TC03210

Appeal number: TC/2011/06914 & TC/2012/09282

CUSTOMS DUTY– classification – nomenclature – imported prepared chicken – whether HMRC decision to revoke a Binding Tariff Information provided to appellant was unreasonable – the correct classification of the processed chicken – whether appellant entitled to repayments of duty – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

INVICTA FOOD LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN
MR DAVID EARLE

Sitting in public at Bedford Square, London WC1 on 13 and 14 November 2013

Nicola Shaw QC, instructed by Ince & Co, for the Appellant

Jonathan Bremner, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Invicta Foods Limited ("the appellant") is an importer, based in Kent, of prepared and unprepared meat products from outside the European Union.

2. The appellant imported treated chicken meat ("the Product") from Brazil. The Product had been classified under Chapter 16 of the Combined Nomenclature ("CN") pursuant to a Binding Tariff Information ("BTI") issued to the appellant on 20 October 2010.

3. Pursuant to a decision of HMRC on 12 May 2011 the BTI was revoked and, instead, the Product was reclassified under Chapter 2 of the CN. The rate of duty under Chapter 16 is lower than that under Chapter 2.

4. There are three preliminary issues in dispute. They are preliminary issues because it has been agreed between the parties that we should give a decision in principle on these issues and that the parties will thereafter agree upon the correct amount of duty payable in accordance with our decision.

5. The three issues are as follows:

(1) Were HMRC entitled to revoke the BTI issued on 20 October 2010 ("the revocation issue");

(2) what is the correct classification of the Product for customs duty purposes ("the classification issue"); and

(3) is the appellant, in principle, entitled to the repayments of duty which it has claimed ("the repayment issue")?

The evidence

6. We were provided with folders containing correspondence between the parties, a hearing bundle and a supplementary hearing bundle (the bundles containing pleadings, witness statements and exhibits).

7. We had three witness statements from Mr Neil Stokes of the appellant. From HMRC we had a witness statement from Mr Mark Attridge and a witness statement from Mr Robert Accleton. Each of the three witnesses gave oral evidence and was cross-examined.

The legislative background

8. There was a significant degree of overlap between the statutory provisions relevant to the three issues under appeal.

The framework and interpretation

9. So far as tariff classification is concerned, the Combined Nomenclature Regulation (no 2568/87) provides the legal basis for the Community's Tariff. An annual amendment to the Combined Nomenclature Regulation contains the combined nomenclature ("**CN**") that is reproduced in the UK Tariff. The UK Tariff sets out the duties and measures affecting the import, export and transit of goods to and from the UK. It consists of three Volumes:

(1) Volume 1 contains essential information including duty relief schemes, contact addresses and explanations of subjects such as excise duty and tariff quotas.

(2) Volume 2 contains the 16,000 or so commodity codes (set out on a chapter by chapter basis). It lists duty rates and other directions such as import licensing and preferential duty rates.

(3) Volume 3 contains a completion guide for import and export entries.

10. Volume 2 Part 1 Section 3 of the UK Tariff sets out the appropriate 4 digit heading that must first be established. There are six General Interpretative Rules ("GIRs") which have legal force and are intended to be applied where goods cannot be classified solely by reference to the terms of headings and sub-headings or by taking into account section or chapter notes. The CN is designed to ensure, with the aid of the GIRs, that any product falls to be classified in one place. The GIRs provide, so far as material, as follows:

(1) Rule 1: classification shall be determined according to the terms of the headings and any relevant section or chapter notes.

(2) Rule 2 is divided into two parts:

(a) The first part extends the scope of the heading to cover incomplete or unfinished articles provided that they have the character of the complete or finished article.

(b) The second part covers mixtures or combinations of materials or substances.

(3) Rule 3 deals with goods that are potentially classifiable under two or more headings. The rule is in three parts, which apply sequentially:

(a) The first part directs that the heading which provides the most specific description is to take precedence over the one which provides only a general description;

(b) The second part relates to mixtures, composite goods consisting of different materials or components and goods put up for retail sale. It specifies that such goods are to be classified according to the material or component which gives them their essential character.

(c) The third part provides that where goods cannot be classified by applying Rule 3(a) or 3(b) they are to be classified in the heading which occurs last among those which equally merit consideration.

(4) Rule 4 provides that goods which cannot be classified in accordance with rules 1 to 3 shall be classified under the heading appropriate to the goods to which they are most akin.

(5) Rule 6 extends the scope of Rules 1 to 5 to subheading level.

11. Explanatory Notes to the Harmonised System ("HSENs") are published by the World Customs Organization. Explanatory Notes to the CN ("CNENs") are published by the European Commission. Both the HSENs and CNENs have been held by the Court of Justice of the European Union to be an important aid to the interpretation of the scope of the various Headings (albeit they did not have legally binding force and cannot alter the meaning of the provisions of the CN) (see, for example, *Intermodal Transports BV v Staatssecretaris van Financiën* (Case C-495/93) [2005] ECR I-8151 para 48).

12. The CJEU has also held that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and the wording of the notes to the sections or chapters (see, for example, *FTS International BV v Belastingdienst – Douane West* (Case C-310/06) [2007] ECR I-6749 ("*FTS*") para 27).

The revocation issue

13. In relation to the revocation of the BTI, article 12(1) of Regulation 2913/92 establishing the Community Customs Code (the "Customs Code") provides that:

> "The customs authorities shall issue binding tariff information … on written request, acting in accordance with the committee procedure."

14. Article 6 of the Community Customs Code (Council Regulation (EEC) No 2913/92) ("CCC") provides that:

> "1. Where a person requests that the customs authorities take a decision relating to the application of customs rules that person shall supply all the information and documents required by those authorities in order to take a decision.
>
> ..."

15. Article 9 of the CCC provides:

> "1. A decision favourable to the person concerned, shall be revoked or amended where, in cases other than those referred to in Article 8, one or more of the conditions laid down for its issue were not or are no longer fulfilled.
>
> 2. A decision favourable to the person concerned may be revoked where the person to whom it is addressed fails to fulfil an obligation imposed on him under that decision.
>
> ..."

16. Article 12 of the CCC provides that:

> "1. The customs authorities shall issue binding tariff information...on written request, acting in accordance with the committee procedure.
>
> 2. Binding tariff information...shall be binding on the customs authorities as against the holder of the information only in respect of the tariff classification...
>
> ...
>
> 4. Binding information shall be valid for a period of six years in the case of tariffs.... By way of derogation from Article 8, it shall be annulled where it is based on inaccurate or incomplete information from the applicant.
>
> 5. Binding information shall cease to be valid:
>
> (a) in the case of tariff information:
>
> ...
>
> (iii) where it is revoked or amended in accordance with Article 9, provided that the
>
> revocation or amendment is notified to the holder."

17. The appellant's right of appeal against the withdrawal of the BTI - the revocation issue - is based on paragraph 3(1)(c) of the Customs Review and Appeals (Tariff and Origin) Regulations 1997 (SI 1997/534) (the "CRA Regulations"). This is an ancillary matter (paragraph 4 CRA Regulations and section 16(8) and (9) Finance Act 1994). The tribunal's jurisdiction is, therefore, a supervisory one. The relevant question, therefore, is whether the decision to revoke the BTI was one which HMRC could not reasonably have arrived at (section 16(4) Finance Act 1994). To succeed on the revocation issue, therefore, the appellant must show that HMRC acted in a way in which no reasonable body of commissioners could have acted, took into account some irrelevant matter or disregarded a relevant matter, or otherwise erred in law (c.f. *CCE v JH Corbitt Numismatists Ltd* [1980] STC 231 (HL) 239 (*per* Lord Lane)).

The classification issue

18. HMRC argue that the Product was correctly classified in Chapter 2 of the CN the relevant Code in Chapter 2 being 02071410:

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

19. The appellant, however, argues that the Product should be classified under Chapter 16 under Subheading 16023211 (which attracts a lower rate of duty). This Subheading relates to:

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

20. Thus, the appellant argues that the Product is "prepared … meat" (it was common ground that the Product was not "preserved").

21. So far as the interpretative aids to Chapter 2 and Chapter 16 are concerned, the following points are relevant:

(1) Explanatory Note 1 to Chapter 16 provides:

> "This Chapter [i.e. Chapter 16] does *not* cover meat, meat offal, fish, crustaceans, molluscs or other aquatic invertebrates, prepared *or preserved by the processes specified in Chapter 2* or 3 or heading 05.04." (*emphasis added*)

(2) The distinction between meat classified in Chapter 2 (on the one hand) and Chapter 16 (on the other) is explained in the HSENs for Chapter 2 as follows:

> "This Chapter [that is, Chapter 2] covers meat and meat offal in the following states only, whether or not they have been previously scalded or similarly treated but not cooked:
>
> (1) Fresh (including meat and meat offal packed with salt as a temporary preservative during transport).
>
> (2) Chilled, that is, reduced in temperature generally to around 0 C, without being frozen.
>
> (3) Frozen, that is, cooled to below the product's freezing point until it is frozen throughout.
>
> (4) Salted, in brine, dried or smoked.
>
> Meat and meat offal, *slightly sprinkled with sugar or with an aqueous solution of sugar are also classified in this Chapter*.
>
> Meat and meat offal in the states referred to in Item 1 to 4 above, remain classified in this Chapter whether or not they have undergone tenderising treatment with proteolytic enzymes (e.g. papain) or have been cut, chopped, minced (ground). In addition mixtures of combinations of products of different headings of the Chapter (e.g. poultry meat of heading 0207 covered with pig fat of heading 0209), remain classified in this Chapter.
>
> Meat and meat offal not falling in any heading of this Chapter are classified in Chapter 16 e.g.:

> (a) sausages and similar products, whether or not cooked (heading 1601).
>
> (b) Meat and meat offal cooked in any way (boiled, steamed, grilled fried or roasted) or *otherwise prepared or preserved by any process not provided for in this Chapter* including those merely covered with batter or bread crumbs, truffled or seasoned (e.g. with pepper and salt) as well as liver pastes and pates." (*emphasis added)*

(3) Additional Note 6(a) to Chapter 2, which was much debated in the course of the hearing, provides that:

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

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

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

23. The HSENs to Chapter 16.02 state:

> "This heading covers:
>
> Meat… prepared… by other processes not provided for in Chapter 2…, including those merely covered with batter or breadcrumbs, truffled, seasoned (e.g. with both pepper and salt)…."

24. The appellant's right of appeal in respect of the classification issue is to be found in section 13A(2)(a)(i) and (ii) Finance Act 1994. This is not an ancillary matter with the result that section 16(5) Finance Act 1994 applies. Thus, the tribunal has the power to quash or vary any decision and the power to substitute its own decision for any decision quashed on appeal.

The repayment issue

25. The position as regards the tribunal's jurisdiction is the same as that set out in paragraph 24 above.

The facts

The BTI

26. The appellant applied for a BTI ruling on 30 September 2010 (although the application was dated 29 September 2010 the covering fax makes it clear it was sent on 30 September 2010).

27. The purpose of a BTI is explained on HMRC's website as follows:

> "A BTI is a written tariff classification decision, given on request, which is **legally binding** on all customs administrations within the European Community for up to six years from the date of issue.
>
> BTI is intended to give you assurance about the correct tariff classification of your goods. It is not a legal requirement.
>
> BTI decisions are made under the terms of Council Regulation (EEC) 2913/92 of 12 October 1992 (as amended) establishing the Community Customs Code, and the Implementing Provisions contained in Commission Regulation (EEC) 2454/93 of July 1993 (as amended). This forms part of Community law and applies in all Member States of the EU."

28. The appellant's application described the goods as:

> "Brazilian, Frozen Boneless, Skinless Chicken Breast Preparation.
>
> Ingredients:
>
> | | |
> |---|---|
> | Raw Chicken | 92% |
> | Seasoning | 8% |
>
> Brine Solution Composition:
>
> | | |
> |---|---|
> | Water | 73.12% |
> | Salt | 10.00 % |
> | Sugar | 8.13% |
> | Dextrose | 5.00% |
> | Phosphates (E450/E451) | 3.75% |
>
> Slaughter:
>
> Fresh killed, electric stunning, eviscerated, water spin chilled to <4c
>
> Cutting:
>
> Automatic or manual boning and separation, inner fillet and skin removed
>
> Preparation of Raw Material:
>
> Product is trimmed and graded to final calibration
>
> Product Tumbling:
>
> Graded breasts are tumbled in a non-cure brine solution at 8%
>
> Freezing:
>
> Product temperature -18c or below at exit from freezing process."

29. Under the heading "commercial denomination and additional information", the appellant described the Product as: "Brazilian, Frozen, Boneless, Skinless, marinated Chicken Breast Fillets."

30. Under the heading "Classification Envisaged", the appellant indicated that the appropriate nomenclature code was: "16023211."

31. The application was signed by Mr Stokes.

32. Pursuant to the appellant's application, on 20 October 2010 HMRC (Tariff Classification Service) issued a BTI (number GB 120015154) to the appellant. The BTI classified a frozen boneless and skinless chicken breast preparation on the commodity code 16023221100. The officer concerned was Ms Linda Carter. Her letter stated:

> "In reaching this decision I have followed the legal procedure for Tariff classification as shown in Volume 2, Part 1, Section 3 of the Tariff. Further information relating to classification is contained in Notice 600."

33. The BTI described the Product as:

> "A frozen boneless, skinless chicken breast preparation. It is 92% of raw chicken with an 8% seasoning. The seasoning consists of water, salt, sugar, dextrose and phosphates."

34. Under the heading "Justification of the classification of the goods" the BTI stated:

> "This prepared chicken is classified the commodity code 16023221100 in accordance with the following:
>
> General Interpretive Rules (GIR)
>
> GIR 1 has been used to classify this product by terms of heading 16.02
>
> GIR 6 has been used to classify the goods the subheading level.
>
> Additional Notes
>
> 1. For the purposes of subheading 1602 31 11, 1602 39 21, 1602 50 10, 1602 90 61, 1602 90 72 and 1602 90 74, the term 'uncooked' shall apply to products which have not been subjected to any heat treatment or which have been subjected to heat treatment insufficient to ensure the coagulation of meat proteins in the whole of the product and which, therefore, in the case of subheading 1602 50 10, 1602 90 61, 1602 90 72 and 1602 90 74, showed traces of a pinkish liquid on the Surface when the product is cut along the line passing through its thickest part.
>
> Harmonised System Explanatory Notes
>
> This heading covers all prepared or preserved meat, meat offal or blood of the kind falling in this chapter, except sausages and similar products (1601), meat extracts and meat juices (16.03)."

Background to the BTI

35. The background to the appellant's BTI application of 30 September 2010 was as follows. Prior to that application, the Product had been classified under Chapter 2 of the CN. It was the appellant's belief that this classification was inconsistent with the

treatment of the product in other Member States. The appellant, therefore, first applied for a BTI in relation to the Product on 9 September 2009.

36. In response to that application, HMRC asked the appellant, in a fax dated 11 November 2009, for further information including questions relating to the full manufacturing process, whether the meat was impregnated throughout with salt and whether there was any change in appearance of the meat. In addition, HMRC asked for photographs of the Product.

37. Mr Stokes replied on 15 March 2010 with a Power Point presentation explaining the production process and giving photographs of the Product at various stages in the process. We shall set out in more detail Mr Stokes' evidence concerning the production process later in this decision. However, the presentation described the process to which the Product was subjected. It showed photographs of the chicken before it was "tumbled". The presentation then described the "tumbling" process. The chicken was vacuum-tumbled for twenty-five minutes in a non-cure brine solution consisting of:

"Water	73.12%
Salt	10.00%
Sugar	8.13%
Dextrose	5.00%
Phosphates (E 450/E 451)	3.75%"

38. The presentation described the rate of application as "8% solution to 92% raw chicken breast." It noted that the tumbling equipment shown in the photographs was considerably smaller than the industrial-sized unit used by the Brazilian supplier. However, the methodology was identical in that "the raw material and solution are tumbled under vacuum, paddles with [sic] the unit constantly agitate the chicken breasts ensuring that all of the solution is absorbed." The presentation noted that the result of the tumbling process was that, once the solution had been absorbed, the colour of the Product had changed. It stated: "Cooking at this stage will demonstrate that the internal structure has changed and the meat has become less fibrous, more tender and succulent." It is important to note that the presentation clearly stated that the whole of the solution was absorbed i.e. the Product was not merely coated by the solution but fully absorbed it.

39. HMRC (Officer JA Jones) replied on 23 March 2010 informing the appellant that the information supplied was insufficient for classification. HMRC's letter stated as follows:

> "From the information provided we do not consider the product to be classifiable within Chapters 16 as the ingredients of the brine solution do not necessarily exclude it from Chapter 02. If you wish to continue with this classification request please supply an analytical taste test results of the chicken before and after the solution has been added."

40. It is worth noting, at this point, that the request for an analytical "taste test" came from HMRC and asked for the chicken to be tested both before and after the solution had been added. It is also clear from Mr Jones' letter that HMRC were alive to the distinction between chicken falling within Chapter 2 and Chapter 16, although there is no specific indication that the words "slightly sprinkled" were considered.

41. Mr Stokes accordingly commissioned Leatherhead Food Research ("Leatherhead") on 30 March 2010 to produce a report. Mr Stokes' e-mail to Leatherhead was scrutinised in cross-examination. The e-mail read as follows:

> "Further to our conversation this morning, we are importers of a meat preparation from South America, which until six years ago was imported under Chapter 16 of the Customs Tariff.
>
> Across Europe, Customs decided that this product should be universally classified in Chapter 02 of the tariff, and ever since we have been paying the higher levy. However, it would appear that our European counterparts have been importing the goods under Chapter 1602 again.
>
> We have requested a new ruling from HMRC and they have called for analytical taste test reports in order to back up our request.
>
> I have arranged for our Brazilian supplier to send by airfreight,, two samples, one being the raw-prepared material and the other a fully prepared sample.
>
> The object of the sensory test will be to demonstrate the changes that the meat has undergone in the following areas:
>
> 1) Appearance
>
> 2) Taste
>
> 3) Texture
>
> …."

42. Mr Stokes concluded his e-mail by giving Leatherhead the percentages contained on the BTI application relating to the Product.

43. On 12 April 2010, Leatherhead submitted a proposal to the appellant setting out the approach which they would adopt in testing the samples of the Product. Mr Stokes contacted HMRC's Officer Philippa Evans, with whom Mr Stokes had already had a number of telephone conversations, to discuss Leatherhead's proposal in view of the cost involved. Mr Stokes was keen to involve HMRC in the process to make sure that the proposed tests were acceptable to HMRC.

44. By 20 July 2010, the chicken samples had been received from the Brazilian producers and HMRC had agreed to the testing format. Leatherhead then proceeded to carry out their tests and submitted their report on 12 August 2010. The report was exhibited to Mr Stokes' witness statement. Due to delays during the holiday period, the report was not reviewed by the appellant until September 2010.

The Leatherhead Report

45. The Leatherhead report records the approach taken in testing the samples. Fourteen assessors, drawn from a trained sensory panel at Leatherhead, took part in the evaluation. All the assessors had previously been trained in the sensory evaluation of an extensive range of food and beverage products and were familiarised with the chicken samples prior to the experimental assessment. The samples were cooked and then stored in a refrigerator overnight. The report set out an explanation of the vocabulary used by the assessors. The assessors carried out individual evaluations of all the test samples. All samples were tested in triplicate and were presented in a balanced presentation order. The assessments were carried out in separate booths at Leatherhead's facility and assessors used "line scales", varying from 0–100, to indicate intensity of attributes. The data from each assessor were pooled and analysed to determine the differences between the samples. A significant level of 5% (95% confidence) was applied for measurement of statistical significant differences between samples.

46. The report contained photographs of the control and prepared samples. The control samples were thinner than the prepared samples, with a different shape, but no clear colour differences were observed. From the photographs it appeared that the control sample covered a greater surface area than the prepared sample.

47. The conclusions of the Leatherhead report were as follows:

- "Statistically significant differences between the treated and untreated samples were found in terms of mouthfeel (texture), flavour, aftertaste and after feel."
- "The changes in mouthfeel show clearly that the mouthfeel/textural characteristics of the treated sample are very difference [sic] from that of the control. The nature of the changes is consistent with the treated sample as being perceived as a more tender product."
- "The changes in flavour and aftertaste again show clearly that the flavour of the treated sample is very different from that of the control. The changes show increased flavour levels of the overall flavour and individual components (salty, sweet and savoury) in the treated sample."
- "One afterfeel attribute (bits in teeth) was significantly lower in the treated sample, which shows different breakdown characteristics in the mouth."
- "Our overall conclusion is that the treated chicken sample differs substantially from the control sample in terms of the wide range of textural and flavour characteristics."

48. The report contained a "Chicken profiling" results table [Table II] (to which we have added explanatory terms taken from the "Chicken vocabulary") as follows:

	Control	Prepared	LSD
Appearance			
Size of portion (size of butterflied Breast – surface area of plate covered)	71.8	56.5	3.9*
Pink colour (intensity of pink colour)	46.9	52.0	NS
Yellow colour (intensity of yellow colour)	17.3	11.2	NS
Aroma-Raw			
Overall aroma intensity (total aroma strength)	35.2	28.8	NS
Aroma – Cooked			
Ar – Chicken (aroma of cooked chicken)	42.3	43.7	NS
Ar – Savoury (aroma of chicken stock cubes)	16.5	20.8	NS
Mouthfeel			
Mf – Hardness on first bite (force required to shear sample)	58.8	28.9	5.1*
Mf – Juiciness (amount of moisture perceived in the sample during mastication)	15.1	42.1	5.0*
Mf – Fibrous (stringiness of meat – strands of meat)	61.8	31.3	6.3*
Mf – Chewy (chewiness of sample)	61.9	35.0	5.9*
Mf – Breakdown rate (speed taken to reduce sample to a swallowing consistency)	17.6	52.1	5.8*
Flavour			
Fl – Overall flavour intensity	35.9	47.9	3.6*
Fl – Cooked chicken (aftertaste of cooked chicken)	38.7	39.4	NS
Fl – Salty (basic taste of sodium chloride)	8.1	35.4	4.9*
Fl – Sweet (basic taste of sucrose (sweet cure))	6.2	12.0	2.4*
Fl – Umami (basic taste of umami, savoury)	5.5	15.9	3.6*
Fl – Sour (sourness associated with meat, which is	4.7	6.0	NS

towards the end of shelflife)			
Aftertaste			
At – Chicken (aftertaste of cooked chicken)	23.6	23.6	NS
At – Salty (basic taste of sodium chloride)	5.2	25.5	3.5*
At – Sweet (basic taste of sucrose (sweet cure))	4.1	9.0	2.6*
At – Umami (basic taste of umami, savoury)	3.3	10.4	2.9*
At – Sour (sourness associated with meat, which is towards the end of shelflife)	4.4	4.3	NS
Afterfeel			
Af – Mouthcoating (residue left in mouth after swallowing)	12.8	14.9	NS
Af – Bits in teeth	33.3	19.7	4.8*
Af – Irritant (Burning after feel)	5.6	5.6	NS

49. The table contained the following Notes:

> LSD = Least Significant Difference. Products with a difference in mean score equal to or higher than the LSD are significantly different in the represented attribute of the 5% significance level.
>
> NS = No significant difference at 95% confidence level
>
> The [*] letters indicate the significant difference, products with the same letters, are not significantly different from each other.

50. Later in the report under the heading "Flavour" it was stated:

> "Within the flavour category 6 attributes were assessed (Table II)…. Significant differences were found in four of the attributes namely overall flavour, salty, sweet and umami character to that of the control chicken."

51. Under the heading "Aftertaste" the report stated:

> "Five attributes were assessed within the aftertaste category…. Significant differences were found in 3 of the attributes these were salt, sweet and umami. No significant differences were found for the cooked chicken or sour character.
>
> As with the flavour category the prepared sample had a significantly greater saltiness, sweetness and umami character to that of the control chicken."

52. The expression "umami" refers to one of the basic descriptions of taste in relation to food and generally equates to a description of its savoury character.

Submission of the Leatherhead Report and Repayment Claims

53. The appellant submitted the Leatherhead report to HMRC (Mr Rob Accleton) on 29 September 2010 but because more than a year had elapsed since the appellant's first application for a BTI HMRC requested that the appellant submit a new BTI application. As a result, the appellant submitted its application by e-mail of 30 September 2010. Mr Accleton promised Mr Stokes that that the Leatherhead report would be "married up" with the application.

54. As already noted, a BTI was then issued by HMRC on 20 October 2010. The appellant then made a claim on 4 November 2010 on Form C285 for repayment of overpaid duty in the amount of £3,523.15 in respect of an importation of the product on 31 August 2010. By a letter dated 9 December 2010, HMRC notified the appellant that its refund claim had been approved.

55. In the period 13 December 2010 to 1 August 2011, the appellant made a number of further claims for repayment of overpaid duty on Forms C 285 in the total amount of £422,251.50 relating to importations of the Product between 28 December 2007 and 31 August 2010 i.e. for periods prior to the issue of the BTI.

56. A total amount of £21,604.27 has been repaid by HMRC to the appellant. The remaining claims have been rejected by HMRC and form the subject matter of the repayment issue.

Revocation of the BTI and refusal of refund claims

57. In April 2011 Mr Stokes received a telephone call from Mrs Towe at HMRC's National Duty Repayment Centre who advised him that the HMRC Classification Team had instructed that no further repayments were to be made in respect of refund claims on Forms C285 without samples of the original consignments having been provided. Mr Stokes was surprised by this request because some of the C 285 repayment claims related to consignments which were imported more than three years before. In Mr Stokes' view it would be impossible to obtain samples of the products from these consignments. Mr Stokes' evidence was that the specifications for the Product had not changed in that period, so he suggested that he could provide a sample from recent import.

58. On 20 May 2011, Mr Stokes received a further telephone call from Mrs Towe who advised him that the BTI had been revoked and that unless samples from the original consignments could be produced, HMRC would be unable to check the classification.

59. Mr Stokes then called HMRC's tariff classification department and spoke to Mr Rob Accleton to whom, as we have seen, Mr Stokes had sent the Leatherhead report. At least, Mr Stokes believed that he had sent it to Mr Accleton. It transpired in Mr

Accleton's evidence that the fax number he gave Mr Stokes was a general number in Mr Accleton's department; it was not Mr Accleton's personal fax number even though Mr Accleton's e-mails created the impression that he would deal with the matter himself.

60. Mr Accleton was a HMRC officer employed at HMRC's Tariff Classification Service, with some 13 years' experience. During the period September 2010 until October 2011, he was temporarily promoted to the role of Technical Team Leader of the relevant team within HMRC.

61. In April 2011 Mr Accleton reviewed the appellant's BTI (GB 120015154) as a result of requests for classification advice in respect of similar products. He considered that he could not find any immediate factual evidence from either the submitted BTI application or taste test report prepared by Leatherhead on behalf of the appellant in respect of "seasoned meat."

62. Mr Accleton then questioned Ms Carter regarding the appellant's BTI. He considered that Ms Carter had misinterpreted guidance notes relating to seasoned meat – she had incorrectly understood that if chicken had a coating of sugar then classification would automatically be excluded from Chapter 2 and would instead, fall under Chapter 16. In his view, this meant that the ruling could be erroneous. He directed Ms Carter to revoke the BTI. Specifically, Mr Accleton said that he made the decision to revoke the BTI for two reasons:

> "1. The correct procedure had not been followed as no samples had been sent for testing and the Leatherhead report had not been appropriately considered.
>
> 2. The issuing officer had misinterpreted the guidance."

63. As regards the second reason, Mr Accleton was asked in cross-examination what steps he had taken to satisfy himself that the Product was "sprinkled" with sugar or an aqueous solution of sugar. Mr Accleton did not answer the question directly but replied that the BTI had referred to sugar and salt. In his opinion sugar and salt were both allowed by Heading 0207 and he did not regard them as seasoning. In Mr Accleton's view, Ms Carter had made the incorrect assumption that if the Product was coated in sugar then it could not fall within Chapter 2. The fact that the Product had sugar in it was, according to Mr Accleton's evidence, one of the grounds for his concern regarding the correctness of the appellant's BTI.

64. Pausing at this point, we find that it was clear from Mr Accleton's evidence that the question whether the Product had actually been "sprinkled" with sugar or an aqueous solution of sugar had not been considered by Mr Accleton or Ms Carter. Mr Accleton's concern with Ms Carter's original decision to issue the BTI was specifically that she had considered that the addition of sugar automatically took the Product out of Chapter 2.

65. In relation to Chapter 16, Mr Accleton accepted that seasoning was a question of taste. Mr Accleton also stated in cross-examination that there were a number of

terms in the Leatherhead report such as "umami" and "Least Significant Difference" which he did not understand.

66. At one stage in cross-examination, Mr Accleton doubted whether Ms Carter had ever considered the Leatherhead report but later he retracted this comment.

67. As regards the first reason given in paragraph 62 above relating to HMRC's procedures, Mr Accleton explained the procedure which the Tariff Classification Service of HMRC had in place relating to the correct classification of meat. Since the decision of the VAT and Duties Tribunal in *Padley and Agroeuropa SPA v Revenue & Customs* [2008] UKSPC. Mr Accleton said that the standard procedure required a sample to be sent to HMRC's Chemist, Camden BRI, which would provide HMRC with their report. The report would indicate whether the seasoning was visible on the surface and would include a test analysis to show if any of the seasoning could be tasted where it was not visible. However, Mr Accleton also stated that, where possible, the Tariff Classification Service would also classify the product on the basis of written reports submitted by BTI applicants if the method, calculations and results were considered both appropriate and comprehensive. In the latter case, Camden BRI "may" be asked to consider the submitted report to confirm that it was appropriate and comprehensive. We note, however, that Mr Accleton merely said that Camden BRI "may" be asked to consider a report commissioned by a BTI applicant – he did not indicate that this was mandatory. It was also plain that the requirement for samples was not mandatory, since an appropriate report was an alternative.

68. Mr Accleton instructed Ms Carter to revoke the BTI and notify the appellant accordingly. Thus, when Mr Stokes telephoned Mr Accleton in May 2011, Mr Accleton stated that a letter had been sent to the appellant advising that the BTI had been revoked. Mr Stokes told Mr Accleton that that letter had not been received.

69. In their telephone conversation, Mr Accleton told Mr Stokes that the application for a BTI should have gone through him and that he had no knowledge of the original application. After Mr Stokes pointed out that he had exchanged e-mails with Mr Accleton on 29 and 30 September 2010 and that the BTI application had been marked for his attention when it was faxed to HMRC, Mr Accleton retracted his statement about not having the knowledge of the existence of the application. Mr Accleton insisted, however, that the appellant had not supplied sufficient information about the Product and said that HMRC should have requested a sample of the Product for their own analysis to be carried out.

70. Mr Stokes reminded him of the information that had been provided about the product, including the presentation on the manufacturing process and the Leatherhead report, which had been obtained following discussions with HMRC. Mr Accleton advised Mr Stokes that he would revisit the file.

71. Mr Accleton called Mr Stokes back the following week and suggested that the appellant re-submit the BTI application. Mr Accleton asked Mr Stokes if he could submit a replica sample for analysis by HMRC's Chemist, Campden BRI. Mr Stokes declined this invitation but Mr Accleton agreed he would submit the Leatherhead

report to Campden BRI to establish if the report was acceptable and provided sufficient evidence that would enable the Product to be classified under Chapter 16. Mr Stokes advised Mr Accleton that the appellant had still not received any written communication from HMRC revoking the BTI.

72. HMRC (Ms Carter) wrote to the appellant in a letter dated 12 May 2011, although it was not received by the appellant until the end of May. For reasons which were not explained to us, HMRC did not call Ms Carter as a witness. The letter, which evidently followed the discussions between Mr Accleton and Ms Carter, informed the appellant that HMRC were revoking the BTI. The letter stated as follows:

> "I refer to BTI GB 120015154, issued on 20 October 2010, which classified a frozen boneless, skinless, seasoned chicken breast, as a preparation of chicken under 16.02. However after further investigation it has been determined that heading 0207 and 0210 allows frozen meat containing a sprinkle of sugar. Therefore it has been decided that the BTI was issued incorrectly as we did not have all the relevant information, at the time, to make the correct judgement.
>
> Consequently, it has been determined that BTI GB 120015154 has been incorrectly classified and will cease to be valid with effect from the date of this letter."

73. At the hearing, in response to a question from the Tribunal, both parties accepted that it was this letter (rather than the outcome of the subsequent review process) which contained the decision against which the appellant has appealed in respect of the revocation issue. It is the *Wednesbury* reasonableness of this decision which is in issue before us.

74. It will also be noted that although Ms Carter's letter refers to Chapter 2 as allowing frozen meat containing "a sprinkle of sugar" there is no indication that Ms Carter has considered whether the Product was "sprinkled." Furthermore, it was not clear what was meant by the words "we did not have all the relevant information."

75. On 24 May 2011 Mr Accleton sent a copy of the Leatherhead report to Ms Louise Gearey at Campden BRI, a company which, inter alia, provides food testing services. HMRC did not call Ms Gearey as a witness. Ms Gearey was asked to confirm if the information provided in the Leatherhead report was "comprehensive enough to provide classification into Headings 0207, 0210 or 1602 (seasoned)."

76. Ms Gearey replied to Mr Accleton by two e-mails dated 26 May 2011 and 8 June 2011 respectively. The e-mail dated 26 May 2011 stated:

> "… I was hoping to have a quick chat about the sensory report from Leatherhead regarding the Invicta samples. The product they have tested is a basic chicken tumbled in a weak brine, due to the way the meat is removed from the carcasses in for example Brazil the meat is very hard and therefore they tumble in brine to tenderise the meat. The levels quoted in the ingredient specification are 0.8% salt and 0.6% sugar therefore it cannot go under the heading 0210 (salted). This chicken commonly goes into food processing to make goods such as

> chicken pies and is not generally seen in the industry as prepared. It appears to me the testing undertaken merely shows it is different from the control sample as it is a comparison on this I would not dispute as it will be slightly more salty and sweet and more tender. However, the testing carried out by ourselves for classification purposes is merely a descriptive test and does not compare with a control, this is the method we have passed on to the other member states as has been put in a draft regulation (I have forwarded some other e-mails to your [sic] for reference).
>
> This means I do not feel report by Leatherhead tells us enough but to be certain I have forwarded it to our sensory department for comment."

77. A few comments can be made on this e-mail. First, Ms Gearey concludes that the Product should not be classified under heading 0210. This is common ground between the parties. Heading 0210 deals with meat which is salted and/or in brine. Both parties accepted that the Product was not salted and was not "in brine" (a common example of a product "in brine" was accepted to be frankfurters).

78. Secondly, Ms Gearey refers to the Product as being suitable for food processing to make goods such as chicken pies. Mr Stokes' evidence (as to which see below) was that the Product was unsuitable for this purpose because tenderising process meant that the Product would disintegrate if incorporated into goods such as chicken pies. The Product was sold to restaurants and not to manufacturers for making pies. We accept Mr Stokes' evidence on this point as we consider he was in a good position to understand the uses to which his customers intended to put the Product.

79. Thirdly, Ms Gearey accepts that the Product would be "slightly more salty and sweet." The Leatherhead report, however, indicated that the differences in the Product in terms of flavour and aftertaste were " statistically significant", that the changes in flavour and aftertaste were "very different" from the control sample and that the Product differed "substantially" from the control sample "in of terms of a wide range of textural and flavour characteristics." It is not clear to us on what evidence Ms Gearey based her conclusion that the Product would be "slightly" more salty and sweet since she apparently carried out no testing herself. We conclude that the Leatherhead report provides a more accurate description of the difference in taste of the Product, based on its analysis described above, than Ms Geary's description.

80. Finally, Ms Gearey questioned whether the correct approach was to compare the Product against a control sample (i.e. an untreated piece of chicken from the same supplier) or whether Campden BRI's approach, which she described as a "descriptive test" not involving a comparison with a control sample was preferable. We will return to this point later in this decision. We should also add that we are aware from an exhibit to Mr Accleton's witness statement that a draft regulation (which is presumably the same draft regulation to which Ms Gearey alludes) concerning the testing procedures for the application of Additional Note 6a is pending before one of the EU institutions. We have not, however, seen any draft regulation which we assume is, in any event, unlikely to apply to the periods under appeal, if and when it is approved.

81. Ms Gearey's sent Mr Accleton another e-mail on 8 June 2011 which stated:

> "Further to my e-mail below I have now had a further look at the sensory report produced by Leatherhead. Technically there is nothing wrong with what they have done as it is a classic QDA* report. There [sic] have basically trained 14 assessors on the samples to develop and agree a vocab to describe the terms used when testing the samples. Both samples the control and prepared sample were tested in triplicate meaning six samples were tested. Statistical analysis of the variance is then carried out to get the least significant difference (LSD). This means table II of their report shows the characteristics that have a significant difference. The report therefore does not tell you the product in question is prepared outside the scope of chapter 2 all it tells you is the product is different from the control for example it is more salty but that it does not mean it is actually salty.
>
> There are a few other issue [sic] with the report the main one being the samples were presented as a whole butterfly breasts this means the sizeable portion could from the training give them the knowledge that the prepared sample is larger. The result of this is that the results could be biased."
>
> [*Mr Bremner helpfully informed us that this acronym stood for "Quantitive Descriptive Analysis"]

82. In neither of her e-mails does Ms Geary comment on the issue whether the Product was "slightly sprinkled" with sugar or and aqueous solution of sugar.

83. Mr Accleton accepted in cross-examination that neither the Leatherhead report nor the comments from Ms Gearey established that the Product was either within Chapter 2 or Chapter 16. When asked why then had then revoked the BTI he confirmed his earlier comments that he was concerned that Ms Carter had wrongly misunderstood that a sugar content removed the Product from Chapter 2. He took the view that he could not allow a BTI to continue if it was possibly wrong. In his view HMRC could revoke a BTI if HMRC suspected (but did not know) that it was incorrect. He did not take the matter any further after receiving Ms Gearey's second e-mail because the appellant had requested an independent review of HMRC's decision to revoke the BTI.

84. On 25 May 2011 Mr Stokes received four letters from the National Duty Repayment Centre in relation to 4 of the outstanding C285 repayment claims. They advised that repayments could not be made because the BTI had been revoked and the appellant was unable to provide a sample from each of the original consignments.

85. Because the appellant considered the revocation of the BTI to be incorrect, it continued to submit further C285 claims for repayment of overpaid customs duty. These were all rejected by HMRC.

86. On 14 June, the appellant received a letter from HMRC, in relation to one of the C285 refund claims which the appellant had submitted, asking for confirmation that

samples of the Product were available on the basis that these would be required for classification purposes as the BTI had been cancelled. Mr Stokes replied to this letter on 6 July 2011 noting that it was unreasonable of HMRC to expect a sample of this product still to be available. He asked that the case should be kept open until the appeal process (i.e. against the revocation of the BTI) had been fully completed.

87. On 6 July 2011, Mr Stokes received a further letter from HMRC in relation to this C285 claim. Mr Stokes was informed that the claim had now been closed because a sample from the consignment had not been provided. The letter said that if the "missing information" (i.e. the sample) came to light in the future the case would then be treated as a new application and the relevant time limits would apply. Mr Stokes was concerned because, as far as he was concerned, HMRC was fully aware that samples from the actual consignments no longer existed. The chicken involved in the importation to which the C285 claims related had been distributed and consumed so that the appellant was unable to provide the "information" requested by HMRC.

88. Mr Stokes wrote back to HMRC on 25 July 2011 and advised that it was not appropriate for the claim to be "closed" until the BTI revocation issue had been resolved.

The HMRC Review of the Revocation Decision

89. On 9 June 2011, Mr Stokes wrote to HMRC requesting a review of Miss Carter's decision of 12 May 2011.

90. The review was carried out by Officer Perry Young who wrote to the appellant on 4 August 2011 confirming the original decision of 12 May 2011. The relevant extracts from Mr Young's letter are as follows:

> "When the classification for the chicken breasts was considered, although you provided an informative taste test report, no sample was taken for analysis by HMRC which would have confirmed whether or not the product in question is prepared outside the scope of Chapter 2 of the Combined Nomenclature (CN).
>
> When classifying the chicken to CN heading 1602, the chicken was excluded from Chapter 2 because of the sugar content.
>
> …
>
> As no analysis of the goods was carried out in relation to BTI GB 120015154, the BTI was reviewed.
>
> [Mr Young then recited the information contained on the original application and the relevant HSENs to Chapter 2.]
>
> Based on the evidence provided both at the time of your BTI application and at this review stage, I have concluded that there is no reason to exclude the Brazilian, frozen boneless chicken breast preparations from Chapter 2 and that there is sufficient evidence to suggest that classification to heading 1602 is incorrect."

91. A few comments may be made about this review letter.

92. First, the "informative taste test report" (i.e. the Leatherhead report) was requested by HMRC and its approach was agreed with HMRC. At no time did HMRC indicate that a sample of the Product was required.

93. Secondly, as regards the reference to Ms Carter's letter of 12 May 2011 (i.e. that "after further investigation it has been determined that heading 0207 and 0210 allows frozen meat containing a sprinkle of sugar"), the reference in the HESNs relating to Chapter 2 to sugar is only relevant if the Product was "slightly *sprinkled* with sugar or with an aqueous solution of sugar." The relevant question, therefore, was whether there was a slight sprinkling of sugar or a sugar solution. This does not seem to have been addressed.

94. Thirdly, Ms Carter's letter also stated that HMRC did not have all the relevant information, at the time, to make the correct judgement. This point is not addressed by Mr Young who simply refers, in his final paragraph, to the "evidence provided both at the time of your BTI application and at this review stage…." There is no indication that any further evidence was produced between the original BTI application and the review stage; nor is it clear what evidence HMRC were lacking when Ms Carter gave her original decision.

95. Finally, the last paragraph of Mr Young's letter quoted above simply states his conclusion. It does not explain why he has reached that conclusion. The letter sets out extracts from the relevant provisions but does not explain how or why those provisions are applicable. This, in our view, negates the purpose of having a review. A review decision should surely explain either why the original decision was correct or why it was wrong; simply stating a conclusion seems pointless.

The refund claims ("time-barred" claims)

96. On 19 August 2011, the appellant received a further letter from HMRC advising that they would not hold the outstanding C 285 applications for repayment of duty open pending the BTI revocation being appealed. The letter attached a schedule of all pending claims currently held by HMRC (in fact, it omitted a number of claims with references P007 to P0021).

97. Mr Stokes replied to this letter on 14 September 2011 noting that the appellant had given notice of its intention to appeal against the decision to revoke the BTI. He requested that HMRC reconsider its decision not to stay the outstanding C 285 claims pending the outcome of that appeal.

98. Mr Stokes explained to HMRC that it was not possible to produce samples of the consignments in question since they had been distributed and consumed. For example, in respect of C 285 (reference P007) the Product had been imported on 29 February 2008, was delivered to customers in March 2008, the C 285 was filed on 5 January 2011 and a sample was requested by HMRC on or around 17 June 2011. In relation to claims P018 and P019, HMRC refused the claims in the absence of the provision of the sample. In relation to claims P020 and P021, HMRC sent further

letters advising that they considered the cases to be closed as additional information had not been provided by the appellant.

99. In relation to claims P007, 008 and 014 – 021 HMRC advised that the C 285 refund claims would be rejected in the absence of samples of the products in question. HMRC requested production of the samples within either 15 or 30 days. HMRC's letters refusing the claims outlined the Appellant's rights of appeal. Some of the letters denied the repayment claim "in the absence of the provision of a sample." A number of the letters stated that the officers issuing the letter refusing the relevant claim had:

> "been instructed by our Policy Section not to hold your claims open pending your appeal against the cancellation of said BTI, which cannot be reinstated. Please see attached a schedule of all the claims currently held at this office."

100. On 14 September 2011, Mr John Prendergast, a colleague of Mr Stokes, wrote on behalf of the appellant to HMRC in response to a letter from HMRC in the above terms:

> "Re: Claims for Repayment – Entry No. 150 – 010304 dated 20/05/2008 & Others
>
> Thank you for your letter dated 19 August referring to the above entry amongst others.
>
> We note that you intend to decline our requests to hold our current claims open pending appeal against the revocation of [the BTI] issued on 20 October 2010 on the grounds that this BTI "cannot be reinstated." We have written to the Tribunal Service and given notice of our intention to appeal against the decision to revoke the BTI. If that appeal is successful then it is of course wrong to say that the BTI "cannot be reinstated." The Tribunal has the power to direct that the BTI was wrongly revoked.
>
> You will appreciate from this letter that we do not agree with the decision recorded in your letter dated 19 August and we asked you to reconsider the decision. Obviously, if ultimately the Tribunal (or any appeal from the Tribunal) does not accept our appeal against the revocation of the BTI, then we will have to reconsider our position in relation to the Claims for Repayment. The current course of action suggested by us, therefore, is one designed to save both time and costs as far [sic] both HMRC and [the appellant] are concerned.
>
> We hope that you will agree that it is both fair and sensible and look forward to hearing from you."

101. Mr Stokes had previously sent letters dated 6 July 2011 to HMRC requesting that the applications be kept open pending the review of the decision to revoke the BTI. Mr Stokes explained that one of the reasons for suggesting this procedure was because he had been involved in an appeal (*Padley Limited v HMRC*) where it was his understanding that HMRC had agreed to do the same (in relation to claims on Form C 18) as he was suggesting in relation to the appellant's C 285 claims.

102. After Mr Prendergast's letter of 14 September 2011, Mr Stokes received five letters dated 28 September rejecting a number of refund claims due to the appellant's "inability to provide satisfactory samples, and also is no further information has been received following your letter dated 6 July 2011."

103. Mr Stokes wrote to HMRC on 29 September 2011 requesting that its claims be held open pending the outcome of a determination of an appeal to the tribunal in respect of the revocation of the BTI. HMRC did not respond to this letter.

Mr Stokes' evidence in relation to the Product

104. Mr Bremner asked us to disregard large portions of Mr Stokes' evidence. He argued that Mr Stokes' witness statement contained comment, recitations from primary documents, non-expert opinion and legal submission. He was concerned that he should not be required to challenge in cross examination matters such as non-expert opinion and/or legal submission advanced by Mr Stokes. Ms Shaw accepted that this point would not be raised against Mr Bremner.

105. As to the substance of Mr Bremner's submission, clearly those parts of Mr Stokes' evidence which consisted of comment and submissions on legal issues do not constitute evidence. More controversial, in our view, was Mr Bremner's submission that certain important parts of Mr Stokes' evidence constituted non-expert opinion. In particular, we consider below Mr Stokes' evidence in relation to the process to which the Product was subjected.

106. We have a number of comments to make about the challenge to Mr Stokes' evidence in relation to non-expert opinion.

107. The guiding principle in proceedings before the tribunal is that we must deal with matters fairly and justly. As far as we are aware, no objection had been raised by HMRC to Mr Stokes' evidence prior to the lodging of Mr Bremner's skeleton argument. Mr Stokes' witness statements had been filed many months before the hearing. No application had been made to the tribunal objecting to his evidence. Leaving a challenge to that evidence until a few days before the hearing would, if the challenge was accepted by the tribunal, deprive the appellant of the opportunity to produce, where necessary, appropriate expert evidence unless the hearing was postponed. It does not seem to us fair or just for a party to be put in this position.

108. Secondly, we did not consider the evidence of Mr Stokes which we set out below (and which we accept) to be non-expert opinion. Instead, we considered it to be evidence of fact (not opinion) delivered by a well-informed, experienced and knowledgeable witness, albeit not an independent one.

109. Mr Stokes had been the logistics manager of the appellant since 1998 i.e. approximately 15 years. Prior to that he had worked for a company called Premier Freight Services Ltd. Mr Stokes' evidence was that his role with the appellant involved looking after food products arriving in the UK, their procurement and the development of products. The appellant imported approximately 250 different types

of food products. Mr Stokes worked closely with the appellant's technical food team (which wrote the technical specification for food products from food suppliers) and part of his role was to establish whether a supply chain for the desired products was available. It was clear to us from his oral evidence that Mr Stokes, in the course of his employment with the appellant, had acquired a considerable knowledge of the Product involved in this appeal. The Product was imported in very large quantities. In addition, Mr Stokes had served for three years as the vice-president of the International Meat Trade Association and had been involved in numerous discussions with government bodies. We therefore concluded that Mr Stokes was knowledgeable and experienced in the relevant field.

110. Furthermore, in his second witness statement relating to the process which the Product underwent at the Brazilian food producer, Mr Stokes' stated that his statement came from his own knowledge as a result of "several years of dealing with these products as well as from recent discussions which I have had with colleagues and suppliers." When challenged by Mr Bremner in relation to his witness statements, Mr Stokes confirmed that his evidence was based on knowledge he had gathered from working in the industry. There seemed to us nothing in in the evidence that follows which would render his evidence inadmissible. Insofar as Mr Stokes relied on information obtained from colleagues and suppliers, the issue is not inadmissibility but one of weight.

111. Mr Stokes said that the appellant had been importing the Product since 1996/1997 i.e. shortly before he joined the Appellant. It was a staple product used by pubs and restaurants. Mr Stokes said that the appellant imported three tons of the Product each day.

112. The Product was supplied to pub chains and restaurants. The Product was usually defrosted and then cooked on the grill. It was not suitable for incorporation in meat pies. The treatment it received at the Brazilian producer was so extensive that any further treatment or processing would mean that the Product would break down.

113. In outline, Mr Stokes described the production process as follows:

- the chicken was killed and butchered to produce raw, boneless, skinless chicken breasts.

- These breasts were trimmed and graded to a specific calibration to ensure consistency of the prepared product. The calibration related both to the size and the trim of each breast. The product was further processed by the addition of a slit from top to bottom. After slitting, the breast was then flattened to give the appearance of a "butterfly" button chicken breast (with both breast portions remaining joined after removal from the carcass). This was done to "maximise plate coverage" i.e. to make the chicken breasts seem large when served to a customer in a restaurant.

- The chicken breasts were then vacuum-tumbled for twenty-five minutes in a solution comprising water, sugar, dextrose and phosphates (in the proportions described in the application for the BTI). The chicken was tumbled at a rate of 6 revolutions per minute. This was done in order to ensure maximum and even absorption of the flavours. The tumbling was done in large stainless steel machines.

- The tumbled breasts were then flattened.

- Finally, the breasts were individually frozen and packaged.

114. Mr Stokes explained that the tumbling process was required because if the breasts were not vacuum-tumbled, the marinating process would require anywhere between one and five days of soaking time. It also ensured that there was an even flavour/ingredient distribution and absorption in the finished product. In other words, the key purpose of the vacuum tumbling machine was efficiently to mix large volumes of meat with other ingredients to ensure a deep and even impregnation of those additional ingredients within the final product.

115. Of the main ingredients of the solution in which the chicken breasts were tumbled, Mr Stokes noted that

- Salt was used to add savoury notes to the product.

- Sugar was used to add sweetness and colour.

- Dextrose increased the colour caramelisation of the product without adding further sweetness, but gave an initial burst or "hit" of sweetness which then mellowed.

- Phosphates aided the retention of the other ingredients, including water, within the Product during the tumbling process. In other words the phosphates did not add flavour themselves but retained the moisture and the flavours from the solution in which it had been tumbled.

116. The ingredients of the solution in which the chicken was tumbled were weighed in controlled conditions to ensure consistency in the batches of the Product. Mr Stokes' evidence was that, as a result of the process, the additional ingredients of the solution became deeply impregnated within the product. Indeed, this was the purpose of the process. In cross-examination, Mr Stokes confirmed that tumbling the Product in a vacuum enabled the flavour to "get into" or get "stuck into" the Product more quickly.

117. The result of the tumbling process was that all the additional ingredients of the solution were absorbed in the finished product. Thus the Product consisted of 92% chicken and the remaining 8% being made up of the ingredients comprising the solution.

118. Mr Stokes confirmed that the solution in which the Product was tumbled did not have as its purpose or effect the preservation of the Product i.e. it was not a preservative.

119. Mr Bremner, in cross-examination, put to Mr Stokes the proposition that the Product after the tumbling process did not taste different from the general flavour of cooked chicken. He suggested to Mr Stokes that chicken could have different flavours depending on its age, diet (e.g. corn-fed) living conditions (e.g. free-range) and suggested that the Product tasted no different from the potential range of flavours that cooked chicken could normally have.

120. Mr Stokes replied that the chicken supplied by the Brazilian supplier was all of the same age and had minimal variations in flavour. He accepted that "elderly" chicken could test different from younger chicken and that corn-fed chicken could taste different from free-range chicken. He accepted that chicken could have a range of tastes. Mr Stokes did not accept that chicken would naturally pick up the salty/sweeter flavour or the moisture/tenderness texture – characteristics which the public now expected as the normal taste of chicken - without undergoing the process to which the Product was subjected. In any event, even as regards the examples given by Mr Bremner he did not expect the differences to be great. Mr Stokes did not accept that the Product would taste the same as fresh chicken purchased from a major UK supermarket.

121. Mr Stokes confirmed that the samples that were sent to Leatherhead for the purposes of their testing were of the same specifications as those in respect of which the repayment claims were made. The appellant tested the specifications of the Product regularly. The appellant had a member of staff on the Brazilian supplier's premises for 6 months of the year carrying out batch-testing on site. Mr Stokes noted that the appellant rarely received complaints from customers about quality control.

122. Mr Stokes stated that it would not be possible for the appellant to retain a sample from each imported batch for each day. The appellant imported large quantities of the Product each day. It may have been possible to save samples from one or two days but not from each day over a three year period. In any event, there had been no change in the process or production of the Product over that period.

Mr Attridge's evidence in relation to HMRC's review of the decision to refuse the refund claims

123. Mr Attridge, a Higher Officer of HMRC, carried out a review of the HMRC decisions to refuse the appellant's repayment claims.

124. Mr Attridge considered that the information supplied by the appellant had not demonstrated that the imported chicken meat had been prepared, preserved or seasoned beyond the scope of Chapter 2. Mr Attridge's review decision, therefore, upheld the original decisions to refuse the repayment claims.

125. In cross-examination, however, Mr Attridge acknowledged that the question whether the Product had been "slightly sprinkled with sugar or an aqueous solution of sugar" did not form part of his decision. We took him to mean that he had not considered this issue.

126. Mr Attridge had, however, considered whether the Product had been "seasoned" for the purposes of Chapter 16. He considered that the quantities of salt, dextrose and sugar in the solution in which the Product had been tumbled were minimal. As regards the question whether the seasoning was clearly distinguishable by taste, Mr Attridge said that he would expect more flavouring to be present. He accepted that "seasoning" meant "flavouring." He had considered the Leatherhead report and was aware of the tumbling process to which the Product had been subjected but noted that no comments had been obtained from Camden BRI. In short, he considered that the ingredients in the tumbling solution were all allowable under Chapter 2.

Discussion

The revocation issue

127. The question before us is whether HMRC's decision to revoke the appellant's BTI was one at which HMRC could not reasonably arrive (section 16 (4) Finance Act 1994). It was common ground that in order for the appellant to succeed on this ground the appellant had to establish that HMRC acted in a way which was *Wednesbury* unreasonable i.e. that HMRC acted in a way which no reasonable body of commissioners could have acted, took into account irrelevant considerations or failed to take account of relevant considerations or otherwise erred in law.

128. As noted above, Article 9 of the CCC provides that a BTI may be revoked where “one or more of the conditions laid down for its issue were not or are no longer fulfilled."

129. In *Timmermans Transport & Logistics BV v Inspecteur Belastingdienst-Douanadistrict Rosendaal* [2004] ECR I-1125 the CJEU at paragraphs 21 to 25 stated:

> “21. Article 12(5)(a) of the Customs Code sets out three situations in which a BTI ceases to be valid. Under point (iii) this is the case when a BTI ‘is revoked or amended in accordance with Article 9’ of the Customs Code and provided that the revocation or amendment decision is notified to the holder.
>
> 22. Under Article 9(1) of the Customs Code, a decision favourable to the person concerned may be revoked if one or more of the conditions laid down for its issue were not or are no longer fulfilled
>
> 23. Thus, the Community legislature has unequivocally provided that a BTI ceases to be valid where one of the conditions set for its issue was not or is no longer fulfilled.
>
> 24. The issue of a BTI is made on the basis of an interpretation by the customs authorities of the legal provisions applicable to the tariff

> classification of the goods concerned and is subject to proper justification for that interpretation.
>
> 25. Where, on more detailed examination, it appears to the customs authorities that that interpretation is wrong, following an error of assessment or evolution in the thinking in relation to tariff classification, they are entitled to consider that one of the conditions laid down for the issue of a BTI is no longer fulfilled and to revoke that BTI with a view to amending the tariff classification of the goods concerned."

130. The CJEU concluded at paragraph 28 that:

> "28. In the light of the foregoing, the answer to the question referred must be that Article 9(1) read in conjunction with Article 12(5)(a)(iii) of the Customs Code must be interpreted as meaning that they provide the customs authorities with a legal basis for withdrawing a binding tariff information where those authorities change the interpretation given therein of the legal provisions applicable to the tariff classification of the goods concerned."

131. Mr Bremner argued that in the present case HMRC (Mr Accleton) had formed the view that the BTI had incorrectly classified the Product to Chapter 16. In accordance with the CJEU's judgment in *Timmermans* the BTI had therefore been validly revoked. In other words, HMRC could revoke the BTI on a change of mind. The question was, Mr Bremner argued, whether HMRC had acted reasonably in so changing their minds.

132. In this case, Mr Bremner submitted that if HMRC had formed the conclusion that the Product was not within Chapter 16 then the commissioners were acting properly in revoking the BTI (which had been, in effect, a ruling that the Product fell within Chapter 16). Mr Bremner urged us not to get involved in a semantic debate about whether the Product had been "sprinkled" but rather that the issue should be looked at "in the round." HMRC had decided that there was not enough evidence for the product to be classified under Chapter 16 and therefore the BTI should be revoked.

133. Mr Bremner sought to make good his submission by arguing that a BTI was a positive administrative act by which HMRC categorised different products. Thus, if HMRC considered that there was evidence that the Product was not within Chapter 16, even if it was not clear whether the product fell within Chapter 2, or even if it was unclear whether the Product fell within Chapter 16 or Chapter 2, HMRC were entitled to revoke the BTI.

134. Ms Shaw referred to paragraph 8 of the CJEU's decision in *Timmermans* where it was clear, she submitted, that the Netherlands authorities had decided to reclassify the disputed goods under a different subheading. In this case, as Mr Accleton's evidence made clear, HMRC made its decision to revoke the BTI because Mr Accleton was concerned that it *may* have been made in error. It was not enough to suspect an error of classification, HMRC had to take a decision that the classification was wrong on the basis of the evidence available to it.

135. Ms Shaw argued that Mr Accleton had accepted that HMRC had not actually decided that the Product was correctly classifiable under Chapter 2.

136. Furthermore, Ms Shaw submitted that HMRC had taken into account two irrelevant factors in reaching their decision to revoke. First, Mr Accleton directed that the BTI be revoked partly on the basis that internal HMRC procedures had not been followed, viz no samples had been requested and the submitted report had not been appropriately considered. Secondly, the sugar content of the Product was irrelevant unless the Product had, in the terms of the HSENs, been "slightly sprinkled" with sugar or an aqueous solution thereof. Mr Accleton (and Mr Attridge) had been unable to state that the Product had been so sprinkled.

137. In our view, it is enough for HMRC to believe that a product may have been wrongly classified to justify the revocation of a BTI. We accept Mr Bremner's argument that the issue of a BTI is a positive administrative act which confirms that goods should be placed in a particular category. If, acting reasonably and taking account all the relevant information in their possession (including that supplied by the BTI applicant), HMRC have grounds to believe that a product may have been placed in the wrong category it seems to us that they are entitled to revoke a BTI. We consider that such a conclusion is consistent with paragraph 25 of the CJEU's judgment in *Timmermans*. In other words, the reconsideration by HMRC leading to a conclusion that a BTI may have been issued in error is an "evolution in thinking" envisaged by the Court.

138. Thus, HMRC had the power to revoke the BTI if it concluded that it may have been issued in error. That said, HMRC must act reasonably, in the *Wednesbury* sense, in reaching the conclusion that the BTI may have been issued in error. In our view, however, HMRC did not act reasonably in this case.

139. The evidence of Mr Accleton was that Ms Carter, when originally issuing the BTI, had made the mistake in believing that the sugar content took the Product outside Chapter 2. There was no evidence, however, that Mr Accleton and Ms Carter considered the question whether the Product had been "slightly sprinkled" with sugar or an aqueous solution thereof. It is true that the letter of 12 May 2011 from Ms Carter stated:

> "However after further investigation it has been determined that heading 0207 and 0210 allows frozen meat containing a sprinkle of sugar."

140. However, there was no indication that Ms Carter and Mr Accleton actually considered whether the Product had been "sprinkled" and no evidence that they reached the conclusion that it had been. Indeed when this point was specifically put to Mr Accleton in cross-examination he did not confirm that the point had been considered. Instead, what happened was that a decision to revoke the BTI was taken on the basis that an incorrect test had been applied but no consideration was given to the question whether, if the correct test set out in the HSENs to Chapter 2 were applied, the Product would have fallen outside Chapter 2. It therefore seems to us that HMRC failed to take account of a relevant factor in reaching their decision. We

should add that there was no suggestion that the information contained in the Power Point presentation sent to HMRC on 15 March 2010 by Mr Stokes (and which explained the tumbling process to which the Product had been subjected) was not available to Ms Carter and Ms Accleton.

141. Indeed, had Ms Carter and Mr Accleton given due consideration to the PowerPoint presentation included with the material submitted with the original BTI application, it would have been plain that the Product had not been "sprinkled". Tumbling chicken in a solution for twenty-five minutes with the result that the solution is fully absorbed cannot, in our view, be described as a process of sprinkling. We shall discuss this in greater detail when we consider the correct classification of the Product later in this Decision.

142. Furthermore, no consideration appears to have been given by Mr Accleton and Ms Carter as to whether the Product actually fell within the terms of Chapter 16 as prepared seasoned meat and was excluded from Chapter 2. The BTI was a positive classification by HMRC that the Product fell within Chapter 16. Again, it seems to us that this was a relevant matter which should have been considered by HMRC when deciding to revoke the BTI. The other reason given by Mr Accleton for his decision to revoke the BTI was that the correct HMRC procedure had not been followed "as no samples had been sent for testing and the submitted report had not been appropriately considered."

143. It was clear, however, that the requirement for samples was not mandatory and that in many cases HMRC would take their decision on the basis of reports submitted by or on behalf of BTI applicants. In some cases these reports might be submitted to HMRC's advisers, Campden BRI, for consideration. Mr Accleton's evidence was clear that such reports "may" be referred to Campden BRI, but this was also not a mandatory HMRC procedural requirement.

144. Thus, by deciding to revoke the appellant's BTI (in part) because he considered that HMRC's optional (i.e. non-mandatory) procedures had not been followed we consider that Mr Accleton mis-directed himself. He treated those procedures – which were not published and, indeed, according to Mr Accleton were not recorded in writing – as if they were binding requirements which, if they were not complied with, required the revocation of the BTI. There was no binding requirement for BTI applicants to provide samples and there was no binding requirement for the Leatherhead report to be considered by Campden BRI.

145. For these reasons, we consider that the decision to revoke the BTI was unreasonable. Accordingly, pursuant to section 16 (4) (a) Finance Act 1994 we direct that the decision shall cease to have effect from 12 May 2011 i.e. from and including its date of issue.

The classification issue

146. Mr Bremner referred to the decision of Briggs J in *Aspinalls Club Limited v HMRC* [2012] UKUT 242(TCC) at [45]:

> "In statutory construction, no less than the construction of contracts, words take their meaning from their context. The meaning of words and phrases is not a matter of dictionaries and grammars."

147. In Mr Bremner's submission it was important to construe Chapters 2 and 16 in context.

148. In our view, there can be no doubt that it is correct to construe the relevant statutory provisions in context. We do not, however, understand Briggs J to be prohibiting the use of dictionaries as an aid to interpretation. Dictionary definitions have been used in so many Court of Appeal, House of Lords and Supreme Court decisions that it would be burdensome and unnecessary to set out references at length. The thrust of Briggs J's words is, however, that whatever meaning may be given to a word by a dictionary, the relevant statutory context (if any) must be the overriding factor to be considered. We respectfully agree.

149. We need first to consider whether the Product was "slightly sprinkled with sugar or an aqueous solution of sugar" within the meaning of the HSENs for Chapter 2. This, of course, was the provision which caused Mr Accleton and Ms Carter to suspect that the BTI may have been incorrectly issued. If the Product is so sprinkled then it will fall within Chapter 2. In our view, as we have indicated above, the process whereby the Product was tumbled in a solution for twenty-five minutes so that the solution was absorbed by the meat cannot, on any sensible basis, be described as "sprinkling". "Sprinkled" connotes some form of scattering droplets or spraying liquid over the surface of the meat. It is an entirely different process from tumbling to which the Product was subjected which was, in effect, a form of marinating (an expression used at one stage by Mr Stokes).

150. Secondly, we need to consider whether the product was prepared by the processes specified in Chapter 2. If it was, then the Product would fall within Chapter 2 and would be excluded from Chapter 16. Explanatory Note 1 to Chapter 16 provides:

> "This Chapter [i.e. Chapter 16] does not cover meat, meat offal, fish, crustaceans, molluscs or other aquatic invertebrates, prepared or preserved by the processes specified in Chapter 2 or 3 or heading 05.04." (emphasis added)

151. The HSENs for Chapter 2 also provides that "Meat and meat offal not falling in any heading of this Chapter are classified in Chapter 16", e.g.:

> (a) …..
>
> (b) "Meat and meat offal cooked in any way (boiled, steamed, grilled fried or roasted) or *otherwise prepared or preserved by any process not provided for in this Chapter…*" (emphasis added) The HSENs for Chapter 2 refer to the following processes in relation to meat:
>
> - Salted, in brine, dried or smoked
> - Slightly sprinkled with sugar or an aqueous solution of sugar

- Meat products which have undergone tenderising treatment with proteolytic enzymes or have been cut, chopped or minced (ground).

152. We have already concluded that the Product was not sprinkled with sugar. It was clear that the Product had not been “salted”, dried or smoked. Mr Bremner suggested that the Product had been “brined”. We do not agree. The Product had been tumbled in a solution of containing salt, sugar, dextrose and phosphates until the solution was absorbed. The solution was not preserved in brine and was not “in brine” i.e. preserved in a brine solution in the same way as, for example, frankfurters (although frankfurters themselves would likely be classified as sausages under Chapter 16). Moreover, it is clear that, in context, the words “in brine” refer to a preservative process. Mr Stokes’ clear evidence was that tumbling the Product in the solution was not done for preservative purposes. Furthermore the Product did not undergo the tenderising, chopping or mincing processes envisaged by the HSENs. We therefore conclude that the Product was not prepared by a process provided for in Chapter 2

153. Thirdly, in order for the Product to fall within Chapter 16 it must have been "prepared" (it was common ground that the Product was not "preserved" for these purposes).

154. Mr Bremner argued that "prepared" meant “to make something ready for eating or cooking” and, notwithstanding the strictures of Briggs J above in *Aspinalls*, Mr Bremner took comfort from the meaning of the word "prepare" in the Shorter Oxford English Dictionary. Mr Bremner further submitted that the concept of preparation meant that the meat had to be prepared beyond the manner provided for in Chapter 2. Thus, Mr Bremner argued, the Product after tumbling was simply an uncooked chicken breast with some additions – it was not "prepared" in any relevant way. Mr Bremner noted that Explanatory Note 1 to Chapter 16 made it clear that Chapter 16 did not cover meat which had been prepared or preserved by the processes specified in Chapter 2. The HSENs to Chapter 2 referred to various processes such as, chilling, freezing, salting, brining, drying or smoking. Chapter 2 also included slightly sprinkling meat with sugar or an aqueous solution of sugar as well as tenderising or mincing meat. Meat subjected to these processes fell within Chapter 2 and was not within the Chapter 16. Thus, meat could be subjected to a whole variety of processes without it falling outside Chapter 2.

155. In our view the Product was “prepared” within the meaning of Heading 1602. We do not think that it is helpful, however, to consider the word “prepared” in isolation. We note that Explanatory Note 1 to Chapter 16 excludes from Chapter 16 "meat… *prepared* or preserved by the processes specified in Chapter 2…." We accept, therefore, that meat can be "prepared" and yet be within Chapter 2 or Chapter 16 (provided it is not prepared by a Chapter 2 process).

156. We see no reason, however, why a narrow definition of the word "prepared", such as suggested by Mr Bremner, should be adopted for Chapter 16. In our view, “prepared” simply means “to make ready for use”. Mr Stokes’ evidence was that the Product, once de-frosted, would be ready for cooking on a grill (and that consumers

expected chicken to have the Product's post tumbling flavour rather than the flavour of un-tumbled chicken). Moreover, the word "prepared" in Heading 16.02 must be read in the context of Additional Note 6(a) to Chapter 2 which provides that "seasoned" meat falls within Chapter 16. Thus, if the Product is "seasoned" then it will be "prepared" meat for the purposes of Heading 16.02.

157. This takes us, fourthly, to the issues raised by Additional Note 6(a) to Chapter 2 which provides:

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

158. The first point to note is that the Additional Note clearly envisages that uncooked meat can fall within Chapter 16. Secondly, the Note requires that the meat be seasoned "in depth" (it was common ground that any seasoning was not in this case visible to the naked eye). Mr Stokes' evidence was that the tumbling had the result that the chicken absorbed the solution. Therefore, if the solution constituted "seasoning" then the Product was, in our view, seasoned "in depth."

159. Was the Product "seasoned" as a result of the process of being tumbled in the solution?

160. Mr Bremner submitted that CNENs to Additional Note 6 (a) to Chapter 2 made it clear that salt was not to be considered as seasoning with the meaning of Additional Note 6(a). Thus, Mr Bremner argued, the Product did not fall within Additional Note 6 (a) to Chapter 2 (sugar comprised less than 1% of the Product post-tumbling).

161. However, as Ms Shaw pointed out, the HSENs for Chapter 2 and Chapter 16 provided respectively that meat that was "seasoned (e.g. with pepper and salt)" and meat "which was seasoned (e.g. with both pepper and salt)" fell within Chapter 16 rather than Chapter 2. This indicated to us that salt could be a component in seasoning but could not be seasoning on its own. In this case, salt was not used on its own but was a component in the solution together with sugar and dextrose. In our view, therefore, the solution constituted seasoning for the purposes Additional Note 6 (a) and that the Product was therefore seasoned.

162. Having determined that the Product was seasoned in depth, the next question is whether it was so seasoned "with seasoning… clearly distinguishable by taste."

163. Mr Bremner submitted that the Product was not seasoned such that it was "clearly distinguishable by taste." Initially, in his skeleton argument, Mr Bremner argued that the seasoning had to be clearly identifiable as such and had to give the Product different objective characteristics from those which it had in its original state. Mr Bremner, in argument, appeared to move away from this position. Instead he argued that after the Product had been cooked it still tasted like cooked chicken. The Product, after processing, had to taste different from chicken within Chapter 2. After tumbling, the Product when cooked possessed nothing beyond the general qualities

and flavour of cooked chicken. He contended that Mr Stokes had accepted the different types of chicken could taste different. All the tumbling process achieved was, he argued, that the flavour of chicken was enhanced but the Product still had a chicken flavour – this was not enough to take the Product out of Chapter 2 and place it into Chapter 16. Chapter 16 was intended to cover seasoning which gave chicken a different flavour from a natural chicken flavour. In this case, the flavour of the Product was merely enhanced.

164. In our view, the seasoning of the Product was clearly distinguishable by taste. We saw no justification for the suggestion that seasoning had to make the chicken taste different from the normal taste of cooked chicken. Seasoning does not need to be so obtrusive that it masks or changes the underlying flavour. Seasoning is generally intended, in our view, to enhance or accentuate the underlying flavour of meat in order to make it more flavoursome and appetising to the taste. It is true that in some cases seasoning can be so strong that that it overpowers the underlying flavour of the meat or that it imparts a different flavour of its own, but we do not think that it is a necessary for it to do so in order to be "clearly distinguishable by taste."

165. Mr Stokes' evidence was that he did not consider that chicken in its natural state would pick up the salt and sweet characteristics of the Product. Furthermore, we also accept Mr Stokes' evidence that consumers expected chicken to taste as it did after the tumbling process, indicating that the Product had a significantly different taste. Mr Stokes' evidence was that the samples that were sent to Leatherhead for the purposes of testing were of the same specifications as those in respect of which the repayment claims were made. The Leatherhead report stated clearly that the Product had significant differences in taste and aftertaste as regards saltiness, sweetness and savouriness ("umami") from the control sample. This, in our view, established that the Product was seasoned in a way that the seasoning was clearly distinguishable by taste. The report's methodology of comparing the Product against a control sample seemed to us an eminently sensible approach to adopt. Indeed comparing the taste of the Product with a control sample was the approach suggested by HMRC and the actual methodology used was finalised after discussion with HMRC by Mr Stokes.

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

167. In this context, we should mention that we did not consider Mr Bremner's attack upon the findings of the Leatherhead report to be well-founded. In the first place, he suggested that Mr Stokes' instructions to Leatherhead Foods were biased and, secondly, that the difference in size of the prepared and control samples of chicken meant that the tests could also be biased. As to the first point, we did not consider Mr Stokes' instructions to be biased and, in any event, there was no reason to doubt that an independent food tester such as Leatherhead Foods tested the Product in anything other than an independent and unbiased fashion. Instead, the evidence was that Leatherhead Foods went to considerable lengths in their methodology to achieve accurate results. Similarly, the size of the samples did not, in our view, appear to be material particularly when it was apparent that the samples of chicken were cooked and then divided up between 14 assessors each of whom tasted three samples. Accordingly, we did not consider the Leatherhead report to be unreliable.

168. Mr Bremner also criticised the appellant for failing to produce a witness from Leatherhead Foods to give evidence. In our view, no adverse inference should be drawn from this failure. There was no clear indication in any of the pleadings that HMRC were querying the findings of the Leatherhead report. The only reference in the Statement of Case relating to the classification issue was a general comment to the effect that the appellant had not "demonstrated that the Chicken had been misclassified." This seemed to us, to say the least, a very oblique reference to the Leatherhead report if, in fact, any such reference was intended. Indeed, in HMRC's skeleton argument, the Leatherhead report was not mentioned. It was clear from the Mr Stokes' witness statements that the Leatherhead report formed an important part of the appellant's case. That it was not challenged specifically by HMRC until the hearing seemed to us to require the appellant to meet a case which had not been put with sufficient clarity.

169. Fifthly, Mr Bremner noted that the only reason why the Product was not classified within Heading 0210 was because the salt content of the Product was not high enough (being less than 1.2% by weight). He suggested that it would be remarkable for the Product not to have sufficient salt content to be removed from Heading 0207 to 0210 yet for it to be appropriate for the Product to be classified outside Chapter 2 altogether. We do not think that this is remarkable. Heading 0210 deals with meat which is "salted, in brine, dried or smoked." In other words, it is dealing with meat that has been preserved in various different ways. It was common ground that the Product was not preserved and that the salt content was insufficient for it to fall within heading 0210. Chapter 16 on the other hand is dealing with various types of prepared (including seasoned) meat. If the meat is prepared within the meaning of Chapter 16 (i.e. if it is seasoned in depth and the seasoning is clearly distinguishable by taste) then there is no incongruity in the meat falling within Chapter 16 rather than Chapter 2 – the Chapters are dealing with different types of product.

170. Sixthly, Mr Bremner submitted that even if the Product could in principle come within Chapter 16, the specific Heading in 0207 was more specific and should be applied to the Product pursuant to GIR 3. For the reasons we have given, however, we consider the Product to be uncooked seasoned meat within Chapter 16 and excluded

from Chapter 2 by virtue of Additional Note 6(a) when considered with the HSENs to Chapters 2 and 16.

171. Finally, we should also mention the decision of this tribunal in *Furukawa Electric Europe Limited v HMRC* [2012] UKFTT 129(TC). Reliance was placed by Mr Bremner on paragraph 73 of the importance of providing samples of the products in question (in that case to the tribunal). We would simply observe that whilst this is no doubt desirable it must yield to practicalities. In that case the product was an item of electrical equipment. We consider, however, that where fresh meat products are concerned different considerations of practicality may apply.

The repayment issue

172. In short, as the parties accepted, the bulk of the repayment claims will, in principle, fall to be determined by our decision on the classification issue. We have been asked only to give a decision in principle as regards the repayment claims with matters of quantum being reserved.

173. At one point it appeared that HMRC were resisting the repayment claims on the basis that the claims were lodged by the Appellant on behalf of other associated companies. In fact, as we understand the position, this point was relevant to the question of the identities of the companies which could rely on the BTI and did not directly relate to the repayment claims, all of which pre-dated the issue of the BTI. In the event, Mr Bremner did not pursue this point in relation to the repayments claims.

174. There were, however, 11 repayments claims where an appeal against a refusal to admit the claims had not been lodged in time.

175. Ms Shaw submitted that in the absence of response to Mr Stokes' letter of 29 September 2011, which requested HMRC to keep the claims open depending resolution of the appeal against the revocation of the BTI, the appellant was entitled to consider that its request had been accepted, particularly in the light of Mr Stokes' understanding of HMRC's previous agreement in relation to the *Padley* appeal. As regards the question of prejudice, this should be considered in relation to the position which would have obtained if the time-limit had been complied with. Ms Shaw submitted that HMRC would be in no worse position if discretion to extend the time-limit was granted whereas the appellant would be prejudiced in that a valid claim may be denied.

176. Mr Bremner submitted that the letters rejecting the appellant's claims were a de facto response to the appellant's requests to keep the claims open pending the outcome of the appeal against the revocation of the BTI. Mr Bremner accepted that there had been no formal response to Mr Stokes' letter of 29 August, but the repayment claims had already been rejected. It was, therefore, too late for HMRC to adopt an informal approach.

177. As regards the relevant statutory provisions, the refusal of the repayment claims was a "relevant decision" (section 13A(2)(a)(iv) Finance Act 1994 ("FA 1994")).

HMRC was therefore required to offer a review of their decision (section 15A(1) FA 1994). HMRC offered a review. No review was requested in respect of the 11 claims referred to above. Section 15E FA 1994 provides for a request for a review to be made out of time. In the present case Mr Attridge declined that request by his letter of 7 September 2012. A right of appeal is provided against such a refusal in section 16(1 D) FA 1994. No appeal, however, was brought against that decision.

178. Section 16 FA 1994 provides for an appeal to be made after the end of the relevant period "if the appeal tribunal gives permission to do so."

179. It was common ground, therefore, that the Tribunal has a discretion to permit an appeal to be made out of time. That discretion must, however, be exercised judicially taking account of and giving appropriate weight to all relevant factors.

180. The relevant principles for giving permission to appeal out of time were conveniently summarised by Judge Poole in *A & E Services (Midland) Ltd v Revenue & Customs* [2013] UKFTT 644 (TC) as follows:

> "31. Recently, the Upper Tribunal has had occasion to examine the issue of judicial discretion to extend time limits in two cases. In *Data Select Limited v HMRC* [2012] UKUT 187 (TCC), the Upper Tribunal was considering whether to permit a late appeal against a VAT assessment. It said (at [37]):
>
> "In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to section 83G(6) of VATA."
>
> 32. This approach was effectively endorsed in *O'Flaherty v HMRC* [2013] UKUT161 (TCC), where the Upper Tribunal said "it is clear that the FTT should consider all the relevant circumstances, and should conduct a balancing exercise in reaching its conclusion whether to grant permission for the late appeal or not."
>
> 33. The reference to "CPR 3.9" is to rule 3.9 of the Civil Procedure Rules, as it stood before 1 April 2013. In its form at the relevant time, it read as follows:
>
> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including–
>
> (a) the interests of the administration of justice;
>
> (b) whether the application for relief has been made promptly;
>
> (c) whether the failure to comply was intentional;
>
> (d) whether there is a good explanation for the failure;
>
> (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;

> (f) whether the failure to comply was caused by the party or his legal representative;
>
> (g) whether the trial date or the likely trial date can still be met if relief is granted;
>
> (h) the effect which the failure to comply had on each party; and
>
> (i) the effect which the granting of relief would have on each party."
>
> 34. It is clear also that extensions of time should not be routinely given, but a proper discretion should be exercised in each case. Also, it is clear that the arguable merits of the underlying case should be considered as part of the balancing exercise – see *O'Flaherty* at [59]."

181. Taking account of all these factors, we have concluded that we should exercise our discretion to give permission for an appeal to be brought out of time in respect of the 11 repayment claims in dispute. In our view, Mr Stokes had a reasonable basis for believing that HMRC may have been prepared to have kept the claims open pending the resolution of the appeal against the revocation of the BTI. He reiterated his position in a letter of 29 September 2011 to which HMRC failed to reply. This seemed to us to constitute a good explanation for the failure to appeal in time. In addition, we have taken into account the balance of prejudice between the parties. The prejudice to the appellant in having a meritorious claim struck out clearly outweighs any prejudice to HMRC. Accordingly, we grant permission to appeal out of time in respect of the 11 repayment claims.

Summary of decision

182. We have decided that:

(1) the revocation of the BTI was a decision which HMRC could not reasonably have reached and accordingly we direct that the decision shall cease to have effect from 12 May 2011.

(2) The Product was correctly classified under Chapter 16 (subheading 16023211) and was not classifiable under Chapter 2 of the CN.

(3) Permission to appeal out of time in respect of the decision to deny the 11 disputed refund claims is granted.

183. Finally, we should conclude this decision by expressing our appreciation to Ms Shaw and Mr Bremner for their skilful and illuminating arguments and for the assistance which they, and those instructing them, have given to the tribunal.

184. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 10 January 2014