

UNITED STATES COURT OF INTERNATIONAL TRADE

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 TAK FAT TRADING CO., MEI WEI FOODS :
 INDUSTRY CO., LTD., LEUNG MI INTERNA- :
 TIONAL, TAK YUEN CORP. and GENEX INTER- :
 NATIONAL CORP., :
 :
 Plaintiffs, :
 :
 v. :
 :
 UNITED STATES, Court No. 00-07-00360 :
 :
 Defendant, :
 :
 -and- :
 :
 COALITION FOR FAIR PRESERVED MUSHROOM :
 TRADE, :
 :
 Intervenor-Defendant. :
 :
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Opinion

[Plaintiffs' motion for judgment on the agency record, vacating antidumping-duty-order scope determination, granted.]

Decided: October 17, 2003

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (Max F. Schutzman, Erik D. Smithweiss and Mark E. Pardo) for the plaintiffs.

Peter D. Keisler, Assistant Attorney General; David M. Cohen, Director, and Velta A. Melnbrencis, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (John F. Koeppen), of counsel, for the defendant.

Collier Shannon Scott, PLLC (Michael J. Coursey and Adam H. Gordon) for the intervenor-defendant.

AQUILINO, Judge: Before the court is plaintiffs' USCIT Rule 56.2 motion for judgment on the administrative record wherein

they seek vacation of the determination¹ by the International Trade Administration, U.S. Department of Commerce ("ITA") that their product is within the scope of the Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Preserved Mushrooms From the People's Republic of China, 64 Fed.Reg. 8,308 (Feb. 19, 1999).

I

This antidumping-duty order was precipitated by petition(s) filed by domestic U.S. mushroom producers requesting investigation of certain preserved mushrooms imported from Chile, China, India and Indonesia. The petitioners sought to exclude from the investigation "'marinated', 'acidified' or 'pickled' mushrooms, which are packed with solutions such as oil, vinegar or acetic acid (HTS heading 2001.90.39)." Plaintiffs' Appendix, tab 1, p. 13. In a letter supplementing the petition(s), they stated that marinated, acidified and pickled mushrooms are all "prepared or preserved by means of vinegar or acetic acid" and are therefore "covered under HTS heading 2001.90.39". Plaintiffs' Appendix, tab 2, p. 4. The petition also contained a footnote stating that its "scope . . . comports with the Food and Drug Administration's ('FDA') standards

¹ This determination has not been published in the Federal Register but is presented in Appendix to Plaintiff's Brief in Support of Their Rule 56.2 Motion [hereinafter referred to as "Plaintiffs' Appendix"], tab 13.

Background of this case is set forth in Tak Fat Trading Co. v. United States, 24 CIT 1376 (2000), and Tak Fat Trading Co. v. United States, 26 CIT ____, 185 F.Supp.2d 1358 (2002).

of identity for canned mushrooms. 21 C.F.R. §155.201." Plaintiffs' Appendix, tab 1, p. 12.

A

Despite those particular references to the Harmonized Tariff Schedule of the United States ("HTSUS") and the FDA's standards of identity, neither the ITA's preliminary nor its amended final determination of sales at less than fair value includes them. Rather, the latter is stated to encompass

certain preserved mushrooms whether imported whole, sliced, diced, or as stems and pieces. The preserved mushrooms covered under this order are the species *Agaricus bisporus* and *Agaricus bitorquis*. "Preserved mushrooms" . . . have been prepared or preserved by cleaning, blanching, and sometimes slicing or cutting. These mushrooms are then packed and heated in containers including but not limited to cans or glass jars in a suitable liquid medium, including but not limited to water, brine, butter or butter sauce. Preserved mushrooms may be imported whole, sliced, diced, or as stems and pieces. Included within the scope of the investigation are "brined" mushrooms, which are presalted and packed in a heavy salt solution to provisionally preserve them for further processing.

Excluded from the scope of this investigation are the following: (1) all other species of mushroom, including straw mushrooms; (2) all fresh and chilled mushrooms, including "refrigerated" or "quick blanched mushrooms"; (3) dried mushrooms; (4) frozen mushrooms; and (5) "marinated," "acidified" or "pickled" mushrooms, which are prepared or preserved by means of vinegar or acetic acid, but may contain oil or other additives.

The merchandise subject to this investigation is classifiable under subheadings 2003.10.0027, 2003.10.0031, 2003.10.0037, 2003.10.0043, 2003.10.0047, 2003.10.0053, and 0711.90.4000 of . . . HTS[US]. Although the[se] subheadings are provided for convenience and Customs purposes, the Department's written description of the merchandise under the order is dispositive.

B

In its preliminary determination of material injury, the International Trade Commission ("ITC") concluded that, although there are some physical and manufacturing-process similarities between marinated, acidified or pickled mushrooms and the preserved mushrooms under investigation,

on the whole there is little interchangeability, with consumers perceiving the two products differently. There are also differences in physical characteristics, particularly taste, between the two products. Consequently, for purposes of these preliminary determinations we find that marinated, acidified and pickled mushrooms are not within the like product subject to these investigations.

Certain Preserved Mushrooms From Chile, China, India, and Indonesia, ITC Pub. No. 3086, p. 10 (Feb. 1998). Its final determination in this matter adopted, for like-product², the reasoning of Certain Preserved Mushrooms From Chile, ITC Pub. No. 3144, p. 6 (Nov. 1998), which stated that,

[a]lthough preserved mushrooms and marinated mushrooms share some common channels of distribution and production facilities, they have different tastes that limit marinated mushrooms' end uses, very limited interchangeability, are perceived to be different products by both producers and customers, and sell in different price ranges. We believe that the distinctions between preserved and marinated mushrooms establish a "clear dividing line." We consequently do not include marinated mushrooms in the domestic like product.

² Certain Preserved Mushrooms From China, India, and Indonesia, ITC Pub. No. 3159, p. 5 (Feb. 1999).

C

The plaintiffs herein are a producer, an exporter, and importers of

marinated or acidified mushrooms of the species *agaricus bisporus* that are . . . washed, blanched in water . . . and then placed in . . . cans [that] are then filled with a marinade consisting of . . . water[,], salt [], sugar [], vinegar [], acetic acid [], yeast extract [], citric acid [], MSG [], vitamin C [], flavorings [], and spices []. . . . The finished equilibrium pH of the mushrooms is controlled at or below 4.6.⁴

Defendant's Appendix, Exhibit 1, p. 2 (footnotes 2 and 3 omitted; brackets in original). The footnote 4 to the foregoing product description states:

If an acidified food is found to have a pH above 4.6, it must be subjected to further thermal processing as a low acid food for safety reasons. 21 C.F.R. §114.-89. The manufacturer of the subject product both acidifies and thermally processes its mushrooms.

Id. The plaintiffs requested the scope determination by the ITA, pointing out that the petition(s) "excluded marinated and acidified mushrooms not meeting the [FDA's] standard for canned mushrooms"³, which does not provide for vinegar or acetic acid.⁴ Whereupon

³ Defendant's Appendix, Exhibit 1, p. 2.

⁴ See 21 C.F.R. §155.201(a)(3) (2000). Canned mushrooms are defined as

food properly prepared from the caps and stems of succulent mushrooms conforming to the characteristics of the species *Agaricus (Psalliota) bisporus* or *A. bitorquis*, . . . ; and may contain one or more safe and suitable optional ingredients specified in paragraph (a)(3) of this section. The food is sealed in a container and, before or after sealing, is so processed by heat as to prevent spoilage.

(footnote continued)

their position was and is, "[b]ecause the subject marinated mushrooms . . . do not meet that FDA standard, they are outside the scope of the antidumping duty order." Id.

After a preliminary ruling and considering comments thereon, the ITA issued its final determination that

the "marinated or acidified" mushrooms produced, exported or imported by [the plaintiffs] are within the scope of the antidumping duty order on [certain preserved mushrooms] from the PRC based on their acetic acid content level.

Plaintiffs' Appendix, tab 13, second page. It is based on the petitioners' use of HTSUS subheading 2001.90.39 to define the products they intended to exclude from this matter and the agency's

21 C.F.R. §155.201(a)(1) (2000). Those optional ingredients are:

- (i) Salt.
- (ii) Monosodium glutamate.
- (iii) Disodium inosinate complying with the provisions of Sec. 172.535 of this chapter.
- (iv) Disodium guanylate complying with the provisions of Sec. 172.530 of this chapter.
- (v) Hydrolyzed vegetable protein.
- (vi) Autolyzed yeast extract.
- (vii) Ascorbic acid (vitamin C) in a quantity not to exceed 132 milligrams for each 100 grams (37.5 milligrams for each ounce) of drained weight of mushrooms.
- (viii) Organic acids (except no vinegar is permitted), only where the inside metal of the container is fully enamel-lined and in glass containers with fully enamel-lined caps. Ascorbic acid as provided for in paragraph (a)(3)(vii) of this section.
- (ix) Calcium disodium ethylenediaminetetraacetate (CaNa₂ EDTA) in a quantity not to exceed 200 parts per million for use to promote color retention.

Ibid.

"appropriat[ion of] the phrase 'prepared or preserved with vinegar or acetic acid' directly from the HTS heading". Id., seventh page. The ITA read that phrase as having been interpreted by Customs to require a minimum 0.5 percent acetic-acid level. See id., ninth page. As plaintiffs' product, admittedly, does not contain that much, the agency determined it to be within the ambit of its anti-dumping-duty order. See id., second and fifth pages.

II

Jurisdiction over this case is pursuant to 28 U.S.C. §§ 1581(c) and 2631(c). The standard of review is whether the determination is unsupported by substantial evidence on the record or otherwise not in accordance with law. See 19 U.S.C. §§ 1516a(a)(2)(B)(vi), 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). It must also be noted that, on questions of scope, the ITA has "broad authority to interpret its own antidumping duty orders". INA Walzlager Schaeffler KG v. United States, 108 F.3d 301, 307 (Fed.Cir. 1997). Such determinations are made pursuant to 19 C.F.R. §351.225, which states that, in

considering whether a particular product is included within the scope of an order . . . , the Secretary will take into account the following:

(1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.

(2) When the above criteria are not dispositive, the Secretary will further consider:

- (i) The physical characteristics of the product;
- (ii) The expectations of the ultimate purchasers;
- (iii) The ultimate use of the product;
- (iv) The channels of trade in which the product is sold; and
- (v) The manner in which the product is advertised and displayed.

19 C.F.R. §351.225(k) (2000).

A

None of the parties suggests resort to these enumerated criteria.⁵ Rather, each side argues for a different interpretation of the petition language and the agency determination(s). See, e.g., Plaintiffs' Brief, pp. 12-13; Defendant's Memorandum, p. 31; Response Brief of Defendant-Intervenor, pp. 15-16.

The plaintiffs reiterate that the "petitioners intended the dumping order to cover only products meeting the 'standard of identity' for 'canned mushrooms'".⁶ They further argue that nei-

⁵ Indeed, as noted by the ITA in its preliminary ruling, the FDA standard of identity

is not controlling of the scope of the order . . . , which contains intentionally broad text so as to include all preserved mushrooms, with some very specific exceptions.

Plaintiffs' Appendix, tab 12, numbered pages 8-9.

⁶ Plaintiffs' Brief, pp. 16-17. However, as they explained in a letter supplementing the petition, the petitioners were

concerned about circumvention by the placing of preserved mushrooms in containers other than cans, such as jars or tubs, and therefore . . . have defined the scope as "certain preserved mushrooms."

Plaintiffs' Appendix, tab 2, numbered page 5.

ther the plain language of the order nor the record support use of the 0.5 percent acetic-acid-level test to determine whether their product is within the scope of the order.

The defendant maintains that the order reflected the petitioners' intent to exclude from the scope only such mushrooms that are "prepared and preserved by means of vinegar or acetic acid," even though it omitted the reference to HTS subheading 2001.90.39.

Defendant's Memorandum, pp. 30-31. The intervenor-defendant also contends that the exclusionary language should be interpreted in conformity with the HTS subheading. See Response Brief of Defendant-Intervenor, pp. 15-16.

B

The merchandise specifically excluded from this matter was described in the ITA's notices of initiation of investigation and of the preliminary, final, and amended final determinations with identical language, to wit:

"marinated," "acidified" or "pickled" mushrooms, which are prepared or preserved by means of vinegar or acetic acid, but may contain oil or other additives.⁷

The ITC also excluded from its preliminary and final determinations "marinated, acidified and pickled mushrooms", stating that they

⁷ 63 Fed.Reg. at 5,361; at 41,795; at 72,256; 64 Fed.Reg. at 8,309. The language in the petition differed somewhat from that of the ITA, excluding

"marinated", "acidified" or "pickled" mushrooms, which are packed with solutions such as oil, vinegar or acetic acid (HTS heading 2001.90.39).

"defined the domestic like product to encompass only the types of preserved mushrooms within Commerce's scope definition." ITC Pub. No. 3086, pp. 5, 10; ITC Pub. No. 3159, p. 5.

On its face, this administrative exclusion is clear, and the court so finds. After review of the agency record developed in connection herewith, the court also concludes that plaintiffs' product is just as clearly within the ambit of the exclusion. The record does not support a description of that product other than as posited by the plaintiffs, supra, to wit, mushrooms marinated or acidified, packed in cans with water, salt, sugar, vinegar, acetic acid, yeast extract, citric acid, MSG, vitamin C, flavorings, and spices, the finished equilibrium pH of which is controlled at or below 4.6.

Indeed, the defendant does not argue otherwise. Rather, it explains in the exercise of its broad discretion that the

petitioners clearly referred to the HTS number in the petition, and cited to specific descriptive language of the HTS heading in the Petition Supplement when clarifying for the Department the scope of the excluded merchandise. Although we omitted from the exclusion clause of the scope language the HTS headings provided by the petitioners, we appropriated the phrase "prepared or preserved with vinegar or acetic acid" directly from the HTS heading for products classified under HTS heading 2001. . . .

Regarding Tak Fat's arguments with respect to the FDA standards for acetic acid content, we reiterate that we have considered all of the evidence on the record, and we continue to find more compelling the evidence that the petitioners relied upon the language which was taken from the HTS subheading and which had an established meaning to describe the excluded merchandise.

Plaintiffs' Appendix, tab 13, numbered pages 6-7.

This being the case, it is necessary to consider that part of the HTSUS referred to by the agency, namely:

2001 Vegetables, fruit, nuts and other edible parts
 of plants, prepared or preserved by vinegar or
 acetic acid:

 Other:

 Other:

 Vegetables:

2001.90.39

Other[.]

The "established meaning" of this subheading to which they also refer and rely emanates from a 1983 ruling letter (069121) of the U.S. Customs Service which this court has examined. It reflects thorough reasoning, but that analysis necessarily focused on interpretation of item 141.77 of the Tariff Schedules of the United States ("TSUS") (1980), the heading for which encompassed "Vegetables (whether or not reduced in size), packed in salt, in brine, pickled, or otherwise prepared or preserved". And note 1(b) to that heading provided that

 the term "pickled" means prepared or preserved in vinegar or acetic acid whether or not packed in oil or containing sugar, salt, or spices.

Underscoring in original. Hence, the issue for consideration and resolution by Customs was refinement of that term, not the above phrase of the HTSUS "appropriated" by the ITA covering vegetables

"prepared or preserved by vinegar or acetic acid". Resolution of that issue led to the following holding by the Service:

Based on trade, technical, and common understanding of the term "pickled," the obvious intent of Congress in its use thereof was to require more than a mere minimal amount of acetic acid in order to result in a "pickled" product for tariff purposes. The requirement of Customs that such a product contain a minimum of 0.5 percent acetic acid (subject to allowable tolerances) in the equilibrated product comports with these bases of [w]ell-settled principles of Customs law interpreting the scope of various terms

HQ 069121, p. 10, para. 1. See id., p. 4.

This quantitative holding may still be of some moment for *pickled* products⁸, but Congress has left that organoleptic term out of the HTSUS relevant to this case with no indication that the 1983 approach to enforcement of the TSUS continue now.

Here, there is no claim or showing on the record that plaintiffs' product is pickled in accordance with the Customs concept of acidity, but this void cannot be dispositive since the ITA's language of exclusion is in the disjunctive, *viz.*, marinated, acidified, **or** pickled mushrooms. On the other hand, the record does support the fact that plaintiffs' product is both marinated and acidified.

Finally, the HTSUS subheadings referred to by the agency in its amended final determination of sales at less than fair

⁸ Cf. HQ 957041 (Nov. 10, 1998); HQ 959313 (Feb. 20, 1997); HQ 956850 (March 22, 1996); HQ 952738 (Jan. 27, 1993); HQ 085838 (Dec. 21, 1989).

value, supra, 64 Fed.Reg. at 8,309, as genuinely encompassing the merchandise subject thereto are headed by the following descriptions:

2003 Mushrooms and truffles, prepared or preserved otherwise than by vinegar or acetic acid[.]

0711 Vegetables provisionally preserved (for example, by sulfur dioxide gas, in brine, in sulfur water or in other preservative solutions), but unsuitable in that state for immediate consumption[.]

The record developed does not place plaintiffs' product under either heading. There is no showing, for example, that those mushrooms are prepared or preserved "otherwise" than by vinegar or acetic acid.

III

Given the lack of substantial evidence in support of the ITA's scope determination contested herein and the inapposite standard of law exclusively relied on by the agency in connection therewith, plaintiffs' motion for judgment upon the record must be granted.

Decided: New York, New York
October 17, 2003

Judge