TC03172

Appeal number: LON/2009/07019, LON/2009/07020, LON/2009/07022 LON/2009/7024 LON/2009/7026, LON/20098, TC/2009/10081-3 & TC/2012/07174

PROCEDURE – Other – customs duty appeals on imports of garlic - appellants' application to exclude evidence containing multiple hearsay contained within report of European Anti-fraud Office (OLAF) under Rule 15(2)(b)(iii) of the Tribunal Rules – whether Tribunal should exclude on grounds unfair – no – Tribunal to assess weight at substantive hearing – whether Tribunal under European law obligation to take into account findings of OLAF report – no – HMRC's objection to appellants' extension of time application for appellants' service of list of documents – scope of earlier Tribunal decision granting permission to appeal on limited grounds considered –appellants not precluded from relying on documents relating to origin of garlic for purposes of time bar issue - extension of time granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) BELGRAVIA TRADING CO LIMITED, Appellants
(2) CYROVEG LIMITED
(3) ELNAGY (UK) LIMITED
(4) JC FOODS (UK) LIMITED
(5) PUREGOLD ENTERPRISES LIMITED
(6) S&S FRUIT AND VEGETABLES LIMITED
Appellants in LON/09/7019 and others

(1) ELNAGY TRADING LIMITED
(2) BELGRAVIA TRADING LIMITED
(3) PUREGOLD ENTERPRISES LIMITED
(4) ELNAGY UK LIMITED
Appellants in TC/2009/10081 and others

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS Respondents

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TRIBUNAL: JUDGE SWAMI RAGHAVAN

Sitting in public at Bedford Square, London on 15 November 201

Stephen Ferguson, counsel, instructed by Neumans LLP, for the Appellants

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

DECISION

1. This decision relates to two sets of appeals before the Tribunal that involve various different appellant companies in the UK which are controlled or operated by Mr Elnagy. Both sets of appeals relate to imports of fresh garlic and the issue of where the garlic originated from. One set of appeals relates to imports of garlic which the appellant says is from India ("the India appeals"). The other set relates to imports of garlic which the appellants say are from Egypt ("the Egypt appeals"). HMRC say both sets of imports are of garlic from China (which attracts a higher rate of customs duty).

2. This decision covers the following procedural applications by the appellants:

(1) in relation to the India appeals, an application that HMRC be barred from adducing certain evidence relating to:

(a) scientific analysis relating to laboratory tests conducted on garlic samples in the US; and

(b) hearsay evidence including that contained within a report of the European Anti-fraud Office (OLAF).

(2) in relation to the Egypt appeals, an application for extension of time to 31 January 2014 for service of the appellants' list of documents in order to obtain and collate certain documents.

3. HMRC contest the evidence barring applications on the basis that the evidence is relevant and it is for the tribunal to consider its weight at the substantive hearing. In

addition in relation to the OLAF report they argue by reference to a European law duty to co-operate that the Tribunal ought to take the report into account.

4. In relation to the extension of time application they object on the basis that the documents the appellant proposes to obtain relate to matters which it is not open to them to litigate given the limited grounds upon which permission to appeal out of time had been given by a previous decision of the Tribunal which had not been appealed.

Application to bar reliance on American scientific evidence and subsequent application to stay application and proceedings pending reference to CJEU by Dutch court

5. At the hearing the appellant made an application to stay on the basis of a Dutch reference to the CJEU which they say raises a similar point.

6. The reference to the CJEU from the referring Dutch court (Case C-437/13) OJ (2013/C 325/21) published in the Official Journal on 9 September 2013 following a reference lodged on 2 August 2013 concerns Article 47 of the Charter of Fundamental Rights of the European Union (right to an effective remedy and to a fair trial) and the treatment of examinations carried out by a third party in the context of submission of evidence as to the origin of imported goods. The particular questions referred are set out in an annex to this decision.

7. While HMRC do not agree the case has the relevance the appellant seeks to place on it they do not object to the stay on the basis that they are aware that a similar stay has been granted in relation to another case which is proceeding before the Tribunal.

8. Although the parties are not agreed on the relevance of the Dutch reference, there seems to me, having considered the parties' arguments on the application in outline and the Dutch reference, some likelihood that the CJEU's decision on the reference will be one which the Tribunal will want to take account of in the determination of the appellants' application. Taking account of HMRC's non-objection to staying the application I have directed a stay of the appellants' application until release of the CJEU's decision in the directions which are sent separately to the parties.

9. As to whether there should be a wider stay of proceedings, HMRC accept that there is little that may be progressed in terms of case preparation pending receipt of the CJEU's answer and were prepared, if the appellants were willing to undertake not take an Article 6 ECHR point on delay (which they were), to not object to the India matters being stayed more generally. In the circumstances I have also directed that the proceedings in the India appeals are stayed.

Application to exclude all documents containing hearsay evidence including OLAF report

Appellants' arguments

10. HMRC propose to use multiple hearsay evidence rather than adducing evidence if it exists from witnesses who can speak directly to the key matters in issue. The appellant gives as an example statements in the OLAF report which rely on something that the Sri Lankan authorities stated to an OLAF officer in relation to something which the Sri Lankan authorities were apparently told by the Indian authorities. Where serious allegations are being made it is not appropriate for evidence to be adduced in this way.

11. The appellant argues there are key issues around the consistency of what is being said that need to be explored. In one piece of correspondence the Sri Lankan authorities say the certificates of origin are genuine. Then they are reported as saying that the underlying Indian documents were forgeries. Then they refer to certificates of origin having been received by the Indian Director of Revenue Intelligence.

12. It is open to HMRC to call the named individuals in the documents as witnesses and it is proper that they should so. For instance in the documents there is a named Sri Lankan official whom the appellants cannot cross-examine which refers to admissions by another named individual. To the extent HMRC do intend to provide a witness (see below) cross examination is too blunt a tool to remedy the unfairness of allowing the statements the appellants complain of in.

13. The appellant also highlights that there is no formal mutual assistance agreement in place between Sri Lanka and India with the accompanying safeguards that that provides.

HMRC's arguments.

14. The OLAF report is plainly relevant. HMRC propose to call a witness from OLAF (Guy Jennes) who can speak to the conduct of the OLAF Mission and the evidence uncovered in the course of it. The appellants can challenge that evidence in cross-examination and through written and oral submissions. They can make submissions as to the weight to be attached to the evidence. There is an issue of timing. The weight or the evidence should be assessed in the substantive hearing (as opposed to this interlocutory hearing) when its value can be assessed against the many corroborating items of documentary evidence HMRC say will be adduced. A similar procedure was adopted and a witness called in *FMX Food Merchants Import Export Co Ltd v HMRC* [2011] UKFTT 20 (TC). In common with other similar cases much of the evidence is documentary evidence.

Legal framework and principles

15. The Tribunal's ability to admit and exclude evidence is set out in the Rule 15 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules").

16. Rule 15(2)(a) states that the Tribunal may:

> "admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom."

17. Rule 15(2)(b)(iii) permits the Tribunal to exclude evidence if:

> "it would otherwise be unfair to admit the evidence"

18. HMRC refer to extracts from *Megantic Services Ltd v HMRC* [2010] UKUT 464 (UT), *Megantic Services Ltd v HMRC* [2013] UKFTT 492 and *Atlantic Electronics Ltd v HMRC* [2013] UKFTT 492 (TC) where Ryder LJ held that the key question was the relevance of the material in question and that there was a presumption that all relevant evidence would be admitted before the FtT unless there was a compelling reason to hold to the contrary.

19. At the hearing the Mr Ferguson sought to clarify the appellants were not seeking to argue the materials they sought to have excluded was prejudicial because they contained hearsay. Rather his argument was that the documents which were the subject of the application ought to be excluded because it was unfair to admit them. If I have understood the argument correctly it is that the presence of hearsay was a means of identifying such documents but it was not the basis of the application. Mr Ferguson, correctly in my view, did not take issue with the propositions put forward by HMRC that:

(1) evidence in civil proceedings (defined in s11 of the Civil Evidence Act 1995 to cover any tribunal in relation to which the strict rules of evidence apply) shall not be excluded on the ground that it is hearsay,

(2) that the FtT is not a tribunal before which the strict rules of evidence apply; and

(3) that under Rule 15(2)(a) of the Tribunal Rules the FtT may "admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom."

Discussion

20. Having considered the particular documents referred to and Mr Ferguson's arguments which did not in my view articulate a basis of unfairness which stemmed from something other than matters of hearsay I am unclear as to the substance of the distinction he sought to draw.

21. From the propositions and legal framework above the fact that the evidence is hearsay does not prevent the Tribunal from excluding it. Nor does it require the Tribunal to exclude hearsay. The issue for the Tribunal is whether to exercise its discretion to exclude evidence and this rests on whether it would be "unfair to admit the evidence".

22. I describe some but not all of the documents included in the appellants' bundle below. Given the appellants' application was "that HMRC be barred from relying

upon any and all documents that contain hearsay evidence" the documents below are a sub-set of the documents the appellants seek to exclude (which it was clarified at the hearing were those annexed to its skeleton argument in the appellants' bundle.) To the extent the discussion below considers unfairness predicated on the presence of hearsay, and given no other basis of unfairness was identified, the conclusions I reach apply equally in relation to the other documents within the scope of the appellants' application.

23. The OLAF report is headed "Findings and conclusions of Olaf's mission to Sri Lanka (26.05 – 28.05.2008) Subject: Transhipment of fresh garlic through Sri Lanka with India as declared origin but suspected to be of Chinese origin." The copy before me had annexes numbered 1, and 3 to 6 as follows (there appeared to be no annex 2):

(1) Annex 1 is headed "copies of all relevant documents collected by Sri Lankan Customs authorities evidencing this transhipment under Customs Control (Application of the multi-country consolidated cargo scheme.)

(2) Annex 3 is headed "Correspondence with the plant quarantine station, Sea port, Columbo, concerning the issuing of 9 phytosanitary certificates. Copies of the relevant documents (the application and/or Indian Phytosanitary certificate."

(3) Annex 4 contains "correspondence with the National Chamber of commerce of Sri Lanka, concerning the issuing of certificates of origin."

(4) Annex 5 is headed "overview of imports of fresh garlic into the UK – transhipped in Sri Lanka

(5) Annex 6 contains an "event chart".

24. The appellant highlights that the report is a summary of "interim findings". It refers to investigations that were carried out by the Sri Lankan Customs authorities.

25. In addition the appellant referred me to:

(1) a letter from OLAF to HMRC Local compliance of May 2010 regarding OLAF's observations on comments provided by the appellants' former representatives. This reports a statement said to be from a named official at Sri Lanka Customs which states that a named person admitted that his company name was given to an Indian party to ship the Chinese garlic to the EU for a fee. The appellant says it lacks the opportunity to challenge this in cross-examination.

(2) Letters from L M Nelson of Sri Lanka Customs to OLAF of 20 September 2007 and 7 December 2007 which amongst other matters referred to investigations revealing that consignments had been imported from China but where it was not clear what consignments were in issue.

(3) Letter from the European Union Delegation of the European Commission to India, Bhutan and Nepal to OLAF of 11 December 2006 enclosing a table setting out quantities and value of garlic imports the source of which was stated to be the Ministry of Commerce and Industry, Government of India.

26. This was a non-exhaustive list of the documents the appellant sought to exclude. The totality appeared in the bundle provided for the hearing. But as HMRC pointed out there were some materials included there where there can be no question of unfairness of admission. These were a Notice to Importers addressed to Community operators from the European Commission and published in the Official Journal and the review decision of HMRC in a letter dated 4 June 2010 (which is the decision which is appealed against.)

27. In relation to the remainder of the documents, for the reasons below I am not persuaded the admission of the documents referred to in the appellants' application is unfair and that the Tribunal should exercise its discretion to exclude them.

28. Fundamentally I see no reason why the matters the appellants complain of as being unfair cannot be addressed through a combination of the opportunity to cross-examine the witness(es) HMRC propose to call and by submissions to the Tribunal hearing the substantive matter. If HMRC choose not to call the makers of the statements as the appellants say they should, and there is correspondingly, if the Tribunal accedes to any submissions of the appellants that little or no weight is thereby to be attributed to the documentary evidence, this is a risk HMRC bear. It is not a reason to exclude evidence.

29. HMRC say they intend to call Mr Guy Jennes. He is one of the individuals named as a contact for further information on OLAF's letter of May 2010. The appellant does not accept that calling Guy Jennes addresses the unfairness. He is "part of the danger" in that he is a commission official and will rely on the OLAF fndings. I disagree this means the OLAF report is inadmissible. It will be open to the appellant to cross examine Mr Jennes and to invite the Tribunal through submissions to place whatever weight, if any, on that evidence in view of any shortcomings identified by the appellants (with which the Tribunal agrees). HMRC do not argue that the findings of the OLAF report are binding on the Tribunal.

30. In relation to both *Megantic* and *Atlantic Electronics* the appellants point to differences between the evidence in issue as compared with the current matters. The appellant highlights that *Atlantic Electronics* concerned the admissibility of a prosecution opening and matters relating to convictions which were of public record whereas the OLAF report consists of the opinions of an investigatory body. *Megantic*, the appellant says, was a case about non-expert opinion evidence. Leaving aside any inconsistency between saying on the one hand that the report consisted of opinions by an investigatory body and on the other the implication that the report was something other than non-expert opinion evidence I am not persuaded the distinctions the appellants draw are relevant.

31. The principle relied upon by HMRC from *Atlantic* (that relevant evidence should be admitted unless there is a compelling reason not to) are no less applicable outside of the area of statements which explain the background to something which is a matter of public record. To the extent there is opinion evidence this may be taken into account and may be disregarded by the Tribunal. As pointed out by the FtT in *Megantic* at [38] if the evidence is not given by an expert or given by an expert but

safeguards not observed this may go to the weight of the evidence. But, neither of those matters compels a conclusion that evidence, if it is relevant, should not be admitted.

32. I also do not find the lack of a mutual assistance agreement between India and Sri Lank to be relevant. Even if there were a mutual assistance agreement that would not preclude submissions being made as to the weight to be attached to documents exchanged between the authorities of those two countries. The appellants make the point that if the Tribunal were to go ahead with allowing the evidence in and even if Mr Jennes were to turn up there will be a whole series of questions that Mr Jennes will simply not be in a position to answer. But, we cannot know that now. No witness evidence has as yet been served, and even if that is the case now, if there are matters in the documents which Mr Jennes is unable to answer then it is open to the appellants to make arguments as to why that detracts from any weight HMRC seek to place on the documents they rely on.

33. While that in my view is sufficient to deal with the appellants' application, I will deal briefly with HMRC's additional argument that the Tribunal ought to take the OLAF report into account as a matter of European law.

34. In short the HMRC argue that the FtT is an emanation of an EU Member State and bound by EU law obligations in the Treaties which include a duty of sincere cooperation between EU institutions and Member States.

35. I was referred to the case of the General Court of the European Union ('GCEU', formerly the Court of First Instance) in Case T-193/04 *Tillack v. Commission* [2006] ECR II-3995, which held in relation to the duty to cooperate that:

> "when OLAF forwards them information pursuant to Article 10(2) of Regulation No 1073/1999, the national judicial authorities have to examine that information carefully and draw the appropriate consequences from it in order to comply with Community law, if necessary by initiating legal proceedings if they consider such action justified. Such a duty of careful examination does not, however, require an interpretation of that provision to the effect that the forwarded information in dispute has binding effect, in the sense that the national authorities are obliged to take specific measures, since such an interpretation would alter the division of tasks and responsibilities as prescribed for the implementation of Regulation No 1073/1999."

36. Further in relation to applications for remission and repayment, the fact that there has been an OLAF mission is one of the matters which would require the dossier to be submitted to the Commission under Article 905(1) of the Implementing Regulation (Commission Regulation (2454/93/EEC)) to the Community Customs Code were the FtT to find at substantive hearing that the conditions for remission and/or repayment were otherwise made out. Also in Joined Cases C-153/94 and C-204/94 *Faroe Seafood and Others* [1996] E.C.R. I-2465, the CJEU recognised at [35] that the OLAF Mission report can properly be taken into account by customs authorities when deciding whether or not to issue Post Clearance Demands.

37. Given the reference to "initiating legal proceedings" in the passage above from *Tillack* the reference there to "national judicial authorities" having to "draw the appropriate consequences" from OLAF information is not in my view apposite to the position of the Tribunal's role in the substantive hearing of the matter which will be to assess the evidence, make findings of fact and apply the law. I accept that the fact that OLAF is an EU institution charged with a particular relevant remit and that it is built into the architecture of the European Regulation (in so far as the fact of whether there has been an OLAF mission is one of the criteria for referral to the Commission) are matters which indicate the OLAF report is likely to be a relevant matter to consider. But, this is distinct from saying that the Tribunal's discretion to exclude evidence is curtailed and it is obliged to consider the OLAF evidence whatever the circumstances by which it came about. The *Faroe Seafood and Others* cases confirm the Tribunal may take the OLAF mission report into account but do not go as far as suggesting that the Tribunal must take them into account.

The Egypt applications

38. On 7 May 2013 the appellants applied for an extension of time in which to serve their List of documents to 9 October 2013. HMRC filed a notice of objection on 17 May 2013. By a letter dated 31 October 2013 the appellants applied for a further extension for time to serve further documents by no later than 31 January 2014.

39. HMRC served their consolidated list of documents the day before the hearing of this application. The appellants say they require time to consider that list in formulating their list. HMRC do not object in principle to the appellants having longer to file their list of documents. What they object to are the reasons underlying the extension in that the reasons advanced for the extension of time are, they say, an attempt to re-litigate an issue which has already been determined against the appellants by a decision of the FtT released on 2 April 2012.

40. That decision allowed permission to appeal out time on limited grounds and no appeal has been brought by the appellant against that decision. In particular HMRC say the appellants propose to resurrect the purported validity of the EUR1 certificates which accompanies the consignments of garlic which purported to be of Egyptian origin which is inconsistent with the limited grant of permission by the FtT. Referring to *Johnson v Gore-Wood (A firm)* [2002] 2 AC 1 per Lord Bingham at pg 31, the HMRC say that what the appellants propose to do is an abuse of process, and it is wrong to go behind a finding that has actually been made.

41. Given HMRC's stance on the deadline for filing the list of documents it would be possible to simply dispose of the extension of time application and direct as I have done that the appellant have until 31 January 2014 to file its list of documents.

42. It would also be open to defer consideration of the issue of whether the materials the appellant is seeking to adduce go to matters which are not within the scope of the appeal given the Tribunal's previous determination that the appeal could only proceed on limited grounds.

43. The appellants takes objection to the fact that through being upfront in saying why they needed extra time for their list of documents they are now exposed to an objection from HMRC which if the Tribunal accepts, will mean they are shut out from adducing evidence.

44. The appellants have quite properly, given it is incumbent on them to provide reasons for their application, been transparent about the reasons why they need additional time to file their list of documents. These relate to the evidence they wish to rely on. Having learned of the evidence the appellants propose to adduce it is equally proper for HMRC, given they object to it, to take the point now rather than wait for the final hearing to raise the matter.

45. The issue was raised at the hearing as to whether it was appropriate for the Tribunal to give directions as to issues on which it requires evidence or submissions. The Tribunal's case management power and powers to require evidence or submissions (set out in Rules 5 and 15 of the Tribunal's Rules) would in my view allow the Tribunal to direct by way of case management what evidence or issues may be addressed by parties (leaving it to the parties to decide whether they wished to avail themselves of such option).

46. Although the appellants argue I should defer consideration of this matter until later I consider it desirable for a number of reasons to make a decision now on the scope of the appeals rather than leaving it to the Tribunal hearing the substantive matter.

47. These are: 1) that the question of the scope of the grounds which the FtT allowed to proceed out of time impacts on the breadth of the evidence and submissions the parties may wish to adduce with consequential effects as to the timing and expense of the proceedings, 2) that I have already received full argument from the parties as to the scope of the FtT's previous decision, and 3) the scope of the FtT's decision can be assessed now and is not dependent on future events.

Basis on which permission to appeal was granted

48. Permission to appeal out of time was sought in relation to two batches of Post Clearance Demand Notices ("PCDNs") which were sought to recover customs duty payable on imported fresh garlic. The first batch were upheld on a formal departmental review taken on 14 July 2006. The second were issued in October 2006 and were deemed upheld by operation of s15 of the Finance Act 1994. The second batch were issued more than 3 years after the importations occurred (which brought into play Article 221(4) of the Council Regulation (2913/92/EEC) (the Community Customs Code). The hearing to determine whether the appellants could appeal out of time took place on 30 January 2012.

49. Judge Berner refused permission in relation to the first batch and granted it on limited grounds in relation to the second batch.

50. Permission to appeal was given on limited grounds ("that the PCDNs issued in October 2006 were time barred"). The judge stated "For the avoidance of doubt, I refuse permission to appeal out of time on the ground the EUR1s were valid."

51. In order to properly understand the parties' arguments and the scope of the permission to appeal out of time it is necessary to set out the FtT's decision *(El Nagy International Limited and others* [2012] UKFTT 269 (TC)) in more detail.

The decision on permission to appeal out of time

52. At [6] the Tribunal's approach to its exercise of discretion was set out as follows:

> "…the Tribunal must consider all material factors, including the reasons for the delay, whether the Appellants have a prima facie case, whether there would be prejudice to HMRC if the appeal were permitted to be made out of time, and whether there would be demonstrable injustice to the Appellants were I not to allow the appeals to proceed."

53. At [8] Judge Berner stated:

> "The question is not simply whether an appellant has a good reason for the delay, but whether, taking account of all the circumstances, including the merits of the appellants case, there is a good enough reason that the tribunal should exercise its discretion in favour of the appellant in the interest of justice."

54. Having set out that the PCDNs concerned the importation of 21 consignments of garlic by the appellants from Egypt in the period from October 2002 to September 2004, the judge went on to set out the appellants' arguments claim that the EUR1s were valid following a September 2005 report from Egyptian authorities (following an OLAF enquiry) which suggested that the General Organisation for Export and Import Control in Egypt had not issued the EUR1 certificates presented by the appellants and that at least some of the consignments had not entered Egypt for customs purposes. The judge considered a letter from the Undersecretary of the Ministry Head of Export Affairs Central Department. In the judge's view that letter did not support the appellants' case that the EUR1s were valid, indeed the whole tenor of the letter pointed in the opposite direction. The judge also considered a witness statement from Mr Elnagy and a document claiming the certificates of origin were valid made by Mr Shebi Hammam, letters from Elnagy International Import-Export and a memo from Customs Clearance Transportation Forwarders.

55. At [21] he dealt with the arguments above as follows:

> "From what I have seen concerning the issues around the authenticity of the EUR1s, I do not consider the case of the Appellants to be a strong one. It is possible of course that further evidence might become available, including witness evidence from Mr Suliman. But on the evidence available to me I conclude that the Appellants do not have a

> reasonable prospect of succeeding on the ground that the EUR1s were valid."

56. The judge then went on to consider the appellants' argument that they had acted on good faith such that relief should be available under Article 220.2(b) of the Community Customs Code, or under Article 239. Setting out his reasons the judge came to the conclusion at [26] that on the basis of the evidence available to him the appellants did not have an arguable case on this contention.

57. Judge Berner then dealt with the appellants' argument that the second batch of demands issued in October 2006 were issued out of time and HMRC's answer to this as follows:

> "28. On the face of it therefore the appeals against HMRC's decisions in respect of these PCDNs *[i.e. the second batch of October 2006 PCDNs]* should succeed. HMRC, however, rely upon the terms of Article 221(4) to justify the issue of the PCDNs more than three years after the customs debt arose. They say that the delay was caused by the need to investigate the validity of the EUR1 certificates presented by the Appellants on import. HMRC say that the Appellants made untrue declarations by declaring the garlic in question to be of Egyptian origin and by asserting that the EUR1 certificates had been validly issued. The circumstances behind those declarations are such that could give rise to criminal proceedings under the domestic law of the UK. Alternatively, say HMRC, the Appellants recklessly made untrue declarations and the requirements of Article 221(4) are met.
>
> 29. It would not be appropriate for me, on an application of this nature, to comment on the respective positions of the parties on the applicability or otherwise of Article 221(4). There are technical legal arguments on the test to be applied in this respect. What I can say, however, is that I am satisfied that in this respect the Appellant has an arguable case."

58. Having gone through the merits of the appellants' various arguments Judge Berner then considered the appellants' reasons for the delay in making its appeals. In relation to the first batch he came to the view that Mr Elnagy was well aware that no appeals had been made but the position was different in relation to the second batch where he came to view that Mr Elnagy's adviser was (wrongly) under the impression that an appeal had effectively been made and that it was therefore unsurprising that Mr Elnagy shared that misapprehension.

59. In reaching his conclusions the judge considered the first and second batches separately saying at [48]:

> "48. It is convenient, I think, for separate consideration to be given to the circumstances of the first batch of PCDNs, where a review decision was made which founded the right of appeal, and the second batch, issued in October 2006, where there was no review, and the decision was deemed to have been confirmed, with the consequent right of appeal. There is, however, some overlap, as I shall explain."

60. In relation to the first batch the judge noted the above views that the appellants did not have a reasonable prospect of success on its arguments the EUR1s were valid, and that the appellant companies took a commercial decision not to appeal. He went on to consider the prejudice to the respective parties, accepting HMRC's submissions as to the difficulties of obtaining reliable witness testimony so long after the events in question and rejecting the appellants' point about the appellant companies being likely to cease trading and be placed in liquidation. In relation to the first batch he came to the conclusion "taking the merits of the case and all the circumstances into account" that permission should be granted for the appeals out of time.

61. In relation to the second batch the judge concluded that having regard to the non-culpability of the appellants in not appealing and his finding that the appellants "had a clear arguable case on the basis of the argument that the PCDNs were issued out of time" (HMRC's counter argument not having provided an immediate answer), permission to appeal out of time was to be given on terms further described.

62. At [57] Judge Berner made the point that considerations of the reliability of witness evidence are relevant:

> "only to the question of the validity of the EUR1s and not the essentially legal argument on the time limits for the issue of the PCDNs. So if the appeal were confined to the ground that the PCDNs are time-barred the prejudice element of the balancing equation would have less weight."

63. Permission to appeal was given on limited grounds ("that the PCDNs issued in October 2006 were time barred"). The judge stated "For the avoidance of doubt, I refuse permission to appeal out of time on the ground the EUR1s were valid."

64. At [58] the reasons were explained as follows:

> "58. It is the combination of the merits of the appeal on the ground that the second batch of PCDNs are time barred, and the circumstances of the delay in appealing the deemed review decision in that respect, that lead me to conclude that the appeals in respect of the second batch of PCDNs should be permitted to proceed. Both elements of that combination are material to the conclusion. The answer would have been different if the appeal had rested on the validity of the EUR1s; the merits of that case would have carried far less weight in the balancing exercise."

65. At [59] Judge Berner explained the basis on which it was possible to give permission to appeal out of time on limited grounds:

> "I have considered whether the scope of the Tribunal's discretion enables me to give permission to appeal on limited grounds only. I have concluded that it does. An appeal has no existence separate from the grounds on which that appeal is made. The discretion that the Tribunal has in this respect requires consideration of the prima facie merits of the case; a judgment must be made on the grounds put forward for the appeal. Where an appeal raises a number of different

> grounds, only some of which the Tribunal considers to be of sufficient merit in all the circumstances to justify permitting an out-of-time appeal to proceed, it would not be in the interests of justice to permit an appeal on other grounds which, by themselves, would not have persuaded the Tribunal to grant permission."

Discussion on what is in scope -Article 221(4) and the 3 year time limit

66. Although HMRC have couched their objection in terms of an abuse of process, the underlying issue is one of interpretation of the scope the grounds of appeal for which permission to appeal was granted. If the matter is out of scope and the appellant is re-opening the matter then the result is the Tribunal will have no jurisdiction to deal with matters which go beyond that for which permission to appeal out of time has been granted.

67. The crux of the issue is whether in allowing the appellant permission to appeal on the grounds the notices were time barred, but refusing permission to appeal on the ground the notices were invalid, the appellant is prevented from raising arguments and adducing evidence as to the validity of the notices. In particular the question arises as to whether the appellant may bring evidence relating to the origin of the garlic in order to meet HMRC's argument that the notices are not time barred because of the application of Article 221(4).

68. Article 221(3) and (4) of the Customs Code provide as follows:

> "(3) Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. This period shall be suspended from the time an appeal within the meaning of Article 243 is lodged, for the duration of the appeal proceedings.
>
> (4) Where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period referred to in paragraph 3."

69. As to the time bar argument the judge outlined at [29] that there were technical legal arguments and that the appellant had an arguable case.

70. Looking at [28] this sets out the ingredients for satisfaction of Article 221(4) as (1) untrue declarations of EU origin, 2) asserting the EUR1 certificates were validly issued under circumstances which could give rise to criminal proceedings or 3) recklessly making untrue declarations. The statement in [29] about the appellant having an arguable case is limited to whatever the technical arguments were on the test to be applied on Article 221(4).

71. From the arguments before me it is clear there continues to be a legal dispute between the parties on the interpretation of Article 221(4). For instance HMRC say it is enough that the actus reus of a criminal offence to which the criminal court

proceedings relate is present, whereas the appellants say both the actus reus and mens rea must be made out before Article 221(4) bites.

72. Beyond this the appellants say they are aware of certain documents that support the contention that no criminal act has been committed and that they need time to obtain and collate these documents. The issue of origin of the garlic is central to the 3 year time limit issue on which permission was granted. If the garlic originated in Egypt and not China then they say liability to criminal proceedings is not established. If they are not allowed to adduce this evidence, the appellants say the result is inconsistent both with the Tribunal's overriding objective and natural justice.

73. Further at the hearing Mr Ferguson suggested however that if the appellant was not allowed to adduce evidence relevant to origin little more needed to be done than HMRC making an assertion to which the appellant was not able to respond to.

74. HMRC say permission was granted to appeal only in relation to the time bar argument and it is not open to the appellant to argue about the origin of the garlic (there being no distinction between that and the argument on validity which the judge clearly did not allow permission to appeal.) The decision did not envisage the kind of "factually dense" hearing the appellant now appears to be embarking on (and that was factored into the balancing exercise). As the decision makes clear at [58] the result would have been different if the appeal rested on validity.

Tribunal's views on scope of permission to appeal out of time

75. Having examined the decision I consider it is open for the appellant to argue about the origin of the garlic for the reasons discussed below.

76. The Tribunal did not make findings of fact on validity and made this clear. At [21] the judge stated: "It is not of course appropriate for me to make findings in relation to the substantive appeal."

77. The purpose of looking at the evidence was to assess arguability in the context of assessing the prima facie merits of the appellants' case. There was no finding that the notices were invalid, just that it was not an argument on the basis of the evidence before the judge that would stand a reasonable prospect of success. In seeking to adduce evidence on origin I reject any suggestion the appellant is seeking to re-open findings of fact that have been made.

78. In favour of HMRC's position I think it is correct the judge did not envisage that if the appeal were to proceed there would be significant matters of evidence and fact finding to contend with. At [57] Judge Berner makes the point that the issues surround reliability of witness evidence are relevant only to the question of the validity of the EUR1s and not the essentially legal argument on the time limits for the issue of PCDNs (the prejudice element for which would carry less weight). However it is necessary to put this in the context of what was available at the hearing.

79. It is not clear to me that the FtT had the benefit of knowing what criminal proceedings HMRC were proposing to rely on. HMRC's Statement of Case was not produced until after the hearing. By directions issued on 2 April 2012 Judge Berner directed HMRC to serve a consolidated statement of case no later than 60 days after the release of the decision. There were hardship issues which needed to be resolved and HMRC were directed to serve the consolidated Statement of Case by 11 February 2013. Following an extension of time which was not objected to by the appellant HMRC filed its Statement of Case ahead of the 5 April 2013 on 27 March 2013. To the extent there is anything to be drawn from the appellants' failure to appeal it needs to be borne in mind that the appellants did not know HMRC's case until some significant period of time had passed after the FtT's decision.

80. In addition, even to the extent there were legal arguments it would not necessarily be the case that once those were resolved the appeal would end there. If it was correct that mens rea was also necessary there would not necessarily be sufficient facts to determine the matter. Also even if the conclusion was only actus reus was necessary, a finding of fact was not made on that. The finding that was made was for the purpose of deciding whether permission to appeal out of time was to be granted. So it cannot have been the case that no fact finding would be necessary to determine the matter.

81. It is correct that on HMRC's conception of scope, there is a purpose to the Tribunal granting permission on the limited grounds. Even if the EUR1s were invalid it would still need to be established that the hurdle in Article 221(4) was surmounted that there was the requisite act which was liable to proceedings in a criminal court and that the customs debt was the result of the act. I reject the appellants' argument that if they cannot adduce the further evidence they seek there is essentially nothing left for them to argue about.

82. However I cannot place too much weight on this as I think there is equally a point to the permission being given on limited grounds of appeal on the appellants' conception of scope. Permission to appeal out of time was sought by the appellant on various grounds. The fact the appellants would be allowed to argue about origin under the auspices of meeting HMRC's argument that Article 221(4) is satisfied so as to address the time bar that would otherwise apply does not mean that the appellants can raise validity or origin arguments in any other context. If the appellants are unsuccessful in showing the notices are time-barred there are no further grounds of appeal, or bases upon which the appellants' have permission to appeal the notices and the matter ends there. There could have been acts liable to proceedings in the criminal courts which led to the customs debt and which opened the door to the extended time limits but nevertheless other arguments the appellant could deploy to say why they were not liable (e.g. as to relief where importers acted in good faith). The limited permission serves a function in closing off the opportunity to argue about such other matters.

83. In relation to the second batch, the judge made it clear validity was not being allowed as a ground of appeal but the time bar argument was to be allowed. He considered HMRC's counter argument on disapplication of the time bar but reached

the view this did not provide an answer. In allowing the time bar argument he did not carve out validity from the question of whether there was an Article 221(4) act.

84. In relation to Judge Berner's statement at [58] that the position would be different if the appeal rested on validity it is not the case in my view that allowing the appellant to argue about EUR1 validity and country of origin in the context of its time bar arguments is equivalent to an appeal resting on validity. Even if the EUR1s are invalid the appellants could still succeed if the disapplication of the time bar in Article 221(4) is shown not to apply.

85. HMRC say there is no distinction between the question of origin of goods and the question of validity of EUR1 certificates. The presentation of valid EUR1 certificates was a necessary precondition to the entitlement to benefit from preferential arrangements concluded between the EU and Egypt. The appellants' position as I understand it does not however rely on a distinction between validity and questions of origin. They do not argue that they can adduce documents relevant to origin because the FtT only precluded the issue of validity but not origin. In my view to the extent the issue of origin is relevant to validity of the EUR1s and validity is relevant to Article 221(4) then I cannot see that the FtT's decision prevents the appellants from arguing about origin for the purpose of their arguments that the PCDNs are time barred.

86. I should point out however that I do not consider the appellants' arguments on the overriding objective and natural justice take the matter further. The question is one of the scope of the permission to appeal that was granted rather than one of discretion. If the conclusion were that HMRC's view of scope were correct the Tribunal would not have any jurisdiction to hear a ground of appeal in respect of which permission to appeal out of time had been excluded.

87. Fundamentally there are various facts which have to be established before the requirements of Article 221(4) are fulfilled in order for the notices not to be time barred. The FtT indicated its view of the prospects of success of arguments on validity but the fact that the appellants' case on validity as presented to the FtT was found not to stand a reasonable chance of success does not serve to establish the facts necessary for the application of Article 221(4).

88. To the extent the issue of origin is encapsulated within the issue of whether an act being liable to give rise to criminal court proceedings has taken place I cannot see that the appellants are prevented from adducing evidence which is relevant to that issue.

89. In their Consolidated Statement of Case HMRC set out various contentions of fact which underpin their argument that the 3 year time bar is disapplied. The appellant is, in my view, entitled to rely on documents with a view to challenging those contentions. These would include documents relevant to the origin of the garlic.

90. In directions issued separately to the parties the appellants are allowed their extension of time to serve their list of documents in the Egypt appeals to 31 January

2014. The documents referred to on the list may include documents relevant to meeting the facts which HMRC contend enable the time bar to be disapplied as set out in HMRC's Consolidated Statement of Case. These may include documents which go to the issue of the origin of the garlic consignments.

91. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 20 December 2013

Annex

Case C-437/13

Request for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) lodged on 2 August 2013 — Unitrading Ltd; other party: Staatssecretaris van Financiën

Questions referred

1. Do the rights enshrined in Article 47 of the Charter (1) [of Fundamental Rights of the European Union] mean that if customs authorities, in the context of the submission of evidence as to the origin of imported goods, intend to rely on the results of an examination carried out by a third party with regard to which that third party does not disclose further information either to the customs authorities or to the declarant, as a result of which it is made difficult or impossible for the defence to verify or disprove the correctness of the conclusion arrived at and the court is hampered in its task of evaluating the results of the examination, those examination results may not be taken into account by the court? Does it make any difference to the answer to that question that that third party withholds the information concerned from the customs authorities and from the party concerned on the ground, not further explained, that 'law enforcement sensitive information' is involved?

2. Do the rights enshrined in Article 47 of the Charter mean that when the customs authorities cannot disclose further information in respect of the examination carried out which forms the basis for their position that the goods have a specific origin — the results of which are challenged by reasoned submissions — the customs authorities — in so far as can reasonably be expected of them — must cooperate with the party concerned in connection with the latter's request that it conduct, at its own expense, an inspection and/or sampling in the country of origin claimed by that party?

3. Does it make a difference to the answer to the first and second questions that, following the notification of the customs duties payable, portions of the samples of the goods, to which the party concerned could have obtained access with a view to having an examination carried out by another laboratory, were still available for a limited period, even though the result of such an examination would have had no bearing on the fact that the results obtained by the laboratory used by the customs authorities could not be verified, with the result that even in that case it would have been impossible for the court — if that other laboratory were to find in favour of the origin claimed by the party concerned — to compare the results of the two laboratories with respect to their reliability? If so, must the customs authorities point out to the party concerned that portions of the samples of the goods are still available and that it may request those samples for purposes of such an examination?