

# U.S. Customs and Border Protection

Slip Op. 11–50

CBB GROUP, INC., Plaintiff, v. UNITED STATES, Defendant.

**Before: Timothy C. Stanceu, Judge**  
**Court Number: 10–00383**

[Denying defendant’s motion for a stay and protective order in response to plaintiff’s discovery requests]

Dated: April 28, 2011

*Stein Shostak Shostak Pollack & O’Hara (Elon A. Pollack, Juli C. Schwartz)* for plaintiff.

*Tony West*, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Karen V. Goff*), *Beth C. Brotman*, U.S. Customs and Border Protection, of counsel, for defendant.

## **OPINION AND ORDER**

**Stanceu, Judge:**

### **I. INTRODUCTION**

This action arises from the importation by plaintiff CBB Group, Inc. (“CBB”), an importer of toys and other consumer goods, of “785 cartons of plush toys” that were the subject of Entry No. 735–0096303–5, which plaintiff filed in September 2010 at the port of Newark, New Jersey. Summons; Compl. ¶¶ 2, 13. United States Customs and Border Protection (“Customs”) refused to release 574 of the 785 cartons and appears to have determined that the merchandise it did not release are “piratical” copies that infringe a registered copyright. Plaintiff filed a protest challenging the alleged exclusion of the goods from entry and contests before the court what it characterizes as a deemed denial of that protest. Compl. ¶¶ 26.

Before the court is Defendant’s Motion to Stay Discovery & for a Protective Order (“Mot. to Stay Discovery”), filed on March 31, 2011, which defendant filed after plaintiff submitted twenty-four interrogatories and thirteen document requests. Defendant requests that the court allow it to delay its response to the discovery requests until twenty days following the date on which the court rules on a motion

for judgment on the pleadings that defendant filed on March 17, 2011. Mot. to Stay Discovery, proposed order. Because defendant has made no showing justifying a stay of discovery in these expedited proceedings, the court denies the instant motion.

## II. BACKGROUND

The importation giving rise to this action occurred on or around September 7, 2010. Compl. ¶ 13. Customs released to CBB 211 cartons of the merchandise; the 574 cartons remaining in the custody of Customs were the subject of the protest and therefore are at issue in this proceeding. Pl.'s Opp'n to Def.'s Mot. to Stay Discovery & for a Protective Order, Declaration of Raymond Hung ("Pl.'s Opp'n to Mot. for Stay"). CBB filed its protest on November 19, 2010, Compl. ¶ 2, and commenced this action on December 21, 2010, *id.* ¶ 20; Summons. Upon plaintiff's motion to expedite these proceedings, the Court of International Trade granted precedence to this action. Order (Jan. 11, 2011) (Eaton, J.), ECF No. 11; USCIT Rule 3(g) (allowing an action to "be given precedence . . . over other actions pending before the court, and expedited in every way . . .").

Customs issued to CBB a notice ("Seizure Notice") dated January 11, 2011, stating that Customs "had seized the merchandise described below at Newark, NJ on December 21, 2010," the date on which the summons was filed. Mem. in Support of Def.'s Mot. for J. on the Pleadings, exhibit 1 ("Def.'s 12(c) Mem."). This notice described the merchandise by quantity of pieces and domestic value but did not indicate how many cartons of each product were seized and failed to identify the entry number of the merchandise.<sup>1</sup> *Id.* Several weeks later and following a telephone conference with the court, the parties agreed to an expedited scheduling order requiring, *inter alia*, that discovery be concluded by April 29, 2011. Scheduling Order (Feb. 23, 2011), ECF No. 15.<sup>2</sup>

On March 17, 2011, defendant moved pursuant to USCIT Rule 12(c) for judgment on the pleadings. Def.'s Mot. for J. on the Pleadings; Def.'s Rule 12(c) Mem. Briefing on this motion is not yet complete. Defendant filed the instant motion to stay discovery on March 31, 2011, in response to the discovery requests plaintiff served on defen-

<sup>1</sup> This notice ("Seizure Notice") described the merchandise as 1,080 each Piratical Frog Pillow domestically valued at \$15,140.17, 960 each Piratical Bumble Bee Pillow domestically valued at \$14,053.11, 408 each Piratical Dolphin Pillow domestically valued at \$5,972.57, 4,200 each Piratical Unicorn Pillow domestically valued at \$61,482.37 and 240 each Piratical Dog Pillow domestically valued at \$3,513.28.

Mem. in Support of Def.'s Mot. for J. on the Pleadings, exhibit 1.

<sup>2</sup> The parties have informed the court that they will submit a joint motion to amend the scheduling order to extend the period for discovery.

dant on March 25, 2011. Mot. to Stay Discovery 1. Following completion of briefing on defendant's motion to stay discovery, the court held telephone conferences with the parties on April 26 and 27, 2011, during which conferences defendant informed the court that the United States had not instituted judicial proceedings for the forfeiture of the merchandise.

### III. DISCUSSION

Defendant argues in support of its motion to stay discovery that “[d]iscovery in this matter is unnecessary at this stage and could be obviated by the Court’s disposition of our motion for judgment on the pleadings.” Mot. to Stay Discovery 1. Defendant seeks “an order staying further discovery at this time and ordering defendant to respond to plaintiff’s discovery requests within twenty (20) days of the Court’s ruling on the motion for judgment on the pleadings. . .” *Id.* In its motion for judgment on the pleadings, defendant argues that the complaint should be dismissed because the court could grant no relief in this case due to the court’s lack of jurisdiction over forfeiture cases, Customs having seized and subjected to forfeiture the merchandise at issue for copyright infringement. Def.’s Rule 12(c) Mem. 4–9.

As defendant acknowledges, the question as to whether to stay discovery pending determination of a dispositive motion is committed to the court’s sound discretion. Mot. to Stay Discovery 2–3. The stay in discovery defendant seeks necessarily would interrupt the progress of adjudicating this case, which under the Court’s rules is to be “expedited in every way.” USCIT R. 3(g). The merchandise at issue was imported nearly eight months ago, and the additional delay that would be caused by a granting defendant’s motion is not justified by any circumstance to which defendant directs the court’s attention. Although citing USCIT Rule 26(c), Mot. to Stay Discovery 1–2, defendant makes no showing that the discovery sought to be stayed will cause it undue burden or expense. With respect to defendant’s argument grounded in matters pertaining to seizure and forfeiture, on which defendant’s Rule 12(c) motion is also grounded, the Seizure Notice Customs issued on January 11, 2011—four months after the importation in question—does not constitute a basis on which the court may conclude that further delay in these proceedings is warranted.<sup>3</sup> Moreover, the court declines to decide the instant motion

<sup>3</sup> The Seizure Notice, by failing to identify the entry number for the seized goods, appears to be in violation of the Customs Regulations. See 19 C.F.R. § 162.31(b)(3)(ii) (2010). The court need not, and does not, decide the question of the validity of the Seizure Notice in ruling on defendant’s motion to stay discovery.

based on a resolution or probable resolution of issues raised by defendant's Rule 12(c) motion, which is not yet under submission.

#### **IV. CONCLUSION AND ORDER**

Upon consideration of the Defendant's Motion to Stay Discovery and for a Protective Order, the opposition thereto, and all proceedings herein, and upon due deliberation, it is hereby

**ORDERED** that Defendant's Motion to Stay Discovery and for a Protective Order, as filed on March 31, 2011, be, and hereby is, **DENIED**.

Dated: April 28, 2011  
New York, New York

*/s/ Timothy C. Stanceu*  
TIMOTHY C. STANCEU  
*Judge*

Slip Op. 11–51

GRAPHITE SALES, Plaintiff, v. UNITED STATES, Defendant.

Before: Nicholas Tsoucalas,  
Senior Judge  
Court No. 07–00225

[Granting Plaintiff's Motion for Summary Judgment. Denying Defendant's Cross Motion for Summary Judgment]

Dated: May 4, 2011

*Rodriguez O'Donnell Gonzalez & Williams, PC (Lara A. Austrins, Thomas J. O'Donnell, Jessica R. Rifkin), for Graphite Sales, Plaintiff.*

*Tony West, Assistant Attorney General; Barbara S. Williams, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (Alexander J. Vanderweide); Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, (Of Counsel, Michael Heydrich), for United States, Defendant.*

#### **OPINION**

**Tsoucalas, Senior Judge:**

#### **INTRODUCTION**

Plaintiff, Graphite Sales brings this action to contest the classification of its merchandise under the Harmonized Tariff Schedule of the United States ("HTSUS") 9613 arguing that the goods should be classified under HTSUS 8516. The United States Customs and Border Protection (the "Government" or "CBP"), however, contends that the subject goods should be classified under HTSUS 9613. This action

is currently before the Court on cross motions for summary judgment pursuant to United States Court of International Trade (“USCIT”) Rule 56. Jurisdiction is pursuant to 28 U.S.C. § 1581(a) (2010). For the reasons set forth below, the Court finds that no genuine issues of material fact remain and Graphite Sales is entitled to judgment as a matter of law.

## BACKGROUND

### I. The Subject Goods

The subject goods at issue are “electric heating resistors,” known also as “hot surface igniters.” *Jt. Stmt. of Mat. Fcts.* (“*Jt. Stmt.*”) at 1. Electric heating resistors function by converting electric energy into heat energy. *Id.* The subject goods are physically mounted to the appliances they serve, and the two are connected by wires. *Id.*<sup>1</sup> Once turned on, the wires transmit a flow of electricity from the appliance to the subject good. Each electric heating resistor features a specially shaped bar or rod of either silicon carbide or silicon nitride which are highly resistant to electricity. Consequently, when an electric current passes through the silicon carbide or silicon nitride bars or rods, it produces enough heat to ignite gas, or a mixture of air and gas, thus powering the appliance. *See Jt. Stmt.* at 1–2. The subject goods are used in gas powered stoves, clothes dryers, water heaters and furnaces. *Id.* at 1.

### II. Procedural History

From June 22, 2005 until January 16, 2006, Graphite Sales imported eleven entries of the subject goods through the port of Cleveland, Ohio. The commercial invoices for the subject goods identified them as “ceramic heating elements.” *Pl.’s Fcts.* at 1.

Upon liquidation, CBP classified the subject goods under 9613.90.40, HTSUS, as lighter parts. Graphite Sales filed a protest with CBP to contest this classification. *See Protest No.* 4104–06–100149. The Government changed its position and now claims that the subject goods are classifiable under 9613.80.20, HTSUS as complete lighters.<sup>2</sup> *Def.’s Rspns. to Plntf’s Frst. Intrag. and Req. For Prod. Of Docs.* at 8. 9613.8020, HTSUS, provides as follows:

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<sup>1</sup> All models of the subject goods require electric voltage to operate. None of the subject goods can supply their own source of current. *See Pl.’s Fcts.* at 4.

<sup>2</sup> Given the Court’s analysis herein, the result of this case would be the same whether the subject goods were classified under HTSUS 9613.90.40 or HTSUS 9613.80.20.

**9613** Cigarette lighters and other lighters, whether or not mechanical or electrical, and parts thereof other than flints and wicks:

\* \* \*

**9613.80** Other lighters:

\* \* \*

Other:

**9613.80.20** Electrical .....3.9%

Graphite Sales asserted that the proper classification of the subject goods is 8516.80.80, HTSUS, which provides:

**8516** Electric instantaneous or storage water heaters and immersion heaters; electric space heating apparatus and soil heating apparatus; electrothermic hairdressing apparatus (for example, hair dryers, hair curlers, curling tong heaters) and hand dryers; electric flatirons; other electrothermic appliances of a kind used for domestic purposes; electric heating resistors, other than those of heading 8545; parts thereof (con.):

\* \* \*

**8516.80** Electric heating resistors:

\* \* \*

**8516.80.80** Other .....Free

After its protest was denied, Graphite Sales filed a timely summons with the Court disputing the classification of the subject goods. All liquidated duties, charges and exactions for the subject entries have been paid prior to the commencement of this action. See Pl.’s Fcts. at 1.

**LEGAL STANDARD**

Pursuant to USCIT Rule 56, summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In classification cases, summary judgment is appropriate when “there is no genuine dispute as to the underlying

factual issue of exactly what the merchandise is.” *Ero Indus., Inc. v. United States*, 24 CIT 1175, 1179, 118 F. Supp. 2d 1356, 1359 (2000). The fact that both parties have moved for summary judgment “does not mean that the court must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not proper if disputes remain as to material facts.” *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987) (citation omitted).

Here, the parties have stipulated that the subject goods are “electric heating resistors”. Therefore, the only remaining question is the proper scope of the relevant classification provisions of the HTSUS, which is a question of law. Accordingly, a grant of summary judgment for either side, based on the pleadings and supporting documents, is appropriate.

The Court reviews classification cases *de novo*, pursuant to 28 U.S.C. § 2640(a). It is ultimately the Court’s duty to determine the correct classification. See *Jarvis Clark Co. v. United States*, 733 F.2d 873, 876 (Fed. Cir. 1984). In order to do so, the Court applies a two-step analysis whereby it (1) ascertains the proper meaning of the specific terms in the tariff provisions; and then (2) determines whether the merchandise comes within the description of such terms as construed. See *Global Sourcing Group v. United States*, 33 CIT \_\_, \_\_, 611 F. Supp. 2d 1367, 1371 (2009); *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999). The first step of the analysis is a question of law and the second is a question of fact. See *Pillowtex Corp.*, 171 F.3d at 1373.

“It is a general rule of statutory construction that where Congress has clearly stated its intent in the language of a statute, a court should not inquire further into the meaning of the statute.” *Id.* “Absent contrary legislative intent, HTSUS terms are construed according to their common and commercial meanings, which are presumed to be the same.” *Phototenetics, Inc. v. United States*, 33 CIT \_\_, \_\_, 659 F. Supp. 2d 1317, 1322 (2009) (quoting *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)). The Court may also rely on its “own understanding of the terms used” and “consult lexicographic and scientific authorities, dictionaries, and other reliable information sources.” *Phototenetics*, 33 CIT at \_\_, 659 F. Supp. 2d at 1322 (quoting *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1337–38 (Fed. Cir. 1999)).

## ANALYSIS

A classification analysis utilizes the General Rules of Interpretation (“GRI”) and commences with GRI 1. *Len-Ron Manufacturing Co., Inc. v. United States*, 334 F. 3d 1304, 1308 (Fed. Cir. 2003). GRI 1 provides that classification shall be “according to the terms of the headings and any relative section or chapter notes . . . .” Gen. R. Interp. 1, HTSUS. As such, the terms of the headings and any relative section or chapter notes are paramount. Accordingly, this classification analysis necessarily begins by examining the separate language of the headings of HTSUS 8516, and HTSUS 9613 to determine whether the subject goods are prima facie classified under either or both.

Turning first to HTSUS 8516, the Court concludes that the goods are prima facie classifiable thereunder because HTSUS 8516 specifically includes “electric heating resistors” and the parties stipulated, “[t]he goods at issue in this case are electric heating resistors.” *See*, Jt. Stmt. at 1.<sup>3</sup> Similarly, the goods also appear to be prima facie classifiable under HTSUS 9613 because the Government has presented evidence that the subject goods are lighters, and the heading includes “other lighters, whether or not mechanical or electrical”. Additionally, the accompanying Explanatory Notes (“EN”) therein make clear that some electric lighters may contain electric resistors. Explanatory Notes, Section XX, Chapter 96.13. As such, under GRI 1, the subject goods are prima facie classifiable under both HTSUS provisions.

Under GRI 3(a), when a product is prima facie classifiable under two or more headings, “[t]he heading which provides the most specific description shall be preferred to headings providing a more general description.” Gen. R. Interp. 3(a), HTSUS. “Under this so-called rule of relative specificity, we look to the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty.” *Orlando Foods Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998). The rule of specificity refers to the specificity in the headings and not subheadings. *See Archer Daniels Midland Co. v. United States*, 561 F.3d 1308, 1317 (Fed. Cir. 2009); *see also*, *Orlando Foods*, 140 F.3d at 1440 (“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.”). As such, the more appropriate classification for

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<sup>3</sup> The only language limiting the provision is the exclusion of Heading 8545 which provides for electric heating resistors made of carbon. This exclusion is inapplicable on these facts because the subject goods are not made of carbon.

the subject goods will be the provision which is more specific. *See Id.* at 1441.

HTSUS 8516 expressly covers “electric heating resistors.” Conversely, HTSUS 9613 covers “other lighters whether or not mechanical or electrical.” There is no reference to an electric heating resistor nor to a hot surface ignitor under HTSUS 9613. Of the two competing headings, HTSUS 8516 is more specific than HTSUS 9613 because HTSUS 8516 specifically covers “electric heating resistors,” which both parties stipulate the goods “are” and HTSUS 9613 refers simply to “other lighters” a general term which may include the subject goods under some circumstances.

Moreover, both HTSUS 8516 and HTSUS 9613 are an *eo nomine* provisions, i.e., a tariff provision that identifies an item by name. *See Global Sourcing Group*, 33 CIT at \_\_ n.12, 611 F. Supp. 2d at 1374 n.12. An *eo nomine* tariff classification that names articles without terms of limitation is deemed to include all forms of the article, absent evidence of contrary legislative intent. *See Chevron Chemical Co. v. United States*, 23 CIT 500, 505, 59 F. Supp. 2d 1361, 1367 (1999). Here, there are two *eo nomine* provisions subject to the rule of specificity. Clearly, the *eo nomine* provision of HTSUS 8516 which contains the actual term “electric heating resistor” is more specific to the subject goods than the *eo nomine* provision of HTSUS 9613, which refers only to “other lighters whether or not mechanical or electrical”.

Also, EN 85.16 additionally provides that “all electric heating resistors are classified here, irrespective of the classification of the apparatus in which they are to be used.” Explanatory Notes, Volume V, Section XVI, Chapter 85.16(F) (4th Ed. 2007). This EN provides additional specificity and support confirming that not only are electric heating resistors classified under HTSUS 8516, they are classified there regardless of any subsequent goods in which they may be used. “Although the ENs are not legally binding or dispositive, they may be consulted for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions.” *Avenues In Leather, Inc. v. United States*, 423 F.3d 1326, 1334 (Fed. Cir 2005). It is appropriate to rely on this EN, especially since the text is unambiguous and there are no persuasive reasons to disregard it. *Drygel, Inc. v. United States*, 541 F.3d 1129, 1134 (Fed. Cir. 2008).

The EN of HTSUS 96.13 does not offer similar specific language. Instead, EN 96.13, provides for mechanical lighters, electrical lighters, chemical lighters and non-mechanical lighters. Moreover, not all

types of electrical lighters necessarily contain electric resistors.<sup>4</sup> Additionally, it is significant to note that to operate the subject goods, an outside electrical power source is required whereas the other lighters described in EN 96.13 are fully equipped with their own internal power source. Explanatory Notes, Section XX, Chapter 96.13. As such, HTSUS 9613 does not describe the subject goods with the same specificity as provided for in HTSUS 8516, nor does EN 96.13 contain similar language of exclusivity as described earlier in EN 85.16.

The Court's analysis is consistent with a June 4, 2007 conclusion made by CBP Import Specialist 231 contained in an Interoffice Memorandum from the Chief of the Special Products National Commodity Division to the Director of the Commercial Rulings Division Office. Specifically, the Memorandum stated:

We find that an "electric heating resistor" is a narrowly defined product consisting essentially of an electrical conductor designed to become very hot when a current is passed through it. On the other hand, we find that the phrase "cigarette lighters and other lighters, whether or not mechanical or electrical," denotes a broad range of products having many different types of construction and means of operation. Thus, we find that heading 8516 more specifically describes the instant articles, and is therefore the more appropriate classification for them. The fact that these particular goods may be specifically designed or intended to function as igniters, or lighters, in ovens or other appliances, is not relevant to this GRI 3(a) analysis.

Plt. Mot. for Sum. J., Ex. 10 at 3.

### CONCLUSION

Considering all of the foregoing, the Court agrees with Graphite Sales that the subject merchandise should be classified under HTSUS 8516 because the description "electric heating resistors" more specifically describes the subject merchandise with a greater degree of accuracy and certainty than "other lighters, whether or not mechanical or electrical". Therefore, under a GRI 3(a) analysis, HTSUS 8516 prevails over HTSUS 9613 and is the appropriate classification for the subject goods.

The GRIs are applied in numerical order. If the headings, subheadings and any relevant chapter notes resolve a classification issue, the

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<sup>4</sup> Not all electric lighters are electric resistor type lighters: "Current from the mains or a battery produces a spark, or in certain types, a glowing heat in an electric resistor." Explanatory Notes, Volume V, Section XX, Chapter 96.13 (4th Ed. 2007).

matter stops there. *North American Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001). “The court applies the GRIs in numerical order and once a particular rule provides proper classification, the court may not consider any subsequent GRI.” *Lemans Corp. v. United States*, 34 CIT \_\_, \_\_, 675 F. Supp. 2d 1374, 1379 (2010), *appeal docketed*, No. 10–1295 (Fed. Cir. April 9, 2010). This matter has been decided at the GRI 3(a) level of analysis. Accordingly, the parties’ contentions which sought to extend beyond the GRI 3(a) level need not be addressed. *See Mita Copy Star Am. v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998).

For the foregoing reasons, Graphite Sales’ Motion for Summary Judgment is granted and the Government’s Cross Motion for Summary Judgment is denied. The merchandise at issue is properly classified under HTSUS 8516.80.80. Judgment will be entered accordingly.

Dated: May 4, 2011

New York, New York

*/s/ Nicholas Tsoucalas*  
NICHOLAS TSOUCALAS  
SENIOR JUDGE

