Slip Op. 21-136

UNITED STATES COURT OF INTERNATIONAL TRADE

ROOT SCIENCES, LLC, **Plaintiff,** **v.** **THE UNITED STATES,** **Defendant.**	**Before: Gary S. Katzmann, Judge** **Court No. 21-00123**

OPINION

[The court grants Defendant's motion to dismiss.]

Dated: October 7, 2021

John M. Peterson, Neville Peterson LLP, of New York, N.Y., argued for Plaintiff Root Sciences LLC. With him on the briefs were Richard F. O'Neill, of Seattle, WA and Patrick B. Klein.

Guy R. Eddon, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. With him on the brief were Brian M. Boynton, Acting Assistant Attorney General, Jeanne E. Davidson, Director, Justin R. Miller, Attorney in Charge, International Trade Field Office, Aimee Lee, Assistant Director. Of Counsel on the brief were Mathias Rabinovitch and Alexandra Khrebtukova, Office of the Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

Katzmann, Judge: This is a case about a cannabis processor manufactured in Germany that was seized by Customs and Border Protection ("CBP") as prohibited merchandise, namely drug paraphernalia, not subject to import. Is the dispute regarding that seizure to be adjudicated by the United States Court of International Trade ("CIT") or the United States District Court? This case addresses the question of whether the CIT has jurisdiction over a deemed exclusion and protest therefrom where CBP seized goods within thirty days of presentation for examination, but Plaintiff did not receive the notice of that seizure from CBP until bringing a challenge to the court. Plaintiff Root Sciences, LLC, an importer, manufacturer, and distributor of merchandise for the cannabis

and hemp processing industry, challenges what it contends is the deemed denial of its protest to exclusion of merchandise for import and argues that the CIT has jurisdiction over the case. Compl. ¶¶ 1–3, Mar. 24, 2021, ECF No. 15. In response, Defendant the United States ("Government") moves to dismiss this case for lack of jurisdiction, arguing that there has been no exclusion, and no denial of Plaintiff's protest, because of CBP's seizure of the merchandise and that jurisdiction is thereby lodged in the district court. Def.'s Mot. to Dismiss, Apr. 23, 2021, ECF No. 27 ("Def.'s Br."). The court concludes that it does not have jurisdiction over this dispute because CBP seized Plaintiff's merchandise before a deemed exclusion occurred by operation of law. Accordingly, the case is dismissed.

BACKGROUND

I. Legal Framework and Jurisdiction

The jurisdictional statute 28 U.S.C. § 1581(a) grants the court "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930," which enumerates certain decisions made by CBP. The exclusion of merchandise is one such protestable decision. 19 U.S.C. § 1514(a)(4). In 1993, Congress passed the Customs Modernization Act ("Mod Act"), which amended 19 U.S.C. § 1499 to create the mechanisms of deemed exclusion and deemed denial of protests. Under 19 U.S.C. § 1499(c)(5)(A), the failure of CBP "to make a final determination with respect to the admissibility of detained merchandise within 30 days after the merchandise has been presented for customs examination . . . shall be treated as a decision of the [CBP] to exclude the merchandise for purposes of section 1514(a)(4) of this title," i.e., a deemed exclusion. Under CBP's implementing regulation, 19 C.F.R. § 151.16(b), "merchandise shall be considered to be presented for [CBP] examination when it is in a condition to be viewed and examined by a [CBP] officer." Presentation

for examination requires that "the merchandise itself -- not a proxy or summary -- be laid out or put before a [CBP] official to look at or otherwise visually inspect." Blink Design, Inc. v. United States, 38 CIT __, __, 986 F. Supp. 2d 1348, 1355 (2014). Under 19 U.S.C. § 1499(c)(5)(B), if CBP fails to respond to a protest of an exclusion within thirty days, that protest will be deemed denied. That denial is then appealable to the court under 28 U.S.C. § 1581(a). Thus, if an importer promptly protests a deemed exclusion, and CBP fails to make a decision to admit or exclude the importer's goods within sixty days, that importer may challenge the deemed denial to its deemed exclusion before the court.

However, 19 U.S.C. § 1499(c)(4) states that "if otherwise provided by law, detained merchandise may be seized and forfeited." Seizures, unlike exclusions, are not protestable decisions under 19 U.S.C. § 1514(a), and are not appealable to this court. Int'l Maven, Inc v. McCauley, 12 CIT 55, 57, 678 F. Supp. 300, 302 (1988); Milin Indus., Inc. v. United States, 12 CIT 658, 659, 691 F. Supp. 1454, 1454 (1988); see also Ovan Int'l, Ltd. v. United States, 39 CIT __, __, 49 F. Supp. 3d 1327, 1331 (2015) (The Court's jurisdiction "is limited to appeals of valid and timely protests that have been denied by Customs."). Rather, they are governed by 28 U.S.C. § 1356, which grants to the federal district court in which the merchandise is located exclusive jurisdiction over "any seizure under any law of the United States . . . except matters within the jurisdiction of the [CIT] under section 1582 of this title." Section 1582 refers only to actions commenced by the United States, and so is not applicable to the instant case. Relatedly, 19 C.F.R. § 162.31 states that "[w]ritten notice of . . . any liability to forfeiture shall be given to each party that the facts of record indicate has an interest in the . . . seized property." Notably, the regulation does not state when such notice must be provided, nor that CBP must ensure notice is received. To obtain relief from seizure, the importer may file an administrative petition pursuant to 19 U.S.C.

§ 1618 and 19 C.F.R. § 171.1; or file a claim pursuant to 19 U.S.C. § 1608 and 19 C.F.R. § 162.47, for referral to the U.S. attorney for the district in which the seizure was made, who shall then institute forfeiture proceedings.

In short, the CIT has jurisdiction over CBP's decision to exclude goods from entry (if properly protested), but the CIT does not have jurisdiction over seized goods.

II. Factual Background

The facts of this case are largely undisputed. In December 2020, Plaintiff attempted to import through the port at Los Angeles/Long Beach, California a German-manufactured component of a Cryo-Ethanol Extraction System, "an all-in-one cryo-extraction, solvent recovery and decarboxylation system designed for the recovery of cannabis crude extract from cannabis biomass," ("Merchandise"). Compl. ¶ 6. In essence, the Merchandise is a component part of a cannabis extraction machine.

According to the Declarations of CBP officials Scott Jarrell and Lee Baxley, the following happened upon presentation of the Merchandise to CBP: CBP selected the Merchandise for cargo examination on December 16, 2020.[1] Def.'s Br. at 9 (citing Decl. of Scott Jarrell in Supp. of Def.'s Mot. to Dismiss ¶ 9, Apr. 23, 2021, ECF No. 28-1 ("Jarrell Decl.")). The vessel transporting the Merchandise arrived at the Los Angeles/Long Beach Seaport on December 31, 2020. Id. On January 13, 2021, CBP detained the Merchandise as "possible drug paraphernalia," and issued a notice of detention to Plaintiff's broker. Id. at 10 (citing Jarrell Decl. ¶ 13). On or about January 25, 2021, a CBP official determined that the Merchandise was to be seized as drug paraphernalia,

[1] Plaintiff's Complaint mistakenly identifies the date the Merchandise was presented to CBP for examination as December 18, 2020. Compl. at 2. Plaintiff amended this error in responding to the Government's motion to dismiss, and both parties now agree that the Merchandise was presented to CBP for examination on January 11, 2021. Pl.'s Br. at 3, 10–11; Def.'s Br. at 2.

and as such would be subject to forfeiture. Id. at 3–4 (citing Jarrell Decl. ¶ 16). On February 10, 2021, CBP seized the Merchandise and updated its records system to reflect the seizure. Id. (citing Jarrell Decl. ¶¶ 18-19). That system was updated again on February 11, 2021, to release the "hold" on the Merchandise and reflect that it had been seized. Id. (citing Jarrell Decl. ¶ 20). On February 17, 2021, the Merchandise was transferred to CBP's long-term seizure storage facility where it remains to date. Id. at 4 (citing Jarrell Decl. ¶ 20). On March 8, 2021, CBP sent notice of the seizure ("Notice") to Plaintiff via certified mail using the address listed by Plaintiff's broker on the entry filing for the Merchandise. Id. at 5 (citing Decl. of Lee Baxley in Supp. of Def.'s Mot. to Dismiss ¶ 5, Apr. 23, 2021, ECF No. 28-2 ("Baxley Decl.")). On March 11, 2021, the United States Postal Service unsuccessfully attempted to deliver the Notice. Id. (citing Baxley Decl. at Exh. 3). On March 22, 2021, the Notice was returned to CBP as undeliverable. Id. (citing Baxley Decl. ¶ 6). On March 24, CBP re-sent the Notice via regular mail, but this attempt was also returned as undeliverable on April 2, 2021. Id. (citing Baxley Decl. ¶ 7).

Plaintiff does not dispute this version of events, but stresses that "Plaintiff could have done nothing more to learn about the alleged administrative seizure in advance of bringing this exclusion case." Resp. of Pl. in Opp. to Def.'s Mot. to Dismiss 15 n.6, Apr. 30, 2021, ECF No. 29 ("Pl.'s Br."). Rather, according to the Affirmation of Richard F. O'Neill, counsel to Plaintiff, beginning in late January 2021, Plaintiff repeatedly asked CBP for information about the detention. Pl.'s Br. at 3 (citing Aff. of Richard O'Neill in Supp. of Pl.'s Appl. for an Order to Show Cause, Mar. 24, 2021, ECF No. 14-3 ("O'Neill Aff.")). Plaintiff received no substantive response to its multiple requests, which continued throughout early February 2021. Id. The Government does not dispute Plaintiff's representations of CBP's lack of communication. See generally Def.'s Br. Having received no information regarding the detention, and unaware of the seizure of February 11, 2021,

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