TC01488

Appeal number: MAN/2008/7063

IMPORT DUTY- two post-clearance demands in the sums of £149,994.58 and £199,701.49 respectively- GPS certificates of origins form As and Bangladeshi certificates of origin forgeries – no – Singapore bills of lading not substantiated documentation for purposes of the direct transport rule – no – appeal allowed apart from three invoices –observations on whether 'waiver relief' under Article 220 (2) allowable – not allowed - no evidence of good faith – observations on whether ' remission of duty' requested under Article 239 allowable - special situation - yes- no obvious negligence- yes.

FIRST-TIER TRIBUNAL

TAX

MARCO TRADING LIMITED **Appellant**

- and -

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

TRIBUNAL: DAVID S PORTER (TRIBUNAL JUDGE)
PETER R SHEPPARD (MEMBER)

Sitting in public at Alexandra House, Manchester on 31 May, 1, 2 and 3 June 2011

Mr T Nawaz, chartered accountant, for the Appellant.

Mr J Cannan, of counsel, instructed by the General Counsel and Solicitor to H M Revenue and Customs, for the Respondents

DECISION

1. Marco Trading Company Ltd (Marco) appeals against the review decisions confirming the post-clearance demands by way of duty dated 12 June 2008 and 15 August 2008 in the sums of £149,994.58 and £199,701.49 respectively. The review decision confirming the demand issued on 12 June 2008 was a deemed decision pursuant to section 15 (2) Finance Act 1994 because the review had not been carried out within the time limit of 45 days. The two appeals have been consolidated by a direction of the Tribunal dated 7 November 2008. Marco contend that they are entitled to the preferential rate of duty pursuant to the Generalised System of Preferences (GSP) in Commission Regulation 2454/93/EEC on the basis that the Form A Certificate of Origin, issued on behalf of the Bangledeshi customs authorities, were not forgeries and the Bills of Lading issued by the Singapore carriers were sufficient alternative evidence that the goods had come from Bangladesh. Marco also considered that it and its authorised Agents, Gateship Limited trading as Gateway Shipping Company (Gateship), had acted in good faith. The Respondents (HMRC) say that the Form A Certificates were forgeries, that the Bills of Lading by the Singapore carriers were not acceptable as evidence, that the goods came from Bangladesh and that the parties had not acted in good faith.

2. Mr Jonathan Cannan (Mr Cannan) of counsel appeared for HMRC and called the following people as witnesses all of whom gave evidence under oath:

- Michael Dittrich (Mr Dittrich), a customs investigator for the European Anti-Fraud Office (OLAF).
- Matthew William Luty (Mr Luty), an Assurance officer for the Tariff Preference Team.
- Sharon Tarik Barbouti (Mrs Barbouti), the Reviewing Officer.
- Joan Pond (Mrs Pond) a senior policy officer who gave evidence with regard to a repayment.

Mr Cannan also produced some bundles of documents.

Mr Tahir Nawaz (Mr Nawaz) appeared for Marco and called:

- Tahir Ahmed (Mr Ahmed) managing director of Marco and principal shareholder, who affirmed.
- Colin Camin (Mr Camin) managing director of Gateship, who gave evidence under oath.
- Dr Abdulziz-AL-Musa Alkahtani (Dr Alkahtani) a handwriting expert who affirmed.

Mr Nawaz produced some further bundles. All the bundles had been agreed by the parties.

3. We were referred to the following cases:

- *Eyckeler & Malt AG v United Kingdom of Great Britain and Northern Ireland*. Case T-42/96
- *PrimwexProdukte Import-Export GmbH & Co KG,Gebr.Kruse GmbH, Interport Im-und Export GmbH v United Kingdom of Great Britain and Northern Ireland* Case T-50/96

- *Geologistics BV v Commission of the European Communities v Kingdom of Spain* Case T-26/03
- *Llumitronica v Chefe da Dvisiao de Procedimentos Aduaneiros e Fiscais* [2002] ECR 1-10433
- *SCI UK Ltd v Commissioners* [2002] ECR 11-2597
- Case V-370/96 *Covita* [1998] ECR 1-17711
- Case C-348/89 *Mecanarte* [1991] ECR 1-3277.
- *Faroe Seafood and others* [1998] ECR 11-5285)
- Case T-290/97 *Mehibas Dorstseekan v Commission* [2000] ECR 11-15

Preliminary matters

4. (a) We were surprised to be told that Gateship was also appealing its liability in this matter in a separate appeal in the London Tribunal under references LON/2008/7123 and LON/2008/7158. We understand that Gateship's appeal is subject to a hardship appeal which had not, at the time of this appeal, been heard. We considered that both their case and this appeal ought to have been heard together as the liability for the duty is joint and several. As this appeal had been listed for four days and all the parties were available we decided to proceed with the hearing rather than adjourn it.
(b) Mr Nawaz told us that on 24 July 2008 Marco had applied with Gateship for relief from the liability to pay the duty on merchandise, which were not entitled to the preferential rate under Article 220(2)(b),on the basis that Marco and Gateship had acted in good faith. That application had been acknowledged by HMRC on 12 November 2008 for both paarties. For reasons which were never explained, HMRC took the view that that application had been for Gateship only and Mr Cannan contended that as a result the defence was not available to Marco. We did not agree and we have allowed Mr Nawaz to pursue such a claim on behalf of Marco.

The Law

5. Textile goods originating in Bangladesh are, in principle, eligible for preferred duty treatment in accordance with preferential tariff measures adopted unilaterally by the European Community (the 'general system of preferences'). The rules applicable to such goods are contained in Chapter 2 of Commission Regulations 2454/93 EEC ('the implementing Regulation'). Article 94 of the said Regulation provides for the subsequent verification of proofs of origin by the authorities of the exporting State, at the request of the authorities of the Importing state, and for the refusal of preferential entitlement if such verification does not bear out the declared origin of the goods in question. It is also agreed that such proof may be declared invalid without the consent of the authorities of the exporting State.

6. Post-clearance decisions may be challenged before the national courts under article 243 of the code. Section 14 (1) and (2) of the Finance Act 1994 provide for a review of the decision. Upon a review taking place, the decision may be confirmed, withdrawn or varied and appropriate consequential steps taken. The Tribunal's jurisdiction is confirmed by section 16 (5) FA 1994, which provides as follows:

> " (5) In relation to other decisions, the powers of an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

i. On an appeal under this section the burden of proof as to-
(a) [Various matters not relevant to this appeal]
…. Shall lie upon the Commissioners: but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established."

7. The tribunal must, in the first instance, decide whether a liability to customs duty arises. Article 80 requires submission of a certificate of origin Form A if the products are to benefit from tariff preference. Article 78 of the Implementing Regulation provides as follows, so far as relevant:

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

(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 in those countries, provided that the products remain under the surveillance of the customs authorities in the country of transit or of the 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 the passage from the exporting country through the country of transit; (b) a certificate issued by the customs authorities of the country of transit giving an exact description of the products; stating the dates of the unloading and reloading of the product 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**.(Our emphasis)

8. In order to be entitled to tariff preference the importer must therefore satisfy two conditions:

- It must have a valid/genuine Form A issued by the customs authorities in the beneficiary country, and
- It must satisfy the direct transport rule.

If the importer is unable to establish that it had a valid Form A and that it had complied with the direct transport rule it may, however, obtain relief under Article 220 (2)(b) which provides:

"22. Except in cases referred to in the second and third subparagraphs of Article 217(1), subsequent entry in the account shall not occur where:

(a)…..

(b) the amount of duty legally owed was not entered in the account as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

Where the preferential status of the goods is established on the basis of a system of administrative cooperation involving the authorities of a third country, the issue of a certificate by those authorities, should it prove to be

incorrect, shall constitute an error which could not reasonably have been detected within the meaning of the first subparagraph.

The issue of an incorrect certificate shall not, however, constitute an error where the certificate is based on an incorrect account of the facts provided by the exporter, except where, in particular, it is evident that the issuing authorities were aware or should have been aware that the goods did not satisfy the condition laid down for entitlement to preferential treatment.

The person liable may plead good faith when he can demonstrate that, during the period of the trading operations concerned, he has taken due care to ensure that all the conditions for preferential treatment have been fulfilled.

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

9. Article 239 provides as follows:-

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

- to be determined in accordance with the procedure of the committee;
- resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the committee procedure. Repayment or remission may be made subject to special conditions.

Article 904 (c) provides that the duties shall not be remitted or repaid where the **only** (our emphasis) grounds relied upon are the presentation, for the purpose of obtaining preferential tariff treatment of goods declared for free circulation, of documents subsequently found to be forged, falsified or not valid for that purpose, even where such documents were presented in good faith."

The facts

10. Marco has been importing goods for over 20 years and has relied on its overseas agents and suppliers for the shipping and Customs documentation. Its United Kingdom agents are Gateship. For many years merchandise has been cleared without any difficulty and, up to this appeal, Marco has never had any difficulties with Customs. This appeal arises out of two consignments of goods from Bangladesh, the first period from 27/9/05 to 28/7/06 and the second period from 9/8/06 to 30/1/07. There were 58 importation entries (involving 63 origin certificates). Two separate C18's were issued: C1801/0898/08 on the 12 June 2008 for £149,994.58 and C1801/1273/08 on 15 August 2008 for £199,701.49. On 23 June 2008, Mr Nawaz, on behalf of Marco, requested a review of the first decision. The review was not carried out within the 45 day time limit and as a result the original decision was deemed to be upheld. On 19 August 2008, Mr Nawaz, on behalf of Marco, asked for a review in respect of the second decision. Mr Ahmed, who affirmed, told us that Marco had been in business for forty years and, as wholesalers, it had originally traded within the United Kingdom. Faced with a changing retail environment and the decline of the United Kingdom production, some of Marco's suppliers relocated their manufacturing facilities to Turkey. At this stage Marco instructed Gateship to act as its import agents, as Marco had no expertise in the import

procedures. Marco also sourced some production from Morocco. As a result of success in these markets, Marco decided to source further goods from Pakistan and China. As these were new suppliers Marco would, to the best of its ability, vet the supplier, often including a visit to the supplier before placing any orders.

11. Mr Ahmed told us that he spent 12 to 14 weeks in each year out of the country visiting Marco's suppliers and prospective suppliers. In 2003 Marco was approached by Mr Azhar, representing Mian International General Trading, (Mian) in Ajman, UAE. Mr Ahmed met with Mr Azhar in Ajman and was shown round the factories that Mian worked with. Several orders were placed through Mian, which proved to be satisfactory. As the market began to change much of the textile production moved to Bangladesh. Marco had had difficulties with supplies from Bangladesh some 15 years previously, arising from incorrect deliveries and subsequent legal proceedings. In spite of Marco's concerns, Mian were anxious to continue trading with Marco and it persuaded Marco to trade with Mian's Bangladeshi Team. Mr Ahmed told us that purchases from Mian consisted of three types of orders:

i. Mian arranging to have goods made to Marco's design and specification
ii. Adding Marco's requirements on to orders Mian/factories were producing for Mian's large export contracts
iii. Buying cancelled orders, which Mian's team would try to find from local manufacturers.

12. The first orders were successful, with no problems arising from any documentation. As a result, Marco placed substantial orders with Mian for the spring and summer of 2007. Marco began experiencing difficulties in the spring of 2007, such that Mr Ahmed agreed to meet representatives from Mian in Karachi in March 2007. Mr Ahmed, on behalf of Marco, had been reassured by Mr Azhar that there would be no further problems and Marco placed orders for the autumn season. Mr Ahmed confirmed that the procedures for imports from Mian were conducted on a similar basis to those supplied from other countries.

13. We were referred to the two bundles relating to the preference documents. Those relating to the consignment demand C1801/0898/08 of the 12 June 2008 for £149,994.58 consisted of 29 Form A certificates. We were told that HMRC believed that all of the Forms A certificates were forgeries. Taking as an example document EPB 312826 the bundle identified the following:

- The GSP Certificate of Origin From A number EPB/311468 reveals that the goods were consigned from M/S Anowara Styles Ltd (Anowara) of 67 Naya Paltan, Vip Road, Dhaka -1000, Bangladesh for Marco
- The means of transport and route was from Chittagong, Bangladesh by sea B/L no: SOU.42391-01 DT 19.02.2006 vessel APL India V125 W Container no MOLU 7058930 for 24,559 pieces.
- That certificate identified the clothing involved and appears to have been signed by MD, Muzbarul Hoque. It is alleged that the signature was a forgery, a matter which we address later in this decision.
- There is then a certificate of origin identifying 24,599 pieces. The certificate refers to the same container number and appears to bear an appropriate seal. HMRC say that the seal is incorrect as the central arrow points between the first 'O' and the 'M' in the word Promotion in the wording 'Export promotion Bureau'. They say it should point between the 'P' and the 'R'. The EPB in Bangladesh have published

specimen seals and signatures on their web site. Mr Camin, who gave evidence at the tribunal, says that, as far as he was concerned, those tallied with the ones on the documents. The form is signed by Mr S M Alam. Again HMRC say that the signature is a forgery.

- There is a bill of lading from WPC Ocean Line Limited, which made up consignments of several hundred containers in Singapore. The Bills of Lading identify the container number MOLU 7058930; identifies the same goods, indicates that the transport is from Singapore to Felixstowe by APL India V125 and that the shipment came from Bangladesh.
- A Lloyds listing is available, which indicates that there was a vessel APL IndiaV125 which came from Hong Kong, arrived at Singapore on19/01 2006 and sailed for Southampton on 20/01/2006.
- There is also a Lloyds Listing of the vessel Banga Barta, next referred to, which left Chittagong on 12/01/2006 for Sri Lanka
- Mr Camin had been able to obtain the Bills of Lading supplied in Bangladesh in relation to the first consignment to which we refer later. The pre-carriage Bill of Lading number FV15041 identifies the same goods and the container number. It also indentifies the vessel for the onward journey as APL India V125.

The other documents and consignments were in similar form.

14. Mr Camin, who is a director of Gateship made a statement for the purposes of his appeal on behalf of Gateship and for this appeal. He described to the tribunal the procedures he understood took place when goods were purchased from Bangladesh. He understood that the port at Chittagong, from where the goods were to be transport, is a shallow port. As a result smaller vessels of about 100 tons were used to ferry one or two containers to Singapore, which was the trading hub for the area, and which could accommodate a substantial number of larger ships, which carried as many as 300 containers. WPC Ocean Liner Ltd (WPC) and Speedier Logistics Co Limited (Speedier) were two of the agents who assembled container ships, which were used by Mian and Marco. A pre-carriage bill of lading was prepared by the shipper in Bangladesh. This has on it among other information; the details of the goods; the container number; the seal number and the port of departure (in this case Chittagong) and the date. The vessel proceeds to Singapore where the containers are off loaded onto the dock side. The whole of the Singapore container system is computerised. WPC 'cut a new bill of lading' (i.e. prepare a second bill of landing, which cancels the pre-carriage bill of lading), taking the details from the pre-carriage bill of lading and send their bill of lading to the person paying for the freight -in this case Anowara, Agami Fashions Limited (Agami) or La Bella Apparels (PVT) Limited (La Bella), the suppliers found by Mian for Marco in Bangladesh. The bill of lading prepared by WPC or Speedier indentifies the ship and date the container is boarded. The pre-carriage bill of lading is not then required. It appears that the exporting industry accepts that WPC's bill of lading is sufficient evidence to identify that the goods were loaded in Chittigong and come from Bangladesh.

15. Anowara, Agami or La Bella, having been provided with WPC's bill of lading, take it to the Export promotion Bureau (EPB) in Bangladesh who issue a Form A, which is the certificate confirming the source of the goods. This identifies the details from WPC's bill of lading and is the confirmation from the Bangladesh authorities that the goods originated in Bangladesh. It has been alleged by Mr Dittrich from OLAF, who gave evidence, that as many

as 25% of these forms have been forged during the period 2005 to 2007, the period for the transactions the subject of this appeal. Form A is issued retrospectively as Anowara or the others cannot apply to the Bangladeshi EPB until they receive the new Bill of lading from WPC or Speedier. Anowara or the others companies send the Form A; the bill of lading; and its commercial documents to Mian as Marco's agents. The commercial documents will include Anowara's invoice for the goods and may be the freight costs, if the latter are being paid by Mian. Mian will take out Anowara's invoice and create another one for Marco representing Mian's bill for the transaction. Mian then sends the Form A, WPC's bill of lading and its invoice to Marco by post (usually registered to make sure they arrive). The container is placed on board the ship in Singapore with all the others and is brought eventually to the port at Felixstowe or Southampton, as designated on WPC's bill of lading. We were told that the container vessels frequently visit other ports on the way to their final destination.

16. When Marco receives Form A; the Bills of lading and the invoice from Main, 5 members of staff (and Mr Ahmed) are authorised to check the documents. Mr Ahmed told us that Marco receive 7 or 8 such documents each week. It would appear that the documents are checked in relation to the goods but that Marco relied on Gateship to ensure that the documentation is otherwise compliant. Mr Ahmed made it clear that he paid Gateship to deal with the importation details. Mr Camin of Gateship, in his evidence, indicated that he expected Marco to know what was needed for importation purposes. Having checked the documentation, Marco send the Form A and WPC Bill of Lading to FV Freight, the freight forwarders acting for Mian, who store the container when it arrives at the appropriate port. Marco is allowed 3 days to collect the goods before demurrage arises. This is because the documentation often takes some time to arrive from Bangladesh, even by recorded delivery. We were told that FV Freight check the container and seal numbers from the documentation and release the goods to the hauliers, who are contracted by Gateship to deliver the container to Marco. It appears that Form A and the WPC bill of lading are returned to Marco, presumably by the hauliers. Mr Ahmed admitted that he had not read any of the HMRC's documentation or notices in relation to the action Marco needed to take to import goods from Bangladesh, which, with hind-sight he said he ought to have done. Importantly, he was unaware of the requirement of evidence, preferably from Singapore, that the goods had remained in the container sent from Bangladesh and that they had nor been tampered with. Mr Camin was adamant that there was not need for the pre-carriage bill of lading to be produced. He confirmed that he had obtained copies of the majority of the pre-carriage bills of lading for the purposes of the first preference demand but that he had been unable to obtain any for the second preference demand because Mian had fallen out with all the parties. In light of the evidence of the first selection of pre-carriage bills we believe on the balance of probabilities that there were similar pre-carriage bills of lading for the second consignment.

17. The first indication Mr Camin had that there were problems with Forms A was in October 2007 when a paper was issued advising that a number of Forms A had been falsified mainly arising from spelling mistakes and the size of the EPB stamp and the direction in which the arrow was pointing. He confirmed that he had checked those with the seals on the forms that they had received and there was no problem. The stamps on the Forms A, the subject of this appeal, appear to be the same as those applied to several imports that have not been queried by HMRC. As the Certificates of Origin identify the containers he saw no reason to query the documentation provided for these consignments.

18. A written representation from John Shelly has been produced to the Tribunal on behalf of Gateship, for whom he acts. In that statement he says:

" 2.1(h) the EPB have published specimen seals and signatures of their officials at www,epb.gov.bd [we contend that these tally with the disputed GSP certificates].

3.3 The EPB have various offices including Chittagong, Dhaka and Khulna. They are many miles apart and do not share the same stamps for example the official stamp for Khulna office has an arrow pointing between the letters 'P' and 'R' where the arrows on the Dhaka stamp points to the letters 'O' and 'M' and moreover the EPB has admitted to printing errors……. The same Dhaka stamp, which points to 'O' and 'M' appears on numerous other Marco shipments from the same period which are not in dispute."

Mr Shelly also referred to a paper from the Joint Customs Consultative Committee (JCCC) paper (07) 42 which we assume to have been prepared in 2007, which states under recommended action:

"NB – It has also come to the attention of the European Commission that a large number of Forms A have been issued by Bangladesh, which comply with the legal requirements in all respects, with the exception that they have what appears to be, yellow, rather than green background, and the background does not have the required Guilloche (intertwining ribbons) pattern. The Bangladeshi authorities have confirmed that these certificate are authentic (the non-standard format being due to a printing error) and as a large number of blank documents have already been distributed to regional offices throughout the country, the Commission have given Bangladesh a period of grace until 31 December 2007 to use the forms.

19. Mr Ahmed told us that he had become concerned again with the quality of the goods being manufactured in Bangladesh, on Mian's instructions, for Marco. As a result, Mr Ahmed arranged to go to Bangladesh with Mr Azhar on 23 February to 26 February 2008. We note that this visit was arranged before Mr Ahmed was aware of any problems with the Forms 'A' the subject of this appeal. He visited some 14 factories. He told us that he saw some of the goods which Marco had ordered and which had been delivered. These derived from the large orders that Mian had placed for its larger companies, as explained earlier. As a result of that visit and form knowledge gained from his past experience he was absolutely certain that all the goods, the subject of this appeal, came from Bangladesh and that as a result the preference claim should have been allowed. We found Mr Ahmed to be an experienced businessman. His evidence was convincing and straightforward.

20. Mr Luty gave evidence under oath. He confirmed that he examined the 29 GSP Forms A certificates set out in the first demand C1801/0898/08 preference documents. He understood that OLAF had undertaken a mission to Bangladesh in March 2007 with the assistance of the EPB. As a result, HMRC had been provided with details of all the GSP Forms A which had been issued by EPB in Bangladesh for the period January 2005 to the end of February 2007. The 29 Form A's relied on by Marco did not appear on that list nor did the reference numbers on the certificates match the sequence used by the Dhaka office at the time. Mr Luty had also checked the certifying authority stamp against the official impression of the stamp used by the EPB. He stated that the central arrow points to the incorrect letters. Mr Luty annexed to his witness statement details of the OLAF mission in March 2007. This revealed that of the 5600 Forms A checked during the mission 1383 (24.7%) were invalid. It is significant that none of the Companies which had issued the Forms A were companies with which Marco traded. Furthermore the report stated that any Forms A that were not on the list provided by

the EPB as genuine were suspected to be false. In those circumstances OLAF requested that HMRC should send any such Forms A to the issuing authorities for post-clearance verification. We have seen no evidence that HMRC have carried out such post-clearance verification in relation the Forms A the subject of this appeal.

21. Mr Luty also produced a document dated in 2002 purporting to show the authorized seal and signatures of amongst others Mr Muzharul Hogue and MD Johirul Islam. In examining the transport documentation Mr Luty decided that as all the consignments had been shipped to the United Kingdom from Singapore and there was no evidence that the goods had been shipped from Bangladesh to Singapore, Marco had not complied with the direct transport requirements in Articles 78 and 81 of the Commissioners regulation 2454/93. As a result of all the above he concluded that the consignments did not qualify for the preferential duty rate claimed. He also confirmed that the second list of consignments in his witness statement was incorrect he had, in error, pasted the first list into the second. He confirmed that the list should have been that provided in the bundle for the second demand number C1801/1273/08.

22. In his second witness statement Mr Luty confirmed that he had checked for the names of the vessels used to transport the goods from Bangladesh to Singapore to the United Kingdom on the SeaSearcher lists provided by 'Lloyds List Intelligence', a highly regarded database. The list holds details of the movements of 120,000 merchant vessels around the world. Mr Luty has extrapolated on to the schedule at the front of each consignment bundle details of each consignment and the ships reputably used to transfer the goods from Singapore. We do not propose to identify all of them other than EPB/315510 declared on 4 July 2006:

- The Speedier Bill of Lading indicates that the consignment was 'shipped on board' on 30 June 2006. Mr Camin has explained that the Bill of Lading would be returned to Bangladesh so that Anowara could obtain the Form A certificate, which it did on 5 July 2006. The Bill of Lading appears to have taken 5 days to return to Bangladesh. We have not been told how far Bangladesh is from Singapore but if the Bill of Lading went by sea, which it must have, then presumably the goods left Bangladesh on or before 25 June 2006 (five days before 30 June 2006). The Bill of Lading identifies the container as number MISU2329396, the right quantity of goods, and identifies NYK Apollo as the container vessel taking the goods to Southampton.

- The Form A Certificate Identifies the container number and the NYK Apollo and is signed by MD. Johirul Islam and dated 5 July 2006

- The Certificate of origin has all the same details and is signed by MD Muzharul Hoque and also dated 5 July

- The SeaSearcher information supplied to the Tribunal for the NYK Apollo shows details of that vessel's sailings as listed by SeaSearcher from 9/4/06 to 8/12/06. Mr Luty did accept that the ship may well have docked elsewhere in Europe.

23. Mrs Barbouti gave evidence under oath and is a Reviewing Officer for the Customs Reviews and Appeals Team, she was the case Officer in this appeal. The EPB had provided a list of valid Form A certificates originating from two of the exporters supplying Marco, namely Agami and Anowara. She produced a redacted list and stated that none of the valid

Form A Certificates indentified Marco as the importer. Mrs Barbouti also provided in her supplemental statement a list of valid Form A certificates in relation to goods supplied by La Bella. Mrs Barbouti indicated that none of the importers, whose names had been redacted, related to Marco. In cross-examination Mr Nawaz referred her to certificates identified to a UK trader and numbered 120849, 120850, 120852 and 121112. It appeared that the importer was a Spanish company. Mr Nawaz suggested that that it was unlikely that the goods would have been delivered to the United Kingdom for a Spanish company. Mr Ahmed had also produced evidence, which showed that the number of garments, the price on the Certificate of Origin from Bangladesh and numbered 120852 and dated 14 January 2007 is in the same form, with the same seal as the alleged forged documentation for Marco. As a result the Tribunal had required the name of the importer in relation to these listings. This showed that the merchandise had been delivered to Marco Polo Trading Ltd. In the light of Mrs Barbouti's evidence we are satisfied that these four certificates related to Marco and not to Marco Polo Textiles SL as alleged by Mrs Barbouti.

24. Mrs Pond gave evidence of a repayment of £11,922.86 was made on19 February 2007 arising from a certificate dated 8 February 2007 in relation to a transaction from Mian to Marco. The repayment was made in the same period as the consignments the subject of this appeal. Gateship contacted Mr Healey of the Customs Team at HMRC by a fax dated 12 February 2007 and stated;

> "We have just checked our deferment account and it appears that the VAT and duty amounts on the above entry have been incorrectly entered. The reason for the error was the fact that although the goods are consigned from and originate in Bangladesh, the consignor is based in Dubai. The entry was originally input as UAE goods, but the error was quickly spotted. Immediately after the original entry was transmitted, an amendment was submitted, and it was assumed that the correct details have now been entered".

Mrs Pond confirmed that the department would consider the Form A certificate on its face value and would be unaware of any of the difficulties in Bangladesh. Mr Luty would not have found the details on the CHIEF system because the certificate showed the consignee to be in Dubai.

25. Mr Dittrich gave evidence under oath. He is a Customs Investigator for OLAF. He went to some length to tell us that he was independent both of the Commission and HMRC. He told us that he regularly undertook missions to countries outside Europe. OLAF's representatives first visited Bangladesh in March 2007, he had not been involved in that mission. The report produced to the Tribunal had all the names redacted and Mr Nawaz, in cross-examination, pointed out that from the letter dated 26 April 2010 from HMRC addressed to him none of the names appeared to relate to Marco. It would appear, therefore, that as the mission in April 2007 did not relate to the United Kingdom and could not have been the source for any of the Form A certificates the subject of this appeal.

26. OLAF participated in three further missions to Bangladesh in April 2008, March 2009 and May 2011. The purpose of these missions was to verify the authenticity of the Bangladeshi GSP certificates of origin Form A presented to the Member States in support of preference claims for goods imported into Europe. The Final Report in relation to the mission in April 2008 indicates that the verification related to imports from Bangladesh to the Netherlands, Ireland, Germany, Belgium, Sweden, Finland, France and Denmark. As it made no reference to the United Kingdom its only relevance can be that many of the Forms A produced for all those countries had also given rise for concern.

27. The Mission report for March 2009 arose from a request in September 2006 from the United Kingdom's Customs and the Danish Customs. Mr Dittrich told us that OLAF suspected that products which originated in China were imported in to the Community with false or invalid Bangladeshi Forms A. Moreover, in almost all cases the direct transport rule was not applied as the goods were transhipped via Singapore and had never emanated from Bangladesh. The Mission identified approximately 1400 false or forged certificates Forms A. The mission had targeted nine Bangladesh companies none of which were companies with which Marco had dealt. As a result we fail to see what relevance this mission has to this case other than to establish yet again that many Forms A Certificates were forgeries. The member Mr Sheppard asked Mr Dittrich if he could tell the difference between the two stamps on the certificates of origin and Mr Dittrich admitted that he could not.

28. In his second witness statement Mr Dittrich gave evidence as to his third visit to Bangaldesh for OLAF from 9 to 19 May 2011. The purpose of the mission was to verify the authenticity of the Forms A Certificates presented to the Netherlands and to make enquiries, we understood, concerning a number of issues rising in this appeal. It was unclear whether, on this last visit to Bangaldesh, he had been instructed by HMRC directly to investigate the circumstances of Marco's trading or not. The list appears to have come from Director General (Textile) by email to Mr Dittrich. The list states:

> 'None of the Form A's presented by Marco Trading appear on the EPB list/database.. see EPB Statement dated 11 May and 16 May 2011 as Annex 1 of the 2011 Final report'.

Mr Dittrich also produced a letter signed by Reaz-Bin-Mahmood stating that La Bella had never traded with the EU importers identified to them which we are told did not included Marco.

29. Mr Dittrich indicated that in these types of investigations the merchandise often did not originate in Bangladesh as declared. In order to disguise the true origin of the traffic and to create a transport history for the consignments, false bills of lading were produced indicating the containers were loaded and transported from Bangladesh (e.g. Chittagong) to Singapore. In Singapore, an ocean bill of lading, issued by a shipping line, would be produced to cover the transport of the container from Singapore to Europe. This was known as 'Cross-stuffing' and could be done legitimately under customs surveillance and, is not of itself, a breach of the applicable legislation.

30. Mr Dittrich also confirmed that *Baksheesh (bribes)* occurred in Bangaldesh but, when they did, it resulted in a file being moved lower or higher up the shelf. He did not accept that *Basheesh* tainted the whole process. Mr Nawaz produce to the Tribunal a print out dated 24 January 2011 from the internet indicating that a top anti-corruption official in Bangladesh was arrested as he had accepted a bribe during a sting operation in the port city of Chittagong. The report explained that *baksheesh* is widespread in impoverished Bangladesh and that the country is the worst on the Berlin based Transparency International's global list of the most corrupt nations covering the five years from 2001 to 2005. Mr Cannan raised no objection to the introduction of this evidence but we accept that its evidential weight is slight as the incident occurred in 2011. We note, however, that OLAF has carried out at least 4 missions to Bangladesh from 2007 to the present time. That in itself indicates that the Commission were far from content with the way in which Bangladesh operates.

31. Mr Dittrich had been provided with the pre-carriage Bills of Lading from CSL Shipping Lines Ltd obtained by Mr Camin in relation to the first consignment. These identified the 'CSL Shipping Line' as the carrier on all the bills of lading with an address at 78 Motijheel C/A Dhaka-1000, Bangladesh. The mission attempted to clarify the existence and the whereabouts of the company. A visit was made to 78 Motijheel (1st Floor) 1000 Dhaka. It appears that the 'Unicorn Group' had offices there and that Coral Shipping Lines Ltd was part of the group. Mr Amirul Haque, the accounts manager, confirmed in writing (as annexed

to Mr Dittrich's second statement) that Coral Shipping Lines Ltd had never traded with Marco trading; that the company never used the name CSL Shipping Lines Limited; and the company was involved in carrying BPC oil from Chittagong to different oil depots within Bangladesh. In cross-examination Mr Nawaz suggested that there were many offices in the building and CSL Shipping Lines Limited could be in one of those. Mr Dittrich conceded that that could be possible. For our part we fail to understand why Mr Dittrich presumed that 'CSL Shipping lines Limited' as identified on pre-carriage Bills of Lading could be Coral Shipping Lines Limited as that would make the second reference to Shipping lines in' CSL Shipping Lines' redundant.

32. Mr Dittrich confirmed that the names Agami, Anowara and La Bella were already known to OLAF. Both Agami and Anowara confirmed that they had had no dealings with Marco. Mr Dittrich had been told that La Bella had ceased to trade at the beginning of 2009 but the managing director, Mr Reaz-Bin-Mohmood confirmed that the Forms A, shown to him, and ostensibly belonging to Marco were false and had not been signed by him. Mr Dittrich has told us that the documentation arising from the various missions are only retained for 3 to 6 years. It appears from his evidence that he did not utilise the documents the subject of this appeal. If so his evidence can have no relevance to this appeal, in so far as it purports to establish that the documents in the two consignments were forged. Marco and their representatives have been given no opportunity to reply to the allegations. Furthermore, given the period of the consignments, we would have been surprised if Mr Reaz-Bin-Mohmood could remember the forms in any event. We have found all this evidence very unsatisfactory. If all these companies were known to OLAF it is hardly surprising that they denied any knowledge of the documentation in May 2011 relating, as they do, to transactions between September 2005 and February 2007 due to the passage of time. We have not been told on what basis the questions were put to all the representatives only that the documents were shown to them. Presumably they had been told that the forms were the subject of an enquiry by HMRC. In any event the forms referred to are not the ones the subject of this appeal. It could be possible that the companies, known to OLAF, may have carried out some legitimate trade.

33. No evidence, other than that from Mr Dittrich, has been produced by HMRC as to the veracity of the signatures of Mr Hoque, Mr Johirul Islam and Mr Abdul Moyen. Mr Nawaz called Dr Alkahtani, as a handwriting expert, who affirmed, and who had been asked by Mr John Shelly, on behalf of Gateship, to compare the various signatures by Mr Hoque, Mr Johirul Islam and Mr Abdul Moyen. He confirmed that the veracity of his evidence was affected by the fact that he had not been provided with original signatures but copy specimens on EPB Certificates of origin and the sample signatures provided to Mr Luty. He identified these limitations in his evidence. Furthermore, his English was no very good but we found him to be a straight forward expert witness with no bias to either party. Dr Alkahtani indicated that he had taken 3 days to examine the signatures and identified a range of opinion as follows:

- *Identification* – The signature is genuine
- *Likely* Strong evidence that the signature is genuine
- *Not conclusive:* The evidence is inconclusive as to whether the signature is genuine or not
- *Unlikely:* Strong evidence that the signature is not genuine
- *Elimination:* The signature is not genuine.

He considered that 3 of the 5 signatures relating to Mr Hoque were *likely* to be genuine; that 2 of the 4 signatures of Mr Johirul Islam were likely to be genuine; and that it was *inconclusive* as to whether Mr Abdul Moyen's signature was genuine. Interestingly none of the signatures

were identified in the 'elimination' catergory As this is the only evidence we have been given with regard to the handwriting we have decided, on the balance of probabilities and in the light of the earlier evidence, that HMRC have failed to prove that the signatures were forgeries

Submissions on behalf of HMRC.

34. Closing submissions were served pursuant to a direction of the Tribunal made on 3 June 2011 and were received at the end of July. Further observations on each of the submissions by the other party were received at the beginning of August 2011. Mr Nawaz included with his observations on Mr Cannan's submissions representations on behalf of Gateship provided by Mr Shelly, its representative. We have not considered those representations, and do not propose to do so. Mr Shelly did no appear before the Tribunal, and Mr Cannan has not had, nor will have, the opportunity to consider Mr Shelly's views. We have considered Mr Shelley's evidence in so far as it appears in the bundles and forms part of Marco's evidence. Mr Cannan has set out the law as he sees it and we do not propose to repeat his observations. Mr Cannan submits that the issues in dispute in the present appeals are:

- Was Marco entitled to the preferential rate?
- Are the conditions set out in Article 220 (2) (b) of the Code satisfied?
- Are the conditions set out in Article 239 of the Code satisfied? And
- If the conditions in Article 220 (2) (b) and/or Article 239 of the code are satisfied what remedy is available to Marco?

It is also important that the Tribunal distinguish the different test applicable to article 220 (2) (b) (waiver) and Article 239 (remission).The submissions by Mr Nawaz fail to make this important distinction. Section 16 (5) of the Finance Act 1994 states that the burden of proof on appeal lies with HMRC ' but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established'. Accordingly, the burden is on Marco to satisfy the Tribunal that it should exercise its powers under section 16(5) to quash or vary HMRC's decision on review or to substitute its own decision.

35. Is there a liability to customs duty? The ECJ in the *Llumitronica v Chefe da Dvisiao de Procedimentos Aduaneiros e Fiscais* [2002] ECR 1-10433, at paragraph 33 noted that

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

Article 80 requires submission of a certificate Form A if the products are to benefit from tariff preferences. By virtue of Article 81, originating products are eligible for tariff preference *"provided they have been transported directly [to the EU] within the meaning of Article 78, [and] on submission of a certificate of origin Form A"* issued by the competent government authority of the beneficiary country. In order to be entitled to the tariff preference Marco must have a valid/genuine Form A issued by the customs authorities in Bangladesh and must satisfy the direct transport rule. In *SCI UK Ltd v Commissioners* [202]ECR 11-2597 the Court of First Instance stated:

In that respect, it is clear that the importer is responsible both for payment of the import duties and for the regularity of the documents presented by him to the customs authorities,

and that the adverse consequences of wrongful acts of his contractual partners cannot be borne by the community. The possibility that price undertaking documents are subsequently discovered to be invalid is a trade risk inherent in the importation business (see, by analogy, *Mehibas Dordtselaan,*paragraph 83). Moreover, the importer may seek damages against the trader involved in the fraudulent use of the documents in question. Finally, a prudent trader aware of the rules must assess the risks inherent in the market which he is considering and accept them as normal trade risks".

36. The direct transport rule is in Article 78 and the conditions in 78 (1) (b) are cumulative – transport as a single consignment and remaining under customs surveillance. Where there is no single transport document covering transport from the exporting country through the country of transfer, which is the case in the present appeal, the primary alternative evidence will be a customs non-manipulation certificate. The evidence establishes on the balance of probabilities that the Form A certificates relied on by Marco were not issued in Bangladesh. Mr Dittrich has carried out detail investigations into the Form A certificates purportedly issued by the EPB, including the Form A certificates relied upon by Marco in this appeal. Mr Dittrich's evidence was measured and impartial. There can be no doubt that the missions to Bangladesh established that there was a significant problem with fraudulent Form A certificates. The EPB maintained a register of certificates issued by them. None of the Form A's relied on by Marco appear in the register. This is confirmed by Mr Dittrich and by the EPB itself in the final report to the 2011 joint mission, which is signed by all parties.

37. Mr Muzharul Hoque, whose signature purports to be on all but one of the Form A's, has made a statement that the signatures on those forms are not his. The exporters named on the Form A's each denied any dealings with Marco or Mian. Mr Dittrich has exhibited signed statements from Agami and Anowara to this effect. There was an oral statement to Mr Dittrich from the managing director of La Bella to the same effect. The embossing stamps used on all the Form A's do not match the stamps used by the ERB at the time the Form A's were executed.

38. Mr Cannan agreed that Dr Alkahtani was qualified to give expert evidence and that his evidence was helpful and impartial. Mr Cannan submitted that Dr Alkahtani was not helped by the fact that he was not provided with any original disputed signatures or original specimen signatures. In relation to 5 Form A's, purportedly signed by Mr Hoque, 3 were likely to have been signed by the same person who signed the specimens and 2 were unlikely to have been. Unfortunately Marco has not produced the original forms to Dr Alkahtani, although Mr Camin held the originals.

39. Much time was spent in cross-examination of HMRC's witnesses dealing with imports, which were not the subject of post-clearance demands. Mr Luty stated that only results from his search of the CHIEF system were the import entries which subsequently formed the basis of the two post-clearance demands. It was explained by Mrs Pond that the officer authorising the repayment would not have been aware of the issue concerning false Form A's and would not, therefore, seek to verify them as such. The fact that other entries were not the subject of a post-clearance demand does not mean that they were entitled to preference. Marco cannot rely on imports, which were not included on the demands, as being supported by authentic Form A certificates.

40. Marco complains that it has not had access to the list of genuine certificates issued by the EPB. This is because they are confidential. The evidence that the Form A's relied upon do not appear on the list is overwhelming. Mr Luty, Ms Barbouti, Mr Dittrich and the EPB

officers have confirmed that to be the case. Mr Cannan accepts that the evidence of the EPB officers and Bangladeshi company officers is plainly hearsay, but he contends that relying on Mr Dittrich's investigation findings in the circumstances of this case is both reasonable and proportionate. Looking at the evidence as a whole the Tribunal can be satisfied that the Form A's relied on by Marco were not genuine Form A's issued by the EPB and there is therefore no entitlement to preference.

41. Did Marco comply with the direct transport rules? Their evidence consists of the Bills of Lading from Singapore to the United Kingdom and the container numbers and seals. No issue is taken with regard to one entry where there does not appear to be any Bill of Lading and one entry where the relevant vessel docked in Amsterdam rather than the United Kingdom. Marco has produced a number of pre-carriage Bills of Lading for only 22 of the 29 import entries covered by the first C18 demands and none for the second. Mr Dittrich had been unable to identify the feeder vessels or ships for QC Eastern Sea or CSL Shipping Lines Ltd. CSL Shipping Lines Ltd also stated that they had not issued the Bills of Lading. Mr Gamin himself did not express any enthusiasm for suggesting that the Bills of Lading were genuine. The feeder Bills of Lading were false. The Seasearchers data base establishes either that the feeder vessels did not exist or, where they did exist, they were not in Chittagong not Singapore on the dates shown on the pre-carriage Bills of Lading. There is no reason to doubt those searches. Mr Cannan accepts that for 2 of the SeaSearcher entries show the feeder vessel being in Chittagong at the relevant date. The likely explanation is co-incidence rather than demonstrating the authenticity of those 2 Bills of Lading. It is not disputed that on export from Bangladesh feeder vessels would be required, however, the documentation, even if the feeder vessel Bills of Lading are taken into account at face value, is not sufficient to comply with Article 78.

42. The Tribunal cannot be satisfied that the goods were subject of '*one single consignment transported [to the Untied Kingdom]'* and that '*the goods remained under the surveillance of the customs authorities of Singapore'* and *'did not undergo operations other than unloading, reloading or any operation designed to preserve them in a good conditions'*. There is no single transport document covering passage from Bangladesh through Singapore to the United Kingdom. Mr Cannan submitted that a 'single transport document' in this context means a through Bill of Lading or equivalent document. In other words a single document which on its face evidences represents the contract for the carriage of goods and identifies the party or parties genuinely responsible their carriage. Piecemeal evidence of transport, including evidence of dubious providence relating to part of a journey for some import entries, and the absence of any evidence of customs control during trans-shipment in Singapore, is insufficient to satisfy the requirements of Article 78. Indeed the existence of false Bills of Lading for the feeder vessels raise a strong inference that that conditions are not satisfied.

43. The Ocean and Speedier Bills of Lading are insufficient as they do not evidence the circumstances of transportation from Bangladesh. There is no reference on those documents in the box relating to 'Description of Package Goods' to 'Shipment from Chittagong, Bangladesh to final destination: Felixstowe United Kingdom via Singapore'. However, Mr Camin accepted that this simply reflected what WPC Ocean Line Ltd had been told by an unspecified person as to the origin of the goods. WPC were not the carrier for the alleged carriage from Chittagong to Singapore. The appearance on the feeder vessel Bills of Lading of the container numbers and seal numbers cannot corroborate the journey from Chittagong to Singapore and then to the United Kingdom as a single consignment or the required customs supervision because they are false. The fact that the eligibility of the goods for

preferential treatment is tainted by fraud – fraud in relation to the Form A certificates and fraud in relation to the feeder vessels bills of Lading, HMRC are entitled to expect clear evidence that the direct transport rules are satisfied and there is no such evidence. The same principles apply in relation to the Airway Bills as there is no documentary evidence whatsoever.

44. The nature of the fraud is to disguise the fact that the goods did not originate in Bangladesh, or otherwise did not qualify for a preferential rate. The Form A's and feeder vessels' Bills of Lading are not genuine. As Mr Camin said at the very end of his evidence having expressed his opinion that the goods originated in Bangladesh: *'I don't know what the fiddle is, but there is one'*. Exceptionally, the Form A relied upon in relation to goods said to have been exported by La Bella has a reference number (102849) which matches that of an authentic Form A issued by the EPB. However, the EPB records show that Form A to have been issued in connection with an export to Marco Polo Textile SL (which is known to be a Spanish company now in liquidation). It has no connection to Marco. The details of quantity and value in the Form A in the EPB records are apparently the same as those in the Form A relied upon by Marco. Quite how or why that should be the case remains unanswered. However, it is not evidence that the Form As' relied upon by Marco in this appeal are genuine.

45 Marco has been allowed by the Tribunal to seek a waiver of the post-clearance demands under Article 220 (2) (b) of the Code. In Case V-370/96 *Covita* [1998] ECR 1-17711, the ECJ set out at paragraphs 24 to 28 the conditions to be fulfilled in relation to the statutory predecessor to Article 220 (2)(b);

"First, non-collection of the duties must have been as a result of an error made by the competent authorities themselves. In this connection, the legitimate expectation of the person liable do not attract the protection provided for in Article 220(2)(b) unless it was the competent authorities themselves which created the basis for the expectations of the person liable.
Secondly, the error made by the competent authorities must be such that it could not reasonably be detected by the person liable acting in good faith, despite his professional experience and the diligence shown by him.
Thirdly, the person liable must have complied with all the provisions laid down by the rules in force as far as his customs declaration is concerned".

46 In *Llumitronica v Chefe da Dvisiao de Procedimentos Aduaneiros e Fiscais* [2002] ECR 1-10433 the ECJ at paragraph 39 stated:

> "The fulfilment of those conditions must be assessed in the light of the purpose of Article 5(2) of Regulation No 1697/79, which is to protect the legitimate expectation of the person liable that all the information and criteria on which the decision whether or not to proceed to recovery of customs duties is based is correct (see, in particular, Case C-348/89 *Mecanarte* [1991] ECR 1-3277 paragraph 19, and *Faroe Seafood and others* [1998] ECR 11-5285)"

It is only errors by a competent authority which give rise to the right to waiver. If the authorities have been misled as a result of an incorrect declaration the condition is not fulfilled. (See *Faroe Seafood and others* [1998] ECR 11-5285). The position is even clearer where there is a forged document and no valid certificate has been issued by the Bangladeshi customs authorities. Marco can have had no legitimate expectation that the duty would not be due as it relies on the forged documents.

47. The error must not be reasonably detectable by the person liable, who must be acting in good faith, despite his professional experience and the diligence shown by him. The nature of the error has to be determined in the light of the complexity or otherwise of the rules concerned. A trader, who has not consulted the relevant issues of the Official Journal to ascertain the provisions of Community law applicable to his transaction, will be considered negligent and will not comply with the conditions. (See. *SCI UK Ltd v Commissioners* [2002] ECR 11-2597). That case also confirmed that the adverse consequences of wrongful acts of an importer's contractual partners cannot be borne by the Community but must fall at the door of the importer. There has been no official error by the Bangladeshi authorities as the certificates were not issued by the EPB. Marco has not satisfied the transportation rule. No certificate has been provided from Singapore to confirm that the goods came from Bangladesh and that they had not been tampered with. Marco does not even come close to establishing due care. The documentation was subjected only to a cursory check before being forwarded to Gateship, and no checks were made by Marco with Mian or the other producers or exporters. Mr Ahmed confirmed that he had not even bothered to read the rules or make any effort to discover what Marco needed to do. Mr Ahmed said that he relied on Gateship to do that. Article 198 of the Implementing Regulation deals with the relevant provisions as regards customs declarations.

48. Article 904 (c), as set out above, does not allow remission of duty where the only grounds relied on are that the documents are forgeries. The form As relied upon by Marco fall within that definition. It is the responsibility of the traders to make the necessary arrangement in their contractual relations to guard against the risk of an action for post-clearance payment. However, remission or repayment will be refused if the importer cannot show that there was a 'special situation'. In Case T-290/97 *Mehibas Dorstseekan v Commission* [2000] ECR 11-15 at paragraph 83, the CFI in that case noted:

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

49. In *SCI UK Ltd v Commissioners* [2002] ECR 11-2597 the court suggested at paragraph 5

> "A different conclusion , namely that there was a special situation, would only be possible in the event of serious failures by the Commissioners or the customs authorities, facilitating the fraudulent use of the price undertaking documents (see to that effect *Eyckeler & Malt, paragraph 163 et seq,* and *Primex Produckte Import-Export,* paragraph 141 et seq). It is therefore necessary to consider whether the applicant has demonstrated the existence of such failures".

50. Marco have relied on the two case of *Eyckeler & Malt* and *Primex Produckte Import-Export* which established that a serious situation existed because the Commission failed in its obligations to supervise and ensure the proper application of quotas. The position in the present case is entirely different. There are no quotas for the Commission or indeed HMRC to supervise. *Geologistics* involved a special situation in that there was an allegation of

negligence on the part of the Dutch authorities because they failed to advise the trader of irregularities of which it knew. There was also the possible involvement of a Spanish customs official in the fraud and the failure of the Spanish customs authorities to comply with regulations. There were also breaches of the Commissions own obligations. The position in this case is different. This is not a case where HMRC are aware that Marco was importing goods on the strength of fraudulent documentation. There is no evidence to suggest that either HMRC or the Commission acted deliberately in failing to inform Marco and allowing it to incur a customs debt. Marco would have to establish as serious breach of the Commission's general duty of diligence in order to satisfy the Tribunal that there was a special situation. There is no evidence to support such a conclusion.

51. The Tribunal directed that Marco could rely on the grounds relied on by Mr Shelly in his letters date 20 and 21 November 2008. In his letters he stated:

> "We have no idea when the Commissioners first entertained a suspicion that false GSP certificates might be in use but at no time did the Commission (or HMRC) give any warning of this until February 2008. The Commission's enquiries must have started well before that date which invites the conclusion that importers could have been alerted to the possibility of false certificates being used at a much earlier time. This also disguises the extent to which, if at all, there may have been material failings either in the Commission or by relevant authorities in Bangladesh to intervene at some earlier time and in our opinion the case law of the ECJ draws attention to the fact that the Bangladesh authorities (and the Commission) may have been under some obligation to take steps to intervene and to rectify matters at a much earlier time. We have no means of knowing how those obligations were discharged or when they should have been first implemented but it seems quite proper for us to point out that it is inherently unfair for HMRC (or the Commission) to simply send out a generic warning in February 2008 and then to subject innocent importers and their agents to retrospective charges of duty. It is our contention that this is not within the contemplation of the Community rules and the case law".

52. Clearly the special situation must arise from the facts and matters which existed at the time of the import entries, in other words in the period September 2005 to February 2007. Mr Dittrich, in his evidence, has established that there were serious doubts with regard to textile products for Bangladesh, which gave rise to the joint mission in March 2007. There is simply nothing to suggest that the Commission, or indeed HMRC, failed to act promptly. Even if a case could be made to the existence of a special situation in relation to the Form As, Marco has failed to comply with the direct transport condition. The failure to supply such evidence cannot be said to arise from any serious failure (or indeed any act or omission at all) on the part of the Commission or HMRC.

53. It is also necessary for Marco to establish that it has not acted negligently in the checks to be carried out to satisfy it that the imports were entitled to the preferential rate of duty. As indicated earlier, Mr Ahmed, on behalf of Marco, failed to take any steps at all to appraise himself of the rules applicable to the preference system or to confirm that the imports were entitled to preference relief. Essentially, all Marco did was to obtain the purported Form As and the Ocean Bills of Lading and to treat those documents as determinative of the right to preference relief. It is clear from Public Notice 826 that such an approach is wholly insufficient and amounts to obvious negligence.

54. Mr Cannan submits that if the Tribunal considers that the Commissioners' decision was wrong a dossier is to be submitted to the Commission to consider whether the waiver or

remission is justified. In the present case not only is the special situation relied upon said to be the result of the Commission's failings, but the circumstances are related to an investigation carried out under Regulation (EC) No 515/97 and Article 94 (6). As a result the remedy available to the Tribunal is to set aside the review decision under appeal and direct either a re-review of the earlier decisions or require the Commissioners to submit a dossier to the Commission under Articles 871 and 899 (as amended).

55. Mr Cannan also submits that the 2009 procedure rules apply to this appeal and in the absence of an application that the 1986 rules should apply. There is no discretion to award costs to either party. Neither party has made such an application.

Submissions on behalf of Marco.

56. Mr Nawaz, in his submissions, has treated Marco and Gateship as one and the same. Mr Ahmed considered the evidence again and we have highlighted the points relevant to his submission. Marco has been involved in the importation of clothing into the United Kingdom for a matter of decades and Gateship has been their clearance agents for many years. Mian supplied their invoice, a certificate of Origin, GSP Form A, and an Ocean Bill of Lading. Chittagong is a shallow port, silting up from the river, so that ocean going vessels cannot use the port and feeder vessels are used to transport the merchandise to Singapore. Ocean and Speedier booked spaces for hundreds of containers and issued a Bill of Lading, which it subsequently submitted to the EPB so that the Form As could be issued. That Bill of Lading included the container number and indicated that the merchandise came from Bangladesh. The container would have been sealed in Bangladesh and that container is released to Marco by F V International, the local agents, for the shipping consolidators (in the main Speedier). Mr Camin has confirmed that he had no reason to suppose that the documents were other than genuine. The seals appeared to agree with those supplied for inspection and the documents were in a format that had been used for many other imports from Bangladesh.
57. It is clear from Article 78 that 'any substantial documents' should be adequate as evidence of direct transportation from Bangladesh to the United Kingdom. Mr Nawaz submitted that the load consolidators specified the original destination as Bangladesh on their Bill of Lading and would not have done so without appropriate evidence. The certificate of origin and the GSP Form As contained details of the container numbers and the seals. The seals to the containers are applied in Bangladesh and are intact when delivered by the road haulier to Marco in the United Kingdom. There is therefore no opportunity to tamper with the merchandise either in Singapore or elsewhere. As a result the Ocean Bill of Lading, the Certificate of Origin and GPS Form are adequate 'substantiating documents' in support of the direct transport rule.

58. Several Missions have been carried out by OLAF and Mr Dittrich appears to have been involved in the last three. It appears that the missions in 2007, 2008 and 2009 have no direct involvement with Marco. However, the 2007 mission highlighted that the Bangladeshi authorities allowed a large number of genuine Form As with the exception that they have what appears to be a yellow, rather than green background, and the background does not have the required Guilloche. Apparently this was due to a printing error but, because of the quantity printed, the Bangladesh authorities confirmed that they could be treated as authentic. A warning was issued on 15 February 2008 advising that "relief will not be available under the 'good faith' provisions of Article 220 (2) (b) of the Communities Customs Code (Council Regulation 2913.92), which are described in Notice 826… for any customs duty debt arising on consignments of Chapter 61 and 62 garments imported form Bangladesh …on or after the

date of publication (15 February 2008)". Each of the consignments challenged are more than a year prior to 15 February 2008.

59. None of the people involved in the final mission from 9 to 19 May 2011, other than Mr Dittrich, attended at the Tribunal. Evidence has been provided by Mr Dittrich that Mr Hogue indicted that he had not signed the Forms A. This is hardly surprising when he understood that the Form As were the subject of an investigation. Dr Alkahtani, in any event, has indicated the likelihood of some of the signatures being Mr Hogue's. Marco and Gateship have always maintained that the Form As were genuine. HMRC rely on the list of genuine EPB certificates provided to Mr Luty and Mrs Barbouti. Two lists of 'genuine' EPBs have materialised, one as an exhibit to the first witness statement of Mrs Barbouti relating to Anowara and Agami, and the other relating to La Bella in her second witness statement.No first hand evidence has been produced of any wrongdoing with regard to the shipments either from Bangladesh or to the United Kingdom, other than the fact that the Marco shipments do not appear on the 'genuine' lists. The only evidence in that regard is the spread sheet produced by Mr Luty, which can hardly be a substitute for the original lists. There are problems with the spreadsheets as they omit several Marco imports from Anowara. Evidence has been deduced that Marco had taken delivery of garments from La Bella in spite of HMRC alleging that those deliveries were to Marco Polo. These errors cast serious doubt on the validity of the 'genuine lists' supplied in evidence. Furthermore the lists provided by the EPB must be considered suspect when 25-85% of the genuine forms issued by the EPB were issued on the basis of false information. In the absence of reliable evidence it can only be assumed that there is something seriously wrong with the EPBs and the monitoring of imports from Bangladesh.

60. None of the OLAF Missions in 2007, 2008 and 2009 related to Marco. The 2009 mission established, however, that of 3311 'genuine' EPB forms examined on that occasion, 2861 related to companies which had ceased trading some five years previously. This represents and error rate of 86% of GPS Forms A being examined and genuinely issued by the EPB. A further 841 certificates were found not to have been issued by the EPB. During all these visits none of the Marco forms, the subjects of this appeal, were examined. In relation to the last mission in 2011, none of the individuals, who gave evidence to Mr Dittrich, came before the Tribunal. Mr Hogue, not surprisingly indicted that the signature on the Forms A he was shown was not his. The only expert evidence in this regard came for Dr Alkahtani, who indicted that some of the signatures were probably Mr Hogue's. Marco are of the opinion that all the Form As are genuine.

61. The only evidence on which HMRC have relied to confirm that the seals were incorrect is the 'genuine' list of Form As provided to HMRC by the EPB. Two lists of genuine Form As have been produced, but the original list has not been made available either to Marco or to the Tribunal. The spreadsheets provided can hardly be a satisfactory substitute for the actual lists. Can the so-called lists from the EPB be considered as correct given that 25-86% of the 'genuine' forms issued by the EPB were issued on the basis of false information? Can the officials at the EPB be trusted with a correct extraction of the list? Are their registers correct? None of these questions could be addressed as there were no witnesses to cross-examine. In the absence of such evidence one can only assume that there is something seriously wrong with the EPB. The only evidence that Marco has came from Mr Camin, who has given evidence to the effect that he checked the Form A's seals against those made available to him and he could not see any difference. A view shared by Mr Dittrich. HMRC also appear to be suggesting, as a result of Mr Dittrich's evidence, that the European Community believes Singapore is a 'known' hub for Chinese goods to be repackaged as sourced form Bangladesh. No evidence to that effect has been produced to the Tribunal. Mr Dittrich acknowledged in

cross-examination that it would not make economic sense for shipments to be repackaged merely to obtain the 12% relief.

62. A formal request for relief under the 'good faith' provisions was made on behalf of both companies and the Judge in the Tribunal confirmed that Marco should have the right to pursue an appeal in that regard. Steve Payne carried out the review and turned down the application. Mrs Nuttall responded to the request on 12 November 2008 and stated:

> "However, relief will not be granted under good faith arrangements where products were covered by preference certificates which have been forged/falsified in the overseas country or which have not been issued/authenticated by the proper certifying authorities there. This restriction will apply regardless of whether you are able to produce the evidence of 'good faith' referred to above".

Mr Nawaz submits that there are two principal issues that the Tribunal has to determine in order to consider whether or not the tests for relief from duty under the 'good faith' provisions apply:

- Whether there was a ' special situation' in terms of problems with the customs Authorities at the European Community, or the exporting country or member states; and
- Whether there was a breach of faith on the part of Marco either in the manner it conducted itself or 'obvious negligence'.

Marco needs to prove the special circumstances and HMRC needs to prove that Marco were dishonest or obviously negligent. HMRC have acknowledged that they do not allege dishonesty on the part of Marco. They suggest, however, that Marco failed to comply with the guidance in leaflets which may not necessarily be the correct reflection of the legal position in presenting this case. HMRC have not specified the areas in which Marco failed to follow the requirements of the guidance.

63. There have been problems of fraud in Bangladesh. Mr Dittrich confirmed that *Baksheesh* was prevalent in Bangladesh in that applications could be advanced or delayed upon suitable payments being made. More specifically, problems of textile frauds from Bangladesh appear to have been addressed in 1996 by the introduction of security printing, whereby a specific form could only be printed and issued by the appropriate authorities. Yet the first OLAF mission in 2007 found that 'because of printing errors' incorrect forms – of a different colour and without the 'required Guilloche (inter-twining ribbon) pattern' – were in use and in fact the EPB allowed the continued use of the forms until December 2007, an additional period of nine months. The OLAF mission in March 2007 also found that of 4000 GSP Form As 'genuinely' issued by the EPB, 998 were based on false information an error rate of 25%. The second OLAF mission in April 2008 stated:

> " In view of the joint mission to Bangladesh authorities will institute further appropriate checks in the procedure of verifying the eligibility to GSP of consignments of textile products for export to the European Community"

The clear inference being that even after the first OLAF visit there was need for improvement

64. The third OLAF mission in March 2009 found that of 3111 GPS Form As 'genuinely' issued by the EPB in respect of 9 'exporting' companies there were problems with the nine companies. One company refused to co-operate and another had only sent 25 genuine consignments to Europe in the period 2005 to 2009, the remaining 7 companies appear to have ceased trading between four and six years previously and 2,861 of the forms were considered to have been issued on the basis of bogus information as the companies no longer

existed. This amounted to 86.41% of the forms being incorrect. The fourth OLAF mission in May 2011 does not appear to have finalised any statistics but there does not appear to be anything to suggest that matters have improved. The OLAF findings can have no bearing on the appeal since the consignments, the subject of the appeal, took place between September 2005 and February 2007. There is no doubt that the La Bella supplies related to Marco and not Marco Polo Textiles SL. Mr Nawaz submitted that the foregoing adequately points to the existence of a 'special situation' as no one can regard the conditions in Bangladesh as either normal or acceptable.

65. Mr Nawaz pointed out that the genuine list presented by HMRC has been extrapolated from lists provided by the EPB. The Tribunal has not seen the original list. It has been demonstrated that the La Bella list in part related to Marco although HMRC suggested to the contrary. The position has been confused further by the failure of both Mr Luty and Mrs Barbouti to extrapolate the details of the second list in their evidence. This appears to have arisen as a result of a failure to 'cut and paste' the necessary information when constructing the witness statements. This further suggests that other errors could have occurred when extrapolating the list of forms from the original list of genuine forms. This lack of precision indicates that HMRC have been careless in considering the Form As and amounts to a 'special situation'.

66. The European Commission was aware that there were serious shortcomings with regard to the procedures and documentations in Bangladesh. They condoned the use of defective stationery by allowing it to be used for some nine months to the end of December 2007. The error rate in the Forms revealed by the various OLAF visits is sufficient to demonstrate that the European Commission was not exercising sufficient control with regard to the import of merchandise from Bangladesh. The European Commission had a duty to check compliance. Whether or not there were quotas it could still have instituted a simple monitoring system to keep a check on 'genuine' EPB certificates. It was not until 15 February 2008 that they indicated that the 'good faith' relief would not be available after that date.

67. The case for Marco is that the merchandise originated in Bangladesh. Mr Ahmed actually went to Bangladesh for four days when problems had arisen with regard to the quality of the merchandise. He visited a number of factories in Dhaka and actually saw rejects of clothing similar to those goods previously supplied to Marco. His visit was such that Marco stopped trading with Mian in Bangladesh in February 2008 long before HMRC had shown any concerns. There is no evidence that Marco did not show good faith. They employed accredited –CFSP agents, produced documents with stamps, signatures and appropriate seals, which had been examined and checked by its agents. Nor can Marco be considered to have been 'obviously negligent' as neither Mr Dittrich, nor the officers at HMRC, noticed that anything was wrong with the documentation.

68. Mr Nawaz submits that as the appeal predates the 2009 rules Marco wishes to reserve its position with regard to costs. Mr Nawaz also refers to other matters in his written submissions which we shall deal with in our decision.

The decision

69. We have considered the evidence and the law and we allow the appeal, save in relation to the consignments set out at the end of this decision where there were no Bills of Lading. For the rest of the consignments we are satisfied from the evidence that all the other EPB

Form As and the Certificates of Origin, the subjects of this appeal, are genuine. Mr Cannan has submitted :

> "Section 16 (5) of the Finance Act 1994 states that the burden of proof on appeal lies with HMRC ' but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established'. Accordingly, the burden is on Marco to satisfy the Tribunal that it should exercise its powers under section 16(5) to quash or vary HMRC's decision on review or to substitute its own decision".

What evidence have HMRC produced to show that the documentation is not genuine? Mr Luty has told us that he has been provided with a list of genuine 'General System of Preferences Certificates of Origin' and 'Certificates of Origin' from Bangladesh, which he has extrapolated on to his spreadsheets. We have not been provided with copies of the original documents from which the extrapolation has been made. We were surprised that the Tribunal had not been supplied with sight of the original list of Form A certificates from which Mr Luty had made his conclusion. Not least because it would appear that some of the valid Form A certificates inspected by Mrs Barbouti in relation to La Bella were deliveries to Marco, which casts considerable doubt on the accuracy of the cross-checking of the appeal forms against the originals. We were told that they had not been produced because of confidentiality. We have been told that Mr Hoque's and Mr Moyen's signatures are forgeries. We note that the samples appear in a document dated 31 March 2002 some 4 years before the documents the subject of this appeal and 5 years before the OLAF mission, which established that many documents might be forgeries. Other than that statement 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 Alkahtani. 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 Alkahtani 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 indicted that the English equivalent is spelt 'Haque'. Whilst we accept that the signature is in Bengali we would have expected HMRC to have noticed 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 that his comments are of no value.

70. Both Mr Luty and Mrs Barbouti have failed to notice that the second list in their witness statements is the same as the original list. We have not been told how that happened, but we suspect that a common word processed source was used and the error was perpetuated in each statement. Whilst that, in itself is understandable, it is singularly unhelpful when the Tribunal is being asked to accept that the contested documents have been properly checked against the original list, which has not been produced to the Tribunal. Furthermore, Mr Dittrich in his second witness statement produced a letter from M.Shahid Hossain, the Deputy Managing Director of Agami to the effect that Agami had never dealt either with Mian or Marco. La Bella no longer existed and Mr Reaz-Bin-Mohammed was being asked about specific documentation prepared some 6 years earlier. In the light of the evidence produced by Mrs Barbouti, we can only conclude that La Bella has traded with Marco and that Mr Reaz-Bin-Mahmood has chosen not to admit to that for his own reasons. Whilst the La Bella list is not the subject of this appeal the obvious error in the listing casts serious doubt on the validity of the information relied on by HMRC as provided by the authorities in Bangladesh. We were also concerned to note that Mrs Barbouti had made the same mistake as Mr Luty when

preparing her statement in that she supplied the wrong list of Certificates for the second consignment.

71. 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 Shelly, in his observations in the bundle, indicated that the seals for Dhaka, Chittagong and Khulna are different. Neither Mr Cannan nor Mr Nawaz nor any of the witnesses have disagreed with that observation. As the consignments' relate to transactions some four and 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.

72. Mr Luty in his second statement 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 ocean going container ships, which may well result in the feeder vessels not appearing on the list. Mr Luty has, in any event, conceded that the 'Kota Ranta' appears on the list as a feeder vessel from Chittagong but its tonnage is unknown. The Ocean Bills of lading identify the date the goods were "shipped on board the vessel". It is, however, unclear as to when the vessel left Singapore. The fact that the goods were "shipped on board" does not, presumably, mean that the container sailed on that date. The sailing date would depend entirely on the date when the loading of all the containers was completed. Without further evidence as to how the lists are compiled and the tonnage of the shipping recorded we find the evidence less than satisfactory

73. Our greatest concern relates to Mr Dittrich's evidence. He went to considerable lengths to indicate his independence from countries' authorities. He has produced a list of Marco's GSP Certificates of Origin Form-A but it is unclear as to where those came from. The email entry indicates that they were sent from 'Director General (Textile)' at the EPB in Bagladesh'. Both Mr Dittrich and HMRC were unable to properly explain how the documents were obtained by OLAF. Mr Dittrich indicated that the forms had been supplied to him by HMRC, but he was evasive as to how he received them. It appears that neither HMRC not Marco have checked the lists produced by Mr Dittrich. None of the items on his list relates to any of the consignments, the subject of this appeal. We have examined all the entries on that Annex against the two consignment lists in relation to this appeal. The Annex is headed up "….. the under mentioned 61 (sixty one) GSP Certificates of Origin Form-A has not been issued from export promotion Bureau Dhaka…"). None of them match any of the EPB numbers on the two consignments. Where the dates are the same the numbers are not - as shown below

Marco Number	Date	EPB Numbers
EPB 314687	30/7/2006	EPB 316477
EPB 315326	18/7/2006	EPB 315938
EPB 313524 EPB 313580	6/4/2006	EPB 313660
EPB 313827	9/2/2006	EPB 313153 EPB 313152

		EPB 313153
EPB 317287	7/9/2006	EPB 317907
EPB 318714 EPB 318426 EPB 318424	10/10/2006	EPB 319124 EPB 319125
EPB 319388	20/11/2006	EPB 319911
EPB 319125	31/10/2006	EPB 319476.
EPB 315236	18/7/2006	EPB 315938
EPB 316625	22/8/2006	EPB 317287

Mr Dittrich also accepted that it was possible that CSL Shipping Limited could have had an office elsewhere in the same building as Coral Shipping Lines and their subsidiary. We have found Mr Dittrich's evidence to be of little help because it was of general interest only and contained little that was applicable to the transactions undertaken by Marco. He did, however, establish that there were serious compliance problems in Bangladesh.

74. In contrast, we have found the evidence given by Mr Ahmed and Mr Camin to be straightforward. Mr Ahmed told us that Marco had originally traded with companies in Bangladesh but that he was concerned to start trading with them again. He told us that he spent a considerable time abroad checking the companies that produced goods for Marco. He had been persuaded by Mian to use its team, however, he had been unhappy with the quality of the goods being sourced for him by Mian and decided to go to Bangladesh to check on the factories. He said he visited some 14 factories of varying sizes. He also confirmed that he had seen similar goods to those which he had purchased earlier in one or two of the factories. His visit to Bangladesh occurred before any problems arose with regard to the two consignments, the subject of this appeal. He told us that he was sure that the goods had come from Bangladesh. When cross-examined by Mr Cannan about his understanding as to the documentation required for preference to be allowed he candidly confirmed that he had never read the Notices or other documentation as Marco relied on Gateship to process its imports. Mr Ahmed has been in business for many years and is clearly familiar with importing goods. We have no reason to suppose that his evidence was other than truthful. It is the only contemporaneous evidence that we have as to the existence of the goods and their manufacture.

75. Mr Camin's evidence was equally straight forward. Gateship has been in business for many years and it has successfully imported goods, with preferential rate, from Bangladesh in the past. He was familiar with the procedures and had read the appropriate literature provided by HMRC. He explained to us how the goods were transported from Bangladesh, through Singapore, to the United Kingdom. He submitted that the completion of the Bill of Lading by Ocean and Speedier in Singapore was generally accepted as evidence as to the original port of embarkation. In any event, the container numbers were the same as those on the pre-carriage Bills of Lading and the seals were unbroken on arrival. The container port in Singapore was entirely computerised and it would not have been feasible to break open the original container and re-load it into a new one. Article 78 requires:

> 78(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 the passage from the exporting country through the country of transit; (b) a certificate issued by the customs authorities of the country of transit giving an exact description of the products;

stating the dates of the unloading and reloading of the product 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.** (Our emphasis)

76. We are satisfied that the direct transport rule has been complied with. We have decided that the GPS Certificates of Origin Form As and the Certificate of Origin are genuine. We are also satisfied that the Ocean and Speedier Bills of Lading correctly identify 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 any 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 vessels. 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..

77. In addition Mr Camin had been asked to produce the Bills of Lading from Anowara to Marco. He confirmed that he had contacted Mian, notably some time after the transactions had taken place. He had been able to produce the Bills of Lading in respect of the first consignments and the same are annexed to Mr Luty's second statement. From the example at paragraph 13 above, the merchandise can be traced through the pre-carriage Bill of Lading to Bangladesh. We have no doubt that these bills of lading relate to those goods coming from Chittagong, which were shipped to Singapore. Nor do we have any doubt that they are the same goods as are indentified on the Bills of Lading from Ocean. As these were produced some considerable time after the transactions took place and they appear to correspond with the details on the Bills of Lading provided by Ocean, we are satisfied that the goods originated in Bangladesh. Mr Camin had been unable to obtain copies of the Bills of Lading from Bangladesh for the second consignment as Mian were no longer prepared to assist because of the disputes with Marco. Christopher Clarke J in Red 12 Trading Ltd v HMRC [2009] EWHC 2563 (CH) at paragraph 109 suggested that the Tribunal may considerer compelling similarities between one transaction and another and that it is not precluded from drawing inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part. On that basis we believe that the Bills of Lading in relation to the second consignment would have shown that the goods came from Chittagong. As we have decided that the Ocean and Speedier Bills of Lading together with both original certificates of origin are sufficient to be substantiating documentation for the purposes of Article 220 (2), the pre-carriage Bills of Lading for the first assignment do no more than confirm that the goods came from Bangladesh and, as a result, the Ocean and Speedier Bills of Lading are accurate.

78. Mr Camin confirmed that he had checked the stamps against samples he had been provided with and they appeared to be the same. Mr Shelly has suggested, and it has not been contested, that there were different stamps for Chittagong, Dhaka and Khulna. 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 have been accepted by

HMRC. Mr Hogue, in his statement attached to Mr Dittrich's second witness statement, has indicated that the signatures on the Forms A Certificates listed in the Annex are not his. Mr Hogue in his statement has indicted that the English spelling of his name is H**a**gue with an 'a'. The evidence relied on by Mr Luty in March 2002 shows Mr Hogue's signature as H**o**que, as do all the other certificates provided to the Tribunal. We appreciate that his actual signature is written in Bengali, but we would have expected the interpreter to have interpretated the spelling of his name correctly. If he has then, and Mr Dittrich 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.

79. We have found the evidence provided by Mr Ahmed, Dr Alkahtani and Mr Camin to be compelling and that provided by HMRC to be unreliable and unsubstantiated. In those circumstances, and on the balance of probabilities, we have decided that HMRC have not proved that the GSP Certificate of Origin Form As or the Certificate of Origins from Bangladesh were other than genuine. We are satisfied that the Ocean and Speedier Bills of Lading in conjunction with both the Certificates of Origin are sufficient substantiating documentation for the purposes of Article 78 subsection (2). We allow the appeal apart from the following consignments where insufficient substantiating documentation has been produced to enable Marco to take advantage of the preference:

EPB 319388 dated 20/11/2006 where there is no Bill of lading
EPB 313326 dated 02/03/2006 freighted by Emirates from Singapore and
EPB 313506 dated 17/03/2006 freighted by Emirates from Singapore.

80. Having decided that the documents are genuine there is no need for us to consider the applications with regard to 'waiver' and 'remission' on the grounds of 'good faith'. However, as we have been addressed at some length in relation to that by both parties we propose dealing with the same. What follows is on the basis that either, the certificates were not genuine, and/or that the documents did not substantiate direct transportation. There are two reliefs based on 'good faith', waiver and remission.

Waiver

81. Waiver of post-clearance recovery by national authorities is permitted where the three cumulative conditions under Article 220 (2) of the code are met. Those conditions are:

a. There has been an error by a 'competent authority' In this case the EPB in Bangladesh, the European Commission and/or HMRC
b. That error could not have been detected by the Importer in this case Marco
c. The importer, Marco and their agents Gateship, have acted in good faith (See Case V-370/96 *Covita* [1998] ECR 1-17711 paragraphs 24 to 28)

As frequently occurs in these types of cases a balance has to be struck as to whether the loss should lie with the authorities or the individual traders. Some of the cases we have been referred to suggest that where the contracting parties can make provision for any loss then the loss should remain with those parties. Where, however, there is a legitimate expectation on the part of the importer or its agent that they can rely on the actions of the competent authorities relief will be made available. (See Article 5 (2) of regulation No 1697/79). In *Llumitronica v Chefe da Dvisiao de Procedimentos Aduaneiros e Fiscais* [2002] ECR 1-10433 the ECJ at paragraph 39 stated:

> The fulfilment of those conditions must be assessed in the light of the purpose of Article 5(2) of Regulation No 1697/79, which is to protect the legitimate expectation of the person liable that all the information and criteria on which the decision whether or not to proceed to recovery of customs duties is based is correct .”

82. Mr Dittrich’s evidence undoubtedly establishes that the arrangements with the EPB in Bangladesh were far from satisfactory. The first mission was in 2007 and presumably arose as a result of earlier concerns with regard to the issue of EPB certificates of Origin Form As. We have been told that the Bangladesh authorities have allowed Certificates of Origin Form As to remain in circulation even though they accepted that they were incorrect. This was because a large quantity of Form As had been incorrectly printed and distributed around the various ports. As a result a paper from the Joint Customs Consultative Committee (JCCC) paper (07) 42 which we assume to have been prepared in 2007 stated:

> “NB – it has also come to the attention of the European Commission that a large number of Forms A have been issued by Bangladesh, which comply with the legal requirements in all respects, with the exception that they have what appears to be, yellow, rather than green background, and the background does not have the required Guilloche (intertwining ribbons) pattern. The Bangladeshi authorities have confirmed that these certificate are authentic (the non-standard format being due to a printing error) and as a large number of blank documents have already been distributed to regional offices throughout the country, the Commission have given Bangladesh a period of grace until 31 December 2007 to use the forms.”

83. The period of grace expired after the transactions the subject of this appeal. We have not been told what form the GSP Certificates of Origin Form As in this appeal were in, but it is clear that the authorities were concerned at the time that there was a possibility of forgeries. That is confirmed by the warning issued on 15 February 2008 advising that “relief will not be available under the ‘good faith’ provisions of Article 220 (2) (b) of the Communities Customs Code (Council Regulation 2913.92), which are described in Notice 826… for any customs duty debt arising on consignments of Chapter 61 and 62 garments imported from Bangladesh …on or after the date of publication (15 February 2008)”. We consider that both the relaxation of the requirements up to December 2007 and the subsequent warning in February 2008 are evidence that the authorities knew there were problems with regard to the GPS Certificates of Origin Form As issued by the EPB in Bangladesh in 2006. The mission in March 2007 must have arisen from alerts raised in the previous years. Mr Dittrich confirmed in his evidence that it took some time to arrange a mission, as the criteria had to be agreed with the member states and the team assembled, before the mission could be undertaken. In those circumstances we consider that there was an error on the part of both the Commission and the Bangladeshi authorities (but not HMRC) not to have advised traders of the difficulties in Bangladesh. The errors by Mr Luty and Mrs Babouti as to the schedules of the consignments in their evidence before the Tribunal do not amount to an error of a ‘competent authority’.

84. It has taken the Commission several years to identify a problem, which they only alerted the general public to in December 2007 and finally in February 2008. In those circumstances there is no basis on which Marco could have detected the error, not least, because they had been trading satisfactorily in previous years utilising the same documentation. Marco also needs to demonstrate that it has acted in good faith. Mr Ahmed candidly agreed that he had

not read Notice 826- Tariff preferences-imports. If he had done so he would have seen paragraph 1.9 Note 2 which states:

> "Where an agent makes a customs declaration as an indirect representative, both agent and principal are jointly and severally liable for the debt."

As a result Marco cannot evade its obligations under the regulations by relying on Gateship to carry out the procedures for it. We would therefore have found that Marco had not acted in good faith and the waiver relief under Article 220 (2) would not be available to it.

Remission

85. As an alternative, Article 239 provides for remission of the duty if Marco can show a 'special situation' and that there has been no 'obvious negligence' on its part. Article 904 (c) provides that the duties shall not be remitted or repaid where the only grounds relied upon are the presentation, for the purpose of obtaining preferential tariff treatment of goods declared for free circulation, of documents subsequently found to be forged, falsified or not valid for that purpose, even where such documents were presented in good faith. Where, however, the grounds are more than just the forgery of the documentation a 'special situation' can arise. In *Eyckeler & Malt AG v United Kingdom of Great Britain and Northern Ireland*. Case T-42/96 the court stated at paragraph 104:

> "It is also incorrect to claim, with reference to Article 904 9 (c) of Regulation 2454/93, that expectations as to the validity of a 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 on several grounds."

Mr Nawaz submits in this appeal that both the Commission and the Bangladeshi authorities were aware of the difficulties with the documentation but failed to advise traders, until December 2007, after the transactions the subject of this appeal. In those circumstances there were 'special situations'. Mr Cannan submits the serious failures in the cases referred to above, giving rise to 'special situations', arise from a failure to monitor quotas and that those cases bear no relationship to the circumstances in this appeal. We do not agree. Mr Dittrich established that the procedures in Bangladesh were far from satisfactory. He also confirmed that *Baksheesh* was prevalent, although he restricted his evidence to the fact that *Baksheesh* only assisted in moving files up or down. We cannot agree. Mr Reaz-Bin-Mohmood told him that La Bella had never dealt with Marco, which we have found to be untrue. 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

86. There has been no 'obviously negligence' on the part of Marco. We do not consider that it is unreasonable for Marco to rely on its agent to ensure that it complies with the importation rules. In *Eyckeler & Malt AG v United Kingdom of Great Britain and Northern Ireland*. Case T-42/96 the court stated at paragraphs 141 and 142:

> "141, the applicant has not been accused of any deception. In response to a question from the Court, the Commission expressly confirmed at the hearing that it was not claiming that the applicant was in any way involved in the falsifications at issue".

> "142. Furthermore, it cannot be held that there was any obvious negligence either. Indeed, it is apparent both from the documents on the file and the oral arguments before the Court that the applicant was not aware of the falsification or irregularities in the certificates of authenticity until the Commission initiated investigations in 1993."

HMRC have neither alleged nor proved either fraud or dishonesty on the part of Marco. Under Article 239 the provision is 'obvious negligence', not 'good faith' as required by Article 220 (2). The failure by Marco to read notice 286, when Marco placed reliance on Gateship, cannot be 'obviously negligent'. In the circumstances we would have found that Marco would be entitled to remission and we would have set aside the review and required HMRC to require an officer, other than Mr Luty or Mrs Barbouti, to carry out a further review.

87. Mr Nawaz in his written submissions has referred to "other matters" which we are required to address. They are:

- Was there any justification for the late disclosure?
- The separate appeals for Marco and Gateship.
- Informality of tribunal proceedings
- Treatment of application for additional witness evidence.

We shall deal with these in turn.

Was there any justification for the late disclosure? Mr Nawaz properly states in his submission:-

> " If a tribunal orders witness statements to be served the parties should comply with the directions not as a stop-gap to have a second and third bite at the cherry by supplying further witness statements but dealing with the matter in one fell swoop"

In checking bundle 2 of 2 from tab 51 to the end it appears that neither party has met the deadlines proposed by the various directions. If there is a delay with regard to evidence from one party the other inevitably will not be able to deal with matters until it receives a response. The Notice of Appeal was lodged on 1 September 2008. The parties have been aware since March 2010 that the case was to be heard from 31 May 2011 for four days. Rule 5 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the Rules) permits the Tribunal to regulate its own procedures. Rule 2 identifies that the overriding objective to the Rules is to enable the Tribunal to deal with cases fairly and justly. The Tribunal took the view on that basis to allow the second witness statements of Mr Luty, Mrs Barbouti and Mr Dittrich. Furthermore, as the case had been listed for 4 days and had been on-going since 1 September 2008 it was inappropriate to adjourn the appeal. Where evidence is introduced on the last minute it often has little probative value as has proved to be the case in this appeal. Rule 15 (2) (a) allows the tribunal to admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom. As a result hearsay evidence can be taken into account and given such weight as the Tribunal considers appropriate.

88. **The separate appeals for Marco and Gateship.** It is unfortunate that these two appeals have not been consolidated. This appears to be because the 'hardship appeal' by Gateship had not been heard when this appeal came on for hearing. We have been in some difficulties with regard to the evidence provided by Gateship. A direction, which appears in the bundle, provided that Mr Shelly could give evidence. We have not, however, considered his submissions as Mr Shelly had not appeared at the tribunal. He must also have been informed by Mr Nawaz as to the submissions from Mr Cannan and his observations can only be a

comment arising from both submissions, which adds nothing to the case. We have not addressed the appeal from Gateships perspective as we are unable to do so. We do not know what evidence Gateship might produce with regards to relief for 'good faith'. We do, however, consider that the facts are identical for both parties and it would be unfortunate and wrong for the parties to change their evidence to accommodate the findings from this appeal. Unless HMRC intends to appeal this case we would hope that HMRC would withdraw form the Gateship appeal.

89. **Informality of tribunal proceedings.** Mr Nawaz on several occasions has indicated that he has near enough 30 years experience in the tribunal. This is the first appeal where Mr Nawaz has appeared before Judge Porter. Mr Nawaz has an interesting style of presentation. He sometimes forgets the difference between assertiveness and aggression. Under the former it is quite proper for a representative to stand his corner. Under the latter it is not appropriate to allege dishonesty, without evidence, or consistently confront the Judge in a hostile manner. Where counsel appears for either party it is not for the Judge, except in exceptional cases, to object to the way a case is being presented. Mr Cannan did not appear to take objection to Mr Nawaz providing the answers for his witnesses. Judge Porter pointed this out, in view of Mr Nawaz's considerable experience. As indicted above Rule 5 allows the Tribunal to regulate its own procedure.

90. **Treatment of application for additional witness evidence.** Mrs Pond was allowed to give evidence in response to evidence from Marco to the effect that a repayment had been made of duty involving the same type of documentation, the subject of the two consignments. As the evidence had been led by Mr Nawaz, and it appeared to the Tribunal to be of some importance, it was only appropriate that Mrs Pond should be allowed to elaborate on the facts. It will be noted from the decision that her interjection has been helpful to Marco. Mr Nawaz has taken exception to Judge Porter refusing him the right to give evidence as to corruption in Pakistan. Judge Porter has allowed other evidence as to *baksheesh* and dishonesty in Bangladesh on the basis that Mr Cannan had not objected to it. However, it was not appropriate for Mr Nawaz to give evidence as an expert. First, because he should have asked to do that prior to the hearing. Secondly, he would hardly be independent. Thirdly, the case relates to merchandise from Bangladesh not Pakistan.

91. We reserve our decision with regard to costs. We consider that costs must be decided under the Value Added Tax Tribunals Rules 1986 as the Appellant entered into this appeal on the basis of those rules and not the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. We direct that the Appellant submit its application for costs to the Tribunal, and to the Respondents, within 56 days from the release of the decision. The Respondent shall reply within 56 days from the date of the receipt of the Appellant's application with the Appellant's right to reply to the Respondents reply within 28 days of the receipt of the same. The Tribunal will decide the costs on the basis of written representations.

92. This document contains the 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.

TRIBUNAL JUDGE
RELEASE DATE: 5 October 2011