Decisions of the United States Court of International Trade

(Slip Op. 02–121)

SL SERVICE, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 99–03–00151

Plaintiff, SL Service, Inc. ("SL Service"), moves for summary judgment pursuant to USCIT R. 56 alleging that the undisputed material facts in this case show that, as a matter of law, the United States Customs Service ("Customs") misapplied the vessel repair statue, 19 U.S.C. § 1466 (1994), as interpreted in *American Ship Management, LLC v. United States,* 25 CIT ____, 162 F. Supp. 2d 671 (2001), and *Texaco Marine Servs., Inc. v. United States,* 44 F.3d 1539 (Fed. Cir. 1994), by assessing vessel repair duties on SL Service's dry-docking expenses on a pro-rata basis during a period of mandatory inspections by the American Bureau of Shipping ("ABS") and the United States Coast Guard ("USCG"). Customs contends that it acted legally by apportioning the dry-docking expenses on a pro-rata basis in a fashion mimicking the methodology used by Customs for apportionment of expenses between dutiable and non-dutiable work. Since no genuine issue as to any material fact remains, and for the reasons stated below, SL Service's motion for summary judgment is granted.

Held: For the reasons stated below, and since no genuine issue as to any material fact remains, SL Service's motion for summary judgment is granted.

[SL Service's motion is granted.]

(Dated October 15, 2002)

Sonnenschein Nath & Rosenthal (Evelyn M. Suarez) and *Robert S. Zuckerman,* Vice President and General Counsel of CSX Lines, LLC, for plaintiff SL Service, Inc.

Robert D. McCallum, Jr., Assistant Attorney General; *John J. Mahon,* Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Barbara S. Williams);* of counsel: *Karen P. Binder,* Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for defendant.

Collier Shannon Scott, PLLC (Lauren R. Howard) for amicus curiae Shipbuilders Council of America, Inc.

MEMORANDUM OPINION AND ORDER

TSOUCALAS, *Senior Judge:* Plaintiff, SL Service, Inc. ("SL Service"), moves for summary judgment pursuant to USCIT R. 56 alleging that the undisputed material facts in this case show that, as a matter of law, the United States Customs Service ("Customs") misapplied the vessel repair statue, 19 U.S.C. § 1466 (1994), as interpreted in *American Ship*

Management, LLC v. United States, 25 CIT ___, 162 F. Supp. 2d 671 (2001), and *Texaco Marine Servs., Inc. v. United States,* 44 F.3d 1539 (Fed. Cir. 1994), by assessing vessel repair duties on SL Service's dry-docking expenses on a pro-rata basis during a period of mandatory inspections by the American Bureau of Shipping ("ABS") and the United States Coast Guard ("USCG"). Customs contends that it acted legally by apportioning the dry-docking expenses on a pro-rata basis in a fashion mimicking the methodology used by Customs for apportionment of expenses between dutiable and non-dutiable work. Since no genuine issue as to any material fact remains, and for the reasons stated below, SL Service's motion for summary judgment is granted.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (2000).

DISCUSSION

I. Background

On November 9, 1999, this Court granted an Order designating Consolidated Court Number 99–03–00151 a test case. Originally, this case included SL Service, Inc. and a second plaintiff, namely American Ship Management ("ASM"). ASM and SL Service filed a joint motion for summary judgment before this Court on November 9, 2000, and Customs filed a cross-motion for summary judgment on March 2, 2001. In *American Ship Management,* 25 CIT ____, 162 F. Supp. 2d 671, this Court denied both motions and ordered that the parties proceed with the litigation on the merits.

By Order of Partial Dismissal dated February 28, 2002, ASM was dismissed, with prejudice, as a party in this pending action. SL Service proceeded with court ordered discovery and provided Customs with: (a) Sea-Land Pacific Drydock Report NOV/DEC 1995—HUD—HKG ("Dry-Docking Report"); (b) Sea-Land Pacific Planning Schedule; (c) Spreadsheet prepared by Joseph Breglia; and (d) Declaration of Joseph Breglia. *See* Pl. SL Service Inc.'s Mem. Supp. Mot. Summ. J. at 2–3 ("Pl.'s Mem."); *see also* Pl.'s Mem. at Exs. A–D.

II. Undisputed Facts

This case concerns dry-docking duties imposed by Customs on the vessel Sea-Land Pacific owned by SL Service.[1] *See American Ship Management,* 25 CIT ____, 162 F. Supp. 2d 671. The Sea-Land Pacific was dry-docked at the Hongkong United Dockyards Ltd. from November 22, 1995, through December 1, 1995, in order to comply with mandatory USCG and ABS regulations requiring certain inspections and modifications. During the dry-docking, the Sea-Land Pacific underwent non-dutiable modifications as well as dutiable repairs. The Sea-Land Pacific

[1] Plaintiff properly filed a Motion to Amend Summons, changing plaintiff's name from Sea-Land Service, Inc. to SL Service, Inc., on July 27, 2000. This Court granted SL Service's motion on August 29, 2000, and considers Customs' naming of plaintiff as Sea-Land Service, Inc., instead of SL Service, Inc. in this summary judgment proceeding, a mere oversight.

was not dry-docked for a period of time in excess of that necessary for mandatory inspections and/or modifications pursuant to the guidelines set forth in *American Ship Management,* 25 CIT ____, 162 F. Supp. 2d 671.

III. Contentions of the Parties

SL Service asserts that the Dry-Docking Report and additional exhibits provided to Customs adequately show that "non-dutiable mandatory inspections and modifications occurred * * * from November 22, 1995 through December 1, 1995, and that no dry-docking occurred beyond the period [necessary for] non-dutiable mandatory inspections and/or modifications [to take place]." Pl.'s Mem. at 3; *see also* Pl.'s Statement of Material Facts Not in Issue at 2–3. SL Service contends that such documents support the argument that under the test established by *Texaco,* 44 F.3d 1539, and articulated in *American Ship Management,* 25 CIT ____, 162 F. Supp. 2d 671, none of the maintenance expenses of dry-docking the Sea-Land Pacific are dutiable and, therefore, summary judgment is appropriate. *See* Pl.'s Mem. at 4–7.

Customs continues to maintain that "the original methodology used by Customs in this action to apportion the dry-docking costs was reasonable, proper, and in accordance with law." Def.'s Mem. Resp. Pl.'s Mot. Summ. J. at 3. Customs, however, admits "that the Sea-Land Pacific was not dry-docked for any period of time in excess of that necessary for mandatory inspections and/or modifications pursuant to the guidelines set forth in *American Ship Management*[, and that] * * * none of the maintenance expenses of dry-docking are dutiable in this action." *Id.* at 3–4. Customs further contends that the discovery produced by SL Service "would not be generally sufficient to satisfy a plaintiff's burden as set forth in *American Ship Management.* * * *"[2] *Id.* at 3 n.4.

IV. Analysis

A. American Ship Management's Application of Texaco

1. Statutory Background and the Texaco Test

Section 1466(a) of United States Code, Title 19, provides that

> [t]he equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the *expenses of repairs* made in a foreign country upon a vessel documented under the laws of the United States * * * shall * * * be liable to entry and the payment of an ad valorem duty * * * on the cost thereof in such foreign country.

19 U.S.C. § 1466(a) (emphasis added).

The case at bar involves the interpretation of the term "expenses of repairs" used in 19 U.S.C. § 1466(a). Prior to the Federal Circuit decision in *Texaco,* 44 F.3d 1539, Customs used a restrictive interpretation of the

[2] The Court is not amused by this argument, and finds that the evidence produced by SL Service, in addition to the statements provided by Customs in Defendant's Response to Plaintiff's Statement of Material Facts, clearly show that the Sea-Land Pacific was only dry-docked for the length of time necessary to perform non-dutiable mandatory inspections and/or modifications.

term. For example, Customs did not treat the dry-docking as an "expense of repairs" making dry-docking expenses non-dutiable. *See Texaco,* 44 F.3d 1539. Customs' pre-Texaco treatment was based upon the premise that dry-docking expenses were not "part of" and/or "directly involved" in a dutiable repair. *See id.*

The court in *Texaco* examined the statutory language, determined the language to be clear and unambiguous, and concluded that it is proper to

> interpret [the term] "expenses of repairs" as covering all expenses (not specifically excepted in the statute) which, but for dutiable repair work, would not have been incurred. Conversely, [the term] "expenses of repairs" does not cover expenses that would have been incurred even without the occurrence of dutiable repair work. [In sum,] the "but for" interpretation accords with what is commonly understood to be an expense of a repair.

Texaco, 44 F.3d at 1544 (citations omitted).

The court in *Texaco* also specified that

> [t]he mere drawing up of a vessel on a dry dock is not a part of her repairs, but is rather a method of making an inspection of her to determine whether any repairs are necessary. The examination might show the hull to be in perfect condition, requiring no attention of any kind.

Id. at 1546 (citing *United States v. George Hall Coal Co.,* 142 F. 1039 (2d Cir. 1906)).

In *American Ship Management,* 25 CIT at ____, 162 F. Supp. 2d at 674, this Court observed that Customs started assessing duty on the dry-docking expenses which would not have been incurred "but for" dutiable repairs even if the expenses were not "part of" and/or "directly involved" in the repair itself, in light of the *Texaco* decision.

2. Apportionment Under the Texaco Test

In *American Ship Management,* 25 CIT ____, 162 F. Supp. 2d 671, the plaintiff, SL Service, argued that any imposition of duties on dry-docking expenses on a pro-rata basis is per se illegal under the *Texaco* test. SL Service further pointed out that "the Federal Circuit has specifically ruled" that "mixed purpose dry-docking * * * do[es] not qualify as expenses of repairs." *American Ship Management,* 25 CIT at ____, 162 F. Supp. 2d at 674 (internal quotations and citation omitted). While the Court agreed with the plaintiff's reading of *Texaco* with regard to "mixed purpose" dry-docking expenses in *American Ship Management,* 25 CIT ____, 162 F. Supp. 2d 671, the Court disagreed with the plaintiff's unreasonable expansion of the *Texaco* holding.

In essence, the court in *Texaco* delineated two categories of expenses under 19 U.S.C. § 1466(a), specifically: (1) dutiable expenses that would not be undertaken "but for" the need to repair; and (2) non-dutiable expenses undertaken for a purpose either unrelated to repair or for a "mixed purpose" related to a dutiable repair as well as to a non-dutiable activity, e.g., an inspection or modification. The *Texaco* classification, however, does not make an apportionment of dry-docking expenses per

se illegal if there is a clear identification of the dutiable dry-docking expenses undertaken solely for the purpose of repair and the non-dutiable dry-docking expenses undertaken for a purpose either unrelated to repair or for a "mixed purpose." *See generally, Texaco,* 44 F.3d 1539. Therefore, the Court held that Customs correctly concluded that it could apportion dry-docking expenses under the mandate of 19 U.S.C. § 1466(a), as clarified by *Texaco,* 44 F.3d 1539.

3. Pro-Rata Apportionment Used by Customs

In *American Ship Management,* 25 CIT ____, 162 F. Supp. 2d 671, the dutiable and non-dutiable dry-docking expenses were apportioned by Customs according to the percentage corresponding to the value of dutiable repairs and non-dutiable expenses incurred by each vessel. While the general concept of apportionment of dry-docking expenses does not contradict the holding of *Texaco,* 44 F.3d 1539, the particular apportionment used by Customs was arbitrary, capricious and in violation of the classification designated by *Texaco,* 44 F.3d 1539.

Dry-docking expenses include, among other things, maintenance expenses and the cost of tugs to put the vessel into and out of dry dock.[3] *See, e.g., Dahlia Maritime Co. v. M/S Nordic Challenger,* 1993 U.S. Dist. LEXIS 10170 (E.D. La. 1993). Consequently, the cost of tugs is an inevitable expense of a mandatory inspection and, thus, is non-dutiable. *See Texaco,* 44 F.3d 1539. Similarly, all maintenance charges (along with all other charges related to the maintenance)[4] associated with the dry-docking during the period of mandatory inspection and/or modifications are non-dutiable expenses under the test posed by *Texaco* notwithstanding whether or not the vessel undergoes any repair during this period. *See id.* Therefore, only the maintenance expense of dry-docking for the period of time in excess of that necessary for a mandatory inspection and/or modifications are dutiable under the *Texaco* test. *See id.*

While, under an unlikely scenario, such calculation may create a result accidently corresponding to that reached by Customs in the given case, this possibility is irrelevant to the validity of Customs' method of calculation because the method violates, as a matter of law, the test offered by *Texaco,* 44 F.3d 1539. Accordingly, this Court, in *American Ship Management,* 25 CIT ___, 162 F. Supp. 2d 671, ordered Customs to obtain from SL Service the information necessary to make a calculation supported by logic rather than random guessing.[5]

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[3] The latter usually comprises the main expense of the dry-docking process.

[4] The term "maintenance" in the context of dry-docking usually associates with utilities and analogous services. The related charges could include, for example, the procedures and tools necessary to bring and keep the vessel in a stable position.

[5] In *American Ship Management,* 25 CIT ___, 162 F. Supp. 2d 671, Customs asserts that SL Service failed to satisfy the plaintiff's "burden" because, according to Customs, there was no pertinent information in the plaintiff's original brief. This Court presumed that Customs was referring to the term "burden of production." The term "burden of production" defines the burden on one party to introduce sufficient evidence to avoid judgment against that party as a matter of law. Specifically, the plaintiff shall go forward with the evidence on the issue, thus, shifting the burden to the defendant to produce evidence showing otherwise. *See, e.g., Environmental Defense Fund, Inc. v. EPA,* 179 U.S. App. D.C. 43, 548 F.2d 998, 1013 (D.C. Cir. 1976) (noting that the burden of production does not necessarily lay with the same party carrying the burden of persuasion). In the case at bar, SL Service and Customs now stipulate that the vessel, Sea-Land Pacific, was not dry-docked for a period longer than that necessary to perform the mandatory inspections and/or modifications required by the USCG and ABS.

B. Determination at Bar

"On a motion for summary judgment, it is the function of the court to determine whether there are any factual disputes that are material to the resolution of the action." *Phone-Mate, Inc. v. United States,* 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988) (citation omitted). In this case, the parties now stipulate to the central fact at issue, namely, that the Sea-Land Pacific was not dry-docked for a period of time longer than that necessary to perform the mandatory inspections and/or modifications pursuant to the guidelines set forth in *American Ship Management,* 25 CIT ____, 162 F. Supp. 2d 671. In accordance with the holding in *American Ship Management,* this Court finds that SL Service met its "burden of production," and therefore SL Service's motion for summary judgment is granted.

V. Conclusion

For the foregoing reasons, the Court grants SL Service's motion for summary judgment. Judgment will be entered accordingly.

ANNOUNCEMENT

Chief Judge Gregory W. Carman has announced the call of the 12th Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Wednesday, November 13, 2002 at the New York Marriott Marquis (45th Street & Broadway), 1535 Broadway, New York, New York and will commence promptly at 9:00 a.m.

The theme of the Conference is: **"The Future is Now—The Impact of Change on Practice at the Court."**

The Conference will be attended by the Judges of the United States Court of International Trade, officials from the International Trade Commission, the Customs Service, the Departments of Justice, Commerce, and Treasury; members of the Bar of the Court; and other distinguished guests.

More than 300 lawyers, the largest single gathering in the United States of attorneys interested in the field of customs and international trade law, have participated in each of the Court's prior Judicial Conferences.

All interested persons are invited to attend. The Conference program, registration forms and additional information may be obtained through the Judicial Conference page on the Court's website, **www.cit.uscourts.gov** or by contacting the Clerk's Office at 212–264–2800.

Dated: October 7, 2002.

LEO M. GORDON,
Clerk of the Court.

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Please be advised that the United States Court of International Trade has moved its Website in order to provide better service. The move will not result in any disruption in service. Please begin using our new address (URL): <www.cit.uscourts.gov> to access the Court's Website. If you previously have saved pages of the USCIT Website as a "Favorite" or a "Bookmark" with "www.uscit.gov" as part of the address (URL), you will want to resave the page. If you do not resave the page and update your links to www.cit.uscourts.gov, when the Court discontinues use of the old address <www.uscit.gov>, you will see a message indicating the new address (URL) for the main page and a statement that the site has been moved. The Court will disable the old address as of the close of business on Friday, October 11, 2002.

Dated: September 25, 2002.

LEO M. GORDON,
Clerk of the Court.