

Slip Op. 12-126

UNITED STATES COURT OF INTERNATIONAL TRADE

PRP TRADING CORP.,

Plaintiff,

v.

UNITED STATES,

Defendant.

Before: Gregory W. Carman, Judge

Court No. 12-00103

[Court lacks jurisdiction; case will be dismissed absent request for transfer.]

Peter S. Herrick of Miami, Florida, for plaintiff.

Justin R. Miller, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Barbara S. Williams*, Attorney-in-Charge. Of counsel on the brief was *Yelena Slepak*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

October 2, 2012

OPINION & ORDER

CARMAN, JUDGE: Before the Court is Defendant United States' ("Defendant" or "Customs") motion to dismiss under USCIT Rule 12(b)(1) for lack of subject matter jurisdiction and under USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. Plaintiff PRP Trading Corporation ("Plaintiff" or "PRP Trading") brought this case, pursuant to 28 U.S.C. § 1581(a) (2006), challenging the allegedly

improper exclusion of five entries of aluminum extrusions from Malaysia into the United States. Defendant asserted that the action is subject to dismissal because the case involves seized goods and subject matter jurisdiction lies in a federal district court.

For the reasons set forth below, the Court finds that this is a seizure case and grants Defendant's motion to dismiss for lack of subject matter jurisdiction. Absent a request demonstrating why the interest of justice requires transfer of this case to another judicial forum by October 9, 2012, the case shall be dismissed by the Clerk of the Court on October 10, 2012.

FACTUAL BACKGROUND

At issue is the seizure of five entries of aluminum extrusions claimed to be imported from Malaysia into the port of San Juan, Puerto Rico, in December 2011 and January 2012. Compl. ¶¶ 1, 8, 13, 18, 23, 28. Upon arrival at the port, Customs detained the merchandise on suspicion that the country of origin marking of the merchandise was false. Def.'s Mem. in Supp. of Its Mot. to Dismiss ("Def.'s Mot.") at 2. Customs issued notices of detention to PRP Trading. *Id.*, Ex. 1. Plaintiff presented the merchandise to Customs for examination, and thus started the thirty day clock for Customs to decide upon the admissibility of the merchandise. Def.'s Reply Mem. in Supp. of Its Mot. to Dismiss ("Def.'s Reply") at 2. After examination, Customs decided to seize all the merchandise. Def.'s Mot. at 5. On February 7, 2012, Customs seized all

five entries, and on March 23, 2012, issued notices of seizure to PRP Trading. *Id.*, Ex. 2.

Because the merchandise was seized, Defendant asserted that jurisdiction lies in a federal district court pursuant to 28 U.S.C. § 1356 (2006).

Plaintiff countered that this Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1581(a) because the entries at issue were deemed excluded or should have been deemed excluded. Pl.'s Mem. in Supp. of Its Opp'n to Def.'s Mot. to Dismiss for Lack of Subject Matter Juris. or in the Alternative for Failure to State A Claim ("Pl.'s Opp'n") at 3-4, 6. Plaintiff focused its argument on the deemed exclusion part of the process. If Customs does not actively issue an admissibility decision within thirty days of the importer's presentation of the merchandise, then "Customs' inaction is treated as a decision to exclude the merchandise for purposes of filing an administrative protest under 19 U.S.C. § 1514(a)(4)," which is referred to as a "deemed exclusion." Def.'s Reply at 2 (citing 19 U.S.C. § 1499(c)(5)(A)(2006)¹). Two of Plaintiff's five entries were deemed excluded—D05-0125496-1 and D05-0125498-7—because Customs did not act upon them within the requisite thirty days from the date the merchandise was presented for examination. Pl.'s Opp'n at 4-5. Plaintiff alleged that it was prejudiced in claiming jurisdiction for the remaining three entries—D05-012550-5,

¹Under 19 U.S.C. § 1499(c)(5)(A), when Customs fails to make a final determination with respect to the admissibility of detained merchandise within thirty days after the merchandise has been presented for Customs examination, it is tantamount to a decision of inadmissibility and referred to as "deemed exclusion."

D05-0125451-6, D05-0125723-8—for which deemed exclusion should have occurred but for Customs' delay in examining the merchandise. *Id.* at 6. Therefore, relying on the legal construct of deemed exclusion, Plaintiff argued that the Court has exclusive jurisdiction under 28 U.S.C. § 1581(a), which confers “exclusive jurisdiction of any civil action commenced to contest the denial of a protest,” for all five of its entries. *Id.*

Defendant conceded that two of the entries—D05-0125496-1 and D05-0125498-7—became deemed excluded. Def.'s Reply at 4. Defendant explained that the other three entries—D05-012550-5, D05-0125451-6, D05-0125723-8—were seized within thirty days, which means that Commerce made an active decision about admissibility, and thus these entries were not deemed excluded. “Because no deemed exclusion occurred, there is no protestable event, and there is no basis for § 1581(a) jurisdiction.” Def.'s Reply at 2. Defendant elucidated, however, that deemed exclusion is not the decisive factor in this case; seizure is the decisive factor. Deemed exclusion does not affect or preclude dismissal of the instant case “[b]ecause Customs seized the merchandise prior to the commencement of the Court action.” Def.'s Reply at 4. Defendant distinguished these facts—where seizure occurred on February 7, 2012, before commencement of this action on April 12, 2012—from the case on which Plaintiff relies to claim jurisdiction—where seizure occurred after commencement of that action— noting “[t]his timing forms the critical distinction.” Def.'s Reply at 7; *see CBB Group, Inc. v.*

United States, 35 CIT ___, 783 F. Supp. 2d 1248 (2011) (holding that the court has subject matter jurisdiction to adjudicate importer's protest of a deemed exclusion of merchandise where seizure occurred after the commencement of an action) (emphasis added). Defendant moves for dismissal of this action. Def.'s Mot. at 8-12.

DISCUSSION

While this Court has exclusive jurisdiction of any civil action commenced to contest the denial of a protest pursuant to 28 U.S.C. § 1581(a), this is a court of limited jurisdiction. The Court considered Plaintiff's argument regarding deemed exclusion. However, this is a seizure case at its heart. Upon review of the relevant statutes, the Court agrees with Defendant that the fact of seizure trumps the fact of deemed exclusion. Further, the timing of the seizure, before commencement of Plaintiff's action, makes the jurisdictional analysis of *CBB Group* inapposite to this case. Because the merchandise was seized, the Court looks at the jurisdictional statute for seizure found under 28 U.S.C. § 1356, which provides that

[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

This statute cross references 28 U.S.C. § 1582, which provides that

[t]he Court of International Trade shall have exclusive jurisdiction of any civil action which arises of out of an import action and which is commenced by the United States—

(1) to recover a civil penalty under section 592, 593(A), 641(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930;

(2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or

(3) to recover customs duties.

For this court's exclusive jurisdiction to attach pursuant to 28 U.S.C. § 1582, the case must be brought by the United States, which does not apply to the instant case.

Accordingly, Plaintiff must obtain relief by commencing an action in the district court pursuant to 28 U.S.C. § 1356. The Court holds that it lacks subject matter jurisdiction to hear this case.

Upon deciding that the Court lacks jurisdiction, the final question is what the Court should do with the case. The possibilities are to grant Defendant's motion and dismiss the case, or to transfer the case to district court. The Court has a statutory duty to transfer a case to cure a want of jurisdiction, if it is in the interest of justice:

[w]henever a civil action is filed in a court . . . , including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed.

28 U.S.C. § 1631. The Court notes that Plaintiff has not requested a transfer in its papers. To provide full opportunity to be heard on this issue, either party may file, by

October 9, 2012, a letter demonstrating if the interest of justice requires transfer of this case to another judicial forum. Absent such a request, the case will be dismissed for lack of subject matter jurisdiction by the Clerk of the Court on October 10, 2012.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the Clerk of the Court shall dismiss this case on October 10, 2012, unless a party shows by letter filed with the Court by October 9, 2012 that the interest of justice requires transfer to another forum.

/s/ Gregory W. Carman
Gregory W. Carman, Judge

Dated: October 2, 2012
New York, NY