U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, August 28, 2002.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

MICHAEL T. SCHMITZ,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF DRUMMERS' GLOVES

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letters and treatment relating to the classification of drummers' gloves.

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 Customs intends to revoke two rulings relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain drummers' gloves. Similarly, Customs proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before October 11, 2002.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings,

Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs Service, 799 9th Street, N.W., Washington D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Timothy Dodd, Textiles Branch: (202) 572–8819.

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) (hereinafter "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 Customs 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 trade and Customs 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 provide any other information necessary to enable Customs 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 Customs intends to revoke two rulings relating to the tariff classification of certain drummers' gloves. Although in this notice Customs is specifically referring to two Headquarters Ruling Letters (HQ), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases 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, an internal advice memorandum or decision or a protest review decision) on the merchandise subject to this notice, should advise Customs during this 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, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to im-

portations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importers or their agents for importations of merchandise subsequent to this notice.

In Headquarters Ruling Letter (HQ) 951980, dated March 29, 1993, and Headquarters Ruling Letter (HQ) 952704, dated February 26, 1993, the Customs Service classified drummers' gloves under subheading 4203.21.8060, HTSUSA, which provides for "Articles of apparel and clothing accessories of leather or of composition leather: Gloves, mittens and mitts: Other: Specially designed for use in sports: Other, Other." HQ 951980 is set forth as "Attachment A" and HQ 952704 is set forth as "Attachment B" to this document.

It is now Customs determination that the proper classification for the drummer's gloves is subheading 4203.29.3010, HTSUSA, which provides for "Articles of apparel and clothing accessories of leather or of composition leather: Gloves, mittens and mitts: Other: Other: Men's, Not lined." Proposed Headquarters Ruling Letter (HQ) 965715 revoking HQ 951980 and HQ 952704 is set forth as "Attachment C" to this document.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke HQ 951980 and HQ 952704 and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed HQ 965715, *supra*. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: August 22, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 29, 1993.

CLA–2 CO:R:C:T 951980 CRS
Category: Classification
Tariff No. 4203.21.8060

PETER J. FITCH, ESQ.
FITCH, KING AND CAFFENTZIS
116 John Street
New York, NY 10038

Re: Drummer's glove; batting glove; specially designed for use in sports; request for reconsideration; HRL 089393 modified.

DEAR MR. FITCH:

This is in reply to your letter of June 3, 1992, on behalf of your client Universal Percussion, Inc., in which you requested reconsideration of Headquarters Ruling Letter (HRL) 089393 dated August 26, 1991.

Facts:

The article in question is a man's glove manufactured in and imported from the Republic of Korea. The glove is full-fingered, with a palm and palm-side fingers constructed from smooth pigskin leather. The back of the glove is of man-made fabric mesh, while the fourchettes are made from knit fabric. An elastic strap with a hook and loop closure is featured at the wrist, directly below a divided, elasticized cuff.

In HRL 089393 the instant glove was classified in subheading 4203.29.3010, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). However, you maintain, as you contended in your original ruling request of April 23, 1991, which resulted in the issuance of HRL 089393, that the glove is specially designed for use in sports and thus is properly classifiable in subheading 4203.21.2000, HTSUSA, under a provision for batting gloves.

In addition to the glove in question, you submitted four other gloves for the purposes of comparison. Two were submitted with your initial ruling request as examples of batting gloves, and two as examples of gloves sold and used as drummer's gloves. With regard to the former, one, a "Louisville Slugger" model, featured a palm and palm-side fingers made from cowhide leather, a back made from synthetic knit material, and a wide, knit, elasticized cuff with a tab strap secured by a hook and loop fastener. The second batting glove, a "Franklin" model, also had a palm and fingers made from cowhide leather, and an elasticized, tight-fitting, hook and loop type tab closure. The back was made from knit elastic mesh and the fourchettes from a finely knit synthetic material.

The sample drummer's gloves were attached to your request for reconsideration of HRL 089393. The first bears the name "Ascend" and features a palm and fingers made from thin leather, and a mesh upper. The second is sold under the "Tama" name, and has a stiff leather finish and uppers made from man-made knit fabric. On the "Ascend" the leather extends around to cover the back side of the thumb, while on the "Tama," both the thumb and part of the index finger are made from leather. Both models fasten by means of hook and loop closures, with that of the "Tama" being similar to that of the glove in question.

Issue:

The issue presented is whether the glove in question is specially designed for use in sports such that it is classifiable as a batting glove.

Law and Analysis:

Heading 4203, HTSUSA, provides for articles of apparel and clothing accessories of leather or composition leather. At the six digit international level, subheading 4203.21, HTSUSA, covers gloves, mittens and mitts specially designed for use in sports. At the eight digit U.S. level, subheading 4203.21.2000, HTSUSA, provides for batting gloves. The glove in question is made from leather and man-made fabric. However, the leather portion of the glove determines the article's classification pursuant to General Rule of Interpretation 3(b); accordingly, the glove is classifiable in heading 4203 as an article of apparel of leather.

The legal standard for determining whether, for tariff purposes, an article is "specially designed" for a particular use is well established in judicial precedent. In United States v. Faber, 7 Ct. Cust. Appls. 406 (1916), the issue was whether certain lead pencils were articles designed to be carried on or about the person. The court stated that more was required than the fact that an article was susceptible of being carried on or about the person and that "by the use of the word 'designed' it must be assumed that Congress intended to include only such articles as were peculiarly and specially fitted for being carried on or about the person and devoted to such use." Id. at 407. The court found nothing to suggest that the pencils were "designed" to be carried on or about the person.

In Plus Computing Machines, Inc. v. United States, 44 CCPA 160, C.A.D. 655 (1957), the issue was whether certain calculating machines were "specially constructed for multiplying and dividing". The court interpreted "specially constructed" to refer to an article "designed for * * * a specific purpose." The court added, however that "the statement that an article is specially designed for a particular purpose means merely that it includes features which adapt it for that purpose." Id. at 167.

In Stonewall Trading Co. v. United States, 64 Cust. Ct. 482, C.D. 4023 (1970), the issue before the court was whether certain vinyl gloves were designed for use in skiing such that they were dutiable under item 735.05 of the Tariff Schedules of the United States, which provided for gloves "specially designed for use in sports." The court found that the gloves had features which made them "particularly suitable for use in the sort (sic) of skiing as an aid and protective equipment for the skier." Id. at 489.

Similarly, in Sports Industries, Inc. v. United States, 65 Cust. Ct. 470, C.D. 4125 (1970), the court held that certain neoprene gloves were specially designed for use in scuba diving in that they had special features such as insulating properties that indicated they were designed for underwater sports. The court noted that "it is well established that whether an article is 'specially designed' or 'specially constructed' for a particular purpose may be determined by an examination of the article itself, its capabilities, as well as its actual use or uses." Id. at 473.

You contend that the glove in question is specially designed for use as a batting glove, and request that we revoke HRL 089393 which ruled to the contrary. In HRL 089393, Customs identified certain features of the glove in question which indicated that it was not specially designed for use as a batting glove. First, the strap was positioned below an elasticized cuff as opposed to being part of an elasticized cuff. In addition, the cuff was divided. Second, the palm was made from a smooth leather that would not afford the wearer a firm grip. Finally, the color of the glove was not considered typical of a batting glove. Each of these features are examined below.

As noted above, in HRL 089393 certain differences in the wrist closure which distinguished the glove in question from a batting glove, were identified, specifically, the fact that the wrist closure was located below an elasticized cuff rather than forming part of the cuff as with the comparison batting gloves. Customs remains of the opinion that the positioning of the wrist closure of the instant glove distinguishes the article from a batting glove. The cuff itself was also deemed to be significant to the extent that, in contrast with the comparison batting gloves, the cuff of the glove in question remains divided for ease of movement even when the hook and loop fastener is secured. This is a particularly desirable feature of drummers' gloves, if not essential, given the range of movement required in drumming. Similarly, Customs remains of the view that the presence of a divided cuff excludes the instant glove from classification as a batting glove.

We also regarded the leather palm of the glove in HRL 089393 as being unsuitable to effect the primary purpose of a batting glove, viz., an improved grip. In contrast, while the batting gloves submitted for comparison purposes had palms made from a textured leather that did afford a secure grip, the leather used in the comparison drummer's gloves was either smooth and did not provide a secure grip, as with the glove in question, or was textured but of a flimsy construction that would be unsuitable for use as a batting glove. Accordingly, we determined that the glove was not designed for use as a batting glove. We continue to adhere to the view that the leather palm of the instant glove is indicative of the fact that the article is not specially for use as a batting glove.

In addition, we now note that the leather portion of the comparison batting gloves covers not only the palm and palm-side fingers but also protects those upper parts of the index and little fingers that would come into contact with a baseball bat. On the other hand, the leather portion of the comparison drummer's gloves extends to cover those upper parts of the thumb and forefinger that would likely be subject to added wear through the activity of

drumming. In this respect the glove in question resembles the gloves submitted as examples of drummer's gloves.

Furthermore, we are of the opinion that the man-made fiber mesh from which the upper is constructed also indicates that the instant glove was not specially designed for use as a batting glove. Although suitable for the activity of drumming, the mesh portion of the glove would not withstand the rigors of baseball, and thus would soon render the article unfit for use.

Finally, in HRL 089393 we stated that we considered the color of the instant glove, black, as indicative of the fact that it was not specially designed or constructed as a batting glove. We have reviewed this position and have determined that the color of the glove at issue does not preclude it from being classified as a batting glove.

However, based on our review of this matter it remains Customs' opinion that the instant glove is not specially designed for use as a batting glove. Its construction, specifically the smooth leather of the palm and the protection for the thumb and index finger, indicate that it was not designed as a batting glove.

Although Customs does not consider the instant glove to have been specially designed for use as a batting glove, we are now of the opinion that it is specially designed for use in sports. The Harmonized Commodity Description and Coding System, Explanatory Notes, constitute the official interpretation of the Harmonized System at the international level (four and six digits). With regard to sports gloves, subheading Explanatory Note 4203.21 provides:

The expression "Gloves, mittens and mitts, specially designed for use in sports" includes gloves, mittens, mitts, whether sold singly or in pairs, having functional design features which make them particularly suitable for use in sports (e.g., ice hockey gloves, which protect the hands and assist the holding of the stick, and boxing gloves).

Among the features which indicate that the instant glove is specially designed and constructed for use in sports are the knit mesh fabric covering the back of the hand and the thin leather palm. While these features are not characteristic of a batting glove they would still be sufficient to provide an improved grip and protection for the hand such that the glove could be used as an all-purpose sports glove, e.g., for racquetball, golf.

These design features also distinguish the glove from dress gloves, work gloves, etc., and indeed render impractical the use of the glove in most non-sporting activities, with the exception of drumming. The glove does not provide warmth and is not fashionable. See HRL 952074. Thus while the glove at issue is not specially designed for use in sports as a batting glove, it is properly classifiable at the six digit (international) level under the provision for gloves specially designed for use in sports, specifically at the eight digit (U.S.) level under the residual provision for other gloves.

Holding:

Pursuant to section 177.9(d)(1), Customs Regulations (19 C.F.R. §177.9(d)(1)), HRL 089393 dated August 26, 1991, is modified in conformity with the foregoing.

The merchandise in question is classifiable in subheading 4203.21.8060, HTSUSA, under the provision for other gloves specially designed for use in sports; it is dutiable at the rate of 4.9 percent ad valorem.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 26, 1993.

CO:R:C:T 952074 SK
Category: Classification
Tariff No. 4203.21.8060

PETER J. FITCH
FITCH, KING AND CAFFENTZIS
116 John Street
New York, NY 10038

Re: Classification of leather and man-made fiber glove from Korea; not batting glove; not drummer's glove; subheading 4203.21.8060, HTSUSA; leather palm, synthetic mesh covering for back of hand, wrist vent and velcro-like closure indicative of special design for use in sports; Subheading EN to heading 4203.

DEAR MR. FITCH:

This is in response to your inquiry of June 12, 1992, on behalf of your client, Universal Percussion, Inc., requesting the classification of a leather and man-made fiber glove from Korea. A sample was submitted for Customs' examination.

Facts:

The submitted sample, referenced UPDG, is a man's leather and synthetic mesh and knit full-fingered glove. It has a thin leather palm, finely knit fourchettes and a man-made fiber mesh back. The glove has a two-inch vent on top of the wrist secured with a velaro-like strap, and the underside of the wrist is elasticized. The submitted sample has an abstract black and white stitched graphic design on the closure strap.

A photocopy of page 35 of the importer's catalogue advertises the submitted sample as "DRUMMERS' GLOVES" and the copy reads: "No more sore hands or callouses; Touch sensitive leather palm actually increases your grip; Ventilated knit back allows your hand to breathe; Super light weight. White-Red-Black. Medium or Large." A photograph shows the gloves being worn on two hands, presumably by a drummer.

Issue:

Is the submitted sample classifiable as a batting glove under heading 4203, HTSUSA, or under that heading's statistical breakout at the subheading level for "other" sports gloves or "other" leather gloves?

Law and Analysis:

Classification of merchandise under the HTSUSA is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may be applied, in order of their appearance.

Our first inquiry is whether the leather or the textile component of the subject merchandise governs classification. When articles ire classifiable under two headings in the nomenclature, in the instant case heading 6116, HTSUSA, which provides for, inter alia, knit gloves and heading 4203, HTSUSA, which provides for leather articles of apparel and clothing accessories, classification is determined using a GRI 3(b) analysis. GRI 3(b) states:

> (b) Mixtures, composite goods consisting of different materials or made up of different components * * * 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.

Explanatory Note VIII to GRI 3(b) states:

> The factor which determined 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.

In the instant case, the majority of the glove's surface area is covered with leather. The leather is significantly more expensive than the knit textile components and, although the textile portion provides for flexibility and ventilation, it is the leather which affords the wearer a better grip and this is the motivating impetus for the purchase of this glove. Accordingly, it is the leather component which imparts the essential character to this article.

The Explanatory Notes (EN) to heading 4203, HTSUSA, which provide the official interpretation of the tariff at the international level, state that the heading covers clothing accessories of leather or of composition leather. As the article at issue is a leather glove, there is no doubt that classification is proper under heading 4203, HTSUSA.

The distinction need now be made whether the subject merchandise is more aptly classified as a batting glove under subheading 4203.21.2000, HTSUSA, as an "other" sports glove under subheading 4203.21.8060, HTSUSA, or as an "other" leather glove under subheading 4203.29.1500, HTSUSA.

In your submission you assert that the subject merchandise is properly classifiable as a batting glove under subheading 4203.21.2000, HTSUSA, for two reasons: 1) the glove is of the class or kind principally used in the United States as a batting glove, and 2) the glove at issue is "virtually identical" to the glove classified in Headquarters Ruling Letter 086355, dated May 16, 1990, as a batting glove.

Classification as a particular sport glove requires that the glove be "specially designed" for use in that sport. Subheading Explanatory Note to section 4203.21, HTSUSA, states that "[t]he expression 'Gloves, mittens and mitts, specially designed for use in sports' includes gloves, mittens and mitts, whether sold singly or in pairs, having functional design features which make them particularly suitable for use in sports (e.g., ice hockey gloves, which protect the hands and assist the holding of the stick, and boxing gloves)." (emphasis added) In the instant case, we are not prepared to hold that the subject merchandise has been specially designed for use as a batting glove inasmuch as it is not suitable for use as such. Batting gloves must serve several functions: 1) reduce bat "sting; 2) afford a better grip when at bat; 3) protect the hand when sliding into base; and 4) protect the hands from impact when catching the ball. It is this office's position that the article at issue has not been specially designed for these purposes: the leather palm is very thin and will not adequately protect from bat sting nor from the impact of a ball; the textile mesh back is too delicate to afford protection when sliding nor will it withstand the stress of being repeatedly shoved in and out of a baseball glove. This glove is not substantial enough to hold up well under the normal rigors of baseball.

On site visits to several sporting goods stores in the Washington, D.C. area were performed for the purpose of specifically examining the batting gloves offered for sale. Each glove was significantly different than the submitted sample. Primarily, the differences were in construction and the types of material used. The batting gloves examined used much thicker palm leather and the glove backs were made from significantly thicker synthetic fibers, often ribbed and opaque in appearance. Some of the gloves had the forefinger and little finger nearly encased in leather. Accordingly, contrary to your assertion, the glove at issue is not of the class or kind principally used in the U.S. as a batting glove.

The submitted sample is not "virtually identical" to the glove the subject of HRL 086355. The glove in the instant case is distinguishable from the glove the subject of that ruling in that it is less substantial in its construction and made from thinner leather.

Subheading 4203.21.8060, HTSUSA, provides for "other" gloves specially designed for use in sports. The statistical breakout at the subheading level does not expressly set forth the exact type of sport for which the glove must be designed. Rather, as the "other" designation suggests, a glove is properly classifiable here if it is specially designed for sporting activities not specifically enumerated in the other subheadings of 4203, HTSUSA. Design features particularly suitable for use in sports generally include wrist vents which promote mobility, ventilated knit mesh fabric covering the back of the hand which allows perspiration to evaporate and allows great flexibility of movement when grasping various pieces of sports equipment, and a thin leather palm which, while not sturdy enough to be used as a batting glove, is nevertheless suitable for use in other sports where a more secure grip and protection from callouses is desirable (i.e., golfing, racquetball, etc * * *). The submitted sample possesses features which indicate that it is specially designed for use in sports generally. These very same design features render the glove impractical for use in most non-sport activities, with the exception of drumming. The glove will not provide warmth, it is not protective, nor is it aesthetically pleasing as a fashion glove. Also, the glove is of no practical use outside the sports arena if it is sold individually and not as a pair.

For these reasons, classification under subheading 4203.29.1500, HTSUSA, as "other" gloves of leather is not proper.

Although we recognize the suitability of this glove for use as a drummers' glove, and the importer's catalogue indicates that it is marketed as such, this glove's use in sports will most assuredly outweigh any other uses to which it will be put. In other words, contrary to the fact that it may be used as a drummers' glove, it is nevertheless of the class or kind of glove principally used in various sporting activities which require a secure grip and light protection. As an aside, we note that although drumming is not a "sport", it requires the exact same capabilities from a glove that many sports do: secure grip, good ventilation, and flexibility of movement.

Holding:

The submitted sample is classifiable under subheading 4203.21.8060, HTSUSA, which provides for gloves, mittens and mitts specially designed for use in other sports not specifically enumerated. The rate of duty is 4.9 percent ad valorem.

Due to the nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 965715 ttd
Category: Classification
Tariff No. 4203.29.3010

PETER J. FITCH, ESQ.
FITCH, KING AND CAFFENTZIS
116 John Street
New York, NY 10038

Re: Revocation of Headquarters Ruling Letter 951980 and Headquarters Ruling Letter 952074; Drummers' Gloves.

DEAR MR. FITCH:

This letter is pursuant to Customs reconsideration of Headquarters Ruling Letter (HQ) 951980, dated March 29, 1993, and HQ 952074, dated February 26, 1993, both filed by Fitch, King and Caffentzis on behalf of Universal Percussion, Inc., regarding classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of pairs of gloves. After review of HQ 951980 and HQ 952074, Customs has determined that the classification of the gloves considered under subheading 4203.21.8060, HTSUSA, was incorrect. For the reasons that follow, this ruling revokes both HQ 951980 and HQ 952074.

Facts:

The articles under consideration are gloves used for drumming. In HQ 951980, dated March 29, 1993, and HQ 952074, dated February 26, 1993, Customs classified two styles of gloves under subheading 4203.21.8060, HTSUSA, which provides for "Articles of apparel and clothing accessories, of leather or of composition leather: Gloves, mittens and mitts: Specially designed for use in sports: Other, Other." In HQ 951980, the merchandise was described as follows:

> The article in question is a man's glove manufactured in and imported from the Republic of Korea. The glove is full-fingered, with a palm and palm-side fingers

> constructed from smooth pigskin leather. The back of the glove is of man-made fabric mesh, while the fourchettes are made from knit fabric. An elastic strap with a hook and loop closure is featured at the wrist, directly below a divided, elasticized cuff.

We note that HQ 951980 modified HQ 089393, dated August 26, 1991, which originally classified the subject glove under subheading 4203.29.3010, HTSUSA, which provides for articles of apparel and clothing accessories, of leather or of composition leather: Other: Other: Other: men's, not lined.

In HQ 952074, dated February 26, 1993, the merchandise was described as follows:

> The submitted sample, referenced UPDG, is a man's leather and synthetic mesh and knit full-fingered glove. It has a thin leather palm, finely knit fourchettes and a man-made fiber mesh back. The glove has a two-inch vent on top of the wrist secured with a velcro-like strap, and the underside of the wrist is elasticized. The submitted sample has an abstract black and white stitched graphic design on the closure strap.

Issue:

Whether the merchandise is specially designed for use in sports.

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes * * *." In the event that goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. While neither legally binding nor dispositive of classification issues, the EN provide commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. *See* T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989).

Subheading 4203.21, HTSUSA, provides for "Articles of apparel and clothing accessories, of leather or of composition leather: Gloves, mittens and mitts: Specially designed for use in sports." As this is a "use" provision, to determine whether an article is classifiable in subheading 4203.21, HTSUSA, requires consideration of whether the article has particular features that adapt it for the stated purpose. In *Sport Industries, Inc. v. United States*, 65 Cust. Ct. 470, C.D. 4125 (1970), the court, in interpreting the term "designed for use," under the Tariff Schedules of the United States, the predecessor to the HTSUSA, examined not only the features of the articles, but also the materials selected and the marketing, advertising and sale of the article. The case suggests that, to be classifiable in subheading 4203.21, the subject gloves must be shown to be, in fact, specially designed for use in a particular sport.

Concerning the proper classification of sports gloves, numerous other court cases have examined the term "specially designed for use in sports." In *American Astral Corp. v. United States*, 62 Cust. Ct. 563, C.D. 3827 (1969), the court held that certain gloves were properly classified as lawn tennis equipment because the evidence established that the gloves were specially designed for use in the game of tennis. At the time, the Tariff Schedules of the United States included provisions covering specially designed protective articles as tennis equipment, such as gloves. The court noted the glove's distinguishing characteristics, which set it apart from ordinary gloves worn as apparel. Those features included: (a) an absorbent terry cloth back; (b) a partially perforated lambskin palm designed to aid grip, provide protection, and prevent perspiration by allowing air circulation; (c) fourchettes made from stretch material; (d) elasticized wrist for a snug fit and support; and (e) a button positioned to prevent interference to the player. Additionally, the court considered factors such as the nature of the importer's business, how the gloves were advertised in the trade, the types of stores where the gloves were sold, and the fact that the gloves were sold only in single units and not in pairs. The court also noted that, the fact that the gloves had other possible uses did not preclude their classification as sporting equipment. *See*, U.S. Customs Service, *What Every Member of the Trade Community Should Know About: Gloves, Mittens & Mitts, Not Knitted or Crocheted Under the HTSUS*, 32 Cust. B. & Dec. 51 (Dec 23, 1998).

In *Porter v. United States*, 409 F. Supp. 757; 76 Cust. Ct. 97, Cust. Dec. 4641 (1976), the court held that certain motorcross gloves, which possessed features specially designed for use in the sport of motorcross, were accordingly, specially designed for use in sports, even though not used exclusively for the sport of motorcross. In *Porter*, the court based its conclusion on the fact that motorcross gloves featured special characteristics and construction, specially designed for the sport of motorcross. These characteristics included a shortened palm, a reinforced thumb, an elastic band, protective strips or ribbing, and an out-seam construction. These features complemented the particular protective needs of the driver while racing with the specially designed motorcross bike on a dirt track. It was also shown that motorcross racing encompasses internationally accepted rules and that the American Motorcycle Association Motorcross Competition Rule Book specifically requires certain protective clothing and equipment, of which the motorcross gloves at issue were one type that complied with the requirements for the gloves. While the court noted that the gloves were subject to use outside the sport of motorcross, the plaintiff had already demonstrated that the gloves were primarily designed for the sport of motorcross. Moreover, the features, which made the gloves ideal for the sport of motorcross, rendered them useless or cumbersome for other types of motorcycle riding. Thus, the court in *Porter* found that the merchandise considered was designed to meet the needs of the sport.

Accordingly, a conclusion that a certain glove is "specially designed" for a particular sport, requires more than a mere determination of whether the glove or pair of gloves could possibly be used in a certain sport. In determining whether gloves are specially designed for use in sports, Customs considers the connection the gloves have to an identified sporting activity, the features designed for that sporting activity, and how the gloves are advertised and sold in relation to the named sport.

While the term "sport" is not defined by the tariff, in HQ 089849, dated August 16, 1991, Customs noted that common dictionaries defined the term "sport" as "an activity requiring more or less vigorous bodily exertion and carried on according to some traditional form or set of rules, whether outdoors, as football, hunting, golf, racing, etc., or indoors, as basketball, bowling, squash, etc." In *Newman Importing Company, Inc. v. United States*, 415 F. Supp. 375, Cust. Ct. 143, Cust. Dec. 4648 (1976), in finding backpacking to be a sport, the court determined that the term "sport" is not solely defined in terms of competitiveness, but also arises from the development and pursuit of a variety of skills. In this respect, in HQ 957848, dated August 10, 1995, Customs found hunting, fishing, canoeing, archery and similar outdoor activities to fall within the purview of "sport." *The American College Dictionary* (1970) defines the term "sport" as "a pastime pursued in the open air or having an athletic character." Likewise, *Webster's New Dictionary of the English Language* (2001) defines "sport" as:

> 1: a source of diversion: PASTIME
> 2: physical activity engaged in for pleasure.

Notably, the term "sport" appears to also encompass activities in which individuals engage professionally (i.e., professional sports).

Recently, in HQ 965157, dated May 14, 2002, Customs ruled that five styles of gloves were not properly classified as gloves specially designed for use in sports. In that ruling, the gloves had some features associated with sports gloves, such as hook and loop closures, additional padding on the palm and palm-side fingers, man-made fabric mesh on the back of the glove, and a reinforced thumb. However, the gloves were not classifiable under subheading 6216.00.4600, HTSUSA, because they were not marketed, advertised and sold for use in the sports for which they were claimed to be designed. In HQ 957848, dated August 10, 1995, we declined to classify the gloves considered therein (half-fingered with synthetic palm patch) as being "specially designed for sport," since they were not designed, marketed and sold specifically for use as sports gloves. In that ruling, we found that the advertising materials accompanying the gloves showed the wearer engaged in non-sport activities such as writing, playing a trumpet, looking through a bag and taking pictures. As those activities were not sports, we found that the gloves were not specially designed for use in sports. *See also* NY H80836, dated June 4, 2001, wherein Customs classified fingerless computer gloves in subheading 6116.93.8800, HTSUSA, which provides for "Gloves, mittens and mitts, knitted or crocheted: other: of synthetic fibers: other: other: without fourchettes."

Similarly, in HQ 083450, dated August 25, 1989, in determining whether gloves were "specially designed for use in sports," Customs found that a glove designed as a multisport glove and used in many different sports did not necessarily satisfy the meaning of

"specially designed for use in sports." In that ruling, we interpreted the term "specially designed for use in sports" to mean that the gloves must have special design features particular to the identified sport. Comfort, breathability and a reinforced thumb were not sufficient to show that special design features pertained specifically to any one of the sports cited (bicycling, cross-country skiing, ATV-motorcycling, racing and boating).

While we recognize that the term "sport" may encompass a variety of outdoor and indoor activities, which may or may not have competitive aspects, we do not find that the activity of drumming falls within the purview of the term "sport." In this case, the subject pair of gloves is not associated with any identified sport. Rather, they are intended to be used by drummers during the activity of playing a musical instrument, namely a drum. While drumming, may be considered a "pastime" and a "physical activity engaged in for pleasure," it is not by any collective understanding or categorization considered a sporting activity. Rather, drumming is a musical activity. Thus, while the submitted gloves may have shown characteristics useful in the pursuit of sporting activities, we erred in concluding that the gloves were specially designed for a sport. After review of both HQ 951980 and HQ 952074, we do not find any evidence to support the claim that the subject gloves are specially designed for a sporting activity, as drumming is not a sport. Accordingly the subject pair of gloves are precluded from classification as gloves specially designed for use in sports.

Additionally, we acknowledge the fact that a glove may be used for purposes other than sporting activities does not necessarily prevent it from being classified as a glove specially designed for use in sports. The test for principal use is not solely dependent on actual use of the specific merchandise at issue but rather the principal use of that "class or kind" of merchandise to which the goods belong. Determining whether goods fall into a particular "class or kind" of merchandise, requires additional consideration of certain commercial factors, as enumerated by the court in *United States v. Carborundum Co.*, 63 C.C.P.A. 98, 102, 536 F.2d 373, 377, cert. denied, 429 U.S. 979, 50 L. Ed. 2d 587, 97 S. Ct. 490 (1976). The factors cited are: the expectation of the ultimate purchaser, channels of trade, general physical characteristics, environment of sale, economic practicality of so using the import, and recognition in the trade of this usage.

In HQ 963746, dated May 16, 2001, we applied the *Carborundum* factors in finding that disposable latex gloves for non-medical (industrial) use and medical use latex gloves were not of the same "class or kind" of merchandise. In that ruling, the gloves for both the industrial use and medical use were made on the same machines and were composed of the same materials. In fact, the only differences between the gloves were the higher leak resistance and degradation qualities of the medical use gloves. Essentially, the quality differences and marketing of the gloves distinguished the medical use gloves from the industrial use gloves.

Customs determined in HQ 963746 that while any particular glove for industrial use is likely to be physically exactly like a medical use glove, a given box of industrial use gloves would likely contain a higher number of defective gloves than a box of the medical use gloves. In this case, the subject gloves somewhat resemble gloves designed specially for use in a sport such as baseball, with features that include palm and palm-side fingers constructed from smooth pigskin leather, man-made fabric mesh on the back of the glove, knit fabric fourchettes, and a hook and loop closure. However, it has not been shown how the individual features or accumulation of them contribute to use in a sport.

In HQ 963746, the expectation of the ultimate purchaser of the medical gloves was the assurance of a higher quality product to the lower quality of the industrial use gloves. In this case, the ultimate purchaser expects that the subject gloves will provide necessary protection to the hands while engaged in the activity of drumming, not a sport.

Unlike the latex gloves in HQ 963746, where the industrial use gloves were sold through the same retailers as the medical use gloves, the subject gloves are sold through different channels of trade than gloves used for sports. While the subject gloves are sold through retailers such as music stores, gloves specially designed for sport are sold through retailers like sporting goods stores and outdoor outfitters. Moreover, as the industrial gloves did not enter the same industries as the medical use gloves in HQ 963746, the subject gloves do not enter the same trades as gloves designed specially for use in sport.

In HQ 963746, we determined that the distinctions were based on real differences in the use of the gloves, whether or not any particular glove from a box labeled "not for medical use" could theoretically form an effective barrier against blood-borne pathogens and other bodily fluids. The same holds true in this case: the subject gloves which have been de-

signed, marketed and sold for use by drummers are distinctly different than those used in sports whether or not they could theoretically be used in a sport.

After determining that the products were actually different in HQ 963746, we concluded that they did not belong to the same class or kind of merchandise. Similarly, balancing the *Carborundum* factors in this case reveals that the subject gloves are not of the same class or kind of merchandise as those specially designed for use in sports.

As the gloves under consideration are not specially designed for use in sports, they would not be properly classified in subheading 4203.21.8060, HTSUSA. The subject gloves are properly classified in subheading 4203.29.3010, HTSUSA, as "Articles of apparel and clothing accessories, of leather or of composition leather: Gloves, mittens and mitts: Other: Other: Other: Men's, Not lined."

Holding:

HQ 951980, dated March 29, 1993, and HQ 952074, dated February 26, 1993, are hereby REVOKED.

Based on the foregoing, the merchandise is classified in subheading 4203.29.3010, HTSUSA, which provides for "Articles of apparel and clothing accessories of leather or of composition leather: Gloves, mittens and mitts: Other: Other: Men's, Not lined." The applicable general column one rate of duty is 14 percent *ad valorem* per dozen pairs.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF COMPRESSION ACTIVE WEAR FOR THE LOWER BODY

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter and revocation of treatment relating to the classification of compression active wear for the lower body.

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 Customs intends to revoke a ruling letter relating to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of compression active wear for the lower body. Similarly, Customs proposes to revoke any treatment previously accorded by it to substantially identical merchandise that is contrary to the position set forth in this notice. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before October 11, 2002.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted

comments may be inspected at U.S. Customs Service, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Joe Shankle, Textiles Branch, at (202) 572–8824.

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) (hereinafter "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 Customs 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 trade and Customs 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 provide any other information necessary to enable Customs 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 Customs intends to revoke a ruling relating to the tariff classification of compression active wear for the lower body. Although in this notice Customs is specifically referring to the revocation of New York Ruling Letter (NY) H88484, dated April 5, 2002, (Attachment A); this notice covers any rulings on this merchandise which may exist but have not been specifically identified that are contrary to the position set forth in this notice. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to those identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this 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, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise that is contrary to the position set forth in this notice. This treatment may, among other reasons, be the result of the

importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUSA. Any person involved with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice that is contrary to the position set forth 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 H88484, Customs classified three styles of garments. One pair reaches above the knee, one pair reaches to just below the knee and one pair extends to the ankle. The garments are manufactured from finely knit 80% polyester, 20% spandex fabric. They have an enclosed one-inch highly elasticized waistband with a drawstring that ties on the interior of the waistband. The design of the garments utilizes the use of single-ply fabric with double-ply components. The single-ply fabric is easily stretched, whereas the two-ply fabric requires substantially more force to stretch. The two-ply fabric panels are located in specific areas of the garment, such as along the thigh, around the knees, under the buttocks and along the hamstring. The effect is to simulate the taping of muscles and joints, thereby obviating the need for taping or the use of a brace during physical activity. Customs classified the garments in subheading 6212.20.0020, HTSUSA, which provides for: Brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted: Girdles and panty-girdles, Of man-made fibers.

Based on our analysis of the scope of the terms of subheadings 6212.20.0020, HTSUSA, and 6212.90.0030, HTSUSA, the Legal Notes, and the Explanatory Notes, the garments of the type discussed herein, are classifiable under subheading 6212.90.0030, HTSUSA, which provides for: Brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted: Other, Of man-made fibers.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY H88484, and any other ruling not specifically identified, that is contrary to the determination set forth in this notice, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Ruling Letter HQ 965621 (Attachment B). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions that are contrary to the determination set forth in this notice.

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

Dated: August 23, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, April 5, 2002.

CLA–2–62:RR:NC:TAB:354 H88484
Category: Classification
Tariff No. 6212.20.0020

MS. SANDRA LISS FRIEDMAN
BARNES, RICHARDSON & COLBURN
475 Park Avenue South
New York, NY 10016

Re: The tariff classification of compression active wear from Thailand.

DEAR MS. FRIEDMAN:

In your letter dated March 7, 2002, on behalf of Wacoal America Inc., you requested a tariff classification ruling.

Three samples were submitted. The lower body garments are manufactured from finely knit 80% polyester 20% spandex fabric. Style 120805 reaches above the knee, style 120806 reaches below the knee and style 120809 reaches the ankle. All the garments feature an enclosed one-inch highly elasticized waistband with drawstring adjustment. A three-inch wide two-ply overlaid panel extends down from the waist on either side of each garment. Above the knee the overlaid panel splits to cross the front of the leg and curve behind the knee. On each garment this panel extends to the bottom. A second two-ply overlaid panel begins on the inner mid-thigh and extends down the leg. On the below knee and ankle length garment this panel curves to slightly overlap the outer panel at points above and below the knee.

Your submission indicates that the garment's construction is designed to enhance the wearer 's performance in physical activities that place a strain on leg muscles and knees. As further evidence of the garment's novel construction you have provided copies of three U.S. patents for the design of these garments. The patents indicate that piece construction creates a garment with portions (two-ply overlays) that require relatively high force to stretch and other portions (single-ply) that are easily stretched. The effect is to simulate the taping of muscles and joints.

You believe the subject merchandise should be classified as other sports equipment in HTS 9506.91.0030. To support this you cite the revocation of NY E82612 (HRL 965106 dated 11/21/01) in which buoyancy compensator vests were initially classified as wearing apparel in chapter 62. The vest was describes in the ruling as follows:

> The item under consideration is known as a buoyancy compensator. The buoyancy compensator submitted, style ISLA, is a vest constructed of a flexible stretchable material known as BioFlex (U.S. patent #5,403,123). The material is cut, sewn and sealed to form an inflatable bladder that constitutes the vest. The bladder is inflated by a tube which extends from the back top of the vest, down the shoulder harness, to the diver's front. The diver can either inflate the vest manually, by blowing into the tube, or can inflate the vest by attaching the regulator to the tube. The vest is

> equipped with a large exhaust valve with a pull cord that releases the air from the vest. On each side of the front of the buoyancy compensator is a pouch with hook and loop closures. The pouches are designed to hold weights that provide negative buoyancy while diving. By inflating and deflating the buoyancy compensator, in conjunction with the weights inserted into the front pockets, the diver is able to control his or her buoyancy throughout all stages of a dive.

The exterior center back of the buoyancy compensator is molded plastic, shaped to cradle the compressed air cylinder. A heavy plate of plastic on the inside of the vest counter balances the weight of the compressed air cylinder when in place in the "cradle." A heavy strap with hook and loop fasteners secures the cylinder in place. A carry handle allows for easy transportation of the buoyancy compensator and tank.

Clearly the vest described is much more than an item of apparel. It has an inflatable bladder, pockets for weights, tubes for inflating and valves for deflating, straps and a heavy plastic plate. The item is a requisite for the sport of scuba diving.

Another ruling you cite is HRL 083854 which classified a weight vest in subheading 9506. This item was described as:

> * * * analogous to ankle and wrist weights which are classifiable in chapter 95. There is little difference between strapping weights to the ankles and wrists and having weights worn on the upper body. The instant vest enables the user to place the weights on the body and hold them in place while exercising.

Once again the item described is more than apparel. In both cases the items are far removed both in design and function from that of an apparel vest. In our opinion the active wear at issue is not similar to either item.

Sports equipment is provided for generally in heading 9506, HTSUSA. However, Note 1(e), Chapter 95, HTSUSA, excludes sports clothing of Chapters 61 and 62, HTSUSA, from the coverage of Chapter 95. Not withstanding, you indicate that the items are designed to provide muscle support and protection by applying a tightening force along critical areas of the body during athletic activities and serve to improve the wearer's performance. Improvement of muscle tone, stamina and endurance are cited. As a result you assert that the items should be classified a sports equipment.

Although protective equipment is covered by heading 9506, it is Customs' view that the heading embraces only certain forms of protective gear, and that sports clothing, regardless of the protection they afford the wearer, is still excluded. The Explanatory Notes, which constitute the official interpretation of the Harmonized System at the international level, provide at EN 95.06(B)(13), that protective gear of heading 9506 includes such articles as fencing masks and breast plates, elbow and knee pads, cricket pads and shin guards.

The items at issue are not similar to any of the exemplars noted above. The items listed afford protection from impact, usually with additional padding or hard surfaces or a combination of the two. The samples provided are made with soft stretchable fabric and offer no protection from impact. What they do provide is considerable support to the body.

In HRL 957469 we ruled that football compression shorts were classified as a girdle in HTS 6212.20.0020. In that ruling the firm's catalog description of the item design bears a striking similarity to the claims made for the items before us. The description provided follows:

> BIKE's unique two-way knit construction offers steady, uniform pressure and support to the hamstring, groin, abdomen and quadricep muscle groups during the twisting, stretching and pivoting movements, brought about during a game or strenuous exercise program. BIKE COMPRESSION improves circulation and stamina, helps prevent edema after a blow or injury, acts like a second skin to prevent abrasions, and restricts muscle movement in injured muscle groups. Wearing BIKE COMPRESSION also fights fatigue and increases stamina. [emphasis added.]

A close reading of the U.S. patents for these items provides an unambiguous description. The items are identified as wearing articles, garments and girdles. In one patent the word supporter is used more than 35 times.

As an alternative to classification as sports equipment, counsel for the importer proposes that the goods be classified as other made up textile articles in HTS 6307. We find no Legal Notes to Section XI, HTS, which would influence the classification of these goods. The suggested alternative heading, 6307, HTS, provides for other made up textile articles. It is a "basket" heading in that it serves to classify merchandise not provided for more spe-

cifically in other headings of the nomenclature. We must first determine whether the merchandise is more specifically in either chapter 61 or 62.

Heading 6212, HTS, provides for, among other things, girdles and similar articles, whether or not knitted or crocheted. The EN for heading 6212 states, in relevant part:

This heading covers articles of a kind designed for wear as body-supporting garments or as supports for certain other articles of apparel, and parts thereof. These articles may be made of any textile material including knitted or crocheted fabrics (whether or not elastic).

The heading includes, inter alia:

* * * * * * *

(2) Girdles and panty-girdles.

As indicated by the patents, the garments at issue provide support throughout the area of the body they cover. They are called girdles and perform as such.

The applicable subheading for the garments will be 6212.20.0020, Harmonized Tariff Schedule of the United States (HTS), which provides for brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted: girdles and panty-girdles. The rate of duty will be 21 percent as valorem.

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 Brian Burtnik at 646–733–3054.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 965621 JFS
Category: Classification
Tariff No. 6212.90.0030

SANDRA LISS FRIEDMAN, ESQ.
BARNES, RICHARDSON & COLBURN
475 Park Avenue South
New York, NY 10016

Re: Classification of Compression Active Wear; Revocation of NY H88484.

DEAR MS. FRIEDMAN:

This letter is to inform you that Customs has reconsidered New York Ruling Letter (NY) H88484, dated April 5, 2002, issued to you on behalf of your client, Wacoal America, Inc. (Wacoal), concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of CW-X™ compression active wear. After review of NY H88484, it has been determined that the classification of the garments in subheading 6212.20.0020, HTSUSA, was incorrect. For the reasons that follow, this ruling revokes NY H88484.

Facts:

In NY H88484, Customs classified the instant garments under subheading 6212.20.0020, HTSUSA, which provides for: "Brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted: Girdles and panty-girdles, Of man-made fibers." The general column one rate of duty is 21 percent *ad valorem*, and the quota/visa category number is 649.

You filed a request for reconsideration, arguing that the garments are not girdles and are properly classified in subheading 9506.91.0030, HTSUSA, which provides, in part, for:

"Articles and equipment for general physical exercise, gymnastics, athletics, other sports * * *: Other: Articles and equipment for general physical exercise, gymnastics or athletics; parts and accessories thereof, Other." The general column one rate of duty is 4.6% *ad valorem*. There are no quota or visa restraints.

Three lower body garments were submitted for consideration and classification in NY H88484. Style 120805 reaches above the knee, style 120806 reaches below the knee and style 120809 extends to the ankle. The CW-X™ garments are manufactured from finely knit 80% polyester, 20% spandex fabric. They have an enclosed one-inch highly elasticized waistband with a drawstring that ties on the interior of the waistband. The design of the garments utilizes the use of single-ply fabric with double-ply components. The single-ply fabric is easily stretched, whereas the two-ply fabric requires substantially more force to stretch. The two-ply fabric panels are located in specific areas of the garment, such as along the thigh, around the knees, under the buttocks and along the hamstring. The effect is to simulate the taping of muscles and joints, thereby obviating the need for taping or the use of a brace during physical activity.

The manufacturer obtained three patents on the subject garments. Patent No. 5,367,708, dated November 29, 1994, describes the design and function of the garments as follows:

Wearing article for wearing in pressed relation to human body surface

ABSTRACT

A wearing article with a taping function for wearing on a human body in pressed relation to a surface of the human body, has a heavily-stretchable portion which has an excellent tightening force and is adapted to be held against a required portion of the human body so as to extend generally along muscle fibers over a region from a tendon to a central portion of the muscle. The remainder of the wearing article is defined by an easily-stretchable portion. With this arrangement, by merely wearing this wearing article on the required portion of the body, the heavily-stretchable portion tightens only a required portion of the body to support the central portion of the relevant muscle, thereby easily achieving a taping function.

SUMMARY OF THE INVENTION

According to the present invention, there is provided a wearing article with a taping function for wearing on a human body in pressed relation to a surface of the human body, comprising at least one heavily-stretchable portion which has an excellent tightening force and is adapted to be held against a required portion of the human body so as to extend generally along muscle fibers over a region from a tendon to a central portion of the muscle; the remainder of the wearing article being defined by an easily-stretchable portion.

The heavily-stretchable portion is pressed against that portion (e.g. muscle or articulation) of the human body requiring a taping treatment, in such a manner that the heavily-stretchable portion is extended along the muscle fibers over the region from the tendon to the central portion of the muscle. The other portions not requiring such a taping treatment are covered by the easily-stretchable portion.

With this construction, the wearing article, when worn on the human body, has the portion applying a high tightening force to the body surface, and the portion applying a low tightening force to the body surface. The former portion applying the high tightening force achieves a localized tightening effect similar to that achieved with a taping treatment, thereby enabling the prevention and remedy of an injury. The wearing article can be provided in the form of a tights for the lower half of the human body, a sock, an overall tights, a limb supporter, a shoulder supporter, a glove and so on. Therefore, upon wearing of this wearing article, even those who are not skillful in taping techniques can obtain an effect similar to that of a taping treatment. The other portion of the integral wearing article except for the taping portion is made of a two-way stretchable material which can stretch longitudinally and transversely, and therefore the taping portion can not be recognized from an external view, and the wearing article can be smoothly worn on the body with a beautiful silhouette.

Patent No. 6,186,970, dated February 13, 2001, states, in part, that:

Protective clothing for regions of lower limb

ABSTRACT

The present invention provides a leg protection garment that is effective for mainly supporting the hamstrings, the muscle of the posterior side of the femoral region

among the leg portion. The leg protection garment having a lower half of the body part which has a leg portion of length capable of covering at least the patella region and formed of stretchable fabric, the garment having a portion having a partially strong straining force, the portion having a strong straining force comprising at least a portion having a strong straining force 101 (A) which ranges from an area above the trochanter major to the vicinity 5 of the upper end of the tibia by way of the trochanter major and further the vicinity over the boundary between the musculus biceps femoris and the tractus iliotibialis so as to support the musculus biceps femoris, wherein the portion obliquely crosses the vicinity 4 of the tendon region located below the muscle belly of the musculus biceps femoris without crossing the muscle belly of the musculus biceps femoris.

TECHNICAL FIELD

The present invention relates to a leg protection garment.

More particularly, it relates to a leg protection garment applied generally in close contact with the surface of the human body and is mainly effective for supporting the hamstrings, namely, the muscles of the posterior side of the femoral region of the leg.

BACKGROUND ART

Hitherto, various kinds of sports or training activities or the like excessively load muscles of the leg region and often cause disorders in this region. In order to prevent such disorders in muscles, or to support the relevant muscles or bones when disorders occur, a taping treatment or so-called supporter has been employed. However, the above mentioned conventional taping method has a problem, for example, applying the taping treatment requires skill etc. Moreover, the taping treatment inhibits the movement of the muscles to prevent excessive contraction. On the other hand, the supporter, worn over the articulation, also restricts the movement of the articulation, and in turn often indirectly inhibits the movement of muscles. Therefore, both the taping treatment and the supporter restrict the function of muscles and do not provide support for the contraction of muscles.

Thus, a leg protection garment having a structure for supporting the specific muscles of the leg by a portion having a strong straining force has been developed (See Publication of Japanese Patent Application (Tokkai Hei) No. 4–343868, (Tokko Hei) No.6–41641, (Tokko Hei) No. 6–51921). These leg protection garments: can be put on easily and adequately by ordinary people; provide a comfortable fit without being painful to a user; have no hygienic problems such as itchy skin due to it becoming stiff; and furthermore support the muscle contraction and help the extended muscle easily recover, thus being effective for reducing muscle fatigue during exercise and exhibiting the effect of promoting the prevention or treatment of specific disorders etc. of the leg.

Moreover, the leg protection garment described in the above mentioned official gazettes support the muscles of the medial, lateral and anterior sides of the femoral region, or the muscle below the patella region. Among such muscles, the musculus quadriceps femoris, for example, functions by flexing the articulatio coxae and extending the articulatio genus. However, the articulatio genus becomes unstable when it is in the extended position, so that an impact can easily cause a rupture of the ligament and a fracture in the vicinity of the articulation. Therefore, by supporting the musculus quadriceps femoris, its function can be strengthened and the above mentioned disorders can be prevented.

Wacoal hired three Ph.D.'s to test the effectiveness of the their CW-X™ garments at reducing muscle fatigue during physical activity. You submit that a similar study has been conducted in Japan with favorable results. The hired scientist submitted a research proposal wherein they detail the purpose and methods of their testing. The research proposal, titled *The Effect of CW-X Supporting Sportswear on Physiological Responses During Prolonged Running*, states, in part, that:

Introduction

* * * * * * *

Recently, a specialized support garment has been developed for the purpose of assisting muscular contraction, thereby possibly reducing fatigue during physical activity. If such a device is effective, it may improve performance and/or allow athletes to train harder and maximize their training adaptations.

Purpose

The purpose of this project will be to determine the effect of wearing supporting garments on 1) the physiological responses during a 60 min run at 70% of maximal aero-

> bic capacity, and 2) a short duration, high intensity performance run after the 60-min run. Specifically, a selection of physiological variable known to be markers of energy expenditure and/or fatigue during prolonged submaximal running will be measured with and without the CW-X™ support garment, and a time-to-exhaustion run will be completed at a pace corresponding to 100% maximal aerobic capacity.

Japanese marketing materials depict the garments being worn as outerwear by persons engaged in various sports such as hiking, jogging, biking, skiing and skateboarding. Wacoal has begun marketing the articles to sporting goods stores in the United States. A Wacoal representative submitted a marketing letter to a store specializing in running, which states that:

> The specialized fabric in CW-X tights uses a "taping technique" to support muscles, prevent injuries and reduce fatigue. CW-X pants are not traditional tights and definitely not fashion. They are designed to support the body in very specific ways, allowing full natural movement without excessive pressure.

Issue:

Are the compression active wear garments with a taping function classified as "other" sports equipment in Chapter 95, HTSUSA, as trousers or shorts in headings 6103 or 6104, HTSUSA, or as "other" support garments in heading 6212, HTSUSA?

Law and Analysis

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). 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 GRI may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN's) represent the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings). The EN's facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI's. While not legally binding, the EN's represent the considered views of classification experts of the Harmonized System Committee. It has, therefore, been the practice of the Customs Service to follow the terms of the EN's, when appropriate, when interpreting the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989).

Several possible headings can be considered for classification of the garments. You argue that the garments should be classified in subheading 9506.91.0030, HTSUSA, as articles and equipment for general physical exercise or athletics. However, Legal Note 1 (e) to Chapter 95 excludes sports clothing of textiles, of chapter 61 or 62 from classification in Chapter 95. Therefore, in order to qualify for classification in Chapter 95, the garments must not be clothing or wearing apparel.

All things worn by humans are not necessarily wearing apparel. See *Dynamics Classics, Ltd. v. United States*, Slip. Op. 86–105, 10 C.I.T. 666 (Oct. 17, 1986) (plastic suits used for weight reduction inappropriate for wear during exercise or work not wearing apparel); *Antonio Pompeo v. United States*, 40 Cust. Ct. 362, C.D. 2006 (1958) (crash helmets not wearing apparel); *Best v. United States*, 1 Ct. Cust. Appls. 49, T.D. 31009 (1910) (ear caps for prevention of abnormal ear growth not wearing apparel). "*Admiral Craft Equipment* developed the standard that items are not considered wearing apparel when the use of those items goes 'far beyond that of general wearing apparel.'"[1] *Daw Industries, Inc. v. United States*, 714 F.2d 1140, 1143 (Fed. Cir. 1983). In *Daw Industries* the Court found that sheaths and socks used exclusively with prostheses do not provide "significantly more, or essentially different," protection than analogous articles of clothing, but merely "differ incrementally." The Court concluded that while in some cases the differences may become so large that the article is no longer wearing apparel, that was not the case with the sheaths and socks.

In Headquarters Ruling Letter (HQ) 952204, dated April 12, 1993, Customs applied the reasoning relied upon in *Daw Industries* when considering the classification of a "swim sweater" which is a flotation device that functions as a swimming aid for children. Customs found that while the "swim sweater" provides some protection from the elements

[1] *Admiral Craft Equipment, Corp. v. United States*, 82 Cust. Ct. 162, C.D. 4796 (1979).

and arguably adorns the body, it is used in very specific situations. Customs concluded that the increment in the difference in use and effect between the "swim sweater" and a conventional sweater is so large that the "swim sweater" is no longer wearing apparel.

Customs recently considered what constitutes wearing apparel in HQ 965312, dated January 14, 2002, wherein Customs concluded that the difference in use and effect between "buoyancy compensators worn by SCUBA divers" and vests are so large, that buoyancy compensators are no longer wearing apparel. Customs reasoned that the entire design of buoyancy compensators is centered around buoyancy control and that while features such as padding provide some warmth and protection, these benefits are ancillary to the function of allowing the diver to control her buoyancy. In contrast, the difference between use and effect between the instant garments and traditional athletic shorts or tights is not great enough that they are no longer considered wearing apparel. Significantly, they are manufactured from Coolmax™ fabric that is specially designed to wick away moisture and to cool the body. Moreover, the garments are designed to be worn as outer wear and are worn as such during athletic activity. The garments are wearing apparel and are excluded from classification in Chapter 95. See also HQ 962072, dated August 12, 1999 (classifying ice-hockey pants with sewn-in protective padding as wearing apparel in Chapter 62, HTSUSA).

The instant garments are constructed from a knit fabric and are therefore classified in Chapter 61. Classification within Chapter 61, HTSUSA, is dependent upon whether the garments are trousers or shorts of headings 6103 or 6104 (depending on whether they are designed for men or women), or whether they are "other" support garment of subheading 6212, HTSUSA, which provides for brassieres, girdles, corsets, and similar articles.

EN (D) to heading 6103, HTSUSA, provides the following definition of trousers:[2]

> "Trousers" means garments which envelop each leg separately, covering the knees and usually reaching down to or below the ankles; these garments usually stop at the waist; the presence of braces does not cause these garments to lose the essential character of trousers.

EN (F) to heading 6103, HTUSA defines shorts as "'trousers' which do not cover the knee." In that the subject garments "envelope each leg separately" and "stop at the waist," they generally meet the description of "trousers" and "shorts" that are provided in the EN.

In appearance, the instant garments, in particular the pair that stop above the knee, are similar to bicycle shorts. In HQ 955479, dated March 17, 1994, Customs classified a pair of "Trail Shorts" that were essentially a pair of bicycle shorts inside a pair of hiking shorts, as shorts in subheading 6204.63.3532, HTSUSA. The "Trail Shorts" were described as follows:

> The submitted sample, the Trail Short, is a size medium pair of shorts constructed from 100 percent nylon woven fabric. The garment features a knit inner lining which is constructed with elastomeric yarns. It possesses an elasticized waist, an internal drawstring, zippered side-pockets, side vents and a pad or insert sewn at the crotch.

The "Trail Shorts" did not contain any features that would demonstrate that they were designed, or intended, to serve a "support" function. They contained no spandex, they did not have targeted paneled construction, they did not have two-ply construction, and they were marketed as having "all the technical features and performance of a tight." Customs concluded that the shorts were designed to be multi-functional and with fashion in mind. In contrast, the instant shorts are designed, marketed, and worn, for their support or taping function. While they may be worn as outerwear, their primary purpose is to act as a support garment.

The EN for heading 6212 states, in relevant part:

> This heading covers articles of a kind designed for wear as body-supporting garments or as supports for certain other articles of apparel, and parts thereof. These articles may be made of any textile material including knitted or crocheted fabrics (whether or not elastic).

The heading includes, *inter alia*:

> (1) Brassieres of all kinds.
> (2) Girdles and panty-girdles
> (3) Corselettes (combinations of girdles or panty-girdles and brassieres).

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[2] The provisions of the EN to heading 6103, HTSUSA, apply *mutatis mutandis* to articles of heading 6104, HTSUSA.

(4) Corsets and corset-belts. These are usually reinforced with flexible metallic, whalebone or plastic stays, and are generally fastened by lacing or by hooks.

(5) Suspender-belts, hygienic belts, suspensory bandages, suspender jock-straps, braces, suspender, garters, shirt-sleeve supporting arm-bands and armlets.

(6) Body belts for men (including those combined with underpants).

(7) Maternity, post-pregnancy or similar supporting or corrective belts, **not being** orthopaedic appliances of **heading 90.21** (see Explanatory Note to that heading).

All of the above articles may be furnished with trimmings of various kinds (ribbons, lace, etc.), and may incorporate fittings and accessories of non-textile materials (e.g., metal, rubber, plastics or leather).

* * * * * * *

Customs has had occasion to classify articles of wearing apparel, similar to the ones at issue, within heading 6212, HTSUSA. These rulings provide guidance as to what garments Customs considers support garments. In HQ 957940, dated June 30, 1995, Customs classified "baseball slider pants." The pants were constructed of 72 percent nylon/28 percent spandex knit fabric and had protective pads sewn in place to protect the athlete from abrasion and injury while playing baseball. Customs found that:

> Customs believes the difference in fabric composition and construction of the sliding pants at issue imparts a significant feature to the sliding pants that was not present in the garments at issue in HRL 083876 [(classifying knit undergarments with no support function as other baseball equipment in 734.54 Tariff Schedules of the United States)]. **It is Customs' view that the tightly knit fabric containing 28 percent spandex causes the subject sliding pants to hold in and support the body. Customs also believes the support offered by the subject garment is an intended feature and not mere happenstance.** It may be argued that sliding pants are designed for wear as body-protecting garments, not body-supporting garments. However, Customs believes that the subject sliding pants are designed for both purposes. **Without the pads, Customs would view the garment before us as a girdle.** With the permanently sewn-in pads, the garment offers support and protection, thus giving it a feature not associated with girdles or other support garments.

Emphasis added. Similarly, in HQ 957469, dated November 7, 1995, Customs considered the classification of compression girdles or shorts for football. The articles were described as:

> The submitted compression shorts, style 7648, are made of heavy gauge 92 percent nylon/8 percent spandex knit fabric. The shorts measure 14 inches from the elastic waistband to the bottom of the hemmed leg openings. The fabric of the center front and rear panels is oriented to reduce the lateral stretch and thus provide additional support to the body. You assert that the garment is designed for use as a support garment for wear by players of football and other sports needing protective pads. The garment features three internal pockets into which plastic foam pads may be inserted to protect the hips and tailbone. The pads are sold separately from the garment.

The manufacturer in HQ 957469, BIKE, marketed its compression shorts as follows:

> BIKE's unique two-way knit construction offers steady, uniform pressure and support to the hamstring, groin, abdomen and quadricep muscle groups during the twisting, stretching and pivoting movements, brought about during a game or strenuous exercise program. BIKE COMPRESSION improves circulation and stamina, helps prevent edema after a blow or injury, acts like a second skin to prevent abrasions, and restricts muscle movement in injured muscle groups. Wearing BIKE COMPRESSION also fights fatigue and increases stamina.

Customs noted that BIKE stressed the support feature of their compression shorts in their marketing catalogues. Customs concluded that without the pads, the compression shorts were girdles classified in heading 6212, HTSUSA.

Like the sliding pants and compression shorts discussed above, the instant garments are designed to support muscles, joints and tendons. The patent materials stress the drawbacks to taping or using a brace when engaged in sporting activity. Namely, that they don't provide the correct directional support, require a high level of skill to be properly applied, can cause fatigue, and can impede the movement and function of the targeted limb, muscle or joint. The instant garments are designed to alleviate some of the problems encountered with taping and the use of a brace while allowing the limb as a whole to move freely. This functionality is obtained by locating the double-ply non-stretch panels so that they target the muscle, tendon or joint that needs support. Proper application of the support is ob-

tained by wearing the garments, thereby allowing even the casual athlete the ability to properly support a weak body part.

Wacoal has invested substantial resources, as evidenced by the research and patent materials, to ensure that the instant garments act as a replacement to taping or a support brace. In addition to the substantial resources allocated to develop the instant garments, the garments are marketed as providing a taping function that reduces fatigue and prevents injury. This is seen in the marketing materials targeting the Japanese market, as well as the individualized marketing materials sent to store owners in the U.S.

While the instant garments may be worn as outerwear, thereby resembling trousers or shorts, their entire function and design is centered on providing support to muscles, joints, and ligaments of the legs during physical activity. Accordingly, the instant garments are more specifically described by the terms of heading 6212, HTSUSA, than they are by the general provisions for trousers in headings 6103 and 6104, HTSUSA.

At the subheading level, the issue is whether to classify the articles in subheading 6212.20, HTSUSA, the provision for girdles, or in subheading 6212.90, HTSUSA, the provision for "other" support garments. In HQ 957469, discussed above, after dismissing the claim that girdles were "women's" garments, Customs took note of the fact that the compression shorts were clearly undergarments to be worn under other clothing. Customs stated that:

> Neither of these definitions identify girdles as gender specific. All of the definitions, however, indicate that girdles are understood to be undergarments which provide support and hold in the body along the lower torso, specifically including the waist and hips.

After extensive research, Customs is still of the opinion that girdles are understood to be undergarments.[3] See HQ 965236, dated December 5, 2001 (Exemplars to heading 6212, HTSUSA, are generally worn underneath other garments). Furthermore, two of the garments extend below the knees and this is not a common characteristic of girdles. Accordingly, the instant articles are not classified as girdles in subheading 6212.20, HTSUSA. Even though the instant articles can be worn as outerwear, they are principally used and are primarily designed to act as a support garment. Accordingly, the CW-X™ active wear garments are classified in subheading 6212.90.0030, HTSUSA, as "other" support garments.

Holding:

NY H88484 is revoked. The CW-X™ active wear, styles 120805, 120806 and 120809, are classified in subheading 6212.90.0030, HTSUSA, which provides for: Brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted: Other, Of man-made fibers." The general column one rate of duty is 6.7 percent *ad valorem*, and the quota/visa category number is 659.

Effect on Other Rulings:

NY H88484, dated April 5, 2002, is 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.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[3] As opposed to certain sports bras which, although usually worn underneath workout clothes, may be worn alone with exercise bottoms. See HQ 951264, dated July 1, 1992. Girdles are distinguishable from bras because the EN state that bras of "any kind" are classified in subheading 6212.10 HTSUSA, and because it is not uncommon to have women wear sports bras as outer wear. Girdles have yet to become fashionable as outerwear.

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE CLASSIFICATION AND COUNTRY OF ORIGIN OF BLENDED TOBACCO

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letter and treatment relating to the classification and country of origin marking of blended tobacco.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification under the Harmonized Tariff Schedule of the United States and to the country of origin marking of tobacco from Italy. Notice of the proposed action was published on July 10, 2002, in Volume 36, Number 28, of the CUSTOMS BULLETIN. One comment was received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 11, 2002.

FOR FURTHER INFORMATION CONTACT: T. James Min II, Special Classification and Marking Branch, (202) 572–8839.

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), (hereinafter "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 Customs 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 trade and Customs 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 provide any other information necessary to enable Customs 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, as amended, (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was

published on July 10, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 28, proposing to modify Headquarters Ruling Letter (HRL) 546534, dated August 21, 1998, pertaining to the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) and country of origin marking of tobacco from Italy. One comment was received in reply to the notice.

In New York Ruling Letter (NYRL) C86085, dated April 14, 1998, Customs ruled on whether a blend of various types and grades of unmanufactured, stemmed, threshed burley and flue-cured tobacco, and unmanufactured, unstemmed, unthreshed oriental tobacco is substantially transformed in the country (Italy) where the blending took place. The tobacco was imported into Italy from a variety of countries. After the processing in Italy, the tobacco was further processed in the U.S. before it could be used to make finished cigarette products. Customs held that the country of origin for country of origin marking purposes (19 USC § 1304) of the blended unmanufactured tobacco was the country where the blending took place. Customs further ruled that the proper classification of the tobacco was in heading 2403, Harmonized Tariff Schedule of the United States (HTSUS), which provides, in pertinent part, for other manufactured tobacco.

Customs has reconsidered the country of origin and tariff classification holdings in NYRL C86085 and determined that they are incorrect. It is now Customs position that the blending and other processing performed in Italy as described in NYRL C86085 does not result in a substantial transformation of the tobacco into a new and different article of commerce. Therefore, when imported into the U.S., the tobacco is not considered a product of Italy for purposes of 19 U.S.C. § 1304. It is also Customs position that the imported blended strip tobacco is properly classified in heading 2401, HTSUS, as unmanufactured tobacco.

One comment received by Customs in response to the proposal notice asserts that blending of various types of tobacco results in a substantial transformation of the constituent tobacco. The comment states that the blending of oriental tobacco with other types results in a substantial transformation. Furthermore, the comment stipulates that the processing that occurs in Italy as described in NYRL C86085 results in a blend that is specific to a brand and thus the essential character of the tobacco has been changed into a manufactured tobacco. The comment asserts that the processing in the United States of the imported tobacco blend is an additional substantial transformation. As stated in HRL 562176 ("Attachment" to this notice), it is Customs position that the blending process in Italy does not substantially transform the tobacco at issue. Furthermore, the processing in Italy does not result in manufactured tobacco because the resulting tobacco blend is not ready for final use until further processed in the United States.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NYRL C86085 and any other rulings not specifically identified to reflect the proper tariff classification of the above described tobacco and the proper country

of origin of tobacco from Italy, pursuant to the analysis set forth in HRL 562176 (*see* "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is modifying any treatment previously accorded by Customs to substantially identical transactions.

As stated in the proposal notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject of this notice, should have advised the Customs Service 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, Customs is modifying any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importation of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any persons involved in substantially identical transactions should have advised Customs during the notice period. An importer's failure to advise the Customs Service of substantially identical transaction or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of 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: August 21, 2002.

CRAIG WALKER,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 21, 2002.
CLA–2 RR:CR:SM 562176 TJM

MS. TERESA GLEASON, ESQ.
BAKER AND MCKENZIE
815 Connecticut Ave, NW
Washington DC 20006–4078

Re: Revocation of NYRL C86085, dated April 14, 1998; Classification of unmanufactured tobacco; Country of origin marking for unmanufactured tobacco; substantial transformation; cigarettes; tariff rate quota; Brown & Williamson Tobacco Corp.; 19 CFR 134.35(a).

DEAR MS. GLEASON:

This letter is to inform you that Customs has reconsidered New York Ruling Letter ("NYRL") C86085, dated April 14, 1998, addressed to you on behalf of Brown & Williamson Tobacco Corp., concerning the classification and country of origin marking of tobacco from Italy. After review of that ruling, we have determined that the country of origin for the "ABC Blend" is not Italy because the tobacco is not substantially transformed in Italy. Additionally, the correct classification of the unmanufactured blended tobacco is in subheading 2401.20, HTSUS, rather than in 2403.99, HTSUS, as stated in NYRL C86085. For the reasons that follow, this ruling revokes NYRL C86085.

Facts:

In NYRL C86085, dated April 14, 1998, Customs ruled that the production process of "ABC Blend" in Italy from tobacco imported from various countries constituted a substantial transformation and therefore qualified as a product of Italy. It also ruled that the "ABC Blend" is classifiable in subheading 2403.99.30, HTSUS.

According to the facts of NYRL C86085, the merchandise, which is called, "ABC Blend," is a blend of various types and grades of unmanufactured, stemmed, threshed burley and flue-cured tobacco, and unmanufactured, unstemmed, unthreshed oriental tobacco. The tobacco is imported into Italy from a variety of countries. The tobacco is blended in Italy and imported into the United States for your client's (Brown & Williamson Tobacco Corp.) use in the production of Bugler/Kite "Roll Your-Own" tobacco.

The types of tobacco imported into Italy and used to produce "ABC Blend" include predominantly flue-cured and burley tobacco, and a small percentage of oriental tobacco. "ABC Blend" is comprised of three different types of tobacco from nine different countries including Italy.

In Italy, the threshed tobacco is placed on a flue-cured line and burley line according to specific blend percentages. These tobaccos proceed through a vertical slicer that cuts the tobacco to facilitate ordering later in the manufacturing process. A small percentage of oriental tobacco is fed into the blend in whole leaf form. During this stage, both the flue-cured and burley lines undergo the same processes. Steam and/or water are applied to the tobacco to make it more pliable and to minimize breakage. Then the tobacco proceeds through a system which removes string from the product. The tobacco is then reordered to insure that it has the proper moisture level before it enters the next stage of manufacture. An air-leg removes naked stem and foreign matter. The tobacco is then conveyed to the silos where it is distributed horizontally to maximize the blending of the different types and grades. Once filled, the silo is discharged vertically to maximize further blending. Once the blending process is complete, the tobacco passes over a shaker that removes scrap on its way to the final dryer. The final dryer brings the blended tobacco to a predetermined moisture level for packing.

The blend is imported into the U.S. where your client processes it further for use in producing the final product. In the United States, the imported tobacco blend is preconditioned to a specific moisture level, cased, cut, dried, cooled, flavored, and packaged for sale as Bugler/Kite Roll-Your-Own tobaccos.

Issue:

What is the proper classification and country of origin marking for the unmanufactured blended tobacco processed in Italy and imported into the United States as described above?

Law and Analysis:

Classification

The classification of goods under the Harmonized Tariff Schedule of the United States (HTSUS) is governed by the General Rules of Interpretation (GRIs), taken in order. GRI 1 provides that classification 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 may then be applied, taken in order.

Additionally, the Explanatory Notes to the Harmonized Commodity Description and Coding system (EN), although not legally binding, are the official interpretation of the Harmonized System at the international level. While not treated as dispositive, the Explanatory Notes are to be given considerable weight in Customs' interpretation of the HTSUS. *See* Guidance for Interpretation of Harmonized System, T.D. 89–30, 54 F.R. 35127 (1989). In Headquarters Rulings Letter ("HRL") 087511, dated January 14, 1991, we stated that "[i]n the absence of clear and unambiguous statutory language to the contrary it has been the practice of the Customs Service to follow, whenever possible, the terms of the Explanatory Notes when interpreting the HTSUSA." Furthermore, we noted in the Guidance for Interpretation of Harmonized System, T.D. 89–30, 54 F.R. 35127 (1989) that "the ENs are a dynamic instrument reflecting the intent of the Contracting Parties to the application and interpretation of the HS. They will be amended from time to time and may thus reflect a change in interpretation. * * * When a decision of the HSC is published * * * it should receive the same weight as ENs. * * *"

Unmanufactured tobacco is classifiable in heading 2401, HTS. Heading 24.01 EN, states that this heading covers:

> (1) Unmanufactured tobacco in the form of whole plants or leaves in the natural state or as cured or fermented leaves, whole or stemmed/stripped, trimmed or untrimmed, broken or cut (including pieces cut to shape, but not tobacco ready for smoking).
>
> Tobacco leaves, blended, stemmed/stripped and "cased" ("sauced" or "liquored") with a liquid of appropriate composition mainly in order to prevent mould and drying and also to preserve the flavour are also covered in this heading.
>
> (2) Tobacco refuse, e.g., waste resulting from the manipulation of tobacco leaves, or from the manufacture of tobacco products (stalks, stems, midribs, trimmings, dust, etc.).

On the other hand, manufactured tobacco is classifiable in heading 2403, HTS. Heading 24.03, note 1, EN, states that this heading covers "smoking tobacco, whether or not containing tobacco substitutes in any proportion, for example, manufactured tobacco for use in pipes or for making cigarettes."

In HSC 25 in March 2000 (Doc. NC0288E1), the Harmonized System Committee ("HSC") of the World Customs Organization ("WCO") classified basic blended strip tobacco ("BBS") in heading 2401. BBS was a tobacco mixture consisting of 75 percent by weight of uncut stemmed leaves (i.e., "strips") and 25 percent reconstituted tobacco. The processing steps that the product underwent prior to export from the country of origin were described as including stemming, mixing, moistening, and casing. In its imported condition, BBS is not ready for smoking. It must be further cased, cut and blended with other ingredients to form the processed tobacco "cut filler" that is used in cigarettes. Subsequently, in the country of importation, the product is subjected to the following processes including slicing (horizontal or vertical) of a batch of the BBS and other types of tobacco, moistening in a conditioning cylinder, casing before cutting, blending, cutting, drying, and flavoring. The Harmonized System Committee (HSC) classified BBS as a mixture of products classifiable in two or more headings. By application of GRIs 2(b), 3(b), and 6, the product was classified in heading 2401.

The product at issue (which is a blend of: 1) unmanufactured, stemmed, threshed burley and flue-cured tobacco; and 2) unmanufactured, unstemmed, unthreshed oriental tobacco), in its imported condition, having some similarities to the BBS before the HSC, is not ready for smoking. Your client imports the blend and further processes it (e.g. preconditioning, casing, cutting, and flavoring,) in the U.S. before using it to manufacture the final product. More importantly, the EN for heading 2401 includes "unmanufactured tobacco * * * or cut * * * but not * * * ready for smoking. * * *"

As a distinguishing example, in Headquarters Ruling Letter ("HRL") 560102, dated June 17, 1997, Customs classified imported blended tobacco in heading 2403. In that case,

the cut-filler tobacco was processed in Argentina. In contrast to the instant case, in HRL 560102 all the blending, cutting, conditioning, casing, flavoring, drying, et cetera were completed in Argentina prior to importation into the United States. In other words, the imported product was ready for use by the final user of the tobacco to make cigarettes. In the instant case, the imported ABC blend is not ready for smoking because they must be further preconditioned, cased, cut, and flavored with other ingredients in the U.S. in order to produce the final product—Bugler/Kite Roll-Your-Own tobaccos. Therefore, the imported article (a blend of unmanufactured blended tobacco in heading 2401, HTSUS) in the instant case is properly classifiable in heading 2401, HTS.

Accordingly, if entered under quota, the product at issue will be classifiable under subheading 2401.20.8590, HTSUS, which provides for unmanufactured tobacco (whether or not threshed or similarly processed); tobacco refuse, tobacco, partly or wholly stemmed/stripped, threshed or similarly processed, other, other, other, described in additional U.S. note 5 to Chapter 24 and entered pursuant to its provisions, other. If entered outside the quota, the applicable subheading will be 2401.20.8790, HTSUS, which provides for unmanufactured tobacco (whether or not threshed or similarly processed); tobacco refuse, tobacco, partly or wholly stemmed/stripped, threshed or similarly processed, other, other, other, other, other.

Marking Requirements

As you are aware, Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. § 1304), provides that unless excepted, every article of foreign origin imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. 19 C.F.R. part 134 implements the country of origin marking requirements of 19 U.S.C. § 1304.

Section 134.1(d), Customs Regulations (19 CFR § 134.1(d)), provides that the "ultimate purchaser" is generally the last person in the United States who will receive the article in the form in which it was imported. Congressional intent in enacting 19 U.S.C. § 1304 was "that the ultimate purchaser should be able to know by an inspection of the marking on imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of the purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." *United States v. Friedlander & Co*., 27 C.C.P.A. 297 at 302; C.A.D. 104 (1940).

The ultimate purchaser in the instant case is the manufacturer in the United States who receives the ABC blend and substantially transforms it to produce the Bugler/Kite "Roll-Your-Own" tobacco. Pursuant to 19 C.F.R. § 134.32(d), the outermost container of the imported blended strip tobacco should be marked with the countries of origin applicable to the specific contents.

Country of Origin

An article that consists in whole or in part of materials from more than one country is a product of the last country in which it has been substantially transformed into a new and different article of commerce with a name, character, and use distinct from that of the article or articles from which it was so transformed. *See* 19 C.F.R. § 134.1(b); *United States v. Gibson-Thomsen*, 27 C.C.P.A. 267 (1940); *Uniroyal Inc. v. United States*, 542 F. Supp. 1026 (Ct. Int'l Trade 1982), *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983); *Koru North America v. U.S.*, 701 F. Supp. 229 (Ct. Int'l Trade 1988); *National Juice Products Ass'n v. United States*, 628 F. Supp 978 (Ct. Int'l Trade 1986); *Coastal States Marketing Inc. v. United States,* 646 F. Supp 255 (Ct. Int'l Trade 1986), *aff'd*, 818 F.2d 860 (Fed. Cir. 1987); *Ferrostaal Metals Corp. v. United States*, 664 F. Supp 535 (Ct. Int'l Trade 1987).

In *National Juice Products Association v. United States*, 628 F. Supp. 978 (CIT 1986), the Court considered whether foreign manufacturing concentrate processed into frozen concentrated orange juice and reconstituted orange juice in the U.S. was considered substantially transformed. The U.S. processing involved blending the manufacturing concentrate with other ingredients to create the end product. The manufacturing concentrate was mixed with purified and dechlorinated water, orange essences, orange oil, and in some cases, fresh juice. The foreign manufacturing concentrate was blended with domestic concentrate, with ratios of 50/50 or 30/70 (foreign/domestic).

The court considered that the U.S. processing added relatively minor value to the product and that the manufacturing orange concentrate imparts the essential character to the juice and makes it orange juice. The court concluded that the foreign manufacturing juice concentrate was not substantially transformed in the U.S. when it was blended with other ingredients.

In *Coastal States Marketing, Inc. v. United States*, 646 F. Supp. 255 (Ct. Int'l Trade 1986), *aff'd*, 818 F.2d 860 (Fed. Cir. 1987), the Court held that the blending of No. 2 gas oil from then the Soviet Union with Italian No. 5 fuel oil in Italy did not substantially transform the Soviet oil into a product of Italy. In that case, an oil tanker loaded No. 2 gas oil in the U.S.S.R. The vessel then proceeded to Italy where No. 5 fuel oil was added to the same storage tanks holding the Soviet gas oil. The oils were mechanically mixed. The mixing created an oil with different gravity, sulfur content, flashpoint, pourpoint, and kinematic viscosity than the two oils separately. Regardless, the court opined and affirmed Customs' view that the oils had not been substantially transformed. Although the grade of the mixed oil had changed, the Court opined that the essential character of the Soviet oil, being oil, remained unchanged. The Court also noted that the lack of a tariff shift although not determinative was indicative that the oils had not changed in essential character.

Previous Customs rulings have held that in general mere blending of materials does not constitute a "substantial transformation." In HRL 088799, dated November 20, 1991, Customs ruled that cocoa from various countries blended in Canada with sugar did not constitute a substantial transformation. In HRL 561208, dated March 8, 1999, Customs held that blending foreign crab meat with domestic meat did not constitute a substantial transformation. In HRL 734479, dated January 29, 1993, Customs held that spray dried coffee of Central and South American origin was not substantially transformed in the European Community by blending and agglomeration.

In HRL 560102, dated June 17, 1997, unmanufactured tobaccos from various countries (classified under heading 2401, HTSUS) were imported into Argentina. There, the tobaccos were processed into manufactured cut-filler tobacco, classified in heading 2403, HTSUS. All the processing, including the final delamination, cleaning, conditioning, and top dressing, were conducted in Argentina. The resulting cut filler tobacco imported into the United States was ready to be used to produce cigarettes. Customs held that the tobacco was substantially transformed in Argentina. In determining whether a substantial transformation of an article has occurred, each case must be decided on its own particular set of facts. *See Uniroyal Inc. v. United States*, 542 F. Supp 1026, 1029 (1982); *Grafton Spools, Ltd. v. United States*, 45 Cust. Ct. 16, 23, C.D. 2190 (1960); *United States v. Murray*, 621 F.2d 1163 (1st Cir. 1980); *Texas Instruments, Inc. v. United States,* 69 CCPA, (1982), 681 F.2d 778 (1982).

This case is distinguishable from the facts in HRL 560102. In the instant case, unmanufactured tobacco (classifiable in heading 2401, HTS) is imported into Italy. The primary operations in Italy will be cutting, blending and controlling the humidity of the tobacco. Upon importation into the United States, the blended tobacco is further processed as described above. As the Court stated in *Coastal States Marketing Inc. v. U.S.*, a tariff shift although not dispositive, is indicative of a substantial transformation. In the instant case, as discussed above, the product does not undergo a shift in its tariff classification in Italy. Furthermore, unlike the tobacco in HRL 560102 which underwent a tariff shift, the imported tobacco in the instant case is not ready for use upon importation. It requires further processing in the United States, including casing, blending, and flavoring, to obtain its final specific use. Therefore, the imported tobacco does not undergo a substantial transformation in Italy and thereby does not qualify as a product of Italy.

Holding:

Unmanufactured tobacco, including a blend of unmanufactured, stemmed, threshed burley and flue-cured tobacco, and unmanufactured, unstemmed, unthreshed oriental tobacco that requires further processing in the country of importation is properly classifiable in heading 2401, HTS. In this case, the applicable subheading for the "ABC Blend" if entered under quota, will be 2401.20.8590, HTSUS. If entered outside the quota, the applicable subheading will be 2401.20.8790, HTSUS.

For reasons stated above, the product at issue is not substantially transformed in Italy and therefore does not qualify as a product of Italy. Therefore, upon importation, the container holding the product must be marked with the appropriate countries of origin of the tobacco for the ultimate purchaser—the U.S. manufacturer.

Effect on Other Rulings:

NYRL C86085, Dated April 14, 1998, is hereby revoked. In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

CRAIG WALKER,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF COTTON BOOTIES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of two ruling letters and revocation of treatment relating to the tariff classification of certain cotton booties.

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 Customs is proposing to revoke two ruling letters related to the classification of certain cotton booties under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Similarly, Customs intends to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before October 11, 2002.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at U.S. Customs Service, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Teresa Frazier, Textile Branch (202) 572–8821.

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) (hereinafter "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 Customs 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 trade and Customs 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 provide any other information necessary to enable Customs 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 Customs intends to revoke two ruling letters relating to the classification of certain cotton booties. Although in this notice Customs is specifically referring to New York Ruling Letter (NY) E82597, dated June 11, 1999 and NY E85669, dated August 17, 1999, this notice covers any rulings on such merchandise which may exist but have not been specifically identified. Customs 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 issues subject to this notice, should advise Customs 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, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Any person involved in substantially identical transactions should advise Customs during the notice period. An importer's failure to advise Customs of the substantially identical transactions or of a specific ruling not identified in this notice, may raise the rebuttable presumption of lack 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 E82597, dated June 11, 1999, Customs classified a pair of pedicure booties in subheading 6217.10.9510, HTSUSA, which provides for "other made up clothing accessories; parts of garments or of clothing ac-

cessories, other than those of heading 6212; Accessories; Other: Other * * * Of cotton."

In NY E85669, dated August 17, 1999, 1999, which replaced NY E83136, dated June 21, 1999, Customs classified a cotton bootie which was imported separately for use within a paraffin bath unit in subheading 6217.10.9510, HTSUSA, which provides for "other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212; Accessories; Other: Other * * * Of cotton."

Customs has reviewed both of these rulings and, with regard to the classification of this merchandise, has determined that the rulings are in error. Accordingly, we intend to revoke NY E82597 and NY E85669, as we find that the cotton booties are classifiable in subheading 6307.90.9889, HTSUSA, which provides for "other made up articles * * * other * * * other."

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY E85669 and NY E82597 (see "Attachments A and B" to this document) and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in HQ 964828 and 964829 (see "Attachments C and D" to this document).

Additionally, pursuant to 19 U.S.C. 1625(c) (2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: August 21, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 17, 1999.

CLA–2–62:RR:NC:3:353 E85669
Category: Classification
Tariff No. 6217.10.9510

MS. CAROL RITCHINGS
CONAIR CORPORATION
150 Milford Road
East Windsor, NJ 08520

Re: The tariff classification of a cotton bootie from China.

DEAR MS. RITCHINGS:

Ruling NY 83136, dated June 21, 1999, contained a clerical error. Model PB10CB Cotton Bootie was said to fall within textile category designation 659, which was a typographical error. The ruling should have read textile category designation 359. The corrected ruling follows:

The item is a Model PB10CB Cotton Bootie, which is part of a Model PB10B Paraffin Bath Unit. The Bath Unit consists of Model PB10W Paraffin Bath Wax, Model PB10CM Cotton Mitts, Model PB10CB Cotton Bootie and Model PB10PL Plastic liners. You requested classification of the items imported separately, and together as part of the Bath Unit. The four items, imported separately, will be the subject of individual rulings. However, this office cannot classify the items imported as the Model PB10B Paraffin Bath Unit unless a ruling request is made to Customs accompanied by a sample of the Bath Unit, packaged, in its imported condition.

The submitted sample, a Model PB10CB Cotton Bootie, is constructed of woven 100% cotton terry fabric. It is shaped for the foot, has a single seam down the center, piped opening and a hook and loop closure on the inner upper front of the opening to help secure the bootie to the ankle.

The Explanatory Notes to 62.17 state, "The heading covers, *inter alia:* (12) Stockings, socks and sockettes (including those of lace) and footwear without an outer sole glued, sewn or otherwise affixed or applied to the upper, excluding babies' booties."

The applicable subheading for the Model PB10CB Cotton Bootie will be 6217.10.9510, Harmonized Tariff Schedule of the United States (HTS), which provides for "Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other * * * Of cotton." The duty rate will be 15% ad valorem.

The Model PB10CB Cotton Bootie falls within textile category designation 359. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information, we suggest that you check, close to the time of shipment, the *U.S. Customs Service Textile Status Report,* an internal issuance of the U.S. Customs Service, which is available at the Customs Web Site at WWW.CUSTOMS.USTREAS.GOV. In addition, the designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

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 Kenneth Reidlinger at 212–637–7084.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, June 11, 1999.

CLA–2–62:RR:NC:3:353 E82597
Category: Classification
Tariff No. 6217.10.9510

MR. RICK MOSLEY
KUEHNE & NAGEL INC.
101 Wrangler Dr., Suite 201
Coppell, TX 75019

Re: The tariff classification of pedicure booties from China.

DEAR MR. MOSLEY:

In your letter dated May 25, 1999 you requested a classification ruling.

The submitted sample is as pair of pedicure booties composed of woven 100% cotton terry cloth fabric. The booties are oversized and are sewn together with a single seam. They have piping at the ankle and a hook and loop closure.

The applicable subheading for the pedicure booties will be 6217.10.9510, Harmonized Tariff Schedule of the United States (HTS), which provides for "Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other, Of cotton." The duty rate will be 15% ad valorem.

The pedicure booties falls within textile category designation 359. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels),* an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

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 Kenneth Reidlinger at 212–637–7084.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 964828 TF
Category: Classification
Tariff No. 6307.90.9889

MR. RICK MOSLEY
KUEHNE & NAGEL, INC.
101 Wrangler Drive, Suite 201
Coppell, TX 75019

Re: Revocation of NY E82597; classification of pedicure booties from China.

DEAR MR. MOSLEY:

In NY E82597, dated June 11, 1999, Customs classified a pair of pedicure booties composed of 100% woven cotton terry cloth fabric in subheading 6217.10.9510, Harmonized Tariff Schedule of the United States Annotated, which provides for "other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other, Of cotton."

We have reviewed this ruling and found it to be in error. Therefore, this ruling revokes NY E82597.

Facts:

The submitted sample is as pair of pedicure booties composed of woven 100% cotton terry cloth fabric. The booties are oversized and are sewn together with a single seam. They have piping at the ankle and a hook and loop closure.

Issue:

What is the classification of the subject pedicure booties within the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. Where goods cannot be classified solely on the basis of GRI 1, and if the headings or notes do not require otherwise, the remaining GRIs, 2 through 6, may be applied.

Additionally, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) are 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 HTSUSA. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Heading 6217 provides for "other made up clothing accessories; parts of garments or of clothing accessories." There is no heading within the Tariff that expressly provides for the classification of the subject merchandise. Further, classification as a clothing accessory is classification based upon use and per Additional Rule of Interpretation 1(a), classification controlled by use is determined by the principal use in the United States of the item. In order to be classified as a clothing accessory of heading 6217, an article must be intended for use solely or principally as an accessory.

The term "accessory" is not defined in the tariff schedule or Explanatory Notes. *Merriam-Webster's New Collegiate Dictionary*, (10^{th} Edition), defines "accessory" as "a thing of secondary or subordinate importance;" or "an object or device not essential in itself but adding to the beauty, convenience, or effectiveness of something else." Customs defined accessory in Headquarters Ruling Letter HQ 088540, dated June 3, 1991, as an article that is related to the primary article, and intended for use solely or principally with a specific

article.[1] In heading 6217, HTSUSA, the primary article is clothing, and the accessories classifiable under this provision will be related to clothing, intended for use with clothing and of secondary importance to clothing.

EN 62.17 states that heading 6217 provides for "made up textile clothing accessories, **other than** knitted or crocheted, not specified or included in other headings of this Chapter or elsewhere in the Nomenclature." Thus, this heading is a "basket" provision, which is appropriate "only when there is no [other] tariff category which covers the merchandise more specifically." *See Apex Universal, Inc., v. United States*, CIT Slip Op. 98–69 (May 21, 1998). Therefore, we will consider the function of the subject booties as accessories.

In this instance, the subject pedicure booties do not work in conjunction with another article of clothing. Rather, they are designed to be a part of an activity (in this case, the activity is a pedicure). Further, we note that accessories of heading 6217 are used to enhance, adorn or complement articles of clothing. Therefore, where articles are used principally for other purposes, they are not classified in heading 6217.

It is the opinion of this office that the booties are not clothing accessories. They do not exhibit the relationship with clothing necessary to be considered accessories to clothing; they do not adorn or accent clothing. Further, their principal use is in conjunction with the paraffin wax as a heat container for keeping the feet warm, which helps the wax to ultimately soothe and soften the skin.

Customs has previously classified cotton booties as accessories of paraffin wax pedicure kits. For example, in NY F89312, dated July 20, 2000, Customs classified a Remington Paraffin Wax Heat Treatment System, which consisted of a plastic basin filled with wax and accessories (cotton mitt, cotton booties, plastic liner bags and terry cloth wrap) as a set put up for retail sale, if imported together, in subheading 8516.79.0000, HTSUSA, which provides for "electrothermic appliances of a kind used for domestic purposes, other electrothermic appliances, other." *See also* NY E87777, dated October 13, 1999, in which a paraffin bath kit, which consisted of a basin filled with paraffin wax and accessories (a cotton mitt, a cotton bootie, and plastic liner bags) was classified in subheading 8516.79.0000, HTSUSA.

As the articles do not function as accessories to clothing, they are excluded from classification in heading 6217, and since no other heading more specifically describes them, if imported separately, they are classified in heading 6307 which provides for "other made up articles of textile materials."

Holding:

NY E82597, dated June 11, 1999, is hereby revoked. At GRI 1, the pedicure booties are classified as "other made up articles * * * other * * * other" within subheading 6307.90.9889, HTSUSA. The general column one duty rate is seven percent *ad valorem*.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The *Status Report on Current Import Quotas (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at www.customs.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

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[1] *See also* HQ 089581, dated November 4, 1991 defines an accessory as not necessary to the functioning of the primary good; an adjunct; something subordinate or supplemental that must relate to or exhibit some nexus with the primary article.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 964829 TF
Category: Classification
Tariff No. 6307.90.9889

MS. CAROL RITCHINGS
CONAIR CORPORATION
150 Milford Road
East Windsor, NJ 08520

Re: Revocation of NY E85669; classification of a cotton bootie from China.

DEAR MS. RITCHINGS:

In NY E85669, dated August 17, 1999, Customs classified a cotton bootie composed of 100% woven cotton terry cloth fabric in subheading 6217.10.9510, Harmonized Tariff Schedule of the United States Annotated, which provides for "other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other, Of cotton."

We have reviewed this ruling and found it to be in error. Therefore, this ruling revokes NY E85669, which replaced NY E83136, dated June 21, 1999.

Facts:

The item, Model PB10CB Cotton Bootie, is constructed of woven 100% cotton terry fabric. It is shaped for the foot, has a single seam down the center, piped opening and a hook and loop closure on the inner upper front of the opening to help secure the bootie to the ankle. It is part of a Model PB10B Paraffin Bath Unit, which consists of Model PB10W Paraffin Bath Wax, Model PB10CM Cotton Mitts, Model PB10CB Cotton Bootie and Model PB10PL Plastic liners. However, the subject bootie is imported separately from the Bath Unit. A sample was provided for our review

Issue:

What is the classification of the subject cotton bootie within the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. Where goods cannot be classified solely on the basis of GRI 1, and if the headings or notes do not require otherwise, the remaining GRIs, 2 through 6, may be applied.

Additionally, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) are 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 HTSUSA. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Heading 6217 provides for "other made up clothing accessories; parts of garments or of clothing accessories." There is no heading within the Tariff that expressly provides for the classification of the subject merchandise. Further, classification as a clothing accessory is classification based upon use and per Additional Rule of Interpretation 1(a), classification controlled by use is determined by the principal use in the United States of the item. In order to be classified as a clothing accessory of heading 6217, an article must be intended for use solely or principally as an accessory.

The term "accessory" is not defined in the tariff schedule or Explanatory Notes. *Merriam-Webster's New Collegiate Dictionary*, (10th Edition), defines "accessory" as "a thing of secondary or subordinate importance;" or "an object or device not essential in itself but adding to the beauty, convenience, or effectiveness of something else." Customs defined accessory in Headquarters Ruling Letter HQ 088540, dated June 3, 1991, as an article that is related to the primary article, and intended for use solely or principally with a specific

article.[1] In heading 6217, HTSUSA, the primary article is clothing, and the accessories classifiable under this provision will be related to clothing, intended for use with clothing and of secondary importance to clothing.

EN 62.17 states that heading 6217 provides for "made up textile clothing accessories, **other than** knitted or crocheted, not specified or included in other headings of this Chapter or elsewhere in the Nomenclature." Thus, this heading is a "basket" provision, which is appropriate "only when there is no [other] tariff category which covers the merchandise more specifically." *See Apex Universal, Inc., v. United States*, CIT Slip Op. 98–69 (May 21, 1998). Therefore, we will consider the function of the subject bootie as an accessory.

In this instance, the subject cotton bootie does not work in conjunction with another article of clothing. Rather, it is designed to be a part of an activity (in this case, the activity is a pedicure). Further, we note that accessories of heading 6217 are used to enhance, adorn or complement articles of clothing. Therefore, where articles are used principally for other purposes, they are not classified in heading 6217.

It is the opinion of this office that the bootie is not a clothing accessory. It does not exhibit the relationship with clothing necessary to be considered an accessory to clothing; it does not adorn or accent clothing. Further, its principal use is in conjunction with the paraffin wax as a heat container for keeping the feet warm, which helps the wax to ultimately soothe and soften the skin.

Customs has previously classified cotton booties as accessories of paraffin wax pedicure kits. For example, in NY F89312, dated July 20, 2000, Customs classified a Remington Paraffin Wax Heat Treatment System, which consisted of a plastic basin filled with wax and accessories (cotton mitt, cotton booties, plastic liner bags and terry cloth wrap) as a set put up for retail sale, if imported together, in subheading 8516.79.0000, HTSUSA, which provides for "electrothermic appliances of a kind used for domestic purposes, other electrothermic appliances, other." *See also* NY E87777, dated October 13, 1999, in which a paraffin bath kit, which consisted of a basin filled with paraffin wax and accessories (a cotton mitt, a cotton bootie, and plastic liner bags) was classified in subheading 8516.79.0000, HTSUSA.

As the article does not function as an accessory to clothing, it is excluded from classification in heading 6217, and since no other heading more specifically describes it, if imported separately, it is classified in heading 6307 which provides for "other made up articles of textile materials."

Holding:

NY E85669, dated August 17, 1999 (which replaced NY E83136, dated June 21, 1999) is hereby revoked. At GRI 1, the cotton bootie is classified as an "other made up article[s] * * * other * * * other" within subheading 6307.90.9889, HTSUSA. The general column one duty rate is seven percent *ad valorem*.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The *Status Report on Current Import Quotas (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at www.customs.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

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[1] *See also* HQ 089581, dated November 4, 1991 defines an accessory as not necessary to the functioning of the primary good; an adjunct; something subordinate or supplemental that must relate to or exhibit some nexus with the primary article.

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF TOLONATE® HDB/HDT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of ruling letter and treatment relating to the tariff classification of Tolonate® HDB/HDT.

SUMMARY: 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 (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of Tolonate® HDB/HDT, under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed actions.

DATE: Comments must be received on or before October 11, 2002.

ADDRESS: Written comments are to be addressed to the U.S. Customs Service, Office of Regulations & Rulings. Attention: Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Comments submitted may be inspected at the U.S. Customs Service, 799 9th Street, N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Allyson Mattanah, General Classification Branch, (202) 572–8784.

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) (hereinafter "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 Customs 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 trade and Customs 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 us-

ing reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable Customs 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 (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of Tolonate® HDB/HDT. Although in this notice Customs is specifically referring to New York ruling (NY) 833598, dated January 4, 1989, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. This notice will cover any rulings on this merchandise that may exist but have not been specifically identified. Any party, who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this 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, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importation of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs 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 his agents for importation of merchandise subsequent to this notice.

In NY 833598 it was determined that Tolonate® HDB and HDT products were classifiable in subheading 3909.30.00, HTSUS, which provides for "[a]mino-resins, phenolic resins and polyurethanes, in primary forms: [o]ther amino resins." NY 833598 is set forth as Attachment A.

We now believe the merchandise is classified in subheading 3911.90.90, HTSUS, the provision for "[p]etroleum resins, coumarone-indene resins, polyterpenes, polysulfides, polysulfones and other products specified in note 3 to this chapter, not elsewhere specified or included, in primary forms: [o]ther: [o]ther." The merchandise is not formed by the condensation of condensation of amines or amides with aldehydes, thus it can not be classified as an amino resin. Nor is it produced by the reaction of polyfunctional isocyanates with polyhydroxy

compounds. While the instant merchandise will be reacted with polyhydroxy compounds after entry, the merchandise is not polyurethane at the time of entry into the U.S. Hence, the merchandise is not classifiable in heading 3909.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke NY 833598, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed HQ 965753 (Attachment B to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: August 26, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, January 4, 1989.

CLA–2–39:S::N:N1:238 833598
Category: Classification
Tariff No. 3909.30.0000

MR. RALPH C. MEOLA
RHONE-POULENC INC.
CN 5266
Princeton, NJ 08543–5366

Re: The tariff classification of eight chemical products from France.

DEAR MR. MEOLA:

In your letter dated August 19, 1988, you requested a tariff classification ruling on the following eight chemical products:

Tolonate® HDB	Tolonate® HDB 75 MX
Tolonate® HDB 75	Tolonate® HDB 75 B
Tolonate® HDB 75 BX	Tolonate® HDT
Tolonate® HDT 90	Tolonate® HDT 90 B

The applicable HTS subheading for these eight products will be 3909.30.0000, which provides for other amino-resins. The rate of duty will be 6.9 percent ad valorem.

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

This merchandise may be subject to the regulations of the Environmental Protection Agency, Office of Pesticides and Toxic Substances. You may contact them at 402 M Street, S.W., Washington, D.C. 20460, telephone number (800) 424–9086.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have already been filed, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 965753 AM
Category: Classification
Tariff No. 3911.90.90

MS. NORA H. BAHR
RHODIA, INC.
CN 7500
Cranbury, NJ 08512

Re: NY 833598 revoked: Tolonate HDB and HDT.

DEAR MS. BAHR:

This is in reference to New York Ruling Letter (NY) 833598, dated January 4, 1989, issued to Rhone-Poulenc Inc., concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of eight Tolonate HDB and HDT products. Rhone-Poulenc Inc. underwent a name change to Rhodia, Inc. in 1998. In NY 833598, it was determined that Tolonate HDB and HDT products were classifiable in subheading 3909.30.00, HTSUS, which provides for "[a]mino-resins, phenolic resins and polyurethanes, in primary forms: [o]ther amino resins."

We have reconsidered NY 833598, and find the classification for the subject merchandise in NY 833598 to be incorrect.

Facts:

The subject merchandise Tolonate® HDB, HDB75, HDB75BX, HDB75MX, HDB75B, HDT, HDT 90 and HDT90B is a straw colored liquid consisting of polyurea prepolymer manufactured from the 1,6-hexamethylene diisocyanate. The merchandise are low molecular weight (average Mw 900–1100) thermosetting isocyanate pre-polymers used in the manufacture of polyurethane foam products.

Issue:

Is the instant merchandise an amino resin or a thermosetting prepolymer?

Law and Analysis:

Merchandise imported into the U.S. 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 that 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.

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 order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs.

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 following HTSUS provisions are relevant to the classification of this product:

3909 Amino-resins, phenolic resins and polyurethanes, in primary forms:

* * * * * * *

3911 Petroleum resins, coumarone-indene resins, polyterpenes, polysulfides, polysulfones and other products specified in note 3 to this chapter, not elsewhere specified or included, in primary forms:

Note 3 to Chapter 39 states the following:

Headings 3901 to 3911 apply only to goods of a kind produced by chemical synthesis, falling in the following categories:

(a) Liquid synthetic polyolefins of which less than 60 percent by volume distills at 300°C, after conversion to 1,013 millibars when a reduced-pressure distillation method is used (headings 3901 and 3902);

(b) Resins, not highly polymerized, of the coumarone-indene type (heading 3911);
(c) Other synthetic polymers with an average of at least five monomer units;
(d) Silicones (heading 3910);
(e) Resols (heading 3909) and other prepolymers.

The EN to heading 3909, HTSUS, states, in pertinent part, the following:

This heading covers:

(1) Amino-resins

These are formed by the condensation of amines or amides with aldehydes (formaldehyde, furfuraldehyde, etc.). The most important are urea resins (for example, urea-formaldehyde), thiourea resins (for example, thiourea-formaldehyde), melamine resins (for example, melamine-formaldehyde) and aniline resins (for example, aniline-formaldehyde).

* * * * * * *

(3) Polyurethanes

This class includes all polymers produced by the reaction of polyfunctional isocyanates with polyhydroxy compounds, such as, castor oil, butane-1,4-diol, polyether polyols, polyester polyols. Polyurethanes exist in various forms, of which the most important are the foams, elastomers, and coatings. They are also used as adhesives, moulding compounds and fibres.

The instant merchandise is not formed by the condensation of amines or amides with aldehydes, thus it can not be classified as an amino resin. Nor is it produced by the reaction of polyfunctional isocyanates with polyhydroxy compounds. While the instant merchandise will be reacted with polyhydroxy compounds after entry, the merchandise is not polyurethane at the time of entry into the U.S. Hence, the merchandise is not classifiable in heading 3909.

Rather, the merchandise is described in Chapter 39, note 3(e), HTSUS, as an "other prepolymer." Specifically, this merchandise is classifiable in subheading 3911.90.90, HTSUS, the provision for "[p]etroleum resins, coumarone-indene resins, polyterpenes, polysulfides, polysulfones and other products specified in note 3 to this chapter, not elsewhere specified or included, in primary forms: [o]ther: [o]ther."

Holding:

Tolonate® HDB/HDT is classifiable in subheading 3911.90.90, HTSUS, the provision for "[p]etroleum resins, coumarone-indene resins, polyterpenes, polysulfides, polysulfones and other products specified in note 3 to this chapter, not elsewhere specified or included, in primary forms: [o]ther; [o]ther."

Effect on Other Rulings:

NY 833598 is revoked.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF A CHILDREN'S INFLATABLE BED TENT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of ruling letter and treatment relating to tariff classification of a children's inflatable bed tent.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (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 Customs is revoking one ruling pertaining to the tariff classification of a children's inflatable bed tent under the Harmonized Tariff Schedule of the United States ("HTSUS"). Similarly, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. Customs invites comments on the correctness of the proposed action.

DATE: Comments must be received on or before October 11, 2002.

ADDRESS: Written comments are to be addressed to the U.S. Customs Service, Office of Regulations & Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs Service, 799 9th Street, NW, Washington, D.C during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Deborah Stern, General Classification Branch (202) 572–8785.

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), (hereinafter "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 Customs 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 trade and Customs 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 provide any other information necessary to enable Customs 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, as amended (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke one ruling letter pertaining to the tariff classification of a children's inflatable bed tent. Although in this notice Customs is specifically referring to one ruling (NY G88728), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No additional rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or to the importer's or Customs' previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs 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 notice of the proposed action.

In NY G88728, dated April 19, 2001 (Attachment A), a children's inflatable bed tent was classified as a tent of synthetic fibers in subheading 6306.22.90, HTSUS, which provides for "Tarpaulins, awnings and sunblinds; tents; sails for boats, sailboards or landcraft; camping goods: tents: of synthetic fibers: other." The product is comprised of a polyester cover with eight mesh panels, two of which are in the roof, and an inflatable base, over which the cover fits to create an enclosure. The inflatable portion consists of a mattress-type bottom, which measures roughly the size of a twin bed, and a tent frame. Upon reconsideration, we are of the opinion that the inflatable bed tent does not provide the minimal protection from the elements required of a tent of heading 06306, HTSUS, due to the mesh panels on the roof, lack of rain flaps, and lack of ability to seal the tent.

It is now Customs position that the children's inflatable bed tent is of a class or kind of merchandise classifiable as a toy in subheading 9503.90.00, HTSUS, because it is designed and principally used for chil-

dren's amusement. Although its size suggests otherwise, the unique structure of the inflatable base, which is both mattress and frame combined in a single unit, makes this article impractical as a bed. Further, the design and marketing are as a play tent, and Customs has previously classified similar tent-like articles that attach to beds as toys of heading 9503, HTSUS.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY G88728 and any other ruling not specifically identified, to reflect the proper classification of the subject merchandise or substantially similar merchandise, pursuant to the analysis set forth in HQ 965202 (Attachment B). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical merchandise. Before taking this action, we will give consideration to any written comments timely received.

Dated: August 27, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, April 19, 2001.
CLA–2–63:RR:NC:TA:351 G88728
Category: Classification
Tariff No. 6306.22.9030

MS. DONNA VAN DEN BROEKE
KAMINO INTERNATIONAL TRANSPORT, INC.
514 Eccles Ave.
So San Francisco, CA 94080

Re: The tariff classification of an "Inflatable Kid's Bed Tent" from China.

DEAR MS. VAN DEN BROEKE:

In your letter dated March 23, 2001, on behalf of Northpole USA, you requested a classification ruling. The sample is being returned as requested.

The sample submitted is an "Inflatable Kid's Bed Tent". The article consists of a textile enclosure and a plastic inflatable base. The textile enclosure is made of woven fabric panels, open worked knit fabric panels and plastic sheeting panels. The panels are sewn together to create the enclosure and has a hook and loop fastener opening to permit entry inside the unit. The inside lower corners each have an elastic strap to attach the enclosure onto the plastic inflatable base. The inside top, at set intervals, features textile straps with hook and loop fasteners. The base is composed of PVC material and inflates on one side.

The applicable subheading for the "Inflatable Kid's Bed Tent" will be 6306.22.9030, Harmonized Tariff Schedule of the United States (HTS), which provides for tents, of synthetic fibers, other, other. The duty rate will be 9.2 percent ad valorem.

The "Inflatable Kid's Bed Tent" falls within textile category designation 669. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information, we suggest that you check, close to the time of shipment, the U.S. Customs Service Textile Status Report, an internal issuance of the U.S. Customs Service, which is available at the Customs Web site at www.customs.gov. In addition, the designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

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 Mitchel Bayer at 212–637–7086.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 965202 DBS
Category: Classification
Tariff No. 9503.90.00

MR. JAMES C. MCKELVEY
NORTH POLE, INC.
3333 Yale Way
Fremont, CA 94538–6169

Re: Inflatable Air Bed Play Tent; *Ero Industries, Inc. v. United States*, 118 F. Supp. 2d 1356 (Ct. Int'l Trade 2000); NY G88728.

DEAR MR. MCKELVEY:

This is in response to your letter, dated June 28, 2001, requesting reconsideration of NY Ruling Letter (NY) G88728, issued to a customs broker on behalf of North Pole, Inc. on April 19, 2001, which classified a children's inflatable air bed tent in subheading 6306.22.90, Harmonized Tariff Schedule of the United States (HTSUS), as a textile tent. We have reviewed that ruling and, based in part on information obtained from your representatives during a teleconference, now believe it is incorrect.

Facts:

The merchandise at issue, the "Inflatable Air Bed Play Tent," (inflatable bed tent) consists of a polyvinyl chloride (PVC) inflatable base and textile (polyester and mesh) enclosure/covering. The base is a single inflatable unit comprised of a mattress-type bottom and a tent frame. The textile covering is draped over the frame and attached to the base with elastic loops to create an enclosure. The mattress part of the base measures 72 inches long by 32 inches wide. The tent frame measures 34 inches from the top of the bed to the peak of the interior. The textile cover is comprised of polyester panels of various colors sewn together with eight mesh panels, two on the front, back and top, and one at each end, and plastic sheeting panels. There are no flaps to cover the mesh. The cover's opening can be closed with hook and loop patches. Product advertisements state the inflatable bed tent provides "hours of creative fun" and is for "indoor use or backyard play time."

In a teleconference, your representatives provided us with information regarding the development of this product. The product was designed to be a play tent, providing amusement by the enclosure. The tent was designed on an inflatable base both for children to bounce around and to provide parents with a product that could be deflated and stowed. We were also informed that the polyester portion of the cover is treated with a water repellant coating.

Issue:

Whether the inflatable air bed play tent is classifiable as a toy of heading 9503, HTSUS, or a tent, classifiable by constituent material, in heading 6306, 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 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 may then be applied.

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

The HTSUS provisions under consideration are as follows:

6306	Tarpaulins, awnings and sunblinds; tents; sails for boats, sailboards or landcraft; camping goods:
	Tents:
6306.22	Of synthetic fibers:
6306.22.90	Other
* * * * * * *	
9503	Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof:
9503.90.00	Other

The term "tent" is not defined in the HTSUS. However, the ENs for heading 6306, HTSUS, provide, in part, as follows:

> Tents are shelters made of lightweight to fairly heavy fabrics of man-made fibres, cotton or blended textile materials, whether or not coated, covered or laminated, or of canvas. They usually have a single or double roof and sides or walls (single or double), which permit the formation of an enclosure. The heading covers tents of various sizes and shapes, e.g., marquees and tents for military, camping (including backpack tents), circus, beach use. They are classified in this heading, whether or not they are presented complete with their tent poles, tent pegs, guy ropes or other accessories.

Although the term "tents" has been broadly construed by Customs to encompass many types of tents, all merchandise classifiable in that heading must provide a minimum threshold of protection against the elements. Simply stated, all tents classifiable in heading 6306, HTSUS, must be designed for outdoor use and provide some sort of shelter, albeit minimal. *See, e.g.,* HQ 962147, dated April 6, 1999 (classifying duck blinds for hunters in heading 6306 because it was "of a class or kind of merchandise" classified in heading 6306); HQ 962408, dated December 17, 1998 (classifying a tent-like attachment for a mattress in heading 9503). We have stated that a tent of heading 6306, HTSUS, need not be fully enclosed and need not protect against *extremes* in weather. HQ 951774, dated May 28, 1992 (classifying a sun/windscreen shelter in heading 6306); HQ 953684, dated April 26, 1993 (classifying a cabana in heading 6306); and HQ 951814, dated September 8, 1992 (classifying a tent-like structure for protection from wind and sun on the beach or camping in heading 6306).

We found that the tent-like article at issue in HQ 962408 did not provide minimum protection against the elements because the fabric was of flimsy construction and would not be suitable or appropriate for outdoor use, and the openwork windows, which are not designed with any rain flaps, would expose the whole enclosure to wind, sun and rain. *See also* HQ 954239, dated September 14, 1993 (classifying a similar article outside of heading 6306 because of flimsy construction and mesh "sunroofs"). Similarly, two of the instant article's eight mesh panels are located in the roof, but the product has no protective flaps. Further, the entrance is secured only with hook and loop patches rather than zippers, as are used in most camping tents to seal the tent closed. We find the instant article does not provide a minimum threshold of protection against the elements. Contrary to NY G88728, this article cannot be classified as a tent of heading 6306, HTSUS.

You claim the inflatable bed tent is a play tent and that it is classifiable as a toy of heading 9503, HTSUS. The term "toy" is not defined in the HTSUS. However, the general EN for Chapter 95, HTSUS, states that the "Chapter covers toys of all kinds whether designed for the amusement of children or adults." Although nothing in heading 9503, HTSUS, or the relevant chapter notes explicitly states that an item's classification as a "toy" is dependent upon its use, the Court of International Trade has found inherent in various dictionary definitions of "toy" the notion that an object is a toy only if it is designed and used for amusement, diversion or play, rather than practicality. *See Minnetonka Brands, Inc. v. United States*, 110 F. Supp. 2d 1020, 1026 (CIT 2000).

Because heading 9503, HTSUS, is, in relevant part, a principal use provision, classification under this provision is controlled by the principal use "of goods of that class or kind to which the imported goods belong" in the United States at or immediately prior to the date of importation. Additional U.S. Rule of Interpretation 1(a), HTSUS. *See also Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1365 (Fed. Cir. 1999). Factors considered when determining whether merchandise falls within a particular class or kind include: general physical characteristics, the expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. *United States v. Carborundum Company*, 536 F. 2d 373 (CCPA 1976), *cert. denied*, 429 U.S. 979.

EN 95.03 (22) includes "Play tents for use by children indoors or outdoors." Thus, play tents are toys. In *Ero Industries, Inc. v. United States*, 118 F. Supp. 2d 1356 (Ct. Int'l Trade 2000) (*Ero*), the court considered the classification of "tent-like articles" (playhouses, play tents and vehicle tents) made of a vinyl shell and a supporting framework of interconnected elastic-corded PVC poles and connectors with colorfully imprinted on the exterior licensed copyrighted and trademarked graphics depicting various fictional children's characters and images. It held that all of the merchandise was play tents, classifiable as toys of heading 9503, HTSUS. The *Ero* court stated, "It is beyond peradventure that young children derive "amusement" * * * from the function of the imports to enclose the child while "playing fort," "playing house," playing "hide-and-seek."" 118 F. Supp. 2d at 1360.

In HQ 954239 and HQ 962408, *supra* at 3, we classified other tent-like products, which consisted of textile and poles designed to fit over twin-sized beds, as toy of heading 9503, HTSUS. As explained above, neither was classifiable as tents of heading 6306, HTSUS, because both lacked minimum protection against the elements, and, since they were designed with elastic loops to attach to a mattress, were not intended for outdoor use. It is noted that play tents need not be limited to indoor use, especially since the addition of EN 95.03 (22), *supra* at 4.

You contend that the *Ero* decision controls the classification of the instant product, and that it is a play tent. We recently reviewed the *Ero* decision and discussed the scope of the decision with respect to heading 6306, HTSUS, in HQ 964897, dated August 13, 2002. Though we find *Ero* instructive in ruling out heading 6306, HTSUS, in this case, it does not control the classification of the instant product because the composition and size of the inflatable bed tent is dissimilar from merchandise subject to *Ero*. The product is uniquely comprised in part of an inflatable base, which is both a "bed" and the frame for the "tent." Additionally, the "bed" portion of the inflatable component is 72 inches long and 32 inches wide, only slightly smaller than a standard twin-sized mattress, which measures 74 inches long and 39 inches wide. The name of the product includes the word "bed," indicating the product was intended to be, at least in part, a bed.

Thus, "when amusement and utility become locked in controversy, the question becomes one of determining whether the amusement is incidental to the utilitarian purpose, or the utility purposes incidental to the amusement." *Ideal Toy Corp. v. United States*, 78 Cust. Ct. 28, C.D. 4688 (1977) (holding that a baby playfloat was classifiable as a toy since the practical use of the device to support a child in water was incidental and the merchandise was essentially for the child's amusement). The frame presents an impediment to fitting the mattress portion with sheets, a factor that conflicts with the product being principally designed to be a bed. The product is not identical to the tent-like articles classified in HQ 954239 and HQ 962408 because it is not designed to attach to a real bed and is not limited to inside use. However, the cover is designed to fit the inflatable frame and is attached to the "bed" part with elastic loops, as were the play tents in those rulings. And, as stated above, play tents need not be solely designed for use indoors.

The product literature advertises "hours of creative fun," and "indoor use and outdoor play time" which, according to the *Ero* court, suggests "cognitive amusement rather than somnolence or napping." *Id* at 1363. The literature also includes a parental supervision warning for when children are using it, which also suggests that the product was not designed for sleeping. According to your representative, the product was designed with an inflatable base for children to be able to bounce around, the product was tested by children in such a manner.

The marketing and channels of trade are geared towards children. The physical characteristics make use of the product as a bed impractical. And the product is a brightly colored enclosure not useable as a shelter. Moreover, the product is similar to other articles previously classified as toys. It is evident that this product, though distinct from other play tents classified in heading 9503, HTSUS, because of its inflatable base, is designed and intended to be used in the same manner as a play tent. Therefore, its principal use is amusement. According to the factors set forth in *Carborundum*, the inflatable bed tent is of a class or kind of merchandise classifiable as a toy in heading 9503, HTSUS. According to Additional U.S. Rule of Interpretation 1(a) and GRI 1, it is classifiable in subheading 9503.90.00, HTSUS.

Holding:

The "Inflatable Air Bed Play Tent" is classifiable in subheading 9503.90.00, HTSUS, which provides for, "Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof: other."

Effect on Other Rulings:

NY G88728, dated April 19, 2001, is hereby REVOKED.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

REVOCATION AND MODIFICATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN AGGLOMERATED STONE SLABS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation and modification of ruling letters and revocation of treatment relating to the tariff classification of agglomerated stone slabs under the 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 Customs is revoking a ruling, modifying another ruling and is revoking any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of certain agglomerated stone slabs. Notice of the proposed revocation was published on July 24, 2002, in Vol. 36, No. 30 of the CUSTOMS BULLETIN. No comments were received.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 11, 2002.

FOR FURTHER INFORMATION CONTACT: Andrew M. Langreich, General Classification Branch: (202) 572–8776.

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) (hereinafter "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 Customs 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 trade and Customs 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 provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, notice proposing to revoke New York Ruling Letter (NY) E89493, dated February 7, 2000, and to modify NY F82849, dated June 8, 2000, both which pertain (in the case of NY F82849, in pertinent part) to the tariff classification of agglomerated stone slabs, was published on July 24, 2002, in Vol. 36, No. 30 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

As stated in the proposed notice, the revocation and modification actions will cover any rulings on this merchandise that may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. § 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions

should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice, may raise the rebuttable presumption of lack of reasonable care on the part of the importers or their agents for importations of merchandise subsequent to the effective date of this final decision.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking NY E89493 and is modifying NY F82849, and any other ruling not specifically identified, to reflect the proper classification of certain agglomerated stone slabs under subheading 6810.99.00, HTSUS, which provides for other articles of artificial stone, pursuant to the analysis in Headquarters Ruling Letters (HQs) 965585 (which modifies NY F82849) and HQ 965586 (which revokes NY E89493), which are set forth as Attachments A and B to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

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

Dated: August 27, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 27, 2002.

CLA–2 RR:CR:GC 965585 AML
Category: Classification
Tariff No. 6810.99.00

MR. PAUL MEYER
NIK AND ASSOCIATES
800 South Hindry Avenue
Unit A
Inglewood, CA 90301

Re: "Silestone" agglomerated stone slabs; NY F82849 modified.

DEAR MR. MEYER:

This is in regard to New York Ruling Letter (NY) F82849, dated June 8, 2000, issued to you on behalf of European Natural Stone Co., concerning the classification of various "Silestone" articles which were classified as agglomerated stone slabs and tiles and agglomerated glass slabs and tiles. In NY F82849, agglomerated stone slab, among other articles not relevant to this decision, were classified under subheading 6810.19.50, Harmonized Tariff Schedule of the United States (HTSUS), which provides for articles of * * * artificial stone * * * tiles, flagstones, bricks and similar articles: other: other. We have

reviewed NY F82849 and determined that its conclusion concerning agglomerated stone slab is incorrect. This ruling sets forth the correct classification of the agglomerated stone slab.

Pursuant to section 625(c)(1), 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), notice of the proposed modification of NY F82849 was published on July 24, 2002, in Vol. 36, No. 30 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

Facts:

NY F82849 set forth the facts under consideration, in pertinent part, as follows:

> The subject article, which is identified as "Silestone", is a slab or tile that is composed of natural stone agglomerated with plastics resin or glass agglomerated with plastics resin. An analysis of a few illustrative samples by our Customs laboratory was not inconsistent with [that] description.
>
> When the product is an agglomerated stone slab, the applicable subheading will be 6810.19.50, HTSUS, which provides for articles of stone, whether or not reinforced: tiles, flagstones, bricks and similar articles: other: other.

Issue:

Whether the agglomerated stone slabs at issue are classifiable as articles of cement, of concrete or of artificial stone, whether or not reinforced: tiles, flagstones, bricks and similar articles: other: floor and wall tiles: of stone agglomerated with binders other than cement: under subheading 6810.19.50, HTSUS, or as other articles of artificial stone under subheading 6810.99.00, 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 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 may then be applied. GRI 6 provides that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, by appropriate substitution of terms, to GRIs 1 through 5, on the understanding that only subheadings at the same level are comparable.

The HTSUS provisions under consideration are as follows:

6810	Articles of cement, of concrete or of artificial stone, whether or not reinforced:
	Tiles, flagstones, bricks and similar articles:
6810.19	Other:
	Floor and wall tiles:
6810.19.12	Of stone agglomerated with binders other than cement:
6810.19.50	Other.
	Other articles:
6810.99.00	Other.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise. Customs believes the ENs should always be consulted. See T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The agglomerated stone slabs are *prima facie* classifiable in Chapter 68, which provides for, *inter alia*, stone, plaster, cement, asbestos, mica or similar materials. The General ENs to Chapter 68 provide, in pertinent part, as follows:

> Some of the goods [included in Chapter 68] may be agglomerated by means of binders, contain fillers, be reinforced, or in the case of products such as abrasives or mica be put up on a backing or support of textile material, paper, paperboard or other materials.
>
> Most of these products and finished articles are obtained by operations (*e.g.*, shaping, moulding), which alter the form rather than the nature of the constituent materi-

> al. Some are obtained by agglomeration (*e.g.*, articles of asphalt, or certain goods such as grinding wheels which are agglomerated by vitrification of the binding material); others may have been hardened in autoclaves (sand-lime bricks). The Chapter also includes certain goods obtained by processes involving a more radical transformation of the original raw material (*e.g.*, fusion to produce slag wool, fused basalt, etc.).

Within Chapter 68, heading 6810, HTSUS, provides for, among other things, articles of artificial stone. Additional U.S. Note 2 to Chapter 68, HTSUS, states that "for the purposes of heading 6810, the term "tiles" does not include any article 3.2 cm or more in thickness."

The ENs to heading 6810 provide, in pertinent part, as follows:

> Artificial stone is an imitation of natural stone obtained by agglomerating pieces of natural stone or crushed or powdered natural stone (limestone, marble, granite, porphyry, serpentine, etc.) with lime or cement or other binders (*e.g.*, plastics). Articles of artificial stone include those of "terrazzo", "granito", etc.

At issue is whether the articles in question should be considered to be raw materials that will be further worked following importation that cannot be considered to be tiles, bricks, flagstones, etc. as described by subheading 6810.19.50, HTSUS. Therefore, in accordance with GRI 6 above, we must determine whether the articles are similar to tiles, flagstones and bricks, classifiable in the first subprovision of heading 6810, HTSUS, or as other articles in the basket provision at the same level.

In Headquarters Ruling Letter 084608, dated August 24, 1989, in determining the classification of, among other things, agglomerated stone counter tops, we consulted various sources concerning the meaning of the terms "tiles" and "flagstones". (A tariff term that is not defined in the HTSUS or in the ENs is construed in accordance with its common and commercial meaning. *Nippon Kogaku (USA) Inc. v. United States*, 69 CCPA 89, 673 F.2d 380 (1982). See also *C.J. Tower & Sons v. United States*, 69 CCPA 128, 673 F.2d 1268 (1982) and *Hasbro Industries, Inc. v. U.S.*, 703 F. Supp. 941 (CIT 1988), aff'd, 879 F.2d 838 (1989)) We concluded in HQ 084608 that counter tops and channel systems made of agglomerated, artificial stone were classified under subheading 6810.99.00, HTSUS, as articles of cement, of concrete or of artificial stone, whether or not reinforced, other articles, other.

In HQ 085410, dated January 4, 1990, we addressed the Additional U.S. Notes to Chapter 68 vis-à-vis the size criteria for tiles and slabs in headings 6802 and 6810, HTSUS. We declined to adopt an absolute standard regarding the dimensions of such articles, in essence deciding to classify such articles on a case-by-case basis. We stated in this regard as follows:

> [W]e agree that the terms of Chapter 68, and indeed the entire tariff schedule, must be considered in *pari materia*, and that all the terms of the schedule must have meaning. However, we are of the opinion that the Additional U.S. Notes apply only to the tariff heading to which the notes, by their terms, refer. Despite your contention to the contrary, the drafters of the HTSUSA clearly manifested their intent to restrict the definitions of the terms "slab" and "tile" by referring to a specific heading in each note. It is our opinion that a rigid, uniform application of a "tile" or "slab" definition throughout the chapter was not, and is not, contemplated by the Nomenclature.
>
> * * * * * * *
>
> [W]e are of the opinion that the term "tiles" does not encompass articles which are so large that they cannot rationally be considered "tiles". It was in this light that we compared the large building components to the "slabs" of heading 6802, and found them to be *ejusdem generis*. We did not, as your letter suggests, purport to make the concept of "slabs" in heading 6802, HTSUSA, "applicable with equal force to the classification of 'artificial stone' articles in HTS 6810". Our intent was simply to illustrate that larger articles are contemplated by the Nomenclature. In terms of heading 6810, those types of articles are properly classified as items "other" than tiles.
>
> * * * * * * *
>
> We did not, nor do we now, intend to specify precise dimensions or surface areas which will define "tiles" and "other" articles for the purposes of heading 6810, HTSUSA, other than those found in the relevant Legal Notes. In our opinion, the principal use of the term "tile(s)" in the stone or similar industries, is in reference to products having sides which measure up to 18 inches. Again, we are not prescribing absolute limits or dimensions in this regard. However, given these general guidelines, it is clear that articles such as the small building components addressed in your original request would be considered a "tile" in the stone trade, and they are classified as such.

We note that the Court of International Trade (in *Blakley Corp. v. United States*, 22 CIT 635, 15 F. Supp. 2d 865 (CIT 1998)) considered the definition of the terms "tile" and "slab" in Additional U.S. Note 1 of Chapter 68, and, in reaching the same conclusion regarding the Additional U.S. Note, gave imprimatur to the conclusions made in HQ 085410.

There is evidence that the instant merchandise will be further worked following importation into various kitchen counter tops, vanities and fireplace surrounds. The articles at issue are of substantial size, approximately 4 feet by 10 feet and presumably weigh a significant amount. We conclude that they cannot, in their condition as imported, be construed to be tile, flagstone or brick or similar articles. The terms tile, flagstone or brick connote articles that can easily be manipulated by hand and arranged, fixed or set in place to collectively comprise a floor, ceiling, wall or structure. The articles at issue, in their condition as imported, are unwieldy and cannot be likened to the articles contemplated within subheading 6810.19.50, HTSUS.

We liken the slabs of agglomerated stone to goods presented in material lengths that must be further worked prior to installation. In such instances, there is no recognizable article and the material length is precluded from classification as a part, even though the material may be dedicated for making the individual articles. *Avins Industrial Products Co. v. United States*, 515 F.2d 782 (CCPA 1975). In HQ 955346, dated February 9, 1994, which concerned the classification of coils of stainless steel curved wire designed for the manufacture of piston rings for automobile engines, we stated that:

> [u]nder a longstanding Customs principle, goods which are material when entered are not classifiable as a particular article unfinished. See *Sandvik Steel, Inc. v. U.S.*, 321 F.Supp. 1031, 66 Cust. Ct. 12, C.D. 4161 (1971) (shoe die knife steel in coils and cutting rules in lengths, without demarcations for cutting or bending, held to be material rather than unfinished knives or cutting blades); *The Harding Co. v. U.S.*, 23 Cust. Ct. 250 (1936) (rolls of brake lining held to be material because the identity of the brake lining was not fixed with certainty*); Naftone, Inc. v. U.S.*, 67 Cust. Ct. 340, C.D. 4294 (1971) (rolls of plastic film without demarcations for cutting despite having only one use held to be insulating material). See also HQ 952938, dated August 4, 1993, and HQ 084610, dated May 17, 1990.

Therefore, at GRI 6, the instant slabs of agglomerated stone are considered to be goods imported in material form. They are not similar to tiles, flagstones or bricks, but rather are other articles of artificial stone.

Holding:

Under the authority of GRI 6, the agglomerated quartz slabs are classified under subheading 6810.99.00, HTSUS, which provides for other articles of artificial stone.

Effect on Other Rulings:

NY F82849 is modified. In accordance with 19 U.S.C. §1625 (c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 27, 2002.

CLA–2 RR:CR:GC 965586 AML
Category: Classification
Tariff No. 6810.99.00

MR. NORMAN STONE
HALSTEAD INTERNATIONAL
289 Greenwich Avenue
Greenwich, CT 06830

Re: "Topstone Granyte" agglomerated stone slabs; NY E89493 revoked.

DEAR MR. STONE:

This is in regard to New York Ruling Letter (NY) E89493, issued to you on February 7, 2000, concerning the classification of "Topstone Granyte" agglomerated stone slabs. In NY E89493, the agglomerated stone slab, imported in 1200 millimeter (mm) by 3000 mm (approximately 4 feet by 10 feet) pieces, was classified under subheading 6810.19.50, Harmonized Tariff Schedule of the United States (HTSUS), which provides for articles of * * * artificial stone * * * tiles, flagstones, bricks and similar articles: other: other. We have reviewed NY F89493 and determined that its conclusion concerning the classification of agglomerated stone slab is incorrect. This ruling sets forth the correct classification.

Pursuant to section 625(c)(1), 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), notice of the proposed revocation of NY E89493 was published on July 24, 2002, in Vol. 36, No. 30 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

Facts:

NY E89493 set forth the facts under consideration, in pertinent part, as follows:

> The subject article, which is identified as "Topstone Granyte", is a square piece of cut stone that is gray in texture and surface polished. It measures approximately 10 cm square and 1.2 cm thick. You stated that this product will be imported in a slab size (1200 mm x 3000 mm).
>
> You indicated in your letter that this item is composed of natural stone agglomerated with plastic resin. An analysis of the sample by our Customs laboratory was consistent with your description.

Issue:

Whether the agglomerated stone slabs at issue are classifiable as articles of cement, of concrete or of artificial stone, whether or not reinforced: tiles, flagstones, bricks and similar articles: other: floor and wall tiles: of stone agglomerated with binders other than cement: under subheading 6810.19.50, HTSUS, or as other articles of artificial stone under subheading 6810.99.00, 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 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 may then be applied. GRI 6 provides that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, by appropriate substitution of terms, to GRIs 1 through 5, on the understanding that only subheadings at the same level are comparable.

The HTSUS provisions under consideration are as follows:

6810	Articles of cement, of concrete or of artificial stone, whether or not reinforced:
	Tiles, flagstones, bricks and similar articles:
6810.19	Other:
	Floor and wall tiles:

6810.19.12		Of stone agglomerated with binders other than cement:
6810.19.50	Other.	
	Other articles:	
6810.99.00	Other.	

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise. Customs believes the ENs should always be consulted. See T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The agglomerated stone slabs are *prima facie* classifiable in Chapter 68, which provides for, *inter alia*, stone, plaster, cement, asbestos, mica or similar materials. The General ENs to Chapter 68 provide, in pertinent part, as follows:

> Some of the goods [included in Chapter 68] may be agglomerated by means of binders, contain fillers, be reinforced, or in the case of products such as abrasives or mica be put up on a backing or support of textile material, paper, paperboard or other materials.
>
> Most of these products and finished articles are obtained by operations (*e.g.*, shaping, moulding), which alter the form rather than the nature of the constituent material. Some are obtained by agglomeration (*e.g.*, articles of asphalt, or certain goods such as grinding wheels which are agglomerated by vitrification of the binding material); others may have been hardened in autoclaves (sand-lime bricks). The Chapter also includes certain goods obtained by processes involving a more radical transformation of the original raw material (*e.g.*, fusion to produce slag wool, fused basalt, etc.).

Within Chapter 68, heading 6810, HTSUS, provides for, among other things, articles of artificial stone. Additional U.S. Note 2 to Chapter 68, HTSUS, states that "for the purposes of heading 6810, the term "tiles" does not include any article 3.2 cm or more in thickness."

The ENs to heading 6810 provide, in pertinent part, as follows:

> Artificial stone is an imitation of natural stone obtained by agglomerating pieces of natural stone or crushed or powdered natural stone (limestone, marble, granite, porphyry, serpentine, etc.) with lime or cement or other binders (*e.g.*, plastics). Articles of artificial stone include those of "terrazzo", "granito", etc.

In response to a protest concerning similar articles, we have reexamined whether the articles in question should be considered to be raw materials that cannot be considered to be tiles, bricks, flagstones, etc. as described by subheading 6810.19.50, HTSUS. Therefore, in accordance with GRI 6 above, we must determine whether the articles are similar to tiles, flagstones and bricks, classifiable in the first subprovision of heading 6810, HTSUS, or as other articles in the basket provision at the same level.

In Headquarters Ruling Letter 084608, dated August 24, 1989, in determining the classification of, among other things, agglomerated stone counter tops, we consulted various sources concerning the meaning of the terms "tiles" and "flagstones". (A tariff term that is not defined in the HTSUS or in the ENs is construed in accordance with its common and commercial meaning. *Nippon Kogaku (USA) Inc. v. United States*, 69 CCPA 89, 673 F.2d 380 (1982). See also *C.J. Tower & Sons v. United States*, 69 CCPA 128, 673 F.2d 1268 (1982) and *Hasbro Industries, Inc. v. U.S.*, 703 F. Supp. 941 (CIT 1988), aff'd, 879 F.2d 838 (1989)) We concluded in HQ 084608 that counter tops and channel systems made of agglomerated, artificial stone were classified under subheading 6810.99.00, HTSUS, as articles of cement, of concrete or of artificial stone, whether or not reinforced, other articles, other.

In HQ 085410, dated January 4, 1990, we addressed the Additional U.S. Notes to Chapter 68 vis-à-vis the size criteria for tiles and slabs in headings 6802 and 6810, HTSUS. We declined to adopt an absolute standard regarding the dimensions of such articles, in essence deciding to classify such articles on a case-by-case basis. We stated in this regard as follows:

> [W]e agree that the terms of Chapter 68, and indeed the entire tariff schedule, must be considered in *pari materia*, and that all the terms of the schedule must have meaning. However, we are of the opinion that the Additional U.S. Notes apply only to the tariff heading to which the notes, by their terms, refer. Despite your contention to the contrary, the drafters of the HTSUSA clearly manifested their intent to restrict the definitions of the terms "slab" and "tile" by referring to a specific heading in each

> note. It is our opinion that a rigid, uniform application of a "tile" or "slab" definition throughout the chapter was not, and is not, contemplated by the Nomenclature.
>
> * * * * * * *
>
> [W]e are of the opinion that the term "tiles" does not encompass articles which are so large that they cannot rationally be considered "tiles". It was in this light that we compared the large building components to the "slabs" of heading 6802, and found them to be *ejusdem generis*. We did not, as your letter suggests, purport to make the concept of "slabs" in heading 6802, HTSUSA, "applicable with equal force to the classification of 'artificial stone' articles in HTS 6810". Our intent was simply to illustrate that larger articles are contemplated by the Nomenclature. In terms of heading 6810, those types of articles are properly classified as items "other" than tiles.
>
> * * * * * * *
>
> We did not, nor do we now, intend to specify precise dimensions or surface areas which will define "tiles" and "other" articles for the purposes of heading 6810, HTSUSA, other than those found in the relevant Legal Notes. In our opinion, the principal use of the term "tile(s)" in the stone or similar industries, is in reference to products having sides which measure up to 18 inches. Again, we are not prescribing absolute limits or dimensions in this regard. However, given these general guidelines, it is clear that articles such as the small building components addressed in your original request would be considered a "tile" in the stone trade, and they are classified as such.

We note that the Court of International Trade (in *Blakley Corp. v. United States*, 22 CIT 635, 15 F. Supp. 2d 865 (CIT 1998)) considered the definition of the terms "tile" and "slab" in Additional U.S. Note 1 of Chapter 68, and, in reaching the same conclusion regarding the Additional U.S. Note, gave imprimatur to the conclusions made in HQ 085410.

There is evidence that the instant merchandise will be further worked following importation into various kitchen counter tops, vanities and fireplace surrounds. The articles at issue are of substantial size, approximately 4 feet by 10 feet and presumably weigh a significant amount. We conclude that they cannot, in their condition as imported, be construed to be tile, flagstone or brick or similar articles. The terms tile, flagstone or brick connote articles that can easily be manipulated by hand and arranged, fixed or set in place to collectively comprise a floor, ceiling, wall or structure. The articles at issue, in their condition as imported, are unwieldy and cannot be likened to the articles contemplated within subheading 6810.19.50, HTSUS.

We liken the slabs of agglomerated stone to goods presented in material lengths that must be further worked prior to installation. In such instances, there is no recognizable article and the material length is precluded from classification as a part, even though the material may be dedicated for making the individual articles. *Avins Industrial Products Co. v. United States*, 515 F.2d 782 (CCPA 1975). In HQ 955346, dated February 9, 1994, which concerned the classification of coils of stainless steel curved wire designed for the manufacture of piston rings for automobile engines, we stated that:

> [u]nder a longstanding Customs principle, goods which are material when entered are not classifiable as a particular article unfinished. See *Sandvik Steel, Inc. v. U.S.*, 321 F.Supp. 1031, 66 Cust. Ct. 12, C.D. 4161 (1971) (shoe die knife steel in coils and cutting rules in lengths, without demarcations for cutting or bending, held to be material rather than unfinished knives or cutting blades); *The Harding Co. v. U.S.*, 23 Cust. Ct. 250 (1936) (rolls of brake lining held to be material because the identity of the brake lining was not fixed with certainty*); Naftone, Inc. v. U.S.*, 67 Cust. Ct. 340, C.D. 4294 (1971) (rolls of plastic film without demarcations for cutting despite having only one use held to be insulating material). See also HQ 952938, dated August 4, 1993, and HQ 084610, dated May 17, 1990.

Therefore, at GRI 6, the instant slabs of agglomerated stone are considered to be goods imported in material form. They are not similar to tiles, flagstones or bricks, but rather are other articles of artificial stone.

Holding:

Under the authority of GRI 6, the agglomerated quartz sheets are classified under subheading 6810.99.00, HTSUS, which provides for other articles of artificial stone.

Effect on Other Rulings:

NY E89493 is revoked. In accordance with 19 U.S.C. §1625 (c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

REVOCATION OF CUSTOMS RULING LETTER RELATING TO FILLING OF CONTAINERS UNDER 19 U.S.C. 1313(b)

ACTION: Notice of Revocation of Manufacturing Ruling Letter under 19 U.S.C. 1313(b).

SUMMARY: Pursuant to Section 625(c) (1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), amended by section 623 of Title VI of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling which had previously allowed the *filling of containers* to be considered a manufacturing process under 1313(b). Notice of the Proposed Revocation was published on March 20, 2002, in the CUSTOMS BULLETIN, Volume 36, No. 12.

EFFECTIVE DATE: Merchandise exported on or after November 11, 2002.

FOR FURTHER INFORMATION: Rebeca DeJesus, Duty and Refund Determination Branch, Commercial Rulings Division, (202) 572–8798.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On March 20, 2002 Customs published a Notice of the Proposed Revocation in the CUSTOMS BULLETIN, Volume 36, No. 12, proposing to revoke (ACS) Ruling Letter #44–04385–001 dated August 26, 1999 and (ACS) Ruling letter # 44–04385–000 dated September 29, 1995.

The subject rulings had previously allowed a party to claim drawback by filling cosmetic products (such as beauty lotions and powders) into imported containers (such as tubes, plastic bottles, jars and godets) under 19 U.S.C. 1313(b). The notice indicated our intention to revoke the identified rulings to reflect Customs' policy that the process of filling imported already-made containers with domestic products (not-eligible for drawback) cannot be considered a manufacturing process under 19 U.S.C. 1313(b).

Customs now REVOKES the identified rulings and any other treatment based on those rulings. Customs has determined that the *filling process* described does not rise to the level of "manufacture" that is required in order to claim manufacturing drawback under 1313(b).

These are the processes specifically revoked:

a. The Filling of Tube Container and Dispenser: The process was described as having imported plastic tubes with a closure affixed at the top and the bottom open so that a cosmetic product (not eligible for drawback) may be automatically dispensed into the tube. Once filled, the bottom was lightly melted to secure a closure. The tube was then labeled and packaged for retail.

b. The Filling of Plastic Bottles, Jars and Godets: The process was described as imported plastic bottles and jars whereby a base product (not eligible for drawback) was injected. A disc was applied to the top, or an orifice reducer inserted; the bottle and jars were then capped and labeled. The godets are small aluminum trays made to hold powder products. Base product (not eligible for drawback) was dispensed into the godets; the powder was pressed and a closure secured. The product was then labeled and packaged for retail.

Two parties submitted comments. The essence of their comments and our responses follow:

COMMENT: The process of filling containers should be allowed as a manufacturing procedure under 1313(b). The process entails filling imported containers with beauty products such as lotions and powders. It must be viewed as a "continuous manufacturing process" whereby the end product results in a new and different article having a distinctive name, character and use. The end result is a "single article of commerce" known as a "cosmetic product".

RESPONSE: We disagree. The filling procedures described in the affected rulings do not rise to the level of manufacture that is required under law. If a new and different article has not emerged from the process, beginning with the use of the imported or substituted merchandise which forms the basis for drawback, then there has not been a manufacture or production for drawback purposes. In its initial request under 1313(b), Customs allowed Amway to use containers in a manufacturing process. The issue is whether the designated merchandise was subjected to a process of manufacture that resulted in the creation or transformation of the container into a different article and exported. Upon review of Amway's production, Customs determined that the filling procedure did not constitute a manufacture because the end result was nothing more than a filled container being packaged for retail purposes. The item that resulted was *not so changed in condition so as to conclude that the container was made into another article*.

The containers were the merchandise on which drawback was based under 1313(b). When Amway initially submitted its intent to manufacture under 1313(b), it proposed that duties be refunded on those designated containers which, upon their subjection to a manufacturing process, resulted in a distinct article having a distinctive name, character and use. Customs found that the designated containers were not being subjected to a manufacturing process. This was evidenced by the fact that a process that began with empty containers ended with filled containers. The process of encasement of a domestic product with the use of

an imported containers did not, it itself, *create* a new product. Customs cannot conclude, (as the commenters desire), that a "single article of commerce known as a cosmetic product" was created. The cosmetic product existed *prior to being put into the container.* The filling process merely encased it for retail. If a process simply dispenses a product into a container, the process is not that of a manufacture. The operation of filling *does not change the nature of the container into a new article.* The container did not become anything else but a container holding a product for retail use. Furthermore, Customs cannot consider the "continuous manufacturing process" to include those initial preparations done on the base materials (as Amway claims) because the statute requires that the imported and substitute merchandise be used in the manufacture of an article.

The filling procedure here is not significantly different from the situation considered by the court in *United States v. Border Brokerage Co.* 48 C.C.P.A. 10 (Cust. & Pat. App. 1960) where the court found that the sewing shut of imported bags filled with domestically produced fertilizer did not result in a processing of the bags. Congress recognized the unique characteristics of containers by expressly providing for drawback on containers that are used solely as containers in 19 U.S.C. 1313(q). Unless the container itself is made in the U.S. in compliance with 19 U.S.C. 1313(a) or (b), mere filling of a container limits drawback eligibility on that container provided by 19 U.S.C. 1313(q).

Some of Amway's comments emphasized on how the design of the container/dispenser permitted the proper application of the product. We find that such arguments only proves that the imported containers were *designed and manufactured abroad* to meet Amway's specification for suitable containers. How the container was designed or manufactured *abroad* serves of little or no evidence to support Amway's contention that a complex manufacturing process was conducted on the containers within Amway's premises.

Concerning specifically to the bottles, jars and godets, Amway's states that after cleaning operations are conducted, the bottles are filled with the chosen cosmetic product. Then, the capping machinery performs the process of attaching the appropriate "closure components". In its comments, Amway stated that *"* * * some bottles are constructed with pump assemblies and others with orifice reducers to assist in proper dispersal" and "* * * each type of closure has a specific design intended to perform a specific purpose".* Concerning the plug inserts and orifice reducers, the "manufacturing process" was described as "*when this feature* (plug insert/orifice reducer) *is added to the bottle * * * (D)uring the bottle assembly/filling operation. The plugs are placed into a hopper where they are properly aligned and fed into a capping machine * * * the capping machine inserts the plug * * * the plug is seated firmly * * * (A) threaded cap is next fastened".* That description is not distinguishable from the filling and sewing process found by the *Border Brokerage* court to not constitute any processing of the bag.

This case is similar to the *Joseph Schlitz Brewing Co. v. U.S.,* where the Supreme Court stated that imported bottles and corks for the bottling of beer were not to be regarded as an "imported material" to be added to a manufacturing process. The court stated that the bottles and corks were "simply the packages which the manufacturer, for the purposes of export, sees fit, and perhaps is required, to make use for the proper preservation of its product". As in *Joseph Schlitz Brewing Co. v. United States,* 181 U.S. 584, 21 S. Ct. 740 (1901), the containers are "finished products" rather than an ingredient to a manufacturing process. In the *Joseph Schlitz's* case, the plaintiffs claimed that the beer used for export required additional processes so that it could withstand changes in temperature, climate, transportation, etc. The plaintiffs considered that the use of the corks and bottles needed to be processed differently from beer used for domestic purposes. As such, the plaintiffs wanted Customs to consider the bottles and corks as "imported material" used in the manufacture of a product that would subsequently be exported. The court found that, the imported bottles and corks were not "imported material' to be used as "ingredients", but rather, they were considered "finished products". This is a similar situation with the use of Amway's containers. The containers were imported as finished products and while they may have been subjected to minor processes such as cleaning and melting, these items were not transformed into a new and different article with a different name, character or use.

None of the domestic products (lotions, creams and powders) used by Amway are articles being designated to claim drawback. Being non-designated products, whatever processes these domestic products are subjected prior to the *filling operation,* remain innaplicable to the determination as to whether a new and different article is created. Also, none of the raw materials used to prepare the cosmetic lotions and powders prior to filling qualify for drawback under 1313(a), (b), (c) or (j). Section 1313(q) is specific in that it will allow drawback on the packaging material only if the contents *themselves* qualify for drawback under sections (a), (b),(c) or (j). The stated reason for the expanded provision is found in H. Rpt. 103–361, Part 1, 130 (November 15, 1993): "To expand eligibility for dutiable packaging material packaging material if used in the packaging of either dutiable imported article or its substitute article (see also, S. Rpt. 103–189 (November 18, 1993). Both the plain language of the statute and the legislative history do not support the proposition that 19 U.S.C. 1313(q)(1) applies when the articles themselves do not qualify for drawback.

Our focus was whether *a filling procedure* constituted a sufficient manufacturing process so that a party, such as Amway, could claim drawback upon exportation under 1313(b). The importation of the plastic tubes served their intended purpose, which was to contain the cosmetic product. These were specifically designed abroad, wholly manufactured and imported to be used as containers. The filling of a

container does not result in the use that container to make another article. We revoke the treatment initially accorded under 1313(b).

Dated: August 27, 2002.

WILLIAM G. ROSOFF,
(for Myles Harmon, Acting Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 27, 2002.

DRA 2–02–RR:CR:DR:RDJ 228918

MR. JOSEPH F. DONOHUE, JR
26 Broadway
New York, NY 10004

Re: 19 USC 1625(c)(1); filling process revoked; 19 USC 1313(b).

DEAR MR. DONOHUE:

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1), amended by section 623 of Title VI of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, on March 20, 2002, Customs published a Notice of the Proposed Revocation in the CUSTOMS BULLETIN, Volume 36, No. 12, proposing to revoke (ACS) Ruling Letter #44–04385–001 dated August 26, 1999 and (ACS) Ruling letter # 44–04385–000 dated September 29, 1995.

The subject rulings had previously allowed Amway to claim drawback by filling cosmetic products (such as beauty lotions and powders) into imported containers (tubes, plastic bottles, jars and godets) under 19 U.S.C. 1313(b). The notice indicated our intention to revoke the identified rulings to reflect Customs' policy that the process of filling imported already-made containers with domestic products (not-eligible for drawback) cannot be considered a manufacturing process under 19 U.S.C. 1313(b). Customs now REVOKES the identified rulings and any other treatment based on those rulings.

The filling procedures described in the affected rulings do not rise to the level of manufacture that is required under law. If a new and different article has not emerged from the process, beginning with the use of the imported or substituted merchandise which forms the basis for drawback then, there has not been a manufacture or production for drawback purposes. In its initial request under 1313(b), Customs allowed Amway to use containers in a manufacturing process. The issue is whether the designated merchandise was subjected to a process of manufacture that resulted in the creation or transformation of the container into a different article and exported. Upon review of Amway's production, Customs determined that the filling procedure did not constitute a manufacture because the end result was nothing more than a filled container being packaged for retail purposes. The item that resulted was *not so changed in condition so as to conclude that the container was made into another article*.

The containers were the merchandise on which drawback was based under 1313(b). When Amway initially submitted its intent to manufacture under 1313(b), it proposed that duties be refunded on those designated containers which, upon their subjection to a manufacturing process, resulted in a distinct article having a distinctive name, character and use. Customs found that the designated containers were not being subjected to a manufacturing process. This was evidenced by the fact that a process that began with empty containers ended with filled containers. The process of encasement of a domestic product with the use of an imported containers did not, it itself, *create* a new product. Cus-

toms cannot conclude, that a "single article of commerce known as a cosmetic product" was created. The cosmetic product existed *prior to being put into the container.* The filling process merely encased it for retail. If a process simply dispenses a product into a container, the process is not that of a manufacture. The operation of filling *does not change the nature of the container into a new article.* The container did not become anything else but a container holding a product for retail use. Furthermore, Customs cannot consider the "continuous manufacturing process" to include those initial preparations done on the base materials because the statute requires that the imported and substitute merchandise be used in the manufacture of an article.

The filling procedure here is not significantly different from the situation considered by the court in *United States v. Border Brokerage Co.* 48 C.C.P.A. 10 (Cust. & Pat. App. 1960) where the court found that the sewing shut of imported bags filled with domestically produced fertilizer did not result in a processing of the bags. Congress recognized the unique characteristics of containers by expressly providing for drawback on containers that are used solely as containers in 19 U.S.C. 1313(q). Unless the container itself is made in the U.S. in compliance with 19 U.S.C. 1313(a) or (b), mere filling of a container limits drawback eligibility on that container provided by 19 U.S.C. 1313(q).

Some of Amway's comments emphasized on how the design of the container/dispenser permitted the proper application of the product. We find that such arguments only proves that the imported containers were *designed and manufactured abroad* to meet Amway's specification for suitable containers. How the container was designed or manufactured *abroad* serves of little or no evidence to support Amway's contention that a complex manufacturing process was conducted on the containers within Amway's premises.

Concerning specifically to the bottles, jars and godets, Amway's states that after cleaning operations are conducted, the bottles are filled with the chosen cosmetic product. Then, the capping machinery performs the process of attaching the appropriate "closure components". In its comments, Amway stated that *"* * * some bottles are constructed with pump assemblies and others with orifice reducers to assist in proper dispersal" and "* * * each type of closure has a specific design intended to perform a specific purpose".* Concerning the plug inserts and orifice reducers, the "manufacturing process" was described as "*when this feature* (plug insert/orifice reducer) *is added to the bottle * * * (D)uring the bottle assembly/filling operation. The plugs are placed into a hopper where they are properly aligned and fed into a capping machine * * * the capping machine inserts the plug * * * the plug is seated firmly * * * (A) threaded cap is next fastened".* That description is not distinguishable from the filling and sewing process found by the *Border Brokerage* court to not constitute any processing of the bag.

This case is similar to the *Joseph Schlitz Brewing Co. v. U.S.,* where the Supreme Court stated that imported bottles and corks for the bottling of beer were not to be regarded as an "imported material" to be added to a manufacturing process. The court stated that the bottles and corks were "simply the packages which the manufacturer, for the purposes of export, sees fit, and perhaps is required, to make use for the proper preservation of its product". As in *Joseph Schlitz Brewing Co. v. United States,* 181 U.S. 584, 21 S. Ct. 740 (1901), the containers are "finished products" rather than an ingredient to a manufacturing process. In the *Joseph Schlitz's* case, the plaintiffs claimed that the beer used for export required additional processes so that it could withstand changes in temperature, climate, transportation, etc. The plaintiffs considered that the use of the corks and bottles needed to be processed differently from beer used for domestic purposes. As such, the plaintiffs wanted Customs to consider the bottles and corks as "imported material" used in the manufacture of a product that would subsequently be exported. The court found that, the imported bottles and corks were not "imported material" to be used as "ingredients", but rather, they were considered "finished products". This is a similar situation with the use of Amway's containers. The containers were imported as finished products and while they may have been subjected to minor processes such as cleaning and melting, these items were not transformed into a new and different article with a different name, character or use.

None of the domestic products (lotions, creams and powders) used by Amway are articles being designated to claim drawback. Being non-designated products, whatever processes these domestic products are subjected prior to the *filling operation,* remain innaplicable to the determination as to whether a new and different article is created. Also, none of the raw materials used to prepare the cosmetic lotions and powders prior to filling qualify for drawback under 1313(a), (b), (c) or (j). Section 1313(q) is specific in that it

will allow drawback on the packaging material only if the contents *themselves* qualify for drawback under sections (a),(b)(c) or (j). The stated reason for the expanded provision is found in H. Rpt. 103–361, Part 1, 130 (November 15, 1993): "To expand eligibility for dutiable packaging material packaging material if used in the packaging of either dutiable imported article or its substitute article (see also, S. Rpt. 103–189 (November 18, 1993). Both the plain language of the statute and the legislative history do not support the proposition that 19 U.S.C. 1313(q)(1) applies when the articles themselves do not qualify for drawback.

Our focus was whether *a filling procedure* constituted a sufficient manufacturing process so that a party, such as Amway, could claim drawback upon exportation under 1313(b). The importation of the plastic tubes served their intended purpose, which was to contain the cosmetic product. These were specifically designed abroad, wholly manufactured and imported to be used as containers. The filling of a container does not result in the use that container to make another article. We revoke the treatment initially accorded under 1313(b).

WILLIAM G. ROSOFF,
(for Myles Harmon, Acting Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTER AND TREATMENT RELATING TO THE DUTY-FREE STATUS OF FOREIGN ORIGIN CONTAINERS OF DOMESTIC ORIGIN GOODS ADMITTED INTO THE CUSTOMS TERRITORY OF THE UNITED STATES FROM A FOREIGN TRADE ZONE.

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of modification regarding the duty-free status of foreign origin containers which contain domestic origin goods entered into the Customs Territory of the United States from a Foreign Trade Zone.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs is modifying one ruling relating to the duty-free status of foreign origin containers which contain domestic origin goods entered into the Customs Territory of the United States from a Foreign Trade Zone. Similarly, Customs is modifying any treatment previously accorded by it to substantially identical transactions. Notice of the proposed modification was published on December 9, 1998 in the CUSTOMS BULLETIN.

EFFECTIVE DATE: This modification is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 11, 2002.

FOR FURTHER INFORMATION CONTACT: William G. Rosoff, Duty and Refund Determination Branch: (202) 572–8807.

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) (hereinafter "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 Customs 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 trade and Customs 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 provide any other information necessary to enable Customs 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 on December 9, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 49 proposing to modify two rulings, HQ 559769 and HQ 221259. Both rulings related to the duty-free status of foreign origin containers which contain domestic origin goods entered into the Customs Territory of the United States from a Foreign Trade Zone. Comments were received in response to this notice. One comment was of particular importance, it noted that the first sentence of Paragraph 7 of the *Law & Analysis* section of the proposed ruling is incorrect in that it states, "At the time of withdrawal from the FTZ, and before consumption, the foreign bottles are classified with the perfume, which are subject to a specific rate of duty."

That comment correctly identified a typographical error. The ruling consistently refers to "ad valorem" and in one instance a "specific" rate was unintentionally used. The sentence should read, "Subsequent to an *ad valorem* rate of duty." The proposed ruling was intended to affect only *ad valorem* rates of duty. Specific rates of duty are not intended to be affected by this proposed ruling. This change is reflected in the final version of the ruling, which is in this publication.

Furthermore, Customs notes that this error was repeated in the Notice of Proposed Modification published in the CUSTOMS BULLETIN Vol. 32., No. 49 pursuant to 19 U.S.C. 1625(c)(1). Upon further consideration, Customs has determined that HQ 221259 will not be modified or affected by the proposed ruling. HQ 221259 concerned pineapple subject to a specific rate of duty, and we have determined that the proposed ruling will only affect merchandise subject to an *ad valorem* rate of duty. These corrections are reflected in this, the final publication.

As stated in the proposed notice, this modification will cover any rulings on this type of transaction, which may exist but have not been spe-

cifically identified. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised Customs 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, Customs is modifying any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the title 19 of the United States Code. Any person involved with substantially identical transactions should have advised Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to this effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is modifying HQ 559769, which concerned the country of origin and proper duty rate of tropical fruit salad, which is canned with both domestic and imported fruit in a Foreign Trade Zone. The product consisted of U.S. grown pineapple, which was taken to the zone to be peeled, trimmed, and cut into chunks to be combined with foreign ingredients—papaya, guava, and passion fruit– which was admitted into the FTZ in domestic status. The cans for the product were manufactured in the FTZ using tin-plate from Japan, which was admitted into the FTZ in non-privileged foreign status. In HQ 559769 Customs ruled that if the contained product was domestic-status goods, the cans would be duty free. Pursuant to the analysis in "Attachment " to this document, Customs has determined that to the extent that HQ 559769 implied that a foreign status can acquired domestic status as a result of being used as a container for a domestic status good, that implication was erroneous.

In addition, HQ 559769 held that the tropical fruit was classified in subheading 2008.90.10, HTSUS. The correct classification for the tropical fruit salad is 2008.92.10, HTSUS.

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

Dated: August 23, 2002.

MYLES HARMON,
Acting Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 23, 2002.

FOR–2–06–RR:CR:DR 227355 CK
Category: Foreign Trade Zone

MS. JUDITH A. SCHECHTER
GRAHAM & JAMES
885 Third Avenue
24th Floor
New York, NY 10022–4834

Re: Request for Reconsideration of *HQ* 226493: Foreign Trade Zone; Perfume Bottles; 19 U.S.C. 81(c); Foreign Origin; Merchandise Processing Fee: General Rules of Interpretation 5(a) and 5(b).

DEAR MS. SCHECHTER:

This is in response to your letter dated November 27, 1996, on behalf of Avon Products, Inc., requesting a reconsideration of Headquarters Ruling (HQ) 226493 (April 9, 1996). A binding ruling is requested concerning the dutiable status of domestically-produced scents and their foreign bottles, admitted into the Customs Territory of the United States from a Foreign Trade Zone (FTZ). Our decision follows.

Facts:

Avon Products, Inc. (Avon) mixes scents, formulated from domestic status ingredients such as water, denatured alcohol, perfume, and color solutions, in a Foreign Trade Zone (FTZ) with additives to ensure consistency, and then filter presses the scents. The finished product is bottled in a foreign container that was admitted into the FTZ in non-privileged foreign status.

In *HQ* 226493, dated April 9, 1996, Customs held that domestic status perfume that was put into a non-privileged foreign status bottle in a FTZ would take the classification and duty rate of the perfume. In *HQ* 226493, Customs held that a bottle which is not suitable for repetitive use is dutiable in accordance with its contents under the General Rules of Interpretation (GRI) 5 (a) and 5 (b), of the Harmonized Tariff Schedule of the United States (HTSUS). Customs, in *HQ* 226493, determined that Avon's bottles were not separately dutiable from their contents upon entry for consumption. Customs stated that the bottled perfume would be classifiable under subheadings 3303.00.10/Free HTSUS, 3303.00.20 or 3303.00.30, HTSUS.

Avon disagrees with *HQ* 226493 in that bottled perfume classifiable under subheadings 3303.00.20 and 3303.00.30, HTSUS, would be dutiable. Avon refers to *HQ* 559769, dated August 28, 1996, which held that foreign-origin packaging cans were not subject to duty when packed with domestic status fruit salad in a FTZ. Avon claims that the issues at hand are identical to those in *HQ* 559769. Avon also cites to *Crystal Clear Industries v. United States*, 18 C.I.T. 47, 843 F. Supp. 721, Slip Op. 94–15 (Jan. 28, 1994), *aff'd*, 44 F.3d 1001 (Fed. Cir. 1995), and *Kurt S. Adler, Inc. v. United States*, 68 Cust. Ct. 162 (1972), *aff'd*, 61 C.C.P.A. 68, C.A.D. 1122, 496 F.2d 1220 (1974).

Issue:

Whether a non-privileged foreign status bottle is entitled to domestic status when domestic status perfume is put into the bottle in a FTZ?

If these non-privileged foreign status bottles are not entitled to duty-free treatment upon entry for consumption into the Customs Territory of the United States, how should they be valued? What is the dutiable value of foreign bottles that take the classification of their contents?

Law and Analysis:

Pursuant to the provisions of section 3 of the Foreign Trade Zones Act of 1934, as amended (19 U.S.C. 81c), foreign and domestic merchandise of every description, except such as is prohibited by law, may be brought into a FTZ without being subject to the customs laws of the United States for the purposes set forth in the statute. Such merchandise may "be brought into a zone, and may be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchan-

dise, or otherwise manipulated, or be manufactured * * * and be exported, destroyed, or sent into the Customs Territory of the United States therefrom, in the original package or otherwise; * * *" 19 U.S.C. 81c (a) (1997). From reading the plain language of the above-cited statute, the packaging operation of filling foreign origin glass bottles with domestic perfume is a permissible operation in a FTZ.

The FTZ statute further provides that, "* * * when foreign merchandise is so sent from a zone into the Customs Territory of the United States affecting imported merchandise * * *" 19 U.S.C. 81c (a), non-privileged foreign status merchandise is subject to tariff classification in accordance with its character, condition, and quantity as transferred to the Customs Territory at the time of entry.

In the instant case, if the subject merchandise were imported directly from the foreign source (in this case the vendors are in France), the bottles would be classifiable as other glass carboys, bottles, etc., of a kind used for the conveyance or packaging of goods under HTSUS subheading 7010.91.20, dutiable at the rate of 3.5% *ad valorem*.

General Rule of Interpretation (GRI) 5 (b), HTSUS, states, in pertinent part:

> Packaging materials and packaging containers entered with the goods therein shall be classified with the goods if they are of a kind normally used for packaging such goods. However, this provision does not apply when such packing material or packaging containers are clearly suitable for repetitive use.

Avon refers to *HQ* 559769, dated August 28, 1996, which held that foreign-origin packaging cans were not subject to duty when packed with domestic status fruit salad in a FTZ. Avon claims that the issue at hand is identical to that in *HQ* 559769.

The relevant text of *HQ* 559769 with respect to the dutiable status of the cans is as follows:

> In interpreting the foregoing, we have held that canned fruit produced in a FTZ with the use of domestic status ingredients and non-privileged foreign status canning materials may be entered for consumption from the FTZ free of duty (see, *e.g.*, rulings 073879, February 29, 1984, and memorandum 220707, October 3, 1988, affirmed by ruling 221259, October 15, 1991). Thus, in the case under consideration, in which ingredients (*all* having domestic status) are packed in a FTZ in cans produced from Japanese origin tin-plate, when the canned "Tropical Fruit Salad" product is entered for consumption from the FTZ, neither the domestic status ingredients nor the canning materials would be subject to duty.

The reference to the prior rulings cited is critical to understanding the scope of the conclusion that non-privileged, foreign status cans would be duty-free if entered as containers of domestic status goods from a zone. The relevant text of *HQ* 073879 is as follows:

> Under the situation presented, the processed pineapple, pineapple juice, and the pineapple juice concentrate would be, if they were dutiable, subject to specific rates of duty *i.e.*, items 148.98, 165.44 and 165.46, TSUS, dutiable at the column 1 rates of duty of 0.5 cent per pound, 20 cents per gallon and 5 cents per (reconcentrated) gallon, respectively). Clearly, these specific rates of duty preclude the consideration of dutiability for usual and ordinary containers not designed for, or capable of, reuse provided for in the cited General Headnote. Thus, it is our position that the cans would not be dutiable.

The relevant text of *HQ* 220707, is as follows:

> Under this provision, the cans are not subject to tariff treatment as imported articles and the cans are dutiable in accordance with their contents. We held that since the contents would be subject to specific rates of duty, rather than *ad valorem* rates, these containers of domestic merchandise were not dutiable.

The relevant text of *HQ* 221259, is as follows:

> An earlier Customs letter on February 29, 1984, stated: "Under the situation presented, the processed pineapple, pineapple juice, and the pineapple juice concentrate would be, if they were dutiable, subject to specific rates of duty (*i.e.* items 148.98, 165.44, and 165.46, TSUS, dutiable at the column 1 rates of duty of 0.5 cents per pound, 20 cents per gallon, and 5 cents per [reconcentrated] gallon, respectively). Clearly, these specific rates of duty preclude the consideration of dutiability for usual and ordinary containers not designed for, or capable of, reuse provided for in the cited General Headnote. Thus it is our position that the cans would not be dutiable."

Every one of the cited rulings involved pineapples which, if imported, were dutiable at a specific rate of duty. The addition of the value of the can to the contained pineapple could

have no effect on the duty liability in each of the circumstances set forth in the cited rulings because the duty was determined exclusively by the weight or volume of the pineapples. Only by reading the words out of their context can one conclude that the words apply with equal effect when the contained merchandise was dutiable at an *ad valorem*, rather than a specific, rate of duty.

On the contrary, *HQ* 220707 and *HQ* 221259 concerned the application of the merchandise-processing fee, which was based on value. Consistent with the principle that the cans represented an addition of value to the contained pineapple and since the liability for the fee was based on value, the rulings held that the value of foreign cans would form part of the basis for the assessment of the fee.

The classification of the fruit salad in *HQ* 559769 was stated to be in subheading 2008.90.10, HTSUS. That classification was erroneous. There has never been a subheading 2008.90.10, HTSUS. The correct subheading, based on the documents in that file appears to have been subheading 2008.92.10, HTSUS. In 1996, when the ruling was requested and issued, merchandise classifiable within subheading 2008.92.10, HTSUS, was dutiable at 6.5% *ad valorem*. *HQ* 559769 also is erroneous in that the conclusion that no duty applied to the cans was based on an analysis, that was grounded on the fact that the merchandise in those rulings was dutiable at a specific rate of duty rather than an *ad valorem* rate of duty.

None of those rulings support a premise that a container classifiable with its contents would be duty free if the contained merchandise was dutiable at an *ad valorem* rate of duty. Consequently, *HQ* 559769 must be modified to the extent that it references an erroneous subheading and conflicts with the prior rulings on which it is based.

The imported bottle is not considered to be a separate article for tariff classification purposes since the bottle is a usual container and, as such, is not separately dutiable in accordance with GRI 5 (b), HTSUS.

As set forth above, GRI 5 (b), HTSUS, requires, for classification purposes, that the identity of a bottle that is not suitable for repetitive use is subsumed by the identity of the goods within the bottle. The effect of such a rule is that the container is disregarded when determining classification of the entire good. Moreover, the statutory definition of transaction value, requires that the cost of packaging materials be included in the value of the goods contained. 19 U.S.C. 1401a (b)(1)(A). In both instances, the statutes require that the packing materials be considered as part of the goods they contain, not as separate tariff entities. *See Kurt S. Adler, Inc. v. United States*, 68 Cust. Ct. 162, 167 (1972), *aff'd*, 61 C.C.P.A. 68, C.A.D. 1122, 496 F.2d 1220 (1974) (recognizing long-standing Congressional policy of treating the cost of containers as part of the value of the goods, not separate as separate tariff entities).

Avon cites to *Kurt S. Adler, Inc. v. United States*, 68 Cust. Ct. 162, 167 (1972), *aff'd*, 61 C.C.P.A. 68, C.A.D. 1122, 496 F.2d 1220 (1974); however, the argument is not persuasive. In *Adler*, the plaintiff asserted that German box parts imported with Czechoslovakian Christmas ornaments were entitled to be classified separately for tariff purposes. The court disagreed with this proposition, and found that the "container" provision of the TSUS, predecessor to GRI 5 (b), HTSUS, required that the cost of "usual containers" must be included in the dutiable value of its contents. The package inserts, package bottoms, and the ornaments were *imported together into the United States*. The court found that it was fundamental that the tariff status of merchandise is controlled by its condition *at the time of importation into the United States*. 61 Cust. Ct. 162, 168. (emphasis in original). The appellate court affirmed and agreed that when the box inserts with the ornaments, were imported together, the box inserts lost their identity as products of Germany.

Therefore, the difference between *Adler* and the present case, is that the French glass bottles were not imported at the same time as the domestic perfume ingredients. The French bottles were imported and admitted into the FTZ in nonprivileged foreign status. Separately, the U.S. perfume ingredients were admitted into the FTZ and there they were combined to produce the perfume. It is clear that foreign goods in an FTZ have already been imported. *See, Nissan Motor Mfg. Corp, USA v. U.S.*, 884 F.2d. 1375 (1989) and *Hawaiian Indep. Refinery v. U.S.*, 81 Cust. Ct. 117, 460 F. Supp. 1249 (1978). The French glass bottles and domestic perfume ingredients were not imported as one item, and each one retained its own identity and origin. *Adler* did not involve the application of the second proviso to 19 U.S.C. 81c (a), to a foreign bottle containing perfume that was made and bottled in a FTZ before entry from the FTZ.

Avon also cited to *Crystal Clear Industries v. United States*, 18 C.I.T. 47, 843 F. Supp. 721, Slip Op. 94–15 (Jan. 28, 1994), *aff'd*, 44 F.3d 1001 (Fed. Cir. 1995). In *Crystal Clear Industries*, the issue before the court was whether glassware made in East Germany, Romania, and Czechoslovakia, and packed in gift boxes made in Austria and Italy, when imported together, were classifiable separately. The court found that the boxes were usual containers and therefore, classifiable with the contents.

In *Crystal Clear* and *Adler*, the entered article and its packaging were imported together. Here, the bottles were imported apart from the perfume. While a FTZ is not part of the Customs Territory for the purpose of the Customs entry laws, a FTZ is not a foreign country. *Chrysler Motors Corp. v. U.S.*, 755 F. Supp. 388(CIT, 1990); affd 945 F. 2d. 1187 (Fed. Cir. 1991). Consequently, an entry from a FTZ is not itself an importation of merchandise from outside the United States.

General Note 3, HTSUS, governs the application of rates of duty. General Note 3(a)(i), HTSUS, provides: "[T]he rates of duty in column 1 are rates which are applicable to all products other than those of countries enumerated in paragraph (b) of this note." General Note 3(b), HTSUS, referred to in General Note 3(a)(i), states, in relevant part: "Notwithstanding any of the foregoing provisions of this note, the rates of duty shown in column 2 shall apply to products, whether imported directly or indirectly, of the [countries listed]."

As we accept the argument that the glass bottles and perfume become one good, for purposes of tariff classification, the second question becomes, what is the effect of the second proviso to 19 U.S.C. 81c (a), The Foreign Trade Zone Act, where the foreign container is classified in the tariff subheading of the contents. It is Avon's contention that because the glass bottles and the perfume have become one good for tariff purposes, the glass bottles obtain the domestic status of the perfume. The argument is that because the perfume is domestic and not subject to duty, the same duty exemption applies to the container as well.

The second proviso to 19 U.S.C. 81c (a), allows the domestic status exemption for a good that was manufactured in the U.S. and a foreign good that was admitted into a FTZ after first being entered for consumption. Neither description covers a foreign bottle that is imported and admitted into a FTZ in non-privileged status.

The act of pouring the perfume into the bottles does not change the bottles to U.S. origin; filling the bottles does not result in those bottles becoming articles manufactured or produced in the U.S. See *U.S. v. Border Brokerage Co.*, 48 CCPA 10 (1960).

Further, the sixth proviso to 19 U.S.C. 81c (a), limits duty-free status for goods actually manufactured in a FTZ and then exported to goods manufactured exclusively of domestic merchandise.

Under section 146.65 (a) (2) of the Customs Regulations (19 C.F.R. 146.65 (a) (2)), nonprivileged foreign merchandise (*See* 19 C.F.R. 146.24 (a)) is subject to tariff classification in accordance with its character, condition, and quantity as transferred to the Customs Territory at the time of entry or entry summary is filed with Customs. The glass bottles in this situation are subject to tariff classification and duty on entry from the FTZ. The domestic perfume has not lost its identity, and it may clearly be separated from the bottle in order to determine value.

In *HQ* 225903, dated January 9, 1995, advice was sought on the dutiable status of importing automobiles made with foreign components in a foreign trade zone after being exported from the zone. In that case, originating status was sought for foreign components of automobiles manufactured in the FTZ. Customs held that 19 U.S.C. 81c (a), "the statute contemplates that goods which meet the applicable rule of origin by virtue of operations performed in a United States Foreign Trade Zone will not be regarded as originating upon entry for consumption into the United States. In this case, it is clear that the operations performed in the zone will not render the vehicles originating based on the change in tariff classification that occurs to the non-originating materials in the zone."

Note additionally, that *HQ* 225903 was modified by section 19 of the Miscellaneous Trade and Technical Corrections Act of 1996 (Public Law 104–295; 110 Stat. 3535). This section assesses duty on the foreign origin components of automobiles manufactured in a zone. Using a formula, the domestic origin parts are separated from the foreign origin, and duty is assessed on the foreign value. Foreign origin components are not given domestic status by virtue of manufacture in a zone.

Domestic status is defined in the second proviso to 19 U.S.C. 81c (a) and the requirements of that proviso have not been met here.

With regard to determining dutiable value, section 81c (a), states:

> "subject to such regulations respecting identity and the safeguarding of the revenue as the Secretary of the Treasury may deem necessary, articles, the growth, product, or manufacture of the United States, on which all internal-revenue taxes have been paid, if subject thereto, and articles previously imported on which duty and/or tax has been paid, or which have been admitted free of duty and tax, may be taken into a zone from the Customs Territory of the United States, placed under the supervision of the appropriate customs officer, and whether or not they have been combined with or made part, while in such zone, of other articles, may be brought back thereto free of quotas, duty or tax."

Thus, for purposes of assessing duty on a good, which includes domestic status content, entered from a FTZ, the domestic portion of the value of the good is not included in the dutiable value of the entered good. The statute prescribes a method to determine dutiable value of entered goods by deducting the domestic value and assessing duty only on the value of the foreign components. In addition, 19 CFR 146.65 (b)(2) sets forth the proper method to determine dutiable value for goods entered from an FTZ. 19 CFR 146.65 (b)(2) states,

> "The dutiable value of merchandise provided for in this section shall be the price actually paid or payable for the merchandise in the transaction that caused the merchandise to be admitted into the zone * * *"

Thus, 19 CFR 146.65 (b)(2), implements the statute, by including the value of the bottle in the bottled perfume. The value of the domestic perfume is excluded from the value of the bottled perfume. The value of the foreign bottle that is classifiable within subheading 3303.00.20 or 3303.00.30, HTSUS, as perfume by virtue of GRI 5 is included as part of the value of the bottled perfume.

In addition, under 19 U.S.C. 58c (b)(D)(v) and (vi) the *ad valorem* MPF is to be assessed only against the foreign value of merchandise entered from a FTZ.

Holding:

The packaging operation, as described in the FACTS portion of this ruling, is a permissible operation that may be accomplished in a FTZ. This Holding affirms the Holding in *HQ* 226493 insofar as non-privileged foreign-origin containers, which under GRI 5 (b) are classifiable by their contents, will be assessed duty, according to the applicable rate for said contents, even if the contents are domestic duty-free themselves.

This ruling modifies *HQ* 559769.

MYLES HARMON,
Acting Director,
Commercial Rulings Division.

MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF THE "XYRON 510" MACHINE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of ruling letter and revocation of treatment relating to tariff classification of the "Xyron 510" machine.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (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 Customs is modifying one ruling pertaining to the tariff classification of the "Xyron 510" machine under the Harmonized Tariff Schedule of the United States ("HTSUS"). Similarly, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed revocation was published on July 24, 2002, in the CUSTOMS BULLETIN. No comments were received in response to this notice.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 11, 2002.

FOR FURTHER INFORMATION CONTACT: Deborah Stern, General Classification Branch (202) 572–8785.

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), (hereinafter "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 Customs 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 trade and Customs 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 provide any other information necessary to enable Customs 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, as amended (19 U.S.C. 1625(c)(1)), a notice was published on July 24, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 30, proposing to modify NY H81167, dated June 5, 2001, which classified the "Xyron 510" machine in subheading 8479.89.97, HTSUS, as a machine having individual functions, not elsewhere specified or included (in chapter 84). No comments were received in response to this notice.

As stated in the proposed notice, this modification will cover any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or to the importer's or Customs' previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's failure to advise Customs of substantially identical transactions or of specific rulings concerning merchandise covered by this notice which was not identified, 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 final decision.

In NY H81167, dated June 5, 2001, Customs classified the "Xyron 500 Create-a-Sticker" and the "Xyron 510 4 in 1 machine" in subheading 8479.89.97, HTSUS, as other machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter. Various parts for both machines and for a machine substantially similar to the "Xyron 510" were also classified in the ruling in subheading 8479.90.95, HTSUS, which provides for parts of the machines of heading 8479, HTSUS.

It is now Customs position that the "Xyron 510" is provided for in subheading 8420.10.90, HTSUS, which provides for "Calendering or other rolling machines, other than for metals or glass, and cylinders therefor; parts thereof: calendering or other rolling machines: other."

According to the Harmonized Commodity Description and Coding System Explanatory Notes (ENs), machines of heading 8420, HTSUS, consist of two or more parallel cylinders or rollers revolving with their surfaces in more or less close contact so as to perform certain functions, such as the application of dressings or surface coatings, by either pres-

sure of the cylinders alone or by pressure combined with friction, heat or moisture.

The "Xyron 510" is a sticker maker, laminator, label maker and magnet maker. It consists, in pertinent part, of a crank handle and two geared rubber-covered rollers with their surfaces close together, which, when cranked, applies pressure, bringing the articles and materials together to apply an adhesive or laminate. That is, the rollers revolve in close contact to apply dressings or surface coatings, such as adhesive or laminate, by the pressure of the rollers. The "Xyron 510" is a rolling machine as described by the ENs to heading 8420, HTSUS. The machine was classified elsewhere because, as we stated in NY H81167, the machines of heading 8420 featured "a degree of physical robustness and pressure which the Xyron 510 lacks."

A product literally included in a tariff definition may nonetheless be excluded upon a showing of legislative intent, *United States v. Andrew Fisher Cycle Co*., 57 C.C.P.A. 102, 426 F.2d 1308, 1311 (CCPA 1970), but there must be "strong and sufficient indications that it was the intent of Congress" to exclude the product at issue. *Id.* There is no indication the "Xyron 510" should be excluded. We therefore conclude that the "Xyron 510" is classifiable as an "other rolling machine" of heading 8420, HTSUS. As such, parts for the "Xyron 510" and for the machine substantially similar to the "Xyron 510" are classifiable as parts of a machine of heading 8420, HTSUS, in subheading 8420.99.90, HTSUS, which provides for "Calendering or other rolling machines, other than for metals or glass, and cylinders therefor; parts thereof: parts: other."

Pursuant to 19 U.S.C. 1625(c)(1), Customs is modifying NY H81167 and any other ruling not specifically identified, to reflect the proper classification of the subject merchandise or substantially similar merchandise, pursuant to the analysis set forth in the attached ruling HQ 965289. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical merchandise.

In accordance with 19 U.S.C.(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN

Dated: August 26, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 26, 2002.

CLA–2 RR:CR:GC 965289 DBS
Category: Classification
Tariff No. 8420.10.90 and 8420.99.90

MR. CHRISTOPHER R. WALL
PILLSBURY WINTHROP, LLP
1133 Connecticut Avenue, NW
Washington, DC 20036–4305

Re: "Xyron 510" machine; NY H81167 modified.

DEAR MR. WALL:

In NY H81167, issued to your client, Xyron, Inc., on June 5, 2001, the Director, National Commodity Specialist Division, New York, classified the "Xyron 500 Create-a-Sticker" and the "Xyron 510 4 in 1 machine," ("Xyron 510") in subheading 8479.89.97, Harmonized Tariff Schedule of the United States (HTSUS), as other machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter. Various parts for both machines and for a machine substantially similar to the "Xyron 510" were also classified in the ruling in subheading 8479.90.95, HTSUS, which provides for parts of the machines of heading 8479, HTSUS. We have reconsidered the classification of the "Xyron 510" and its accompanying parts, and now believe NY H81167 is, in part, incorrect.

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, 2186 (1993), notice of the proposed modification of the above identified ruling was published on June 26, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 30. No comments were received in response to the notice.

Facts:

The Xyron 510 is a sticker maker, laminator, label maker and magnet maker. It features a crank handle, sliding cutting blade, and two geared rubber-covered rollers about 1 inch in diameter to bring the article and materials together. Depending on the rolls of material in the replaceable cartridge inserted into the unit, it can laminate one or both sides of a card or similar article up to 5 inches wide with plastic film, apply an adhesive to the back of the article to create a sticker, laminate the top and simultaneously apply adhesive to the back of the article, or laminate the top and glue the back of the article to a flexible magnetic material, thus creating a personalized refrigerator magnet. It is also made of plastic, and is 14.1 inches wide, 5.7 inches high, and 8.6 inches deep. It weighs approximately 5 pounds. A sample was submitted.

In addition, sample sets of parts for use with either the "Xyron 510" or for the unit which is substantially similar to the Xyron 510 but is made by a competitor was submitted to the National Commodity Specialist Division, New York. As described in NY H81167, one set consisted of twin plastic holders for the two rolls of material, two flat plastic panels which, when assembled together with other U.S. made components (film/adhesive rolls, cores, and a washer), form a cartridge for the Xyron 510. Another set consisted of parts identical to the aforementioned set in design and use intended, after assembly into a cartridge unit, for use with the competitor's unit. And another set was two plastic parts consisting of a housing with an attached roller and a portion of the frame of a unit to which three plastic pieces (a gear wheel, a roller, and a sliding cutter blade) are attached. These components will also be used in a Xyron 510 type machine sold by the competitor.

You contend that the "Xyron 510" is a calendering machine classifiable in subheading 8420.10.90, HTSUS, which provides for other calendering or other rolling machines. You further contend that the requirement enumerated in NY H81167 that machines of heading 8420, HTSUS, feature "a degree of physical robustness and pressure" introduces a criterion that is not legally defensible. In the alternative, you argue that the "Xyron 510" and its parts are classifiable as other office machines, classifiable in heading 8472, HTSUS and parts of other office machines, classifiable in heading 8473, HTSUS.

Issues:

Whether the "Xyron 510" is classifiable as a calendering or other rolling machine of heading 8420, 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 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 may then be applied.

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

The HTSUS provisions under consideration are as follows:

8420	Calendering or other rolling machines, other than for metals or glass, and cylinders therefor; parts thereof:
8420.10	Calendering or other rolling machines:
8420.10.90	Other
* * * * * * *	
	Parts:
8420.99	Other:
8420.99.90	Other
* * * * * * *	
8479	Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof:
	Other machines and mechanical appliances:
8479.89	Other:
	Other:
8479.89.97	Other
* * * * * * *	
8479.90	Parts:
8479.90.95	Other

Your first claim is that the "Xyron 510" is a calendering machine classifiable in heading 8420, HTSUS. We turn to the EN for this heading to determine if the machine is described therein. EN 84.20 provides, in pertinent part, as follows:

> With the exception of metal-rolling or metal-working machines * * * this heading covers calendering or other rolling machines, whether specialised to a particular industry or not.
>
> These machines consist essentially of two or more parallel cylinders or rollers revolving with their surfaces in more or less close contact so as to perform the following operations, either by pressure of the cylinders alone or by pressure combined with friction, heat or moisture:
>
> (1) The rolling into sheet form of material (including bakery, confectionery, biscuit, etc., doughs, chocolate, rubber, etc.) fed to the rollers in a plastic condition.
>
> * * * * * * *
>
> (3) The application of dressings or surface coatings.
>
> * * * * * * *
>
> Machines of this kind are employed in various industries (e.g. the paper, textile, leather, linoleum, plastics or rubber manufacturing industries)
>
> In certain industries particular names are given to calendering machines (e.g. ironing machines in laundries, finishing mangles for the textile industry, or supercalenders for the paper industry) but they are classified in this heading whether called calendering machines or not * * *.

The exemplars listed in the EN all refer to machines for manufacturing and various other industrial uses. It is clear that the machines contemplated to be classified in this head-

ing are predominantly industrial machines. However, the EN also provides for certain items for domestic use, as it also states "The heading covers smoothing or ironing machines of the calendar type, whether or not for domestic use." Further, the ENs do not specifically exclude small or domestic-type machines. Rather, they exclude industrial machines that are "somewhat similar to calender or rolling machines" that "do not fulfil the purposes described" in the EN cited above.

As stated in the facts section, the "Xyron 510" is a sticker maker, laminator, label maker and magnet maker. It consists, in pertinent part, of a crank handle and two geared rubber-covered rollers with their surfaces close together, which, when cranked, applies pressure, bringing the articles and materials together to apply an adhesive or laminate. That is, the revolving rollers are in close contact to apply dressings or surface coatings by pressure of the rollers alone. The machine fulfills the description and purposes of a machine of heading 8420, HTSUS.

A product literally included in a tariff definition may nonetheless be excluded upon a showing of legislative intent, *United States v. Andrew Fisher Cycle Co*., 57 C.C.P.A. 102, 426 F.2d 1308, 1311 (CCPA 1970), but there must be "strong and sufficient indications that it was the intent of Congress" to exclude the product at issue. *Id.* We stated in NY H81167, the machines of heading 8420 featured "a degree of physical robustness and pressure which the Xyron 510 lacks." Though this is true, as the machine is a lightweight, domestic item, there is no indication this article should be excluded.

We note that Chapter 84, Note 2 provides that, subject to Note 3 to Section XVI, which is not applicable here, a machine which answers to a description in one or more of the headings 8401 to 8424 and also answers to a description in one or more of the headings 8425 to 8480 is to be classified under the appropriate heading in the former group. It is unnecessary to address whether the machine may be classified as an office machine of heading 8472, HTSUS, or a machine of heading 8479, HTSUS, because the machine would still be classified in heading 8420, HTSUS, by virtue of the aforementioned note.

We conclude that the "Xyron 510" is classifiable as a rolling machine of heading 8420, HTSUS. Therefore, parts for the "Xyron 510" are classifiable, pursuant to Section XVI, Note 2(b), HTSUS, in subheading 8420.99.90, HTSUS, which also provides for parts of the machines of heading 8420, to the extent that Section XVI, Note 2(b) is inapplicable.

Holding:

The "Xyron 510" is classifiable in subheading 8420.10.90, HTSUS, which provides for, "Calendering or other rolling machines, other than for metals or glass, and cylinders therefor; parts thereof: calendering or other rolling machines: other." Parts for the "Xyron 510" and for the machine substantially similar to the "Xyron 510" are classified in subheading 8420.99.90, HTSUS, which provides for "Calendering or other rolling machines, other than for metals or glass, and cylinders therefor; parts thereof: parts: other."

Effect on Other Rulings:

NY H81167, dated June 5, 2001, 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.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)