Slip Op. 03 - 67

UNITED STATES COURT OF INTERNATIONAL TRADE

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VANETTA U.S.A. INCORPORATED, :

Plaintiff, :

v. : Consolidated Court No. 97-01-00117

UNITED STATES, :

Defendant. :

- - - - - - - - - - - - - - - - - - - -x

Memorandum & Order

[Cross-motions for summary judgment as to classification of animal-feed additives denied.]

Dated: June 25, 2003

Barnes, Richardson & Colburn (James S. O'Kelly) for the plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; John J. Mahon, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Bruce N. Stratvert); and Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection (Joseph M. Spraragen), of counsel, for the defendant.

AQUILINO, Judge: The parties have interposed cross-motions for summary judgment in this consolidated action, which contests U.S. Customs Service classification of certain additives imported from Italy for animal feeds. While this court's careful, albeit belated, review of these motions does not lead it to conclude that such judgment can be entered, they do substantiate, yet again, the accumulated wisdom encompassed by USCIT Rule 56(d) that such motions aid in

> ascertain[ing] what material facts exist without substantial controversy and what material facts are actually and in good faith controverted[,]

thereby streamlining preparation for and conduct of the trial on the remaining material issue(s) of fact.

I

Subsequent to the filing of plaintiff's motion for summary judgment, the defendant chose to respond with such a motion of its own. This form of response has precipitated a formal motion to strike by the plaintiff, which takes the position that defendant's cross-motion "was not timely filed in accordance with the scheduling order in this case."

That order of the court issued pursuant to USCIT Rules 1 and 16 set a date certain for submission of any dispositive motion*s*. The plaintiff met the deadline, whereas the defendant twice moved for, and obtained, formal extensions of time "to respond to plaintiff's motion for summary judgment". Whereupon the plaintiff presses that "[i]n neither instance did defendant seek a modification of the scheduling order or request more time to file its own motion for summary judgment." Plaintiff's Motion to Strike Defendant's Motion for Summary Judgment, p. 2.

The precision of this motion to strike is unimpeachable, but, when faced with a similar challenge by the plaintiff in

Rollerblade, Inc. v. United States, 24 CIT 812, 116 F.Supp.2d 1247 (2000), aff'd, 282 F.3d 1349 (Fed.Cir. 2002), the court determined to accept "as such" the defendant's cross-motion for summary judgment on the ground that the

> practice of combining the cross-motion for summary judgment with the party's response to the original motion for summary judgment is an efficient use of court resources.

24 CIT at 813 and 116 F.Supp.2d at 1250, n. 1. Since the motion to strike at bar does not show any prejudice to the plaintiff as a result of the nature of defendant's chosen response, this court discerns no basis for deviation from the determination in Rollerblade. Indeed, all parties are at liberty to posit motions for summary judgment whenever, in the exercise of sound analysis, they come to conclude "that there is no genuine issue as to any material fact and that the[y are] entitled to a judgment as a matter of law." USCIT Rule 56(c). Moreover, it has long been the mandate in an action like this that the court reach "the *correct* result[] by whatever procedure is best suited to the case at hand." Jarvis Clark Co. v. United States, 733 F.2d 873, 878, reh'g denied, 739 F.2d 628 (Fed.Cir. 1984) (emphasis in original). Here, that procedure may well include cross-motions for summary judgment.

II

The court's jurisdiction to hear and decide this matter is pursuant to 28 U.S.C. §§ 1581(a), 2631(a). Cf. Defendant's Reply Brief in Support of Motion for Summary Judgment and in

Opposition to Plaintiff's Response, p. 2, n. 3 ("the Government withdraws its jurisdictional objections previously advanced").

As required by Rule 56, plaintiff's motion for summary judgment is accompanied by a statement of the material facts as to which it contends there is no genuine issue to be tried. Included therein are the following averments:

> 4. The imported merchandise consists of Menadione Sodium Bisulfite (hereinafter "MSB"), Menodione Sodium Bisulfite Complex (hereinafter "MSBC"), Menadione Dimethylpyrimidinol Bisulfite (herein after "MPB")and Menadione Nicotinamide Bilsulfite (hereinafter "MNB"). . . .
>
> 5. The chemical structure of naturally occurring Vitamin K_1 phylloquinone is 2-methyl-3-phytyl-1, 4-naphthoquinone. . . .
>
> 6. The chemical structure of naturally occurring Vitamin K_2 menaquinone is 2-methyl-3-all-trans-polyprenyl-1, 4-naphthoquinone. . . .
>
> 7. Vitamin K_1 and vitamin K_2 are vitamins for purposes of the HTSUS and are classified under heading 2936, HTSUS. . . .
>
> * * *
>
> 11. When MSB, MSBC, MPB or MNB is ingested, the menadione in these products is converted into a form of vitamin K_2, specifically vitamin $K_{2(20)}$. . . .
>
> 12. The principal use of the imported products is as a component in animal feeds. . . .
>
> 13. Customs excluded the imported products from classification under heading 2936 because, as interpreted by Customs, this heading does not include "synthetic substitutes for vitamins". . . .

14. The phrase "synthetic substitute for a vitamin" does not appear anywhere in the HTSUS statute enacted by Congress. . . .

15. Defendant defines "synthetic substitute for a vitamin" as "a synthesized chemical compound that is not found in nature but has vitamin activity. This differs from a synthetically reproduced vitamin whose structure is found in nature but has been synthesized from other chemicals." . . .

* * *

17. The imported MSB was classified by Customs as "Ketones and quinones, whether or not with other oxygen function, and their halogenated, sulfonated, nitrated or nitrosated derivatives: . . . Halogenated, sulfonated, nitrated or nitrosated derivatives: Aromatic: . . . Other", under subheading 2914.70.20, HTSUS, dutiable at 11% *ad valorem*. . . .

18. The imported MSB has the same menadione moiety (2-methyl-1, 4-naphthoquinone) as naturally occurring Vitamin K_1 phylloquinone and naturally occurring Vitamin K_2 menaquinone. . . .

19. The SB or sodium bisulfite portion of MSB is excreted by the body after ingestion. . . .

20. From a nutritional perspective, the menadione (2-methyl-1, 4-naphthoquinone) moiety is the most important component of MSB. . . .

* * *

21. The imported MSBC was [also] classified by Customs . . . under subheading 2914.70.20, HTSUS, [supra, para. 17,] dutiable at 11% *ad valorem*. . . .

22. The imported MSBC has the same menadione moiety (2-methyl-1, 4-naphthoquinone) as naturally occurring Vitamin K_1 phylloquinone and naturally occurring Vitamin K_2 menaquinone. . . .

23. MSBC is essentially MSB with additional sodium bisulfite added for increased stability. . . .

24. The SBC or sodium bisulfite complex portion of MSBC is excreted by the body after ingestion. . . .

25. From a nutritional perspective, the menadione (2-methyl-1, 4-naphthoquinone) moiety is the most important component of MSBC. . . .

* * *

27. The chemical structure of MPB is 2-methyl-1, 4-naphthoquinone 2-hydroxy-4, 6-dimethylpyrimidine bisulfite. . . .

28. The imported MPB has the same menadione moiety (2-methyl-1, 4-naphthoquinone) as naturally occurring Vitamin K_1 phylloquinone and naturally occurring Vitamin K_2 menaquinone. . . .

29. The PB portion of MPB is excreted by the body after ingestion and has no nutritional value. . . .

30. From a nutritional perspective, the menadione (2-methyl-1, 4-naphthoquinone) moiety is the most important component of MPB. . . .

* * *

32. Nicotinamide is also known as niacinamide. . . .

33. Niacinamide is a vitamin described in heading 2936, HTSUS. . . .

34. The bisulfite portion of MNB is excreted by the body after ingestion. . . .

35. The nicotinamide portion is not excreted by the body after ingestion and provides niacin or niacinamide activity. . . .

> 36. The nicotinamide portion of MNB is a vitamin, as described in subheading 2936.29.1530, HTSUS. . . .
>
> * * *
>
> 38. Defendant is unaware of any uses of MNB as a component of animal feeds other than as a source of vitamin K activity and niacin. . . .[1]

The defendant admits without any reservation all but one of these averments. See Defendant's Response to Plaintiff's Statement of Material Facts as to Which There is No Genuine Dispute, pp. 1-4. As for that single, enumerated paragraph, 4, supra, the defendant admits it with regard to MSB and MSBC but

> [a]vers that none of the imported merchandise is described on the commercial invoices as MNB, or MPB, or their equivalents.

Id. at 1, para. 4. As for defendant's own statement of material facts in support of its cross-motion, the plaintiff admits the following averments contained therein:

> 2. MSB, MNB and MSBC are aromatic derivatives of quinones.
>
> 3. MPB is an aromatic heterocyclic compound containing a pyrimidine ring.
>
> * * *
>
> 5. Menadione is not the natural precursor of vitamins K_1[] in plants and K_2 in bacteria.

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[1] Plaintiff's Rule 56(i) Statement of Material Facts as to Which No Genuine Dispute Exists (citations in support of each averment omitted).

6. The Menadione found in nature is not a pro-vitamin of Phylloquinone.[2]

In sum, there is agreement between the parties with regard to many of the salient facts. Hence, the plaintiff also agrees that HTSUS chapter 29 (1994)

> contemplates that some organic chemical products may be described in more than one of its headings. MSB, MSBC, MPB and MNB are examples of four such products.

Plaintiff's Memorandum, p. 12. This means that MSB, MNB and MSBC are at least arguably covered by HTSUS subheading 2914.70.20 and MPB by subheading 2933.59.70, as now posited by the defendant.

Be such concurrence as it may, a court

> first construes the language of the heading, and any section or chapter notes in question, to determine whether the product at issue is classifiable under the heading. Only after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise. *See* GRI 1, 6. Furthermore, when determining which heading is the more specific, and hence the more appropriate for classification, a court should compare only the language of the headings and not the language of the subheadings. *See* GRI 1, 3.

Orlando Food Corp. v. United States, 140 F.3d 1437, 1440 (Fed.Cir. 1998); Schulstad USA Inc. v. United States, 26 CIT ___, ___, 240 F.Supp.2d 1335, 1338 (2002)("GRI" referring to the HTSUS General

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[2] Compare Defendant's Statement of Additional Material Facts as to Which There is No Genuine Issue to be Tried, p. 1, paras. 2, 3, 5, 6 with Plaintiff's Response to Defendant's Statement of Additional Material Facts as to Which There is No Genuine Issue to be Tried, paras. 2, 3, 5, 6.

Rules of Interpretation). As indicated above, the headings favored by the defendant are as follows:

> 2914 Ketones and quinones, whether or not with other oxygen function, and their halogenated, sulfonated, nitrated, or nitrosated derivatives[.]
>
> 2933 Heterocyclic compounds with nitrogen hetero-atom(s) only; nucleic acids and their salts[.]

Headnote 3 to HTSUS chapter 29 provides, however, that

> [g]oods which could be included in two or more of the headings of this chapter are to be classified in that one of those headings which occurs last in numerical order.

The plaintiff relies on this note in pressing for classification of its merchandise under heading 2936, to wit:

> Provitamins and vitamins, natural or reproduced by synthesis (including natural concentrates), derivatives thereof used primarily as vitamins, and intermixtures of the foregoing, whether or not in any solvent[.]

With regard to this rubric, the defendant complains that the plaintiff

> ignores, completely, the Government's key point that while the MSB, MSBC, MPB, and MNB undoubtedly are provitamins (albeit *artificial* provitamins), they assuredly do not reproduce natural provitamins[2], and hence, cannot be described, and are not described, by the language of Heading 2936, HTSUS, which, by its terms, only covers natural vitamins, natural provitamins, reproductions of natural vitamins or provitamins, and derivatives of natural vitamins or provitamins.

Defendant's Reply Brief, pp. 1-2 (emphasis in original, footnote 3 omitted). Footnote 2 to this reply states in part:

> *Reproduce* means to produce a copy of something. Inasmuch as the HTSUS heading, in issue, Heading 2936, provides for "[p]rovitamins and vitamins, natural or reproduced by synthesis," clearly, the only provitamins described by this language are natural provitamins or reproductions of natural provitamins, which MSB, MSBC, MPB, and MNB plainly are not. . . .

Id. at 2, n. 2 (emphasis in original).

III

This reply by the defendant is the crux of the controversy at bar. Having studied the affidavits of Dr. John W. Suttie, Dr. T.M. Frye, and Dr. Mark W. LaVorgna, as well as Binder, Benson & Flath, Eight 1,4-Naphthoquinones From *Juglans*, 28 Phytochemistry, pp. 2799-2801 (1989), and Shils & Young, Vitamin K, Modern Nutrition in Health and Disease, ch. 14 (7th ed. 1988), proffered by the plaintiff in support of its instant motion, and having compared their rather esoteric contents with those of the two affidavits of Dr. Robert E. Olson filed on behalf of the defendant, the court is unable to conclude that the parties cross-motions completely satisfy the requirement that "there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (emphasis in original). The foregoing material matter articulated by the defendant must be addressed at trial and subjected to cross-examination, "which has been said to be the surest test of truth and a better security than the oath." The Hanover Ins. Co. v. United States, 25 CIT ___, ___, Slip Op. 01-57, p. 21 (2001).

Thus, the parties' cross-motions for summary judgment must be, and they hereby are, denied. Counsel are directed to confer and propose to the court on or before August 1, 2003 a schedule for the necessary preparation for, and conduct of, the trial of those issue(s) of fact which are not already agreed to herein and which cannot be stipulated to in the pretrial order.

So ordered.

Dated: New York, New York
June 25, 2003

_____
Judge