean going bill of lading to the Bangladesh Export Promotion Bureau (EPB) which issued a Form A to the supplier;
- (vii) the supplier sent the ocean going bill of lading, the Form A and its invoice to Mian which sent the ocean going bill of lading, the Form A and its own invoice to Marco;
- 20 (viii) when the ship arrived in the UK the container was unloaded. Marco and Gateship, using the ocean going bill of lading and the Form A secured the release of the goods and their transport to Marco.
- (ix) The Forms A thus provided by Marco and the evidence of shipment from Bangladesh thus satisfied the dual requirements for the preferential tariff rate.
11. The FTT were provided with copies of:
- (i) the Forms A, the ocean going bills of lading, and Mian's invoice for each consignment apart from three;
- 25 (ii) separate Certificates of Origin for the consignments, and
- (iii) pre-carriage bills of lading in respect of 22 of the first 29 shipments at issue.
12. HMRC considered that the requirements for the application of the preferential tariff were not met on the basis that:
- 30 (i) the Forms A provided by Marco were not genuine; and
- (ii) Marco had not shown that the Direct Transport Rule had been complied with inter alia because they viewed the available documentation as establishing only transport from Singapore, and not from Bangladesh.
13. In support of its arguments that the Forms A were not genuine, HMRC adduced evidence to show:
- 35 (i) that the impressed seals applied to the Forms A were not of the form notified by Bangladesh to the European Commission;

(ii) that the signature on behalf of the EPB on the Forms A purporting to be that of a Mr Hoque (or Haque) was not the signature of that Bangladeshi customs official;

(iii) that the forms were not acknowledged by the EPB as genuine; and

5 (iv) that Anowara, Agami and LaBelle had not traded with Marco.

14. In support of its argument that it had not been shown that the Direct Transport Rule had been complied with, HMRC:

(i) produced evidence to show that only two of the ships mentioned in the 22 pre-carriage bills of lading had been in Chittagong at the relevant time;

10 (ii) produced evidence to show that the shipper CSL Shipping Lines Limited identified on the pre-carriage bills of lading did not exist; and

(iii) argued that such evidence as there was did not substantiate the movements of each consignment or that they had been under customs control during trans-shipment in Singapore.

15 15. The FTT found that (apart from three consignments for which there was no bill of lading or transport had been from Singapore by air) the Forms A were genuine, that the Direct Transport Rule had been satisfied, and that the "Bills of Lading [meaning the ocean going bills of lading] in conjunction with both the Certificates of Origin [meaning the Forms A and the Certificates of Origin] are sufficient substantiating documents for the purposes of" the Direct Transport Rule. It therefore allowed the
20 appeal.

16. The FTT made findings in relation to the waiver and remission provisions to which we shall return later.

25 **HMRC's contentions before us in relation to the applicability of the preferential tariff.**

17. Mr Thomas contended that the FTT erred in that: (1) it wrongly treated the burden of proof in the appeal as lying on HMRC; (2) it made findings in relation to the Forms A which could not be justified by the evidence; (3) it reached a conclusion on the Direct Transport Rule which could not be supported by the evidence.

30 **The form of this decision**

18. We have concluded that it is clear that the FTT's conclusion in relation to the Direct Transport Rule could not have been supported by the evidence before it. Having reached that conclusion it is unnecessary to deal in detail with the other criticisms of the FTT's decision.

35 | 19. Therefore in [\[20\] to \[69\] below](#) we set out our reasons for our conclusions in relation to the Direct Transport Rule and then consider the application of the waiver and remission provisions. [In \[70\] to \[97\] below](#) we summarise our views on some of the other criticisms of the FTT's decision debated before us.

The Direct Transport Rule

20. Article 81 makes it clear that the preferential tariff is available "provided that [the products] have been transported directly within the meaning of Article 78". Article 78(1) sets out the meaning of "transported directly", and Article 78(2) requires the production of evidence that the conditions in Article 78(1) (b) and (c) have been satisfied. It is not made clear whether the requirement in Article 78(2) for the supply of evidence to the customs authorities is a condition for the satisfaction of the requirement in Article 81 that the products have been "transported directly within the meaning of Article 78". In our view it is such a condition, but our conclusions in this section are equally applicable if it is not. What is clear is that direct transport must be proved and the burden of proof in that respect lies on the importer: see our analysis in [6] and [7] above.

21. The applicable subparagraph of Article 78(1) is (b) because the products were said to be transported to the territory of Singapore, a country other than the beneficiary country (Bangladesh) or of the Community, and the trans-shipment took place in Singapore. The fact of transport through Singapore brings paragraph (b) into operation whether or not the goods were unloaded there. In those circumstances paragraph (b) requires:

(i) that the products remained under surveillance of the customs authorities in the country of transit, (Singapore), and

(ii) did not undergo operations other than unloading or preservation.

22. The importance of (i) is emphasised by the requirements of Article 78(2)(b) that the certification there mentioned should be provided by the customs authorities of the country of transit.

Marco's submissions

23. Mr Southern says that the FTT accepted that the movement in two stages raised difficulties with DTR compliance, but taking the documents as a whole the FTT was satisfied that compliance was achieved within Article 78(2)(c). This he says was a question of weight of evidence for the FTT which cannot be disturbed on appeal.

The requirements of Article 78(1) – direct transport.

24. The FTT addressed these requirements at [76]. It said:

"76. We are satisfied that the direct transport rule has been complied with. We have decided that the [Forms A] and the Certificate of Origin are genuine. We are also satisfied that the Ocean and Speedier Bills of Lading correctly identified that the goods came from Bangladesh. HMRC have suggested that there is evidence of fraud but they have not suggested that Marco was party to it. Furthermore they have brought no evidence of fraud to the Tribunal. Nor have they produced any evidence to the effect that the containers, loaded in

Bangladesh, came from China or that they were unloaded and reloaded in Singapore. We are satisfied, without further evidence, that neither Ocean nor Speedier have done other than arrange for the containers to be put on board the appropriate vessel. We have been told that the container port in Singapore is totally computerised. If, in those circumstances, the containers had been tampered with, there must be evidence of their movements on arrival at Singapore. We have had no evidence to that effect. No evidence has been produced other than that the container numbers and Chittagong detail appearing on the Ocean and Speedier Bills of Lading are in order. Mr Camin's evidence is that the Ocean and Speedier Bills of Lading are generally accepted in the trade as evidence of the original port of embarkation."

25. In paragraph [77] the FTT goes on to discuss the pre-carriage bills of lading. They conclude that an inference could be drawn from the 22 pre carriage bills of lading that there would have been bills of lading in relation to the second consignment which would have shown that the goods came from Chittagong. On that basis it concluded that the Ocean and Speedier Bills of Lading were accurate in stating that the goods started their journey in Chittagong

26. Nowhere in this passage or elsewhere does the FTT directly address the requirement that the goods remained under the surveillance of the customs authorities in the country of transit. Neither is the requirement addressed indirectly. The documents mentioned by the FTT do not mention customs surveillance, the discussion of the activities of Ocean and Speedier betray no hint of customs surveillance, the computerisation of the port and the absence of evidence of tampering does not speak of the oversight of customs authorities. It is clear to us that the FTT did not address the issue.

27. Nor did the evidence before the FTT permit the conclusion that the condition had been satisfied. The onus was on Marco to produce evidence that it was satisfied. None of the evidence addressed this issue. We find that the only possible conclusion which could have been reached by the FTT on the evidence before it was that the requirements of the Direct Transport Rule in Article 78 (1) were not shown to have been satisfied.

The requirements of Article 78(2)- documents

28. The FTT noted that Article 78(2) would be satisfied if "substantiating documents" were provided. But the FTT did not discuss what such documents had to substantiate.

29. However, as Mr Southern accepted, one must look at Article 78(2) (c) through the eyes of Article 78(1) (b). It is clear from the opening words of Article 78(2) that such documents must provide evidence that the conditions of Article 78(1)(b) have been satisfied, namely evidence:

- (i) of the third countries through which the goods were transported:

(ii) that the products remained under the surveillance of the customs authorities in those countries, and

(iii) that the products did not undergo operations other than unloading etc.

5 The detail of this requirement is emphasised by Article 78(2)(b) which requires details of dates and of ships and of the conditions under which the products were held. Those are the particulars which the documents must substantiate if they are to satisfy the requirements of Article 78(2) (c).

10 30. The object of Article 78(2) is manifestly to provide detailed auditable evidence to the customs authority of the passage of the goods. That is why the names of the ships are required to be provided by (b). (The way in which such information is intended to be available for use by the customs authorities was shown in this case by the investigation which HMRC made of the ships shown on the 22 pre carriage bills of lading. This information enabled them to search a database to discover whether the ships named on those bills were recorded therein as having been at Chittagong at the stated times.)

15 31. The FTT set out its conclusion in relation to substantiating documents at [79]. It said:

20 79. "We are satisfied that the Ocean and Speedier bills of lading in conjunction with both Certificates of Origin [i.e. the Certificates of Origin and the Forms A] are sufficient substantiating documentation for the purposes of Article 78 subsection (2)."

25 32. Even assuming that it was open to the FTT to conclude that the Forms A, the Certificates of Origin, and the bills of lading at Singapore were genuine and identified the goods, their source in Bangladesh, and the dates and the means of their transport from Singapore to the UK, those documents do not provide any evidence in relation to:

(i) the dates and means of transport from Bangladesh to Singapore, or

(ii) the conditions under which the goods were held while they were in Singapore, or

30 (iii) whether the goods were under customs surveillance when they were in Singapore.

33. Thus the documents which the FTT relied on could not be substantiating documents for the purposes of Article 78(2)(c).

35 34. Earlier in the decision, at [77], the FTT had discussed the pre-carriage bills of lading. It explained that these enabled the passage of goods to be traced back to Bangladesh. It had no doubt that these bills related to goods coming from Chittagong to Singapore. The pattern established by the 22 pre-carriage bills of lading in relation to the first 29 consignments enabled the FTT to infer that the remaining 38 consignments also came from Chittagong.

35. Each of the forms A and the Certificates of Origin state that the means of transport and route of the goods was from Chittagong by sea but the bill of lading referred to in support of the statement of the FTT at [79] in each case is the bill of lading for the journey from Singapore; nothing in relation to the factors listed in paragraph 32 above is substantiated with regard to the Bangladesh to Singapore leg of the journey. Furthermore, whilst it might be open to the FTT to infer from the 22 pre-carriage bills of lading that the goods came from Bangladesh to Chittagong to be loaded onto oceangoing ships at Singapore, the evidence did not show that the goods had been under customs surveillance when transshipped at Singapore or give adequate detail of how the remaining 38 consignments had been dealt with when they were at Singapore and before.

36. Accordingly, even if the FTT were to have said that the substantiating documents included the pre-carriage bills of lading that could not have satisfied the requirements Article 78(2)(c) in relation to the 38 consignments for which there were no pre-carriage bills of lading. The inference drawn by the FTT does not permit the precise journeys to be checked. The pre-carriage bills of lading for the 22 consignments do not provide substantiating details for the others and provide no information as to customs surveillance.

37. We reject Mr Southern's submission that this was a question of weight for the FTT. Evidence may weigh in favour of a particular conclusion only if there is something in it which points in some way to that conclusion. Even if the FTT was entitled to conclude that the weight of the documentary evidence showed that the goods had been transported from Chittagong to the UK via Singapore, there was nothing in the documents which in any way pointed to customs surveillance in Singapore. These documents could not therefore be substantiating documents for the purpose of Article 78(2)(c).

38. Mr Southern also submitted that the FTT were entitled to regard the evidence relating to the seals on the containers as enabling it to conclude that direct transport had been proved, and the seals as themselves providing part of the substantiating documents. That was because the evidence given to the FTT enabled it conclude that the seals were affixed in Bangladesh and had not been broken until arrival in the UK, and thus that the shipments had not been tampered with en route. The seals were documents substantiating that fact.

39. The problem with this argument is twofold. First, whilst we accept that the numbered seals were capable of being documents, they were not provided to HMRC or the FTT and so could not have satisfied the requirement for the production of substantiating documents within Article 78(2)(c). The evidence of the existence of those documents was not their production.

40. Second, the evidence that the seals were unbroken says nothing about customs surveillance in Singapore. Mr Southern suggested that the evidence that the seals remained intact meant that the goods must have been or should be deemed to have been under customs supervision. We cannot see how evidence of lack of tampering provides any pointer to whether the goods were under customs supervision or not, and

can see no indication that the Implementing Regulations would deem such to be the case.

41. Finally in this context we should mention Mr Thomas' submission that the FTT misunderstood the oceangoing bills of lading when at [13] it said in relation to an example consignment:

(i) "There is a bill of lading for WPC Ocean Line Limited....The Bills of lading identify the container number...identifies the same goods, [and] indicates that...the shipment came from Bangladesh."

42. Mr Thomas says that whilst the bill of lading states that the exporter/shipper was a company in Bangladesh, it does not say anything about the goods having come from Bangladesh – indeed he notes that the boxes "pre-carriage by" and "place of receipt" on the Bill are empty

43. We agree that those boxes are empty and that there is no identification of the pre carriage ship or the place of receipt, but in the box "description of Packages and Goods" there appear the words "Shipment from Chittagong, Bangladesh to final destination: Felixstowe, UK Via Singapore".It seems to us that these words were enough for the FTT's limited conclusion in [13], although they are little help in satisfying the other more detailed requirements of the Direct Transport Rule.

Conclusion - the Direct Transport Rule.

44. We have concluded that, on the evidence before it, the FTT could not have been satisfied that the requirements of Article 78(1) had been met. As a result whether or not the requirements of Article 78(2) were satisfied the goods could not benefit from the preferential tariff available under the terms of Article 80. Further, if it is necessary, in order to benefit from that Article, to satisfy the evidential requirements of Article 78(2) then the FTT could not on the evidence before it have found that that requirement was satisfied.

45. As a result the only conclusion the FTT could have reached was that the preferential tariff was not available. The FTT made an error of law. We set aside its decision and replace it by our decision that the preferential tariff was not shown to be available in respect of the consignments which are the subject of this appeal.

46. Waiver and Remission.

47. In certain circumstances Article 220 of the Code provides for the waiver of duty, and Article 239 for the remission of duty.

48. The FTT considered whether, if it was wrong in relation to the availability of the preferential tariffs, one of these two provisions would avail Marco. It held that the waiver provisions were not available but that remission would be. Marco did not contest the FTT's finding in relation to waiver but relied on its finding in relation to remission in the event that it lost the appeal in relation to the preferential tariff rate.

The relevant legislative provisions.

49. Article 239 of Code provides:

1. Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237 and 238 -

- 5 - to be determined in accordance with the procedure of the committee;
- resulting from circumstances in which no deception or obvious negligence may be exhibited by the person concerned. The situations in which this provision may be applied and procedures to be followed to that end shall be defined in accordance with the committee procedure.
- 10 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.

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50. Article 899 of the Implementing Regulations 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:

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- 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,

25

- 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 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. ...

30

51. In the circumstances Articles 900 to 903 are not relevant.

52. Article 904 provides that “import duties shall not be repaid or remitted where the only grounds relied on in the application for repayment or remission are, as the case may be -

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... (c) 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.

53. Article 905 applies “where the application for admission 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". It requires a member state to transmit to the Commission the dossier relating to the case if:

- (i) the State considers the special situation is the result of the Commission failing in its obligations
- (ii) the circumstances are related to the findings of a Community investigation, or
- 10 (iii) the amount in respect of one or more import transactions but in consequence of a single special situation is €500,000 or more.

54. The effect of these Articles is therefore that:

- (i) if Articles 900 to 903 apply HMRC may make payment. But these articles do not apply;
- 15 (ii) if Article 904 applies HMRC shall not remit;
- (iii) if there might be special circumstances and Article 905 otherwise applies the dossier must be sent to the Commission and
- (iv) if there are special circumstances and Article 905 does not apply and no deception or obvious negligence is present, HMRC "shall decide to grant repayment or remission".

55. Marco can therefore succeed in an application for remission only if there were "special circumstances", or might have been such circumstances.

The FTT's conclusion

56. The FTT said at [85]:

25 “...Article 904 (c) provides Where, however, the grounds are more than just the forgery of the documentation a "special situation" can arise. In *Eyckeler & Malt v United Kingdom of Great Britain and Northern Ireland* Case T-42/96 the Court stated that paragraph 104:

30 "it is also incorrect to claim, with reference to Article 904 9 (c) of Regulation 2454/93 that expectations as to the validity of the certificate of authenticity were not protected. That provision simply states that import duties will not be remitted **if the only grounds** (our emphasis) in support of the application is the presentation of documents subsequently found to be forged or falsified even where such documents are presented in good faith. In any event, that is not the case here since the applicant has relied

35 on several grounds."

“ ... That there is no doubt that the arrangements for the production of the GSP Certificates of Origin Form As in Bangladesh were chaotic during the period under appeal - a chaos which appears to have continued even up to the mission

in 2011. We would therefore have found that there was a 'special situation' for the purposes of Article 239"

57. It concluded, at [86], that there had been no obvious negligence, fraud or dishonesty on Marco's part. Thus it concluded that, had it found that the duty was due, it would have required HMRC to conduct a further review of its decision.

58. (We note that the quotation from *Eyckler* in the FTT's decision appears to have been from the submissions made by a party rather than from the court's judgement. We also note that the defendant in the case was the European Commission, not the UK.)

10 Discussion

59. We were grateful for the additional submissions of the parties on these issues.

60. There was some question as to whether Marco had in fact applied for relief under Article 239. The FTT recorded at [4] that Marco had applied with Gateship for relief under Article 220. Mr Thomas told us that there was no clear record of any decision by HMRC in relation to Marco under Article 239. The FTT directed that Marco be entitled to challenge a decision in relation to both waiver and remission which had been addressed to Gateship.

61. We address this issue on the assumption that either a formal application was made or that Marco's submissions to the FTT could be treated as such an application and that HMRC's response was a rejection of that application; and also on the basis that the 12 month time limit in Article 239(2) was treated as extended either by the FTT or by HMRC's acquiescence thereto at the tribunal hearing.

62. In this case whether or not there were special circumstances in relation to the provenance of the Forms A or the Bangladeshi administration, the preferential tariff rate is not available because of the failure of Marco to satisfy the Direct Transport Rule. If that failure is not capable of being or resulting from a special situation then in our view no combination of that failure with other circumstances would be a special situation. That is because it seems to us that for something to be a special situation it must in some way cause the failure to obtain relief or exemption from duty.

63. In *Hyper SrL v Commission* T - 205/99 the Court of First Instance said at [92]:

"... the case law indicates that the existence of a special situation is established where it is clear from the circumstances of the case that the person liable is in an exceptional situation as compared with other operators engaged in the same business".

64. In this regard the situation Marco finds itself in is that it has, or has presented, no evidence to show that the goods were under customs supervision in Singapore or how precisely they were shipped thither and transshipped there. There was no suggestion that some exceptional circumstance had deprived Marco of the possibility of proving that the conditions of the Direct Transport Rule had been satisfied.

65. Thus in our view Marco did not show that there was a special situation as respects the duty in issue.

66. Mr Southern says that the conclusion of the FTT that there were major, sustained and systematic failures in the implementation of the tariff regime in Bangladesh would also have encapsulated a finding that a special situation existed in relation to the Direct Transport Rule procedures. The difficulty with this submission is that whatever the problems in Bangladesh there was no suggestion or evidence that they extended to the arrangements in Singapore. For whatever it was that caused Marco to fail to be able to meet the preferential tariff rules there must be some causal link between the nature of the situation and the failure to qualify. The failures in relation to Bangladesh did not cause the failure of the Direct Transport Rule condition in Singapore.

67. The FTT held that the Direct Transport Rule was satisfied. Thus their consideration of special situations was made without consideration of that issue. As a result it must be set aside.

69. Therefore to the extent that a remission application under Article 239 has been made and refused, we find that such a refusal should be upheld.

Other Issues

70. We said at [13] that before the FTT HMRC argued that the Forms A produced by Marco were not genuine, and that they adduced evidence to show: (1) that the seals were not genuine; (2) that the signatures were not genuine, (3) that the Forms were not acknowledged by the Bangladeshi EPB as genuine, and were said by it not to be genuine; and (4) that the claimed suppliers of the goods had not traded with Marco. We summarise below the FTT's findings on the first three of these issues, the submissions of the parties before us and our conclusions. We also address in summary some other issues raised by the parties before us.

Seals

71. The Forms A had embossed seals, and the Certificate of Origin a wet stamp. Both were of the same design but they have an arrow which may point in different directions.

72. The FTT said that [71]:

(i) "Mr Luty also told us that the seal on the Certificate of Origin is incorrect. He stated that the arrow pointed between the 'O' and the 'M' and should have pointed between the 'P' and the 'R'. He has relied on copy samples made available from Bangladesh in 2002. Mr Shelley, in his observations in the bundle, indicated that seals for Dhaka, Chittagong and Khulna are different. Neither Mr Cannan nor Mr Nawaz nor any of the witnesses had disagreed with that observation. As the consignments relate to transactions some four or five years later we query whether the seals may have changed. As mentioned below we are less than satisfied with the way in which the authorities in Bangladesh

have dealt with matters and in the circumstances we cannot accept that the seals are necessarily incorrect.”

73. HMRC made several criticisms of this passage:

- (i) the sample embossed seals were dated 2005 - 2006, not 2002;
- 5 (ii) the imports were in 2005/6 -- the same period as the specimens seals, not 4 to 5 years later;
- (iii) the sample seals were provided through the official channels to the EU; they showed the seals used by Dhaka, Chittagong and Khulna. All were the same and all had the arrow pointing between the ‘P’ and the ‘R’;
- 10 (iv) the presentation by HMRC of the sample seals indicates that HMRC's witnesses did disagree with Mr Shelley's observation;
- (v) the specimens produced by Mr Shelley or were not of the embossed seals but of wet stamps and signatures of Bangladeshi officials;
- 15 (vi) the FTT's conclusion "we cannot accept that the seals are necessarily incorrect" is not enough for it to hold that they were correct.

74. Mr Southern said that the evidence of Mr Luty on the comparison of the seals on the Forms A does not make clear whether he was comparing with the EPB specimen seals or those on the original Forms A, and that the FTT were entitled to accord less weight to his evidence because of careless errors in his witness statement.

20 75. We were told that both the Forms A which were the subject of the appeal and a copy of the EPB seals were available to the FTT at the hearing. A comparison of the two shows clearly that the arrow on Marco's Forms A points to a different place from that in the official versions - which all point to the same place. Had the FTT conducted the same exercise the FTT could not have concluded that the seals were
25 shown to be the same as the official copies even if they doubted the accuracy of Mr Luty's comparison.

76. Mr Southern told us that it seemed that Marco's Forms A were not produced to the FTT at the hearing by HMRC's witnesses. He said it was difficult to determine whether the FTT had the original Forms A before it or just the photocopies which did
30 not show the detail of the embossed seals. The FTT appeared therefore to make its conclusion on its assessment of the evidence given by Mr Luty of the comparison he had made and its assessment of whether official copies of the seals put before it by HMRC represented those actually used by the EPB offices in Bangladesh. He says that the FTT were entitled on the evidence before it to doubt whether the official
35 copies of the seals represented those actually used by the EPB and so to conclude that the evidence of the provenance of Form A certificates was sufficient to conclude that they were genuine.

77. The FTT's reasoning in paragraph [71] relied on two mistakes: (i) a mistaken
40 conclusion as to the date of the copy samples. They took them to be from 2002 whereas they were dated 2005 – 06; and (ii) a mistake as to whether Mr Shelley's observations were in fact contested. It was clearly on the basis of those mistakes that

the FTT concluded that the seals may have changed. Those were mistakes of law because they were findings which were not available to the FTT on the evidence. They were also directly relevant to its overall conclusion. Thus its conclusion must be set aside. Were it necessary we would have to consider whether to remit the decision to the FTT or remake it ourselves.

The signatures of Mr Hoque on the Forms A

78. The Forms A appeared to bear the signature of an EPB official. Some appeared to be signed by a Mr Hoque, others by a Mr Moyen. Our discussion below relates to the Hoque signatures but similar issues arose in relation to Mr Moyen.

79. The FTT received the following evidence:

(i) oral evidence from Mr Camin, a director of Gateship, that the signature of Mr Hoque on the disputed Forms A appeared to be the same as many other signatures processed by Gateship which had been accepted by HMRC in the past.

(ii) evidence from a handwriting expert, Dr Alkatani, who compared the signatures of Mr Hoque on five of the disputed Forms A against specimen signatures on documents which were provided by Mr Shelly. Dr Alkatani concluded that it was likely that three of the five signatures were, and two of the five were not, those of the same person as on of the specimens;

(iii) a written statement from Mr Hoque (in which he spells his name Haque) saying that the signatures on Marco's Forms A were not his;

(iv) other specimen official signatures provided by the EPB to the EU .

80. The FTT said at [69]

"... other than that statement [which appears to refer to the specimen signatures noted that d. above] no evidence has been produced by HMRC to show why the signatures are forgeries. The only evidence we do have has been given by Dr Alkatani. We have found his evidence to be impartial and forthright. He accepts that he has only had copies to work with, but that is no more than the copies Mr Luty had to rely on. On the balance of probabilities, and from Dr Alkatani's evidence we believe that the signatures by Mr Hoque and Mr Moyen are genuine. HMRC have not helped their case in that Mr Dittrich has produced evidence from Mr Hoque stating that he has not signed the documents. In Mr Hoque's statement to that effect, the translator has indicated that the English equivalent is spelt 'Haque'. Whilst we accept that the signature is in Bengali we would have expected HMRC to notice that there was a discrepancy in the spelling, particularly as the evidence goes to credibility. In any event it appears that the documents which Mr Hoque was asked to comment on were not the documents the subject of this appeal, so his comments have no value."

81. And later at paragraph [78]:

(i) “Mr Camin also confirmed that the signatures of Mr Hoque and Mr Moyen appeared to be the same as many of the other certificates they had processed in the past and which had which have been accepted by HMRC. Mr Hoque, in his statement attached to Mr Dittrich’s second witness statement, indicated that the signatures on the Forms A Certificates listed in the Annex were not his. Mr Hoque in his statement has indicated that the English spelling of his name is Haque a with an “a”. The evidence relied upon by Mr Luty in March 2002 shows Mr Hoque’s signature as Hoque, as do all the other certificates provided to the tribunal. We appreciate that his actual signatures were in Bengali, but we would have expected the interpreter to have interpreted the spelling of his name correctly. If he has then, and Mr Dirtrich confirmed that he had, then all the other signatures on which Mr Luty relies are incorrect. Mr Dittrich’s evidence appears to demonstrate considerable confusion within the officials and others in Bangladesh.”

82. Mr Thomas criticises these passages thus:

- (i) the documents Mr Hoque was asked to comment on where in fact those the subject of the appeal (Mr Southern accepts this);
- (ii) Dr Alkatani’s evidence was that it was unlikely that two of the five signatures matched;
- (iii) Dr Alkatani did not compare against the official signatures but against signatures whose authenticity was disputed by HMRC; and
- (iv) the FTT comments about translation mistakes, but Mr Hoque’s statement was not a translation.

83. Mr Southern says that the FTT were entitled to give a little weight to Mr Hoque’s statement: he must have signed thousands of documents a year and it would have been difficult for him to be sure that something was not his signature. Given Dr Alkatani’s evidence and his conclusions it was not unreasonable for the FTT to have found Mr Hoque’s statement as marginal rather than central.

84. The FTT relied upon Dr Alkatani’s evidence. We accept that Dr Alkatani’s evidence could be relied upon to show that some of the signatures were likely to be by the same persons who signed the documents presented to him. But one needs something to suggest that the signature on the documents presented to him were signatures of Mr Hoque: without that Dr Alkatani’s evidence, however strong his conclusion, could not prove anything. There was no evidence on which the FTT could have concluded that the comparator signatures were genuine. Even if one accepted (without evidence) that the other documents bore genuine signatures, Dr Alkatani’s evidence was that 40% of his sample was unlikely to be genuine. It is not possible to conclude that Dr Alkatani’s evidence weighed in favour of the signatures being genuine.

85. We accept that the FTT was entitled to treat the confusion over the spelling of Mr Hoque’s name as affecting the credibility of the evidence in his statements, and to give that evidence less weight because they did not have the opportunity to question him on it. And we accept that the FTT could have weighed the evidence of what Mr

Hoque had written in his statement against that of the provenance of the Forms A to conclude that they had in fact been signed by him. But the FTT also took into account the evidence of Dr Alkatani; in the circumstances that was an irrelevant consideration which affected their judgment. That was an error of law which justifies the setting
5 aside of their decision.

The EPB lists.

86. HMRC adduced evidence to the FTT that Marco's Forms A were not on the list of genuine forms maintained by the EPB.

87. The FTT dealt with this at [73]. That paragraph contains a number of statements
10 which Mr Southern accepts were mistaken or confused:

(i) the FTT compared the list of the EPB numbers produced by one of HMRC's witnesses said not to have been on the EPB's list of approved Forms A and said that "none of the items on [witness's] list relates to any of the consignments, the subject of this appeal. This was completely wrong; and

15 (ii) The FTT conducted an exercise to match the EPB numbers in the witness's list of 61 Forms A reported by EPB as not having been issued by it. It produces a table in which it confuses import and authorisation dates and concludes "none of these match any of the EPB numbers on the two consignments".

20 88. Is clear that the FTT gave weight to these conclusions in its overall assessment because, after discussing the evidence of the witness who produced the EPB lists (Mr Dittrich) it says that "by contrast, we have found the evidence given [for Marco] to be straightforward".

25 89. Mr Southern says that the doubts sown in the FTT's mind by errors in HMRC's witness statements, by HMRC's failure to produce full EPB lists, and by evidence of lax practice in Bangladesh or lack of evidence of the accuracy of the transcripts of the lists, were sufficient grounds for it to conclude that the Forms A, even if not on the official EPB list, had been issued by EPB.

30 90. It seems to us that only if the mistakes and confusion of the FTT related to minor or irrelevant matters, or if it based its conclusion on alternative grounds which were not vitiated by those mistakes that its conclusion could be upheld. That was not the case.

Summary: Forms A

35 91. The FTT made errors of law in reaching its conclusions in that it reached conclusions which were not available to it on the evidence. Those errors informed its eventual conclusion that the Forms A were shown to be genuine. That conclusion must therefore be set aside.

Pre-carriage bills of lading.

92. Marco produced 22 pre-carriage bills of lading which recounted the transport of shipments from Bangladesh to Singapore. These showed the ships on which these shipments were said to have been transported. Mr Luty, HMRC's witness, provided the FTT with extracts from a database showing the movements of commercial shipping. The pre carriage bills of lading showed that nine vessels were involved. Mr Luty's initial evidence was that four of these were not on the database (although later he conceded that one of the four was on the list) and that the others did not dock in Bangladesh at the relevant times. Mr Thomas accepted that there were two of the vessels which did dock at Bangladesh at the relevant times.

10 93. The FTT concluded at [72]:

15 “Mr Luty ... has referred to his inspection of the SeaSearchers list. He has been able to trace very few of the vessels ostensibly used by Marco. It was unclear exactly how the information is recorded on the lists. We were unclear as to whether the first port was the starting or finishing port. If the latter, it is unclear where the ship came from. He was unable to advise as to the tonnage of the shipping identified on the searches. It is conceded by the parties that feeder vessel were smaller than the oceangoing container ships, which may well result in the feeder vessels not appearing on the list. ... the Ocean Bills of lading identified the date of the goods were "shipped on board the vessel". It is however, unclear as to when the vessel left Singapore. ... without further evidence as to how the lists are compiled and the tonnage of the shipping recorded we find the evidence less than satisfactory"

25 94. Mr Thomas made a number of criticisms of this passage including that the tracing of five out of nine was not “very few”. But, whatever conclusions we may have reached on this evidence in our view on this evidence the FTT was entitled to reach its conclusion on the weight of the evidence before them. It was entitled to conclude that the pre-carriage bills of lading were evidence of transport of the 22 shipments from Bangladesh and that the weight of that evidence was not outweighed by the uncertainties drawn from the SeaSearcher lists.

Burden of proof.

95. We have explained that the burden of proof in a case such as this is on the taxpayer. There were a number of passages in the FTT's decision which are difficult not to read as imposing an onus on HMRC to prove the contrary case.

35 96. Mr Southern says that, properly understood, the FTT did not direct itself wrongly, or apply the wrong approach. In each case he says that the FTT was describing in its conclusion the result of the ebb and flow of the evidential burden. Thus he says that by producing its Forms A Marco was providing evidence of origin and shipment from Bangladesh, thereafter the evidential burden passed back to the Commissioners. HMRC attempted to dislodge the Marco's evidence by producing evidence of fraud or lack of authenticity. The FTT saw that evidence and doubted it:

