**[2014] UKUT 0067 (TCC)**
**Appeal number: FTC/49/2013**

***CUSTOMS DUTY – Community Customs Code – Generalised system of preferences – whether relevant time limit for repayment of duties not legally owed is three years – Article 236(2) Council Regulation 2913/92/EEC – no – proof of origin of goods must be submitted within ten months of issue – Article 90(b) Commission Regulation 2454/93***

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

**LANE FOURACRES ASSOCIATES** **Appellant**

**- and -**

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

**TRIBUNAL: Judge Timothy Herrington**
**Judge Edward Sadler**

**Sitting in public in London on 16 December 2013**

**Peter Lane, Partner, and Tony Kazaz, Accountant, for the Appellant**

**Vinesh Mandalia, Counsel, instructed by the General Counsel of Solicitor to HM Revenue and Customs, for the Respondents.**

DECISION

## Introduction

1. This is an appeal from a decision ("the Decision") of the First-tier Tribunal (Tax Chamber) (the "FTT") dismissing the Appellant's appeal against a decision by the Respondents ("HMRC") to refuse to repay import duties of almost £49,000 paid by the Appellant on imports from India of leather handbags in the period July 2005 to September 2009.

2. The issue in these proceedings is whether in circumstances where import duties were erroneously paid because no declaration was made that they qualified for preferential tariff treatment in accordance with the Generalised System of Preference ("GSP") provided for in the Community Customs Code (Council Regulation 2913/92/EEC) and the Implementing Regulation (Commission Regulation 2454/93/EEC) those duties may be repaid within the three year time limit for repayment of duties established not to be legally owed provided for in Article 236 of the Community Customs Code. The Appellant contends that it is entitled to repayment pursuant to this Article whereas HMRC contend that no repayment can be repaid where, as in the case of the imported goods which are relevant to this appeal, a certificate of origin for the relevant goods has not been submitted within ten months of its issue to the UK customs authorities, as required by Article 90(b) of the Implementing Regulation. The Applicant contends that as long as the relevant certificate of origin was available at the time of import even if not submitted at that time then Article 236 can apply.

## Relevant Facts

3. The FTT made short findings of fact in paragraphs 3 to 8 of the Decision as follows:

> "3. The Appellant is a partnership that has traded since 2001 importing footwear from Italy for sale to high street retailers and, since 2005, importing leather handbags from India for sale to the same customers. The Appellant has been hard hit by the insolvencies of Dolcis and Stead & Simpson – its two largest customers.
>
> 4. Between 12 July 2005 and 8 September 2009 the Appellant made 200 imports of leather handbags from India. It used a professional import agent (SBS Worldwide) ("the Agent"). The entries declared the goods to free circulation in the EU and the appropriate duties were accounted for on import.
>
> 5. In February 2009 HMRC Officer Ashif Kanji telephoned the Appellant to discuss those imports. A meeting scheduled for March was cancelled but rearranged and held on 16 July 2009. Mr Kanji expressed the view that the handbags should not attract import duties, and suggested a reclaim be submitted.
>
> 6. A formal reclaim was submitted by the Appellant on 25 September 2009. Although HMRC have no record of receipt (the Appellant accepts that the claim was

originally sent to the wrong HMRC office), HMRC have agreed to accept that the date of the claim was 25 September 2009.

7. By a formal decision dated 17 February 2011 HMRC rejected the claim. HMRC's reasons are set out in detail below in the description of their case, but in summary they considered:

(1) part of the claim (relating to imports pre-26 November 2008) to be out-of-time; and

(2) the rest was inadmissible because of inadequate paperwork – in that the relevant GSP Form A's were apparently not available. Although, as will be seen, HMRC were entitled to require the original Form A's, they did agree that exceptionally they would in this case accept sight of photocopies.

8. The Appellant requested an internal review of the disputed decision, stating that it had not kept copies of the Form A's. The review upheld the original refusal and the Appellant appealed to this Tribunal."

4. The Appellant made an application to this Tribunal for permission to adduce new evidence. Specifically, it applied for evidence to be provided by Officer Kanji as to what he knew and when about the eligibility of the imported handbags for exemption from input duties, and what prompted him to telephone the Appellant to express the view that the handbags should not attract import duties and suggest a reclaim be submitted, as found by the FTT in paragraph 5 of the Decision. Mr Lane submitted that evidence from Mr Kanji would clarify when HMRC became aware of the mistake made by the Appellant in not declaring the goods benefited from the preferential tariff. Mr Lane submits that such evidence would be relevant to the question as to when HMRC should have scrutinised the customs forms submitted and come to a view that duty was not payable and thus determine that the duty should be repaid, Mr Lane submitting that where HMRC discovered within the three year period referred to in Article 236(2) of the Community Customs Code that the duties paid were not legally owed it was obliged to repay the duty concerned on their own initiative.

5. We deferred a decision on the Appellant's application until we had considered, in the light of the parties submissions on the substantive issues in the appeal, whether Article 236(2) was relevant in the context of the issues we have to decide. Accordingly, we deal with the application when dealing with Mr Lane's more general submissions on Article 236 below.

## Relevant legislation

6. The parties referred us to various provisions of the Community Customs Code and the Implementing Regulation as being relevant to the issues in this appeal.

7. Article 20(1) provides:

"Duties legally owed when a customs debt is incurred shall be based on the Customs Tariff of the European Communities."

8. Article 20(3), so far as relevant, provides:

> "The Customs Tariff of the European Communities shall comprise:
>
> …
>
> (d) the preferential tariff measures contained in agreements which the Community has concluded with certain countries or groups of countries and which provide for the granting of preferential tariff treatment."

9. Article 27, so far as relevant, provides:

> "The rules on preferential origin shall lay down the conditions governing acquisition of origin which goods must fulfil in order to benefit from the measures referred to in Article 20(3)(d) …"

10. Article 78 deals with the ability of Customs Authorities to amend a customs declaration after the relevant goods have been released. Article 78, so far as relevant, provides as follows:

> "1. The Customs Authorities may on their own initiative or at the request of the declarant, amend the declaration after release of the goods.
>
> 2. The Customs Authorities may, after releasing the goods and in order to satisfy themselves as to the accuracy of the particulars contained in the declaration, inspect the commercial documents and data relating to the import or export operations in respect of the goods concerned or to subsequent commercial operations involving those goods …
>
> 3. Where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the Customs Authorities shall, in accordance with any provisions laid down, take the measures necessary to regularise the situation, taking account of the new information available to them."

11. Article 201 deals with the question as to when a customs debt is incurred. Article 201, so far as relevant, provides:

> "1. A customs debt on importation shall be incurred through:
>
> (a) the release for free circulation of goods liable to import duties, or
>
> (b) the placing of such goods under the temporary importation procedure with partial relief from import duties.
>
> 2. A customs debt shall be incurred at the time of acceptance of the customs declaration in question.
>
> 3. The debtor shall be the declarant. In the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor.
>
> …"

12. Article 236 deals with the repayment of duties established not to be legally owed. Article 236, so far as relevant, provides:

> "1. Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).
>
> 2. Import duties or export duties shall be repaid or remitted upon submission of an application to the appropriate customs office within a period of three years from the date on which the amount of those duties was communicated to the debtor.
>
> 3. Where the Customs Authorities themselves discover within this period that one or other of the situations described in the first and second subparagraphs of paragraph 1 exists, they shall repay or remit on their own initiative."

13. The Implementing Regulation lays down provisions for the implementation of the Community Customs Code, including detailed provisions relating to the conditions that need to be complied with to obtain the benefit of preferential tariffs.

14. Article 80 deals with the requirement to show proof of origin in order to obtain the benefit of the preferential tariff and provides as follows:

> "Products originating in the beneficiary country shall benefit from the tariff preferences referred to in Article 67, on submission of either:
>
> (a) a certificate of origin Form A, a specimen of which appears in Annex 17; or
>
> (b) in the cases specified in Article 89(1), a declaration, the text of which appears in Annex 18, given by the exporter of an invoice, a delivery note or any other commercial document which describes the products concerned in sufficient detail to enable them to be identified (hereinafter referred to as the 'invoice declaration')."

15. Article 81(1) sets out the condition for eligibility for tariff preferences as follows:

> "Originating products within the meaning of this section shall be eligible, on importation into the Community, to benefit from the tariff preferences referred to in Article 67, provided that they have been transported directly within the meaning of Article 78, on submission of a certificate of origin Form A, issued by the customs authorities or by other competent governmental authorities of the beneficiary country, provided that the latter country:
>
> - has communicated to the Commission the information required by Article 93, and
> - assists the Community by allowing the customs authorities of Member States to verify the authenticity of the document or the

> accuracy of the information regarding the true origin of the products in question."

16. Article 86 allows for the provision of duplicate certificates of origin as follows:

> "1. In the event of the theft, loss or destruction of a certificate of origin Form A, the exporter may apply, to the competent governmental authorities which issued it, for a duplicate to be made out on the basis of the export documents in their possession. Box 4 of a duplicate Form A issued in this way must be endorsed with the word 'Duplicate' or 'Duplicata', together with the date of issue and the serial number of the original certificate.
>
> 2. For the purposes of Article 90b, the duplicate shall take effect from the date of the original."

17. Article 90(b) provides for a limited time during which certificates of origin may be valid as follows:

> "1. A proof of origin shall be valid for 10 months from the date of issue in the exporting country, and shall be submitted within the said period to the customs authorities of the importing country.
>
> 2. Proofs of origin which are submitted to the customs authorities of the importing country after the final date for presentation specified in paragraph 1 may be accepted for the purpose of applying the tariff preferences referred to in Article 67, where the failure to submit these documents by the final date set is due to exceptional circumstances.
>
> 3. In other cases of belated presentation, the customs authorities of the importing country may accept proofs of origin where the products have been submitted before the said final date."

**The decision of the FTT**

18. The FTT noted that the goods in question were imported following the completion and submission of the relevant Forms C88 by professional import agents appointed by the Appellant: see paragraph 30 of the Decision. The FTT found in the same paragraph that these Forms showed normal duty rates as applying despite the agents holding certificates of origin. In rejecting the Appellant's contention that HMRC should have audited the C88, and identified that preferential duty rates may have been available the FTT held:

> "HMRC would have been spotted this [sic] only if they performed post-clearance checks on the particular consignments; there was nothing to alert HMRC that the C88s prepared and submitted by professional import agents should be elected for post-clearance checks. I also do not accept the Appellant's contention that HMRC were aware of the mistake but deliberately chose not to question it for some reason (possibly nefarious). Further, I do not accept the Appellant's contention that HMRC should have ignored the legal time limits (discussed below) by concession."

19. The FTT dealt with the relationship between the three year time limit in Article 236 of the Community Customs Code and the ten month limit imposed by Article 90(b) of the Implementing Regulation in paragraph 31 of the Decision as follows:

> "I consider there is no contradiction between the three year time limit imposed by Art 236 of the Community Customs Code and the ten month time limit imposed by Art 90b of the Implementing Regulation. The three year time limit applies to *all* customs duty reclaims. The ten month time limit can be extended only where:
>
> (a) there are "exceptional circumstances", or
>
> (b) the products have been "submitted" within the ten month period."

20. The FTT held in paragraph 32 of the Decision that there was no evidence of "exceptional circumstances" and on the authority of *DSG Retail Limited v HMRC* [2010] UKFTT 12 (TC) the word "submitted" means the submission of the documents necessary to evidence the entitlement to preferential treatment in relation to goods (here the certificate of origin): see paragraph 33 of the Decision.

21. Consequently, the FTT held in paragraph 35 of the Decision that the ten month time limit imposed by Article 90(b) of the Implementing Regulation precluded any refund in relation to imports prior to 26 November 2008, and in paragraph 35 of the Decision that any refund in relation to imports in the period from 26 November 2008 to 25 September 2009 was precluded because of the failure of the Appellant to produce certificates of origin in respect of those imports or (by concession from HMRC) photocopies thereof.

**Issues to be determined**

22. It is common ground that valid certificates of origin were not submitted within the ten month period referred to in Article 90(b)(1) of the Implementing Regulation. The FTT found in paragraph 32 of the Decision that there were no "exceptional circumstances" in this case, and so Article 90(b)(2) of the Implementing Regulation, which permits in such a situation certificates of origin to be submitted after the end of the ten month period, is not in point. In our view the key issue to be determined in this case is therefore whether it is necessary that the conditions of Article 90(b) (3) of the Implementing Regulation were met in this case (that is, whether the Appellant can claim repayment of the overpaid duty if, and only if, he first establishes that the products have been submitted within the ten month period) and if so what is the correct interpretation of the phrase "products have been submitted" as used in that provision.

23. If we were to decide either that the products have been submitted within the ten month period, or that such requirement is not a precondition because we accept the Appellant's primary submission that the only requirement is that certificates of origin were available at the time the customs declaration was made on the import of the goods, then we would need to consider whether an obligation to repay arose pursuant to Article 236 of the Community Customs Code, either upon a valid application made

by the Appellant under Article 236(2) or because HMRC had discovered that the duties were not legally owed (because of the availability of preferential tariff) and therefore were, on their own initiative, obliged to repay the amounts paid.

**Discussion**

24. We start our discussion with some observations on how the Generalised System of Preference in the Community Customs Code and the Implementing Regulation fits in with the general provisions of the Community Customs Code in respect of the liability of an importer to pay import duties following completion of the relevant Forms C88, taking into account the practice followed by HMRC when dealing with importations.

25. By virtue of Article 20(1) of the Community Customs Code goods imported from India will be subject to the normal customs tariff of the European Union unless the condition for a preferential tariff is met. Article 20(3) of the Community Customs Code makes it clear that the preferential tariff, if available, will be the relevant tariff instead of the normal customs tariff and Article 27 makes it clear that the rules on preferential origin shall lay down the conditions to be fulfilled before the preferential tariff can be available.

26. The conditions to be fulfilled are to be found in the Implementing Regulation and we have set out the relevant conditions in this case in paragraphs 14 to 17 above, in particular, the requirement to submit a certificate of origin as required by Articles 80 and 81 within the validity period prescribed in Article 90(b).

27. We were told that in practice HMRC do not require to see certificates of origin before clearing goods for import on payment of duties (if any) at the preferential rate provided that Box 36 of the import declaration (Form 88) has been completed indicating that the goods are being imported as preferential goods. If the box is so completed, and the goods cleared it is open to HMRC to carry out an audit subsequently to see if the relevant conditions have been satisfied. Article 78 of the Community Customs Code set out in paragraph 10 above makes it clear that in such a situation HMRC can ask for evidence to support the statements made in the declaration so, for example, if a preferential tariff is claimed HMRC could ask to see the relevant certificate of origin so it can check that the goods were imported during the period of validity of the certificates in question. In the event that it was found that no valid certificates were available, HMRC would be entitled to raise a post-clearance demand. In that situation the application of Article 20(1) of the Community Customs Code would lead to the conclusion that the customs debt incurred should have been calculated in accordance with the normal tariff and not the preferential tariff and duty recoverable accordingly.

28. Conversely, in a situation such as the present case where it appears that the importer's agent has wrongly completed Box 36 to indicate that normal tariff arrangements applied and duty was paid on that basis, it would appear that by application of Article 201 of the Community Customs Code a customs debt of an

amount calculated in accordance with the declaration made would be incurred upon release of the goods into free circulation.

29. Mr Lane submitted that no customs debt had been incurred at this point because the goods concerned qualified for a preferential tariff in respect of which no duty was payable. He submitted that an actionable debt cannot be created by the fact of an incorrectly completed customs declaration. Therefore in this case had there been an action for debt in respect of duties owed in respect of the goods in question then the Appellant could and would have produced the documents necessary to show no duties were payable.

30. Mr Lane also submitted that as a result of the incorrect declaration and the conditions for the application of the preferential tariff having been met the Appellant would be entitled to make a claim for repayment of the duties paid, on the basis that no customs debt had been incurred, within the three year time limit provided for in Article 236(2) following submission of the Appellant's claim for repayment.

31. We reject these submissions. In our view HMRC were entitled to accept the declaration made by the Appellant's agent to the effect that the goods were not entitled to be a preference. The goods were cleared on that basis of that declaration and in accordance with Article 201(1) (a) at that point a customs debt was incurred, and indeed, as we understand it, was paid. It would then be open to the Appellant to make an application to amend the declaration in accordance with Article 78(1) of the Community Customs Code and make an application for repayment under Article 236.

32. The Appellant contends that all the other information on the Form C88 would clearly evidence beyond doubt that the goods concerned were of Indian origin and therefore available for the preferential tariff and invoices were available to show they had been supplied by an Indian exporter. In those circumstances, and in Mr Lane's submission, the fact that HMRC had carried out an audit of the Forms and came to the view that the preferential tariff was available (as communicated by Mr Kanji at the meeting held on 16 July 2009) then HMRC should be obliged to make repayment under Article 236. To do otherwise, Mr Lane submits, would involve treating the Appellant differently to other taxpayers because HMRC did not as a matter of practice require the submission of certificates of origin as a condition of applying a preferential tariff.

33. We reject these submissions. We see nothing wrong in HMRC's practice to allow goods to be cleared on the basis of the declarations made on the relevant Forms without having sight of all the relevant documents. This must be administratively convenient for all concerned and both parties are protected against the consequences of a wrong declaration by the ability to amend the declaration in accordance with Article 78 and for the duty paid to be adjusted accordingly, where necessary by the application of Article 236.

34. We see nothing in the legislation that requires HMRC to carry out an audit of customs forms to ascertain whether they have been correctly completed. The fact that some taxpayers may get the benefit of the preferential tariff even though they have not

had to produce a certificate of origin (even in cases where they have made an incorrect declaration and the form has not been audited) does not mean that the Appellant in this case has been treated differently because it has been required to show valid certificates of origin. The reason the result is different for the Appellant is that its agent made an incorrect declaration in the first place. Had the agent correctly declared that the goods qualified for the preferential tariff then the Appellant may have been able to import the goods without production of the certificates of origin, but it would obviously have been open to HMRC, if it chose to carry out an audit, to ask for evidence to support the declaration. In that regard the Appellant would be in no different a position to any other taxpayer, and it is not surprising, if it chooses to make a claim for repayment on the basis that an incorrect declaration was made, that HMRC ask for the evidence that Articles 80, 81 and 90(b) of the Implementing Regulations require in mandatory terms.

35. Neither do we take the view that HMRC should have met the claim for repayment on the basis that all the other evidence pointed to the fact that the goods were of Indian origin and therefore benefitted from the preferential tariff.

36. As Mr Mandalia submitted, the scheme laid down in the Community Customs Code and the Implementing Regulation taken together demonstrate that the availability of preferential treatment is subject to compliance with strict conditions. In order to make the determination of the correct duty payable administratively convenient, the scheme works on the basis of production of the correct documentary evidence, whether in the form of a properly completed customs declaration or documentation of the prescribed form to back it up. It is not for HMRC to make a judgment that the preferential tariff should be available because of the existence of other documentation not prescribed by the Implementing Regulation that might evidence the availability of the preferential tariff. The existence of such documentation accompanied by a declaration that the goods are subject to the normal tariff is in any event not inconsistent with the goods not being of Indian origin as required by the Implementing Regulation. For example, the leather concerned could have been sourced outside India or the handbags assembled outside India; the fact that invoices showed the exporter to be based in India would not be conclusive. For these reasons, the FTT's finding in paragraph 30 of the Decision, referred to in paragraph 18 above, that there was nothing to alert HMRC that the forms in question should be selected for post-clearance checks, was a finding open to the FTT on the evidence before it.

37. In any event the FTT made no finding that HMRC had concluded that the goods were entitled to the preferential tariff in the absence of the submission of the certificates of origin. The FTT found in paragraph 5 of the Decision that Mr Kanji "expressed the view" that the handbags should not attract import duties and suggested a reclaim be submitted. This is a finding consistent with a position that HMRC had not come to a final view on the matter until it made its decision to reject the claim on 17 February 2011. It is also consistent with HMRC's letter of 14 October 2010 to the Appellant, which was before the FTT, written in response to the Appellant's repayment claim and which asked for further information "in order for us to investigate whether there is a potential repayment claim". This indicates that no

settled view had been expressed by Mr Kanji at the meeting on 16 March 2009. It follows that we reject Mr Lane's submission that the FTT's finding in paragraph 30 of the Decision, dismissing the Appellant's contention that HMRC were aware of the mistake but deliberately chose not to question it, was inconsistent with its findings in paragraph 5 of the Decision. As we have observed, the evidence was consistent with HMRC not having come to a final view at the relevant time and had therefore not discovered that it had been established that duty was repayable, as required by Article 236.

38. We can therefore conclude in relation to the application of Articles 78 and 21 of the Community Customs Code that where a taxpayer, such as the Appellant in this case, is seeking repayment of import duty where the customs declaration incorrectly states that the goods concerned are not entitled to a preferential tariff, HMRC is entitled to require the taxpayer to have complied with the strict conditions laid down in Articles 80, 81 and 90(b) of the Implementing Regulation before it is required to meet that repayment claim. We therefore agree with the FTT that there is no contradiction between the three year time limit imposed by Article 236 of the Community Customs Code and Article 90(b) of the Implementing Regulations. Once it is realised that there are additional conditions to be satisfied if the taxpayer is to obtain the benefit of the preferential tariff through a repayment claim under Article 236, one of which is that the ten month time limit specified in Article 90(b) is complied with, it is clear that there is no conflict.

39. We therefore need to consider whether it can be said in this case the Appellant did comply with the conditions of Article 90(b) in order to substantiate its repayment claim. The FTT made clear findings of fact in paragraph 35 of the Decision that the Appellant was unable to produce the relevant certificates in relation to the period from 26 November 2008 to 25 September 2009. That being the case, on the basis of our foregoing analysis, the Appellant's claim in respect of goods imported during that period must fail.

40. In relation to the period prior to 26 November 2008, the evidence before the FTT suggests that certificates of origin were available in respect of imports made before that time, but they would not have been produced to HMRC before 25 September 2009, long after the ten month period from their date of issue referred to in Article 90(b)(1). The question therefore arises as to whether Article 90(b)(3) will apply on the basis that the "products have been submitted" before the expiry of the certificate of origin. Mr Lane submits that the fact that the certificates were available at the time the goods were imported is sufficient for this purpose. He accepts that if valid certificates of origin were not available at that time then the repayment claim must fail.

41. As referred to in paragraph 20 above, the FTT based its rejection of this submission on the FTT's finding in *DSG Retail Limited v HMRC*. In that case, which concerned imports from Turkey, the FTT refused a repayment claim for duty on the basis that import duties between the European Community and Turkey had been abolished. Proof of entitlement to free circulation had to be provided in similar terms to Article 90(b) of the Implementing Regulation in that a movement certificate

showing export from Turkey had to be produced at the latest within four months of the goods being "submitted". The FTT accepted HMRC's submissions in that case that this provision refers to the presentation of the goods for the purpose of preferential treatment, rather than simply presentation and declaration of the goods themselves, and that any alternative interpretation would render nugatory the primary positive requirement that a movement certificate "shall" be submitted within four months of issue.

42. The FTT, at paragraph 19 of the Decision, accepted this reasoning and held that the requirements of Article 90(b) would be met where the importer indicated in Box 36 on the import declaration that the goods are being imported as preference goods. The FTT held that to accept a belated proof of origin without a provisional claim for preference would deprive Articles 90(b)(1) and (2) of effective force.

43. In our view the FTT's reasoning was entirely correct and it is consistent with our analysis that in practice what is declared on the customs declaration is the starting point for calculation of the duty payable, which is subject to verification by production of certificates which are within their period of validity at the time the declaration is made. Such a conclusion preserves the paramount principle, as we have identified it, that entitlement to the preferential tariff is to be verified by strict compliance with the terms of the Implementing Regulations. Thus in order for the Appellant's repayment claim under Article 236 of the Community Customs Code to have been met, certificates of origin would have to have been valid at the time the claim for repayment was made.

44. Consequently, in our view HMRC was correct to refuse the Appellant's claim for repayment.

45. We have determined this issue by reference to our interpretation of the applicability of Article 90(b) of the Implementing Regulation. That being the case it is clear that whether a claim was made within the three year period prescribed in Article 236 of the Community Customs Code is not relevant as Article 236 cannot apply in the case of a claim for repayment on the grounds that a preferential tariff applies unless the strict conditions of Article 90(b) of the Implementing Regulation have been complied with.

46. It follows that any further evidence from Officer Kanji as to whether HMRC had determined that the preferential tariff was available would be irrelevant and we must dismiss the Appellant's application in that regard. In any event, we would have dismissed the application on the basis that, applying the principles laid down by Denning LJ in *Ladd v Marshall* [1954] 1 WLR 1489 at page 1491 regarding the deployment of fresh evidence on appeal, we would have been bound to find that the evidence concerned could, with reasonable diligence, have been obtained for use at the hearing before the FTT. Mr Lane was unable to provide a good reason why the Appellant did not seek to call Mr Kanji as a witness at that stage.

47. We should deal briefly with two submissions made by the Appellant in reply. First, Mr Lane submitted that it was inequitable to deny the Appellant its repayment

claim simply because of a mistake made by the agent in completing the customs declaration at a time when all the evidence was available to verify the claim for the preferential tariff.

48. We regret that we can see no basis to construe the legislation otherwise than in accordance with what we have found to be the strict requirements that need to be made to claim the preferential tariff. The proper administration of this legislation is dependent upon reliance on the documents submitted, and the burden is on the importer, or its agent to complete the declaration accurately and ensure that it is properly verified. It is not open to us to modify the effect of the legislation on the grounds that it would be inequitable or unfair to apply the strict requirements of the legislation in a case where an honest mistake has been made, in the absence of a specific power in the legislation to do so.

49. Secondly, Mr Kazaz asked us to take into account the fact that as from January 2017 the requirement for certificates of origin will be abolished, with the burden shifting to the registration of exporters who will issue statements of origin. It is however not open for us to interpret the legislation otherwise than in accordance with its terms as in force at the time of the imports in question so what may be the position in 2017 is of no relevance to this appeal. Mr Kazaz also made submissions in respect of *Futter and another v HMRC* and *Pitt and another v HMRC* [2013] UKSC 26 but we have not found these cases to be of any relevance to this appeal.

50. We must therefore dismiss the appeal.

**TIMOTHY HERRINGTON** **EDWARD SADLER**

**JUDGES OF THE UPPER TRIBUNAL**

**RELEASE DATE: 11 FEBRUARY 2014**