

rate of duty of 7.9% ad valorem. The importer protested that the goods should have been classified under subheading 7115.90.30 ("Other articles of precious metal . . . : Other . . . Other: Of gold, including metal clad with gold . . . 3.9%).

Upon CBP denial of the protest and liquidation of duties at the higher rate, the plaintiff filed its summons and complaint. The court's jurisdiction is predicated upon 28 U.S.C. §§ 1581(a), 2631(a).

I

Each side has filed a motion for summary judgment. The court has now perused the plethora of papers¹ each has filed in

¹ Among those docketed on behalf of the plaintiff are its Motion for Summary Judgment, Opposition to Defendant's Cross-Motion for Summary Judgment, Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment, Motion for Oral Argument on Cross-Motion for Summary Judgment, Motion for Leave to File Sur-Reply Brief, and its Motion for Leave to File Supplement to Sur-Reply Brief.

As indicated, the defendant has responded with a Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment, a Reply to Plaintiff's Opposition to Defendant's [Cross-]Motion for Summary Judgment, a Response to Motion for Oral Argument By Plaintiff, a Response to Plaintiff's Motion for Leave to File Sur-Reply Brief and to Plaintiff's Sur-Reply, and a Response to Plaintiff's Motion for Leave to Supplement Plaintiff's Sur-Reply.

Upon due deliberation, plaintiff's aforesaid motions for leave to file a sur-reply and to supplement it can be, and each hereby is, granted.

Given the content of the foregoing written submissions, plaintiff's motion for oral argument can be, and it hereby is, denied.

support thereof and come to conclude that summary judgment is indeed dispositive. That is, there is no genuine issue of material fact that requires trial within the meaning of USCIT Rule 56 and teaching of Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and their progeny. The dispute is simply a matter of law, to wit, interpretation of provisions of the HTSUS.

A

USCIT Rule 56(h)(1) states that, on any motion for summary judgment, there must be annexed a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. The convoluted statement the plaintiff has submitted herein hardly satisfies this requirement. To attempt to extract from its matrix facts that obviously are apposite:

. . . 5. The . . . merchandise . . . imported by Salem Minerals from the People's Republic of China[] is described on the Entry's commercial invoice as "gold leaf vials," and consists of a small glass vial filled with clear liquid and a small quantity of gold leaf fragments, topped with a "theme" cap featuring a small figurine, and affixed with a label. . . .

a. The imported merchandise:

- (1) is marketed and sold in the United States as a "gold vial";
- (2) measures 2½"-2¾" high and 1½" wide;

* * *

b. The constituent of the imported merchandise being the gold leaf fragments:

* * *

- (2) are derived from gold leaf;
- (3) are procured from a gold leaf manufacturer;
- (4) are very small in weight per vial . . . ;
and
- (5) are not worked or formed during production of the imported merchandise.

* * *

c. The constituent of the imported merchandise being the glass vial:

- (1) is clear glass;
- (2) is spherical in shape (approximately 1½" in diameter), with a flat base and a short threaded neck at the top;
- (3) nominally holds 15 milliliters of liquid;
and
- (4) is of a type commonly used to package nail polish.

- d. The constituent of the imported merchandise being the clear liquid:
 - (1) is an anionic solution . . .; and
 - (2) serves to magnify the appearance of the gold leaf fragments and allow them to float freely and prevent them from clumping.

- e. The constituent of the imported merchandise being the "theme" cap:
 - (1) has a cylindrical lower section designed to fit over the threaded neck of the glass vial;
 - (2) has an upper, figurine section in the shape of a theme object, varying in size from up to ½" wide and up to ¾" high;
 - (3) is cast from high-tin alloy; and
 - (4) except for the "Mt. Rushmore" theme cap, is electroplated with 18k gold.

In further detail[, . . .]the imported merchandise featured 19 different gold-plated theme caps (and the unplated Mt. Rushmore theme cap), evoking western, wildlife, San Francisco, and other themes.

* * *

- f. The constituent of the imported merchandise being the label:
 - (1) is crescent-shaped, approximately 1½" long, and made from paper with a gold-colored foil overlay (without any gold content);
 - (2) has a top printed line that refers to the gold vial's gold content; and

- (3) has a second printed line that varies depending upon the intended market for the gold vial (and, to some degree, the theme top that it bears).

6. Regarding the production process for the imported merchandise:

- a. Production of the unplated theme caps requires metalworking facilities (for casting) and appropriately skilled workers.
- b. Electroplating the theme caps requires electroplating facilities and appropriately skilled workers.
- c. Assembling the gold vials does not require specialized equipment, tools, machinery, or workers.

7. Regarding the production costs for the imported merchandise:

- a. The gold leaf fragments are the single largest cost element, constituting approximately 38% of production costs; and
- b. The theme caps (if gold-plated) also constitute approximately 38% of production costs, divided approximately evenly between: (i) the high-tin allow and its casting, and (ii) the gold plate and its electroplating.

8. Regarding the marketing and sale of the imported merchandise in the United States:

- a. The entities that purchase the imported merchandise at wholesale:
 - (1) cater to the tourist/transient trade; and
 - (2) do not include fine jewelry stores, interior decorators, or other high-end outlets.

b. The imported merchandise:

- (1) sells at retail for approximately \$6.00 per piece;
- (2) is purchased at retail:
 - (a) primarily by tourists/transients on impulse;
 - (b) as a souvenir or small gift; and
 - (c) for its visible gold content embodied by the gold leaf fragments.

In the interest of contraction of the foregoing, the court has deleted plaintiff's citations to evidence proffered in support of the individual averments, but the court has looked at it and found backing.

Defendant's Response to Plaintiff's Statement of Material Facts as to Which There is No Genuine Dispute admits paragraphs 5(a)(2), 5(c), 5(d), 5(e)(1,2,3), 5(f), 6, 7 and 8(a) and 8(b)(1), supra. It admits in part paragraphs 5, 5(a)(1) and 5(e)(4) but denies 5(b) and 8(b)(2), either for lack of sufficient information or due to plaintiff's peculiar presentment.

Defendant's Rule 56(h)(1) statement in support of its cross-motion for summary judgment, in sum and substance, is counsel's attempt to digest the transcript of his pretrial deposition examination of plaintiff's founder and president. The

court has reviewed that transcript and does not find either it or its attempted digest of sufficient moment to warrant its recitation *in haec verba* herein.

That is, the salient facts of this case are essentially as presented by the plaintiff above, and which underlie its resolution as a matter of law.

B

Plaintiff's complaint avers that CBP's denial of its protest 3307-06-100042, which underlies this case, was predicated upon earlier HQ 966983 (Oct. 24, 2004). Defendant's answer admits this averment, contending that the ruling "speaks for itself and is the best evidence of its contents." A copy has been produced that states, in controlling part:

10. For the purposes of heading 7114, the expression "articles of goldsmiths' or silversmiths' wares" includes such articles as ornaments, tableware, toilet-ware, smokers' articles and other articles of household, office or religious use.

* * *

The importer protests that heading 7114, HTSUS, does not describe the article because "goldsmith's [*sic*] wares" are those items made by a craftsman of the decorative or industrial arts. We do not take such a narrow view of the term "goldsmith's [*sic*] wares." Rather, the article consists of a semimanufactured form of gold, namely gold leaf. The gold has been worked and

fashioned into part of an ornamental souvenir. Under Chapter 71, note 10, ornaments are specifically covered in heading 7114. Since we find that heading 7114, HTSUS, describes the article at issue, it cannot be more specifically described by heading 7115, HTSUS, as an "other article of precious metal.["]

Plaintiff's Exhibit I, third page.

This analysis is thus the focus of this case, as discussed and developed by the parties' thorough memoranda of law in support of their cross-motions. In fact, Note 10, as published in HTSUS Chapter 71 (and recited by CBP in its HQ 966983 above), emphasizes via underscoring the wording "articles of goldsmiths' or silversmiths' wares". Explanatory Note ("EN") 71.14 attempts to elucidate the scope of number 10, stating that, in general, goods covered are larger than articles of jewellery within the purview of Heading 71.13 and include (A) articles of tableware, (B) toilet articles, (C) office or desk equipment, (D) smokers' requisites (other than cigarette and other lighters, smoking pipes, cigarette holders, etc.), (F) articles for religious use, and

- (E) Other articles for domestic or similar use, for example, busts, statuettes and other figures for interior decoration; jewel cases; table centre-pieces, vases, jardinières; picture frames; lamps, candelabra, candlesticks, chandeliers; mantelpiece ornaments, decorative dishes and plates, medals and medallions (other than those for personal adornment); sporting trophies; perfume burners, etc.

On its face, this explication does not encompass plaintiff's pieces à la its Exhibit A, although the Explanatory Note concludes that heading 7114

also covers unfinished or incomplete articles of goldsmiths' or silversmiths' wares and identifiable parts of goldsmiths' or silversmiths' wares, for example, silver handles for tableware, silver backs for toilet brushes, etc.

(1)

Plaintiff's memoranda press for a "common meaning" of goldsmiths' wares viz. "articles of household, office or religious use" containing gold that has been genuinely smithed or "formed into a useful shape." Volume VI, page 659, of The Oxford English Dictionary (2d ed. 1989) defines goldsmith as a "worker in gold, one who fashions gold into jewels, ornaments, articles of plate, etc." Page 795 thereof defines smith as one who works in iron or other metals, often compounded with prefixes like black-, copper-, gold-, gun-, iron-, lock-, silver-, tin-. See also Webster's Third New International Dictionary Of The English Language, Unabridged, p. 976 (3d ed. 1981):

goldsmith 1: an artisan who makes vessels, jewelry, and other articles of gold 2: a manufacturer of and dealer in articles of gold.

Id. at 2151:

smith: 1a: a worker in metals - often used in combination
<goldsmith> <ironsmith> <platinumsmith>

Id. at 2576:

ware 1a: manufactured articles, products of art or
craft . . .: articles of merchandise . . . 2: goods,
commodities, manufactures, or produce of a specific class
or kind . . .

Cf. The Random House Dictionary of the English Language,
Unabridged, p. 1608 (1st ed. 1969):

ware 1. Usually, wares. a. articles of merchandise or
manufacture; goods. . . . 2. a specialized kind or
class of merchandise or of manufactured article (usually
used in combination). . .

Plaintiff's Exhibit O contains copies of pages 864-70 from volume
12 of The Dictionary of Art (J. Turner ed. 1996) that focus on
gold, the yellow metallic element, with an atomic weight of 197.2
and a specific gravity of 19.32. It is stated therein that the

long history of goldworking has led to the evolution of
a large range of manipulative techniques. These can be
classified under three main headings: forming, cutting
and joining, and decorating.

Ibid. at 865. Plaintiff's Memorandum of Law, page 16 digests the
discussion therein of those techniques as follows:

Gold forming . . . principally include[s] casting to
produce solid objects, and hammering/rolling/drawing to
produce sheet, rod or wire. Gold sheet can be further
processed into hollowware by such techniques as blocking,
raising, and spinning.

Gold cutting . . . principally include[s] shearing, piercing, and sawing. Gold joining techniques principally include riveting (perhaps the oldest technique) and soldering (the most common modern technique).

A wide range of decorative techniques is available to the goldsmith, the majority of them adaptations of constructional techniques. These techniques include granulation (tiny gold spheres arranged and soldered onto a gold surface), filigree (fine wirework, which can be backed or open), repoussé and chasing (high-relief and low-relief designs, respectively, using hammer-and-punch or rubbing/pushing tools), engraving (using small chisels to remove metal), and carving (related to engraving but with more metal removed).

Compare United States v. Olivetti & Co., 7 U.S. Cust. App. 46, 49, T.D. 36309 (1916) ("The potter, the glassmaker, the goldsmith, the weaver, the needlewoman, the lace maker, the woodworker, the jeweler, all produce things which are both artistic and beautiful"); Reardon v. United States, 11 Cust.Ct. 233, 238 (1922) (goldsmithing is among the "dependent" fine arts "whose object is to create form that shall minister to some utility"); Tutton v. Viti, 108 U.S. 312, 313 (1883) ("The evident intent of Congress, in putting a much lower duty on statues which are 'professional productions of a statuary or of a sculptor' than on other 'manufactures of marble,' is to encourage the importation of works of art, by distinguishing between the productions of an artist and those of an artisan or mechanic"); United States v. Baumgarten &

Co., 2 U.S. Cust. App. 321, T.D. 32052 (1911) (carved marble vase, made by a sculptor as a copy of an original in the Borghese collection, artistic skill having been employed in its production, is dutiable as a "sculpture" and not as a "manufactured" article); Plaintiff's Exhibit ZB (McGraw-Hill Dictionary of Art, p. 539 (B. Myers ed. 1969) (goldsmith's work is "[t]he artistic production of objects of precious metals . . . in the form of vessels, utensils and jewelry"))).

(2)

Defendant's position is that the flakes of gold in plaintiff's goods are substantial and of paramount importance to them, such leaf is a semi-manufactured form that has been worked into ornamental souvenirs, "ornaments" are specifically covered in HTSUS heading 7114, and they are not more specifically described by heading 7115.

Congress is presumed not to have used superfluous words in a statute. Ameliotex, Inc., v. United States, 65 CCPA 22, 25, 565 F.2d 674, 677 (1977). Emphasizing that the language of the statute is "articles of goldsmiths' wares", and not simply "goldsmiths' wares", and that the "plain terms" of Note 10 and certain exemplars in the explanatory notes show that heading 7114

covers articles for display or ornamentation such as souvenirs, the defendant argues the statute could not have been intended to be limited to "utilitarian" goods "fashioned by" goldsmiths but rather "clearly" encompasses all articles "displayed in the home" that are composed wholly or partly of gold by virtue of Note 10 to Chapter 71. See Defendant's Memorandum, pp. 16-18, citing Brookside Veneers, Ltd. v. United States, 847 F.2d 786, 788-89 (Fed.Cir.) (if terms are plain, the scope of a classification provision is clear), cert. denied, 488 U.S. 943 (1988).

The defendant concedes that the electroplated gold caps are not themselves classifiable in heading 7114 due to Note 6 to Chapter 71². The defendant maintains, nonetheless, that the entirety of the imported articles (including their caps and the gold flakes) still satisfy even the lexicographic definitions of "goldsmiths' wares" propounded by the plaintiff as well as Note 10 to Chapter 71 and that the articles in their entirety are theme

² It provides:

Except where the context otherwise requires, any reference in the tariff schedule to precious metal or to any particular precious metal includes a reference to alloys treated as alloys of precious metal or of the particular metal . . . but not to metal clad with precious metal or to base metal or non-metals plated with precious metal.

"ornaments" consisting "of precious metals" that are indistinguishable from ornamental bottle stoppers or automobile hood ornaments. See Defendant's Memorandum, pp. 21-22, referencing, inter alia, Vol. 1, Funk & Wagnalls New International Dictionary of the English Language (Comp. ed. 1987), p. 543 (defining goldsmith as "A worker in gold", which "would obviously include the solid gold flakes portion of the vials and also the gold plated ornamental themed stoppers"). According to the defendant,

the undisputed record shows that the gold vials are sold as souvenirs for display on a desk, mantle or window. Thus, they are no different than the gold ornaments described by Note 10 and the Explanatory Notes for Heading 7114, precisely because they are sold as ornaments for display in the house - basically, in the same fashion as the articles specifically enumerated in Note 10 to Chapter 71 and in the Explanatory Notes.

Id. at 20 (underscoring in the original).

(3)

The plaintiff argues that there is no evidence of record to support such a characterization and that any use of the imported merchandise is immaterial because the physical characteristics alone preclude classification under heading 7114. It argues the imported gold-leaf vials exist to attract purchasers, not to decorate or embellish anything. By contrast, the plaintiff points out, in none of the exemplars of Note 10 to Chapter 71 has gold

merely been packaged or contained; all feature gold that has been formed into a useful shape beyond random pieces of gold leaf and electroplated base metal.

It is rather defendant's interpretation, the plaintiff argues, that would render parts of heading 7114 redundant. Defendant's construction of goldsmiths' wares is either "articles or goods made by a manufacturer of and dealer in articles of gold" or "goods made by a worker in gold", each of which would include both the gold leaf pieces contained in the imported merchandise and its gold-plated theme-figurine cap. But, as the plaintiff points out, the first formulation is a tautology: "articles of goldsmiths' wares" are "articles made by someone who makes and sells articles of gold", and the second formulation tends to support construing "goldsmiths' wares" as gold formed into a useful shape because, in the context of metals, "work" means more than simply "make".

II

This court cannot conclude that plaintiff's goods as an entirety landed within HTSUS heading 7114. Note 10 to Chapter 71 limits articles of goldsmiths' wares to finished goods for consumption, i.e., articles of household, office or religious use

(and, of course, goldsmiths also create gold jewelry). See, e.g., McGraw-Hill Dictionary of Art, supra. In this regard, defendant's "hairbrush with a gold handle" example is telling:

. . . The essential character of the brush is provided by the bristles, but the brush is classifiable in Heading 7114 because the gold handle is not a minor constituent of the brush.

Defendant's Memorandum, p. 12. Precisely.

A hairbrush's bristles-and-base is not a goldsmith's ware, but its gold handle is because that metal has been formed into a "useful" shape. Reference to goods "of" a given material or substance means goods consisting wholly or partly thereof. See HTSUS GRI 2(b). The gold hairbrush handle alone is classifiable in heading 7114 as an "incomplete" article wholly "of goldsmiths' wares", see EN 71.14, supra, and the gold-handled hairbrush, as an entirety, is likewise classifiable under that heading because it is an article partly of "goldsmiths' wares" that is not a minor component. Thus, contrary to defendant's implication, "articles of" in heading 7114 does not mean that the gold component of the article need not come within the common meaning of "goldsmiths' wares", rather it means that heading includes not just goldsmiths' wares per se but also articles that incorporate them as component parts, e.g., the gold-handled hairbrush.

Gold leaf itself is a semi-manufactured form of gold. It is created by "goldbeaters"³, not goldsmiths, and would find classification in HTSUS subheading 7108.13.10 eo nomine⁴. The defendant argues the gold in plaintiff's vials is actually gold flake, which is a commodity marketed for a variety of uses

³ The beating of gold into leaf developed as a distinguishable craft, with its own guild distinct from that of the goldsmiths. See Plaintiff's Exhibit P (Cullity, "The Art of the Gold Beater", Vol. 47-2 The Decorator, pp. 4-7 (1993)) and Plaintiff's Exhibit Q ("The History of Gold Beating: 5000 Years of Craftsmanship" reproduced in The Regilded Age: An Exhibition of Contemporary Gilded Art and Historic Gilded Objects, pp. 9-12 (1991)).

And "goldsmiths' wares" does not encompass the gold leaf produced by goldbeaters.

⁴ The defendant asserts that such gold would not be so classified because superior subheading 7108.13 limits gold leaf to "semi-manufactured forms". HTSUS Chapter 71, Additional U.S. Note 1(b), allows classification thereunder only for gold leaf in "sheets", and it is clear that the gold-leaf fragments contained in plaintiff's merchandise are not sheets. Defendant's Memorandum, p. 24.

While the Notes and Additional U.S. Notes to Chapter 71 do not define "sheets" of precious metals for purposes of that chapter, the HTSUS chapters for the principal non-ferrous base metals and articles thereof uniformly define "sheets" to include "[f]lat-surfaced products . . . coiled or not, of solid rectangular (other than square) cross section . . . of a uniform thickness, which are: . . . of a shape other than rectangular or square, or any size, provided that they do not assume the character of articles or products of other headings". See Ch. 74, Note 1(g) (copper); Ch. 75, Note 1(d) (nickel); Ch. 76, Note 1(d) (aluminum); Ch. 78, Note 1(d) (lead); Ch. 79, Note 1(d) (zinc); Ch. 80, Note 1(d) (tin). These definitions of "sheets" encompass irregularly-shaped metal pieces -- even small ones -- that have been rendered flat.

including sale in vials and globes as "gold flake vials" or "gold flake" globes and sale for food or beverage decoration. Be that as it may, whether the gold in the vials can be characterized as fragments, pieces, flakes, flecks, nuggets or powder, if imported on their own they would not find classification in heading 7114. Cf. NY N024842 (April 2008) (imported gold powder classifiable in HTSUS 7108.11.0000, imported gold flakes and nuggets classifiable under subheading 7108.12.5050). Moreover, as the defendant agrees, "goldsmiths' . . . wares" excludes gold-plated articles in the light of Note 6 to Chapter 71, supra footnote 2. Thus, if the goods at bar consisted solely of the gold-plated caps for the glass vials, they would be classifiable under HTSUS subheading 8309.90.00 ("Stoppers, caps and lids (including . . . screw caps . . .) . . . of base metal: . . . Other").

Plaintiff's goods herein lack any constituent component that a goldsmith would make and cannot be concluded to be "more than" the sum of their constituent parts. See, e.g., Montgomery Ward & Co. v. United States, 73 Cust.Ct. 187, 189 (1974); F.B. Vandergrift & Co. v. United States, 43 Cust.Ct. 22, 25 (1959). Taken as a whole, those "gold leaf vials" do not reach to the level of the work, or the ware, of a goldsmith within the purview of HTSUS heading 7114. The gold floating within the vials has not

been "worked" by a goldsmith beyond its obvious, simple, beaten state (and regardless of "tweezing" and "blooming" within the anionic solution after immersion therein and also of defendant's arguments on lack of proof on complete production of the gold leaf pieces and/or whether they are "worked" upon insertion as well as whether the gold leaf pieces can be considered "waste or scrap").

The finished product results from simple assembly that ends up short of any goldsmithing. It is but a *tchotchke*, not something like creative exemplars of Explanatory Note 71.14.

III

In view of the foregoing, the court concludes that plaintiff's merchandise is properly classifiable under HTSUS subheading 7115.90.30 (2005). Judgment will enter accordingly.

So ordered.

Decided: New York, New York
June 26, 2012

/s/ Thomas J. Aquilino, Jr.
Senior Judge