

LONDON TRIBUNAL CENTRE

INVICTA FOODS LIMITED

Appellant

- and -

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

Respondents

**Tribunal: DR JOHN F AVERY JONES CBE (Chairman)
RAY BATTERSBY**

Sitting in public in London on 4 and 5 June 2007

Nicola Shaw, counsel, instructed by **Clyde & Co LLP**, for the Appellant

Owain Thomas, counsel, instructed by the **Acting Solicitor for HM Revenue and Customs**, for the Respondents

DECISION

1. Invicta Foods Limited appeals against a number of post-entry demands for customs duty. This hearing concerns 10 entries, five selected by each party on which the Tribunal is asked to make findings about their validity following which it is hoped that the parties will be able to agree the other cases. This is therefore an interim decision in principle relating to those 10 entries. Because the parties exchanged witness statements simultaneously each gave them different numbers. We shall adopt the Appellant's numbering but in the summary of the documents we also give Customs' numbers. Following the hearing the Appellant sent us further evidence on 21 June 2007 which Customs commented on in a letter of 23 July 2007 and we have included this material in our decision. The Appellant was represented by Miss Nicola Shaw and Customs by Mr Owain Thomas.
2. The Appellant imports chicken meat sourced from Brazil. All the entries with which we are concerned originate from Brazilianfood SA ("Brazilianfood") of Uruguay but concern chicken originating from Brazil.
3. Poultry meat has an import quota which is divided equally among importers who import more than 100 metric tonnes of poultry meat in each of the previous two years; no additional quota is earned for imports greater than this amount. The quota is valuable, being equivalent to 80p per tonne. In order to maximise its quota the Appellant adopted a method of working that is common in the industry of splitting its imports among a number of associated (not group) companies, which include all the companies named in the summary of the documents (except where stated) so that each company qualified for a portion of the quota. Its method of dealing was that first there is a contract between Brazilianfood and the Appellant for which the Appellant by reason of the size of its purchases can obtain favourable terms. The Appellant then "assigns" all or part of the contract to an associated company which acts as importer. The assignment is evidenced by a Purchase Confirmation from the associated company to Brazilianfood saying "We are pleased to confirm our purchase from you as follows...". We did not see any evidence of acceptance by Brazilianfood. However this will be followed (or in Entry Nos.1 and 9 was preceded) by an invoice from Brazilianfood to the associated company. The associated company will be shown in the Entry as the importer. An issue relating to many of the Entries is whether such a Purchase Confirmation qualifies as "the purchasing contract, or any other equivalent document" and in some cases other documents listed in Commission Regulation No.1484/95 as amended by Regulation 393/99 with effect from 6 March 1999 ("the Regulation").
4. That Regulation lays down rules for implementing a system of additional import duties (sometimes called super levy) in the poultry meat sector. The Regulation lays down a trigger price which varies according to the CN code. Imports at a price below 90 per cent of the trigger price bear the additional duty. The liability is different depending on whether the cif price is above or

below the representative price, which is below the trigger price and is determined monthly as the current price from prices on third country markets, cif import prices and prices at the various stages of marketing in the Community. Where the cif price is lower than the representative price additional duty is payable on a number of bands based on the difference between the cif price and the trigger price. Where, however, the cif price is above the representative price, security must be given for the additional duty based on the representative price. If the cif price is shown to be correct the security is released; if not, the security is forfeited as duty.

5. Relevant extracts from the Regulation are as follows:

“...Whereas the import prices to be taken into consideration for imposing an additional import duty should be checked against the representative prices on the world market or on the Community import market for the products in question; whereas it is necessary that Member States communicate the prices at various stages of marketing at regular intervals in order to be able to determine the representative prices and the corresponding additional duties;

Whereas the importer may choose that the additional duty is calculated on a basis which is different from the representative price; whereas, however, in that case there should be provision for the lodging of a security equal to the amount of additional duty which he would have paid if the additional duty had been determined on the basis of the representative price; whereas the security will be reimbursed if, within a certain time limit, proof is provided that the conditions for the disposal of the consignment have been met; whereas, as part of a posteriori checks, additional duty due will be recovered pursuant to Article 220 of Council Regulation (EEC) No 2913/92 (5) establishing the Community customs code; whereas it is only fair that, within the framework of such checks, interest will be added to the duty due;

...

Article 3

1. The additional duty shall be established on the basis of the cif import price of the consignment in question in accordance with the provisions of Article 4.

2. When the cif import price per 100 kg of a consignment is higher than the applicable representative price referred to in Article 2(1), the importer shall present to the competent authorities of the importing Member States at least the following proofs:

- the purchasing contract, or any other equivalent document,
- the insurance contract,
- the invoice,
- the certificate of origin (where applicable),
- the transport contract,
- and, in the case of sea transport, the bill of lading.

3. In the case referred to in paragraph 2, the importer must lodge the security referred to in Article 248(1) of Commission Regulation (EEC) No 2454/93, equal to the amount of additional duty which he would have paid if the

calculation of the additional duty had been made on the basis of the representative price applicable to the product in question, as shown in Annex I.

4. The importer shall have one month from the sale of the products in question, subject to a limit of six months from the date of acceptance of the declaration of release for free circulation, to prove that the consignment was disposed of under conditions confirming the correctness of the prices referred to in paragraph 2. Failure to meet one or other of these deadlines shall entail the loss of the security lodged. However, the time limit of six months may be extended by the competent authorities by a maximum of three months at the request of the importer, which must be duly substantiated.

The security lodged shall be released to the extent that proof of the conditions of disposal is provided to the satisfaction of the customs authorities.

Otherwise, the security shall be forfeit by way of payment of the additional duties.

5. If on verification the competent authorities establish that the requirements of this Article have not been met, they shall recover the duty due in accordance with Article 220 of Regulation (EEC) No 2913/92. The amount of the duty to be recovered or remaining to be recovered shall include interest from the date the goods were released for free circulation up to the date of recovery. The interest rate applied shall be that in force for recovery operations under national law.”

6. The dispute between the parties arises essentially from the interaction of Appellant’s method of trading designed to maximise the quota with the evidence required by the Regulation. The dispute arises because before 1999 Customs admit that they did not apply the Regulation properly in that they did not ask for the documents required by the Regulation and they did not ask for security in cases where the Regulation requires it. In April 2000 Customs asked for such documents retrospectively and the issue in this appeal is whether the Appellant has provided sufficient documents.
7. We heard evidence from Neil Stokes, logistics manager of the Appellant, and Pauline Brown of Customs’ Common Agricultural Policy Unit of Expertise (formerly the CAP Centre of Operational Expertise) and we had three bundles of documents.
8. We start by summarising the documents relating to each of the sample Entries, which constitute findings of fact. We have divided these into three categories:
 - (1) those where the importer was unconnected with the Appellant which then sold the goods to the Appellant (Entries No.3 and 7);
 - (2) those where the Appellant was the importer which then sold the goods to an associated company (Entries No 9 and 10); and
 - (3) those where an associated company of the Appellant was the importer which then sold the goods to the Appellant (all the remaining Entries).

*Cases where the importer was unconnected with the Appellant
Entry No.3 (Customs No 9)*

- (1) 24 November 1999. Contract between Brazilianfood and Euomeat Srl (not an associated company of the Appellant) contract No 344/99 “We have pleasure in confirming our sale as per details below: 15,000 Kg (about) frozen boneless skinless chicken breast H/C 1420 GR UP Tamble Origin Brasil for Eur 2.30/Kg payment at receipt of invoice delivery CIF Tilbury.
- (2) 7 December 1999. Invoice Brazilianfood to Euomeat (no contract number) for the same goods and price total Eur 34,500, CIF Tilbury, also stating the vessel, port of loading, container, and bank details.
- (3) 9 December 1999. Entry later corrected to show Euomeat as the importer.
- (4) (there is no copy invoice from Euomeat to the Appellant)
- (5) 7 January 2000. Invoice the Appellant to Ice-Pak Seafoods Ltd (not an associated company of the Appellant) for the same goods at £2.20 per Kg, total £33,000, contract no.A.5480.

Entry No.7 (Customs No.2)

- (6) 30 October 1998. Purchase Confirmation the Appellant to Brazilianfood, Contract A.4884, stating “We are pleased to confirm our purchase from you as follows” for frozen boneless skinless chicken breast: 14,000 Kg butterfly Cajun, 1,000 Kg inner fillet Cajun, 1,000 Kg plain, and 1,000 Kg Teriyari for US \$3300/ton; delivery not stated; payment 28 days; terms are IMTA [International Meat Traders Association] C&F terms.
- (7) 1 November 1998. Proforma invoice the Appellant to Bird’s Eye Wall’s Limited (not an associated company of the Appellant) for the above (except that the quantity of the first item is 14,035.2 Kg, total price \$56,216.16)
- (8) 4 November 1998. Entry showing Bird’s Eye Walls Limited as importer.
- (9) No bill of lading or contract between the Appellant and Bird’s Eye Walls was produced.

Cases where the Appellant was the importer

Entry No.9 (Customs No.4)

- (10) 19 April 2000. Invoice Brazilianfood to the Appellant, contract No 352/99, for 3,003 Kg frozen boneless skinless chicken breast tumbled, marinated, calibrated 195-225g at Eur 2.55/Kg total Eur 7,657.65
- (11) 20 April 2000. Purchase Confirmation the Appellant to Brazilianfood contract no A5597 for 3,000 Kg calibrated

chicken breast 195-225 gm price E[uros] 2.55; collection April/May 2000; payment 28 days; terms are IMTA C&F terms.

- (12) 20 April 2000. Entry showing the Appellant as the importer.
- (13) 25 April 2000. Invoice the Appellant to Harlequin Food Products Limited (“Harlequin”) for the same goods at £2.12/Kg total £6,366.36.
- (14) 11 May 2000. Sage accounting entry form showing posting on that date of an invoice dated 25 April 2000 with due date 16 May 2000 (21 days after the invoice date).
- (15) 1 June 2000. Form C285 attaching the last invoice.

Entry No.10 (Customs No.5)

- (16) 4 April 2000. Contract No.700/00 between Brazilianfood and the Appellant (copy not signed by the Appellant) for 240,000 Kg chicken butterfly feast Cajun at Eur 2.70/Kg; payment 30 days after delivery; Delivery terms C&F UK port; delivery date 30,000 Kg a month from June 2000 to January 2001.
- (17) 8 May 2000. Invoice Brazilianfood to the Appellant for 6,269 Kg, total Eur 16,927.38; contract No 700/00, C&F Tilbury with other usual details.
- (18) 8 May 2000. Invoice the Appellant to Harlequin for the same quantity at £2.25/Kg total £14,106.15 (this invoice also contains other goods).
- (19) 8 May 2000. Entry showing the Appellant as the importer.
- (20) 8 June 2000. Form C285 with the invoice at (1)(18) attached.
- (21) 24 May 2000. Sage accounting entry form showing posting on that date of an invoice dated 8 May 2000 with due date 29 May 2000 (21 days after the invoice date).

Cases where an associated company of the Appellant was the importer

Entry No.1 (Customs No 10)

- (22) 11 February 2000. Invoice from Brazilianfood to Fareway Trading Co Limited (“Fareway”) for 15,000 frozen chicken inner-fillet origin Brasil at 2.65 Eur/Kg price Eur 39,750, cif Tilbury, contract no 535/00 with other details given for the vessel, port of loading and container number and the bank details for payment.
- (23) 18 February 2000. Purchase Confirmation from Fareway to Brazilianfood. The details are the same as the invoice except that the contract number is A.5667. Collection is February 1999 [2000?]; payment is 28 days; and terms are IMTA C&F terms.

- (24) 18 February 2000. Entry showing Fareway as the importer.
- (25) 18 February 2000. Invoice Fareway to the Appellant referring to contract F.089 for the same goods at £2.48 per Kg total £37,200.

Entry No.2 (Customs No.8)

- (26) 16 June 1999. Purchase Confirmation Mayfield Trading Co Ltd to Brazilianfood, contract No.M.104, with the same opening words relating to 28,000 Kg tumbled H/C chicken breast at US\$2.80 per Kg; collection July 1999; payment 28 days; terms are IMTA C&F terms.
- (27) 5 July 1999. Invoice Brazilianfood to Mayfield for the same goods at the same price total \$78,400; C&F Tilbury, no contract number stated; with other details of the vessel, port of lading container numbers and bank details. A stamp added by Mayfield with blanks filled in shows the contract as M104.
- (28) 7 October 1999. Entry showing the Appellant as importer.
- (29) 10 October 1999. Invoice Mayfield to the Appellant for 27,980 Kg of the same goods at £2.41 per Kg total £67,431.80, contract No.M104.
- (30) After the hearing eight invoices were produced showing onward sales by the Appellant all at higher prices. Customs accept these as confirming the cif price.

Entry No.4 (Customs No 6)

- (31) 31 January 2000. Contract No 539/00 Brazilianfoods and the Appellant (copy not signed by the Appellant) for 100,000 Kg (about) frozen boneless skinless chicken breast at Eur 2.65/Kg payment at receipt of invoice; C&F Tilbury; Delivery February.
- (32) 23 February 2000. Purchase Confirmation Eurorose to Brazilianfood contract No ER80 for 30,000 Kg of the same goods at the same price collection February 2000 payment 28 days; terms are IMTA C&F terms.
- (33) 23 February 2000. Invoice Eurorose to the Appellant for 30,000 Kg of the same goods for £2.383 per Kg, total £71,508.63, contract No EU80.
- (34) 2 March 2000. Invoice Brazilianfood to Eurorose Ltd contract no 539/00 for the same goods as (15) above total Eur 79,500 with the usual invoice details.
- (35) 2 March 2000. Entry showing Eurorose as the importer. A rubber stamp added by Eurorose shows the contract number as ER80. Security was provided at the time.

- (36) After the hearing two invoices were produced showing onward sales by the Appellant both at higher prices. Customs contend that as security was taken at the time of Entry it is too late to provide further documents.

Entry No.5 (Customs No.7)

- (37) 20 December 1997. Contract No.131/97 between Brasialianfood and the Appellant for 70,000 Kg frozen boneless skinless chicken breast for US\$3.10/Kg; payment at receipt of invoice; C&F Tilbury; Delivery from January to September 1998.
- (38) 2 January 1998. Contract No.288.98 between Brasialianfood and the Appellant for 15,000 Kg frozen boneless skinless chicken breast for US\$3.20/Kg; payment at receipt of invoice; C&F Tilbury; Delivery March 1998.
- (39) 13 March 1998. Purchase Confirmation Invicta Poultry Limited to Brasialianfood; contract No P.77; 13.5 mt; tumbled marinated—B/L S/L Cajun Butterfly at US\$3200 mt; collection April 1998; payment 28 days; terms are IMTA C&F terms.
- (40) 13 March 1998. Purchase Confirmation Invicta Poultry Limited (“Poultry”) to Brasialianfood; contract No P.78; 4.5 mt; tumbled marinated—B/L S/L Cajun Butterfly at US\$3100 mt; collection April 1998; payment 28 days; terms are IMTA C&F terms.
- (41) 8 April 1998. Invoice Brazilianfood to Poultry for 13,223.25 Kg of the same goods as (1)(39) above at US\$3.20/Kg total \$42,346.40 with the usual invoice details. A stamp added by Invicta Poultry shows the contract No as P.77
- (42) 8 April 1998. Invoice Brazilianfood to Poultry for 4,500 Kg of the same goods as (1)(40) above at US\$3.10/Kg total \$13,950 with the usual invoice details. A stamp added by Poultry shows the contract No as P.78.
- (43) 14 April 1998. Entry showing Poultry as the importer.
- (44) 17 April 1998. Invoice Invicta Poultry to the Appellant for 4,009.75 Kg “P.077 Brz Fzn. Garlick/Herb Ckn 373 CTNS” and “P.0771 Brz Fzn. Cajun Chicken 858 CTNS” both for £2.69/Kg total £35,597.45.
- (45) 17 April 1998. Invoice Invicta Poultry to the Appellant for 4,500 Kg of the same goods at £2.70/kg total £12,150 contract No.P078.
- (46) After the hearing fifteen invoices were produced showing onward sales by the Appellant all at higher prices. Customs accept these are confirming the cif price.

Entry No.6 (Customs No.1)

- (47) 8 January 1998. Contract No.411/98 between Brazilianfood and the Appellant (copy not signed by the Appellant) for 15,000 Kg frozen boneless skinless chicken breast at US \$ 2.70/Kg C&F Tilbury; payment at receipt of invoice; delivery February 1998.
- (48) 23 February 1998. Purchase Confirmation, contract No.AV 23 by Avante Contracts Limited (“Avante”) to Brazilianfood for 7.5 mt tumbled chicken breast at \$2.70; collection March 1998; payment 28 days; terms are IMTA C&F terms.
- (49) 23 February 1998. Purchase Confirmation contract No.AV 24 by Avante to Brazilianfood for 7.5 mt tumbled chicken breast plain at £1.63/Kg [this is a different currency from the contract at (1)(47)]; collection March 1998; payment 28 days; terms are IMTA C&F terms.
- (50) 2 March 1998. Invoice Brazilianfood to Avante for 7,500 Kg of the same goods at \$2.70 total \$20,250 (no contract number).
- (51) [Date illegible] Invoice Brazilianfood to Avante for 7,500 Kg of the same goods at £1.63 total £12,225 (no contract number).
- (52) 3 March 1998. Entry showing Avante as the importer.
- (53) (6 March 1998 there is reference in the documents to an invoice from Avante to the Appellant which the Appellant states was at £2.52.)
- (54) After the hearing an invoice was produced showing an onward sale by the Appellant at a higher price of £3.10. Customs point out that since the cif price is below the representative price no further documents are required.

Entry No.8 (Customs No.3)

- (55) 16 June 1997. Purchase Confirmation Ensign Import Export Limited (“Ensign”) to Brazilianfood, contract No.E.20, for 10 mt 140gm H/C tumbled chicken breast at £1.71; collection June 1997; payment 28 days; terms are IMTA C&F terms.
- (56) 20 June 1997. Invoice Brazilianfood to Ensign for 9,975 Kg total £17,057.25 “free Hays Cold Store.” A stamp added by Ensign shows the contract number as E20.
- (57) 20 June 1997. Entry showing Ensign as the importer.
- (58) 24 June 1997. Invoice Ensign to Mayfield same goods at £2.55/Kg total £25,436.25 contract No E.020.

- (59) No bill of lading was produced, the Appellant pointing out that the goods were bought from the warehouse.
 - (60) After the hearing the Appellant produced a copy of Mayfield's sales ledger showing that Mayfield sold the goods to the Appellant at £2.55/Kg but no copy of the invoice was available) and a copy invoice showing a sale by the Appellant of 21,991.1 lb [equivalent to 9,975 Kg] of the same goods at £1.40/lb [equivalent to £3.0864/Kg]. Customs accept these as confirming the cif price.
9. The documents summarised above are not complete for each transaction. We infer and find that the following documents would exist for a complete transaction in what we specified as category (3) in paragraph 8 above in which the Appellant first contracts to buy goods from Brazilianfood, then an associated company becomes the buyer and sells the goods to the Appellant (as in Entries 1, 2, 4, 5, 6 and 8).
- (1) The Appellant issues a Purchase Confirmation to Brazilianfood (as shown in Entries 7 and 9).
 - (2) Brazilianfood issues a contract with the Appellant (as in Entries 4, 5, 6 and 10).
 - (3) (The Appellant agrees on the telephone with Brazilianfood for an associated company to take over the contract.)
 - (4) The associated company issues a Purchase Confirmation to Brazilianfood on the same terms as the Appellant's Purchase Confirmation at (1) above (as in Entries, 1, 2 4, 5 and 6).
 - (5) Brazilianfood does not issue a new contract to the associated company but invoices the associated company instead of the Appellant (as in Entries 1, 2, 4, 5, 6 and 8). In Entries 1 and 9 the date of the invoice precedes the date of the purchase confirmation because Brazilianfood would have been acting on the telephone agreement.
 - (6) The associated company is shown on the Entry as the importer.
 - (7) The associated company sells the same goods to the Appellant evidenced only by an invoice to the Appellant (as in Entries 1, 2, 4, 5 and the documents produced after the hearing)
 - (8) (The Appellant pays the duty to Customs and the purchase price to Brazilianfood by way of setoff.)
10. We find the following additional facts:
- (1) Customs became aware in 1999 that the correct procedures under the Regulation were not being followed. No security was taken before then, and no action was taken against importers who did not produce the documents required by the

Regulation except for the invoice and the veterinary certificate. As a result every import was checked and while some traders had complied with the document requirements, many had not. From April 2000 Customs asked for additional documents for imports during the previous three years. The Appellant complied so far as it was able and the ten test entries with which we are concerned are a representative sample.

- (2) Mr Stokes was fully aware of the Regulation. The Appellant was involved in a previous dispute with Customs about super levy which went to the Court of Appeal on 6 May 1998 in which Mr Stokes appeared as a witness in the Tribunal proceedings. He was aware that Customs were not applying the Regulation properly and spoke to two named Customs officers on the telephone about it. He was told to continue as before and that Customs would not accept an Entry with additional documents attached to it or if the Appellant tried to provide security. Mrs Pauline Brown told us that she had spoken to the officers who either did not remember or denied saying this, but she accepted Mr Stokes' evidence. We also accept his evidence. On 14 July 1999 Mr Stokes wrote to the Ministry of Agriculture, Fisheries and Food and to Customs in order to ascertain what documents were required but received only a copy of the Regulations in reply from MAFF and no reply from Customs. A meeting between Customs and the International Meat Trade Association took place in August 2000. He was sent a copy letter of 30 September 1999 from the European Commission stating:

- (a). "Finally, Article 3(2) also means that a declaration of higher cif import prices is only valid where the importer presents the documents mentioned. HM Customs should not have accepted any declaration without the essential documents of that list attached to it."

- (b). In taking these actions the Appellant acted throughout in good faith.

- (3) Mr Stokes' method of dealing with Brazilianfood was to speak to them on a daily (and sometimes hourly) basis on the telephone. Because they deal with each other regularly Brazilianfood understood the reason for associated companies becoming involved. He would follow up the telephone conversations with a Purchase Confirmation. Such confirmations would also be issued for the original contract with the Appellant, see Entry No.9 for an example. We do not have an example but the existence of contracts issued by Brazilianfood in other cases suggests that both documents

would exist in relation to the original contract with the Appellant and we so find. On the “assignment” of the original contract there is only the evidence of the Purchase Confirmation, which suggests that Brazilianfood never issued contracts or confirmations in relation to assigned original contracts and they relied on the original contract plus the Purchase Confirmation by issuing an invoice to the associated company.

- (4) In all cases the associated company having imported the goods sells them to the Appellant at the same price as the original contract between Brazilianfood and the Appellant (although paragraph (1)(49) above shows an exception where the currency changed) and also that in the Purchase Confirmation by the associated company to Brazilianfood plus the duty. Instead of the associated company paying the duty to Customs and the price to Brazilianfood and the Appellant paying the total of the duty and the price to the associated company, the amounts are set-off and the Appellant pays the duty and Brazilianfood. That this will occur is the understanding of the Appellant and the associated company at the time of the assignment.

11. Miss Nicola Shaw for the Appellant contends in outline:

- (1) Before June 1999 it was the practice of Customs and importers to calculate Super Levies by reference to the cif price and to present only the purchase invoice and certificate of veterinary checks. Customs advised the Appellant that this was the case.
- (2) In June 1999 when the Regulation was amended the Appellant wrote to Customs and MAFF to ascertain what documentation was required. Customs did not reply.
- (3) Customs started to require production of documents and security in accordance with the Regulation in relation to imports made after June 1999. In April 2000 they started to apply the new practice retrospectively.
- (4) For Entries 5, 6, and 8 the Appellant has since lodged all the required documents. For Entry No.8 the Appellant produced all the documents required by Customs at the time and further documentation is no longer available.
- (5) Customs are not now not entitled to recover security under article 220 of the Community Customs Code which refers only to additional duty. Security becomes duty only when the security is forfeited. If the security was never lodged it cannot be forfeited and no amount can become duty. The passage relied on by Customs in *Westbridge Foods v Customs and*

Excise Commissioners (2002) Customs Decision 00151 is obiter because the Tribunal notes at [44] that Customs conceded that all security would be repayable.

- (6) Under art 3(4) of the Regulation security is repayable where the importer can confirm the correctness of the cif price within one month of the sale of the goods, otherwise the security is forfeited. By demanding security retrospectively the Appellant can never obtain repayment.
- (7) If, contrary to (5), unpaid security is within art 220 Customs are precluded from recovery by art.220(2)(a) (see paragraph 14 below) on the basis that this Tribunal's decision that not asking for security at the time was wrong; accordingly the decision not to demand it was taken on the basis of general provisions invalidated by a court decision. Alternatively, recovery is prevented by art 220(2)(b) on the basis that the Appellant acted in good faith and complied with the declaration requirements as required by Customs' practice at the time. There is a difference between cases like the earlier *Invicta Poultry* case ([1998] EWCA Civ 775) in which a trader relies on an error on the part of the customs authority, and the position here where the trader thought Customs were wrong and queried it and was told that Customs' interpretation was correct that any attempts to lodge additional documentation would be rejected. If the error could not be detected by Customs when the Appellant queried the advice given, the Appellant could not be reasonably have detected the error.
- (8) The purchase confirmations in Entries 1, 5, 6 are sufficient as "any other equivalent document" to the purchasing contract. There is no need for such a document to be bilateral. Brazilianfood's actions confirm their agreement with the purchase confirmation.
- (9) While there was no bill of lading for Entry 8 the goods were purchased under bond from a cold store and never had access to the bill of lading. In the same way as where an importer does not have access to the transport contract to which it is not a party Customs should be satisfied with the cif invoice.
- (10) The invoice in Entries 9 and 10 was backdated to remove the stock from the books of the importing company to avoid the need to prepare stock accounts. The evidence demonstrates the correct date with the result that it was presented in time.
- (11) Even where the Appellant buys from the associated company at the same price plus the duty, this confirms the correctness of the cif price declared by the associated company (in the absence of any allegation of abusive practice or fraud).

Customs have never asked for the contracts of sale by the Appellant for this purpose.

12. Mr Owain Thomas for Customs contends in outline:

- (1) In the context of the Regulation and the reference in art 3(5) to art 220 of the Code, that article provides for recovery of any additional duty arising from non-compliance with the Regulation. This is in accordance with the Tribunal's decision in *Westbridge Foods*. In particular it decided at [45] that where no security had been demanded Customs had power to invoke art 220 of the Code.
- (2) So far as art 220(2)(b) is concerned the Appellant is an experienced professional importer who knew the correct requirements of the Regulation. He should at the least have made sure that the documents were available for production if later demanded by Customs.
- (3) On the Appellant's contention that the time limits in the Regulation cannot be complied with retrospectively, Customs have not sought to apply the time limits retrospectively and have imposed a liability only for failure to provide the required evidence.
- (4) The equivalent document to the contract must show the seller's agreement. A unilateral document made by the seller will be produced to Customs by the purchaser as confirmation that both parties agree the terms. This is not the case with a unilateral document produced by the buyer. Customs need to be able to be able to check that the invoice is in accordance with the contract, which in practice is done by the invoice quoting the contract reference. The purchase confirmations in Entries 1, 2, 4, 5, 6 and 8 are not sufficient for this purpose.
- (5) For Entries 9 and 10 proof of disposal was presented outside the time limits. Customs cannot be expected to look into the accounting entries to see that the invoices have been backdated.

Customs' ability to require duty retrospectively

13. Miss Shaw raised a legal point that Customs cannot demand duty retrospectively. Article 3(4) of the Regulation gives the importer one month from the sale of the products subject to a limit of six months (extendable for a further three months) from the date of acceptance of the declaration of release for free circulation to prove that the consignment was disposed of under circumstances confirming the correctness of the cif price, with the security being forfeit at the end of the period of the proof has not been provided. If security can be demanded retrospectively it will be forfeit on being given, which she contends cannot be right.

14. She further contends that Customs' only remedy is that stated in art.3(5) of recovering the duty due in accordance with art 220 of the Community Customs Code; here no duty is due, only a requirement to provide security. Article 220 of the Code provides:

“1. Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor (subsequent entry in the accounts). That time limit may be extended in accordance with Article 219.

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

(a) the original decision not to enter duty in the accounts or to enter it in the accounts at a figure less than the amount of duty legally owed was taken on the basis of general provisions invalidated at a later date by a court decision.

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

15. Mr Thomas also points to art 189:

“1. Where, in accordance with customs rules, the customs authorities require security to be provided in order to ensure payment of a customs debt, such security shall be provided by the person who is liable or who may become liable for that debt.”

Security can be demanded for a debt that may become due and accordingly references to a debt include references to demanding security for a debt that may become due. If that is not right there is no remedy for Customs.

16. We agree with Mr Thomas and consider that for the reasons he puts forward and following the Tribunal's decision in *Westbridge Foods*. Even if the decision is obiter in relation to this point we consider that it is correct. Customs can demand the duty in a case where no security was originally provided.
17. Miss Shaw next contends that Customs are prevented from recovering the duty under art.220(2)(a) on the basis that their practice in not asking for security is a general provision that is invalidated by the decision of this Tribunal to the effect that it is wrong. We do not consider that Customs' practice is a general provision or that, even if it were, it would be invalidated by this decision; it is the Regulation that makes the practice invalid. A more natural reading is that

art 220(2)(a) refers to a generally-applicable legislative provision that, for example, a decision of the ECJ invalidates.

18. Finally, she contends that art 220(2)(b) prevents Customs from recovering on the ground that notwithstanding that Mr Stokes was aware of the Regulation he was told to carry on as before. He therefore acted in good faith and there was nothing more he could have done. Mr Thomas contends that Mr Stokes had read the Regulation and knew the legal position and accordingly could not rely on this provision.
19. For the Appellant to succeed under art 220(2)(b) it needs to show (1) the correct amount of duty was not entered in the accounts and that the error was attributable to Customs (which is conceded), (2) the error could not reasonably have been detected by the Appellant, (3) the Appellant acted in good faith and complied with all the provisions laid down for the customs declaration. In the earlier case concerning the Appellant's group, *Invicta Poultry Ltd v Customs and Excise Commissioners* [1997] EWHC Admin 614 (2 July 1997), Lightman J analysed art 220(2)(b) in terms of the trader's legitimate expectation that no further duty is due. Initially there is no legitimate expectation on the initial acceptance of the trader's declaration because Customs are entitled to make checks. Legitimate expectation requires satisfaction of the three conditions set out above. In relation to point (1) he said:

“[19] (b)...The legitimate expectations of the trader are only worthy of protection if the customs authorities themselves have provided the basis for those expectations: *Hewlett Packard Case C-250/91* 1819 at 1845 para 16. The duty is upon the customs authorities to enter the correct figure, and *prima facie* any error in so doing is attributable to the customs authorities. But if the error arises because the customs authorities have been misled by incorrect declarations by the trader (or his agent), whose validity the customs authorities had no duty to check or assess, the error is then attributable to the trader: *Mecanarte supra* at p. 1-3307 para 24. If in turn the trader had previously been misled by the customs authorities into providing this incorrect information, the attribution of error is once again to the customs authorities: see *Faroe Seafood C-153/94* p. 1-2465 at 2541-2, paras 92 and 95.”

20. On point (2) we refer again to Lightman J's analysis:

“24. It is well established that in conducting this exercise it must be taken into account that a trader has available to detect any error the Journal and the provisions of Community law there printed. The principle is clear that ‘everyone was deemed to know the law’: see e.g. *Behn C-80/89* p.2659 at 2676 para 13-14. This principle is more realistically understood and applied under Community law than it is under English law: the trader is only expected to derive from the Journal such knowledge as would be derived by an attentive reader. Where the complexity of the law is such as to defeat the reasonable efforts of such a reader, a greater knowledge and understanding may not be attributed to him: whether it will or not depends on all the circumstances. The position accordingly is that, if the error of

the customs authorities is apparent to an attentive reader from a reading of the Code or associated Community law, then the error could reasonably have been detected by the trader; and if the error is apparent from an attentive reading of the Code and a visual examination of the goods in question a sample of which is in the possession of the trader, again the error could reasonably be detected (see *Binder* Case 161/88 p. 2415 at p. 2438 paras 19 and 20). It is no answer to this conclusion that the error could and should equally have been detected by the customs authorities and that they failed to do so when they made the original entry in the accounts; and that accordingly a higher standard of diligence is being required of the trader in order to satisfy condition (b) than has been displayed by the customs authorities when they committed the error which they are seeking to rectify. If however the relevant provisions of the Code or rules are complex or the facts are complex, the error may not be readily detectable. Examples of cases where such complexity has been found to exist are where there are differences of opinion between Member States on the proper classification of goods and there has been recognised by the EC a need to amend the tariff nomenclature to clarify the law (see *Hewlett Packard* Case C-250/91 p.1-1819 at 1846-7, para 23); where the error of the customs authorities has been repeated on more than one occasion (*Deutsche Fernsprecher* Case C-64/89 p.1.2535 at 1.2557 para 20); and where merely studying the text of the Code leads to no clear application to the facts and has led the customs authority for a period to an erroneous view (see *Faroe Seafood* C-153/94 1-2465 at paras 103-5). To answer the question whether in these circumstances the error is reasonably detectable, reference must be made to the three factors above mentioned, namely the nature of the error, the professional experience of the trader and the degree of care he had exercised.”

In the Court of Appeal ([1998] EWCA 775) Thorpe LJ, with whom Mantell LJ and Buxton LJ concurred, approved this approach:

“In my view, therefore, the cases cited by the appellants in fact fully support the judge’s conclusion that, in this case, the element of complexity being absent, the correct question was whether the error was reasonably detectable by the traders by reference to the Official Journal. It was not appropriate in this case, in determining the issue of whether the error could reasonably have been detected, to conclude that simple reading of the Journal would not elucidate the error, and therefore go on to the more complicated assessment of all the circumstances of the individual case, as the appellants urged.”

21. This case is very different from one in which an importer is told by Customs that his import is within a particular tariff heading and by reading the Official Journal the importer would know that this was the wrong heading (as in *Direct Bargain* heard with the earlier *Invicta Poultry Limited* case), or as in that earlier case, where it was clear from reading the Regulation before its amendment in 1999 and knowing the representative price and the trigger price that additional levy was payable although Customs had not asked for it. These relate to matters that the importer is required to do. Here we are dealing with matters of Customs’ own administration. The trader may think that what

Customs were doing was wrong but it cannot force Customs to accept security or documents that they are unwilling to accept.

22. On point (1) in relation to art 220(2)(b) Customs' error was in no way caused by an incorrect declaration by the Appellant; Customs concede that they were not complying with the Regulation. This is therefore a case where potentially the legitimate expectations of the Appellant are worthy of protection. The Appellant was aware of Customs' error and had pointed it out to them but there is no further action he could take to force Customs to comply.
23. The principle of point (2) is that "everyone was deemed to know the law." There is a further article of the Code that was not argued but which we consider may potentially be relevant, art 217(2):

"The Member States shall determine the practical procedures for the entry in the accounts of the amounts of duty. Those procedures may differ according to whether or not, in view of the circumstances in which the customs debt was incurred, the customs authorities are satisfied that the said amounts will be paid."

Customs therefore have some discretion to determine the practical procedures for the entry in the accounts. Where they do not appear to be complying strictly with the requirements this could be the reason. For example, they might not be asking for security because they are satisfied that the duty will be paid. If that is the case there is no error for the Appellant to detect, and point (2) would not arise.

24. Point (3) is that the Appellant acted in good faith and complied with all the provisions laid down for the customs declaration. Here we have found that the Appellant acted in good faith and has done everything it can to comply but Customs would not allow it to comply.
25. Our provisional conclusion is therefore that art 220(2)(b) prevents Customs from demanding any further duty.

There is a further provision that may potentially be relevant, art 239 of the Code:

"1. Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237, and 238:

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

2. Duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office within

12 months from the date on which the amount of the duties was communicated to the debtor.

However, the customs authorities may permit this period to be exceeded in duly justified exceptional cases.”

Although the point was not argued we make findings of fact that follow from the facts found above that no deception or obvious negligence may be attributed to the Appellant. We understand that this provision deals with exceptional circumstances which may be relevant here.

26. Since neither the Appellant nor Customs have had the opportunity of commenting on arts 217(2) or 239 or consulting the Commission if they think fit, we invite them to consider the applicability of these provisions before we reach a firm view on the applicability of art 220(2)(b).

Sufficiency of Purchase Confirmations

27. Customs’ objection to the Purchase Confirmation forms is that there is nothing to show that Brazilianfood ever accepted it. We do not see any objection in principle to a unilateral document being “any other equivalent document” to the purchasing contract. This is supported by the same letter from the Commission:

“1. Purchase contract: the purchase contract should be an agreement between the buyer and the seller concluded prior to the issue of the invoice. The invoice itself can therefore not be considered as a document equivalent to the contract. An equivalent document could be any document indicating that the buyer has ordered the products from the seller, and the conditions for the delivery eg prices, delivery period, product specifications, delivery place, mode of transport etc. The document could be a telex, a fax, a letter from the supplier etc....”

A unilateral document from the seller produced by the buyer to Customs necessarily has the agreement of both parties, but that is not true of a document made by the buyer and produced by the buyer to Customs. Mr Thomas contends that the original contract remains in place, as is demonstrated by the cases where Brazilianfood includes the original contract number on the invoice with the associated company merely becoming the importer but the Appellant being liable for payment. Miss Shaw contends that the contract has been assigned and Brazilianfood has accepted the associated company as the contracting party in place of the Appellant (which to us is a novation of the original contract because Brazilianfood accepts the associated company’s liability as well) so that only the terms of the original contract still apply but as between Brazilianfood and the associated company.

28. In favour of accepting the Purchase Confirmation are the following considerations. First, the wording purports “to confirm our purchase from you.” Secondly, although there is nothing to say that Brazilianfood ever accepted it, there is nothing to show that they disputed it either. Thirdly, Brazilianfood followed it up with an invoice to the associated company

thereby indicating that they looked to the associated company for payment. Fourthly, the associated company was in all cases shown as the importer in the entry.

29. Against so accepting the Purchase Confirmation is the lack of any acceptance by Brazilianfood. The subsequent invoice merely shows that Brazilianfood looks to the associated company for payment, but not that it no longer looks to the Appellant, which is commercially in its interests to do. In a few cases the invoice shows the contract number of the original contract.
30. It is clear that a unilateral document will suffice as an equivalent document to the contract. If the contract itself is not produced what is required is something that evidences the contract. Clearly it needs to show that there is a contract. Here we have a Purchase Confirmation which purports to confirm a purchase made on the telephone. There is no confirmation by Brazilianfood of the Purchase Confirmation. But in all cases they issued invoices in accordance with the Purchase Confirmation indicating that they looked to the associated company and not to the Appellant for payment, in which case they recognised the existence of a contract based on the Purchase Confirmation. These are consistent with each other and we do not feel able to say that the documents read together do not substantiate the existence of a contract between Brazilianfood and the associated company. We do find Mr Thomas's suggestion that Brazilianfood merely accepted the associated company as importer plausible as it does not account for the invoice. We accept that if there is a substituted contract Brazilianfood is worse off as it then relies on the creditworthiness of the associated company but in business we are aware that many people will deal with a subsidiary of a known company relying on the parent not allowing the subsidiary to fail. Had an associated company not paid Brazilianfood and had the Appellant not paid on its behalf we suspect that Brazilianfood would have ceased doing any further business with the Appellant and its associated companies thereby probably ruining their business. We are not concerned about the invoice to the associated company having Brazilianfood's contract number of the original contract. This seems a natural way of Brazilianfood keeping track of the deal when the substituted contract is on the same terms. Each party seems to use its own contract numbers on documents it produced. In two cases (Entries Nos 1 and 9) the date of invoice precedes the Purchase Confirmation. We are not concerned about this because the Purchase confirmation confirms a telephone contract and the later date of the confirmation does not mean that the contract was not earlier than the invoice; indeed it must have been for the invoice to be addressed to the associated company.
31. A further possible objection to the Purchase Confirmations is that the reference to the contract number on the invoice to the associated company that issued the Purchase Confirmation cannot be matched with the Purchase Confirmation. Each party uses its own reference system so that Brazilianfood will have a contract reference number for its original contract with the Appellant and will continue to use that number on the invoice to the associated

company (Entry No.4 is an example), or more often it will not put any contract number reference on the invoice (Entries No.3, 5, 6, and 8 for example). While we understand that this makes it more difficult for Customs to check that the invoice relates to the contract or Purchase Confirmation there is no requirement in the Regulations that invoices contain reference numbers and we do not consider that this is a valid objection.

Evidence of disposal to satisfy art 3(4) of the Regulation

32. The question is whether the invoice price by the associated company to the Appellant is sufficient in the words of art 3(4) of the Regulation “to prove that the consignment was disposed of under conditions confirming the correctness of the prices referred to in paragraph 2” [namely the prices shown by the six documents referred to in para 2]. Mr Thomas described this as a self-fulfilling prophecy and we agree with him. If the Appellant has an understanding that it will assign the contract with Brazilianfood to an associated company and then buy the goods at the price under that contract plus the duty, the price shown on the invoice to the Appellant from the associated company will not prove anything. The problem is not that it is a price between associated companies but that it is agreed from the start that it will be the same price as under the original contract. The only document that would give the required proof would be the next invoice in the chain between the Appellant and its independent customer. Customs were still prepared to consider these if they can be produced (except where security was taken at the time of Entry, when we accept that following *Westbridge Foods* it is too late to do so), and as mentioned above in a number of cases they have been produced since the hearing.

Proof of backdating of invoices

33. This concerns only Entries 9 and 10. In both cases the accounting entry shows that the invoice was backdated to, we understand, normally the date of arrival of the goods, although in No.10 it is later. The issue is whether the Appellant is bound by the date on the invoice, in which case it is out of time, or whether it can use the additional evidence of the accounting input form to show the date the invoice was actually issued. In our view the Appellant having produced the invoice to Customs, with a view to Customs acting on it, is bound by its date (subject to correction of obvious typing errors) and it is not possible to go behind that date. Customs cannot be expected whenever it sees an out of time invoice to ask questions about the date it was in fact created.

Insurance documents

34. Although not listed in each of the documents relating to the sample Entries there was an insurance policy schedule showing as assured “Invicta Foods Limited and/or Associated and/or Subsidiary Companies and/or for which they are responsible to insure.” There may have been additional schedules listing such associated companies none was produced. We are not sure if Customs

are still taking a point on this but even if Customs are not prevented from recovering any additional duty by art 220(2)(b) we consider that the Appellant has produced what is required which is a representation that the associated company is insured. If Customs wanted more information they could have asked for it and had not done so before the hearing.

Bills of lading

35. In relation to Entries 7 and 8 no bills of lading have been produced. We have provisionally decided that Customs are prevented from recovering any further duty by art 220(2)(b). Even if we are wrong about this Miss Shaw put forward the further argument that the letter of 30 September 1999 from the Commission stated that if an importer cannot obtain the seller's transport contract when he bought on a cif basis "HM Customs should be satisfied with the cif-invoice." By analogy they should be satisfied if the importer cannot obtain the bill of lading, which is particularly the case with Entry No.8 in which the goods were sold in a warehouse. Mr Thomas contends that they should have contracted for production of the bill of lading because they knew that this was required. So far as the law is concerned we are bound to find in favour of Customs on this point. The bill of lading is a document required by the Regulation to be produced. However, we would add that for Customs to fail to ask for it at the time because they were not implementing the Regulation and then to turn round later to say that the Appellant should have contracted for production of a document that Customs did not require at the time, seems unreasonable. If, as the Commission's letter suggests, and Mrs Brown's witness statement accepts in relation to Entry No.7, Customs do have some discretion in cases where a document to which the importer is not a party cannot be produced, we invite them to consider whether such discretion should be exercised in this case in the light of our acceptance of the Purchase Confirmation as "any other equivalent document" to the purchasing contract. Mr Battersby believes (although there was no evidence on this point) that under normal ship procedures Customs will have received a list of the bills of lading in the writing-off of the manifest and accordingly would be aware of its contents, particularly the consignee.

Conclusion

36. We are unable to come to a final view about the Appellant's liability under all of the ten test Entries because we consider that the parties should have the opportunity of commenting on the applicability of arts 217(2) and 239. Subject to that, our conclusions in principle on the liability to post-clearance demands of the test entries are accordingly as follows:
- (1) Liable because no proof of subsequent sale produced.
 - (2) Not liable.
 - (3) Not liable because the requirement to produce documents is on Euromeat and not the Appellant.

- (4) Not liable.
- (5) Not liable.
- (6) Not liable in principle; the cif price is below the representative price so no additional documents are required; but we understand that the duty was incorrectly calculated and the Appellant concedes that the correctly calculated duty should be paid.
- (7) Not liable because the requirement to produce documents is on Bird's Eye Walls not the Appellant.
- (8) Not liable on our provisional conclusion that Customs are prohibited from collecting any further duty by art 220(2)(b) subject to further consideration of arts 217(2) and 239.
- (9) Liable as invoice presented out of time.
- (10) Liable as invoice presented out of time.

We adjourn the appeal to allow the parties to try to agree on the matters left open in relation to the test Entries, and to try to agree on the effect of our decision on the remaining Entries. Either party may by notice to the Tribunal ask for the hearing to be resumed.

37. So far as costs are concerned the Appellant should have their costs in relation to the Entries that we have decided are not liable to the post-clearance demand, and Customs did not ask for costs. We invite the Appellant and Customs to try to agree a suitable apportionment of costs to give effect to this and if the matter cannot be agreed the Appellant may apply to the Tribunal for a direction about costs.