Appeal No: UT/2014/0016

***CUSTOMS DUTY – classification – nomenclature – the correct classification of imported uncooked treated chicken – validity of HMRC decision to revoke a Binding Tariff Information provided to the importer***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

**ON APPEAL FROM THE FIRST-TIER TRIBUNAL**
**(TAX CHAMBER)**

**THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS**

**Appellant**

**- and -**

**INVICTA FOODS LIMITED**

**Respondent**

**Tribunal: Lord Justice David Richards**

**Sitting in public in London on 26 and 27 October 2015**

**Jonathan Bremner (instructed by the General Counsel and Solicitor to HM Revenue and Customs) for the Appellant**

**Nicola Shaw QC (instructed by Ince & Co) for the Respondent**

## DECISION

*Introduction*

1. This appeal concerns the correct classification, for the purposes of customs duty, of goods imported by the respondent, Invicta Foods Limited (Invicta), from outside the European Union.

2. The goods in question were uncooked chicken breasts (the Product) and the primary issue is whether they should have been classified under Chapter 2 of the Combined Nomenclature, as the appellant Commissioners (HMRC) contend, or under Chapter 16, as Invicta contends. A lower rate of duty is payable on goods classified under Chapter 16 than those classified under Chapter 2.

3. A second issue is whether HMRC validly revoked a binding tariff information (BTI), classifying the Product within Chapter 16. The BTI was issued on 20 October 2010 and revoked on 12 May 2011.

4. By a Decision dated 10 January 2014, the First-tier Tribunal (Judge Guy Brannan and Mr David Earle) (the FTT) held that the correct classification of the Product was within Chapter 16 and that the revocation of the BTI was invalid. The parties agree that, if these decisions stand, Invicta is in principle entitled to repayment of duty paid before the issue of the BTI which it has claimed, but the FTT was not concerned with the quantification of the appropriate amount. The parties agreed that they would seek to agree the relevant amount in the light of the determination of the classification issue.

5. HMRC appeal against the decision below, with the permission of the FTT.

*Facts*

6. There is no challenge to any of the findings of fact, which were in any event for the most part uncontentious, fully set out by the FTT in paragraphs 26 to 126 of its Decision.

7. As regards the classification issue, the relevant facts may be summarised as follows.

8. Invicta is an importer on a substantial scale of prepared and unprepared meat products from outside the European Union. The Product, imported from Brazil, consisted of uncooked, skinless chicken breast fillets which, before export from Brazil, were vacuum-tumbled for 25 minutes in a non-cure brine solution consisting of water (73.12%), salt (10%), sugar (8.13%), dextrose (5%) and phosphates (3.75%). The rate of application was 8% solution to 92% raw chicken breast and the Product fully absorbed the solution.

9. In support of its application for the BTI, and before the FTT, Invicta relied on a report prepared by Leatherhead Food Research (Leatherhead). Leatherhead tested a sample of the Product and a sample of raw untreated chicken breast in order, by way of comparison between the two, to test the changes which the meat had undergone as a result of its treatment with the solution as regards taste, appearance and texture. Leatherhead reported that statistically significant differences between the treated and untreated samples were found in terms of, among other things, flavour and after taste. The flavour of the treated sample was very different from that of the untreated sample, showing increased levels

of both the overall flavour and individual components (salty, sweet and savoury) in the treated sample. The report concluded that "the treated chicken sample differs substantially from the control sample in terms of the wide range of … flavour characteristics".

*Legal background*

10. One of the fundamental features of the European Union is that it comprises a customs union, involving the prohibition of customs duties on imports and exports between member states and the adoption of a common customs tariff as regards imports from countries outside the EU. The legal basis for the common customs tariff is provided by Council Regulation (EEC) 2658/87 of 23 July 1987 on the Tariff and Statistical Nomenclature and on the Common Customs Tariff (the Regulation). Each year the Commission adopts a regulation reproducing a complete version of the Combined Nomenclature and Common Customs Tariff duty rates, taking all amendments since the last version into account. Tariffs are fixed by reference to a very extensive list of goods categories, with a code of up to eight digits and a description.

11. Explanatory notes to the Combined Nomenclature (CNENs) are published by the European Commission which have consistently been held by the CJEU to be highly persuasive and an important aid to the interpretation of the scope of the various headings, albeit that they do not have legally binding force.

12. The same is true of the Explanatory Notes to the Global Harmonised System for classifying goods, organised by the World Customs Organisation. The EU Combined Nomenclature and the Global Harmonised System are very similar, although the latter uses six-digit codes as opposed to eight-digit codes.

13. The relationship between these two systems was helpfully explained by Arden LJ in *Amoena (UK) Ltd v HMRC* [2015] EWCA Civ 25 at [7]:

> "In the EU, customs classification is carried out under a system known as the Combined Nomenclature ("CN"). It is based on the customs classification scheme agreed and used internationally by a large number of countries, called the Convention on the Harmonised Commodity Description and Coding System ("HS"). The EU is a party to this Convention. The HS consists of some 5,000 groups of goods with 6-digit codes. The CN integrates the HS but in addition contains further subdivisions with 8-digit codes, specifically adapted for the EU. Both the HS and the CN have explanatory notes (HSEN and CNEN respectively), which are prepared by experts. Courts generally give weight to these notes even though they are not legally binding."

*The relevant product classifications*

14. HMRC submits that it correctly classified the Product within Chapter 2 under Community Code O2071410:

> "Meat and edible offal, of the poultry of heading 01.05, fresh chilled or frozen
>
> – of fowls of the species Gallus domesticus
>
> [ …]
>
> – cuts and offal, frozen:
>
> – cuts:
>
> – boneless."

15. Invicta submits that the Product fell to be classified under Chapter 16 under Community Code 16023211:

> "Other prepared or preserved meat, meat offal or blood:
>
> […] Of fowls of the species Gallus domesticus:
>
> – containing 57% or more by weight of poultry meat or offal:
>
> – uncooked"

16. It is Invicta's case that the Product constituted "prepared … meat". It was common ground that it was not "preserved".

17. Explanatory Note 1 to Chapter 16 states that Chapter 16 does not cover meat prepared or preserved by any of the processes specified in Chapter 2. Before the FTT, HMRC argued that the Product was prepared or preserved by one or more of those processes, but there is no appeal against the FTT's rejection of that part of HMRC's case.

18. Additional Note 6(a) to Chapter 2 is of central importance to this appeal and states that:

> "Uncooked seasoned meats fall in Chapter 16. "Seasoned meat" shall be uncooked meat that has been seasoned, either in depth or over the whole surface of the product, with seasoning either visible to the naked eye or clearly distinguishable by taste."

19. The CNENs to Additional Note 6(a) state that:

> "Salt is not considered to be a seasoning within the meaning of this Additional Note."

20. It is common ground that the Product would fall within Chapter 16 only if it constituted "uncooked seasoned meat" within the meaning of Additional Note 6(a). It is also common ground that no seasoning was "visible to the naked eye" in relation to the Product. The solution in which the Product was vacuum-tumbled was fully absorbed by the Product and did not leave visible traces on the surface of the Product.

21. The central issue is therefore whether any seasoning of the Product was "clearly distinguishable by taste" within the meaning and for the purposes of Additional Note 6(a). HMRC accept that sugar is capable of being seasoning

for these purposes and they therefore accept that if a flavour produced by sugar, in combination with the other constituents of the solution, was "clearly distinguishable by taste", the Product would fall to be classified under Chapter 16.

22. The area of disagreement between the parties is whether the requirement that the seasoning should be clearly distinguishable by taste must be satisfied on tasting the product alone or whether it may be satisfied by a comparative tasting of the product with a sample of untreated chicken breast from the same source as the Product.

23. The FTT dealt with this issue at paragraphs 157-171 of the Decision.

24. Before the FTT, HMRC submitted, first, that because salt was not to be considered as seasoning within the meaning of Additional Note 6(a) and because sugar comprised less than 1% of the Product after it had been vacuum-tumbled in the solution, the Product was not "seasoned" for the purposes of the Additional Note. Referring to the CNENs for Chapter 2 and 16 that provided respectively that meat that was "seasoned (eg with pepper and salt)" and meat "which was seasoned (eg with both pepper and salt)" fell within Chapter 16 rather than Chapter 2, the FTT said:

> "This indicated to us that salt could be a component in seasoning but could not be seasoning on its own. In this case, salt was not used on its own but was a component in the solution together with sugar and dextrose. In our view, therefore, the solution constituted seasoning for the purposes [of] Additional Note 6(a) and that the Product was therefore seasoned."

25. The FTT proceeded to consider whether the seasoning of the Product was "clearly distinguishable by taste". The central part of their reasoning is contained in paragraph 166:

> "At the heart of this issue, in our view, lies the question of what is meant by the words "clearly distinguishable by taste." Does it mean that a person tasting the Product must be able to say: "Oh yes, this tastes of XYZ seasoning" (i.e. it is possible to identify the type of seasoning used) or is it enough that when compared with an untreated control sample the Product exhibits significant differences in taste (as per the Leatherhead report) so that a person tasting it will say: "Oh yes, this tastes saltier/sweeter/more savoury than the untreated sample"? This was, we believe, the point being made by Ms Gearey in her second email to Mr Accleton when she commented that the Leatherhead report indicated only that the Product was saltier than the control sample but not that it was "salty." In other words must the seasoning be distinguishable by tasting the Product without any kind of comparison to untreated chicken or is it sufficient that the seasoning is distinguishable when such a comparison is made. In our view the words "seasoning … clearly distinguishable by taste" are wide enough to cover both possible meanings and there is no compelling reason to confine its meaning to one rather than the other."

26. For the most part, the remaining parts of paragraphs 157-171 are dealing with issues and submissions on which no point is taken on this appeal.

27. HMRC submit that, in holding that it is sufficient that the seasoning is distinguishable when a comparison is made with the untreated Product, the FTT misinterpreted the phrase "clearly distinguishable by taste" in Additional Note 6(a) and made an error of law. They submitted that, as consistently held by the CJEU, the criteria for classification must be based on the objective characteristics and properties of products which can be ascertained when customs clearance is obtained. The subject-matter of the assessment must be goods as presented for customs clearance. The goods must be assessed on their own terms. Moreover, testing based on a comparison with untreated

products would be unworkable in practice. In the present case, Invicta did not import untreated versions of the Product and it would therefore have been impossible, on the import of the Product, to carry out a comparative test. An importer would have to present an untreated sample of the product with the imported product, giving rise to the difficulties of being sure that the sample presented as untreated product was indeed a suitable control sample. Necessarily, untreated chicken may vary in taste depending upon the species and its country of origin (or, in the case of a large country such as Brazil, its area of origin).

28. The CJEU has repeatedly made clear that "in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters": see *Intermodal Transports BV v Staatssecretars van Financiën* (Case C-495/03) [2005] ECR1-8151 at [47]. In *Indurstriemetall Luma GmbH v Hauptzollamt Duisburg* (Case 38/76) [1976] ECR 2027 at [7], the Court said:

> "Whilst the Customs Tariff does indeed in certain cases contain references to manufacturing processes and to the use for which goods are intended it is generally preferred, in the interests of legal certainty and ease of verification, to employ criteria for classification based on the objective characteristics and properties of products *which can be ascertained when customs clearance is obtained*." [emphasis added]

29. In *Gijs van de Kolk-Douane Expéditeur BV v Inspecteur der Invoerrechten en Accijnzen* (Case-233/88) [1990] ECR1-265, a case which concerned customs

duty on seasoned chicken breast fillets, the Court said in relation to Additional Note 6(a):

> "The note at issue purports to specify what is to be understood by seasoned meat or meat offals within the meaning of the abovementioned Explanatory Notes of the Customs Cooperation Council. In order to do so it lays down criteria for classification based on the sensory analysis *of the goods*.
>
> Those classification criteria comply with the case-law of the Court of Justice according to which, in the interests of legal certainty and ease of verification, goods must be classified on the basis of the objective characteristics and properties of products which can be ascertained *when customs clearance is obtained* (see, inter alia, the judgment of 16 December 1976 in Case 38/76 *Luma v Hauptzollamt Duisburg* [1976] ECR 2027, paragraph 7).
>
> In order to apply criteria such as those set out in the note at issue, there are objective techniques of sensory analysis which have recently been developed and for which national and international standards have been laid down, for example, Standard DIN 10954 in the Federal Republic of Germany and Standard ISO 4120, which the International Organization for Standardization, Geneva, submitted to its member committees in 1982. As the Commission has pointed out those methods of analysis allow, in particular, *the goods as presented for customs clearance* to be accurately assessed for the four basic flavours – sweet, acid, salt and bitter – which can be detected, even at very low levels, by a statistically significant population." [emphasis added]

30. Although none of these cases was concerned with whether a comparative test was acceptable as a means of determining a relevant distinguishing feature, I agree with the submission of Mr Bremner on behalf of HMRC that these statements of high authority are directed at the state of the goods themselves at the time when they are presented for customs clearance or when customs clearance is obtained (both phrases are used and I do not think that the Court was seeking to mark any distinction between them).

31. Ms Shaw QC produced a copy of ISO 4120:1983 to which the Court referred in *van de Kolk* at [13]. It details a method of sensory analysis for detecting differences between samples of two products by means of comparison. Ms Shaw submitted that this indicated that the Court was content with the proposition that a comparative test could be used for the purposes of satisfying Additional Note 6(a). I do not think that the reference to the ISO will bear that weight. The issue for the Court was whether the Customs Cooperation Council had exceeded its discretionary power to interpret the Common Customs Tariff when it adapted Additional Note 6(a). It was relevant to that issue that in an earlier case, *Hans Dinter GmbH v Hauptzollamt Köln-Deutz* (Case 175/82) [1983] ECR 969, the Court took the view that a criterion as subjective as taste could not be used to assess the seasoning of meat. It was in that context that in *van de Kolk* the Court referred to the ISO, to demonstrate that there had been advances in this area so that taste was capable of objective analysis. In my judgment, the reference did not go further than that and does not establish that a comparative test was permissible for these purposes.

32. In my judgment, there is nothing in Additional Note 6(a) to suggest that the necessary distinguishing feature, if not recognisable when the product is analysed on its own, may be established by a comparative test. The other distinguishing feature for which the Additional Note provides, "seasoning … visible to the naked eye", does not suggest that it can be established by a comparative test. It directs attention to the product alone. In my view, this is a strong pointer to the adoption of the same approach to whether the seasoning is "clearly distinguishable by taste". It is relevant to note that in

the French text, the same word "perceptible" is used for both the sight and taste tests in the Additional Note.

33. These provisions must, of course, be interpreted against the realities of their practical application. In my view, the practical difficulties of verification of the control sample are a very strong factor against interpreting Additional Note 6(a) as permitting a comparative test.

34. I therefore conclude that the FTT made an error of law in construing the Additional Note as permitting a comparative test.

35. Invicta placed some reliance on the fact that HMRC had, it appeared, been content with the use by Leatherhead of comparative testing as the basis for their analysis and report. In a letter dated 23 March 2010, quoted in paragraph 40 of the Decision below, HMRC wrote to Invicta that if they wished to continue with their request for classification of the Product under Chapter 16 "please supply analytical taste test results of the chicken before and after the solution has been added". HMRC did not raise an issue with regard to the test methodology until the hearing before the FTT. It did not appear in their statement of case, skeleton or evidence nor was it the basis of their decision to revoke the BTI. Ms Shaw submitted that this approach by HMRC provided a valid sanity test. If the point did not occur to HMRC until a late stage in the proceedings, it was an indication of the quality of the point. It was not, however, said that HMRC was in any way estopped from running the point. Indeed, the point was fully developed at the hearing before the FTT without complaint and was dealt with by the FTT in its Decision. The point

must be dealt with on its merits and, for the reasons already given, I consider it to be well-founded.

36. Both parties placed some reliance on the Commission Implementing Regulation (EU) 1362/2013 of 11 December 2013 "laying down the methods for the sensory testing of uncooked seasoned poultry meat for the purposes of its classification in the Combined Nomenclature" (the Implementing Regulation). It makes provision for the visual examination and tasting of poultry meat to be carried out by means of the methods and under the conditions set out in Parts I and II respectively of the Annex to the Regulation. The purpose, as stated in Recital (2), is to lay down methods of testing in order "to ensure that customs authorities apply a uniform approach for the purposes of customs classification". It applies to the import of goods after 8 January 2014, and does not therefore apply to the import of Products in this case. Part II of the Annex provides, in paragraph 1, that the method "consists of tasting one or more samples of poultry meat after cooking". Paragraph 3, under the heading "Preparation of samples", provides that "a sample must consist of a representative portion of the poultry meat destined for consumption". Paragraph 4 provides that qualified and trained assessors are to be presented with one or more samples. Ms Shaw submitted that there was nothing in the Implementing Regulation to prohibit a comparative test involving a sample of the treated and the untreated meat. I do not accept this. The requirement that the samples must consist of a representative portion of the poultry meat "destined for consumption" shows that the samples must be of the treated poultry meat.

37. Ms Shaw submitted that, if the Implementing Regulation introduced a stand-alone method of tasting, it only served to demonstrate that nothing in the wording of Additional Note 6(a) itself restricted the method of tasting to a stand-alone test. By contrast, Mr Bremner on behalf of HMRC submitted that the approach taken in the Implementing Regulation provided further confirmation that Additional Note 6(a) did not permit a comparative test.

38. In my judgment, the Implementing Regulation is of no assistance to the issue to be decided on this appeal. I was not shown any authority to establish that, as a matter of EU law, later legislation could be used as an aid to the interpretation of earlier legislation. In any event, the purpose of the Implementing Regulation was to ensure uniformity of practice across the EU in circumstances where, it may be inferred, it had previously been lacking. Later legislation may be intended either to clarify and confirm or to alter the effect of earlier legislation. It is not clear which class the Implementing Regulation falls into, although it may be that, given that this is a Commission Regulation dealing with a Council Regulation and that there is no alteration to the wording of Additional Note 6(a), it is more readily to be understood as a clarifying, rather than an amending, measure.

39. On the basis that a comparative test is not permissible for the purposes of Additional Note 6(a), HMRC submit that the Product imported by Invicta must be classified under Chapter 2. The only evidence whether seasoning was clearly distinguishable by taste was that resulting from the comparative tests undertaken by Leatherhead. There is no evidence that, if the Product had been tested on a stand-alone basis, the seasoning could have been tasted.

40. Invicta sought to meet this point in two ways. First, it submitted that the results recorded in the Leatherhead report showed that this was not a marginal case. The conclusions quoted in paragraph 47 of the Decision showed that the salty, sweet and savoury characteristics apparent from those tests would have been perceptible on a stand-alone test. I reject this. It is not possible on an appeal to make a finding like this, all the more so as the test results shown in the Leatherhead report demonstrate, on a comparative basis, a much higher intensity of taste for saltiness than for sweetness or savouriness. Alternatively, Ms Shaw initially submitted that the matter should be remitted for further evidence and a new hearing on the basis of such new evidence. She envisaged that there would be a stand-alone test of treated Product. When it transpired that importation of the Product had ceased, it became apparent that this was no longer practicable. In any event, it would not be a test of the Product as imported during the period covered by this appeal.

41. In order to secure classification under Chapter 16, it was the responsibility of Invicta to provide evidence based on tests conducted in accordance with the legal requirements of the Combined Nomenclature and, specifically, Additional Note 6(a). It was not submitted that HMRC was, or could be, estopped from relying on the legal requirements laid down by those provisions.

42. It follows that the Product was correctly classified by HMRC to Chapter 2, not Chapter 16, of the Combined Nomenclature and that, in this respect, the appeal must be allowed.

43. HMRC challenged the decision of the FTT on the classification issue on two further grounds. As they were fully argued, I will express my views on them, although the issue of the test permitted by Additional Note 6(a) is sufficient by itself to dispose of the appeal on the classification issue.

44. First, HMRC submitted that the FTT erred in law in concluding that "salt could be a component in seasoning" for the purposes of Additional Note 6(a).

45. The FTT dealt with this at paragraphs 160-161:

> "160. Mr Bremner submitted that CNENs to Additional Note 6(a) to Chapter 2 made it clear that salt was not to be considered as seasoning with the meaning of Additional Note 6(a). Thus, Mr Bremner argued, the Product did not fall within Additional Note 6(a) to Chapter 2 (sugar comprised less than 1% of the Product post-tumbling).
>
> 161. However, as Ms Shaw pointed out, the HSENs for Chapter 2 and Chapter 16 provided respectively that meat that was "seasoned (e.g. with pepper and salt)" and meat "which was seasoned (e.g. with both pepper and salt)" fell within Chapter 16 rather than Chapter 2. This indicated to us that salt could be a component in seasoning but could not be seasoning on its own. In this case, salt was not used on its own but was a component in the solution together with sugar and dextrose. In our view, therefore, the solution constituted seasoning for the purposes Additional Note 6(a) and that the Product was therefore seasoned."

46. HMRC submitted that the FTT should have left salt, and any saltiness, out of account in determining whether the Product was seasoned and that seasoning other than salt must be clearly distinguishable by taste in order to qualify for the purposes of Additional Note 6(a).

47. I do not think that there was any difference between the parties on this point. Clearly, a solution which includes both salt and at least one other seasoning is

capable of resulting in the product being seasoned. In that sense, salt can be a component of the seasoning. But Ms Shaw on behalf of Invicta accepted that the other seasoning must be clearly distinguishable by taste before the product can be said to be seasoned. If a comparative test were permissible under Additional Note 6(a), the Leatherhead report showed that sweetness, resulting from the presence of sugar and dextrose in the solution, was clearly distinguishable by taste. HMRC accepted that sugar was a seasoning for these purposes. I am far from sure that the FTT was saying anything different in paragraph 161 of its Decision. In any event, the position taken by Ms Shaw, from which Mr Bremner did not dissent, is in my view correct.

48. The other submission made by HMRC was that the FTT's conclusion on classification was inconsistent with the scheme of Chapter 2. Heading 0210 in Chapter 2 makes specific provision for meat which is salted and/or in brine. Additional Note 7 provides that to be salted for this purpose the meat must have a total salt content by weight of 1.2% or more. Additional Note 6(b) provides that products falling in heading 0210 to which seasoning has been added during preparation remain classified under heading 0210 provided that the addition of the seasoning has not changed the character of the product. HMRC submitted that the very surprising result of the FTT's conclusion is that a product whose salt content is too low to fall within heading 0210 can fall to be classified outside Chapter 2 altogether.

49. I do not consider that there is any substance in this point. If the salt content of the Product was too low to fall within heading 0210, but was nonetheless seasoned within the meaning of Additional Note 6(a), I can see no

inconsistency with the scheme of Chapters 2 and 16 in the product falling within Chapter 16. Only if the salt content had been 1.2% or more, would it have been necessary to consider whether the addition of seasoning changed the character of the Product.

*The revocation issue*

50. Turning to the revocation of the BTI, Invicta appealed pursuant to paragraph 3(1)(c) of the Customs Review and Appeal (Tariff and Origin) Regulations 1997 (SI 1997/534). The jurisdiction of the FTT was supervisory and the relevant question was whether the decision to revoke the BTI was one which HMRC could not reasonably have taken. The parties were agreed that in order to succeed on the revocation issue, Invicta had to show that HMRC had acted in a way in which no reasonable body of commissioners could have acted, took into account some irrelevant matter or disregarded a relevant matter, or otherwise erred in law.

51. If requested in writing, a customs authority must issue a binding BTI in respect of a product and the person requesting it must supply all the information and documents required by the authority in order to take a decision. Article 9 of the Community Customs Code (Council Regulation (EEC) N029134/92) provides that a BTI favourable to the person concerned "shall be revoked or amended where, in cases other than those referred to in Article 8, one or more of the conditions laid down for its issue were not or are no longer fulfilled." Conditions are not expressly laid down in any Regulation but it is established that if the customs authority considers that a BTI wrongly classified a product to a particular code, the authority may, and indeed should,

revoke the BTI: see *Timmermans Transport & Logistics BV v Inspecteur Belastingdienst* (Joined Cases C-1334/02 and C-134/02) [2004] ECR 1-1125.

52. Invicta challenged the revocation of the BTI on the grounds, first, that HMRC had not concluded that the Product had been wrongly classified by the BTI but only that it may have been wrongly classified and, secondly, in any event, in reaching their decision to revoke the BTI, HMRC had failed to take into account two relevant considerations and had taken into account one irrelevant consideration. The FTT rejected the first ground of challenge, holding that HMRC were entitled to revoke a BTI if they considered that it may have been wrong but they upheld the particular ground of challenge on which Invicta relied. HMRC appeal against this decision.

53. Consideration of the validity of the revocation of the BTI is substantially changed by reason of my decision that the Product could not be classified under Chapter 16 on the basis of a comparative test. As a matter of the proper interpretation of the Combined Nomenclature, the Product could be classified under Chapter 16 only if it were demonstrated that the seasoning was clearly distinguishable by taste as a result of tasting only the Product. Without this evidence, HMRC was not entitled as a matter of law to issue a BTI classifying the Product to Chapter 16. It follows that the BTI should not have been issued on 20 October 2010 and that, properly applying the law, HMRC was bound to revoke it, which it in fact did on 12 May 2011.

54. Invicta submits that this does not affect its challenge to the revocation. The Tribunal should confine itself to those matters which in face played a part in the decision-making process. It accepts, as I understand it, that if the decision

were to be taken now, it is inevitable that HMRC would revoke the BTI, having regard to my decision on the classification issue. But, Invicta submits, that is irrelevant to the validity of the revocation decision made on 12 May 2011.

55. I do not accept this submission. In considering the legality of the decision to revoke the BTI, and in deciding whether to quash it, the Tribunal must take into account that the BTI was wrongly issued and that revocation was the only right course, on the basis of the law then applicable, even though the applicable law has only later been established by the decision of this Tribunal. It cannot, in my judgment, be right to quash as unlawful a decision which was the only lawful decision that could have been taken.

56. Accordingly, I will allow the appeal against the decision of the FTT upholding Invicta's appeal against the decision to revoke the BTI. The position of the importer is protected by provisions in the Combined Customs Code in respect of the period during which the BTI was in force and for a period of 6 months from the date of notification of its revocation in respect of binding contracts made on the basis of the BTI.

57. In these circumstances, it is unnecessary to consider the submissions of both parties relating to the grounds on which the FTT reached its decision.

58. Overall, therefore, I allow the appeal of HMRC against the Decision of the FTT on both the classification and the revocation issues.

Lord Justice David Richards - Decision released 19 January 2016