

U.S. Customs and Border Protection

19 CFR PART 111
CBP DEC. NO. 17-05

RIN 1651-AB07

MODERNIZATION OF THE CUSTOMS BROKERS EXAMINATION

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, with changes, the amendments proposed to the U.S. Customs and Border Protection (CBP) regulations concerning the customs broker's examination provisions. Specifically, this rule transitions the examination to a computer automated customs broker examination, adjusts the dates of the examination to account for the fiscal year transition period and payment schedule requirements, and increases the examination fee to cover the cost of delivering the exam.

DATES: Effective July 31, 2017.

FOR FURTHER INFORMATION CONTACT: Julia Peterson, Chief, Broker Management Branch, Office of Trade, U.S. Customs and Border Protection, (202) 863-6601, julia.peterson@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

Background

Section 641 of the Tariff Act of 1930, as amended (19 U.S.C. 1641), provides, among other things, that a person (an individual, corporation, association, or partnership) must hold a valid customs broker's license and permit in order to transact customs business on behalf of others, sets forth standards for the issuance of a broker's license and permit, and provides for disciplinary action against brokers that have

engaged in specific infractions. This section also provides that an examination may be conducted to assess an applicant's qualifications for a license.

The regulations issued under the authority of section 641 are set forth in title 19 of the Code of Federal Regulations, part 111 (19 CFR part 111). Part 111 sets forth the regulations regarding, among other things, the licensing of, and granting of permits to, persons desiring to transact customs business as customs brokers. These regulations also include the qualifications required of applicants and the procedures for applying for licenses and permits, including examination procedures and requirements.

Currently, a customs broker's examination consists of a paper test booklet and a scannable answer sheet which is administered by the Office of Personnel Management (OPM). CBP supplements OPM's resources by providing CBP officials to proctor the examination and space to conduct the examination. There is a \$200 fee to take the examination. This fee, which has not changed since 2000, currently does not cover the administrative costs of the paper-based examination as the costs of administering the examination have increased. At the same time that CBP is looking to update its fee to reflect the costs of administering the exam, OPM has informed CBP that it will no longer administer the paper-based examination and it is shifting all the examinations it administers to an electronic format.

On September 14, 2016, CBP published a document in the **Federal Register** (81 FR 63149) proposing to amend title 19 of the Code of Federal Regulations ("19 CFR") to modernize the customs broker's examination provisions. Specifically, CBP proposed amending the customs broker's examination provisions, which are contained in 19 CFR part 111, to permit automation of the examination. CBP proposed removing references to the "written" examination to accommodate the transition from the paper and pencil format to an electronic format; and proposed removing the requirement that CBP grade the examinations to permit officials at the Office of Personnel Management (OPM) or OPM contractors to grade the examinations. CBP proposed removing the reference to "Headquarters" to allow CBP offices nationwide to assist in preparing the examination. CBP also proposed moving the examination dates to the fourth Monday in April and October to allow more time between the start of the federal fiscal year and the October examination date. To cover the costs of administering the examination, plus the cost of automating the examination, CBP proposed to increase the fee. CBP proposed removing the special examination provision because it was unnecessary. Finally, to better reflect CBP's organizational structure, CBP proposed updating the information on whom to contact when an applicant either would miss an examination, or would file an appeal of examination results.

CBP proposed these changes to benefit both applicants and CBP. For applicants, automation would standardize the testing environment and equipment for all examinations, and provide earlier notification of test scores. For CBP, automation would provide for a more efficient use of CBP staff and administrative resources. The notice of proposed rulemaking requested public comments. The public comment period closed on November 14, 2016.

Discussion of Comments

Eight comments were received in response to the notice of proposed rulemaking.

Comment: Six commenters sought clarification about the transition from a paper and pencil format to computer automated examinations as described in the proposed rule. Three of them requested an additional explanation of how the removal of “written” from the description of the examination in the proposed regulations determined the examination format. One commenter suggested replacing “written” with another term, such as “multiple choice,” to describe the exact examination format in the regulations.

CBP Response: CBP disagrees that the regulations need to define a specific form of examination. CBP is removing the term “written” to describe the examination from the regulation to provide flexibility in the transition from the paper and pen format to delivering the examination via computer. For that reason, CBP is not limiting the examination format by including specific parameters, such as “multiple choice.” CBP understands the applicants’ desire for transparency on the type of question (*e.g.* multiple choice, true/false, essay) that will appear on the examination; therefore, CBP will provide guidance to the public on *CBP.gov* prior to the administration of the electronic examination.

Comment: Several commenters raised specific questions about the process of taking the new electronic examination. Commenters asked whether applicants could choose a testing site; whether applicants could bring electronic reference materials to the site, and, if not, whether they would have sufficient space to use their paper reference materials and receive scrap paper for solving problems; whether they could change their answers during the allotted time; whether they could skip questions and return to them later; and whether the computer program would track skipped questions for the examinee. Commenters also asked whether CBP would have a contingency plan for technical difficulties, whether CBP was going to test the automated examination program before requiring it nationwide, whether it would provide a practice test, when it would provide the answer key, and when it would provide the results to the applicants.

CBP Response: CBP understands the concerns about a new examination format; thus CBP will provide guidance to the public on *CBP.gov* prior to the administration of the electronic examination.

The selection of an examination location depends on the information in the application. Applicants select their business port when they register for the customs broker's examination; CBP assigns the applicants to the exam locations closest to their selected port. With the examination location notification, CBP will provide the applicant with contingency plans for system failures, power outages, and other site-related breakdowns or emergencies. The examination sites themselves will offer ample room for hard copies of reference material, and the guidance on *CBP.gov* will describe the permitted reference materials. Applicants will receive scrap paper at examination sites. The examination sites, however, will provide access to only one computer monitor per examinee: Applicants will not have access to a second monitor or be permitted to access reference materials on-line.

The electronic examination itself will allow applicants to skip answers, to return to skipped or completed answers, and to change their answers during the examination period. After the broker's examination development team completes its testing of the electronic examination, CBP will provide a link to a sample practice examination so that applicants can familiarize themselves with the format and how to navigate within the examination. The guidance CBP will provide on *CBP.gov* will include information on how and when CBP anticipates it will provide a copy of the examination and its answer key. CBP will post the examination online at *CBP.gov* after the completion of all the examinations at all examination locations. CBP will post the examination answer key on *CBP.gov* after it vets the examination results.

Comment: Several commenters questioned the examination fee increase to \$390, or requested more information about the basis for the increase in the fee. They compared the new fee to other licensing fees, and the increase in the examination fee to increases resulting from inflation or changes in the cost of living since 2000; and stated that the fee would be expensive for individuals beginning their trade careers. Commenters questioned how automation could be so expensive when it would save administrative resources.

CBP Response: CBP appreciates that the fee may be expensive for some individuals but CBP disagrees that its examination fee increase is too high as it is set to cover CBP's costs to provide the exam under the new exam process. The fee is not being changed merely to adjust the existing fee for inflation, or to bring it in line with licensing fees for exams in unrelated fields, but to reflect CBP's costs of providing

the exam. The Office of Personnel Management has informed CBP that it will soon no longer administer the current paper based examination. Instead, the exam will now be electronic and provided at private testing centers. While the automation itself saves money by reducing the time spent preparing and grading the exam, the need to rent testing centers with professional proctors will increase the overall exam costs. The increase in costs over time due to inflation, coupled with the need to change to an all-electronic exam administered at private testing centers, makes it necessary to increase the customs broker exam fee from \$200 to \$390 for CBP to recover all of its costs to administer the customs broker exam.

Comment: Commenters said that an individual's brokerage does not always reimburse for the cost of the exam and that \$390 would be a large expense for individuals.

CBP Response: CBP acknowledges that not all brokerages reimburse their employees for the cost of the exam and some only reimburse their employees when they pass the exam. This is consistent with the analysis that indicates only that there is some portion of brokerages who do reimburse their employees and that there are brokers who are sole proprietors. This discussion takes place in the Regulatory Flexibility Act section of this document, which analyzes the impact on small entities. Small entities, as defined by the Regulatory Flexibility Act, includes small businesses but does not include individuals (other than sole proprietors). Therefore, the cost to individuals was not analyzed in this section. For an analysis of the costs of this rule to all parties, see the Executive Orders 13563, 12866, and 13771 and Regulatory Flexibility Act sections in this notice.

Comment: Several commenters requested additional information on what costs were covered by the fee.

CBP Response: As requested, CBP has revised the administrative costs section in the fee study to include a more detailed description of what is included in the costs for informational purposes. Exam administration costs are the costs associated with administering the customs broker license exam. CBP contracts with the U.S. Office of Personnel Management (OPM) to administer the exam. The contracted services include, but are not limited to: The development of the exam onto an electronic platform, the renting of testing locations, the providing of equipment and proctors, the grading of the exam, the mailing of individual score sheets to each examinee, and the providing to CBP of an array of exam metrics including distractor analysis and frequency distribution. The fee study documenting the proposed fee changes, entitled "Customs Broker License Examination Fee Study," has been included in the docket of this rulemaking (Docket

No. USCBP–2016–0059). As stated in the fee study, there were two inputs to determining the new examination fee—the costs to both CBP and OPM and the number of examinees. The cost of administering the examination is increasing to \$390 because CBP now has to hire professional proctors and rent out formal testing centers instead of using port staff to proctor the exam and port facilities to administer the exam.

Comment: Several commenters objected to eliminating the special examination provision, mentioned CBP had applied the provision in 2001, and requested that it remain, in case of extenuating circumstances or unforeseen emergencies.

CBP Response: CBP agrees and will retain the special examination provision at 19 CFR 111.13(c) with changes to reflect that the special examination will also be modernized to allow for electronic testing. In addition, CBP changed the provision to require that special examination requests be submitted to the Executive Assistant Commissioner, Office of Trade.

Comment: Although no one objected to moving the customs broker’s examination dates later in April and October, several commenters suggested that neither Monday nor Friday were ideal dates for business reasons.

CBP Response: CBP agrees that moving the exam administration date to the fourth Wednesday in October and in April would be beneficial. Accordingly, CBP changed the administration date from the fourth Monday to the fourth Wednesday in 19 CFR 111.13(b).

Conclusion

Accordingly, after review of the comments and further consideration, CBP has decided to adopt as final, with the changes discussed above, and grammatical corrections, the proposed rule published in the **Federal Register** (81 FR 63149) on September 14, 2016. Specifically, the final rule will change the examination dates to the fourth Wednesday in April and October (not the fourth Monday); and, will retain the special examination provision with changes in § 111.13(c) (19 CFR 111.13(c)).

Executive Orders 13563, 12866, and 13771

Executive Orders 12866 (“Regulatory Planning and Review”) and 13563 (“Improving Regulation and Regulatory Review”) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quan-

tifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 (“Reducing Regulation and Controlling Regulatory Costs”) directs agencies to reduce regulation and control regulatory costs and provides that “for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.”

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. As this rule is not a significant regulatory action, this rule is exempt from the requirements of Executive Order 13771. *See* OMB’s Memorandum “Guidance Implementing Executive Order 13771, Titled ‘Reducing Regulation and Controlling Regulatory Costs’ ” (April 5, 2017).

1. Purpose of the Rule

Customs brokers are private individuals and/or business entities (partnerships, associations or corporations) that are regulated and empowered by CBP to assist importers and exporters in meeting federal requirements governing imports and exports. Customs brokers have an enormous responsibility to their clients and to CBP that requires them to properly prepare importation and exportation documentation, file these documents timely and accurately, classify and value goods properly, pay duties and fees, and safeguard their clients’ information.

CBP currently licenses brokers who meet a certain set criteria. One criterion is that each prospective broker must first pass a broker license exam. CBP’s current paper-based examination method will soon no longer be available and so CBP is shifting to an all-electronic exam. The all-electronic exam has benefits to both CBP and the trade, such as a faster processing time, which lets examinees know their results more quickly and efficiently, and a significant reduction in administrative duties for CBP employees. However, administering this new electronic exam is also more expensive. Additionally, the current \$200 fee does not cover the costs of the current paper exam. CBP is therefore increasing the examination fee from \$200 to \$390 in order to fully cover all of CBP’s costs of administering the broker examination.

CBP is also changing the date of the semi-annual customs broker exam from the first Monday in October and April to the fourth Wednesday in October and April for easier administration.

2. *Background*

It is CBP's responsibility to ensure that only qualified individuals and business entities can perform customs business on another party's behalf. The first step in meeting the eligibility requirements for a customs broker license requires an individual to pass the customs broker license examination. Currently paper-based, the customs broker examination is an open-book examination consisting of 80 multiple-choice questions.

An individual currently must meet the following criteria in order to be eligible to take the customs broker examination:

- Be a U.S. citizen at least 18 years of age;¹
- Not be an employee of the U.S. federal government; and
- Pay a \$200 examination fee.

The customs broker examination is offered semi-annually, in April and October, and an examinee has four and a half (4.5) hours to complete it. Based on prior year exams from 2004 to 2013, CBP estimates that there will be approximately 2,600 examinees per year, or 1,300 examinees per session. Currently the broker exam is given at 50 testing locations around the country. CBP anticipates that changing the exam format from paper-based to electronic would result in no change in the number of testing locations in the country; the only change would be the type of testing location. The exam is currently administered at hotels and ports throughout the country. In the future, the exam will instead be held at privately operated formal testing locations.

Beginning in October 2017, the current paper testing option will no longer be available and the broker examination will be fully electronic. Despite the higher costs of an electronic exam, it has many favorable features which would benefit both CBP and the examinees, including shorter wait times for examinees to get their test results and a reduction in the time CBP staff spends on administrative matters related to the exam, such as arranging facility space for and proctoring the exam, fielding questions from examinees and mailing test result notices.

3. *Costs*

As discussed above, CBP currently charges a \$200 fee for the customs broker license examination. This fee is used to offset the costs

¹ Although U.S. citizens at least 18 years old may take the broker license exam, a U.S. citizen must be at least 21 years old to apply to become a licensed customs broker. An individual has three years, from the time the individual takes the customs broker exam, to apply to become a licensed customs broker.

associated with providing the services necessary to operate the customs broker license examination. Based on a recently completed fee study entitled, “Customs Broker License Examination Fee Study,” CBP has determined that these fees are no longer sufficient to cover its costs.² Currently, examinees go to either a port or to a rented event space in a hotel to take the paper exam with a 35-page test booklet and a scannable answer sheet, which must subsequently be collected and graded. The new all-electronic version of the exam will be administered entirely on a computer where the examinees answer the questions directly on the screen and the exam is graded automatically. As the electronic exam uses all private facilities with professional proctors, this automated method will be more expensive than the paper exam. Furthermore, the current fee is not enough to cover even the current costs of administering the exam. Exam administration costs include the development of the exam in an electronic platform, the renting of testing locations, the providing of equipment and proctors, the grading of the exam, the mailing of individual score sheets to each examinee, and the providing to CBP of an array of exam metrics including distractor analysis and frequency distribution. As stated above, the current \$200 fee has not been changed since 2000. According to data provided by CBP’s Broker Management Branch, administrative and testing costs have increased since the fee was last changed. This increase in administrative fees coupled with switching to an all-electronic exam administered at private testing centers, makes it necessary to increase the customs broker exam fee from \$200 to \$390 for CBP to recover all of its costs to administer the customs broker exam.

CBP has determined that the fee of \$390 is necessary to recover the costs associated with administering the customs broker license examination once the exam is made electronic. The customs broker examination is an established service provided by CBP that already requires a fee payment. Absent this rule, CBP would be operating the exam at a loss and this fee is intended to offset that loss. As such, a change in the fee is not a net cost to society, but rather a transfer payment from test takers to the government.³ CBP does recognize, however, that the fee change may have a distributional impact on prospective customs brokers. In order to inform stakeholders of all potential effects of the final rule, CBP has analyzed the distributional effects of the final rule in section “5. Distributional Impact.”

² The fee study is included in the docket of this rulemaking (Docket No. USCBP-2016-0059).

³ Transfer payments are monetary payments from one group to another that do not affect total resources available to society. See OMB Circular A-4.

4. *Benefits*

As discussed above, CBP is increasing the customs broker license examination fee from \$200 to \$390. The broker exam fee was last changed in 2000 when it was reduced from \$300 to the current fee of \$200. The lower cost paper-based examination that is currently being administered is being replaced by an all-electronic exam in an effort to fully modernize the customs broker testing procedure. This fee increase will allow CBP to fully recover all of its costs, including those to provide a fully electronic version of the customs broker examination beginning in October 2017. As discussed above, the fee increase is neither a cost nor a benefit of this rule since the broker exam fee is already an established fee. Thus, the fee increase is considered a transfer payment. As stated above, in order to inform stakeholders of all potential effects of the final rule, CBP has analyzed the distributional effects of the final rule in section “5. Distributional Impact.”

In addition to increasing the examination fee, CBP is changing the date the examination is given from the first Monday in October and April to the fourth Wednesday in October and April. Administering the examination on the first Monday in October is administratively difficult because it is too close to the conclusion of the Federal Government’s fiscal year at the end of September. With this rule’s changes, CBP and the examinees will benefit through greater predictability in years where federal budgets are uncertain.

5. *Distributional Impact*

Under the final rule, the customs broker license examination fee will increase from \$200 to \$390 in order for CBP to fully recover all of its costs to administer the broker examination. As noted above, these costs are increasing due to a shift in the administration of the exam that will go into effect beginning with the October 2017 exam.

The customs broker license examination fee will cost individuals an additional \$190 when they register to take the customs broker license examination. As discussed above, CBP estimates that there will be 2,600 examinees per year (1,300 per session) who will take the customs broker license examination. Using this estimate and the additional cost that each examinee will incur, CBP estimates that the fee increase will result in a transfer payment to the government of approximately \$494,000 per year (2,600 examinees per year * \$190 proposed fee increase = \$494,000).

Regulatory Flexibility Act

This section examines the impact of the rule on small entities as required by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA). A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

The final rule will apply to all prospective brokers who take the broker exam. The fee is paid by the individual taking the broker exam and individuals are not considered small entities under the Regulatory Flexibility Act. However, some of these individuals are sole proprietors or may be reimbursed for this expense by their brokerage, so we consider the impact on these entities. The U.S. Census Bureau categorizes customs brokers (as well as freight forwarders and marine shipping agents) under the North American Industry Classification (NAICS) code 488510. As shown in Exhibit 1 below, approximately 96 percent of business entities in this NAICS code are small. As this rule will affect any prospective broker or his/her employer, regardless of its size, this rule has an impact on a substantial number of small entities.

The direct impact of this rule on each individual customs broker examinee, or his/her employer, is the fee increase of \$190. To assess whether this is a significant impact, we examine the annual revenue for customs brokers. The U.S. Census Bureau categorizes customs brokers under the NAICS code 488510. In addition to customs brokers, this NAICS code also includes freight forwarders and marine shipping agents.⁴ The Small Business Administration (SBA) publishes size standards that determine the criteria for being considered a small entity for the purposes of this analysis. The SBA considers a business entity classified under the 488510 NAICS code as small if it has less than \$15 million in annual receipts. We obtained the number of firms in each revenue category provided by the U.S. Census Bureau (see Exhibit 1 below). To estimate the average revenue of all firms under this NAICS code, we first assumed that each firm in each revenue category had receipts of the midpoint of the range. For example, we assumed that the 4,354 firms with annual receipts of between \$100,000 and \$499,000 had average receipts of \$300,000. We then used the number of firms in each category to calculate the weighted average revenue across all small firms. Using this method,

⁴ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=488510&search=2012%20NAICS%20Search>.

we estimate that the weighted average revenue for small businesses in this NAICS code is \$1,496,197. The \$190 increase in the broker exam fee, then, represents 0.01 percent of the weighted average annual revenue for brokers. CBP does not consider 0.01 percent of revenue per exam to be a significant impact. Accordingly, CBP certifies that this rule does not have a significant economic impact on a substantial number of small entities.

EXHIBIT 1—BUSINESS ENTITY DATA FOR NAICS CODE 488510

Annual receipts (\$) (Midpoint)	Number of firms	Small
<100,000 (50,000).....	1,834	Yes.
100,000–499,999 (300,000).....	4,354	Yes.
500,000–999,999 (750,000).....	2,040	Yes.
1,000,000–2,499,999 (1,750,000).....	2,300	Yes.
2,500,000–4,999,999 (3,750,000).....	1,087	Yes.
5,000,000–7,499,999 (6,250,000).....	427	Yes.
7,500,000–9,999,999 (8,750,000).....	242	Yes.
10,000,000–14,999,999 (12,500,000).....	233	Yes.
>15,000,000	548	No.
Total.....	13,065	96 Percent are Small (12,517/13,065).

Source: U.S. Census Bureau.

Signing Authority

This document is being issued in accordance with 19 CFR 0.2(a), which provides that the authority of the Secretary of the Treasury with respect to CBP regulations that are not related to customs revenue functions was transferred to the Secretary of Homeland Security pursuant to section 403(l) of the Homeland Security Act of 2002. Accordingly, this final rule to amend such regulations may be signed by the Secretary of Homeland Security (or his delegate).

List of Subjects in 19 CFR Part 111

Administrative practice and procedure, Brokers, Customs duties and inspection, Penalties, Reporting and recordkeeping requirements.

Amendments to the CBP Regulations

For the reasons given above, part 111 of title 19 of the Code of Federal Regulations (19 CFR part 111) is amended as set forth below:

PART 111—CUSTOMS BROKERS

- 1. The authority citation for part 111 continue to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1624, 1641.

Section 111.3 also issued under 19 U.S.C. 1484, 1498;

Section 111.96 also issued under 19 U.S.C. 58c, 31 U.S.C. 9701.

§ 111.11 [Amended]

- 2. In § 111.11, paragraph (a)(4) is amended by removing the words “a written” and adding in its place the word “an”.

§ 111.12 [Amended]

- 3. In § 111.12, paragraph (a) is amended by removing the word “written” from the two places that it appears in the fifth and sixth sentences.

§ 111.13 [Amended]

- 4. In § 111.13:

■ a. The section heading is revised;

■ b. Paragraph (a) is amended by:

■ 1. Removing the word “written” in the first sentence;

■ 2. Removing the words “and graded at” in the second sentence and adding in their place the word “by”; and

■ 3. Removing the phrase “Headquarters, Washington, DC” from the second sentence;

■ c. Paragraphs (b) through (d) and (f) are revised.

The revisions read as follows:

§ 111.13 Examination for individual license.

* * * * *

(b) *Basic requirements, date, and place of examination.* In order to be eligible to take the examination, an individual must on the date of examination be a citizen of the United States who has attained the age of 18 years and who is not an officer or employee of the United States Government. CBP will publish a notice announcing each examination on its Web site. Examinations will be given on the fourth

Wednesday in April and October unless the regularly scheduled examination date conflicts with a national holiday, religious observance, or other foreseeable event and the agency publishes in the **Federal Register** an appropriate notice of a change in the examination date. An individual who intends to take the examination must complete the electronic application at least 30 calendar days prior to the scheduled examination date and must remit the \$390 examination fee prescribed in § 111.96(a) at that time. CBP will give notice of the exact time and place for the examination.

(c) *Special examination.* If a partnership, association, or corporation loses the required member or officer having an individual broker's license (see § 111.11(b) and (c)(2)) and its license would be revoked by operation of law under the provisions of 19 U.S.C. 1641(b)(5) and § 111.45(a) before the next scheduled examination, CBP may authorize a special examination for a prospective applicant for an individual license who would serve as the required licensed member or officer. CBP may also authorize a special examination for an individual for purposes of continuing the business of a sole proprietorship broker. A special examination for an individual may also be authorized by CBP if a brokerage firm loses the individual broker who was exercising responsible supervision and control over an office in another district (see § 111.19(d)) and the permit for that additional district would be revoked by operation of law under the provisions of 19 U.S.C. 1641(c)(3) and § 111.45(b) before the next scheduled examination. A request for a special examination must be submitted to the Executive Assistant Commissioner, Office of Trade, in writing and must describe the circumstances giving rise to the need for the examination. If the request is granted, the Executive Assistant Commissioner, Office of Trade or his/ her designee, will notify the prospective examinee of the exact time and place for the examination. If the individual attains a passing grade on the special examination, the application for the license may be submitted in accordance with § 111.12. The examinee will be responsible for all additional costs incurred by CBP in preparing and administering the special examination that exceed the \$390 examination fee prescribed in § 111.96(a), and those additional costs must be reimbursed to CBP before the examination is given.

(d) *Failure to appear for examination.* If a prospective examinee advises the Office of Trade at the Headquarters of U.S. Customs and Border Protection, Attn: Broker Management Branch, electronically in a manner specified by CBP at least 2 working days prior to the date of a regularly scheduled examination that he will not appear for the examination, CBP will refund the \$390 examination fee referred to in paragraph (b) of this section. No refund of the examination fee or

additional reimbursed costs will be made in the case of a special written examination provided for under paragraph (c) of this section.

* * * * *

(f) *Appeal of failing grade on examination.* If an examinee fails to attain a passing grade on the examination taken under this section, the examinee may challenge that result by filing a written appeal with the Office of Trade at the Headquarters of U.S. Customs and Border Protection, Attn: Broker Management Branch, within 60 calendar days after the date of the written notice provided for in paragraph (e) of this section. CBP will provide to the examinee written notice of the decision on the appeal. If the CBP decision on the appeal affirms the result of the examination, the examinee may request review of the decision on the appeal by writing to the Executive Assistant Commissioner, Office of Trade, U.S. Customs and Border Protection, within 60 calendar days after the date of the notice on that decision.

§ 111.96 [Amended]

■ 5. In § 111.96:

■ a. Paragraph (a) is amended by removing the word “written” from the second sentence and removing the phrase “\$200 examination fee” in the second sentence and adding in its place the phrase “\$390 examination fee”; and

■ b. Paragraph (e) is amended by removing the words “United States Customs Service” and adding in their place the words “U.S. Customs and Border Protection, or paid by other CBP-approved payment method”.

Dated: June 27, 2017.

ELAINE C. DUKE,
Deputy Secretary.

[Published in the Federal Register, June 30, 2017 (82 FR 29714)]

19 CFR PART 101**EXTENSION OF PORT LIMITS OF SAVANNAH, GA**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed rulemaking.

SUMMARY: U.S. Customs and Border Protection (CBP) is proposing to extend the geographical limits of the port of entry of Savannah, Georgia. The proposed extension will make the boundaries more easily identifiable to the public and will allow for uniform and continuous service to the extended area of Savannah, Georgia. The proposed change is part of CBP's continuing program to use its personnel, facilities, and resources more efficiently and to provide better service to carriers, importers, and the general public.

DATES: Comments must be received on or before September 1, 2017.

ADDRESSES: Please submit comments, identified by docket number, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP-2017-0017.
- *Mail:* Trade and Commercial Regulations Branch, Office of Trade, U.S. Customs and Border Protection, 90 K Street NE., 10th Floor, Washington, DC 20229-1177.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. Submitted comments may be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Trade and Commercial Regulations Branch, Regulations and Rulings, Office of Trade, Customs and Border Protection, 90 K Street NE., 10th Floor, Washington, DC 20229-1177. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325-0118.

FOR FURTHER INFORMATION CONTACT: Roger Kaplan, Office of Field Operations, U.S. Customs and Border Protection, (202) 325-4543, or by email at Roger.Kaplan@dhs.gov.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. U.S. Customs and Border Protection (CBP) also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments that will provide the most assistance to CBP will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

II. Background

As part of its continuing efforts to use CBP's personnel, facilities, and resources more efficiently, and to provide better service to carriers, importers, and the general public, CBP is proposing to extend the limits of the Savannah, Georgia port of entry. The CBP ports of entry are locations where CBP officers and employees are assigned to accept entries of merchandise, clear passengers, collect duties, and enforce the various provisions of customs, immigration, agriculture, and related U.S. laws at the border. The term "port of entry" is used in the Code of Federal Regulations (CFR) in title 8 for immigration purposes and in title 19 for customs purposes. For immigration purposes, Savannah, Georgia port of entry is classified as a Class A port in District 26 under 8 CFR 100.4(a).¹ For customs purposes, CBP regulations list designated CBP ports of entry and the limits of each port in 19 CFR 101.3(b)(1).

Savannah, Georgia was designated as a customs port of entry by the President's message of March 3, 1913, concerning a reorganization of the U.S. Customs Service pursuant to the Act of August 24, 1912 (37 Stat. 434; 19 U.S.C. 1). Executive Order 8367, dated March 5, 1940, established specific geographical boundaries for the port of entry of Savannah, Georgia.

The current boundaries of the Savannah port of entry begin at the intersection of US Highway 17 and Little Back River on the line between South Carolina and Georgia; thence in a general southeasterly direction through the Little Back River, Back River, Savannah River and South Channel to the mouth of St. Augustine Creek, a distance of 11.6 miles; thence in a straight line in a southwesterly direction to the intersection of Moore Avenue and DeRenne Avenue, a distance of 5.8 miles; thence in a straight line in a westerly direction

¹ Ports of entry for immigration purposes are currently listed at 8 CFR 100.4.

to the intersection of Middle Ground Road and DeRenne Avenue, a distance of 2.7 miles; thence in a straight line in a westerly direction to the intersection of Garrard Avenue and Ogeechee Road, a distance of 2.4 miles; thence in a straight line in a northwesterly direction to the intersection of Louisville Road and Bourne Avenue, a distance of 6.2 miles; thence in a straight line in a northeasterly direction to the intersection of Augusta Road and Augustine Creek, a distance of 4.8 miles; thence in a general easterly direction along Augustine Creek to the Savannah River, a distance of 2.4 miles; thence in a straight line in an easterly direction to the Chatham County line on Coastal Highway and Little Back River (the point of the beginning), a distance of 1.4 miles. CBP has included a map of the current port limits in the docket as “Attachment: Port of Entry of Savannah (blue lines).”

Travel modes, trade volume, and transportation infrastructure have expanded greatly since 1940. For example, much of Savannah-Hilton Head International Airport is located beyond the current port limits, including the site of the proposed replacement Federal Inspection Service facility for arriving international travelers. Similarly, distribution centers and cold storage agricultural facilities that support the seaport are located outside existing port limits. As a result, the greater Savannah area’s trade and travel communities do not know with certainty if they will be able to receive CBP services if they build facilities on the region’s remaining undeveloped properties, almost all outside the boundaries of the port of entry.

To address these concerns regarding the geographic limits of the port, CBP is proposing to amend 19 CFR 101.3(b)(1) to extend the boundaries of the port of entry of Savannah, Georgia, to include the majority of Chatham County, Georgia, as well as a small portion of Jasper County, South Carolina. The update will also provide uniform and continuous service to the extended area of Savannah, Georgia, and respond to the needs of the trade and travel communities. Further, the extension of the boundaries will include all of Savannah-Hilton Head Airport, the distribution centers and cold storage agricultural facilities, as well as the site of the proposed replacement Federal Inspection Service facility for arriving international travelers, and any other projected new facilities. However, the proposed change in the boundaries of the port of Savannah, Georgia, will not result in a change in the service that is provided to the public by the port and will not require a change in the staffing or workload at the port.

III. Proposed Port Limits of Savannah, Georgia

The new port limits of Savannah, Georgia, are proposed as follows:

From 32°14.588' N.—081°08.455' W. (where Federal Interstate Highway 95 crosses the South Carolina-Georgia state line) and extending in a straight line to 32°04.903' N.—080°04.998' W. (where Walls Cut meets Wright River and Turtle Island); then proceeding in a straight line to 31°52.651' N.—081°03.331' W. (where Adams Creek meets Green Island South); then proceeding northwest in a straight line to 32°00.280' N.—081°17.00' W. (where Highway 204 intersects Federal Interstate Highway 95); then proceeding along the length of Federal Interstate Highway 95 to the point of beginning at the state line. CBP has included a map of the proposed port limits in the docket as “Attachment: Port of Entry of Savannah (red lines).”

IV. Inapplicability of Notice and Public Procedure Requirements

CBP routinely establishes, expands, and consolidates ports of entry throughout the United States to accommodate the volume of CBP-related activity in various parts of the country. This proposed amendment is not subject to the notice and public procedure requirements of 5 U.S.C. 553 because it relates to agency management and organization (5 U.S.C. 553(a)(2) and 553(b)(3)(A)). Notwithstanding the above, CBP generally provides the public with an opportunity to comment on the establishment, expansion and consolidation of ports of entry.

V. Statutory and Regulatory Reviews

A. *Executive Orders 12866, 13563 and 13771*

Executive Orders 12866 (“Regulatory Planning and Review”) and 13563 (“Improving Regulation and Regulatory Review”) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 (“Reducing Regulation and Controlling Regulatory Costs”) directs agencies to reduce regulation and control regulatory costs and provides that “for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.”

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. As this rule is not a significant regulatory action, this rule is exempt from the requirements of Executive Order 13771. *See* OMB's Memorandum "Guidance Implementing Executive Order 13771, Titled 'Reducing Regulation and Controlling Regulatory Costs'" (April 5, 2017).

The proposed change is intended to expand the geographical boundaries of the Savannah, Georgia, port of entry, and make the boundaries more easily identifiable to the public. There are no new costs to the public associated with this rule.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires agencies to assess the impact of regulations on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

This proposed rule merely expands the limits of an existing port of entry and does not impose any new costs on the public. Accordingly, we certify that this rule would not have a significant economic impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Executive Order 13132

The rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

E. Signing Authority

The signing authority for this document falls under 19 CFR 0.2(a) because the extension of port limits is not within the bounds of those regulations for which the Secretary of the Treasury has retained sole authority. Accordingly, this notice of proposed rulemaking may be signed by the Secretary of Homeland Security (or his delegate).

VI. Authority

This change is proposed under the authority of 5 U.S.C. 301; 6 U.S.C. 101, *et seq.*; 19 U.S.C. 2, 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1623, 1624, 1646a.

VII. Proposed Amendment to the Regulations

If the proposed port limits for Savannah, Georgia, are adopted, CBP will amend 19 CFR 101.3(b)(1) as necessary to reflect the new port limits.

Dated: June 27, 2017.

ELAINE C. DUKE,
Deputy Secretary.

[Published in the Federal Register, July 3, 2017 (82 FR 30807)]



DELAYED EFFECTIVE DATE FOR MODIFICATIONS OF THE NATIONAL CUSTOMS AUTOMATION PROGRAM TESTS REGARDING RECONCILIATION, POST-SUMMARY CORRECTIONS, AND PERIODIC MONTHLY STATEMENTS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Delay of effective date.

SUMMARY: This notice announces that the effective date for the modifications to the National Customs Automation Program (NCAP) tests regarding Reconciliation, Post-Summary Corrections (PSC), and Periodic Monthly Statements (PMS) is delayed until further notice. U.S. Customs and Border Protection (CBP) announced these modifications in notices previously published in the **Federal Register**.

DATES: The effective date for the modifications to the reconciliation, PSC, and PMS NCAP tests is delayed until further notice. CBP will publish a notice in the **Federal Register** announcing a new effective date for changes to these NCAP tests.

ADDRESSES: Comments concerning the reconciliation test program may be submitted at any time during the test via email, with a subject line identifier reading, “Comment on Reconciliation test”, to *OFO-RECONFOLDER@cbp.dhs.gov*.

Comments concerning the PSC and PMS test programs may be submitted via email to Monica Crockett at *ESARinfoinbox@dhs.gov* with a subject line identifier reading, “Post-Summary Corrections and Periodic Monthly Statements.”

FOR FURTHER INFORMATION CONTACT: *Reconciliation:* Acenitha Kennedy, Entry Summary and Revenue Branch, Trade Policy and Programs, Office of Trade at (202) 863–6064 or *ACENITHA.KENNEDY@CBP.DHS.GOV*.

PSC and PMS: For policy-related questions, contact Randy Mitchell, Director, Commercial Operations, Trade Policy and Programs, Office of Trade, at *Randy.Mitchell@cbp.dhs.gov*. For technical questions related to ABI transmissions, contact your assigned client representative. Interested parties without an assigned client representative should direct their questions to the Client Representative Branch at (703) 650–3500.

SUPPLEMENTARY INFORMATION:

Background

I. Reconciliation Test

On December 12, 2016, U.S. Customs and Border Protection (CBP) published a notice entitled “Modification of the National Customs Automation Program Test Regarding Reconciliation and Transition of the Test from the Automated Commercial System to the Automated Commercial Environment” in the **Federal Register** (81 FR 89486), with an effective date of January 14, 2017. This notice announced modifications to the National Customs Automation Program (NCAP) test regarding reconciliation, and the transition of the test from the Automated Commercial System (ACS) to the Automated Commercial Environment (ACE). The effective date for these changes was subsequently delayed. On June 8, 2017, CBP published a notice in the **Federal Register** (82 FR 26699) announcing that the effective date for the test modifications would be July 8, 2017.

This notice announces that the effective date for the modifications to the reconciliation test and for mandatory filing of reconciliation entries in ACE has been delayed until further notice.

II. Post-Summary Correction and Periodic Monthly Statement Tests


On December 12, 2016, CBP published a notice in the **Federal Register** (81 FR 89482) announcing plans to modify and clarify, effective January 14, 2017, the NCAP test regarding Post-Summary Correction (PSC) claims, and the NCAP test regarding Periodic Monthly Statements (PMS). Subsequently, on January 9, 2017, CBP published a second notice in the **Federal Register** (82 FR 2385), superseding the original notice. This notice announced CBP's plans to modify the PMS test and to modify and clarify the NCAP test regarding PSC claims to entry summaries that are filed in ACE. The effective date for these changes was subsequently delayed. On June 8, 2017, CBP published a notice in the **Federal Register** (82 FR 26699), announcing that the effective date for the modifications to the PSC and PMS tests would be July 8, 2017.

This notice announces that the effective date for the modifications to the PSC and PMS tests has been delayed until further notice.

Dated: June 26, 2017.

BRENDA B. SMITH,
*Executive Assistant Commissioner,
Office of Trade.*

[Published in the Federal Register, June 30, 2017 (82 FR 29910)]



DELAY OF EFFECTIVE DATE FOR THE AUTOMATED COMMERCIAL ENVIRONMENT (ACE) BECOMING THE SOLE CBP-AUTHORIZED ELECTRONIC DATA INTERCHANGE (EDI) SYSTEM FOR PROCESSING ELECTRONIC DRAWBACK AND DUTY DEFERRAL ENTRY AND ENTRY SUMMARY FILINGS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Delay of effective date.

SUMMARY: On August 30, 2016, U.S. Customs and Border Protection (CBP) published a notice in the **Federal Register** announcing plans to make the Automated Commercial Environment (ACE) the sole electronic data interchange (EDI) system authorized by the Commissioner of CBP for processing electronic drawback and duty deferral entry and entry summary filings. This notice announces that the effective date for that transition has been delayed until further notice.

DATES: *The effective date is delayed until further notice.* CBP will publish a subsequent notice announcing the date when ACE will become the sole CBP-authorized EDI system for processing electronic drawback and duty deferral entry and entry summary

filings, and ACS will no longer be a CBP-authorized EDI system for purposes of processing these filings.

FOR FURTHER INFORMATION CONTACT: Questions related to this notice may be emailed to *ASKACE@cbp.dhs.gov* with the subject line identifier reading “ACS to ACE Drawback and Duty Deferral Entry and Entry Summary Filings transition.”

SUPPLEMENTARY INFORMATION: On August 30, 2016, U.S. Customs and Border Protection (CBP) published a notice in the **Federal Register** (81 FR 59644) announcing plans to make the Automated Commercial Environment (ACE) the sole electronic data interchange (EDI) system authorized by the Commissioner of CBP for processing electronic drawback and duty deferral entry and entry summary filings, with an effective date of October 1, 2016. The document also announced that the Automated Commercial System (ACS) would no longer be a CBP-authorized EDI system for purposes of processing these electronic filings. Finally, the notice announced a name change for the ACE filing code for duty deferral and the creation of a new ACE filing code for all electronic drawback filings, replacing the six distinct drawback codes previously filed in ACS. The effective date for these changes was subsequently delayed. On June 8, 2017, CBP published a notice in the **Federal Register** (82 FR 26698) announcing that the changes announced in the August 30, 2016 **Federal Register** notice would become effective on July 8, 2017.

This notice announces that the effective date announced in the June 8, 2017 **Federal Register** notice is delayed until further notice. CBP will publish a subsequent notice announcing the effective date for these changes.

Dated: June 26, 2017.

BRENDA B. SMITH,
Executive Assistant Commissioner,
Office of Trade.

[Published in the Federal Register, June 30, 2017 (82 FR 29910)]

**PROPOSED MODIFICATION OF THREE RULING
LETTERS, REVOCATION OF TWO RULING LETTERS, AND
REVOCATION OF THE ELIGIBILITY OF CERTAIN
SURGICAL MICROSCOPES FOR TREATMENT UNDER
SUBHEADING 9817.00.96, HTSUS**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed modification of five ruling letters and revocation of the eligibility of certain surgical microscopes for treatment under subheading 9817.00.96, Harmonized Tariff Schedule of the United States (“HTSUS”).

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (“CBP”) intends to modify three ruling letter and revoke two ruling letters, concerning the eligibility of certain surgical microscopes for treatment under subheading 9817.00.96, HTSUS. Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments are invited on the correctness of the proposed actions.

DATE: Comments must be received on or before August 18, 2017.

ADDRESS: Written comments are to be addressed to the U.S. Customs and Border Protection, Office of International Trade, Regulations & Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229–1179. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: Yuliya A. Gulis, Valuation and Special Programs Branch, at (202) 325–0042.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057) (“Title VI”), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are “**informed compliance**” and “**shared responsibility**.” These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations.

Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP is proposing to modify five ruling letters pertaining to the eligibility of certain surgical microscopes for treatment under subheading 9817.00.96, HTSUS. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) N249825, dated February 19, 2014 (Attachment A); NY N246385, dated October 29, 2013 (Attachment B); Headquarters Ruling Letter (“HRL”) 561801, dated February 28, 2002 (Attachment C); HRL 561940, dated February 7, 2001 (Attachment D); and, HRL 961705, dated August 25, 1999 (Attachment E), this notice covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. §1625(c)(2)), as amended by section 623 of Title VI, CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer’s failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of

reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N249825, NY N246385, HRL 561801, HRL 561940, and HRL 961705, CBP determined, in relevant part, that dental; ear, nose, and throat (“ENT”); ophthalmic; and neurological surgical microscopes were eligible for duty-free treatment under subheading 9817.00.96, HTSUS.

Pursuant to 19 U.S.C. §1625(c)(1), CBP is proposing to modify NY N249825, NY N246385, and HRL 961705; to revoke HRL 561801 and HRL 561940; and to revoke any other ruling not specifically identified to reflect the proper application of subheading 9817.00.96, HTSUS, with regard to such surgical microscopes, in accordance with the analysis contained in proposed HRL H275827 (Attachment F) and HRL H285358 (Attachment G). Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated: June 13, 2017

MYLES B. HARMON
Director,
Commercial & Trade Facilitation Division

Attachments

[ATTACHMENT A]

NY N249825

February 19, 2014

CLA-2-90:OT:RR:NC:N4:414

CATEGORY: Classification

TARIFF NO.: 9011.10.4000; 9011.10.8000;
9817.00.96

MR. MICHAEL E. MURPHY
BAKER & MCKENZIE
815 CONNECTICUT AVENUE, NW
WASHINGTON, DC 20006-4078

RE: The tariff classification of surgical microscopes

DEAR MR. MURPHY:

In your letter dated January 15, 2014 you requested a tariff classification ruling on behalf of Carl Zeiss Meditec, Inc.

The OPMI® PROergo is a surgical microscope used in dental microsurgery. The microscope is used to perform a variety of treatments such as root canal surgeries, gum graft surgeries, tooth extractions/implants, and other dental surgical procedures. The microscope is capable of producing three-dimensional images through the use of a double eyepiece and double objectives and is considered to be a stereoscopic compound optical microscope. The microscope may be imported with a means for photographing an image.

The applicable subheading for stereoscopic microscopes provided with a means for photographing the image will be 9011.10.4000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for compound optical microscopes, including those for photomicrography, cinemicrography or microprojection: stereoscopic microscopes, provided with a means for photographing the image. The rate of duty will be 3.9 percent ad valorem.

The applicable subheading for the stereoscopic microscopes not provided with a means for photographing the image will be 9011.10.8000, HTSUS, which provides for compound optical microscopes: including those for photomicrography, cinemicrography or microprojection: stereoscopic microscopes: other. The rate of duty will be 7.2 percent ad valorem.

Regarding your claim of duty free treatment under 9817.00.96, HTSUS, your item is primarily an important and indispensable aid to medical personnel in treating/alleviating predominately permanent or chronic conditions, which, if left untreated, would substantially limit a major life activity. Even though they are also used in diagnostic procedures, each is primarily used in therapeutic procedures, in the ordinary sense. However, those procedures are not “therapeutic” for the purposes of 9817.00.96, HTSUS. Headquarters Ruling Letter 961705, dated August 25, 1999, held that instruments that do not “heal or cure the underlying” condition of the patient are not excluded from 9817.00.96, HTSUS. It further held, “Apparatus that alleviates symptoms of a condition is not excluded as ‘therapeutic’ within the meaning of U.S. note 4(b) and can be classified in subheading 9817.00.96, and given duty-free treatment.”

On that basis, a secondary classification will apply for the microscope in 9817.00.96, HTSUS, as specially designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped (except articles for the blind), free of duty and user fees (if any). Note that the

requirement that the importer prepare and file a U.S. Department of Commerce form ITA-362P has been eliminated via a notice from the International Trade Administration, published in the Federal Register of June 1, 2010. Also note that this classification has no effect on any quota, visa, or restricted merchandise requirements or countervailing or dumping duties.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Barbara Kiefer at (646) 733-3019.

Sincerely,

GWENN K. KIRSCHNER

Acting Director

National Commodity Specialist Division

[ATTACHMENT B]

N246385

October 29, 2013

CLA-2-90:OT:RR:NC:N4:414

CATEGORY: Classification

TARIFF NO.: 9011.10.4000; 9011.10.8000;

9817.00.96

MR. RICHARD A. MOJICA
BAKER & MCKENZIE
815 CONNECTICUT AVENUE, NW
WASHINGTON, DC 20006-4078

RE: The tariff classification of surgical microscopes

DEAR MR. MOJICA:

In your letter dated September 16, 2013 you requested a tariff classification ruling on behalf of Carl Zeiss Meditec, Inc.

The stereoscopic microscopes are used in ENT (ear, nose throat) and dental microsurgery. The OPMI® Movenas/S7, OPMI® Sensera/S7, OPMI® 1 FC, and OPMI® pico (ENT) are ENT surgical microscopes and the OPMI® pico (S100) is a dental surgical microscope. All are compound optical microscopes. They are capable of producing three-dimensional images through the use of a double eyepiece and double objectives and are considered stereoscopic compound optical microscopes. The microscopes may be imported with a means for photographing an image.

The applicable subheading for the stereoscopic microscopes provided with a means for photographing the image will be 9011.10.4000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for compound optical microscopes, including those for photomicrography, cinemicrography or microprojection: stereoscopic microscopes, provided with a means for photographing the image. The rate of duty will be 3.9 percent ad valorem.

The applicable subheading for the stereoscopic microscopes not provided with a means for photographing the image will be 9011.10.8000, HTSUS, which provides for compound optical microscopes: including those for photomicrography, cinemicrography or microprojection: stereoscopic microscopes: other. The rate of duty will be 7.2 percent ad valorem.

Regarding your claim of duty free treatment under 9817.00.96, HTSUS, each of your items is primarily an important and indispensable aid to medical personnel in treating/alleviating predominately permanent or chronic conditions, which, if left untreated, would substantially limit a major life activity. Even though they are also used in diagnostic procedures, each is primarily used in therapeutic procedures, in the ordinary sense. However, those procedures are not “therapeutic” for the purposes of 9817.00.96, HTSUS. Headquarters Ruling Letter 961705, dated August 25, 1999, held that instruments that do not “heal or cure the underlying” condition of the patient are not excluded from 9817.00.96, HTSUS. It further held, “Apparatus that alleviates symptoms of a condition is not excluded as ‘therapeutic’ within the meaning of U.S. note 4(b) and can be classified in subheading 9817.00.96, and given duty-free treatment.”

On that basis a secondary classification will apply for these items in 9817.00.96, HTSUS, as specially designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped (except

articles for the blind), free of duty and user fees (if any). Note that the requirement that the importer prepare and file a U.S. Department of Commerce form ITA-362P has been eliminated via a notice from the International Trade Administration, published in the Federal Register of June 1, 2010. Also note that this classification has no effect on any quota, visa, or restricted merchandise requirements or countervailing or dumping duties.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the classification of this item in 9817.00.96, HTSUS, contact National Import Specialist James Sheridan at 646-733-3012. If you have any questions regarding the ruling, contact National Import Specialist Barbara Kiefer at (646) 733-3019.

Sincerely,

GWENN K. KIRSCHNER

Acting Director

National Commodity Specialist Division

[ATTACHMENT C]

HQ 561801

February 28, 2002

CLA-2 RR:IA 561801 RFC

CATEGORY: Classification

TARIFF NO.: 9817.00.96

PORT DIRECTOR
PORT OF NEW YORK
U.S. CUSTOMS SERVICE
6 WORLD TRADE CENTER, ROOM 761
NEW YORK, NY 10048-0945

RE: Application for Further Review of Protest No. 1001-00-100554;
HTSUS Subheading 9817.00.96; Specially Designed or Adapted for the
Handicapped; Therapeutic; Nairobi Protocol

DEAR SIR OR MADAM:

This is in reference to a Protest and Application for Further Review timely filed by counsel on behalf of Carl Zeiss, Inc., contesting the denial of the classification in and duty-free exemption provided under subheading 9817.00.96, of the Harmonized Tariff Schedule of the United States ("HTSUS"), for certain neurological microscopes. The merchandise was entered on January 6, 1999. The merchandise was liquidated on November 5, 1999. The protest was filed on February 3, 2000. The protest number is 1001 00-100554. The entry was liquidated under HTSUS subheading 9011.10.8000.

FACTS:

This case involves the classification of a microscope used in neurological microsurgery. The microscope was made in Germany and imported by Carl Zeiss, Inc.

The microscopes are said to be used by surgeons in surgery on the brain and spine. Although these instruments can be used for different types of surgery on the brain or spine, the principal use is said to be in craniotomy procedures to resect brain tumors. In documents submitted on behalf of the protestant, it is indicated that this procedure is intended to remove the tumor but not cure the underlying condition.

ISSUE:

Whether the OPMI Neuro/NC 4 System surgical neurological microscope is classifiable in and eligible for duty-free treatment under HTSUS subheading 9817.00.96.

LAW AND ANALYSIS:

Subheading 9817.00.96 to subchapter XV to chapter 98 to the HTSUS provides for a free rate of duty for certain "[a]rticles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons..."¹ In regard to subheading 9817.00.96 (and related subheadings 9817.00.92 and 9817.00.94), U.S. Note 4 to subchapter XVII to chapter 98 provides as follows:

(a) For purposes of subheadings 9817.00.92, 9817.00.94 and 9817.00.96, the term “blind or other physically or mentally handicapped persons” includes any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working.

- (b) Subheadings 9817.00.92, 9817.00.94 and 9817.00.96 do not cover —
- (I) articles for acute or transient disability;
 - (ii) spectacles, dentures, and cosmetic articles for individuals not substantially disabled;
 - (iii) therapeutic and diagnostic articles; or
 - (iv) medicine or drugs.

U.S. Note 4 to subchapter XVII to HTSUS chapter 98.

The first issue presented in the instant case is whether the microscope under consideration is an “article specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons.” The microscope is designed to assist a surgeon in performing brain and nerve surgery that includes surgery to remove brain tumors. Presumably, this procedure involving brain tumors helps to alleviate the medical problems or manifestations associated with a brain tumor (while not curing the underlying disease that caused the tumor) in order to improve a person’s quality of life who is afflicted with a brain tumor. Therefore, in light of the above, the microscopes are articles specially designed or adapted for the use or benefit of physically handicapped persons for purposes of subheading 9817.00.96. *See generally*, HQ 9524465 (January 27, 1993).

The second issue presented in the instant case is whether the microscope under consideration is a therapeutic article within the meaning of U.S. Note 4(b)(iii) to subchapter XVII to chapter 98. If found to be therapeutic within the meaning of that note, the microscope would be excluded from classification in and duty-free treatment under subheading 9817.00.96.

When the tariff meaning or definition of the term “therapeutic” has been considered by the courts, they have chosen to equate it with a standard of “curing or healing.” *See Travenol Laboratories, Inc. v. United States*, 813 F. Supp. 840, 845 (CIT 1993). Therefore, an article will only be excluded from the coverage of subheading 9817.00.96 as being therapeutic if it serves to cure or heal some malady. *See also* T.D. 92–77 (August 3, 1992). Microscopes used in surgery to remove a brain tumor but not cure or heal the underlying disease that caused the tumor would not appear to constitute a therapeutic article for purposes of U.S. Note 4 to subchapter XVII to chapter 98.

The issue of whether a surgical microscope is therapeutic for purposes of U.S. Note 4(b)(iii) to subchapter XVII to HTSUS chapter 98 has been addressed in previous administrative rulings. In those rulings, the microscopes under consideration were held not to be therapeutic because they were used to perform ophthalmic surgery that did not heal or cure the underlying cause of a malady but rather were used to alleviate the medical problems or manifestations associated with the malady (e.g., cataracts). *See* HQ 961705 (August 25, 1999) and HQ 561940 (February 7, 2001). The surgical microscope in the instant case is similar to the surgical microscopes considered in

the above-mentioned administrative rulings insofar as the surgery for which the microscope is used will not heal or cure the underlying disease that causes brain tumors.

In light of the above, the OPMI Neuro/NC 4 System neurological surgical microscope is not a therapeutic article within the meaning of U.S. Note 4(b)(iii) to subchapter XVII to chapter 98. Accordingly, it is not precluded from classification in HTSUS subheading 9817.00.96.

HOLDING:

The OPMI Neuro/NC 4 System surgical neurological microscope is entitled to classification in and duty-free treatment under HTSUS subheading 9817.00.96. Accordingly, the protest should be granted in full.

In accordance with Section 3a(11)(b) of Customs Directive 099 3550-065, dated August 4, 1993, this decision should be attached to Customs Form 19, Notice of Action, and be mailed by your office to the protestant no later than 60 days from the date of this letter. Any reliquidation of the entry in accordance with the decision must be accomplished prior to mailing of this decision. Sixty days from the date of this decision, the Office of Regulations and Rulings will take steps to make the decision available to Customs personnel via the Customs Rulings Module in ACS and to the public via the Diskette Subscription Service, the Freedom of Information Act, and other public access channels.

Sincerely,

JOHN A. DURANT,

Director

*Commercial Rulings Division
Office of Regulations & Rulings*

1 See section 1121 of the Omnibus Trade and Competitiveness Act of 1988 (P.L.100-418) and Presidential Proclamation 5978 (May 12, 1989)

[ATTACHMENT D]

HQ 561940

February 7, 2001

CLA-2 RR:CR:SM 561940 KSG

CATEGORY: Classification

TARIFF NO.: 9817.00.96

PORT DIRECTOR
PORT OF NEW YORK
U.S. CUSTOMS SERVICE
6 WORLD TRADE CENTER ROOM 761
NEW YORK, NY 10048-0945

RE: Application for Further Review of Protest No. 1001-00-100790;
Nairobi Protocol; subheading 9817.00.96; therapeutic

DEAR SIR:

This is in reference to a Protest and Application for Further Review timely filed by counsel on behalf of Carl Zeiss, Inc., contesting the denial of the duty free exemption set forth at subheading 9817.00.96, of the Harmonized Tariff Schedule of the United States (“HTSUS”), to 120 ophthalmic surgical microscopes.

FACTS:

This case involves 120 ophthalmic surgical microscopes entered on January 14, 1999. The microscopes were made in Germany and were imported by Carl Zeiss, Inc. The entry was liquidated as entered on November 26, 1999, under subheading 9011.10.8000 of the Harmonized Tariff Schedule of the United States (“HTSUS”). The protestant argues that the articles should be classified in subheading 9817.00.60, HTSUS.

The microscopes are used by surgeons in magnifying the area of the eye to be operated on in delicate and precise microsurgeries on the eye. The microscopes are mainly used for cataract surgeries and internal ocular lens implantations. In addition, the microscopes are used for glaucoma surgery, keratoplastic, refractive surgery, vitreous surgery and retinal surgery.

ISSUE:

Whether the ophthalmic surgical microscopes are eligible for duty-free treatment under subheading 9817.00.96, HTSUS.

LAW AND ANALYSIS:

The Nairobi Protocol to the Florence Agreement on the Importation of Educational, Scientific, and Cultural Materials Act of 1982 expanded the scope of the Florence Agreement primarily by expanding duty-free treatment for certain articles for the use or benefit of the handicapped in addition to providing duty-free treatment for articles for the blind. Section 1121 of the Omnibus Trade and Competitiveness Act of 1988 and Presidential Proclamation 5978 provided for the implementation of the Nairobi Protocol by inserting subheadings 9817.00.92, 9817.00.94, and 9817.00.96 into the HTSUS. These tariff provisions specifically state that “articles specifically designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons” are eligible for duty-free treatment.

U.S. Note 4(a), chapter 98, HTSUS, states that the term “blind or other physically or mentally handicapped persons” includes any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working. Individuals who are visually impaired are encompassed by this Note.

U.S. Note 4(b), chapter 98, HTSUS, states that subheadings 9817.00.92, 9817.00.94 and 9817.00.96 do not cover (i) articles for acute or transient disability; (ii) spectacles, dentures, and cosmetic articles for individuals not substantially disabled; (iii) therapeutic and diagnostic articles; or (iv) medicine or drugs.

The issue presented is whether the microscope is a therapeutic article within the meaning of U.S. Note 4(b)(iii) and thereby excluded from duty-free treatment under subheading 9817.00.96, HTSUS. In *Travenol Laboratories, Inc. v. U.S.*, 813 F. Supp. 840 (CIT 1993), the court held that devices used with a dialysis machine were not therapeutic and therefore, the devices were eligible for duty-free treatment under subheading 9817.00.96, HTSUS. The court found that kidney dialysis is not curative and that whether an article cures or heals is the standard with regard to the tariff meaning of the term “therapeutic”. The court relied on a prior case, *Richards Medical Co. v. U.S.*, 720 F. Supp. 998 (CIT 1989), which involved an imported hip prosthesis and separately packaged instruments. The court in *Richards* stated that Congress intended to limit the duty-free treatment only to those articles which help handicapped persons adapt to their handicapped condition. The court held that only articles used to heal or cure disease are considered “therapeutic” within the meaning of the provision. The court also held that the fact that the handicapped persons themselves do not use these instruments or that they do not remain in the body of the person does not preclude classification of the instruments under this provision, inasmuch as it provides for “articles specifically designed or adapted for the use or benefit” of the handicapped (emphasis added).

In Headquarters Ruling Letter (“HRL”) 952465, dated January 27, 1993, Customs held that certain ophthalmic instruments which are used in surgical procedures for chronic degenerative eye conditions were eligible for duty-free treatment under subheading 9817.00.96, HTSUS. Customs determined that the ophthalmic instruments are used to improve a visually handicapped person’s ability to *see* and they are not used in procedures which remove or lessen the disease which caused the underlying condition. In this ruling, Customs cited to HRL 556243, dated December 2, 1991, in which Customs held that imported pacemakers were not therapeutic and therefore, not precluded from duty-free treatment under U.S. Note 4(b).

In HRL 961705, dated August 25, 1999, Customs held that various imported ophthalmic apparatus, including ophthalmic surgery microscopes, were classifiable in subheading 9817.00.96, HTSUS. Customs considered the issue of whether the operation microscopes were therapeutic and concluded that the microscopes did not heal or cure the underlying eye conditions of the patient but served to alleviate the manifestations of the degenerative ophthalmic conditions.

The surgical microscopes in the instant case are similar to the articles involved in *Travenol*, *Richards Medical Co.*, HRL 961705 and HRL 952465, in that the article will not heal or cure the underlying disease. Rather, the

microscopes are used to perform surgery to improve a visually handicapped person's ability to see, not to remove or treat the degenerative ophthalmic condition. Therefore, we find that the surgical microscopes are not therapeutic articles. Accordingly, the imported surgical microscopes are not precluded from subheading 9817.00.96, HTSUS, treatment by U.S. Note 4(b) of Chapter 98, HTSUS.

HOLDING:

The imported ophthalmic surgical microscopes are entitled to duty-free treatment under subheading 9817.00.96, HTSUS. Accordingly, you should grant this protest in full.

In accordance with Section 3a(11)(b) of Customs Directive 099 3550-065, dated August 4, 1993, this decision should be attached to Customs Form 19, Notice of Action, and be mailed by your office to the protestant no later than 60 days from the date of this letter. Any reliquidation of the entry in accordance with the decision must be accomplished prior to mailing of this decision. Sixty days from the date of this decision, the Office of Regulations and Rulings will take steps to make the decision available to Customs personnel via the Customs Rulings Module in ACS and to the public via the Diskette Subscription Service, the Freedom of Information Act, and other public access channels.

Sincerely,

JOHN DURANT

Director,

Commercial Rulings Division

[ATTACHMENT E]

HQ 961705

August 25, 1999

CLA-2 RR:CR:GC 961705 gah

CATEGORY: Classification

TARIFF NO.: 9018.19.95, 9018.50.00, 9817.00.96,
9018.19.9560, 8302.20.00

PORT DIRECTOR
U.S. CUSTOMS SERVICE
JFK AIRPORT, BUILDING 77
JAMAICA, NEW YORK 11430

RE: Protest 1001-97-106205; ophthalmic apparatus

DEAR PORT DIRECTOR:

This is a decision on protest 1001-97-106205 timely filed by counsel, on behalf of Topcon America Corporation, on October 3, 1997, against your decision regarding the classification of ophthalmic apparatus. All entries were liquidated on June 27, 1997. Descriptive marketing literature was submitted to this office for examination. In preparing this ruling, consideration was given to arguments presented by counsel in a meeting on January 12, 1999, and in submissions made on February 10, April 26, July 30, and August 23, 1999.

FACTS:

The merchandise is a variety of ophthalmic apparatus produced by Topcon in Japan. Specifically, they are: slit lamps, tonometers; retinal cameras, ophthalmometers (also known as keratometers); screenscopes, lensmeters, vision testers, auto chart projectors; operation microscopes; and parts thereof.

Customs classified the subject merchandise at entry in subheading 9018.50.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for other ophthalmic instruments and appliances. With one exception, the protestant advocates classification of the subject merchandise in subheading 9018.19.9550, HTSUS, which provides for other electro-diagnostic apparatus. Protestant contend that the ophthalmic surgical microscopes are classifiable in subheading 9817.00.96, as other articles specially designed or adapted for the use or benefit of the handicapped.

ISSUE:

Is the merchandise more specifically classified as electro-diagnostic apparatus (including apparatus for functional exploratory examination or for checking physiological parameters), and therefore classifiable in subheading 9018.19, or other ophthalmic instruments and appliances, and therefore classifiable in subheading 9018.50? If they are electro-diagnostic apparatus, are they for functional exploratory examination? Are the surgical microscopes classified as designed or adapted for the use or benefit of the handicapped?

LAW AND ANALYSIS:

Slit lamp microscopes, tonometers, retinal cameras, ophthalmometers

Classification of merchandise under the Harmonized Tariff Schedule of the United States (HTSUS) is in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the rules of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI.

Heading 9018 provides for instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments.

GRI 6 states, in summary, that classification at the subheading level is determined according to the terms of the subheadings, on the understanding that only subheadings at the same level are comparable. The applicable competing subheadings within heading 9018 are:

Electro-diagnostic apparatus (including apparatus for functional exploratory examination or for checking physiological parameters) and Other ophthalmic instruments and appliances

A diagnosis is the identification of a disease by careful investigation of its symptoms and history. 1 Compact Edition of the Oxford English Dictionary 714 (1987).

Slit lamps are microscopes that examine the cornea, lens and clear fluids in layer-by-layer detail, and can also be used to measure the extent of damage caused by glaucoma. Tonometers measure intra-ocular pressure to aid in the diagnosis of glaucoma as well. Retinal cameras are used to examine and document the condition of the retina, choroid, optic disk and posterior pole. Ophthalmometers (keratometers) examine the cornea to obtain measurements of the corneal curvature and to detect and measure astigmatism. All of the apparatus use electricity to function in one way or another.

These four apparatus are therefore accurately described as electro-diagnostic apparatus (including apparatus for functional exploratory examination or for checking physiological parameters), in subheading 9018.19, HTSUS.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89-80, 54 FR 35127, 35128 (August 23, 1989).

The Explanatory Notes (EN) for heading 9018 lists three categories of ophthalmic instruments: surgical, diagnostic and orthoptic or sight testing apparatus. This is an indication that the drafters of the EN believed that diagnostic apparatus are an identifiable category of ophthalmic instruments. Further, within the diagnostic category, EN (I)(C)(2), two of the four apparatus, slit lamp microscopes and tonometers, are specifically enumerated.

Subheading 9018.50 describes other ophthalmic instruments and appliances. Thus, other ophthalmic instruments and apparatus in subheading 9018.50 can include only ophthalmic apparatus which are other than those provided for at the same subheading level in heading 9018, including ophthalmic instruments or apparatus which are electro-diagnostic apparatus,

within subheading 9018.11 through 9018.19. Since we have determined that the four instruments mentioned are specifically described as electro-diagnostic, they are classifiable as electro-diagnostic apparatus, in subheading 9018.19.

Within subheading 9018.19, the competing provisions for consideration are subheading 9018.19.40, apparatus for functional exploratory examination and subheading 9018.19.95, other apparatus.

Functional in the medical sense means that which relates to the normal physiological activity or vital functioning, of an organ, but not the structure, or anatomy, of that organ. *See* Dorland's Illustrated Medical Dictionary 667 (1994). The instant slit lamp microscopes, tonometers, retinal cameras, and ophthalmometers permit the operator to observe and record the structural effects of a disease or disorder of the eye, but not the activity going on in the eye. The goods do not meet the definition of functional.

Exploratory in the medical sense means that which relates to an active examination, usually involving endoscopy or a surgical procedure, to ascertain conditions present as an aid in diagnosis. *Stedman's Medical Dictionary* 550 (1990). While the instant slit lamp microscopes, tonometers, retinal cameras, and ophthalmometers certainly aid in describing the condition of the eye, they do so through visual examination from outside the body cavity, that is, without invasive procedures. We do not believe the goods are exploratory in nature.

The four enumerated apparatus are therefore classifiable in subheading 9018.19.95, other electro-diagnostic apparatus.

Screenscopes, vision testers, auto chart projectors, lensmeters; operation microscopes

Screenscopes and other vision testers are visual acuity testers, and allow examination of a patient's visual acuity, astigmatism and other vision problems by trained health care professionals. Auto chart projectors electronically project eye testing charts onto a wall for the patient to read. Lensmeters hold a pair of glasses or contact lenses and measure the focus or degree of refraction in the lens. The readings obtained provide a benchmark for the amount of correction a patient currently uses and allows for duplication of that level of correction in another pair of lenses. Ophthalmic surgical microscopes perform microscopic surgery on the eyes. These five apparatus are not diagnostic in nature because they do not identify a disease. The first four are sight-testing apparatus, while the last one is used to correct the effects of disease.

Vision testers and auto chart projectors are specified within the heading 9018 EN (C)(3) category for orthoptic or sight-testing apparatus, as distinct from diagnostic ophthalmic apparatus and because they are not diagnostic, fall to be classified in subheading 9018.50.00, other ophthalmic instruments and appliances. Counsel argues that screenscopes and lensmeters are medical apparatus used by medical professionals to make physical examinations to detect diseases and defects of the body. Counsel notes that the EN (IV) to heading 9018 covers such devices, even though not specifically named, and that if they are medical, they are electro-diagnostic.

We disagree. Screenscopes, for example, may detect visual acuity, but they do not detect the underlying cause of the impairment, and are therefore not diagnostic. Further, electro-medical apparatus are specified in the heading 9018 legal text but they are not entirely captured by any one subdivision of

the heading. Rather, electro-diagnostic apparatus include some medical instruments of the heading but not all. Those used in ophthalmic related endeavors that are not electro-diagnostic fall to be classified in the residual provision of other ophthalmic apparatus, 9018.50.00.

Operation microscopes and subheading 9817.00.96 Counsel advises that the ophthalmic operation microscopes at issue are compound optical microscopes, stereoscopic and without a means for photographing an image, classifiable in subheading 9011.10.8000. However, the goods are specially designed or adapted for the use or benefit of handicapped persons other than the blind, and therefore should be classified in subheading 9817.00.96, duty free. Chapter 98, Subchapter XVII, U.S. Note 4(a) defines the term blind or other physically or mentally handicapped persons to include any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working. Subpart (b)(iii) of that U.S. Note excludes from the scope of subpart (a), therapeutic and diagnostic articles. Persons requiring ophthalmic surgery are physically handicapped within the meaning of this provision since the condition substantially limits a major life activity—seeing.

Customs has set forth certain requirements for an article to receive duty-free treatment in this provision. T.D. 92-77, 26 Cust. B. & Dec. 35. The facts in this case raise three issues, 1) whether the instant microscopes are specially designed or adapted, 2) whether they are for the use and benefit of the handicapped, and 3) whether the goods are therapeutic in nature.

First, as to the specially designed or adapted requirement, Customs has ruled on ophthalmic surgery microscopes, classifying them in subheading 9011.10.80, where the issue of whether they also are classifiable in subheading 9817.00.96 was not raised. HQ 954855, dated December 7, 1994. However, counsel states that the merchandise in that ruling had physical properties similar to the instant microscopes.

In particular, the Topcon sales literature indicates that the microscope is designed to facilitate ophthalmic microsurgery. It delivers three dimensional images using a coaxial illumination standard, and aids in the observation of red reflex. The unit is capable of fine focusing adjustment within a range of 36mm, at a speed of 2.2mm per second. There are five different magnification lens settings. The unit is capable of five different field of view settings. The supporting arms have a range of motion more limited than other surgical microscopes. The axis of the optical path remains fixed over the eye, resulting in an observation angle set at a limited operating rate (generally 45 degrees to the optical axis).

Counsel states that Topcon only produces and distributes to the ophthalmic market, representing them as designed specifically for ophthalmic microsurgery. They are in most cases used for cataract surgery or posterior vitrectomy. We find that counsel has established physical properties and marketing information as to the design and use that indicate the apparatus is used principally in ophthalmic surgery.

Second, Customs has held that ophthalmic surgical instruments other than operation microscopes, were specially designed or adapted for the use and benefit of the handicapped because they were used to improve a visually handicapped person's ability to see. HQ 952465 dated January 27, 1993. In that matter, instruments for cataract surgery, vitrectomy, glaucoma filtration

procedures, corneal transplantation and retinal attachment were classified as for the benefit of the handicapped. Topcon's operation microscopes are an important and indispensable aid to the surgeon in magnifying the area to be operated on and in performing delicate and precise microsurgeries on the eye. These microscopes are used 95 percent of the time for the same five procedures for which the instruments in HQ 952465 were used according to an affidavit of a Topcon executive. Counsel has established that the goods at issue are designed and principally used for the benefit of the handicapped. *See* HQ 557712, dated June 27, 1994.

Third, Customs and the courts have held that therapeutic articles within the context of this provision are those articles that heal or cure a condition. T.D. 92-77, 26 Cust. B. & Dec. 35; *Travenol Laboratories, Inc. v. U.S.*, 17 CIT 69, (1993). As a result, apparatus that alleviates symptoms of a condition is not excluded as "therapeutic" within the meaning of U.S. note 4(b) and can be classified in subheading 9817.00.96, and given duty-free treatment. In HQ 952465, evidence was shown that the instruments at issue did not heal or cure the underlying eye conditions of the patient, but served to alleviate the manifestations of the degenerative ophthalmic condition. Given that Topcon's operation microscopes are used in the same procedures, counsel believes that the evidence in HQ 952465 supports a finding that the instant goods are non-therapeutic as well. We agree. The operation microscopes are classifiable in subheading 9817.00.96.

Parts of the above apparatus

Counsel has listed seventeen distinct parts which he believes are parts suitable for use solely or principally with one of the ophthalmic apparatus discussed above. Note 2(b) to chapter 90 indicates that parts and accessories, not classifiable according to note 1 and note 2(a) to chapter 90, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading are to be classified with the machines, instruments or apparatus of that kind.

We find that the following parts are designed and shaped and assembled in such a way that they are suitable for use solely or principally with their apparatus, as discussed and classified above. Plates or plate assemblies for ophthalmometers (keratometers) and retinal cameras, head rests for retinal cameras, axis, fixation target and fixation target assemblies for slit lamps are each classified in subheading 9018.19.9560 as parts and accessories of electro-diagnostic apparatus (including apparatus for functional exploratory examination or for checking physiological parameters). Holders for lensmeters and spirit levels for vision testers are classified in subheading 9018.50.00 as parts and accessories of other ophthalmic instruments. The lens caps for the camera which is part of the operation microscope is classified as a part in subheading 9817.00.96.

The caster without a brake for attachment to an instrument table is classified as a caster in subheading 8302.20.00.

Counsel has withdrawn its protest as to the following items: retaining rubber for lensmeter, steel ball for retinal camera, remote control unit for chart projector, printer for vision tester, CCD camera for keratometer, and ring for Polaroid attachment.

HOLDING:

The slit lamp microscopes, tonometers, retinal cameras and ophthalmometers imported by Topcon are classified as electro-diagnostic apparatus (including apparatus for functional exploratory examination or for checking physiological parameters), other; other; other; other apparatus in subheading 9018.19.9550, HTSUS. Plates, plate assemblies for ophthalmometers (keratometers) and retinal cameras, head rests for retinal cameras, axis, fixation targets and fixation target assemblies for slit lamps are classified in subheading 9018.19.9560 as parts and accessories of electro-diagnostic apparatus..., other, other, other; parts and accessories, in subheading 9018.19.9560. HTSUS.

The screenscopes, vision testers, auto chart projectors, and lensmeters, holders for lensmeters and spirit levels for vision testers are classified as other ophthalmic instruments and appliances and parts and accessories thereof in subheading 9018.50.00, HTSUS.

The operation microscopes and camera lens caps are classified as articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories that are specially designed or adapted for use in the foregoing articles, other, in subheading 9817.00.96.

The protest should be allowed in part and denied in part, as set forth above. In accordance with Section 3(A)(11)(b) of Customs Directive 099 3550-065, dated August 4, 1993, Subject: Revised Protest Directive, you are to mail this decision, together with the Customs Form 19, to counsel for the protestant no later than 60 days from the date of this letter. Any reliquidation of the entry or entries in accordance with the decision must be accomplished prior to mailing the decision.

Sixty days from the date of the decision, the Office of Regulations and Rulings will make the decision available to Customs personnel, and to the public on the Customs Home Page on the World Wide Web at www.customs.gov, by means of the Freedom of Information Act, and other methods of public distribution.

Sincerely,

JOHN DURANT

Director,

Commercial Rulings Division

[ATTACHMENT F]

HQ H275827
OT:RR:CTF:VS H275827 YAG/AJR

MR. JAMES REICHERT
IMPORT-EXPORT COMPLIANCE SPECIALIST
CARL ZEISS MEDITEC, INC.
5160 HACIENDA DR.
DUBLIN, CA 94568-7562

RE: Modification of NY N249825 and NY N246385, and Revocation of HRL 561801 and HRL 561940; Subheading 9817.00.96, HTSUS; Surgical Microscopes

DEAR MR. REICHERT:

This is in reference to New York Ruling Letter (“NY”) N249825, dated February 19, 2014, issued to Carl Zeiss Meditec, Inc. (the “Company”), via the Company’s counsel. In NY N249825, the U.S. Customs and Border Protection (“CBP”) determined, in relevant part, that a surgical microscope was eligible for duty-free treatment under subheading 9817.00.96, Harmonized Tariff Schedule of the United States (“HTSUS”).

We have reviewed NY N249825 and found that it is partially incorrect. We have additionally reviewed NY N246385, dated October 29, 2013; Headquarters Ruling Letter (“HRL”) 561801, dated February 28, 2002; and, HRL 561940, dated February 7, 2001, which involved various types of the Company’s surgical microscopes that were also found to be eligible for duty-free treatment under subheading 9817.00.96, HTSUS. As with NY N249825, we determined that NY N246385 is partially incorrect, and that HRL 561801 and HRL 561940 are incorrect. For the reasons set forth below, with respect to the eligibility of the subject surgical microscopes for duty-free treatment under subheading 9817.00.96, HTSUS, we hereby modify NY N249825 and NY N246385, and revoke HRL 561801 and HRL 561940.

The tariff classifications of the subject surgical microscopes under subheadings 9011.10.40 or 9011.10.80, HTSUS, as determined in NY N249825 and NY N246385, are unaffected.

FACTS:

NY N249825 concerned the OPMI® PROergo (“PROergo”), a surgical microscope for dental microsurgery, used to perform a variety of treatments, including root canal surgeries, gum graft surgeries, and tooth extractions/implants. NY N246385 concerned four ENT (ear, nose, and throat) surgical microscopes (i.e., the OPMI® Movena/S7 (“Movena”); the OPMI® Sensera/S7 (“Sensera”); the OPMI® 1 FC (“1 FC”); and, the OPMI® pico (ENT) (“pico ENT”)) and a dental surgical microscope (i.e., the OPMI® pico (S100) (“pico S100”). NY N249825 and NY N246385 stated that the subject ENT and dental surgery microscopes: are capable of producing three-dimensional images through the use of double eyepiece and double objectives; are considered to be stereoscopic compound optical microscopes; and, may be imported with a means for photographing an image. NY N246385 explained that stereoscopic microscopes are used in ENT and dental microsurgery.

HRL 561801 concerned the OPMI® Neuro/NC 4 System (“Neuro”), a microscope for neurological microsurgery, used by surgeons in surgery on the brain and spine. HRL 561801 stated that while the Neuro could be used for

different types of surgeries on the brain or spine, the principal use was for craniotomy procedures to resect brain tumors, which is a procedure intended to remove the tumor but not cure the underlying condition.

HRL 561940 concerned ophthalmic surgical microscopes used by surgeons in magnifying the area of the eye to be operated on in delicate and precise eye microsurgeries. HRL 561940 stated that these ophthalmic surgical microscopes are mainly used for cataract surgeries and internal ocular lens implantations, but also for glaucoma surgery, keratoplastic, refractive surgery, vitreous surgery and retinal surgery.

In NY N249825, NY N246385, HRL 561801, and HRL 561940, CBP found that the subject surgical microscopes were all eligible for duty-free treatment under subheading 9817.00.96, HTSUS, because these surgical microscopes were considered specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons, and, without the ability to heal or cure the underlying respective conditions of the patient, such microscopes were not excluded as therapeutic articles.

ISSUE:

Whether the subject surgical microscopes are eligible for duty-free treatment under subheading 9817.00.96, HTSUS?

LAW AND ANALYSIS:

Subheading 9817.00.96, HTSUS, came into effect in the United States through a series of international agreements and acts of Congress. Its basis is in the Agreement on the Importation of Educational, Scientific and Cultural Materials, *opened for signature* Nov. 22, 1950, 17 U.S.T. 1835, 131 U.N.T.S. 25, or “Florence Agreement,” drafted by the United Nations Educational, Scientific, and Cultural Materials (“UNESCO”) in July of 1950. In 1976, UNESCO adopted the Nairobi Protocol to the Florence Agreement, which expanded the scope of products to include materials specially designed for handicapped persons. *See* Protocol to the Agreement on the Importation of Educational, Scientific, or Cultural Materials, *opened for signature* 1 Mar. 1977, 1259 U.N.T.S. 3.

Congress ratified the Nairobi Protocol and enacted it into law in 1983. Pub. L. 97-446, § 161, 96 Stat. 2329, 2346 (1983). The Senate stated in its Report that one of the goals of this law was to benefit the handicapped and show support by the United States for the rights of the handicapped. The Senate was concerned, however, that people would misuse this tariff provision to avoid paying duties on expensive products. As a result, it stated that it did not intend “that an insignificant adaptation would result in duty-free treatment for an entire relatively expansive article . . . the modification or adaptation must be significant so as to clearly render the article for use by handicapped persons.” S. Rep. (Finance Committee) No. 97-564, 97th Cong. 2nd Sess., Sept. 21, 1989.

Section 1121 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. No. 100-418, 102 Stat. 1107) and Presidential Proclamation 5978 implemented the Nairobi Protocol by inserting permanent provisions—specifically, subheadings 9817.00.92, 9817.00.94, and 9817.00.96—into the HTSUS. These tariff provisions provide that “[a]rticles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons” are eligible for duty-free treatment.

Notes in subchapter XVII of Chapter 98 of the HTSUS define the terms “blind or other physically or mentally handicapped persons” and limit the classification of certain products under subheadings 9817.00.92, 9817.00.94, and 9817.00.96, HTSUS. U.S. Note 4(a), subchapter XVII, Chapter 98, HTSUS, defines the term “blind or other physically or mentally handicapped persons” as “any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working.” U.S. Note 4(b), subchapter XVII, Chapter 98, HTSUS, excludes four categories of goods from subheadings 9817.00.92, 9817.00.94, and 9817.00.96, HTSUS: (1) articles for acute or transient disability; (2) spectacles, dentures, and cosmetic articles for individuals not substantially disabled; (3) therapeutic and diagnostic articles; and, (4) medicine or drugs.

To summarize, for the subject surgical microscopes to qualify for duty-free treatment under subheading 9817.00.96, HTSUS, the following must be true:

- (1) Patients undergoing surgery or other treatments with the subject surgical microscopes are considered blind or other physically or mentally handicapped persons for purposes of Chapter 98, HTSUS;
- (2) The subject surgical microscopes are specially designed or adapted for the use or benefit of such patients considered blind or other physically or mentally handicapped persons for purposes of Chapter 98, HTSUS; and,
- (3) The subject surgical microscopes are not articles within the excluded categories listed in U.S. Note 4(b), subchapter XVII, Chapter 98, HTSUS (e.g., therapeutic articles, etc.).

In NY N249825, NY N246385, HRL 561801, and HRL 561940, CBP found that the subject surgical microscopes were not therapeutic articles because the microscopes did not heal or cure the underlying condition of the patient. To support this position, all four rulings cited to HRL 961705, dated August 25, 1999, which stated that “that therapeutic articles within the context of this provision are those articles that heal or cure a condition.” *See also Travenol Laboratories, Inc. v. U.S.*, 17 CIT 69 (1993); T.D. 92-77, 26 Cust. B. 240 1992 (implementing the duty-free provisions of the Nairobi Protocol); and, HRL 952465, dated January 27, 1993.

The evidence for the claims that the subject surgical microscopes were not therapeutic articles is mostly limited to the Company’s statements that the types of surgeries that the microscopes are used for concern permanent and chronic conditions. From these facts alone, it is not entirely clear whether these articles are not considered therapeutic. However, we note that merely because an article is not considered therapeutic does not mean it is not an article for an acute or transient disability or another article within the excluded categories. Similarly, demonstrating that an article is not within the excluded categories alone does not equate to qualification for duty-free treatment under subheading 9817.00.96, HTSUS. These issues were never addressed in NY N249825, NY N246385, HRL 561801, and HRL 561940, and, thus, it is not clear whether the requirements for eligibility under subheading 9817.00.96, HTSUS, were satisfied.

(1) Whether patients undergoing surgery or other treatments with the subject surgical microscopes are considered blind or other physically or mentally handicapped persons for purposes of Chapter 98, HTSUS?

As noted above, U.S. Note 4(a), subchapter XVII, Chapter 98, HTSUS, defines the term “blind or other physically or mentally handicapped persons” as “any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working.” T.D. 92–77 provides further guidance for interpreting this term as follows:

The only ruling by Customs on the issue of what constitutes a “handicapped” person under this statute was HRL 556090, dated November 8, 1991. In this ruling, Customs held that individuals who suffer from chronic arthritis, scoliosis, severe hernia problems and post-polio syndrome and who need heavy-duty support corsets, are “handicapped” within the meaning of the Nairobi Protocol, and therefore, the corsets are eligible for duty-free treatment. However, Customs also held in this ruling that brassieres designed for women who have mastectomies are not eligible for duty-free treatment. Customs determined that women with mastectomies are not substantially limited in any major life activity. The focus of post-operative therapy for women who have had mastectomies is the reassurance that they are fully capable of leading full, productive lives after the operation.

Other physical ailments that CBP has considered to be physical handicaps that limit one or more major life activities include: people who cannot walk (*see* HRL H024976, dated March 23, 2009 (concerning a wheel chair securement system for motor vehicles)); diabetes (*see* HRL 561020, dated October 14, 1998 (concerning a diabetes organizer)); hearing loss/impairment (*see* HRL 563415, dated January 25, 2006 (concerning a carrying case for a hearing aid and its components)); chronic incontinence (*see* HRL 560278, dated April 7, 1997 (concerning adult pull-on pants)); permanent or chronic pain (*see* HRL 563002, dated May 26, 2004 (concerning a pouch for holding a pump that would be implanted into the body and deliver medication)); arrhythmia and other heart problems (*see* HRL 563125, dated December 27, 2004, and HRL 557302, dated March 17, 1993 (concerning pacemakers, defibrillators, and accessories to such medical equipment)); and, people with speech defects (*see* HRL 088503, dated May 3, 1991 (concerning a speech synthesizer that converted typed words into a synthesized voice)).

On the other hand, CBP has noted that certain conditions are not physical handicaps for purposes of Chapter 98, HTSUS. For instance, in HRL H121544, dated October 6, 2014, CBP held that metabolic disorders or severe food allergies, which limit the capacity to digest, metabolize, or ingest certain foods, requiring avoidance of such foods, do not impair the actual physical act of eating. HRL H121544 noted that in the other CBP rulings regarding classification under heading 9817, HTSUS, the conditions or diseases directly impaired one’s physical ability to perform one or more major life activities. Similarly in HRL H131516, dated March 1, 2011, CBP differentiated the pain from swollen, itchy, or aching feet that may render an individual “unable to stand on their feet for an entire shift or too tired to stop at the grocery store on their way home from work” from those individuals with little or no

mobility “unable to perform one or more major life activities.” See also HRL H092454, dated April 28, 2010 (differentiating light incontinence from a condition that CBP considers a physical handicap, chronic incontinence). See generally HRL 559916, dated May 8, 1997; and, HRL 087669, dated November 16, 1990 (holding that broadly used medical supplies (e.g., hospital gowns and medical bed pads) did not qualify for treatment under subheading 9817.00.96, HTSUS, because the evidence showed that various conditions requiring use of the supplies were not chronic or permanent conditions and no evidence specifically showed that the conditions were physical handicaps).

The subject surgical microscopes are used for patients undergoing various types of dental, ENT, neurological, and ophthalmic microsurgies. It is indicated that the dental surgical microscopes (i.e., the PROergo and the pico S100) are used to perform a variety of treatments, including root canal surgeries, gum graft surgeries, and tooth extractions/implants. In NY N249825 and NY N246385, the Company stated that these dental surgical microscopes are “an important and indispensable aid to medical personnel in treating/alleviating predominantly permanent or chronic conditions, which, if left untreated, would substantially limit a major life activity.” Other than NY N249825 and NY N246385, CBP has no other ruling on whether conditions requiring “root canal surgeries, gum graft surgeries, and tooth extractions/implants” are considered a physical handicap for purposes of Chapter 98, HTSUS. To this extent, we find the analysis in these rulings for eligibility under subheading 9817.00.96, HTSUS, erroneous because there is no evidence to corroborate the validity of the Company’s statements about the types of permanent and chronic conditions requiring these dental surgeries. Particularly, there is no evidence that the patients undergoing these dental surgeries are physically handicapped. For instance, surgical tooth extraction is one of the most common surgical procedures provided in the United States, and wisdom teeth are often removed through surgical extraction.¹ It is also approximated that 85 percent of adults have or will have their wisdom teeth removed.² The commonality of this procedure (tooth extractions) to a condition that would be difficult to consider a physical handicap (wisdom teeth) indicate that various patients undergoing dental surgery are not physically handicapped.

Similarly, we find no evidence in NY N246385 and HQ 561801 that patients undergoing surgery with ENT (i.e., the Movena, the Sensera, the 1 FC, and the pico ENT) and the ophthalmic surgical microscopes are physically handicapped. ENT surgery is practiced by otorlaryngologists, which are medical doctors specializing in the ear, nose, throat, and related structures of the

¹ See Colgate Oral Center Care, “When Surgical Extraction of Teeth is Necessary” at www.colgate.com/en/us/oc/oral-health/procedures/tooth-removal/article/when-surgical-extraction-of-teeth-is-necessary-0215 (citing Doctors Uekert and Bradley, “Surgical Extraction” at www.drueckert.com/advanced-dentistry/extraction/surgical-extraction/?ga=1.65604077.2121490374.1491856233).

² See Crest General Oral Hygiene, “Wisdom Teeth Surgery: What You Should Know” at www.crest.com/en-us/oral-care-topics/general-oral-hygiene/wisdom-teeth-surgery-what-you-should-know; Advanced Dental Care, “Do You Need Your Wisdom Teeth Removed?” at www.brandondentistry.com/blog/do-you-need-your-wisdom-teeth/removed; and, Pointe Dental Group, “Is it Wise to Get Wisdom Teeth Removed?” at www.pointedentalgroup.com/blog/is-it-wise-to-get-wisdom-teeth-removed.

head and neck, which includes certain cosmetic surgeries.³ Cosmetic surgery is an elective surgery for purposes of enhancing appearance.⁴ To this extent, the cosmetic purpose for undergoing ENT surgery is not a condition that would be considered a physical handicap. Likewise, ophthalmic surgical microscopes are used for refractive surgeries, and the most widely performed type of refractive surgery is laser-assisted in situ keratomileusis surgery, commonly referred to as LASIK.⁵ The American Academy of Ophthalmology states that LASIK and other types of refractive surgery may be a good option for patients that want to decrease their dependence on glasses or contact lenses and are free of eye disease.⁶ It is difficult to consider a condition that is not an eye disease, but merely wanting less dependence on glasses, to be a physical handicap for purposes of Ch. 98, HTSUS.

As noted in HRL H121544, HRL 559916, and HRL 087669, along with the dental, ENT, and ophthalmic surgical microscopes, these instruments treat various conditions that do not directly impair one's physical ability to perform one or more major life activities. In contrast, with the rulings where CBP has considered physical ailments to be a physical handicap limiting one more major life activity, there has been evidence directly connecting the use of the product with a specific condition (e.g., diabetes, chronic incontinence, arrhythmia, etc.) that is considered a physical handicap. Even when certain products could treat physical handicaps such as chronic incontinence, the fact that evidence showed otherwise without persuasively showing use for conditions considered physical handicaps, weighed against finding that the product qualified for treatment under subheading 9817.00.96, HTSUS. Similarly, we find no persuasive evidence in HRL 561801 directly connecting the use of the Neuro to a specific condition that is considered a physical handicap. Rather, HRL 561801 notes the various and broad neurological microsurgery uses for the Neuro. To this extent, it is not clear which of the various types of surgeries on the brain and spine would be considered physical handicaps, and which would not. Accordingly, we do not have enough evidence in HRL 561801 to substantiate the claim that all, most, many, or any of the patients undergoing surgery or other treatments with the Neuro are considered physically handicapped for purposes of Ch. 98, HTSUS.

(2) Whether the subject surgical microscopes are specially designed or adapted for the use or benefit of such patients considered blind or other physically or mentally handicapped persons for purposes of Chapter 98, HTSUS?

The meaning of the phrase “specially designed or adapted” with regard to imported articles has been decided on a case-by-case basis. In HRL 556449, dated May 5, 1992, CBP set four factors it would consider in making this case-by-case determination. The same factors are relevant in determining whether a part is “specially designed or adapted” for an article for the use or

³ See American Academy of Otolaryngology – Head and Neck Surgery, “What is an Otolaryngologist?” at www.entnet.org/content/what-otolaryngologist.

⁴ See American Board of Cosmetic Surgery, “Cosmetic Surgery vs. Plastic Surgery” at www.americanboardcosmeticsurgery.org/patient-resources/cosmetic-surgery-vs-plastic-surgery/.

⁵ See American Academy of Ophthalmology, “What is Refractive Surgery?” at www.aaopt.org/eye-health/treatment/what-is-refractive-surgery.

⁶ See American Academy of Ophthalmology, *supra* note 5.

benefit of handicapped persons. These factors include: (1) the physical properties of the article itself (i.e., whether the article is easily distinguishable by properties of the design, form, and the corresponding use specific to this unique design, from articles useful to non-handicapped persons); (2) whether any characteristics are present that create a substantial probability of use by the chronically handicapped so that the article is easily distinguishable from articles useful to the general public and any use thereof by the general public is so improbable that it would be fugitive; (3) whether articles are imported by manufacturers or distributors recognized or proven to be involved in this class or kind of articles for the handicapped; (4) whether the articles are sold in specialty stores which serve handicapped individuals; and, (5) whether the condition of the articles at the time of importation indicates that these articles are for the handicapped.

With regard to the first factor, a product's compliance with the ADA has been an important consideration in CBP's determination under this factor. For example, in HRL H230457, dated July 19, 2013, CBP found that certain bathroom fixtures satisfied this factor because they were "easily distinguishable as designed for the handicapped since they met or exceeded the standards under the ADA and were prominently marked as ADA-compliant." In this case, there is no indication that the surgical microscopes are ADA-compliant or designed to a certain standard that specifically benefits physically handicapped individuals. Furthermore, the subject surgical microscopes have physical properties that permit them to be used for various conditions, many of which would not be considered a physical handicap per Ch. 98, HTSUS. Therefore, we do not find that the physical properties of the subject surgical microscopes are readily distinguishable from articles useful to non-handicapped individuals.

With regard to the second factor, CBP ruled in HRL 556449, dated May 5, 1992, that duty-free treatment under subheading 9817.00.96, HTSUS, was precluded for a two-handed mug, which was designed with a low center of gravity and a corresponding top to help reduce spillage, since this article was commonly used by children and the design was common in traveling mugs used by the general public. In HRL 560114, dated October 9, 1997, CBP held that a reading assistance machine that magnifies an image from 5 to 25 times was specially designed and adapted for the use or benefit of handicapped persons. The machine displayed magnified written and pictorial material on a large television screen transmitted by a video camera. CBP concluded that while the machine "may be used to magnify images for non-handicapped persons, Customs believes such a use would be an atypical use" due to its special design features, which included its capacity to magnify images, yellow oversize control knobs, and the product's dark color used to minimize glare and maximize contrast. However, in HRL 562329, dated April 26, 2002, CBP noted that while lenses incorporated into video magnifiers were similar to the product involved in HRL 560115, there was no evidence presented to show that lenses were specially designed or adapted for the use or benefit of physically handicapped individuals. Absent evidence that the lenses were specially designed or adapted for the use or benefit of physically handicapped individuals and that the lenses were not suited for many general uses, CBP was unable to conclude that the lenses in HRL 562329 were eligible for duty-free treatment under subheading 9817.00.96, HTSUS.

In this case, the subject surgical microscopes are used for a variety of conditions, many of which would benefit the general public (e.g., wisdom tooth extraction, cosmetic surgery, LASIK, etc.). Furthermore, no evidence has been presented to show that these surgical microscopes were specially designed or adapted for the use or benefit of physically handicapped individuals and that they were not suited for many general uses. Therefore, we do not find that the subject surgical microscopes have characteristics that create a substantial probability of use by the chronically handicapped.

With regard to the remaining factors, the subject surgical microscopes are manufactured and sold by the Company, which is an entity that has established itself as a manufacturer of microscopes in the medical field. However, microscopes for the medical field are not necessarily articles for the handicapped, as there are many medical needs for the general population. Furthermore, no evidence is found showing that the condition of these surgical microscopes upon importation to the United States indicates that they are for the benefit of physically handicapped individuals. Therefore, these factors were not satisfied based on the evidence provided for the subject rulings.

Given the foregoing, we find that the subject surgical microscopes do not qualify for duty-free treatment under subheading 9817.00.96, HTSUS.

HOLDING:

Based on the information presented, the subject surgical microscopes described in NY N249825, NY N246385, HRL 561801, and HRL 561940 are not eligible for duty-free treatment under subheading 9817.00.96, HTSUS.

EFFECT ON OTHER RULINGS:

NY N24982, dated February 19, 2014, and NY N246385, dated October 29, 2013, are hereby **MODIFIED** in accordance with the above analysis.

HRL 561801, dated February 28, 2002, and HRL 561940, dated February 7, 2001, are hereby **REVOKED**.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Sincerely,

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division

[ATTACHMENT G]

HQ H285358
OT:RR:CTF:VS H285358 YAG/AJR

PORT DIRECTOR
U.S. CUSTOMS AND BORDER PROTECTION
JFK AIRPORT, BUILDING 77
JAMAICA, NEW YORK 11430

RE: Modification of HRL 961705; Subheading 9817.00.96, HTSUS;
Ophthalmic Surgical Microscopes

DEAR PORT DIRECTOR:

This is in reference to Headquarters Ruling Letter (“HRL”) 961705, dated August 25, 1999, issued with regard to a protest filed by counsel, on behalf of Topcon American Corporation (“Topcon”). In HRL 961705, the U.S. Customs and Border Protection (“CBP”) determined, in relevant part, that ophthalmic surgical microscopes were eligible for duty-free treatment under subheading 9817.00.96, Harmonized Tariff Schedule of the United States (“HTSUS”). We have reviewed HRL 961705 and found it is partially incorrect. For the reasons set forth below, with respect to the eligibility of the subject surgical microscopes for duty-free treatment under subheading 9817.00.96, HTSUS, we hereby modify HRL 961705.

The tariff classifications of the other products imported by Topcon under heading 9018, HTSUS, as found in HRL 961705, are unaffected.

FACTS:

HRL 961705 stated, in relevant part:

The merchandise is a variety of ophthalmic apparatus produced by Topcon in Japan. Specifically, they are: slit lamps, tonometers; retinal cameras, ophthalmometers (also known as keratometers); screenscopes, lenses, vision testers, auto chart projectors; operation microscopes; and parts thereof.

Customs classified the subject merchandise at entry in subheading 9018.50.0000, Harmonized Tariff Schedule of the United States (“HTSUS”), which provides for other ophthalmic instruments and appliances. With one exception, the protestant advocates classification of the subject merchandise in subheading 9018.19.9550, HTSUS, which provides for other electro-diagnostic apparatus. Protestants contend that the ophthalmic surgical microscopes are classifiable in subheading 9817.00.96, as other articles specially designed or adapted for the use or benefit of the handicapped.

[. .]

Counsel advises that the ophthalmic operation microscopes at issue are compound optical microscopes, stereoscopic and without a means for photographing an image, classifiable in subheading 9011.10.8000.

[. .]

In particular, the Topcon sales literature indicates that the microscope is designed to facilitate ophthalmic microsurgery. It delivers three dimensional images using a coaxial illumination standard, and aids in the

observation of red reflex. The unit is capable of fine focusing adjustment within a range of 36mm, at a speed of 2.2mm per second. There are five different magnification lens settings. The unit is capable of five different field of view settings. The supporting arms have a range of motion more limited than other surgical microscopes. The axis of the optical path remains fixed over the eye, resulting in an observation angle set at a limited operating rate (generally 45 degrees to the optical axis).

Counsel states that Topcon only produces and distributes to the ophthalmic market, representing them as designed specifically for ophthalmic microsurgery. They are in most cases used for cataract surgery or posterior vitrectomy

The only product at issue in this case is the ophthalmic surgical microscope produced by Topcon in Japan.

ISSUE:

Whether the subject surgical microscopes are eligible for duty-free treatment under subheading 9817.00.96, HTSUS?

LAW AND ANALYSIS:

Subheading 9817.00.96, HTSUS, came into effect in the United States through a series of international agreements and acts of Congress. Its basis is in the Agreement on the Importation of Educational, Scientific and Cultural Materials, *opened for signature* Nov. 22, 1950, 17 U.S.T. 1835, 131 U.N.T.S. 25, or “Florence Agreement,” drafted by the United Nations Educational, Scientific, and Cultural Materials (“UNESCO”) in July of 1950. In 1976, UNESCO adopted the Nairobi Protocol to the Florence Agreement, which expanded the scope of products to include materials specially designed for handicapped persons. *See* Protocol to the Agreement on the Importation of Educational, Scientific, or Cultural Materials, *opened for signature* 1 Mar. 1977, 1259 U.N.T.S. 3.

Congress ratified the Nairobi Protocol and enacted it into law in 1983. Pub. L. 97-446, § 161, 96 Stat. 2329, 2346 (1983). The Senate stated in its Report that one of the goals of this law was to benefit the handicapped and show support by the United States for the rights of the handicapped. The Senate was concerned, however, that people would misuse this tariff provision to avoid paying duties on expensive products. As a result, it stated that it did not intend “that an insignificant adaptation would result in duty free treatment for an entire relatively expansive article . . . the modification or adaptation must be significant so as to clearly render the article for use by handicapped persons.” S. Rep. (Finance Committee) No. 97-564, 97th Cong. 2nd Sess., Sept. 21, 1989.

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Notes in subchapter XVII of Chapter 98 of the HTSUS define the terms “blind or other physically or mentally handicapped persons” and limit the classification of certain products under subheadings 9817.00.92, 9817.00.94, and 9817.00.96, HTSUS. U.S. Note 4(a), subchapter XVII, Chapter 98, HTSUS, defines the term “blind or other physically or mentally handicapped persons” as “any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working.” U.S. Note 4(b), subchapter XVII, Chapter 98, HTSUS, excludes four categories of goods from subheadings 9817.00.92, 9817.00.94, and 9817.00.96, HTSUS: (1) articles for acute or transient disability; (2) spectacles, dentures, and cosmetic articles for individuals not substantially disabled; (3) therapeutic and diagnostic articles; and (4) medicine or drugs.

To summarize, for the subject surgical microscopes to qualify for duty-free treatment under subheading 9817.00.96, HTSUS, the following must be true:

- (4) Patients undergoing surgery or other treatments with the subject surgical microscopes are considered blind or other physically or mentally handicapped persons for purposes of Chapter 98, HTSUS;
- (5) The subject surgical microscopes are specially designed or adapted for the use or benefit of such patients considered blind or other physically or mentally handicapped persons for purposes of Chapter 98, HTSUS; and,
- (6) The subject surgical microscopes are not articles within the excluded categories listed in U.S. Note 4(b), subchapter XVII, Chapter 98, HTSUS (e.g., therapeutic articles, etc.).

In HRL 961705, CBP found that the subject surgical microscopes were not therapeutic articles because the microscopes did not heal or cure the underlying condition of the patient. To support this position, it cited *Travenol Laboratories, Inc. v. U.S.*, 17 CIT 69 (1993), stating that therapeutic articles within the context of this provision are those articles that heal or cure a condition. See also T.D. 92–77, 26 Cust. B. 240 1992 (implementing the duty-free provisions of the Nairobi Protocol); and, HRL 952465, dated January 27, 1993.

From the facts provided in HRL 961705, it is not entirely clear whether the subject surgical microscopes are not considered therapeutic. However, we note that merely because an article is not considered therapeutic does not mean it is not an article for an acute or transient disability or another article within the excluded categories. Similarly, demonstrating that an article is not within the excluded categories alone does not equate to qualification for duty-free treatment under subheading 9817.00.96, HTSUS. These issues were never thoroughly addressed in HRL 961705, and thus it is not clear whether the requirements for eligibility under subheading 9817.00.96, HTSUS, were satisfied.

(3) Whether patients undergoing surgery or other treatments with the subject surgical microscopes are considered blind or other physically or mentally handicapped persons for purposes of Chapter 98, HTSUS?

As noted above, U.S. Note 4(a), subchapter XVII, Chapter 98, HTSUS, defines the term “blind or other physically or mentally handicapped persons” as “any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working.” T.D. 92–77 provides further guidance for interpreting this term as follows:

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On the other hand, CBP has noted that certain conditions are not physical handicaps for purposes of Chapter 98, HTSUS. For instance, in HRL H121544, dated October 6, 2014, CBP held that metabolic disorders or severe food allergies, which limit the capacity to digest, metabolize, or ingest certain foods, requiring avoidance of such foods, do not impair the actual physical act of eating. HRL H121544 noted that in other CBP rulings regarding classification under heading 9817, HTSUS, the conditions or diseases directly impaired one’s physical ability to perform one or more major life activities. Similarly in HRL H131516, dated March 1, 2011, CBP differentiated the pain from swollen, itchy, or aching feet that may render an individual “unable to stand on their feet for an entire shift or too tired to stop at the grocery store on their way home from work” from those individuals with little or no

mobility “unable to perform one or more major life activities.” See also HRL H092454, dated April 28, 2010 (differentiating light incontinence from a condition that CBP considers a physical handicap, chronic incontinence). See generally HRL 559916, dated May 8, 1997; and, HRL 087669, dated November 16, 1990 (holding that broadly used medical supplies (e.g., hospital gowns and medical bed pads) did not qualify for treatment under subheading 9817.00.96, HTSUS, because the evidence showed that various conditions requiring use of the supplies were not chronic or permanent conditions and no evidence specifically showed that the conditions were physical handicaps).

The subject surgical microscopes are used for patients undergoing various types ophthalmic microsurgeries. It is noted that Topcon’s ophthalmic surgical microscopes are an important and indispensable aid to the surgeon in magnifying the area to be operated on and in performing delicate and precise microsurgeries on the eye. In support of Topcon’s position, HRL 952465 is cited. In HRL 952465, instruments for cataract surgery, vitrectomy, glaucoma filtration procedures, corneal transplantation, and retinal attachment were determined to be for the benefit of the handicap because they were used to improve a visually handicapped person’s ability to see. However, in reviewing Topcon’s literature on their ophthalmic surgical microscopes, it is noted that use of these microscopes is not limited to the treatments described in HRL 952465, but extends to other surgeries, such as refractive surgeries.¹ The most widely performed type of refractive surgery is laser-assisted in situ keratomileusis surgery, commonly referred to as LASIK.² The American Academy of Ophthalmology states that LASIK and other types of refractive surgery may be a good option for patients that want to decrease their dependence on glasses or contact lenses and are free of eye disease.³ While HRL 961705 states that persons requiring ophthalmic surgery are physically handicapped, it is difficult to consider a condition that is not an eye disease, but merely wanting less dependence on glasses, to be a physical handicap for purposes of Ch. 98, HTSUS.

Furthermore, as noted in HRL H121544, HRL 559916, and HRL 087669, the subject surgical microscopes treat various conditions that do not directly impair one’s physical ability to perform one or more major life activities. In contrast, with the rulings where CBP has considered physical ailments to be a physical handicap limiting one more major life activity, there has been evidence directly connecting the use of the product with a specific condition (e.g., diabetes, chronic incontinence, arrhythmia, etc.) that is considered a physical handicap. Even when certain products could treat physical handicaps such as chronic incontinence, the fact that evidence showed otherwise without persuasively showing use for conditions considered physical handicaps, weighed against finding that the product qualified for treatment under subheading 9817.00.96, HTSUS. Similarly, we find no persuasive evidence in HRL 961705 directly connecting the use of the subject surgical microscopes to a specific condition that is considered a physical handicap. Rather, there are various and broad ophthalmic microsurgery uses for the subject surgical microscopes. To this extent, it is not clear which of the various types of

¹ See TOCPON CSR Report 2010, “Relationship between TOPCON products and Society” at http://global.topcon.com/csr/pdf/en_csr2010_03.pdf.

² See American Academy of Ophthalmology, “What is Refractive Surgery?” at www.aaopt.org/eye-health/treatment/what-is-refractive-surgery.

³ See American Academy of Ophthalmology, *supra* note 5.

ophthalmic surgeries would be considered physical handicaps, and which would not. Accordingly, we do not have enough evidence in HRL961705 to substantiate the claim that all, most, many, or any of the patients undergoing surgery or other treatments with the subject surgical microscopes are considered physically handicapped for purposes of Ch. 98, HTSUS.

(4) Whether the subject surgical microscopes are specially designed or adapted for the use or benefit of such patients considered blind or other physically or mentally handicapped persons for purposes of Chapter 98, HTSUS?

The meaning of the phrase “specially designed or adapted” with regard to imported articles has been decided on a case-by-case basis. In HRL 556449, dated May 5, 1992, CBP set four factors it would consider in making this case-by-case determination. The same factors are relevant in determining whether a part is “specially designed or adapted” for an article for the use or benefit of handicapped persons. These factors include: (1) the physical properties of the article itself (i.e., whether the article is easily distinguishable by properties of the design, form, and the corresponding use specific to this unique design, from articles useful to non-handicapped persons); (2) whether any characteristics are present that create a substantial probability of use by the chronically handicapped so that the article is easily distinguishable from articles useful to the general public and any use thereof by the general public is so improbable that it would be fugitive; (3) whether articles are imported by manufacturers or distributors recognized or proven to be involved in this class or kind of articles for the handicapped; (4) whether the articles are sold in specialty stores which serve handicapped individuals; and, (5) whether the condition of the articles at the time of importation indicates that these articles are for the handicapped.

With regard to the first factor, a product’s compliance with the ADA has been an important consideration in CBP’s determination under this factor. For example, in HRL H230457, dated July 19, 2013, CBP found that certain bathroom fixtures satisfied this factor because they were “easily distinguishable as designed for the handicapped since they met or exceeded the standards under the ADA and were prominently marked as ADA-compliant.” In this case, there is no indication that the surgical microscopes are ADA-compliant or designed to a certain standard that specifically benefits physically handicapped individuals. Furthermore, the subject surgical microscopes have physical properties that permit them to be used for various conditions, many of which would not be considered a physical handicap per Ch. 98, HTSUS. While it is stated that the subject microscopes have physical properties that permit use in ophthalmic surgery, it has not been demonstrated that people requiring ophthalmic surgery are physically handicapped. Therefore, we do not find that the physical properties of the subject surgical microscopes are readily distinguishable from articles useful to non-handicapped individuals.

With regard to the second factor, CBP ruled in HRL 556449, dated May 5, 1992, that duty-free treatment under subheading 9817.00.96, HTSUS, was precluded for a two-handed mug, which was designed with a low center of gravity and a corresponding top to help reduce spillage, since this article was commonly used by children and the design was common in traveling mugs used by the general public. In HRL 560114, dated October 9, 1997, CBP held that a reading assistance machine that magnifies an image from 5 to 25 times

was specially designed and adapted for the use or benefit of handicapped persons. The machine displayed magnified written and pictorial material on a large television screen transmitted by a video camera. CBP concluded that while the machine “may be used to magnify images for non-handicapped persons, Customs believes such a use would be an atypical use” due to its special design features, which included its capacity to magnify images, yellow oversize control knobs, and the product’s dark color used to minimize glare and maximize contrast. However, in HRL 562329, dated April 26, 2002, CBP noted that while lenses incorporated into video magnifiers were similar to the product involved in HRL 560115, there was no evidence presented to show that lenses were specially designed or adapted for the use or benefit of physically handicapped individuals. Absent evidence that the lenses were specially designed or adapted for the use or benefit of physically handicapped individuals and that the lenses were not suited for many general uses, CBP was unable to conclude that the lenses in n HRL 562329 were eligible for duty-free treatment under subheading 9817.00.96, HTSUS.

In this case, the subject surgical microscopes are used for a variety of conditions, many of which would benefit the general public (e.g., LASIK). Furthermore, no evidence has been presented to show that these surgical microscopes were specially designed or adapted for the use or benefit of physically handicapped individuals and that they were not suited for many general uses. Therefore, we do not find that the subject surgical microscopes have characteristics that create a substantial probability of use by the chronically handicapped.

With regard to the remaining factors, the subject surgical microscopes are manufactured and sold by Topcon, which is an entity that has established itself as a manufacturer of ophthalmic apparatuses. It is also noted that Topcon’s marketing information indicates that these microscopes are used principally in ophthalmic surgeries. However, ophthalmic apparatuses are not necessarily articles for the handicapped, as there are many ophthalmic needs for the general population. Furthermore, no evidence is found showing that the condition of these surgical microscopes upon importation to the United States indicates that they are for the benefit of physically handicapped individuals. Therefore, these factors were not satisfied based on the evidence provided for the subject rulings.

Given the foregoing, we find that the subject surgical microscopes do not qualify for duty-free treatment under subheading 9817.00.96, HTSUS.

HOLDING:

Based on the information presented, the subject surgical microscopes described in HRL 961705 are not eligible for duty-free treatment under subheading 9817.00.96, HTSUS.

EFFECT ON OTHER RULINGS:

HRL 961705, dated August 25, 1999, is hereby **MODIFIED** in accordance with the above analysis.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Sincerely,

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division

**PROPOSED REVOCATION OF THREE RULING LETTERS
AND MODIFICATION OF TWO RULING LETTERS, AND
PROPOSED REVOCATION OF TREATMENT RELATING TO
THE TARIFF CLASSIFICATION OF COCONUT WATER**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of three ruling letters and modification of two ruling letters, and revocation of treatment relating to the tariff classification of coconut water.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke three ruling letters and modify two ruling letters concerning the tariff classification of coconut water under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before August 18, 2017.

ADDRESS: Written comments are to be addressed to the U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: Tatiana Salnik Matherne, Tariff Classification and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0351.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (“Title VI”), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are

“informed compliance” and **“shared responsibility.”** These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations.

Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP is proposing to revoke three ruling letters and modify two ruling letters pertaining to the tariff classification of coconut water. Although in this notice CBP is specifically referring to New York Ruling Letter (NY) N171621, dated July 8, 2011 (Attachment A), NY N188787, dated October 28, 2011 (Attachment B), NY 816865, dated December 14, 1995 (Attachment C), NY N128316, dated November 5, 2010 (Attachment D), and NY N258785, dated November 24, 2014 (Attachment E), this notice covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the five identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. §1625(c)(2)), as amended by section 623 of Title VI, CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer’s failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N171621, N188787, NY 816865, NY N128316 and NY N258785, CBP classified coconut water products in heading 2202,

HTSUS, which provides for “Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavored, and other nonalcoholic beverages, not including fruit or vegetable juices of heading 2009.” CBP has reviewed NY N171621, N188787, NY 816865, NY N128316 and NY N258785, and has determined those ruling letters to be in error. It is now CBP’s position that the coconut water products at issue in those rulings are properly classified, by operation of GRIs 1 and 6, in heading 2009, HTSUS. The coconut water products at issue in NY N171621, NY 816865, NY N128316 and NY N188787, are classified in subheading 2009.89.60, HTSUS, which provides for “Fruit juices (including grape must) and vegetable juices, not fortified with vitamins or minerals, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter: Juice of any other single fruit or vegetable: Other: Fruit juice: Other.” The coconut water products at issue in NY N258785, are classified in subheading 2009.90.40, which provides for “Fruit juices (including grape must) and vegetable juices, not fortified with vitamins or minerals, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter: Mixtures of juices: Other.” Pursuant to 19 U.S.C. 1625(c)(1), CBP is proposing to revoke NY N171621, NY 816865 and NY N128316, and to modify NY N258785 and NY N188787, and to modify or revoke any other ruling not specifically identified, to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H284220, set forth as Attachment F to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated: May 11, 2017

ELIZABETH JUNIOR
for

MYLES B. HARMON,
Director

Commercial and Trade Facilitation Division

Attachments

[ATTACHMENT A]

N171621

July 8, 2011

CLA-2-22:OT:RR:NC:2:235

CATEGORY: Classification

TARIFF NO.: 2106.90.9998; 2202.90.9090

MR. JOHN E. STAIB
J. E. S. FORWARDING INC.
30 MONTGOMERY STREET
SUITE 620
JERSEY CITY, NJ 07302

RE: The tariff classification of Coconut Water from Philippines.

DEAR MR. STAIB:

In your letter dated June 20, 2011 on behalf of your client, Lamex Foods, Inc., you requested a tariff classification ruling. You submitted a manufacturer's flow chart and Technical Data sheet for our review. A sample was not submitted.

The subject merchandise is 100 percent young coconut water, and coconut water concentrate derived from coconut, separated from any solid materials, filled, weighed and stored in an ultra high temperature chiller prior to being packed into individual cartons. You have stated that the article will be imported frozen or aseptically packed in 20kg, 180kg and 1000kg bags, respectively.

The applicable subheading for the unconcentrated coconut water when imported in aseptic packs in condition ready to drink, will be 2202.90.9090, Harmonized Tariff Schedule of the United States (HTSUS), which provides for waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavored, and other non alcoholic beverages, not including fruit or vegetable juices of heading 2209: other: other...other. The rate of duty will be 0.2 cents per liter.

The applicable subheading for the coconut water concentrate, aseptically packed and/or frozen will be 2106.90.9998, HTSUS, which provides for food preparations not elsewhere specified or included. . .other. . .other. . .other. The rate of duty will be 6.4 percent, ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

Articles classified under the subheadings provided which are products of the Philippines, may be entitled to duty free treatment under the Generalized System of Preferences (GSP) upon compliance with all applicable regulations. The GSP is subject to modification and periodic suspension, which may affect the status of your transaction at the time of entry for consumption or withdrawal from warehouse. To obtain current information on GSP, check our Web site at www.cbp.gov and search for the term "GSP".

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling FDA at telephone number (301) 575-0156, or at the Web site www.fda.gov/oc/bioterrorism/bioact.html.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Paul Hodgkiss at (646) 733-3046.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

[ATTACHMENT B]

N188787

October 28, 2011

CLA-2-22:OT:RR:NC:2:235

CATEGORY: Classification

TARIFF NO.: 2202.90.9090

Ms. WARUNEE SARASAS

6432 COXWOLD DR

ELKRIDGE, MD, 21075-5955

RE: The tariff classification of Coconut Water from Thailand

DEAR Ms. SARASAS:

In your letter dated October 12, 2011 you requested a tariff classification ruling for two coconut water based beverages.

The instant products consist of the following:

Product 1: Canned Coconut Water with Pulp – 85 percent Coconut Juice, 8 Percent Sugar, 4.991 Percent Water, 2 Percent Young Coconut Pulp, Ascorbic Acid and Sodium Metabisulphite.

Product 2: Canned Roasted Coconut Juice with Pulp – 83 Percent Roasted Coconut Water, 8.977 Percent Water, 5 Percent Sugar, 3 Percent Young Coconut Meat, Ascorbic Acid and Sodium Metabisulphite.

Both products are in packed in cans and ready to be consumed as a beverage in condition as imported.

The applicable subheading for the Canned Coconut Water with Pulp and the Canned Roasted Coconut Juice with Pulp will be 2202.90.9090, Harmonized Tariff Schedule of the United States (HTSUS), which provides for waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavored, and other non alcoholic beverages, not including fruit or vegetable juices of heading 2209: other: other...other. The rate of duty will be 0.2 cents per liter.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Paul Hodgkiss at (646) 733-3046.

Sincerely,

ROBERT B. SWIERUPSKI

*Director**National Commodity Specialist Division*

[ATTACHMENT C]

NY 816865

December 14, 1995

CLA-2-22:RR:NC:FC:232 816865

CATEGORY: Classification

TARIFF NO.: 2202.90.9090

MR. ROBERT SANTIAGO
R V INDUSTRIES, INC.
2801 BANKERS INDUSTRIAL DRIVE
DORAVILLE, GA 30360

RE: The tariff classification of Aseptic Coconut Water from the Philippines.

DEAR MR. SANTIAGO:

In your letter dated November 8, 1995, you requested a tariff classification ruling.

You submitted a sample and descriptive literature with your request. The product in question is pure coconut water, said to be extracted from coconuts, separated from any coconut solids, processed through ultra high temperature equipment to dispose of any undesirable organisms, stored in aseptic tanks and then packaged for shipment. No preservatives or flavors are added. The product is intended to be consumed as a beverage. It will be imported in 250 ml juice boxes with drinking straws attached, or in 25 liter bags for commercial use.

The applicable subheading for the coconut water will be 2202.90.9090, Harmonized Tariff Schedule of the United States (HTS), which provides for waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavored, and other nonalcoholic beverages, not including fruit or vegetable juices of heading 2209: other: other...other. The rate of duty will be 0.3 cents per liter.

Articles classifiable under subheading 2202.90.9090, HTS, which are products of the Philippines are entitled to duty free treatment under the Generalized System of Preferences (GSP) upon compliance with all applicable regulations if the GSP is renewed.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling, or the control number indicated above, should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist John Maria at 212-466-5730.

Sincerely,

ROGER J. SILVESTRI
Director,
National Commodity
Specialist Division

[ATTACHMENT D]

N128316

November 5, 2010

CLA-2-22:OT:RR:NC:2:235

CATEGORY: Classification

TARIFF NO.: 2202.90.9090

Ms. BARBARA CARMAN
BCB INTERNATIONAL, INC.
1010 NIAGARA STREET
BUFFALO, NY 14213

RE: The tariff classification of Coconut Water from Indonesia

DEAR Ms. CARMAN:

In your letter dated October 20, 2010, you requested a tariff classification ruling.

The subject product is called Coconut Water. You indicate that it is produced from freshly collected coconut water which has been chilled, pasteurized, and sterilized. You further state that coconut water is water which accumulates inside the young coconut prior to the formation of the flesh of the nut. You indicate that the processes utilized allow the beverage to retain its natural freshness, flavor and aroma. The product will be imported in a sterilized packages of either a 20 kilogram cartons, or a 200 kilogram drums. Nothing is added to the product, and you indicate that the sole ingredient is coconut water.

The applicable subheading for the Coconut Water will be 2202.90.9090, Harmonized Tariff Schedule of the United States (HTSUS), which provides for waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavored, and other nonalcoholic beverages... other...other...other. The rate of duty will be 0.2 cents per liter.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

Articles classifiable under subheading 2202.90.9090, HTSUS, which are products of Indonesia may be entitled to duty free treatment under the Generalized System of Preferences (GSP) upon compliance with all applicable regulations. The GSP is subject to modification and periodic suspension, which may affect the status of your transaction at the time of entry for consumption or withdrawal from warehouse. To obtain current information on GSP, check our Web site at www.cbp.gov and search for the term "GSP".

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling FDA at telephone number (301) 575-0156, or at the Web site www.fda.gov/oc/bioterrorism/bioact.html.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Paul Hodgkiss at (646) 733-3046.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

[ATTACHMENT E]

N258785

November 24, 2014

CLA-2-22:OT:RR:NC:232

CATEGORY: Classification

TARIFF NO.: 2202.90.9090

MR. CHRIS KUEHLER
CK LOGISTICS, INC.
431 ISOM RD. #107
SAN ANTONIO, TX 78216

RE: The tariff classification of Coconut Water from Vietnam

DEAR MS. KUEHLER:

In your letter dated October 29, 2014 you requested a tariff classification ruling on behalf of your client HEB Grocery. Samples and information were submitted with your request. Samples were reviewed and disposed of. The products are described as flavored coconut water. The flavored coconut water is imported in five varieties: Coconut Water with Pineapple, Coconut Water with Pomegranate, Coconut Water with Latte, Coconut Water with Chocolate, and Coconut Water with Mango.

Coconut Water with Pineapple is said to contain 94.9 percent natural coconut water, 5 percent pineapple juice, and less than one percent of vitamin C. Coconut Water with Pomegranate is said to contain 94.9 percent natural coconut water, 5 percent pomegranate juice, and less than one percent of vitamin C. Coconut Water with Latte is said to contain 70 percent natural coconut water, 25 percent coffee extract, 3 percent sugar, and 2 percent milk powder. Coconut Water with Chocolate is said to contain 93.4 percent natural coconut water, 4 percent sugar, 2 percent milk powder, and less than one percent cocoa powder. Coconut Water with Mango is said to contain 94.9 percent coconut water, 5 percent mango puree and 10 percent vitamin C.

All of the juice drinks will be packaged in tetra packs in either a 330 ml or 500 ml size designed for retail distribution in the United States.

The applicable subheading for the five flavored Coconut Waters: Coconut Water with Pineapple, Coconut Water with Pomegranate, Coconut Water with Latte, Coconut Water with Chocolate, and Coconut Water with Mango will be 2202.90.9090, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavored, and other nonalcoholic beverages, not including fruit or vegetable juices of heading 2009: Other: Other: Other." The rate of duty will be 0.2 cents per liter.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling FDA at telephone number (301) 575-0156, or at the Web site www.fda.gov/oc/bioterrorism/bioact.html.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Frank Troise at frank.l.troise@cbp.dhs.gov.

Sincerely,

GWENN KLEIN KIRSCHNER

Director

National Commodity Specialist Division

{ATTACHMENT F}

HQ H284220
CLA-2 OT:RR:CTF:TCM H284220 TSM
CATEGORY: Classification
TARIFF NO.: 2009.89.60; 2009.90.40

MR. JOHN E. STAIB
J. E. S. FORWARDING INC.
30 MONTGOMERY STREET
SUITE 620
JERSEY CITY, NJ 07302

RE: Revocation of NY N171621, NY 816865 and NY N128316; Modification of NY N258785 and NY N188787; The tariff classification of coconut water.

DEAR MR. STAIB:

This is in reference to NY N171621, dated July 8, 2011, concerning the tariff classification of coconut water. This is also in reference to NY N188787, dated October 28, 2011, NY 816865, dated December 14, 1995, NY N128316, dated November 5, 2010 and NY N258785, dated November 24, 2014. In those rulings, U.S. Customs and Border Protection (“CBP”) classified the coconut water products under heading 2202, HTSUS, which provides for “Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavored, and other nonalcoholic beverages, not including fruit or vegetable juices of heading 2009.” Upon additional review, we have found this classification to be incorrect. For the reasons set forth below we hereby revoke NY N171621, NY 816865 and NY N128316, and modify NY N188787 (coconut water with pulp) and NY N258785 (coconut water with pineapple and coconut water with pomegranate).

FACTS:

NY N171621, issued to J. E. S. Forwarding Inc. on July 8, 2011, describes the subject merchandise as follows:

The subject merchandise is 100 percent young coconut water, and coconut water concentrate derived from coconut, separated from any solid materials, filled, weighed and stored in an ultra high temperature chiller prior to being packed into individual cartons. You have stated that the article will be imported frozen or aseptically packed in 20kg, 180kg and 1000kg bags, respectively.

ISSUE:

What is the tariff classification of the coconut water at issue?

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

2009	Fruit juices (including grape must) and vegetable juices, not fortified with vitamins or minerals, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter			
	Juice of any other single fruit or vegetable:	*	*	*
2009.89	Other:	*	*	*
2009.89.60	Other	*	*	*
2009.90	Mixture of juices:	*	*	*
2009.90.40	Other	*	*	*
2202	Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavored, and other nonalcoholic beverages, not including fruit or vegetable juices of heading 2009			

In addition, in interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

EN 20.09 provides, in pertinent parts, the following:

The fruit and vegetable juices of this heading are generally obtained by mechanically opening or pressing fresh, healthy and ripe fruit or vegetables. This may be done (as in the case of citrus fruits) by means of mechanical “extractors” operating on the same principle as the household lemon-squeezer, or by pressing which may or may not be preceded either by crushing or grinding (for apples in particular) or by treatment with cold or hot water or with steam (e.g., tomatoes, blackcurrants and certain vegetables such as carrots and celery). The juices of this heading also include coconut water.

* * *

Similarly, intermixtures of the juices of fruits or vegetables of the same or different types remain classified in this heading, as do reconstituted juices (i.e., products obtained by the addition, to the concentrated juice, of a quantity of water not exceeding that contained in similar non-concentrated juices of normal composition).

* * *

Historically, CBP has classified coconut water as “waters . . . or other non-alcoholic beverages” of heading 2202, HTSUS. However, we note that fruit and vegetable juices are excluded from the heading by the text of 2202, HTSUS. Therefore, we must first determine whether the coconut water is a fruit juice. A coconut is the fruit, or seed, of a coconut tree. Coconut water is extracted by mechanically opening and draining the coconut. Therefore, we

find that coconut water is a fruit juice of heading 2009, HTSUS. This conclusion is supported by the Explanatory Notes to heading 2009, which state that “The juices of this heading also include coconut water.”

Therefore, the coconut water products at issue in NY N171621, NY 816865, NY N128316, NY N258785 and NY N188787, are classified in heading 2009, HTSUS, which provides for “Fruit juices (including grape must) and vegetable juices, not fortified with vitamins or minerals, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter.” Specifically, we find that the products at issue in NY N171621, NY 816865, and NY N128316, consisting of 100 percent coconut water, and NY N188787 (coconut water with pulp),¹ are classified in subheading 2009.89.60, HTSUS, which provides for “Fruit juices (including grape must) and vegetable juices, not fortified with vitamins or minerals, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter: Juice of any other single fruit or vegetable: Other: Fruit juice: Other.” Moreover, we find that the relevant products at issue in NY N258785 (coconut water with pineapple juice and coconut water with pomegranate juice),² are classified in subheading 2009.90.40, which provides for “Fruit juices (including grape must) and vegetable juices, not fortified with vitamins or minerals, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter: Mixtures of juices: Other.”

HOLDING:

By application of GRIs 1 and 6, we find that the subject merchandise is classified under heading 2009, HTSUS. Specifically, the products at issue in NY N171621, NY 816865, NY N128316 and NY N188787, are classified in subheading 2009.89.60, HTSUS, which provides for “Fruit juices (including grape must) and vegetable juices, not fortified with vitamins or minerals, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter: Juice of any other single fruit or vegetable: Other: Fruit juice: Other.” The 2017 column one, general rate of duty is 0.5¢/liter.

Moreover, the products at issue in NY N258785, are classified in subheading 2009.90.40, which provides for “Fruit juices (including grape must) and vegetable juices, not fortified with vitamins or minerals, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter: Mixtures of juices: Other.” The 2017 column one, general rate of duty is 7.4¢/liter.

EFFECT ON OTHER RULINGS:

NY N171621, dated July 8, 2011; NY 816865, dated December 14, 1995; NY N128316, dated November 5, 2010, are REVOKED. NY N258785, dated November 24, 2014 (coconut water with pineapple juice and coconut water with pomegranate juice), and NY N188787, dated October 28, 2011 (coconut water with pulp), are MODIFIED.

¹ NY N188787 also addresses tariff classification of another product, referred to as “Product 2.” We note that that product is not at issue here.

² NY N258785 also addresses Coconut Water with Latte, Coconut Water with Chocolate, and Coconut Water with Mango. We note that those products are not at issue here.

Sincerely,
MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division

19 CFR PART 177**MODIFICATION OF ONE RULING LETTER AND
REVOCAION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF ALUMINUM
FERRULE/PLASTIC BUTTON COMBINATIONS**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of modification of one ruling letter and revocation of treatment relating to the tariff classification of aluminum ferrule/plastic button combinations for use, after further processing, as closures for vials.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying one ruling letter concerning tariff classification of aluminum ferrule/plastic button combinations under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 51, No. 18, on May 3, 2017. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 18, 2017.

FOR FURTHER INFORMATION CONTACT: Nicholai Diamond, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–0292.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (“Title VI”), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are “**informed compliance**” and “**shared responsibility**.” These concepts are premised on the idea that in order to maximize voluntary

compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations.

Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the *Customs Bulletin*, Vol. 51, No. 18, on May 3, 2017, proposing to modify one ruling letter pertaining to the tariff classification of aluminum ferrule/plastic button combinations. As stated in the proposed notice, this action will cover New York Ruling Letter ("NY") N260351, dated January 16, 2015, as well as any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. §1625(c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In NY N260351, CBP classified aluminum ferrule/plastic button combinations in heading 3923, HTSUS, specifically subheading 3923.50.00, HTSUS, which provides for "Articles for the conveyance or packing of goods, or plastics; stoppers, lids, caps and other closures, of plastics: Stoppers, lids, caps and other closures." CBP has reviewed NY N260351 and has determined the ruling letter to be partially in error. It is now CBP's position that aluminum ferrule/plastic button combinations are properly classified, by operation of GRIs 1 and 3(c),

in heading 8309, HTSUS, specifically in subheading 8309.90.00, HTSUS, which provides for “Stoppers, caps and lids (including crown corks, screw caps and pouring stoppers), capsules for bottles, threaded bungs, bung covers, seals and other packing accessories, and parts thereof, of base metal: Other.”

Pursuant to 19 U.S.C. §1625(c)(1), CBP is modifying NY N260351 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H271369, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated: June 07, 2017

ALLYSON MATTANAH

For

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division

Attachment

HQ H271369

June 07, 2017

CLA-2 OT:RR:CTF:TCM H271369 NCD

CATEGORY: Classification

TARIFF NO.: 8309.90.0000

JULIE VAIR
SENIOR CONSULTANT
EXPEDITORS TRADEWIN, LLC
1015 THIRD AVENUE
12TH FLOOR
SEATTLE, WA 98104

RE: Modification of NY N260351; Classification of aluminum ferrule/plastic button combinations

DEAR Ms. VAIR:

This is in response to your letter of November 11, 2015, in which you request, on behalf of West Pharmaceutical Services, Inc., reconsideration of New York Ruling Letter (NY) N260351 (“reconsideration request”). NY N260351, issued to you by U.S. Customs and Border Protection (CBP) on January 16, 2015, involves classification of aluminum ferrules, as well as combinations of the ferrules with plastic buttons (“ferrule/button combinations” of “subject merchandise”), under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed NY N260351 and determined that it is incorrect with respect to classification of the ferrule/ button combinations. For the reasons set forth below, we are modifying that ruling letter.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice of the proposed action was published in the Customs Bulletin, Vol. 51, No. 18, on May 3, 2017. No comments were received in response to the notice.

FACTS:

The subject merchandise consists of aluminum ferrules, in ring form, atop which thin plastic buttons have been affixed by means of numerous aluminum “bridges.” In conjunction with rubber stoppers to which they are joined following importation, the ferrule/button combinations form closures for glass vials used as repositories for medicinal products and other substances. The specific function of the ferrule/button combination vis-à-vis the full closure is to crimp and secure in place the rubber stopper residing in the mouth of the vial (see Figure 1 below).

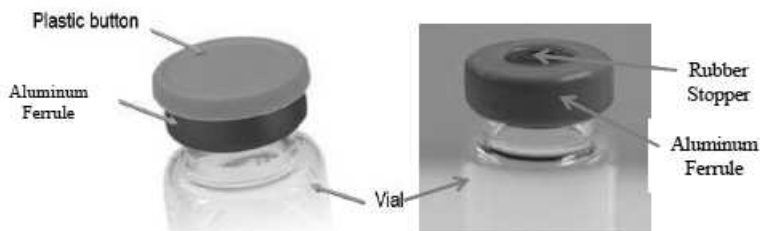


Figure 1

When the ferrule/button combination is placed atop the rubber stopper, the complete closure renders the glass vial impenetrable unless and until the plastic cap's removal, which can be effected by the application of pressure with the thumb so as to sever the aluminum bridges (see Figure 2 below). Removal of the plastic button exposes the underlying stopper, which can be penetrated by a syringe to extract the substance contained in the vial. You state in your reconsideration request that the plastic button "acts as a dust cover for the injection site" and that the aluminum ferrule's function "is to hold the rubber stopper in place on the vial creating container closure integrity."



Figure 2

In NY N260351, CBP ruled that the subject ferrule/button combinations are classified in heading 3923, HTSUS, specifically subheading 3923.50.00, HTSUS, which provides for "Articles for the conveyance or packing of goods, or plastics; stoppers, lids, caps and other closures, of plastics: Stoppers, lids, caps and other closures." CBP additionally ruled that the aluminum ferrules, when imported alone, are classified in heading 8309, HTSUS, specifically subheading 8309.90.00, HTSUS, which provides for "Stoppers, caps and lids (including crown corks, screw caps and pouring stoppers), capsules for bottles, threaded bungs, bung covers, seals and other packing accessories, and parts thereof, of base metal: Other."

Subsequently, following issuance of NY N260351 and our receipt of your reconsideration request, we requested and received from you a supplemental submission ("supplemental submission") detailing the respective weights, densities, and surface areas of the plastic caps and aluminum ferrules.¹ It was indicated in the submission that the articles are of two sizes, one of which includes a plastic button measuring 13 mm in diameter ("13 mm cap type") and the other of which includes a plastic button measuring 20 mm in diameter ("20 mm cap type"). Your supplemental submission, along with samples of the subject merchandise, was submitted to a CBP laboratory for verification. The report issued by the laboratory ("CBP laboratory report") indicates that the samples contained plastic buttons measuring between 20.6 and 20.7 mm in diameter. As such, it can be assumed for the purpose of this ruling that the samples provided to CBP were of the 20 mm button type.

¹ The supplemental submission also includes the buttons' purchase prices and the ferrules' production costs. However, these figures could not be substantiated and, even if they could, do not provide an accurate basis for comparison of the components' values. Accordingly, we do not take them into consideration in the instant decision.

The information provided in your submission, as well as the results of the CBP laboratory's analysis, are detailed in the below table:

	<i>Supplemental Submission</i>				<i>CBP Laboratory Report</i>	
Type	13 mm button		20 mm button		20 mm button	
Component	Button	Ferrule	Button	Ferrule	Button	Ferrule
Material	Polyether propyl	Aluminum 3003 Alloy	Polyether propyl	Aluminum 3003 Alloy	Plastic	Aluminum Alloy
Mass/Weight	245.33 mg	417.103 mg	437.398 mg	420.784 mg	0.51 g	0.37-.39 g
Density	1.02 mg per cubic cm	270 mg per cubic cm	270 mg per cubic cm	270 mg per cubic cm	-	2.67 mg per cubic mm
Surface Area	1503.844 square mm	531.87 square mm	1464.611 square mm	1465.487 square mm	-	-

ISSUE:

Whether the aluminum ferrule/plastic cap combinations are properly classified as plastic caps in heading 3923, HTSUS, or as base metal parts of seals in heading 8309, HTSUS.

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 2(b) states, in pertinent part, that “[a]ny reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance” and that “classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.” GRI 3 provides that “composite goods consisting of different materials or made up of different components” are to be classified “as if they consisted of the material or component which gives them their essential character,” and where this is not possible, “under the heading which occurs last in numerical order among those which equally merit consideration.”

In addition, in interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See* T.D. 89-80, 54 Fed. Reg. 35127 (August 23, 1989).

The 2017 HTSUS provisions under consideration are as follows:

3923	Articles for the conveyance or packing of goods, or plastics; stoppers, lids, caps and other closures, of plastics:
3923.50.00	Stoppers, lids, caps and other closures
8309	Stoppers, caps and lids (including crown corks, screw caps and pouring stoppers), capsules for bottles, threaded bungs, bung covers, seals and other packing accessories, and parts thereof, of base metal:
8309.90.00	Other

At the outset, we note that the subject merchandise consists of two components, i.e., the plastic buttons and aluminum ferrules, which are integrated into a single article. With respect to classification of the plastic buttons, we consider heading 3923, HTSUS, which provides, *inter alia*, for plastic caps and other closures. However, the term cap is not defined in the heading, the pertinent chapter or section notes, or elsewhere in the HTSUS. It is well-established that when a tariff term is not defined by the HTSUS or its legislative history, its correct meaning is its common or commercial meaning, which can be ascertained by reference to “dictionaries, scientific authorities, and other reliable information sources and ‘lexicographic and other materials.” See *Rocknell Fastener, Inc. v. United States*, 267 F.3d 1354, 1356–57 (Fed. Cir. 2001). “Cap” is commonly defined in various dictionaries as an object that provides protective cover for a separate object. [citation] As CBP has previously ruled, however, it is well-established that caps and other closures of heading 3923, while contributive to the “primary closure” of a container, need not necessarily cover the “entirety of the mouth of a container.” See Headquarters Ruling Letter (HQ) H257146, dated January 22, 2016.

Here, the “buttons,” which are indisputably comprised of plastic, are conjoined with the aluminum ferrules and, in turn, the rubber stoppers to form a closure for the vials. While the buttons do not in and of themselves cover the vials’ entire mouths, they do cover the rubber stopper as necessary to prevent inadvertent penetration of the stopper. Moreover, as you contend in your reconsideration request, they shield the stopper from dust particles so as to ensure that the latter remains sanitary when penetrated by a syringe. We therefore find that the buttons satisfy the definition of plastic caps for purposes of classification in heading 3923. However, while the button components of the subject merchandise are classifiable in the heading, the aluminum ferrule components are not. As such, the subject merchandise is described only in part by heading 3923 and cannot be classified there by application of GRI 1.

As to classification of the aluminum ferrules, we consider heading 8309, HTSUS, which provides, *inter alia*, for base metal parts of seals. Like the term “cap,” the terms “seal” and “part” are both left undefined in the HTSUS. With respect to the former, CBP has repeatedly ruled, based upon consultation of dictionary definitions, that “seal” denotes “something that firmly closes or secures: as. . . (1) a tight and perfect closure (as against the passage of gas or water)” or “[a]ny means of preventing the passage of gas or liquid into or out of something, esp. at a place where two surfaces meet.” See HQ H103227, dated July 29, 2010 (citing HQ 951510, dated August 7, 1992). With

respect to the latter term, courts have developed two distinct, yet fully consistent, tests for determining whether a particular item can be described as such. *Bauerhin Techs. Ltd. Pshp. v. United States*, 110 F.3d 774, 779 (Fed. Cir. 1997). Under the first of these, initially promulgated in *United States v. Willoughby Camera Stores, Inc.*, 21 C.C.P.A. 322, 324 (1933), an imported item can be described as part if it is an “integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article.” *Bauerhin*, 110 F.3d at 779.² In view of these definitions, the aluminum ferrules can be described as a part of a seal if, when joined to the remaining components, they form a closure through which substances cannot pass.

Here, it is undisputed that the aluminum ferrules are comprised of base metal. Because they are ringed, they do not constitute a complete closure capable of preventing the passage of substances. They therefore cannot in and of themselves be described as a seal. However, they do form a complete, effective seal when combined with the rubber stoppers, insofar as they fasten the otherwise unsecured stoppers in place. The stoppers are merely inserted into the vials’ mouths, and consequently lack the stability to function as long-term sealants in the absence of the ferrules with which they are crimped. The ferrules are thus an integral component of the complete seal, without which the seal could not function as such. In effect, the aluminum ferrules qualify as base metal parts of seals within the meaning of heading 8309, HTSUS. However, because the ferrules are also conjoined with plastic buttons of heading 3923 to form the subject merchandise, the merchandise cannot be classified in heading 8309 by application of GRI 1.

As articles whose components are classifiable in different headings, i.e., heading 3923 and heading 8309, the subject ferrule/button combinations are classified pursuant to GRI 3. As stated above, GRI 3(b) provides that composite articles are classified “as if they consisted of the material. . . which gives them their essential character.” With respect to “essential character” for purposes of GRI 3(b), EN (VIII) to GRI 3(b) states as follows:

The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

Insofar as the “essential character test” requires a fact-intensive analysis, courts have consistently applied some or all of the above-listed factors, as needed, to ascertain the essential characters of various articles. See *Home Depot, U.S.A., Inc. v. United States*, 427 F. Supp. 2d 1278, 1295–1356 (*Home Depot I*), aff’d 491 F.3d 1334 (Fed. Cir. 2007) (*Home Depot II*); see also *Pomeroy Collection, Ltd. v. United States*, 893 F. Supp. 2d 1269, 1287–88 (Ct. Int’l Trade 2013). In some cases, therefore, the essential character of a given composite article has been identified as that which corresponds to the predominant component in terms of weight, value, surface area, and/or other

² Under the second test, set forth in *United States v. Pompeo*, 43 C.C.P.A. 9, 14 (1955), a good qualifies as a part if it is “dedicated solely for use” with a particular article. *Bauerhin*, 110 F.3d at 779 (citing *Pompeo*, 43 C.C.P.A. at 14). Whether the “Willoughby” or “Pompeo” test applies in a given case depends upon on the specific facts of that case. See *id.* (applying principle from *Pompeo* upon determining that “[t]he facts in *Willoughby Camera* are considerably different from those presented here”). Here, because the aluminum ferrules satisfy the former, we need not apply the latter.

measurable properties. See *Home Depot I*, 427 F. Supp. 2d at 1292–1356; *Home Depot II*, 491 F.3d at 1336. In others, the relative importance of the components to the effective functioning of the whole article has ultimately proven determinative of essential character. See *Pomeroy*, 893 F. Supp. 2d at 1288; *Structural Industries v. United States*, 360 F. Supp. 2d 1330, 1337–1338 (Ct. Int'l Trade 2005); and *Conair Corp. v. United States*, 29 C.I.T. 888 (2005). However, where none of these factors or any others conclusively indicate the constituent component that imparts the essential character, the composite article at issue cannot be classified in accordance with GRI 3(b). See, e.g., HQ H179843, dated March 14, 2012 (determining that a lighted floral arrangement could not be classified pursuant to GRI 3(b) because constituent components accounted for relatively similar values, bulks, and surface areas, and played equally important roles with respect to the use of the arrangement).

Here, read together, your supplemental submission and the CBP laboratory report provide varying and ultimately inconclusive indicia as to which component of the subject merchandise imparts the merchandise's essential character. Your supplemental submission does indicate, consistent with the CBP laboratory report, that the ferrules are universally denser than the buttons. However, it also indicates that the 13 mm buttons predominate significantly by surface area but are much lighter than the ferrules, and that the 20 mm buttons predominate only slightly by mass but have a surface area almost equal to that of the corresponding ferrules. Moreover, the mass/weight measurements provided in the supplemental submission are not entirely consistent with the CBP laboratory report, which indicates that the 20 mm button is significantly heavier than its corresponding ferrule.³ Therefore, given that the bulk of the buttons' and ferrules' properties are either relatively equal or altogether unverifiable, it cannot be conclusively stated that either component is quantifiably predominant.

Nor can it be said, despite your assertions to the contrary, that either plays a greater role than the other in relation to the use of the subject article. While neither component provides a complete, permanent closure, both are indispensable to the functioning of the whole good as an effective, sanitary closure. As discussed above, the ferrule does not in and of itself cover the entire mouth of the vial, but it does enable the rubber stopper's capacity to effectively and continuously do so. For its part, the button spans the entire diameter of the vial's mouth but remains in position atop the mouth only until such time as the vial's contents need to be extracted. While in position, however, the button ensures that the entire seal remains completely impenetrable and free of contaminants. Since neither component forms the complete seal, it cannot be determined which of the two imparts the essential character of the subject merchandise in its condition as imported.

³ It is "well settled that the methods of weighing, measuring, and testing merchandise used by customs officers and the results obtained are presumed to be correct." *Aluminum Co. of America v. United States*, 60 C.C.P.A. 148, 151, 477 F.2d 1396, 1398 (1973) ("Alcoa"). Absent a conclusive showing that the testing method used by the CBP laboratory is in error, or that the Customs' laboratory results are erroneous, there is a presumption that the results are correct. See *Exxon Corp. v. United States*, 462 F. Supp. 378, 81 Cust. Ct. 87, C.D. 4772 (1978). If and only if a *prima facie* case is made out, "the presumption is destroyed, and the Government has the burden of going forward with the evidence." *Alcoa*, 477 F.2d at 1399; *American Sporting Goods*, 27 C.I.T. 450, 456 (Ct. Int'l Trade 2003).

Because the merchandise cannot be classified by reference to GRI 3(b), we accordingly apply GRI 3(c), which requires classification of the subject ferrule/button combinations under the heading which occurs last in numerical order. Of the two headings at issue in the instant case, heading 8309 occurs last in numerical order. The subject ferrule/button combinations are therefore classified in heading 8309, HTSUS. *See* HQ H179843, *supra*.

HOLDING:

By application of GRIs 1 and 3(c), the subject aluminum ferrule/plastic button combinations are properly classified in heading 8309, HTSUS. They are specifically classified in subheading 8309.90.0000, HTSUSA (Annotated), which provides for: “Stoppers, caps and lids (including crown corks, screw caps and pouring stoppers), capsules for bottles, threaded bungs, bung covers, seals and other packing accessories, and parts thereof, of base metal: Other.” The 2017 column one general rate of duty is 2.6% *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at www.usitc.gov/tata/hts/.

EFFECT ON OTHER RULINGS:

New York Ruling Letter N260351, dated January 16, 2015, is hereby MODIFIED with respect to the classification of the ferrule/button combinations, but the classification of ferrules entered without buttons remains in effect.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Sincerely,

ALLYSON MATTANAH

for

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division

19 CFR PART 177**REVOCAION OF ONE RULING LETTER AND
REVOCAION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF DRIED ALGAE POWDER**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of one ruling letter and revocation of treatment relating to the tariff classification of dried algae powder.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of dried algae powder under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 51, No. 18, on May 3, 2017. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 18, 2017.

FOR FURTHER INFORMATION CONTACT: Nicholai Diamond, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–0292.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (“Title VI”), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are “**informed compliance**” and “**shared responsibility**.” These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations.

Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the *Customs Bulletin*, Vol. 51, No. 18, on May 3, 2017, proposing to revoke one ruling letter pertaining to the tariff classification of dried algae powder. As stated in the proposed notice, this action will cover New York Ruling Letter ("NY") N128055, dated October 22, 2010, as well as any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. §1625(c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In NY N128055, CBP classified dried algae powder in heading 1212, HTSUS, specifically in subheading 1212.20.00 of the 2010 HTSUS, which provided for "Locust beans, seaweeds and other algae, sugar beet and sugar cane, fresh, chilled, frozen or dried, whether or not ground; fruit stones and kernels and other vegetable products (including unroasted chicory roots of the variety *Cichorium intybus sativum*) of a kind used primarily for human consumption, not elsewhere specified or included: Seaweeds and other algae: Other." CBP has reviewed NY N128055 and has determined the ruling letter to be

in error. It is now CBP's position that the subject dried algae powder is properly classified, by operation of GRI 1, in heading 2102, HTSUS, specifically in subheading 2102.20.60, HTSUS, which provides for "Yeasts (active or inactive); other single-cell microorganisms, dead (but not including vaccines of heading 3002); prepared baking powders: Inactive yeasts; other single-cell microorganisms, dead: Other."

Pursuant to 19 U.S.C. §1625(c)(1), CBP is revoking NY N128055 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H284445, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated: June 07, 2017

ALLYSON MATTANAH

for

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division

Attachment

HQ H284445

June 07, 2017

CLA-2 OT:RR:CTF:CPM H284445 NCD

CATEGORY: Classification

TARIFF NO.: 2102.20.6000

DONALD STEIN
GREENBERG TRAUIG, LLP
2101 L STREET, N.W.
SUITE 1000
WASHINGTON, D.C. 20037

RE: Revocation of NY N128055; Classification of dried algae powder

DEAR MR. STEIN:

This is in reference to New York Ruling Letter (NY) N128055, which was issued to you by U.S. Customs and Border Protection (CBP) on October 22, 2010. NY N128055 was issued in response to your October 12, 2010 request, filed on behalf of Aurora Algae, for a determination by CBP as to the classification of a dried algae powder under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed NY N128055 and determined that it is incorrect. For the reasons set forth below, we are revoking that ruling letter.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice of the proposed action was published in the Customs Bulletin, Vol. 51, No. 18, on May 3, 2017. No comments were received in response to the notice.

FACTS:

NY N128055 states as follows with respect to the dried algae powder at issue:

According to descriptive literature provided with your request, the dried algae powder is prepared in the following manner. Algae cultures of *Nannochloropsis* sp., cultivated in Karratha, Western Australia are concentrated via centrifugation. The resulting paste is then dried at a temperature greater than 150 degrees Centigrade by passing through a milling flash dryer. After completing the drying process, the dried algae powder is packed in plastic totes, boxed and stored cold until it is ready to be loaded for transportation to the United States. Upon importation into the United States, the dried algae powder will be processed into omega-3 oils and protein biomass raw materials using a solvent based extraction procedure. These raw materials will be refined into omega-3 oils which are intended to be used as ingredients for dietary supplements and fortified food, or into protein biomass that can be used as feed ingredient for aquaculture.

The above-described dried algae powder was classified in heading 1212, HTSUS, specifically in subheading 1212.20.00 of the 2010 HTSUS, which provided for "Locust beans, seaweeds and other algae, sugar beet and sugar cane, fresh, chilled, frozen or dried, whether or not ground; fruit stones and kernels and other vegetable products (including unroasted chicory roots of

the variety *Cichorium intybus sativum*) of a kind used primarily for human consumption, not elsewhere specified or included: Seaweeds and other algae: Other.”

ISSUE:

Whether the dried algae powder is classified as “other algae” in heading 1212, HTSUS, or as “other dead single-cell microorganisms” in heading 2102, HTSUS.

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

In addition, in interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. See T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The 2017 HTSUS provisions under consideration are as follows:

1212	Locust beans, seaweeds and other algae, sugar beet and sugar cane, fresh, chilled, frozen or dried, whether or not ground; fruit stones and kernels and other vegetable products (including unroasted chicory roots of the variety <i>Cichorium intybus sativum</i>) of a kind used primarily for human consumption, not elsewhere specified or included: Seaweeds and other algae:
1212.29.00	Other ¹
2102	Yeasts (active or inactive); other single-cell microorganisms, dead (but not including vaccines of heading 3002); prepared baking powders:
2102.20	Inactive yeasts; other single-cell microorganisms, dead:
2102.20.60	Other

¹ As part of the 2012 amendments to the HTSUS, subheading 1212.20.00 was re-designated subheading 1212.29.00. Because the subheadings are identical in language, we consider whether the subject dried algae powder is classifiable in subheading 1212.29.00, HTSUS, which remains in effect.

At the outset, we note that Note 5(a) to Chapter 12 states: “For the purposes of heading 1212, the term “seaweeds and other algae” does not include. . .Dead single-cell microorganisms of heading 2102.” *See also* EN 12.12 (“The heading **excludes**. . .Dead single-cell algae (**heading 21.02**).” Consequently, if the subject dried algae powder qualifies as a “dead single-cell microorganism” within the meaning of heading 2102, HTSUS, it cannot be classified in heading 1212, HTSUS.

Heading 2102, HTSUS, specifically describes, *inter alia*, “dead single-cell microorganisms.” EN 21.02 states as follows with respect to such:

(B) OTHER SINGLE-CELL MICRO-ORGANISMS, DEAD

This category covers single-cell micro-organisms such as bacteria and unicellular algae, which are **not** alive. *Inter alia*, covered here are those which have been obtained by cultivation on substrates containing hydrocarbons or carbon dioxide. These products are particularly rich in protein and are generally used in animal feeding.

Certain products of this group may be put up as food supplements for human consumption or animal feeding (e.g., in powder or tablet form) and may contain small quantities of excipients, e.g., stabilising agents and anti-oxidants. Such products remain classified here **provided** that the addition of such ingredients does not alter their character as micro-organisms.

According to the above-cited portion of EN 21.02, heading 2102 applies to non-living unicellular algae put up in powder form. In the instant case, the dried algae powder at issue consists of *nannochloropsis* sp. cultures that have undergone concentration by centrifugation and, subsequently, concurrent drying and milling in a milling flash dryer. It is indisputable that *nannochloropsis* sp. is a single-cell algal microorganism. *See* Olivier Kilian et. al., High-efficiency Homologous Recombination in the Oil-producing Alga *Nannochloropsis* sp. 108–52 Proc. Nat’l Acad. U.S. 21266 (2011) (characterizing *Nannochloropsis* sp. as a unicellular microalga in analysis authored in part by affiliate of Aurora Algae). Moreover, a report issued by the World Customs Organization’s Scientific Sub-Committee (SSC) indicates that microalgae is unable to survive the combination of concentration, drying, and milling. *See* Annex A/8 to SSC Doc. NS0102E1a (SSC/20/Jan. 2005), A/8; *see also* Annex G/3 to Harmonized System Committee (HSC) Doc. NC938E1b (HSC/35/March 2005), G/3/1 Rev (relying on the SSC’s analysis in classifying cultures of *Spirulina platensis*, a unicellular alga, in heading 2102). Lastly, because it is entered as a non-supplemented powder, the subject merchandise takes a form that, according to EN 21.02, is permissible for purposes of classification in heading 2102.

The subject dried algae powder is therefore classified in heading 2102, insofar as it falls within the scope of the heading and is consequently excluded from heading 1212, HTSUS. We note that this determination is consistent with several prior CBP rulings pertaining to similarly-produced microalgal products. *See* NY N110542, dated July 1, 2010; NY H84826, dated August 14, 2001; NY F83405, dated March 7, 2000 and NY 895933, dated April 5, 1994 (all classifying powders made up of unicellular microalgae in heading 2102).

HOLDING:

By application of GRI 1, the subject dried algae powder is properly classified in heading 2102, HTSUS. It is specifically classified in subheading 2102.20.6000, HTSUSA (Annotated), which provides for “Yeasts (active or inactive); other single-cell microorganisms, dead (but not including vaccines of heading 3002); prepared baking powders: Inactive yeasts; other single-cell microorganisms, dead: Other.” The 2017 column one general rate of duty is 3.2% *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at www.usitc.gov/tata/hts/.

EFFECT ON OTHER RULINGS:

New York Ruling Letter N128055, dated October 22, 2010, is hereby REVOKED in accordance with the above analysis.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Sincerely,

ALLYSON MATTANAH

for

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division

**PROPOSED REVOCATION OF TWO RULING LETTERS
AND REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF PLASTIC AIR MATTRESSES**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of two ruling letters, and revocation of treatment relating to the tariff classification of plastic air mattresses.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke two ruling letters concerning tariff classification of plastic air mattresses under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before August 18, 2017.

ADDRESS: Written comments are to be addressed to the U.S. Customs and Border Protection, Office of International Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: Nicholai Diamond, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of International Trade, at (202) 325–0292.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (“Title VI”), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are

“informed compliance” and **“shared responsibility.”** These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations.

Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP is proposing to revoke two ruling letters pertaining to the tariff classification of plastic air mattresses. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) N249247, dated February 10, 2014 (Attachment A) and NY K88969, dated September 10, 2004 (Attachment B), this notice covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the two identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. §1625(c)(2)), as amended by section 623 of Title VI, CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer’s failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N249247 and NY K88969, CBP classified plastic air mattresses in heading 9403, HTSUS, specifically in subheading 9403.70.80, HTSUS, which provides for “Other furniture and parts thereof: Furniture of plastics: Other.” CBP has reviewed NY N249247 and NY K88969 and has determined the ruling letters to be in error.

It is now CBP's position that the subject air mattresses are properly classified, by operation of GRI 1, in heading 3926, HTSUS, specifically in subheading 3926.90.75, HTSUS, which provides for "Other articles of plastics and articles of other materials of heading 3901 to 3914: Other: Pneumatic mattresses and other inflatable articles, not elsewhere specified or included."

Pursuant to 19 U.S.C. §1625(c)(1), CBP is proposing to revoke NY N249247 and NY K88969 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H265674, set forth as Attachment C to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated: June 16, 2017

ALLYSON MATTANAH
for

MYLES B. HARMON,
Director

Commercial and Trade Facilitation Division

Attachments

[ATTACHMENT A]

N249247

February 10, 2014

CLA-2-94:OT:RR:NC:N4:433

CATEGORY: Classification

TARIFF NO.: 9403.70.8015

PAT FUMAGALLI
PRESIDENT AND CEO
BESTWAY USA, INC.
3249 E. HARBOUR DRIVE
PHOENIX, AZ, 85034

RE: The tariff classification of an Air Bed from China.

DEAR MR. FUMAGALLI:

In your letter dated January 10, 2014, you requested a tariff classification ruling.

SKU number 67404 is described as the Bestway Comfort Quest Premium Air Bed/Queen. The Air Bed is an inflatable queen size bed which can be used for sleeping accommodations for the home or when traveling away, and is designed to be placed on the floor. The Air Bed measures 80 inches in length by 64 inches in width by 19 inches in height when inflated. The Air Bed is made of Polyvinyl chloride (PVC) with flocking material on top, has a built-in pillow and features two inflatable chambers of which the lower chamber serves as a box-spring while the upper chamber serves as a mattress. The Air Bed is supported by internal I-Beam construction which provides for the bed's sturdiness. Complementing the Air bed is a heavy duty repair patch and a travel bag. This item has a built-in 110-120V electric air pump for ease of inflating.

The applicable subheading for the Bestway Comfort Quest Premium Air Bed/Queen will be 9403.70.8015, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other furniture and parts thereof: Furniture of plastics: Other: Other household. The rate of duty will be free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Neil H. Levy at (646) 733-3036.

Sincerely,

GWENN KLEIN KIRSCHNER

Acting Director

National Commodity Specialist Division

[ATTACHMENT B]

NY K88969

September 10, 2004

CLA-2-94:RR:NC:SP:233 K88969

CATEGORY: Classification

TARIFF NO.: 9403.70.8010

MR. ROLANDO E. PORTAL
ABC DISTRIBUTING, LLC
6301 EAST 10TH AVENUE
HIALEAH, FL 33013

RE: The tariff classification of a Portable Air Bed from China or Hong Kong.

DEAR MR. PORTAL:

In your letter dated August 18, 2004, you requested a tariff classification ruling.

The merchandise to be imported is a Portable Air Bed, Style No. 248486. The item measures 80”L x 60”W x 22”H when inflated and features dual chamber construction. The upper chamber serves as a mattress with adjustable firmness. The lower chamber doubles as a box spring platform that provides extra firmness and support for a traditional bed. The item is composed of 100% plastic vinyl with a flocked, waterproof nylon top. Included are a fast fill pump and a duffel bag with shoulder strap for transport.

The applicable subheading for the Portable Air Bed will be 9403.70.8010, Harmonized Tariff Schedule of the United States (HTS), which provides for “Other furniture and parts thereof: Furniture of plastics; Other, Household.” The rate of duty will be free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at 646-733-3036.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity
Specialist Division

[ATTACHMENT C]

HQ H265674
CLA-2 OT:RR:CTF:CPM H265674 NCD
CATEGORY: Classification
TARIFF NO.: 3926.90.7500

PAT FUMAGALLI
PRESIDENT AND CEO
BESTWAY USA, INC.
3249 E. HARBOUR DRIVE
PHOENIX, AZ 85043

RE: Revocation of NY N249247, dated February 10, 2014, and NY K88969, dated September 10, 2004; tariff classification of plastic air mattresses

DEAR MR. FUMAGALLI:

This is in reference to New York Ruling Letter (NY) N249247, issued to Bestway USA, Inc. (“Bestway”) on February 10, 2014, involving classification of a plastic air mattress under the Harmonized Tariff Schedule of the United States (HTSUS). NY N249247 was issued by U.S. Customs and Border Protection (CBP) in response to Bestway’s letter, dated January 10, 2014, requesting classification of the subject air mattress under the HTSUS (“ruling request”). We have reviewed NY N249247, determined that it is incorrect, and, for the reasons set forth below, are revoking that ruling.

We have also reviewed NY K88969, dated September 10, 2004, which similarly involves classification of a plastic air mattress under the HTSUS. As with NY N249247, we have determined that NY K88969 is incorrect and, for the reasons set forth below, are revoking that ruling.

FACTS:

In NY N249247, CBP described the air mattress at issue as follows:

The Air Bed is an inflatable queen size bed which can be used for sleeping accommodations for the home or when traveling away, and is designed to be placed on the floor. The Air Bed measures 80 inches in length by 64 inches in width by 19 inches in height when inflated. The Air Bed is made of Polyvinyl chloride (PVC) with flocking material on top, has a built-in pillow and features two inflatable chambers of which the lower chamber serves as a box-spring while the upper chamber serves as a mattress. The Air Bed is supported by internal I-Beam construction which provides for the bed’s sturdiness. Complementing the Air bed is a heavy duty repair patch and a travel bag. This item has a built-in 110–120V electric air pump for ease of inflating.

A bill of materials enclosed with Bestway’s ruling request indicates that the air mattress is made up almost entirely of polyvinyl chloride (PVC) and the plasticizer diisononyl phthalate (DINP), and contains small amounts of rayon on its uppermost surface. Our research indicates that its internal I-beams are similarly made up of PVC. *See* U.S. Patent App. No. 14/566,075 (filed Dec. 10, 2014); U.S. Patent App. No. 11/789,211 (filed Apr. 23, 2007).

In NY K88969, the air mattress at issue is described as follows:

The merchandise to be imported is a Portable Air Bed, Style No. 248486. The item measures 80”L x 60”W x 22”H when inflated and features dual chamber construction. The upper chamber serves as a mattress with

adjustable firmness. The lower chamber doubles as a box spring platform that provides extra firmness and support for a traditional bed. The item is composed of 100% plastic vinyl with a flocked, waterproof nylon top. Included are a fast fill pump and a duffel bag with shoulder strap for transport.

In both NY N249247 and NY K88969, the subject air mattresses were classified in heading 9403, HTSUS. They were specifically classified in sub-heading 9403.70.80, HTSUS, which provides for “Other furniture and parts thereof: Furniture and plastics: Other.”

ISSUE:

Whether the subject plastic air mattresses are classified as “other articles of plastics” in heading 3926, HTSUS, or as “other furniture” in heading 9403, HTSUS?

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 3(b) provides, in relevant part, that “composite goods consisting of different materials or made up of different components, and goods put up in sets or retail sale. . . shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.”

The 2017 HTSUS provisions under consideration are as follows:

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
3926.90	Other:
3926.90.75	Pneumatic mattresses and other inflatable articles, not elsewhere specified or included
9403	Other furniture and parts thereof:
9403.70	Furniture of plastics:
9403.70.80	Other

As a preliminary matter, Note 2(x) to Chapter 39 states: “This chapter does not cover. . . Articles of chapter 94 (for example, furniture, bedding, lamps and lighting fittings).” Accordingly, the air mattresses can only be classified in heading 3926, HTSUS, if they are not *prima facie* classifiable in heading 9403, HTSUS, by application of GRI 1.

Heading 9403, HTSUS provides for: “Other furniture and parts thereof.” Note 1(a) to Chapter 94 states, in relevant part, as follows:

1. This Chapter does not cover:

(a) Pneumatic or water mattresses, pillows or cushions, of Chapter 39, 40 or 63. . .

Pursuant to Note 1(a), “pneumatic mattresses” cannot be classified in heading 9403, HTSUS. “Pneumatic mattress” constitutes a tariff term by virtue of its inclusion in a legal note to Chapter 94, but is left undefined in that note and elsewhere throughout the HTSUS. See *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1367 (Fed. Cir. 2011) (“According to the HTSUS’s preface, the legal text of the HTSUS includes all provisions enacted by Congress, including Section and Chapter Notes.”). As such, it must be understood in accordance with its ordinary meaning, which can be ascertained by reference to dictionary definitions. See *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375 (Fed. Cir. 1999); see also *Tyco Fire Prods. v. United States*, 841 F.3d 1353, 1359 (Fed. Cir. 2016) (relying on dictionary definitions to determine the meaning of language appearing in Note 1(c) to Chapter 84). According to various dictionary entries, the term “pneumatic mattress” ordinarily denotes a sack that can be inflated with air and used as a bed or cushion. See THE AMERICAN HERITAGE COLLEGE DICTIONARY 29, 855, 1073 (4th ed. 2004) (defining “pneumatic” as “filled with air, esp. compressed air” and defining “mattress” as “an airtight inflatable pad used as or on a bed or as a cushion”); see also Merriam-Webster Online Dictionary (defining “pneumatic” as “moved or worked by air pressure” and “mattress” as “an inflatable airtight sack”).

Here, both mattresses at issue are empty sacks that, when inflated with air, function as beds. As such, they are pneumatic mattresses within the meaning of Note 1(a) to Chapter 94, and are consequently excluded from classification in heading 9403, HTSUS. We note that this conclusion is consistent with EN 94.03, which counsels classification of pneumatic mattresses in heading 3926 or heading 6307, HTSUS, rather than in a heading of Chapter 94. It is also consistent with numerous CBP decisions in which substantially similar air mattresses were classified in headings outside of Chapter 94. See Headquarters Ruling Letter (HQ) 954544, dated August 19, 1993 (classifying “pneumatic air mattresses” in heading 3926, HTSUS); NY N199311, dated January 24, 2012; NY N190048, dated November 17, 2011; NY N120304, dated September 10, 2010; NY N105077, dated May 28, 2010; NY N105075, dated May 17, 2010; NY N007267, dated March 7, 2007; NY L85321, dated June 20, 2005; NY J85129, dated June 18, 2003; NY I83841, dated July 11, 2002; NY G81090, dated August 28, 2000; NY E84859, dated August 5, 1999; NY E84954, dated August 5, 1999; NY D89731, dated March 26, 1999; NY C83496, dated January 28, 1998; and NY C81575, dated November 18, 1997.

We therefore consider heading 3926, HTSUS, which applies to “other articles of plastic.” EN 39.26 states, in pertinent part, as follows: “This heading covers articles, not elsewhere specified or included, of plastics.” Here, by all indications, the subject air mattresses are both describable as “articles of plastic.” According to NY K88969, for example, the structure of the mattress at issue in that ruling is comprised 100% of plastic vinyl. Similarly, in the case of NY N249247, the bill of materials and patents pertaining to the subject mattress and its internal I-beam collectively indicate that plastic in the form of PVC and DINP accounts for the near entirety of the mattress’s

constituent materials. In view of this, both air mattresses at issue are “plastic” for purposes of classification in heading 3926.¹

Lastly, we note that the subject air mattresses are accompanied by related items of unknown materials, including carrying bags, a repair patch in the case of NY N249247, and a separate air pump in the case of NY K88969. Given that the materials of which these items are comprised are unknown, and could very well be plastic, we are unable to conclusively identify the subject merchandise as “goods put up in retail sets” for which classification pursuant to GRI 3(b) is required. *See* EN(X) to GRI 3(b) (“For the purposes of this Rule, the term “goods put up in sets for retail sale” shall be taken to mean goods which. . .Consist of at least two different articles which are, *prima facie*, classifiable in different headings.”). Even assuming the mattresses and additional items could in fact be described as “sets” within the meaning of GRI 3(b), it is clearly the air mattresses that impart those hypothetical sets’ essential character. *See id.* (“For the sets mentioned above, the classification is made according to the component or components taken together, which can be regarded as conferring on the set as a whole its essential character.”). Specifically, the mattresses are the sole items that meet a particular need of the merchandise’s users, insofar as they provide surfaces upon which the users can comfortably recline and sleep. *See Estee Lauder, Inc. v. United States*, 815 F. Supp. 2d 1287, 1296 (Ct. Int’l Trade 2012) (holding that make-up components were essential to a cosmetics set because they enable the purchaser to “meet the particular need of putting on makeup”). In contrast, the remaining items simply facilitate the use, transport, or repair of the mattresses. *Toy Biz, Inc. v. United States*, 248 F. Supp. 2d 1234, 1256–57 (Ct. Int’l Trade 2003) (holding that a doll conferred the essential character of a doll and trampoline set because the doll imparted the set’s value as an object of play, whereas the trampoline merely enhanced this value).

By any measure, therefore, the air mattresses are properly classified in heading 3926, HTSUS. This result is consistent with previous CBP rulings involving air mattresses made up predominantly or wholly of plastic, all of which were classified in that heading. *See* HQ 954544; NY N199311; NY N190048; NY N120304; NY N105077; NY N105075; NY N007267; NY L85321; NY J85129; NY I83841; NY G81090; NY E84859; NY E84954; NY D89731; NY C83496; and NY C81575.²

¹ The mattresses’ remaining constituent materials include top, non-structural layers of flocking and, in the case of NY N249247, an incorporated air pump. We are of the view that these materials, which account for only a minimal portion of the mattresses’ compositions, do not preclude the mattresses’ classification as “articles of plastic” of heading 3926, HTSUS. Even assuming they render the mattress composite goods, for which classification under GRI 3(b) is required, there is no indication that they, instead of the predominant plastic components, impart the mattresses’ essential character.

² These rulings, as well as the instant decision, are distinguishable from previous rulings classifying air mattresses made up predominantly of textiles in headings 6306 or 6307, HTSUS. *See* HQ 083603, dated March 30, 1989; NY N241594, dated May 17, 2013; NY N233343, dated September 19, 2012; NY N104075, dated May 17, 2010; NY N009788, dated April 25, 2007; NY L89719, dated January 20, 2006; NY K84837, dated April 30, 2004; NY D86312, dated January 22, 1999; NY A87000; dated August 26, 1996; NY A86216, dated August 14, 1996; NY A86591, dated August 14, 1996; and NY 808578, dated April 17, 1995. They are likewise distinguishable from rulings in which air mattresses combined with sleeping bags, metal frames, or similar items were classified in headings 9403 or 9404, HTSUS. *See* HQ W967672, dated June 2, 2006; NY N227092, dated August 15, 2012; NY N011443, dated May 29, 2007; NY R04382, dated July 17, 2006; NY L89204, dated

HOLDING:

Under the authority of GRI 1, the subject air mattresses are classified in heading 3926, HTSUS, specifically in subheading 3926.90.7500, HTSUSA (Annotated), which provides for: "Other articles of plastics and articles of other materials of headings 3901 to 3914: Pneumatic mattresses and other inflatable articles, not elsewhere specified or included." The 2017 column one general rate of duty rate is 4.2% *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at www.usitc.gov/tata/hts/.

EFFECT ON OTHER RULINGS:

NY N249247, dated February 10, 2014, and NY K88969, September 10, 2004, are hereby REVOKED in accordance with the above analysis.

Sincerely,

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division

CC: Rolando E. Portal
ABC Distributing, LLC
6301 East 10th Avenue
Hialeah, FL 33013

December 5, 2005; NY L80719, dated December 1, 2004; NY K88497, dated August 19, 2004; NY K80150, dated November 12, 2003; NY I81047, dated April 22, 2002; and NY H87524, dated January 24, 2002. Finally, they are distinguishable from rulings involving pneumatic sofas that are convertible to mattresses, as such articles must be classified in heading 9401, HTSUS. *See* EN 94.01 ("Subject to the exclusions mentioned below, this heading covers all seats. . ."); NY L85712, dated June 22, 2005; and NY R01434, dated February 16, 2005.

19 CFR PART 177**MODIFICATION OF ONE RULING LETTER AND
REVOCACTION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF A PLASTIC CARTRIDGE
FOR AN EAR PIERCING GUN**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of modification of one ruling letter and of revocation of treatment relating to the tariff classification of a plastic cartridge for an ear piercing gun.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying New York Ruling Letter (NY) N261965, dated March 27, 2015, concerning the tariff classification of a plastic cartridge for an ear piercing gun under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 51, No. 15, on April 12, 2017. One comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 18, 2017.

FOR FURTHER INFORMATION CONTACT: Claudia Garver, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–0024.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (“Title VI”), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are “**informed compliance**” and “**shared responsibility**.” These concepts are premised on the idea that in order to maximize voluntary

compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations.

Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the *Customs Bulletin*, Vol. 51, No. 15, on April 12, 2017, proposing to modify one ruling letter pertaining to the tariff classification of a plastic cartridge for an ear piercing gun. As stated in the proposed notice, this action will cover New York Ruling Letter (NY) N261965, dated March 27, 2015, as well as any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. §1625(c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In NY N261965, CBP determined that a plastic cartridge containing a piercing earring and clutch, to be used within an ear-piercing instrument, was classified in accordance with GRI 3(b) as a composite article in subheading 7116.20.05, HTSUS, when imported with a cubic zirconium gemstone, and subheading 7117.19.90, HTSUS, when imported with a glass gemstone. Subheading 7116.20.05 provides for "Articles of natural or cultured pearls, precious or semiprecious stones (natural, synthetic or reconstructed): Of precious or

semiprecious stones (natural, synthetic or reconstructed): Articles of jewelry: Valued not over \$40 per piece.” Subheading 7117.19.90, HTSUS, provides for “Imitation jewelry: Of base metal, whether or not plated with precious metal: Other: Other: Other.” CBP has reviewed NY N261965 and has determined the ruling letter to be in error. It is now CBP’s position that while the classification and the application of GRI 3(b) was correct, the instant merchandise is not a composite good but rather a GRI 3(b) set.

Pursuant to 19 U.S.C. §1625(c)(1), CBP is modifying NY N261965 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H266006, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated: May 30, 2017

ALLYSON MATTANAH
for

MYLES B. HARMON,
Director

Commercial and Trade Facilitation Division

Attachment

[ATTACHMENT]

HQ H266006

May 30, 2017

CLA-2 OT:RR:CTF:TCM H266006 CkG

CATEGORY: Classification

TARIFF NO.: 7117.19.90; 7116.20.05

CARMEN A. TRUTANICH,
TUCKER ELLIS, LLP
515 SOUTH FLOWER STREET
LOS ANGELES, CA 90071-2223

RE: Modification of NY N261965; classification of plastic cartridge for ear piercing gun

DEAR MS. TRUTANICH,

This is in response to your request of April 30, 2015, on behalf of Onyx Industries, Inc., for the reconsideration of New York Ruling N261965, dated March 27, 2015, concerning the classification of the System 75 cartridge with earring and clutch. You request clarification of the ruling, specifically as to whether the System 75 is classified as a part of an ear piercing gun, or whether it is classified as part of a set along with the included earring.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice proposing to modify NY N261965 was published on April 12, 2017, in Volume 51, Number 15 of the Customs Bulletin. One comment was received in response to this notice.

FACTS:

In NY N261965, the subject merchandise is described as follows:

The merchandise concerned is a plastic cartridge containing a piercing earring and clutch used within an ear-piercing instrument. The backend of the stud is sharpened to a point that enables the earring to pierce through an earlobe without a preexisting hole. The piercing studs are made of stainless steel or titanium posts, and the clutches are made of stainless steel, of which some of the posts and clutches are gold-plated. Some of the posts are further embellished with foreign origin faux jewels made of glass or of Cubic Zirconia (CZ) which is considered a simulated (synthetic) precious gemstone of diamond. Some imitation jewels are also made of plastic, such as those that are sold as faux pearls. Two System 75 Display(s) are sealed together in an adjoining, perforated sterile blister pack and are meant to be sold in pairs, however, one can purchase an individual Display.

Each System 75 Display, not including the foreign faux or simulated gemstone or faux pearl, consists of four plastic components (a white plastic box, a white plastic support, two clear plastic inserts) of United States origin and three base metal components (spring, stud and clutch) of United States origin, all of which are assembled in Mexico. It is unstated whether the faux gemstone or pearl or CZ is affixed to the earring post in the United States or Mexico; for purposes of this discussion the faux stone or faux pearl or CZ will be considered affixed to the post within the United States. The unassembled cartridge itself prior to being assembled in Mexico consists of a white plastic box, a white plastic

support, two clear plastic inserts and a base metal spring. In Mexico the plastic cartridge with base metal spring (five pieces) is assembled, and the base metal piercing earring along with its base metal clutch are positioned and placed appropriately within the cartridge. After which two System 75 Display(s) are sealed together in an adjoining, perforated sterile blister pack. In total seven United States components are assembled together to form the System 75 Display.

The System 75 is designed to be incorporated into a Studex ear piercing gun. The System 75 holds the earring in the correct position, and when the trigger of the ear piercing gun is pulled, the metal spring in the System 75 is activated and pushes the earring into the ear.

ISSUE:

1. Whether the System 75 is classified in heading 8479, HTSUS, heading 7116, HTSUS, or heading 7117, HTSUS.
2. Whether the System 75 is classified by application of GRI 1, GRI 3(b), or GRI 5(b).

LAW AND ANALYSIS:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

7116:	Articles of natural or cultured pearls, precious or semiprecious stones (natural, synthetic or reconstructed):
7116.20:	Of precious or semiprecious stones (natural, synthetic or reconstructed):
	Articles of jewelry:
7116.20.05:	Valued not over \$40 per piece. . .
	* * *
7117:	Imitation jewelry:
	Of base metal, whether or not plated with precious metal:
7117.19:	Other:
	Other:
7117.19.90:	Other. . .
	* * *
8205:	Hand tools (including glaziers' diamonds), not elsewhere specified or included; blow lamps; vices, clamps and the like, other than accessories for and parts of, machine tools; anvils; portable forges; hand or pedal-operated grinding wheels with frameworks.
8205.59:	Other:
	Of iron or steel:

8205.59.45:	Caulking gun. . .
8205.59.55:	Other. . .
	* * *
8479:	Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter:
	Other machines and mechanical appliances:
8479.89:	Other. . .
	* * * *

General Rule of Interpretation (GRI) 5 provides as follows:

5. In addition to the foregoing provisions, the following Rules shall apply in respect of the goods referred to therein :
 - (a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This Rule does not, however, apply to containers which give the whole its essential character;
 - (b) Subject to the provisions of Rule 5 (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.

Note 2 to Chapter 82 provides as follows:

Parts of base metal of the articles of this Chapter are to be classified with the articles of which they are parts, except parts separately specified as such and tool-holders for hand tools (heading 84.66). However, parts of general use as defined in Note 2 to Section XV are in all cases excluded from this Chapter

Note 11 to Chapter 71 provides as follows:

For the purposes of heading 71.17, the expression “imitation jewellery” means articles of jewellery within the meaning of paragraph (a) of Note 9 above (but not including buttons or other articles of heading 96.06, or dress-combs, hair-slides or the like, or hairpins, of heading 96.15), not incorporating natural or cultured pearls, precious or semi-precious stones (natural, synthetic or reconstructed) nor (except as plating or as minor constituents) precious metal or metal clad with precious metal.

* * * *

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The Explanatory Note to GRI 5(b) reads as follows:

RULE 5 (b)

(Packing materials and packing containers)

(IV) This Rule governs the classification of packing materials and packing containers of a kind normally used for packing the goods to which they relate. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use, for example, certain metal drums or containers of iron or steel for compressed or liquefied gas.

(V) This Rule is subject to Rule 5 (a) and, therefore, the classification of cases, boxes and similar containers of the kind mentioned in Rule 5 (a) shall be determined by the application of that Rule.

The EN to heading 7116, HTSUS (EN 7116), provides, in pertinent part:

The heading covers all articles. . .wholly of natural or cultured pearls, precious or semi-precious stones, or consisting partly of natural or cultured pearls or precious or semi-precious stones, but not containing precious metals or metals clad with precious metal. . .

It thus includes:

(A) Articles of personal adornment and other decorated articles. . .containing natural or cultured pearls, precious or semi-precious stones, set or mounted on base metal (whether or not plated with precious metal), ivory, wood, plastics etc.

The EN to heading 7117, HTSUS (EN 7117), provides, in pertinent part:

For the purposes of this heading, the expression imitation jewellery. . . [does] not incorporate precious metal or metal clad with precious metal. . .nor natural or cultured pearls, precious or semi-precious stones (natural, synthetic or reconstructed).

* * * *

In NY N261965, CBP determined that the System 75 with the included earrings was a composite article classified in either heading 7116 or heading 7117, HTSUS, depending on the composition of the gemstone, by application of GRI 3(b) (finding that the earring with the faux gemstone imparted the essential character to the article). You request “clarification” of the holding in NY N261965, suggesting that either the System 75 Display should be classified at GRI 1 as a part of the earring gun in heading 8479, HTSUS, or that it be considered “ordinary packaging” for the earring, and thus classified in heading 7117, HTSUS, by application of GRI 5(b).

In NY N261965, it was noted that the System 75 would be considered a dedicated part of a complete ear piercing gun. You suggest if this is the case, then classification in heading 8479, HTUSS, as a part of a machine with an individual function not elsewhere specified, should be considered.

The courts have considered the nature of “parts” under the HTSUS and two distinct though not inconsistent tests have resulted. See *Bauerhin Techs. Ltd. v. United States* (“Bauerhin”), 110 F. 3d 774 (Fed. Cir. 1997). The first, articulated in *United States v. Willoughby Camera Stores, Inc.* (“Willoughby”), 21 C.C.P.A. 322, 324 (1933), requires a determination of whether

the imported item is an “integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article.” *Bauerhin*, 110 F.3d at 778 (quoting *Willoughby*, 21 C.C.P.A. 322 at 324). The second, set forth in *United States v. Pompeo* (“Pompeo”), 43 C.C.P.A. 9, 14 (1955), states that an “imported item dedicated solely for use with another article is a ‘part’ of that article within the meaning of the HTSUS.” *Id.* at 779 (citing *Pompeo*, 43 C.C.P.A. 9 at 13). Under either line cases, an imported item is not a part if it is “a separate and distinct commercial entity.” *Bauherin*, 110 F.3d at 779.

The System 75 is designed to be used in conjunction with an ear piercing gun. The ear piercing gun cannot function without the cartridge or the earrings. The cartridge, holds the earrings in the correct position and propels the earrings into the ear when the ear piercing gun is triggered. Even though the System 75 can function without the Studex ear piercing gun, the fact that the System 75’s purpose is to secure the operation of the Studex gun is enough to establish that the component is integral to the machine. *See Bauerhin* at 1451. We therefore agree that the System 75 is a part of a complete ear piercing gun. A complete ear piercing gun, however, is classified in heading 8205, HTSUS, as a hand tool¹. *See e.g.*, NY N211356, dated April 6, 2012. *See also* HQ 950032, dated October 30, 1991, and NY C83998, dated February 23, 1998 (tagging guns). A part of an ear piercing gun cannot be classified as a part of machine of heading 8479, HTSUS, if the machine itself is not classified therein.

The System 75 is not a machine of heading 8479, HTSUS. The System 75 operates by way of a simple spring mechanism. Pursuant to the decision of the United States Customs Court in *Border Brokerage Company v. United States*, C.D. 2046 (1958), a simple spring operated mechanism is not considered a machine for the purposes of the HTSUS (“The simple kind of mechanical action involved in the release of the energy stored up in a spring, when in fact nothing more is accomplished than that something held in a downward position by a heavy weight is pulled erect, prompts us to agree with defendant that a spring stake bunk does not rise to the dignity of a machine.”). The System 75 operates by way of a similar spring mechanism to that at issue in *Border Brokerage Company*, it is not sold, marketed, or recognized in the trade as a machine, and therefore is not classifiable as a machine of Chapter 84.

As there is no heading which provides for the System 75 at GRI 1, we turn to the remaining GRIs. In NY N261965, we considered the System 75 a composite good and classified it accordingly, by application of GRI 3(b). Similarly, in NY N214377, dated May 11, 2012, CBP applied GRI 3(b) in classifying an “ear piercing cassette” and earrings included, designed for an ear piercing gun, in heading 7117, HTSUS. While we agree with the ultimate classification and the applicability of GRI 3(b), we disagree that the System 75 is a composite good. The System 75 consists of two distinct goods, classifiable in different headings, which are intended to be used together for the specific purpose of placing the earring in the ear but which are not integrated

¹ Heading 8205, HTSUS, does not include a provision for parts of hand tools. Note 2 to Chapter 82 directs the classification of base metal parts to the heading corresponding to the articles of which they are parts. The plastic cartridge is not made of base metal, and the earrings themselves, imported alone, would not be classified as parts of heading 8205, HTSUS, pursuant to Additional U.S. Rule of Interpretation 1(c). Therefore the System 75 is not classifiable in heading 8205, HTSUS.

or combined together. The earring and clutch are classified in either heading 7116, HTSUS, as precious jewelry, or heading 7117, HTSUS, as imitation jewelry, depending on whether the gemstone is cubic zirconium or glass. The plastic cartridge in turn is classifiable in heading 3926, HTSUS, as an other article of plastic. The earring and clutch are placed into the plastic cartridge, which ejects the earring when the Studex ear piercing gun is triggered. We consider the earring and plastic cartridge to constitute a set under GRI 3(b). We further consider the earrings to impart the essential character to the set. The plastic cartridge is essentially a storage and delivery mechanism for the earring, which is the more valuable component, and the reason for purchasing the System 75.

In regard to the System 75 with a cubic zirconium gemstone, Legal Note 11 to Chapter 71 provides that for the purposes of heading 7117, the expression "imitation jewelry" means articles of jewelry within the meaning of paragraph (a) of note 9 (i.e., any small objects of personal adornment such as earrings), not incorporating natural or cultured pearls, precious or semiprecious stones (natural, synthetic or reconstructed) nor (except as plating or as minor constituents) precious metal or metal clad with precious metal. A cubic zirconium is a synthetic (simulated) diamond and is categorized under precious gemstones. Accordingly, this item is precluded from classification in heading 7117 by operation of Note 11 to Chapter 71, and is classifiable as precious (synthetic) jewelry in heading 7116, HTSUS. *See e.g.*, HQ H007655, dated September 28, 2007. When the System 75 is imported without a cubic zirconium gemstone it is classified in heading 7117, HTSUS.

Within heading 7117, HTSUS, two subheadings are implicated: 7117.19, HTSUS, which provides for other imitation jewelry of base metal, and 7117.90, HTSUS, which provides for other imitation jewelry. Pursuant to GRI 6, we apply GRIs 1 through 5 in order again at the subheading level to determine the classification. The earring consists of a base metal stud and a faux gemstone made of either glass, plastic, or cubic zirconium, and thus could fall under either subheading 7117.19, HTSUS, or 7117.90, HTSUS, at GRI 1. At GRI 3(b), we must determine the essential character of the earring in order to determine the subheading classification. As discussed in NY N261965, the base metal stud is worked into a point, which expressly fulfills the functionality of this good (i.e., to allow for the discharge of a piercing earring into one's earlobe for establishing articles of jewelry worn for personal adornment). Accordingly, the essential character is imparted by the base metal stud. The applicable subheading for the System 75, without a cubic zirconium gemstone, will be 7117.19.90, HTSUS. We therefore agree with the finding in NY N261965 that the System 75 is classified in heading 7116 when imported with a cubic zirconium gemstone, or 7117 when imported with a plastic or glass faux gemstone.

Although you appear to agree with the classification of the System 75 in headings 7116 or 7117, HTSUS, you argue that the classification of the System 75 should be based on GRI 5(b). We note first that we have already found that the System 75 and earrings are classified in heading 7116 or 7117, HTSUS, by GRI 3(b), and therefore resort to GRI 5 is unnecessary. GRI 5(b) is further inapplicable in this case because the System 75 is not a packing container normally used for packing jewelry.

GRI 5(b) provides that packing materials and packing containers presented with the goods therein will be classified with the goods if they are of a kind normally used for packing such goods. In NY N261965 we determined that

the article at issue is the combination of the plastic cartridge and earrings—i.e., a composite good. You argue instead that the earrings are the article or good to be examined, and that the System 75 plastic cartridge is merely the packaging for said article under GRI 5(b) and should be classified with the earrings.

The concept of “usual” containers includes a variety of containers such as plastic envelopes for carrying rainwear when not in use, cases designed for electric shavers, and tobacco tins, which may continue to be used by the purchaser to “house” the original contents but which, when that purpose has been fulfilled, are usually discarded because of their lack of durability or their general unsuitability for other uses. A container is not “of a kind normally used for packing” when it possesses independent commercial appeal and adds significantly to the value of the goods. *See* HQ 560811, HQ 085766, dated February 1, 1990 (bubble bath container). The System 75 cartridge is not so flimsy as to be inherently disposable, and it is capable of being reused with any other set of earrings. It also adds value to the earrings by integrating with the Studex ear piercing gun, thus providing the mechanism by which the earrings are placed in the ear. The convenience of piercing the ear and fitting the earrings in one motion, in the comfort of home, is likely to be an advantage and selling point of the System 75 and the Studex ear piercing gun. The System 75 has multiple functions in relation to the earrings—it serves as packaging, display, and delivery mechanism—i.e., it allows the user to pierce the ears and place the earrings in the ear in one motion. It is more than simply packaging, and it is not the “usual” or “ordinary” packaging for jewelry. It is the blister packs that the System 75 cartridges are placed in that constitute the packaging for the cartridge and earrings. The System 75 is thus not classifiable at GRI 5. *See e.g., Bruce Duncan Co. v. United States*, 63 Customs Ct. 412, C.D. 3927 (1969), *Amersham Corporation v. United States*, 728 F.2d 1453, 1456 (Fed. Cir. 1984), *Mita Copystar Am. v. United States*, 160 F.3d 710, 713 (Fed. Cir. 1998), which classified printer toner cartridges and butane fuel cartridges as parts of printers and cigarette lighters at GRI 1. Although the instant cartridges are not classifiable at GRI 1, they are classifiable at GRI 3 and therefore classification under GRI 5 is precluded. *See also* HQ H273316, dated July 19, 2016.

HOLDING:

By application of GRI 1 and GRI 3(b), the System 75, when imported with a cubic zirconium gemstone, is classified in heading 7116, HTSUS, specifically subheading 7116.20.05, HTSUS, which provides for “Articles of natural or cultured pearls, precious or semiprecious stones (natural, synthetic or reconstructed): Of precious or semiprecious stones (natural, synthetic or reconstructed): Articles of jewelry: Valued not over \$40 per piece.” The 2016 general, column one rate of duty is 3.3% *ad valorem*.

By application of GRI 1 and GRI 3(b), the System 75, when imported with a faux gemstone made of glass or plastic, is classified in heading 7117, HTSUS, specifically subheading 7117.19.90, which provides for “Imitation jewelry: Of base metal, whether or not plated with precious metal: Other: Other: Other.” The 2016 general, column one rate of duty is 11% *ad valorem*.

EFFECT ON OTHER RULINGS:

NY N261965, dated March 27, 2015, is hereby modified.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Sincerely,

ALLYSON MATTANAH

for

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division

**PROPOSED REVOCATION OF ONE RULING LETTER AND
REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF AN UNFINISHED QUILTED
PILLOW SHELL**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of one ruling letter and revocation of treatment relating to the tariff classification of an unfinished quilted pillow shell.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning tariff classification of an unfinished quilted pillow shell under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before August 18, 2017.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: Grace A. Kim, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–7941.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (“Title VI”), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are

“informed compliance” and **“shared responsibility.”** These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations.

Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of an unfinished quilted pillow shell. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) N236267, dated December 19, 2012 (Attachment A), this notice covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. §1625(c)(2)), as amended by section 623 of Title VI, CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer’s failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N236267, CBP classified an unfinished quilted pillow shell in heading 9404, HTSUS, specifically in subheading 9404.90.10, HTSUS, which provides for “[m]attress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally

fitted with any material or of cellular rubber or plastics, whether or not covered: Other: Pillows, cushions and similar furnishings: Of cotton.” CBP has reviewed NY N236267 and has determined the ruling letter to be in error. It is now CBP’s position that the unfinished quilted pillow shell is properly classified, by operation of GRI 1, in heading 6307, HTSUS, specifically in subheading 6307.90.89, HTSUS, which provides for “[o]ther made up articles, including dress patterns: Other: Other: Surgical towels; cotton towels of pile or tufted construction; pillow shells, of cotton; shells for quilts, eiderdowns, comforters and similar articles of cotton.”

Pursuant to 19 U.S.C. §1625(c)(1), CBP is proposing to revoke NY N236267 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H285436, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated: June 19, 2017

IEVA K. O’ROURKE
for

MYLES B. HARMON,
Director

Commercial and Trade Facilitation Division

Attachments

[ATTACHMENT A]

N236267

December 19, 2012

CLA-2-94:OT:RR:NC:N3:349

CATEGORY: Classification

TARIFF NO.: 9404.90.1000

MS. JANIE WANG
FUTURE TEXTILES INC.
1085 CRANBURY SOUTH RIVER ROAD, SUITE 4
JAMESBURG, NJ 08831

RE: The tariff classification of an unfinished quilted pillow shell from China

DEAR MS. WANG:

In your letter dated December 6, 2012 you requested a tariff classification ruling.

The submitted sample is an unfilled pillow shell. The shell consists of two quilted panels joined by a 1.5 inch wide side gusset. A strip of piping is inserted into the seams. The outer surface of the panels and the side gusset are made from 100 percent cotton woven fabric. The panels are backed with a nonwoven fabric and filled with polyester batting. The three layers are quilted together. There is a 16 inch wide unfinished opening along one side. One panel features an embroidered logo. After importation the unfilled main chamber will be stuffed, sewn closed and finished. The pillow shell will be available in 18 x 26 inches or 18 x 34 inches.

The General Rules of Interpretation (GRI's) governs classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Heading 9404, HTSUS, provides for, among other things, articles of bedding and similar furnishings, provided that such articles are fitted with springs or stuffed or internally fitted with any material. GRI 2(a) provides the following:

Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

Given the general appearance of the submitted sample the unfinished pillow has the essential character of the finished article. Although the center chamber is not filled, the top and bottom panels are stuffed and thus for classification purposes is within the plain meaning of "stuffed or fitted" as set out in heading 9404, HTSUS.

The applicable subheading for the pillow will be 9404.90.1000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: other: pillows, cushions and similar furnishings: of cotton. The duty rate will be 5.3 percent ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist John Hansen at (646) 733-3043.

Sincerely,

THOMAS J. RUSSO

Director

National Commodity Specialist Division

[ATTACHMENT B]

HQ H285436
CLA-2 OT:RR:CTF:FTM H285436 GaK
CATEGORY: Classification
TARIFF NO: 6307.90.8945

Ms. JANE WANG
FUTURE TEXTILES INC.
1085 CRANBURY SOUTH RIVER ROAD, SUITE 4
JAMESBURG, NJ 08831

RE: Revocation of NY N236267; Classification of an unfinished quilted pillow shell from China

DEAR Ms. WANG:

This letter is to inform you that U.S. Customs and Border Protection (“CBP”) has reconsidered New York Ruling Letter (“NY”) N236267, which was issued to Future Textiles Inc. on December 19, 2012. In NY N236267, CBP classified an unfinished quilted pillow shell under subheading 9404.90.10, Harmonized Tariff Schedule of the United States (“HTSUS”), which provides for: “[m]attress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: Other: Pillows, cushions, and similar furnishings: Of cotton.” We have reviewed NY N236267 and found it to be incorrect. For the reasons set forth below, we are revoking this ruling.

FACTS:

In NY N236267, the merchandise was described as follows:

The submitted sample is an unfilled pillow shell. The shell consists of two quilted panels joined by a 1.5 inch wide side gusset. A strip of piping is inserted into the seams. The outer surface of the panels and the side gusset are made from 100 percent cotton woven fabric. The panels are backed with a nonwoven fabric and filled with polyester batting. The three layers are quilted together. There is a 16 inch wide unfinished opening along one side. One panel features an embroidered logo. After importation the unfilled main chamber will be stuffed, sewn closed and finished. The pillow shell will be available in 18 x 26 inches or 18 x 34 inches.

ISSUE:

Whether the merchandise is classified as “[m]attress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered”, under heading 9404, HTSUS, or as “[o]ther made up articles, including dress patterns”, under heading 6307, HTSUS.

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (“GRIs”) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes. GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS headings at issue are as follows:

6307 Other made up articles, including dress patterns.

* * *

9404 Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered.

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTS and are thus useful in ascertaining the proper classification of the merchandise. *See* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

EN 94.04 states, in pertinent part, the following:

This heading covers:

...

(B) **Articles of bedding and similar furnishing** which are sprung or stuffed or internally fitted with any material (cotton, wool, horsehair, down, synthetic fibers, etc.), or are of cellular rubber or plastics (whether or not covered with woven fabric, plastics, etc.). For example:

- (1) Mattresses, including mattresses with a metal frame.
- (2) Quilts and bedspreads (including counterpanes, and also quilts for baby-carriages), eiderdowns and duvets (whether of down or any other filling), mattress-protectors (a kind of thin mattress placed between the mattress itself and the mattress support), bolsters, pillows, cushions, pouffes, etc.
- (3) Sleeping bags.

...

This heading also **excludes** :

(e) Pillow-cases, eiderdown or duvet covers (**heading 63.02**).

(f) Cushion covers (**heading 63.04**).

The quilted pillow shell in NY N236267 was not fitted with springs or internally stuffed or fitted with any material, and therefore cannot be considered an article of bedding or similar furnishing classifiable in heading 9404, HTSUS. Therefore, the quilted pillow shell is properly classified in

heading 6307, HTSUS, specifically under 6307.90.8945, HTSUSA (“Annotated”), which provides for “[o]ther made up articles, including dress patterns: Other: Other: Pillow shells, of cotton (369).”

This decision is consistent with other CBP rulings on substantially similar merchandise. *See e.g.*, Headquarters Ruling Letter (“HQ”) 953003, dated February 24, 1993; HQ 953004, dated February 24, 1993; HQ 084046, dated May 11, 1989; NY G81226, dated September 19, 2000; NY H81518, dated June 20, 2001; NY J81183, dated February 20, 2003; NY N016383, dated September 20, 2007; and NY N124420, dated September 30, 2010.

HOLDING:

Under the authority of GRI 1, the unfinished quilted pillow shell is provided for in heading 6307, HTSUS, specifically in subheading 6307.90.8945, HTSUSA, which provides for, “[o]ther made up articles, including dress patterns: Other: Other: Pillow shells, of cotton (369).” The column one general rate of duty is 7% *ad valorem*.

EFFECT ON OTHER RULINGS:

NY N236267, dated December 19, 2012, is hereby REVOKED.

Sincerely,

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division

19 CFR PART 177**REVOCATION OF THREE RULING LETTERS AND
REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF POLYESTER FLOWER LEIS**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of three ruling letters and of revocation of treatment relating to the tariff classification of polyester flower leis.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking three ruling letters concerning tariff classification of polyester flower leis under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 51, No. 15, on April 12, 2017. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 18, 2017.

FOR FURTHER INFORMATION CONTACT: Grace A. Kim, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–7941.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (“Title VI”), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are “**informed compliance**” and “**shared responsibility**.” These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations.

Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the *Customs Bulletin*, Vol. 51, No. 15, on April 12, 2017, proposing to revoke three ruling letters pertaining to the tariff classification of polyester flower leis. As stated in the notice, this action will cover New York Ruling Letter ("NY") N048019, dated January 7, 2009; NY N245539, dated September 19, 2013; and NY N247373, dated November 20, 2013, as well as any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the three identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. §1625(c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In NY N048019, NY N245539, and NY N247373, CBP classified polyester flower leis in heading 7117, HTSUS, specifically in subheading 7117.90.90, HTSUS, which provides for "Imitation jewelry: Other: Other: Valued over 20 cents per dozen pieces or parts: Other: Other." CBP has reviewed NY N048019, NY N245539, and NY N247373 and has determined the ruling letters to be in error. It is now CBP's position that polyester flower leis are properly classified, by operation of GRI 1, in heading 6702, HTSUS, specifically in subheading

6702.90.35, HTSUS, which provides for “Artificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers, foliage or fruit: Of other materials: Other: Of man-made fibers.”

Pursuant to 19 U.S.C. §1625(c)(1), CBP is revoking NY N048019, NY N245539, and NY N247373 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H251022, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated: May 26, 2017

IEVA K. O’ROURKE
For

MYLES B. HARMON,
Director

Commercial and Trade Facilitation Division

Attachment

H251022

May 26, 2017

TARIFF NO.: 6702.90.35

VALERIE SMITH
DIRECTOR OF IMPORTING
3875 SW HALL BOULEVARD
BEAVERTON, OR 97005

RE: Revocation of NY N048019, NY N245539, and NY N247373;
classification of polyester flower leis

DEAR Ms. SMITH:

On January 7, 2009, U.S. Customs and Border Protection (“CBP”) issued to you New York Ruling Letter (“NY”) N048019. CBP also issued NY N245539, dated September 19, 2013, and NY N247373, dated November 20, 2013, on similar products. The rulings pertain to the tariff classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) of polyester flower leis. In NY N048019, NY N245539, and NY N247373, CBP classified the polyester flower leis under subheading 7117.90.9000, HTSUS. We have reviewed these rulings and have found them to be in error. For the reasons described in this ruling, we hereby revoke NY N048019, NY N245539, and NY N247373.

On April 12, 2017, pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI, notice of the proposed action was published in the Customs Bulletin Vol. 51, No. 15. No comments were received in response to this notice.

FACTS:

In NY N048019, CBP described the merchandise, in pertinent part, as follows:

The item is a 34 inch artificial floral lei worn over the neck. The flowers are on a string and are separated by clear plastic tubes measuring 1 inch long by 3/16 of an H251022 CLA-2 OT:RR:CTF:FTM H251022 GaK inch in diameter. Individual flowers of different colors are made of polyester, and measure approximately 2.5 inches in diameter.

It is stated that each flower is made from a single die-cut piece of material. This is analogous to cutting the shape of each flower from a single piece of paper.

ISSUE:

Whether the subject merchandise is classifiable under heading 6702, HTSUS, or under heading 7117, HTSUS.

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (“GRIs”). GRI 1 provides that the classification of goods shall be “determined according to the terms of the headings and any relative section or chapter notes.” In the event that the goods cannot be classified solely on the basis of GRI 1 and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may be applied in order.

The 2017 HTSUS headings under consideration in this case are as follows:
 6702 Artificial flowers, foliage and fruit and parts thereof; articles made
 of artificial flowers, foliage or fruit:

* * *

7117 Imitation jewelry:

Note 9 to Chapter 71 states as follows:

9. For the purposes of heading 7113, the expression “articles of jewelry” means:

- (a) Any small objects of personal adornment (for example, rings, bracelets, necklaces, brooches, earrings, watch chains, fobs, pendants, tie pins, cuff links, dress studs, religious or other medals and insignia); and
- (b) Articles of personal use of a kind normally carried in the pocket, in the handbag or on the person (for example, cigar or cigarette cases, snuff boxes, cachou or pill boxes, powder boxes, chain purses or prayer beads).

These articles may be combined or set, for example, with natural or cultured pearls, precious or semiprecious stones, synthetic or reconstructed precious or semiprecious stones, tortoise shell, mother-of-pearl, ivory, natural or reconstituted amber, jet or coral.

Note 11 to Chapter 71 states as follows:

11. For the purposes of heading 7117, the expression “imitation jewelry” means articles of jewelry within the meaning of paragraph (a) of note 9 above (but not including buttons or other articles of heading 9606, or dress combs, hair slides or the like, or hairpins, of heading 9615), not incorporating natural or cultured pearls, precious or semiprecious stones (natural, synthetic or reconstructed) nor (except as plating or as minor constituents) precious metal or metal clad with precious metal.

Applying GRI 1, Note 11 to Chapter 71 explains that imitation jewelry means “articles of jewelry,” defined in Note 9(a) to Chapter 71, that do not incorporate cultured pearls, precious/semiprecious stones or precious metal. As imitation jewelry of heading 7117, HTSUS, only imitates the articles of jewelry which are described in Note 9(a), we will not apply the description of jewelry set forth in Note 9(b) to the instant merchandise.

Note 9(a) states that, for the purposes of heading 7113, HTSUS, “articles of jewelry” are small articles of adornment. Note 9(a) also provides a list of examples, which include rings, earrings, bracelets and other articles of jewelry. In NY J89816, CBP classified the plastic nail jewels and the body stickers under heading 7117, HTSUS, as imitation jewelry. However, while paragraph (a) of Note 9 defines articles of jewelry as “small articles of personal adornment,” we cannot read paragraph (a) without the context of the first clause of Note 9. Note 9 begins with “for the purposes of heading 7113, the expression ‘articles of jewelry’ means . . .” As such, imitation jewelry must imitate articles of jewelry which are described in paragraph (a) and are classified under heading 7113, HTSUS.

Heading 7113, HTSUS, provides for “articles of jewelry and parts thereof, of precious metal or of metal clad with precious metal.” Thus, imitation jewelry must imitate small articles of personal adornment of precious metal, or of metal clad with precious metal. Per Note 9, imitation jewelry may be

combined or set with imitations of pearls, precious or semiprecious stones, tortoise shell, mother-of-pearl, ivory, amber, jet or coral.

The subject merchandise consists of flowers made of polyester. The polyester flowers do not imitate articles of jewelry clad with any type of metal. Rather they imitate flowers which are classified in heading 0603, HTSUS. As the polyester flowers do not imitate jewelry of heading 7113, HTSUS, they cannot be classified as imitation jewelry under heading 7117, HTSUS.

We return to GRI 1 to determine if the merchandise is classifiable under another heading. In understanding the language of the HTSUS, the Explanatory Notes (“ENs”) of the Harmonized Commodity Description and Coding System, which constitute the official interpretation of the Harmonized System at the international level, may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The ENs to heading 67.02 provides as follows:

This heading covers:

...

(3) Articles made of artificial flowers, foliage or fruit (e.g., bouquets, garlands, wreaths, plants), and other articles, for use as trimmings or as ornaments, made by assembling artificial flowers, foliage or fruit.

...

Subject to the exclusions listed below, these goods may be made of **textile materials**, felt, paper, plastics rubber, leather, metal foil, feathers, shells or of other materials of animal origin. . . Provided they meet the specifications of the preceding paragraphs, all such articles fall in this heading irrespective of their degree of finish.

This heading does not include:

...

(e) Artificial flowers, foliage or fruit, of pottery, stone, metal, wood, etc., obtained in one piece by moulding, forging, carving, stamping or other process, or consisting of parts assembled otherwise than by binding, glueing, fitting into one another or similar methods.

Based upon the express terms of heading 6702, HTSUS and the scope put forth in the corresponding ENs, the polyester flower lei is correctly classified under heading 6702, HTSUS. The polyester flower lei is made of textile materials. It is assembled by connecting the flowers with a string and spacing them using clear plastic tubes. Therefore, the polyester flower leis are classified under heading 6702, HTSUS, specifically under subheading 6702.90.35, HTSUS, which provides for “[a]rtificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers, foliage or fruit: Of other materials: Other: Of man-made fibers.”

HOLDING:

Pursuant to GRIs 1 and 6, the polyester flower lei is classified in subheading 6702.90.35, HTSUS, which provides for “[a]rtificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers, foliage or fruit: Of other materials: Other: Of man-made fibers.” The 2017 column one, general rate of duty is 9 percent *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov/tata/hts/.

EFFECTS ON OTHER RULINGS:

NY N048019, dated January 7, 2009, NY N245539, dated September 19, 2013, and NY N247373, dated November 20, 2013, are revoked.

Sincerely,

LEVA K. O'ROURKE

for

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division

**PROPOSED MODIFICATION OF ONE RULING LETTER
AND REVOCATION OF TREATMENT RELATING TO THE
ELIGIBILITY OF BOYS' SHIRT AND TIE SETS FOR
DUTY-FREE TREATMENT UNDER THE CARIBBEAN BASIN
TRADE PARTNERSHIP ACT**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed modification of one ruling letter and revocation of treatment relating to the eligibility of boys' shirt and tie sets for duty-free treatment under the Caribbean Basin Trade Partnership Act ("CBTPA").

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection ("CBP") intends to modify one ruling letter concerning the eligibility of boys' shirt and tie sets for duty-free treatment under the CBTPA. Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

EFFECTIVE DATES: Comments must be received on or before August 18, 2017.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229-1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325-0118.

FOR FURTHER INFORMATION CONTACT: Elif Eroglu, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325-0277.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057) (“Title VI”), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are “**informed compliance**” and “**shared responsibility**.” These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations.

Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the eligibility of boys’ shirt and tie sets for duty-free treatment under the CBTPA. Although in this notice, CBP is specifically referring to Headquarters Ruling Letter (“HQ”) H022665, dated September 17, 2009 (Attachment A), this notice covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. § 1625(c)(2)), as amended by section 623 of Title VI, CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer’s failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In HQ H022665, CBP determined that boys’ shirts cut and sewn in El Salvador, and packaged with a tie are eligible for duty-free entry

under the CBTPA subheading 9820.11.24, HTSUS, but not for duty-free entry under the Dominican Republic—Central America—United States Free Trade Agreement (“DR-CAFTA”). CBP has reviewed HQ H022665 and has determined the ruling letter to be partially in error. It is now CBP’s position that boys’ shirts cut and sewn in El Salvador, and packaged with a tie are eligible for duty-free treatment under CBTPA if entered on or before March 1, 2006. However, the eligibility of the boys’ shirt and tie sets under DR-CAFTA and their classification remain in effect.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify HQ H022665 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H263569, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated: June 19, 2017

MONIKA R. BRENNER

for

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division

Attachments

[ATTACHMENT A]

HQ H022665

September 17, 2009

CLA-2 OT:RR:CTF:TCM H022665 KSH

CATEGORY: Classification

TARIFF NO.: 9820.11.24; 6205.20.2031

AREA PORT DIRECTOR
U.S. CUSTOMS AND BORDER PROTECTION
1624 EAST SEVENTH AVENUE, SUITE 101
TAMPA, FL 33605

RE: Internal Advice Request No. 08/004; Eligibility of shirt and tie sets under CBTPA and DR-CAFTA.

DEAR PORT DIRECTOR:

This ruling is in response to your memorandum dated January 24, 2008 forwarding a request for Internal Advice initiated by counsel on behalf of its client, KT Group. At issue is the duty free eligibility under the Caribbean Basin Trade Partnership Act (CBTPA) and Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA) for boys' shirt and tie sets. The request for internal advice is sought to clarify whether the presence of the non-originating tie in the retail set will otherwise disqualify the shirt and tie set from receiving preferential treatment. In reaching this decision, consideration has been given to counsel's supplemental decision dated September 22, 2008. FACTS: The merchandise at issue is boys' shirt and tie sets identified as styles FT 4729, FT 4724 and FT 4184. The shirts are constructed from 55% cotton, 45% polyester 186T or 205T broadcloth, yarn dyed woven fabric containing two or more colors in the warp and/or filling. The weight of the fabric is 108 g/m². The 186T broadcloth fabric has 43.3 yarns per centimeter in the warp and 29.9 yarns per centimeter in the filing for a total of 73.2 yarns per square centimeter. The 250T broadcloth fabric has 52.4 yarns per centimeter in the warp and 28.3 yarns per centimeter in the filing for a total of 80.7 yarns per square centimeter. All yarns are combed singles and 76 metric. The fabrics are a 1 x 1 plain weave. The looms are broad looms weaving with two harnesses, with no jacquard motion or doobby attachment. The fabrics are bleached white and piece dyed a solid color. The shirts feature a left over right full front opening with seven button closures, a point collar, long sleeves with buttoned cuffs, a pocket on the left chest, and a curved, hemmed bottom. The shirts are packaged for with coordinating color, 100% polyester, woven fabric ties. The fabric used to manufacture the shirts is made in China and shipped in rolls to El Salvador where it is cut into component pieces and assembled into finished garments. The removable clip ties are made in China and shipped to El Salvador where they are attached to the shirt. The shirt and tie set is packaged and shipped to the U.S. from El Salvador.

ISSUE:

Whether the shirt and tie, imported as a set, are eligible for duty-free treatment under the CBTPA.

LAW AND ANALYSIS:

I. Eligibility under the CBTPA

The CBTPA provides certain specified trade benefits for countries of the Caribbean region. The Act extends North American Free Trade Agreement (NAFTA) duty treatment standards to non-textile articles that previously were ineligible for preferential treatment under the Caribbean Basin Economic Recovery Act (CBERA) into CBTPA and provides for duty- and quota-free treatment for certain textile and apparel articles which meet the requirements set forth in Section 211 of the CBTPA (amended 213(b) of the CBERA, codified at 19 U.S.C. 2703(b)). Beneficiary countries are designated by the President of the United States after having met eligibility requirements set forth in the CBTPA. Eligibility for benefits under the CBTPA is contingent on designation as a beneficiary country by the President of the United States and a determination by the United States Trade Representative (USTR), published in the Federal Register, that a beneficiary country has taken the measures required by the Act to implement and follow, or is making substantial progress toward implementing and following, certain customs procedures, drawn from Chapter 5 of the NAFTA, that allow the United States to verify the origin of products. Once both these designations have occurred, a beneficiary country is entitled to preferential treatment provided for by the CBTPA. El Salvador was designated a beneficiary country by Presidential Proclamation 7351 of October 2, 2000, published in the Federal Register (65 Fed. Reg. 59329). It was determined to have met the second criteria concerning customs procedures by the USTR and thus eligible for benefits under the CBTPA effective October 2, 2000. *See* 65 Fed. Reg. 60236. The provisions implementing the textile provisions of the CBTPA in the Harmonized Tariff Schedule of the United States (HTSUS) are contained, for the most part, in subchapter XX, Chapter 98, HTSUS (two provisions may be found in subheading 9802.00.80, HTSUS). The regulations pertinent to the textile provisions of the CBTPA may be found at §§ 10.221 through 10.228 of the CBP Regulations (19 CFR 10.221 through 10.228).

Counsel states that the Chinese origin fabric used to manufacture the shirts is in “short supply.” The provision commonly referred to as the “NAFTA short supply” provision is contained in subheading 9820.11.24, of the Harmonized Tariff Schedule of the United States (HTSUS). We note that there is no definitive list of “short supply” fabrics or yarns for purposes of the North American Free Trade Agreement (NAFTA). The determination of these short supply fabrics or yarns is based upon the various provisions of NAFTA and whether, under NAFTA, for the particular apparel article at issue, certain fabrics or yarns may be sourced from outside the NAFTA parties for use in the production of an “originating” good. If sourcing of certain fabrics or yarns outside the NAFTA parties is allowed, then those fabrics or yarns are deemed to be in “short supply.”

Counsel cites to New York Ruling Letter (NY) M80139, dated February 2, 2006 and NY L84803, dated June 2, 2005, both issued to the broker for KT Group, in which CBP determined the shirt and tie sets were not eligible for duty-free treatment under the CBTPA. Insofar as M80139 did not address whether the fabric used to manufacture the shirt was in “short supply”, it is not dispositive of the issue presented herein. Moreover, we have been advised that insufficient information was presented to make a determination whether

the fabric used to make the shirt at issue in L84803 was in short supply. As such, the determination in L84803 was issued based on the understanding that neither the shirt nor the tie at issue therein were originating and were therefore ineligible for preferential treatment under the CBTPA.

General Note 12(t), HTSUS, sets out the tariff shift rules for determining whether non-originating materials used in the production of a good have been transformed into originating goods under NAFTA, and by extension under the CBTPA.

To determine the applicable tariff shift rule, we must determine the proper classification of the shirt and tie packaged together. The shirts are classifiable under heading 6205, HTSUS, as men's cotton dress shirts and the ties are classifiable under heading 6215, HTSUS, as ties of man-made fabric.

GRI 3 provides for goods that are, prima facie, classifiable in two or more headings. GRI 3(b) provides that goods put up in sets for retail sale shall be classified as if they consisted of the material or component which gives them their essential character. The shirt and tie are considered a set for purposes of classification because they are prima facie classifiable in more than one heading, are put together to meet a particular need or carry out a specific activity, and they are packed for sale directly to users without repacking. The essential character of the set is imparted by the shirt because the tie merely accessorizes the shirt.

GN 12 Chapter 62 Rule 3 states in part:

For purposes of determining origin of a good of this chapter, the rule applicable to that good shall only apply to the component that determines the tariff classification of the good and such component must satisfy the tariff change requirements set out in the rule for that good.

As the shirt provides the essential character to the shirt and tie sets, only the shirt must undergo the tariff shift requirements.

General Note 12(t) Chapter 62 states in part: (30) A change to subheading 6205.20 through 6205.30 from any other chapter, except from headings 5106 through 5113, 5204 through 5212, 5307 through 5308 or 5310 through 5311, chapter 54, or headings 5508 through 5516, 5801 through 5802 or 6001 through 6006, provided that the good is both cut and sewn or otherwise assembled in the territory of one or more of the NAFTA parties.

Subheading rule (c) to Gn12(t) Chapter 62 (30) states: Men's or boys' shirts of cotton (subheading 6205.20) or of man-made fibers (subheading 6205.30) shall be considered to originate if they are both cut and assembled in the territory of one or more of the parties and if the fabric of the outer shell, exclusive of collars or cuffs, is wholly of one or more of the following: . . . (c) Fabrics of subheadings 5210.21 or 5210.31, not of square construction, containing more than 70 warp ends and filling picks per square centimeter, of average yarn number exceeding 70 metric.

The boys' shirts are constructed from fabric of subheading 5210.31, HTSUS. The fabric contains either 73.2 total yarns per square centimeter or 80.7 total yarns per square centimeter and 76 metric yarns. As such, the boys' shirt and tie sets are eligible for duty-free treatment under subheading 9820.11.24, HTSUS, provided they are cut and assembled in El Salvador and they are imported directly to the U.S. from El Salvador, a CBTPA beneficiary country.

II. Eligibility under the DR-CAFTA

The DR-CAFTA was signed by the governments of Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and the United States on August 5, 2004. The DR-CAFTA was approved by the U.S. Congress with the enactment on August 2, 2005, of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (the “Act”), Pub. L. 109–53, 119 Stat. 462 (19 U.S.C. 4001 et seq.). The Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and the United States are currently parties to the agreement. General Note (GN) 29 of the HTSUS implements the DR-CAFTA. GN 29(a) states, in relevant part: Goods for which entry is claimed under the terms of the Dominican Republic-Central America-United States Free Trade Agreement are subject to duty as set forth herein. For the purposes of this note – (i) originating goods or goods described in subdivision (a)(ii), subject to the provisions of subdivisions (b) through (n) of this note, that are imported into the customs territory of the United States and entered under a provision – * * * (B) in chapter 98 or 99 of the tariff schedule where rate of duty or other treatment is specified, are eligible for the tariff treatment and quantitative limitations set forth therein in accordance with sections 201 through 203, inclusive, of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (Pub. L. 109–53; 119 Stat. 462)[.] * * * GN 29(b) sets forth criteria for determining whether a good (other than agricultural goods provided for in GN 29(a)(ii)) is an originating good for purposes of the DR-CAFTA. GN 29(b) states, in relevant part: For the purposes of this note, subject to the provisions of subdivisions (c), (d), (m) and (n) thereof, a good imported into the customs territory of the United States is eligible for treatment as an originating good under the terms of this note if – * * * (ii) the good was produced entirely in the territory of one or more of the parties to the Agreement, and – (A) each of the nonoriginating materials used in the production of the good undergoes an applicable change in tariff classification specified in subdivision (n) of this note; or (B) the good otherwise satisfies any applicable regional value content or other requirements specified in subdivision (n) of this note; and the good satisfies all other applicable requirements of this note; . . . * * * Subdivision (n) referred to in GN 29(b) sets forth the tariff shift method of qualifying as an originating good under DR-CAFTA. GN 29(m)(viii)(B) is a “short supply” provision that provides an alternative method for an apparel good to qualify as an “originating” good under DR-CAFTA. GN 29(m)(viii)(B) provides: An apparel good of chapter 61 or 62 of the tariff schedule and imported under heading 9822.05.01 of the tariff schedule shall be considered originating if it is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of one or more of the parties to the Agreement, and if the fabric of the outer shell, exclusive of collars and cuffs where applicable, is wholly of – (1) one or more fabrics listed in U.S. note 20 to subchapter XXII of chapter 98; or (2) one or more fabrics formed in the territory of one or more of the parties to the Agreement from one or more of the yarns listed in U.S. note 20 to such subchapter XXII; or (3) any combination of the fabrics referred to in subdivision (B)(1), the fabrics referred to in subdivision (B)(2) or one or more fabrics originating under this note. The originating fabrics referred to in subdivision (B)(3) may contain up to 10 percent by weight of fibers or yarns that do not undergo an applicable change

in tariff classification set out in subdivision (n) of this note. Any elastomeric yarn contained in a fabric referred to in subdivision (B)(1), (B)(2) or (B)(3) must be formed in the territory of one or more of the parties to the Agreement. Subchapter XXII, chapter 98, U.S. Note 20(a) provides: Heading 9822.05.01 shall apply to textile or apparel goods of chapters 50 through 63 and subheading 9404.90 that contain any of the fabrics, yarns or fibers set forth herein, are described in general note 29 to the tariff schedule and otherwise meet the requirements of such general note 29:

* * * (8) Fabrics classified in subheading 5210.21 or 5210.31, not of square construction, containing more than 70 warp ends and filling picks per square cm, of average yarn number exceeding 70 metric[.] As previously stated, the boys' shirts are constructed from fabric of subheading 5210.31, HTSUS. The fabric contains either 73.2 total yarns per square centimeter or 80.7 total yarns per square centimeter and 76 metric yarns. As such, the boys' shirts constructed from a short supply fabric meet the terms of Subchapter XXII, chapter 98, U.S. Note 20(a). However, the coordinating ties of heading 6215, HTSUS, which are packaged with the shirts do not meet the terms of Note 20(a) because they are not constructed from a fabric listed therein.

General Note 29(c)(v), which governs the eligibility of goods put up in retail sets provides, in pertinent part: Goods classifiable as goods put up in sets.— Notwithstanding the rules set forth in subdivision (n) of this note, goods classifiable as goods put up in sets for retail sale as provided under general rule of interpretation 3 to the tariff schedule shall not be considered to be originating goods unless—

(A) each of the goods in the set is an originating good; or

(B) the total value of the nonoriginating goods in the set does not exceed—

(1) in the case of a textile or apparel good, 10 percent of the adjusted value of the set. . .

Counsel states that the adjusted value of the coordinating ties is approximately 13%. Insofar as Note 29(c)(v) limits the value of the non-originating textile component to 10% of the adjusted value of the set, the shirt and tie set is not eligible for preferential treatment under the terms of general note 29(c)(v).

HOLDING:

The boys' shirts cut and sewn in El Salvador, and packaged with a tie as described above, are eligible for duty-free entry under CBTPA subheading 9820.11.24, HTSUS, but not for duty-free entry under DR-CAFTA.

Pursuant to GRI 3(b), the boys' shirt and tie sets are classified in heading 6205, HTSUS. They are specifically provided for in subheading 6205.20.2031, HTSUSA (Annotated), which provides for "Men's or boys' shirts: Other: Dress shirts: Other: Boys'." The 2009 general, column one rate of duty is 19.7% ad valorem. The textile category code is 340.

You are to mail this decision to the internal advice requester no later than sixty days from the date of the decision. At that time, Regulations and Rulings of the Office of International Trade will make the decision available to CBP personnel, and to the public on the CBP Home Page on the World Wide Web at www.cbp.gov, by means of the Freedom of Information Act, and other methods of public distribution.

Sincerely,

GAIL A. HAMILL

for

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division

[ATTACHMENT B]

HQ H263569

OT:RR:CTF:VS H263569 EE

CATEGORY: Classification

AREA PORT DIRECTOR
CUSTOMS AND BORDER PROTECTION
1624 EAST SEVENTH AVENUE, SUITE 101
TAMPA, FL 33605

RE: Modification of HQ H022665; Eligibility of shirt and tie sets under CBTPA and DR-CAFTA

DEAR PORT DIRECTOR:

This is in reference to Headquarters Ruling Letter (“HQ”) H022665, dated September 17, 2009. HQ H022665 concerns the eligibility of boys’ shirt and tie sets for duty-free treatment under the Caribbean Basin Trade Partnership Act (“CBTPA”) and the Dominican Republic—Central America—United States Free Trade Agreement (“DR-CAFTA”). We have reviewed HQ H022665 and determined that it is incorrect with respect to the CBTPA preference. For the reasons set forth below, we are modifying that ruling letter.

FACTS:

The subject merchandise consists of boys’ shirt and tie sets identified as styles FT 4729, FT 4724 and FT 4184. The shirts are constructed from 55% cotton, 45% polyester 186T or 205T broadcloth, yarn dyed woven fabric containing two or more colors in the warp and/or filling. The weight of the fabric is 108 g/m². The 186T broadcloth fabric has 43.3 yarns per centimeter in the warp and 29.9 yarns per centimeter in the filling for a total of 73.2 yarns per square centimeter. The 250T broadcloth fabric has 52.4 yarns per centimeter in the warp and 28.3 yarns per centimeter in the filling for a total of 80.7 yarns per square centimeter. All yarns are combed singles and 76 metric. The fabrics are a 1 x 1 plain weave. The looms are broad looms weaving with two harnesses, with no jacquard motion or dobbie attachment. The fabrics are bleached white and piece dyed a solid color. The shirts feature a left over right full front opening with seven button closures, a point collar, long sleeves with buttoned cuffs, a pocket on the left chest, and a curved, hemmed bottom. The shirts are packaged with coordinating color, 100% polyester, woven fabric ties. The fabric used to manufacture the shirts is made in China and shipped in rolls to El Salvador where it is cut into component pieces and assembled into finished garments. The removable clip ties are made in China and shipped to El Salvador where they are attached to the shirt. The shirt and tie set is packaged and shipped to the U.S. from El Salvador.

In H022665, CBP ruled that the boys’ shirts cut and sewn in El Salvador, and packaged with a tie are eligible for duty-free entry under CBTPA subheading 9820.11.24 of the Harmonized Tariff Schedule of the United States (“HTSUS”), but not for duty-free entry under DR-CAFTA. Additionally, CBP determined that pursuant to General Rules of Interpretation (“GRI”) 3(b), the boys’ shirt and tie sets were classified in subheading 6205.20.2031, HTSUSA (“Annotated”), which provides for “Men’s or boys’ shirts: Other: Dress shirts: Other: Boys’.”

ISSUE:

Whether the shirt and tie, imported as a set, are eligible for duty-free treatment under the CBTPA and the DR-CAFTA.

LAW AND ANALYSIS:**I. Eligibility under the CBTPA**

The CBTPA provides certain specified trade benefits for countries of the Caribbean region. The Act extends North American Free Trade Agreement (“NAFTA”) duty treatment standards to non-textile articles that previously were ineligible for preferential treatment under the Caribbean Basin Economic Recovery Act (“CBERA”) and provides for duty and quota-free treatment of certain textile and apparel articles which meet the requirements set forth in Section 211 of the CBTPA (amended 213(b) of the CBERA, codified at 19 U.S.C. § 2703(b)). Beneficiary countries are designated by the President of the United States after having met eligibility requirements set forth in the CBTPA. Eligibility for benefits under the CBTPA is contingent on designation as a beneficiary country by the President of the United States and a determination by the United States Trade Representative (“USTR”), published in the *Federal Register*, that a beneficiary country has taken the measures required by the Act to implement and follow, or is making substantial progress toward implementing and following, certain customs procedures, drawn from Chapter 5 of the NAFTA, that allow the United States to verify the origin of products. Once both these designations have occurred, a beneficiary country is entitled to preferential treatment provided for by the CBTPA. El Salvador was designated as a beneficiary country by Presidential Proclamation 7351 of October 2, 2000, published in the *Federal Register* on October 4, 2000 (65 *Fed. Reg.* 59329). It was determined to have met the second criteria concerning customs procedures by the USTR and thus eligible for benefits under the CBTPA effective October 2, 2000. See 65 *Fed. Reg.* 60236.

The provisions implementing the textile provisions of the CBTPA in the HTSUS are contained, for the most part, in subchapter XX, Chapter 98, HTSUS (two provisions may be found in subheading 9802.00.80, HTSUS). The regulations pertinent to the textile provisions of the CBTPA may be found at §§ 10.221 through 10.228 of the CBP Regulations (19 C.F.R. §§ 10.221 through 10.228).

In H022665, counsel stated that the Chinese origin fabric used to manufacture the shirts was in “short supply.” The provision commonly referred to as the “NAFTA short supply” provision is contained in subheading 9820.11.24¹, HTSUS. We note that there is no definitive list of “short supply” fabrics or yarns for purposes of the North American Free Trade Agreement (“NAFTA”). The determination of these short supply fabrics or yarns is based upon the various provisions of NAFTA and whether, under NAFTA, for the particular apparel article at issue, certain fabrics or yarns may be sourced

¹1. Subheading 9820.11.24, HTSUS, provides as follows:

9820: Articles imported from a designated beneficiary Caribbean Basin Trade Partnership country enumerated in general note 17(a) to the tariff schedule:
 9820.11.24 Apparel articles both cut (or knit-to-shape) and sewn or otherwise assembled in one or more such countries, provided that such apparel articles of such fabrics or yarn would be considered an originating good under the terms of general note 12(t) to the tariff schedule without regard to the source of the fabric or yarn if such apparel article had been imported from the territory of Canada or the territory of Mexico directly into the customs territory of the United States.

from outside the NAFTA parties for use in the production of an “originating” good. If sourcing of certain fabrics or yarns outside the NAFTA parties is allowed, then those fabrics or yarns are deemed to be in “short supply.”

In H022665, counsel referred to New York Ruling Letter (“NY”) M80139, dated February 2, 2006 and NY L84803, dated June 2, 2005, both issued to the broker for KT Group, in which CBP determined the shirt and tie sets were not eligible for duty-free treatment under the CBTPA. Insofar as M80139 did not address whether the fabric used to manufacture the shirt was in “short supply”, it is not dispositive of the issue presented herein. Moreover, we have been advised that insufficient information was presented to make a determination whether the fabric used to make the shirt at issue in L84803 was in short supply. As such, the determination in L84803 was issued based on the understanding that neither the shirt nor the tie at issue therein were originating and were therefore ineligible for preferential treatment under the CBTPA.

General Note (“GN”) 12(t), HTSUS, sets out the tariff shift rules for determining whether non-originating materials used in the production of a good have been transformed into originating goods under NAFTA, and by extension under the CBTPA.

To determine the applicable tariff shift rule, we must determine the proper classification of the shirt and tie packaged together. The shirts are classifiable under heading 6205, HTSUS, as men’s cotton dress shirts and the ties are classifiable under heading 6215, HTSUS, as ties of man-made fabric.

GRI 3 provides for goods that are, *prima facie*, classifiable in two or more headings. GRI 3(b) provides that goods put up in sets for retail sale shall be classified as if they consisted of the material or component which gives them their essential character. The shirt and tie are considered a set for purposes of classification because they are *prima facie* classifiable in more than one heading, are put together to meet a particular need or carry out a specific activity, and they are packed for sale directly to users without repacking. The essential character of the set is imparted by the shirt because the tie merely accessorizes the shirt.

GN 12 Chapter 62 Rule 3 states in part:

For purposes of determining origin of a good of this chapter, the rule applicable to that good shall only apply to the component that determines the tariff classification of the good and such component must satisfy the tariff change requirements set out in the rule for that good.

As the shirt provides the essential character to the shirt and tie sets, only the shirt must undergo the tariff shift requirements.

GN 12(t) Chapter 62 states in part:

(30) A change to subheading 6205.20 through 6205.30 from any other chapter, except from headings 5106 through 5113, 5204 through 5212, 5307 through 5308 or 5310 through 5311, chapter 54, or headings 5508 through 5516, 5801 through 5802 or 6001 through 6006, *provided* that the good is both cut and sewn or otherwise assembled in the territory of one or more of the NAFTA parties.

Subheading rule (c) to Gn12(t) Chapter 62 (30) states:

Men's or boys' shirts of cotton (subheading 6205.20) or of man-made fibers (subheading 6205.30) shall be considered to originate if they are both cut and assembled in the territory of one or more of the parties and if the fabric of the outer shell, exclusive of collars or cuffs, is wholly of one or more of the following:

... (c) Fabrics of subheadings 5210.21 or 5210.31, not of square construction, containing more than 70 warp ends and filling picks per square centimeter, of average yarn number exceeding 70 metric.

The boys' shirts are constructed from fabric of subheading 5210.31, HTSUS. The fabric contains either 73.2 total yarns per square centimeter or 80.7 total yarns per square centimeter and 76 metric yarns. As such, the boys' shirt and tie sets are eligible for duty-free treatment under subheading 9820.11.24, HTSUS, provided they are cut and assembled in El Salvador and they are imported directly to the U.S. from El Salvador, a CBTPA beneficiary country. We note that El Salvador was removed from the enumeration of designated beneficiary countries under the CBERA and the CBTPA when DR-CAFTA entered into force with respect to El Salvador on March 1, 2006. The imported merchandise in question was entered before and after March 1, 2006. As such, only entries on or before March 1, 2006 are eligible for duty-free treatment under the CBTPA.

II. Eligibility under the DR-CAFTA

The DR-CAFTA was signed by the governments of Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and the United States on August 5, 2004. The DR-CAFTA was approved by the U.S. Congress with the enactment on August 2, 2005, of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (the "Act"), Pub. L. 109-53, 119 Stat. 462 (19 U.S.C. 4001 et seq.). The Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and the United States are currently parties to the agreement.

GN 29 of the HTSUS implements the DR-CAFTA. GN 29(a) states, in relevant part:

Goods for which entry is claimed under the terms of the Dominican Republic-Central America-United States Free Trade Agreement are subject to duty as set forth herein. For the purposes of this note –

(i) originating goods or goods described in subdivision (a)(ii), subject to the provisions of subdivisions (b) through (n) of this note, that are imported into the customs territory of the United States and entered under a provision –

* * *

(B) in chapter 98 or 99 of the tariff schedule where rate of duty or other treatment is specified,

are eligible for the tariff treatment and quantitative limitations set forth therein in accordance with sections 201 through 203, inclusive, of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (Pub. L. 109-53; 119 Stat. 462)[.]

* * *

GN 29(b) sets forth criteria for determining whether a good (other than agricultural goods provided for in GN 29(a)(ii)) is an originating good for purposes of the DR-CAFTA. GN 29(b) states, in relevant part:

For the purposes of this note, subject to the provisions of subdivisions (c), (d), (m) and (n) thereof, a good imported into the customs territory of the United States is eligible for treatment as an originating good under the terms of this note if –

* * *

(ii) the good was produced entirely in the territory of one or more of the parties to the Agreement, and –

(A) each of the nonoriginating materials used in the production of the good undergoes an applicable change in tariff classification specified in subdivision (n) of this note; or

(B) the good otherwise satisfies any applicable regional value content or other requirements specified in subdivision (n) of this note;

and the good satisfies all other applicable requirements of this note

* * *

Subdivision (n) referred to in GN 29(b) sets forth the tariff shift method of qualifying as an originating good under DR-CAFTA. GN 29(m)(viii)(B) is a “short supply” provision that provides an alternative method for an apparel good to qualify as an “originating” good under DR-CAFTA. GN 29(m)(viii)(B) provides:

An apparel good of chapter 61 or 62 of the tariff schedule and imported under heading 9822.05.01 of the tariff schedule shall be considered originating if it is cut or knit to shape, or both, and sewn or otherwise assembled in the territory of one or more of the parties to the Agreement, and if the fabric of the outer shell, exclusive of collars and cuffs where applicable, is wholly of –

(1) one or more fabrics listed in U.S. note 20 to subchapter XXII of chapter 98; or

(2) one or more fabrics formed in the territory of one or more of the parties to the Agreement from one or more of the yarns listed in U.S. note 20 to such subchapter XXII; or

(3) any combination of the fabrics referred to in subdivision (B)(1), the fabrics referred to in subdivision (B)(2) or one or more fabrics originating under this note.

The originating fabrics referred to in subdivision (B)(3) may contain up to 10 percent by weight of fibers or yarns that do not undergo an applicable change in tariff classification set out in subdivision (n) of this note. Any elastomeric yarn contained in a fabric referred to in subdivision (B)(1), (B)(2) or (B)(3) must be formed in the territory of one or more of the parties to the Agreement.

Subchapter XXII, chapter 98, U.S. Note 20(a) provides:

Heading 9822.05.01 shall apply to textile or apparel goods of chapters 50 through 63 and subheading 9404.90 that contain any of the fabrics, yarns

or fibers set forth herein, are described in general note 29 to the tariff schedule and otherwise meet the requirements of such general note 29:

* * * (8) Fabrics classified in subheading 5210.21 or 5210.31, not of square construction, containing more than 70 warp ends and filling picks per square cm, of average yarn number exceeding 70 metric[.]

As previously stated, the boys' shirts are constructed from fabric of subheading 5210.31, HTSUS. The fabric contains either 73.2 total yarns per square centimeter or 80.7 total yarns per square centimeter and 76 metric yarns. As such, the boys' shirts constructed from a short supply fabric meet the terms of Subchapter XXII, chapter 98, U.S. Note 20(a). However, the coordinating ties of heading 6215, HTSUS, which are packaged with the shirts do not meet the terms of Note 20(a) because they are not constructed from a fabric listed therein.

GN 29(c)(v), which governs the eligibility of goods put up in retail sets provides, in pertinent part:

Goods classifiable as goods put up in sets.—Notwithstanding the rules set forth in subdivision (n) of this note, goods classifiable as goods put up in sets for retail sale as provided under general rule of interpretation 3 to the tariff schedule shall not be considered to be originating goods unless—

(A) each of the goods in the set is an originating good; or

(B) the total value of the nonoriginating goods in the set does not exceed—

(1) in the case of a textile or apparel good, 10 percent of the adjusted value of the set. . .

In H022665, counsel stated that the adjusted value of the coordinating ties is approximately 13%. Insofar as Note 29(c)(v) limits the value of the non-originating textile component to 10% of the adjusted value of the set, the shirt and tie set is not eligible for preferential treatment under the terms of GN 29(c)(v).

HOLDING:

The boys' shirts cut and sewn in El Salvador, and packaged with a tie are eligible for duty-free treatment under CBTPA if entered on or before March 1, 2006, but not for duty-free entry under DR-CAFTA.

Pursuant to GRI 3(b), the boys' shirt and tie sets are classified in heading 6205, HTSUS. They are specifically provided for in subheading 6205.20.2031, HTSUSA (Annotated), which provides for "Men's or boys' shirts: Other: Dress shirts: Other: Boys'." The 2009 general, column one rate of duty is 19.7% *ad valorem*. The textile category code is 340.

EFFECT ON OTHER RULINGS:

HQ H022665, dated September 17, 2009, is hereby MODIFIED with respect to the eligibility of the boys' shirt and tie sets for duty-free treatment under the CBTPA; however, the eligibility of the boys' shirt and tie sets under DR-CAFTA and their classification remain in effect.

Sincerely,

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division

MODIFICATION OF A RULING LETTER RELATED TO THE VALUATION OF CERTAIN MERCHANDISE

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of modification of one ruling letter relating to, among other things, the dutiability of certain commission payments made by an importer.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying one ruling letter concerning, among other things, the dutiability of certain commission payments made by an importer. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 51, No. 18, on May 3, 2017. One comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 18, 2017.

FOR FURTHER INFORMATION CONTACT: Cynthia Reese, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–0046.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (“Title VI”), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are “**informed compliance**” and “**shared responsibility**.” These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations.

Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying

out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the *Customs Bulletin*, Vol. 51, No. 18, on May 3, 2017, proposing to modify Headquarters Ruling Letter (HQ) H271308, dated November 20, 2016, as it involved two misstatements in the ruling. The notice did not cover any other rulings.

In HQ H271308, CBP determined that certain commission payments made by the importer to purported agents should be included in the price actually paid or payable because we concluded that the information presented to us did not indicate the parties were *bona fide* buying agents. In addition, CBP determined that payment for fabric development, inspection fees, and advance payments should be included in the price actually paid or payable. After issuance of the decision, counsel for the importer raised concerns about various statements in the decision. Many of these statements were based upon the Office of Regulatory Audit's Referral Audit Report on the importer. As such, the statements are accurate. However, two misstatements do appear in the decision. The decision erred in stating that a purported agent instructed the importer's customers when to make payment when no such instructions were given. In addition, the decision misconstrued an argument regarding the purported agent's services as a buying agent for the importer. The decision erroneously concluded that the importer was the seller, when in fact, the importer is actually the buyer, not the seller. In order to correct these misstatements, CBP is modifying HQ H271308 by issuance of HQ H284364. We note that our modification of HQ H271308 is to correct only the two misstatements which have been identified and will not have any effect on CBP's holding in the decision. The comments received by the commenter are addressed in HQ H284364.

Pursuant to 19 U.S.C. §1625(c)(1), CBP is modifying HQ H271308 to reflect the analysis contained in the HQ H284364 set forth as an attachment to this notice.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

Dated: June 13, 2017

MONIKA R. BRENNER

for

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division

Attachment

HQ H284364

June 13, 2017

OT:RR:CTF:VS H284364

CATEGORY: Valuation

AREA PORT DIRECTOR
U.S. CUSTOMS & BORDER PROTECTION
1 EAST BAY ST.
SAVANNAH, GA 31401

RE: Internal Advice Request; Dutiability of buying commissions, fabric development charges, inspection fees, and advance payments

DEAR PORT DIRECTOR:

This is in response to your memorandum dated November 20, 2015, in which you forwarded the Office of Regulatory Audit's ("ORA") Referral Audit Report ("Report") on Key Apparel Inc. ("Key" or "importer") and Key's response to the Audit, which also included Key's request for internal advice. Key's response, dated September 29, 2014, was prepared in response to the Report findings on the dutiability of foreign payments to purported agents and potential indirect payments for the imported merchandise. The Report also included ORA's rejoinder to Key's response, dated November 19, 2014.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice of the proposed modification of Headquarters Ruling Letter (HQ) H271308, dated November 30, 2016, was published on May 3, 2017, in the *Customs Bulletin*, Volume 51, No. 18. CBP received one comment in response to the notice.

FACTS:

Key is an importer, wholesaler, and manufacturer of textiles and sells its apparel to customers in the U.S. Key was referred to ORA by the Textile/Apparel Policy Division based on the potential for undervaluation. The scope of the audit included Calendar Year ("CY") 2012 imports, and with respect to foreign payments to purported agents, the scope was expanded to include CY 2009 through CY 2012.

The audit was conducted in accordance with generally accepted government auditing standards, except for the following limitations: ORA was unable to perform additional testing of Key's accounting records to fully quantify the violations disclosed during the audit due to the unreliability and inconsistencies in Key's responses and the financial data. Specifically, when ORA requested a Purchase Reconciliation from CBP ACS data for the importer's purchases, Key provided a revised CY 2012 Trial Balance and made significant adjustments/reclassifications to its Purchase account. Key was unable to provide documentary evidence for purported commission payments, client reports to substantiate the accounting entries, and written agreements on advances paid to the manufacturer. Key provided inconsistent explanations as to how fees are paid to purported agents, and how the agents are involved in the import process. Further, ORA noted unaudited financial statements and found commission invoices. As a result, ORA's loss of revenue calculation is limited to the following documents:

- Reconciliation of Purchases to CBP data,
- Commission and fabric development cost schedule,

- Agency agreement between Key and alleged buying agent, Shanghai Nex-T International Co. Ltd. (“SNT”),
- CY 2012 tax return,
- CY 2012 bank statements,
- Schedule of advance payments to Key’s related seller, Nex-T Cambodia Co. Ltd. (“NAC”), and
- CY 2012 Buying Expense Account.

The audit found the following: 1) foreign payments to purported agents were not bona fide buying commissions, 2) foreign payments for fabric development charges were indirect payments for imported merchandise, 3) foreign payments for purported inspection fees were an undeclared indirect payment for imported merchandise, and 4) advance payments to NAC were undeclared additional payments for imported merchandise. ORA concluded that Key did not report accurate and complete transaction value information to CBP, violating 19 C.F.R. § 152.102(f) and 152.103(b). Despite the scope limitation identified, ORA identified a specified amount in undervaluation of the imported merchandise resulting in a specified loss of revenue in duty for CY 2012. ORA also identified an additional undervaluation and resultant loss of revenue in duty for CY 2009 through CY 2011. Key responded to ORA’s results on September 29, 2014 and ORA included its rejoinder in the Report, dated November 19, 2014.

During the audit scope period, Key purchased merchandise from a seller in China, and NAC in Cambodia. Key used alleged related buying agents, SNT and Hong Kong Nex-T Inc. Limited (“HKNT”), located in Shanghai and Hong Kong, respectively.

I. Buying Commissions

ORA stated that the fees paid to SNT and HKNT were not bona fide buying commissions. ORA based this on the fact that SNT’s related party¹ paid the salary of Key’s CEO/President. The total entered value from manufacturers related to both Key and SNT represented 70 percent of Key’s total importations, which ORA interpreted as SNT not being financially detached from the manufacturer or seller. ORA also did not find SNT to be involved in the transactions between the manufacturers and Key, but rather in the transactions between Key and its customers in the U.S. SNT had access to Key’s shared drive, which SNT used to record Key’s customers’ orders. In addition, the agency agreement between Key and SNT was not being followed: there were no commission invoices and SNT was not paid upon receipt of payment from Key’s customers. Lastly, payments were made to SNT, who is identified as a manufacturer on the Automated Commercial System (“ACS”) manufacturer report.

Regarding HKNT, Key and HKNT did not have an agency agreement. ORA also found that the buying commission was based on eight percent of the merchandise resale price to Key’s U.S. customers, rather than based on the sale between Key and the sellers. Furthermore, buying commissions were pre-paid and/or carried over to subsequent years, and could not be correlated to import entries. Key states that because HKNT is SNT’s branch office, a

¹ SNT is owned by Jung Yoon Suk, who is the CEO of Nex-T America. Nex-T America paid Key’s CEO/President’s salary.

separate agency agreement was not necessary. Key also emphasizes that there was no relationship between SNT and the sellers and the lack of reference to SNT in the commercial documents support a sale to Key from the seller, not from SNT to Key. Key submitted copies of periodic debit notices issued by SNT in lieu of commission invoices, which became due when Key received payment from its U.S. customers. With respect to the buying commission being based on the resale price to Key's U.S. customers, Key states that while it may be unorthodox, it is not an indication that the commission is dutiable. In addition, Key states that pre-payment or late payment is nothing more than an element of commercial dealings of the parties, which has no effect on the bona fides of the principal-buying agent relationship. Lastly, Key states that the fact that commission payments cannot be tied to entries is of no consequence.

ORA states that debit notes in lieu of commission invoices were not mentioned or referenced prior to Key's response to the Report. In addition, the debit notes provided with Key's response state that payment should be made to the account of "HK Jak Factory Limited," and Key was unable to explain the entity's involvement in the import transactions. ORA's review of the CY 2012 Trial Balance Account also did not disclose debit notes. ORA found that SNT was in control of the import transaction. SNT received Key's customers' orders and instructed Key when to remit the commission payments. Furthermore, through discussions with Key personnel, ORA found that Key did not have extensive knowledge of the import transaction and its role was to receive the customers' payment and record the payment details onto an excel spreadsheet maintained on a shared drive accessible by Key and SNT.

II. Indirect Payments

A. Fabric Development Charges

ORA states that foreign payments made by Key to HKNT for fabric development were not for garment samples, but undeclared indirect payments to HKNT. ORA traced the payments identified in Key's commission payment schedule and the trial balance sample development cost payable account, directly to HKNT. ORA requested invoices and entries to verify whether the payments were declared to CBP as sample merchandise; however, Key was unable to provide them. ORA concluded that the evidence submitted did not support that the payments relate to fabric development costs for imported mutilated samples. ORA's review also disclosed that Key did not pay the manufacturers the amount due and the amounts were often rounded up or down, and commercial invoice amounts were carried over and payable the following year. Key also did not furnish evidence that duty was paid on left over fabric used in production of imported merchandise.

Key states that the fabric used in samples were all mutilated and therefore classified under subheading 9811.00.60, Harmonized Tariff Schedule of the United States ("HTSUS")² and duty free. According to Key, just because it could not provide entry documents for this fabric did not mean the merchandise should be dutiable. Key explained that samples were typically imported

² Subheading 9811.00.60, HTSUS provides for "[a]ny sample (except samples covered by heading 9811.00.20 or 9811.00.40), valued not over \$1 each, or marked, torn, perforated or otherwise treated so that it is unsuitable for sale or for use otherwise than as a sample, to be used in the United States only for soliciting orders for products of foreign countries."

by means of a courier who made entry, and Key did not have access to entry information. Key states that the payments were booked to Sample Development Costs because they related to samples, and because the sample garments were mutilated and not subject to duty, there was no loss of revenue. Key also referenced the prior disclosure, filed on May 9, 2013 by Key, that addressed the fabric development fee. Key did not provide any additional supporting documents.

ORA reviewed the CBP entry data, and found that Key did not enter goods under 9811.00.60, HTSUS, during the scope period. ORA did *see* mutilated sample garments at Key's office, but according to Key, some of the samples were purchased domestically. ORA was unable to correlate any of the sample garments to import documentation. ORA was not advised that the overseas development costs were related to the merchandise in any way, and could not find entries/invoices for samples. Further, the evidence did not demonstrate that the payments related to fabric development costs for imported mutilated samples. With regard to Key's May 9, 2013 prior disclosure, ORA states that Key did not tender the loss of revenue relating to the subject prior disclosure. The prior disclosure only included lump sum totals in regard to assists, and did not provide supporting schedules or documentation. Therefore, ORA was unable to verify that the payments made to HKNT during the scope period were included in the disclosure.

B. Inspection Fees

ORA also found that Key made undeclared payments to Empire, a third party, for inspection fees on behalf of Key's customer, Kandy Kiss. Key was unable to provide any contracts regarding the purported inspection fee for merchandise entered for sale to Kandy Kiss. ORA found that Key recorded the inspection fee in its commission account, even though the payment was not made to SNT or HKNT. ORA reviewed an invoice from Empire to Key, showing a charge of five cents per piece, which Key explained was for the post import charge and commission paid to Empire for inspection services on behalf of Kandy Kiss. Key submitted an e-mail from Kandy Kiss from August 2013, in which Kandy Kiss stated that Empire provided garment and factory inspection for Kandy Kiss, and Key was required to pay Empire. Key states that because Kandy Kiss is no longer a customer, they are not able to obtain supporting documentation. The e-mail string shows that Key wrote to Kandy Kiss on August 8, 2013, but Kandy Kiss's response was sent on August 7, 2013, which is also the date that ORA received the e-mails from Key. ORA determined that the date of the e-mails is questionable and concluded that Key was unable to provide sufficient and appropriate evidence to support that the payments related to inspection fees, and, as such, they should be dutiable as an undeclared indirect payment.

Key responded by repeating that the payments to Empire were required by Kandy Kiss and the inspection fee was built into Key's price to Kandy Kiss. Key did not provide additional documents aside from the August 2013 e-mails between Key and Kandy Kiss.

C. Advance to a Manufacturer

ORA found that Key made advance payments to NAC, a related seller. Key did not have any written agreements regarding "advances," the invoices did not identify the payments as "advances," and advance payments were also recorded in Key's purchase account. Key admitted that they did not have a

written agreement, but an oral agreement. Key states that it determined it was best that NAC remained a viable supplier while NAC was experiencing difficulty with labor strikes; therefore, advance payments were made. In support of their oral agreement, Key submitted a statement from NAC stating that it received the advances from Key and acknowledging its obligation to repay Key. NAC began to amortize the advance by shipping merchandise without requiring payment or accepting partial payment. An amortization schedule, with invoice numbers, was provided to ORA. Key states that amortization was suspended because of the labor strike that persisted up until 2014. ORA reviewed the advance set-offs which included four invoices that were also listed on the schedule of advances provided by Key, which disclosed that the offsetting was not identified on the invoices. Based on the lack of documentation of the advances and repayment of the advances, ORA concluded that the advances made to NAC were undeclared indirect payments.

Key repeated their reason for making payments to NAC and provided related news articles and pictures of the strike causing NAC's difficulties. Key also submitted an undated amortization schedule and three NAC invoices from July 2013, each set-off against the advance.

ISSUE:

1. Whether the commission payments made by the importer to its agents are bona fide buying commissions.
2. Whether the payment for fabric development, inspection fees, and advance payments are indirect payments for the imported merchandise.

LAW AND ANALYSIS:

Merchandise imported into the United States is appraised in accordance with section 402 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. § 1401a). The primary method of appraisal is transaction value, which is defined as “the price actually paid or payable for the merchandise when sold for exportation to the United States,” plus five enumerated additions. 19 U.S.C. § 1401a(b)(1). The price actually paid or payable shall be increased by the amounts attributable to the five statutory additions enumerated in 19 U.S.C. § 1401a(b)(1)(A) through (E) only to the extent that each such amount is not otherwise included within the price actually paid or payable. 19 U.S.C. § 1401a(b)(1). The term “price actually paid or payable” is defined in pertinent part as “the total payment (whether direct or indirect...) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.” 19 U.S.C. § 1401a(b)(4).

I. Buying Commissions

The enumerated additions to the price actually paid or payable include the value of any selling commissions incurred by the buyer with respect to the imported merchandise. A “selling commission” is any commission paid to the seller's agent, who is related to or controlled by, or works for or on behalf of, the manufacturer or the seller. 19 C.F.R. § 152.102(b). Bona fide buying commissions, however, are not included in transaction value as part of the price actually paid or payable or as an addition thereto. *See Pier 1 Imports,*

Inc. v. United States, 708 F. Supp. 351, 354 (CIT 1989); *Rosenthal-Netter, Inc. v. United States*, 679 F. Supp. 21, 23 (CIT 1988), aff'd, 861 F.2d 261 (Fed. Cir. 1988); and *Jay-Arr Slimwear, Inc. v. United States*, 681 F. Supp. 875, 878 (CIT 1988). The existence of a bona fide buying commission depends upon the relevant factors of the individual case. *J.C. Penney Purchasing Corp. v. United States*, 451 F. Supp. 973, 983 (Cust. Ct. 1978). However, the importer has the burden of proving that a bona fide agency relationship exists and that payments to the agent constitute bona fide buying commissions. *Pier 1 Imports, Inc.*, 13 Ct. Int'l Trade at 164; *Rosenthal-Netter, Inc.*, 12 Ct. Int'l Trade at 78; and *New Trends, Inc. v. United States*, 645 F. Supp. 957, 960 (CIT 1986). The totality of the evidence must demonstrate that the purported agent is in fact a bona fide buying agent and not a selling agent or an independent seller. Headquarters Ruling Letter ("HQ") 542141, dated September 29, 1980, also cited as TAA No. 7.

Although no single factor is determinative, the primary consideration in determining whether an agency relationship exists is the right of the principal to control the agent's conduct with respect to those matters entrusted to the agent. *Pier 1 Imports, Inc.*, 13 Ct. Int'l Trade at 164; *Rosenthal-Netter, Inc.*, 12 Ct. Int'l Trade at 79; and *Jay-Arr Slimwear*, 12 Ct. Int'l Trade at 138. In addition, the courts have examined such factors as the existence of a buying agency agreement; whether the importer could have purchased directly from the manufacturers without employing an agent; whether the agent was financially detached from the manufacturer of the merchandise; and the transaction documents. See *J.C. Penney Purchasing Corp.*, 80 Cust. Ct. at 95–98. The courts have also examined whether the purported agent's actions were primarily for the benefit of the principal; whether the agent bore the risk of loss for damaged, lost or defective merchandise; whether the agent was responsible for the shipping and handling and the costs thereof; and whether the intermediary was operating an independent business, primarily for its own benefit. See *New Trends, Inc.*, 10 Ct. Int'l Trade 640–643.

In the instant case, the transaction documents indicate that Key did not control the agent's conduct. As previously noted, the agency agreement between Key and SNT was provided. The agreement specifies that SNT will bill Key and Key shall pay SNT 15 days after Key's receipt of the merchandise. However, SNT issued periodic debit notes in lieu of commission invoices. The debit notes provided by Key covered two to three month periods of "collections," which were the sale prices of all merchandise sold to Key's U.S. customers, and SNT required payment of eight percent of the collections, in accordance with the agency agreement, as the service charge. The debit notes state that payment should be made to the account of "HK Jak Factory Limited," a party who was not identified in any of Key's submissions. Furthermore, the fact that the service charge is based on the resale price to Key's U.S. customer suggests that the purported agent's actions were not primarily for the benefit of the principal, but for itself as well. See *New Trends, Inc.*, 10 Ct. Int'l Trade 640–643; and HQ 544423, dated June 3, 1992. We disagree with Key's argument that a buying commission based on the resale price to Key's customers has no bearing on the bona fides of the principal-agent relationship. As stated above, SNT was in control of receiving Key's customers' orders and issued debit notes to Key based on the customer orders. SNT's involvement with Key's resale of the merchandise shows that SNT was involved in other aspects of Key's business, and their relationship exceeded that of a principal-buying agent relationship.

Counsel cites to CBP's "Buying and Selling Commissions" ICP, which states that one of the services of a buying agent is "informing the seller of the desires of the buyer," as a justification for SNT's access to Key's shared drive. A buying agent acts on behalf of the buyer. Counsel quotes the ICP to address SNT's access to the shared drive with Key, and asserts that having access to the shared computer drive and having Key's customers' purchase orders assisted SNT in carrying out its responsibilities as a buying agent. However, the shared drive was also used to record the resale of merchandise to Key's U.S. customers. As stated above, SNT's involvement in Key's purchase and resale of merchandise leads us to find that Key did not control the agent. Thus, SNT was not a *bona fide* buying agent, and the commission payments should be included in the price actually paid or payable.

II. Indirect Payments

The term "price actually paid or payable" is defined as the "total payment [...] made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller." 19 U.S.C. § 1401a(b)(4)(A). There is a rebuttable presumption that all payments made by a buyer to a seller, or a party related to a seller, are part of the price actually paid or payable. *See* HQ 545663 dated July 14, 1995. This position is based on the meaning of the term "price actually paid or payable" as addressed in *Generra Sportswear Co. v. United States*, 905 F.2d 377 (CAFC 1990). In *Generra*, the court considered whether quota charges paid to the seller on behalf of the buyer were part of the price actually paid or payable for the imported goods. In reversing the decision of the lower court, the appellate court held that the term "total payment" is all-inclusive and that "as long as the quota payment was made to the seller in exchange for merchandise sold for export to the United States, the payment properly may be included in transaction value, even if the payment represents something other than the per se value of the goods." The court also explained that it did not intend that Customs engage in extensive fact-finding to determine whether separate charges, all resulting in payments to the seller in connection with the purchase of imported merchandise, were for the merchandise or something else.

Although the presumption that payments made directly or indirectly by a buyer to or for the benefit of a seller are part of the price actually paid or payable is rebuttable, the burden of establishing that the payments are unrelated to the imported merchandise rests on the importer. *See id.* HQ 547532; *see also Chrysler Corp. v. United States*, 17 C.I.T. 1049 (1993).

A. Fabric Development Charges

Key made payments to HKNT, stated to be a branch of SNT, for fabric development and samples, which mostly related to fabric used in samples. Key states that it was not able to connect the fabric development charges because the samples were entered by a courier and Key did not have access to the entry information. The fabric samples are claimed to be classified under subheading 9811.00.60, HTSUS, as duty free. However, Key did not enter any items under subheading 9811.00.60, HTSUS, during the scope period. In addition, Key has not provided any documents such as purchase orders, invoices, or contracts to support that the fabric samples were actually exchanged in relation to the sale. No information has been presented to establish that the costs are not part of the price actually paid or payable for the imported merchandise.

B. Inspection Fees

Key cites to HQ W563469, dated March 21, 2006; and HQ 547006, dated April 28, 1998, to support its argument that inspection fees are not dutiable unless they are paid to the seller or employees of the seller. In HQ W563469, CBP determined that payments made by the importer to a company unrelated to the supplier and the importer for inspection services, were not part of the price actually paid or payable for the merchandise. The services provided included validating that the merchandise met the importer's requirements.

In the instant case, Key states that its customer, Kandy Kiss, requested that Key pay Kandy Kiss's buying commission to Empire, their foreign Hong Kong agent, as a condition of the contract between Key and Kandy Kiss. Empire issued an invoice to Key for services at the rate of five cents per item. The invoice did not refer to Kandy Kiss, purchase order numbers associated with the products, or describe the purpose of the invoice. Key did not provide any documents to support the arrangement or describe Empire's duties as Kandy Kiss' agent. In addition, Key provided conflicting descriptions of Empire's services as being a buying agent service paid on Kandy Kiss' behalf, a post import charge, and an inspection fee. Furthermore, the payment to Empire was recorded in Key's commission account as "HK Customer commission," even though the payment was not made to its own agent.

CBP has previously examined the question of whether payments made for testing and consulting services are part of the price actually paid or payable. In HQ 547033, dated June 25, 1998, a garment importer hired an independent overseas fabric consultant. The consultant's primary duties included acting as mill liaison for the importer and helping the importer ensure that woven fabric purchased by the garment manufacturers from the mills conformed to the importer's stringent quality specifications. One of the consultant's quality control functions was to assist with fabric testing. The importer paid the consultancy fees directly to the consultant. The ruling noted that as a general proposition, CBP considers fees paid to third parties, to the extent that they are similar to bona fide buying commissions, generally not to be part of the price actually paid or payable for the imported merchandise.

However, in the case at hand, the documents provided do not sufficiently support that the services provided by Empire to Kandy Kiss reflect bona fide buying commissions and that the associated fees are not part of the price actually paid or payable. The documents also lack sufficient information to determine the extent of Empire's services and whether they related to the design or development of the product. Accordingly, we find that the purported inspection fee should be included in the price actually paid or payable.

C. Advance to a Manufacturer

Key stated that it made advance payments to NAC, a related manufacturer, in order to enable NAC to remain a viable manufacturer. Key cites to HQ W548475, dated March 25, 2004, as support that repaying advances by setting them off against merchandise shipments is evidence that the advances were not supplemental payment for the merchandise. In HQ W548475, CBP considered whether loan payments were part of the price actually paid or payable. The buyer did not provide a loan agreement, documents establishing repayment, or proof of repayment by the seller. CBP held that the buyer did not establish that the payments made to the seller were

unrelated to the merchandise, and found that all financial transfers characterized as loans should be included in the transaction value. While Key describes HQ W548475 to be representative of the fact that repaying advances by setting them off against merchandise shipments is evidence that the advances were not supplemental payments for the merchandise, we find that this characterization is not accurate. Rather, HQ W548475 supports the argument that the advance payments made to NAC are part of the price actually paid or payable.

CBP has previously examined the question of whether advance payments made to a seller are part of the price actually paid or payable. In HQ 544375, dated July 6, 1990, CBP noted that if an advance is paid in order for the seller to begin production of the merchandise, the advances will be dutiable. In the case at hand, while the advance may not have been for production of specific merchandise Key intended to order at the time, it was provided for the purpose of maintaining NAC as a viable producer of the merchandise. See also HQ 545032, dated December 4, 1993 (cash advance from the buyer to seller constitutes part of the price actually paid or payable).

As noted above, there is a rebuttable presumption that all payments made by a buyer to a seller, or a party related to a seller, are part of the price actually paid or payable. Similar to HQ W548475, Key did not have a written agreement with NAC with regard to the advances and the means of recovering the advances were unclear. See HQ 544375 *supra*. The amortization schedule that Key provided is simply a record of invoices that have been set-off against the advance and does not indicate that there was any structure or schedule to the repayment. The amortization and sample invoices provided by Key shows that NAC was repaying the advance in accordance with the orders placed by Key, in lieu of a structured repayment schedule. Further amortization had also been suspended, which also indicates a lack of repayment structure. Furthermore, advance payments to NAC were entered as purchases in Key's accounting records. See generally HQ 548332, dated October 31, 2003; and HQ 546430, dated January 6, 1997. Although the payments are characterized as advances, Key has not provided advance agreements or specific method of repayment by the seller. Therefore, all financial transfers characterized by the parties as advances should be included in the price actually paid or payable.

The commenter disagrees with the conclusion in HQ H271308 (and this modification of that decision), namely, that the commission payments to SNT should be included in the price actually paid or payable. In the commenter's view, CBP reached an incorrect determination on that point. However, the most important factor in determining whether an agency relationship exists is the ability of the principal to control the agent. HQ H271308 cited various reasons, restated in this decision, that led CBP to conclude that Key did not control SNT's conduct. The commenter takes issue with CBP's failure to identify the role of SNT. Stating that the principal, *i.e.*, Key, did not control SNT is a clear indication that CBP did not view SNT as an agent of any kind with regard to Key. Therefore, any payments Key paid to SNT that were characterized as commission payments were not *bona fide* buying commissions.

As to the fabric development charges, the commenter takes issues with the facts as set forth herein. As the facts are stated to be from the ORA's Report, we will not address the commenter's comment regarding duty payments on fabric assists herein. In addition, the commenter seeks to reargue the duti-

ability of the inspection fees and advances to a manufacturer. However, nothing new was submitted with regard to the inspection fees or the advances. In fact, the commenter admits “the advances were not well documented.” The commenter has not provided CBP with a sufficient basis for changing our decisions on either of these points.

HOLDING:

The information presented does not indicate that the purported agents are bona fide agents and commission payments made by the importer should be included in the price actually paid or payable. The payment for fabric development, inspection fees, and advance payments should also be included in the price actually paid or payable.

You are to mail this decision to the internal advice requester no later than 60 days from the date of the decision. At that time, Regulations and Rulings of the Office of International Trade will make the decision available to CBP personnel, and to the public on the CBP Home Page on the World Wide Web at www.cbp.gov, by means of the Freedom of Information Act, and other methods of public distribution.

HQ H271308, dated November 30, 2016, is hereby modified in accordance with this decision. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin and replaces HQ H271308.

Sincerely,

MONIKA R. BRENNER

for

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division

**PROPOSED REVOCATION OF ONE RULING LETTER AND
REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF GEL PACK VEST SET**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of one ruling letter and revocation of treatment relating to the tariff classification of gel pack vest set.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning tariff classification of a gel pack vest set under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before August 18, 2017.

ADDRESS: Written comments are to be addressed to the U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: Reema G. Radwan, Tariff Classification and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–7703.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (“Title VI”), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are “**informed compliance**” and “**shared responsibility**.” These concepts are premised on the idea that in order to maximize voluntary

compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations.

Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of a gel pack vest set. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N259445, dated December 17, 2014 (Attachment A), this notice covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. §1625(c)(2)), as amended by section 623 of Title VI, CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N259445, CBP classified the components of a gel pack vest set separately in different headings for each component. The gel pack component was classified separately in heading 3824, HTSUS, specifically in subheading 3824.90.92, HTSUS, which provides for "chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: Other: Other: Other: Other: Other:

Other.” The insulated cooler bag was classified separately in heading 4202, HTSUS, specifically in subheading 4202.92.08, HTSUS, which provides for “insulated food or beverage bags . . . of textile materials. . . : Other: With outer surface of sheeting of plastics or of textile materials: Insulated food or beverage bags: With outer surface of textile materials: Other: Of man-made fibers.” The vest component was classified in heading 6110, HTSUS, specifically in subheading 6110.30.30, HTSUS, which provides for “Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: Of man-made fibers: Other: Other: Other: Other: Other: Women’s or girls’: Other.” CBP has reviewed NY N259445 and has determined the ruling letter to be in error. It is now CBP’s position that the entire gel pack vest set is properly classified, by operation of GRIs 1 and 3(b), in heading 6110, HTSUS, specifically in subheading 6110.30.30, HTSUS, which provides for “Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: Of man-made fibers: Other: Other: Other: Other: Other: Women’s or girls’: Other.”

Pursuant to 19 U.S.C. §1625(c)(1), CBP is proposing to revoke NY N259445 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H283055, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated: May 11, 2017

ALLYSON MATTANAH
for

MYLES B. HARMON,
Director

Commercial and Trade Facilitation Division

Attachments

[ATTACHMENT A]

N259445

December 17, 2014

CLA-2-38:OT:RR:NC:N2:239

CATEGORY: Classification

TARIFF NO.: 3824.90.9290; 4202.92.0807;

6110.30.3059

MS. MARY KASTNER
PRESIDENT
PMK INTERNATIONAL LLC
1107 SW GRADY WAY
BLDG B, STE 120
RENTON, WA 98057

RE: The tariff classification of Gel Pack Vest Set from Vietnam

DEAR MS. KASTNER:

In your letter dated November 04, 2014, you requested a tariff classification ruling of Gel Pack Vest Set. The Gel Pack Vest Set consists of a gel pack, a reusable insulated cooler bag, and a unisex cardigan. A sample of the item was submitted with your letter for review and is being returned as requested.

The items will be sold for retail sale as a set. For Customs purposes, the item is not a set and each article will be separately classified in its appropriate heading. Although the Gel Pack Vest Set is being imported put up for retail sale packaged together and consists of articles that are classifiable under three separate headings of the tariff, the articles do not consist of products put up together to meet a particular need or carry out a common specific activity. Having failed as a set in accordance with General Rules of Interpretation (GRI) 3(b), the articles must be classified separately.

The gel pack is composed of Water (65%), Glycerol (20%), and Polyacrylamide (15%). The gel pack can be placed in a microwave, boiling water, or freezer and provide instant heating or cooling relief when placed on the body. The gel pack can also be worn when inserted into the cardigan.

The reusable insulated cooler bag is constructed of nonwoven polypropylene (PP) textile fabric. The cooler bag provides storage, protection, portability, and organization to its contents. The bag is also designed to maintain the temperature of its contents. It has an interior storage compartment lined with aluminum foil that is laminated over a layer of foam. The bag has a zipper closure and a top carrying handle. It measures approximately 8" (W) x 5" (H) x 6" (D).

The unisex cut-and-sewn sleeveless cardigan is constructed from different types of fabric. The garment features a stand up collar with a draw cord tightening a full front opening with zipper closure, a draw cord tightening at the waist, a "DrSoothe" reflective heat transfer on the lower left front panel and a capped bottom. The garment extends to below the waist. The collar and center of the front panels are constructed from 100% polyester woven fabric, the outer front panels and back panel are constructed from 90% polyester and 10% spandex knit fabric and the side panels are constructed from 76% polyester and 24% spandex knit fabric. The outer surface of the sample's fabric measures more than nine stitches per two centimeters counted in the direction that the stitches were formed.

The applicable subheading for the gel pack will be 3824.90.9290, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: Other: Other: Other: Other: Other: Other: Other. The rate of duty will be 5 percent ad valorem.

The applicable subheading for the reusable insulated cooler bag will be 4202.92.0807, Harmonized Tariff Schedule of the United States (HTSUS), which provides for insulated food and beverage bags, with outer surface of textile materials, other, of man-made fibers. The duty rate will be 7% ad valorem.

As noted, the submitted sample is constructed of knit and woven fabrics and is considered to be a composite good under GRI 3(b) Harmonized Tariff Schedule of the United States (HTSUS). The essential character of the garment is imparted by the knit fabric. In your request, the sample is referred to as a vest. The cardigan does not have “oversized armholes” common to vests. As such, the applicable subheading for the submitted sample will be 6110.30.3059 HTSUS which provides for Women’s and girls’ Sweaters, pull-overs, sweatshirts, . . . and similar articles, knitted or crocheted (con.): Of man-made fibers (con.): Other: Other: Other: Women’s or girls’: Other. The rate of duty will be 32 percent ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Patrick Day at patrick.day@cbp.dhs.gov.

Sincerely,

GWENN KLEIN KIRSCHNER

Director

National Commodity Specialist Division

[ATTACHMENT B]

HQ H283055
CLA-2 OT:RR:CTF:TCM H283055 RGR
CATEGORY: Classification
TARIFF NO.: 6110.30.3059

Ms. MARY KASTNER
PRESIDENT
PMK INTERNATIONAL LLC
1107 SW GRADY WAY
BLDG B, STE 120
RENTON, WA 98057

RE: Revocation of NY N259445; Tariff classification of gel pack vest set providing backrelieve thermal therapy from Vietnam

DEAR Ms, KASTNER:

This is to inform you that U.S. Customs & Border Protection (“CBP”) has reconsidered New York (“NY”) Ruling Letter N259445, dated December 17, 2014, regarding the classification of a gel pack vest set, consisting of a backrelieve hot and cold therapy delivery system in the form of a gel pack, a reusable insulated cooler bag, and a cardigan vest (hereinafter, “backrelieve thermal therapy system”), under the Harmonized Tariff Schedule of the United States (“HTSUS”). The gel pack, reusable insulated cooler bag, and cardigan vest were classified separately because we had determined that the merchandise was not a set for purposes of General Rule of Interpretation (“GRI”) 3(b). Accordingly, the gel pack was classified separately under subheading 3824.90.9290, HTSUS, which provides for “Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: Other: Other: Other: Other: Other: Other.” The reusable insulated cooler bag was classified separately under subheading 4202.92.0807, HTSUS, which provides for “. . . insulated food or beverage bags . . . : Other: With outer surface of sheeting of plastic or of textile materials: Insulated food or beverage bags: Other: Of man-made fibers.” The cardigan vest was classified separately under subheading 6110.30.3059, HTSUS, which provides for “sweaters, pullovers, sweatshirts waistcoats (vests) and similar articles, knitted or crocheted: Of man-made fibers: Other: Other: Other: Other: Women’s or girls’: Other.” We have determined that NY N259445 is in error. Therefore, this ruling revokes NY N259445.

FACTS:

In NY N259445, we described the merchandise as three separate articles packaged together, which includes a gel pack, a reusable insulated cooler bag, and a cardigan vest.

The gel pack is composed of water (65%), glycerol (20%), and polyacrylamide (15%). The gel pack can be placed in a microwave, boiling water, or freezer and provide instant heating or cooling relief, depending on the user’s need.

The reusable cooler bag is constructed of nonwoven polypropylene textile fabric. It provides storage, protection, portability, and organization for its contents. The cooler bag is designed to maintain the temperature of its contents. It has an interior storage compartment lined with aluminum foil

that is laminated over a layer of foam. The bag has a zipper closure and a top carrying handle. It measures approximately 8" in width, 5" in height, and 6" in depth.

The unisex cut-and-sewn sleeveless cardigan vest is made of approximately 80% polyester and 20% spandex. It is a zippered garment with a neck tightening cord and elasticized back. It features a "perfect fit" to maximize compression of the hot or cold therapy and the user's musculature for greater relief. The compartment for the gel pack is not visible while wearing the two-tone vest.

When the user requires cooling relief, the gel pack and cardigan vest are placed in a freezer, and conversely, they are placed in a microwave oven when heat relief is desired. The large gel pack is maintained over a user's back via the use of a specially designed cardigan vest with a fitted back compartment where the gel pack is placed to provide thermal therapy relief. The entire backrelieve thermal therapy system retails for approximately \$150.

ISSUE:

Whether the merchandise is classified as a set for tariff purposes, or separately under each component's individual subheadings, in heading 3824, HTSUS, for the gel pack as "chemical products and preparations of the chemical or allied industries," in heading 4202, HTSUS, for the insulated cooler bag as "insulated food and beverage bags," or in heading 6110, HTSUS, for the cardigan vest as women's or girls' "sweaters, pullovers, sweatshirts waistcoats (vests) and similar articles, knitted or crocheted: Of man-made fibers."

LAW AND ANALYSIS:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation ("GRI"). GRI 1 provides, in part, that "for legal purposes, classification shall be determined according to terms of the headings and any relative section or chapter notes. . ." In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

GRI 3(b)-(c) provide as follows:

When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

. . .

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

The HTSUS headings under consideration are as follows:

3824	Prepared binders for foundry molds or cores: chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included:
3824.90	Other
3824.90.92	Other
3824.90.9290	Other

4202	Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper:
4202.92	With outer surface of sheeting of plastic or of textile materials:
4202.92.08	Insulated food or beverage bags:
	With outer surface of textile materials:
	Other
4202.92.0807	Of man-made fibers (670)

6110	Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted:
6110.30	Of man-made fibers:
	Other:
	Other:
6110.30.30	Other:
6110.30.3059	Women's or girls':
	Other (639)

The merchandise classified in NY N259445 consists of individual articles that are, *prima facie*, classifiable in different headings and packaged together for retail sale. There is no dispute that heading 6110, HTSUS, describes the cardigan vest in NY N258445. Similarly, there is no dispute that heading 3824, HTSUS, describes the gel pack, and that heading 4202, HTSUS, describes the insulated cooler bag in NY N259445. Consequently, because the individual articles are, *prima facie*, classifiable in separate headings, consideration is given to classification pursuant to GRI 3.

In understanding the language of the HTSUS, the Explanatory Notes ("ENs") of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the Harmonized System at the international level. See T.D. 89-90, 54 Fed. Reg. 35127 (Aug. 23, 1989).

EN to GRI 3(b) states, in pertinent part:

(VII) In all these cases the goods are to be classified as if they consisted of the material or component which gives them their essential character, insofar as this criteria is applicable.

(VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

(X) For the purposes of this Rule, the term “goods put up in sets for retail sale” shall be taken to mean goods which:

- (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. . .
- (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
- (c) are put up in a manner suitable for sale directly to users without repacking. . .

The cardigan vest, gel pack, and insulated cooler bag in NY N259445 are put up together for sale and are not repackaged after importation. Accordingly, they are suitable for sale directly to users without repacking. Together, the components are put up together to meet a particular need or carry out a specific activity. Specifically, all three items are up together for the common purpose of providing thermal therapy relief through the interaction of the cardigan vest, gel pack, and insulated cooler bag. The cardigan vest is required in order to reap the benefits of the backrelieve thermal therapy system because the gel pack cannot be used without it unless the user were to lie on the gel pack or tape it to his or her back. Thus, the backrelieve thermal therapy system would not perform as efficiently if the cardigan vest and gel pack were not used together.

Whether a container such as the insulated cooler bag contributes to a set meeting a particular need or carrying out a specific activity, or whether it thwarts the set, causing the articles to be classified separately and individually, was addressed by the Court of International Trade (“CIT”) in *Estee Lauder, Inc. v. United States*, 815 F. Supp. 2d 1287, 1293 (Ct. Intl’ Trade 2012). There, the CIT considered a cosmetics kit which contained 12–15 different cosmetics, cosmetic brushes and other related items, which were assembled into a zippered carrying case. In addressing the case itself, the Court said, “the fact that the set is imported in a container that could be separately classifiable does not prevent the classification of the set as such.” *Id.* at 1297. This analysis is applicable in the instant matter as regards the insulated cooler bag.

Here, the insulated cooler bag is akin to the case discussed in *Estee Lauder*. This is because a relationship exists between the gel pack, cardigan vest and insulated cooler bag in which the gel pack and vest are stored. The dimensions of the insulated cooler bag are such that it is designed to hold the gel pack and cardigan vest together when they are put away for storage after cooling or heating the gel pack, or when the articles are not in use. The insulated cooler bag contributes to the backrelieve thermal therapy system

because it is suitable for storage, protection, and transportation of the set components under normal use. Therefore, together, the insulated cooler bag, when used with the gel pack and cardigan vest, meets the particular need or specific activity of providing backrelieve thermal therapy. See *Estee Lauder, Inc. v. United States*, *supra*, at 1297, (“Because the...cosmetic case facilitates the transportation, storage and use of the cosmetics and other components contained within and for which it was designed, marketed and sold, it helps carry out the specific activity of applying make-up together with its contents”).

Thus, where the subject merchandise consists of at least two different articles which are, *prima facie*, classifiable in different headings; articles put up together to meet the particular need of providing users with backrelieve thermal therapy; and articles put up in a manner suitable for sale directly to users without repacking, we find that the subject merchandise meets the three requirements found in EN (X) to GRI 3(b) and is a “set” for tariff purposes. CBP must next determine which component imparts the essential character of the set for classification purposes.

There have been several court cases on “essential character” for purposes of classification under GRI 3(b). See *Conair Corp. v. United States*, 29 C.I.T. 888 (2005); *Structural Industries v. United States*, 360 F.Supp.2d 1330, 1337–1338 (Ct. Int’l Trade 2005); and *Home Depot USA v. United States*, 427 F.Supp.2d 1278, 1295–1356 (Ct. Int’l Trade 2006), *aff’d* 491 F.3d 1334 (Fed. Cir. 2007). “[E]ssential character is that which is indispensable to the structure, core or condition of the article, i.e., what it is.” *Home Depot USA, Inc. v. United States*, 427 F.Supp.2d at 1293 (quoting *A.N. Deringer, Inc. v. United States*, 66 Cust. Ct. 378, 383 (1971)). In particular, in *Home Depot USA, Inc. v. United States*, the court stated “[a]n essential character inquiry requires a fact intensive analysis.” 427 F. Supp. 2d 1278, 1284 (Ct. Int’l Trade 2006). In that case, the court examined lighting fixtures and classified them according to glass components that served both decorative and functional purposes. *Home Depot USA, Inc.*, 427 F.Supp.2d at 1295.

We have carefully reviewed each component of the backrelieve thermal therapy system in order to determine which component imparts the essential character for classification purposes. The EN (VIII) to GRI 3(b) is instructive, stating that the factors which determine essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods. Here, as the insulated cooler bag does not provide the primary function of the article as a whole in delivering backrelieve thermal therapy and merely stores the other components when not in use, this component does not impart the essential character of the set as a whole.

Next, we must determine whether the essential character is imparted by the cardigan vest or the gel pack. In Headquarters Ruling Letter (“HQ”) H966262, dated May 29, 2003 we classified a heated head therapy wrap consisting of a terry head cover or hood of knit 100% polyester terry fabric and plastic covered gel packs that can be heated in a microwave and placed inside specially shaped pockets in the terry cloth as headgear of heading 6505, HTSUS. We did so because the headgear portion of the article kept the gel packs in place. The unique shape of the fabric component was paramount in the functioning of the articles. See also HQ 964851, dated April 18, 2001 (classifying a plastic eye mask filled with chemical mixtures that can be

heated or cooled prior to use, with the mask's flexible plastic shell conforming to the wearer's face to keep the article over his or her eyes, as an article of plastic of heading 3924, HTSUS, where plastic shell component imparted essential character); HQ 964877, dated May 17, 2001 (classifying an eye patch consisting of a vinyl plastic eye patch filled with solution consisting of 58% propylene glycol, 41.98% distilled water and 0.02% dyeing material that can be heated or chilled as an article of plastic of heading 3924, HTSUS, where plastic shell component imparted essential character); HQ 964878, dated May 17, 2001 (classifying four different styles of vinyl plastic eye masks and one vinyl plastic head compress designed to be heated or cooled and worn over the eyes or the forehead and temple as plastic articles of heading 3924, HTSUS, where plastic shell component imparted essential character); HQ 963725, dated May 17, 2001 (classifying a vinyl plastic eye mask filled with 59.8% propylene glycol, 40% distilled water and 0.02% color pigment that is intended to be chilled and placed over the user's eyes as articles of plastic of heading 3924, HTSUS, where plastic shell imparted essential character); and HQ 963852, dated May 17, 2001 (classifying one facial mask consisting of a vinyl plastic facial mask filled with water, 0.3% Poly Aery/Sodion, 0.5% salt, 0.2% 2-Phenoxyaethanol and 0.05% food color, and one eye mask consisting of a vinyl plastic mask filled with a 60% glycerin and 40% distilled water mixture as articles of plastic of heading 3924, HTSUS, where plastic shell component imparted essential character).

As in the eye mask cases and the heated head therapy wrap in HQ H966262, the essential character of the backrelieve thermal therapy system is imparted by the portion of the article that maintains the recognizable shape, making it usable for its intended purpose, *i.e.*, providing thermal therapy relief to the user's back. The subject merchandise has a distinct shape imparted by the cardigan vest and does not cease to be classifiable as a garment just because it is worn with another article, such as a gel pack. Further, in order for the user to receive back pain thermal therapy relief while using the product, the gel pack must be placed inside the back pouch of the vest. Without the cardigan vest, the gel pack could not be secured in the appropriate position for providing back pain thermal therapy relief. Moreover, the cardigan vest also can be worn without the gel pack and provides greater surface area and visual appeal to the merchandise. The vest is both a functional holder of the gel pack and a visually appealing garment. Therefore, it provides the set with its essential character. *See Home Depot USA, Inc.*, 427 F. Supp. 2d at 1296 (glass component of a light fixture imparted the essential character where "both the glass and metal contribute to decorative appearance and are part of the structure" but "the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view") (internal quotation marks omitted). Accordingly, pursuant to GRI 3(b), we find that the backrelieve thermal therapy system is classified as a cardigan vest in subheading 6110.30.3059, HTSUS, where the vest component is both functional and decorative as a garment, thus imparting the essential character of the merchandise.

In the alternative, pursuant to GRI 3(c), where no single component of a set imparts the essential character, the merchandise is to be classified in the heading which occurs last in numerical order among those which equally merit consideration in determining their classification. In regards to the backrelieve thermal therapy system, the tariff heading for the cardigan vest, subheading 6110.30.3059, HTSUS, appears last in numerical order among

the competing headings which equally merit consideration. Thus, under a GRI 3(c) analysis, we also find that the proper classification for the back-relieve thermal therapy system is subheading 6110.30.3059, HTSUS, which covers “Sweaters, pullovers, sweatshirts waistcoats (vests) and similar articles, knitted or crocheted (con): Of man-made fibers: Oher: Other: Other: Women’s or girls’: Other.”

HOLDING:

Pursuant to GRIs 1 and 3(b), the gel pack vest set consisting of a back-relieve thermal therapy system is classified under heading 6110, HTSUS, and specifically provided for under subheading 6110.30.3059, HTSUS, as “Sweaters, pullovers, sweatshirts waistcoats (vests) and similar articles, knitted or crocheted (con): Of man-made fibers: Oher: Other: Other: Other: Other: Women’s or girls’: Other.” The general, column one, rate of duty is 32% *ad valorem*.

EFFECT ON OTHER RULINGS:

NY N259445, dated December 3, 2014, is revoked.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

Sincerely,

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division