Bureau of Customs and Border Protection

General Notices

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, October 27, 2004,

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

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

19 CFR PART 177

MODIFICATION OF RULING LETTERS RELATING TO APPRAISEMENT OF ARTICLES RETURNED AFTER HAVING BEEN REPAIRED OR RECYCLED OVERSEAS

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

ACTION: Notice of modification of ruling letters and treatment relating to the appraisement of articles sent abroad for repair or recycling and subsequently returned to the United States.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection ("CBP") is modifying two ruling letters and any treatment previously accorded by CBP to substantially identical transactions, concerning the appraisement of articles sent abroad for repair or recycling and subsequently returned. Notice of the proposed action was published in the *Customs Bulletin* on August 18, 2004. No comments were received in response to this notice.

EFFECTIVE DATE: This modification is effective for merchandise entered or withdrawn from warehouse January 9, 2005.

FOR FURTHER INFORMATION CONTACT: Gina Grier, Value Branch, (202) 572–8719.

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), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts that emerge from the law are **informed compliance** and **shared responsibility**. These concepts are based on the premise that in order to maximize voluntary compliance with CBP laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's rights and responsibilities under the CBP and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484, 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 declare value on imported merchandise, and to provide other necessary information to enable CBP to properly assess duties, collect accurate statistics and determine whether any other 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 August 18, 2004, in the *Customs Bulletin* Vol. 38, No. 34, proposing to modify Headquarters Ruling Letter (HQ) 544241, dated January 12, 1989, and HQ 543859, dated March 13, 1987. These rulings related to the valuation of articles that have been returned to the United States after having been sent overseas for repair or recycling.

As stated in the proposed 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 to this notice, should have advised CBP during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third

party, CBP personnel applying a ruling of a third party to importations involving the same or similar issues, or the importer's or CBP's previous interpretation of the valuation laws. Any person involved in substantially identical transactions should have advised CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to the effective date of this final notice.

HQ 544241 involved the appraisement of defective watches sent overseas for repair and subsequent return. CBP determined that the watches would be appraised under computed value, and that the defective watches that were sent abroad constituted assists for valuation purposes. CBP held that the value attributed to the defective watches was equal to the costs incurred for transporting them to the plant for repair. In HQ 543859, used lacquer thinner was sent to Canada for recycling before being returned to the United States. In that case, transaction value was determined to be the correct appraisement method, comprised of the amount actually paid or payable to the Canadian recycler plus the value, as an assist, of the used solvent. Upon reassessment of these two rulings, it is CBP's position that the characterization of the defective watches and of the used lacquer thinner as assists was in error. Furthermore, in some instances the use of transaction value as the appraisement method in HQ 543859 appears to be incorrect.

Pursuant to 19 U.S.C. 1625(c)(1)), CBP is modifying HQ 544241 and HQ 543859 and any other ruling not specifically identified, to reflect the proper appraisement of the merchandise pursuant to the analysis in HQ 548557 and HQ 548569, as set forth in the Attachments to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment it previously accorded to substantially identical transactions.

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

DATED: October 20, 2004

HAROLD SINGER,
Acting Director,
International Trade Compliance Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 548557
October 20, 2004
VAL–RR:IT:V 548557 GG
CATEGORY: Valuation

MR. RICHARD G. GEARY
CORPORATE MANAGER
CUSTOMS PLANNING & COMPLIANCE
TIMEX CORPORATION
Waterbury, Connecticut 06720

RE: Modification of HQ 544241; Appraisement of Watches; Assists

DEAR MR. GEARY:

This is in reference to Headquarters Ruling Letter (HQ) 544241, dated January 12, 1989, regarding the appraisement of watches that were sent overseas to be repaired and then returned. We have reviewed the ruling and find one of its conclusions to be incorrect.

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), a notice was published on August 18, 2004, in Vol. 38, No. 34 of the *Customs Bulletin*, proposing to modify HQ 544241. No comments were received in response to this notice.

FACTS:

The facts as originally set forth in HQ 544241 are:

> You indicate that your company (importer) purchases and imports watches assembled in the Philippines by a related company. The watches are then sold in the United States with the benefit of a warranty extended to your customers.
>
> Defective watches, both in and out of warranty, are returned to the importer for repair. You state that the defective watches are then exported to importer's related party in the Philippines for repair and return. The watches are repaired and then sold back to the importer at prices which cover the cost of repairs plus a mark-up.
>
> You state that at the present time, the watches are registered and exported under Customs supervision and are entered into the United States under Item 806.20, TSUS [since superseded by subheadings 9802.00.40 and 50 of the Harmonized Tariff Schedule of the United States]. However, in the future, you will continue to have the watches repaired in the Philippines but without export registration and Customs supervision. You are inquiring as to the proper method of appraisement of the watches.

ISSUE:

What is the proper method of appraising watches that are repaired abroad by a related party and subsequently returned to the United States?

LAW AND ANALYSIS:

You are correct in stating that the watches will be appraised pursuant to section 402 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. 1401a). Transaction value, the preferred method of appraisement, is defined as the "price actually paid or payable" when the merchandise is sold for exportation to the United States. *See* section 402(b) of the TAA. With respect to the situation you describe, section 152.103(a)(3) of the Customs and Border Protection (CBP) (19 CFR § 152.103(a)(3)) states the following:

> The price actually paid or payable may represent an amount for the assembly of imported merchandise in which the seller has no interest other than as the assembler. The price actually paid or payable in that case will be calculated by the addition of the components and required adjustments to form the basis for the transaction value.

From the information you have provided, we cannot conclusively state that transaction value is inapplicable. The initial decision as to whether transaction value is appropriate in a related party situation is made by the appraising officer.

If the appraising officer is satisfied that the parties, albeit related, buy and sell from one another as if they are unrelated, then transaction value may be proper. Furthermore, if the price closely approximates one of the "test values" which are enumerated in section 402(b)(2)(B) of the TAA, then transaction value is also appropriate in appraising the merchandise.

Assuming that transaction value is found to be improper in this case, then it is necessary to proceed sequentially through the remaining bases of appraisement provided for under the valuation statute.

The next basis of appraisement, transaction value of identical or similar merchandise pursuant to section 402(c), appears to be inapplicable. U.S. Customs and Border Protection is in possession of no documentation addressing the appraisement of identical or similar used watches.

With respect to deductive and computed value, sections 402(d) and 402(e), respectively, the importer has a choice as to which method is to be utilized. However, here, as you indicate, deductive value is not available since the watches are not "sold" in the United States.

Computed value pursuant to section 402(e) of the TAA appears to be the appropriate method of appraisement in this case. The computed value of imported merchandise is the sum of the cost or value of the materials and the fabrication and other processing, profit and general expenses of the producer, any assist, and packing costs.

In HQ 544241, which this ruling is modifying, CBP's predecessor, the U.S. Customs Service, determined that the defective watches that were sent abroad to be repaired were assists. Upon reconsideration, we now deem that determination to be incorrect. Section 402(h)(1)(A) of the TAA defines assists in the following manner:

> The term "assist" means any of the following if supplied directly or indirectly, and free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or sale for export to the United States of the merchandise:
>
> i. Materials, components, parts, and similar items incorporated in the imported merchandise.

ii. Tools, dies, molds, and similar items used in the production of the imported merchandise.
iii. Merchandise consumed in the production of the imported merchandise.
iv. Engineering, development, artwork, design work, and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise.

The defective watches fall within none of the above categories. They quite clearly are neither tools, dies or molds used in the production of the imported merchandise, nor are they engineering, development, artwork, design work etc. necessary for the production of the imported merchandise. The defective watches also are not "materials, components, parts, and similar items incorporated in the imported merchandise," because they *are* the imported merchandise, albeit in an unrepaired state. Finally, the defective watches are merely repaired and thus are not "consumed in the production of the imported merchandise." For these reasons, we hereby revoke that aspect of HQ 544241 that determined that the defective watches are assists. In so doing, we concurrently overturn the determination that the value attributed to the defective watches in their capacity as assists is equal to the costs incurred for transporting them to the related party's plant.

For purposes of this response, we are assuming to the extent applicable, that the appraised value of the defective watches will include all statutory elements of computed value. Further, absent more specific information pertaining to the profit and general expenses of the repaired watches, we are unable to conclude that the repaired watches are not of the same class as new watches.

HOLDING:

Absent a finding by the appraising officer that the repaired watches may be appraised under transaction value, the proper appraisement method is computed value. The defective watches that are exported for repair and subsequently returned are not assists.

EFFECT ON OTHER RULINGS:

HQ 544241 dated January 12, 1989, is **modified**. In accordance with 19 U.S.C. 1625(c), this ruling will become effective sixty (60) days after publication in the *Customs Bulletin*.

J.S. Jarreau for VIRGINIA L. BROWN,
Chief,
Value Branch.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
548569
October 20, 2004

MR. T.W. KENNARD
PRESIDENT
B.A. MCKENZIE & CO., INC.
Post Office Box 1435
813 Pacific Avenue
Tacoma, Washington 98401

DEAr MR. KENNARD:

This is in reference to Headquarters Ruling Letter (HQ) 543859, dated March 13, 1987, regarding the appraisement of used lacquer thinner which has been returned to the United States after being recycled in Canada. We have reviewed the ruling and find several of its conclusions regarding appraisement to be incorrect. This ruling sets forth the necessary corrections. We restrict our substantive changes to only those issues involving valuation.

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), a notice was published on August 18, 2004, in Vol. 38, No. 34 of the *Customs Bulletin*, proposing to modify HQ 543859. No comments were received in response to this notice.

The facts as set forth in HQ 543859 are, in part, as follows:

> You state that waste used lacquer thinner is acquired from various auto body paint shops where it has utilized to clean paint from articles. The approximate composition of the solvent is toluene 50%, methanol 40%, and methyl ethyl ketone 10%. The recycler charges a fee for the removal of the impurities and there is no market in Canada for the purified solvent.
>
> We were of the opinion that the waste lacquer thinner had been advanced in value and improved in condition by the recycling abroad and, therefore, the classification of the returned product under item 800.00 Tariff Schedule of the United States[1] (TSUS), is precluded. The processing in Canada is too extensive to be considered an alteration under the provisions of item 806.20, TSUS. Accordingly, the returned lacquer thinner would probably be dutiable upon the total quantity and full value of the chemical mixture under item 432.28, TSUS, at the rate of 18.2 percent ad valorem.

In HQ 543859, the U.S. Customs Service (now known as U.S. Customs and Border Protection ("CBP")) also concluded that the returned solvent would be appraised on the basis of transaction value, pursuant to section 402(b) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 ("TAA"). Specifically, the ruling provided that transaction value would be

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[1] The Tariff Schedule of the United States has since been superseded by the Harmonized Tariff Schedule of the United States.

represented by the amount actually paid or payable to the Canadian recycler plus the value, as an assist, of the used solvent that is shipped to the recycler. It further provided that if the solvent was acquired free of charge, then the value of the assist would consist of the freight and related costs involved in transporting the used solvent to the recycling facility in Canada.

Upon reconsideration, CBP now finds that its decisions as to the appraisement method and the characterization of the used solvent as an assist, were not entirely correct. In making this determination, CBP has focused on several aspects of the transaction. Specifically, in the ruling request it was emphasized that the company that acquires and ships the used solvent to Canada for recycling owns the solvent, and that the recycler simply works on a fee basis. It was also stated that the recycled solvent will either be returned to the owner in the United States, or shipped directly to a U.S. located consumer. To the best of the owner's knowledge, no similar product is imported into the United States.

In HQ 543859, Customs held that the purified lacquer thinner would be appraised under transaction value. Transaction value, the preferred method of appraisement, is defined as the price actually paid or payable when the merchandise is sold for exportation to the United States. *See* Section 402(b), TAA. On the basis of the information provided, it appears as though there may be a valid transaction value in those instances when a sale is made to a U.S. customer while the lacquer thinner is still located in Canada. This is because there would have been a "sale for exportation" to the United States. However, no transaction value exists when the recycled lacquer thinner is simply returned to the owner without being subject to a sale. In such cases, an alternative appraisement method must be used.

When imported merchandise cannot be appraised on the basis of transaction value, it is to be appraised in accordance with the remaining methods of valuation, applied in sequential order. The alternative bases of appraisement, in order of preference, are: the transaction value of identical merchandise; the transaction value of similar merchandise; deductive value; and computed value. If the value of imported merchandise cannot be determined under these methods, then resort must be made to the "fallback" valuation method of section 402(f) of the TAA.

The ruling request indicated an absence of sales of similar merchandise. By implication, this means that there are probably no sales of identical merchandise, either. Consequently, transaction values of identical and similar merchandise are not available as appraisement methods. It is possible that there may be a deductive value, if the recycled lacquer thinner is sold domestically within 90 days of importation. Although the ruling request suggests that the computed value of appraisement would be applicable, we note that the owner and the recycler disclaim any relationship. The absence of a relationship usually precludes the use of computed value due to the difficulty in obtaining the producer information necessary to validate a computed value. In some cases the recycled lacquer thinner may have to be appraised under the "fallback" valuation method.

Finally, we wish to reassess the characterization in HQ 543859 of the used lacquer thinner as an assist. Section 402(h)(1)(A) of the TAA defines assists in the following manner:

> The term "assist" means any of the following if supplied directly or indirectly, and free of charge or at reduced cost, by the buyer of imported

merchandise for use in connection with the production or sale for export to the United States of the merchandise:

i. Materials, components, parts, and similar items incorporated in the imported merchandise.
ii. Tools, dies, molds, and similar items used in the production of the imported merchandise.
iii. Merchandise consumed in the production of the imported merchandise.
iv. Engineering, development, artwork, design work, and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise.

The used lacquer thinner that was sent to Canada falls within none of the above categories. It quite clearly is neither a tool, die or mold that is used in the production of the imported merchandise, nor is it engineering, development, artwork, design work etc. that is necessary for the production of the imported merchandise. The used lacquer thinner also is not a material, component, part or similar item that is incorporated in the imported merchandise, because it *is* the imported merchandise, albeit in an unpurified state. This holds true notwithstanding the fact that as a result of the purification process the used lacquer thinner was advanced in value and improved in condition. Finally, the used lacquer thinner is merely recycled in Canada and thus is not "consumed in the production of the imported merchandise." For these reasons, we hereby modify HQ 543859, revoking that aspect of the ruling that held the used lacquer thinner to be an assist.

EFFECT ON OTHER RULINGS:

HQ 543859, dated March 13, 1987, is **modified**. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective sixty (60) days after publication in the *Customs Bulletin*.

J.S. Jarreau for VIRGINIA L. BROWN,
Chief,
Value Branch.

19 CFR PART 177

PROPOSED MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF THE "SAFE START IV START PAK"

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

ACTION: Notice of proposed modification of a tariff classification ruling letter and treatment relating to the classification of the "Safe Start IV Start Pak"

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs

Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to modify a ruling concerning the tariff classification of the "Safe Start IV Start Pak," under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments are invited on the correctness of the proposed actions.

DATE: Comments must be received on or before December 10, 2004.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulation and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at 799 9th St. N.W. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling 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 CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that CBP intends to modify a ruling pertaining to the tariff classification of the "Safe Start IV Start Pak". Although in this notice CBP is specifically referring to Headquarters Ruling Letter (HQ) 555520, dated October 29, 1990, set forth as attachment "A" to this document, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing data bases for rulings in addition to those 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 CBP 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, CBP intends to revoke any treatment previously accorded by CBP 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, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBPs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

In HQ 555520 (Attachment "A"), CBP classified the IV Start Pak as a "set" under GRI 3. Using GRI 3(c), the entire set was classified in heading 4821, HTSUS, the provision for the identification label. CBP reasoned that all of the articles in the set merited equal consideration and none provided the essential character of the set. We no longer believe that the paper ID label equally merits consideration in the classification of this set.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to modify HQ 555520, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 967207 (Attachment "B"). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: October 25, 2004

John Elkins For MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 555520
October 29, 1990
CLA–2 CO:R:C:V 555520 KCC
CATEGORY: CLASSIFICATION TARIFF NO.: 4821.10.40 - 4823.90.65 - 9802.00.80 - 9801.00.10

R. BRIAN BURKE, ESQ.
RODE & QUALEY
295 Madison Avenue
New York, New York 10017

RE: Tariff treatment and the applicable duty exemptions for the "E-Z Prep Kit" and the "Safe Start IV Start Pak".GRI 3(c); 083137; assembly; sonic welding; 554885; packaging; Superscope; 058345/058346

DEAR MR. BURKE:

This is in response to your letters of October 31, 1989, and March 16, 1990, on behalf of Becton Dickinson and Company, requesting a ruling on the applicability of subheadings 9802.00.80 and 9801.00.10, Harmonized Tariff Schedule of the United States (HTSUS), to "E-Z Prep Kit" and "Safe Start IV Start Pak" to be imported from Mexico. Samples were submitted for examination. We regret the delay in responding to your request.

FACTS:

A wholly-owned subsidiary of Becton Dickinson and Company, Deseret Medical, Inc., will export various articles and packaging materials of U.S. origin, and latex gloves of Taiwanese origin to Mexico for assembly and packaging operations. Becton plans on producing kits and paks which will be used for cleaning and sterilizing patients prior to performing medical procedures. The products under consideration are the "E-Z Prep Kit" and the "Safe Start IV Start Pak". However, there will be eighteen different variations to the "E-Z Prep Kit" and fifteen different variations to the "Safe Start IV Start Pak".

The contents of the "E-Z Prep Kit" under consideration are a blue hospital wrap (coated paper), slit urethane sponges, stick sponges, compartmentalized plastic trays, a white paper hospital wrap, seamless latex gloves, paper towels, blue blotting towels, and six-inch wooden applicator sticks with cotton tips.

The contents of the "Safe Start IV Start Pak" under consideration are seamless latex gloves, a tegaderm transparent dressing, an alcohol wipe, a povidine-iodine topical skin prep solution, an ointment containing povidone-iodine, a latex tourniquet, gauze sponges, a roll of plastic tape, and an ID label.

In Mexico, the U.S.-origin urethane head and plastic stick will be sonically welded together, and then packaged with the other specified products to form the "E-Z Prep Kit". The packaging operation for the "E-Z Prep Kit" entails inserting the products into a plastic bag and then sealing the bag. The packaging operation for the "Safe Start IV Start Pak" entails using a multivac blister-type packaging machine which creates a blister in plastic roll stock in which the products are inserted, and adhesively applying a paper lid to complete the package.

Upon completion of the packaging operations, the "E-Z Prep Kit" and "Safe Start IV Start Pak" will be imported into the U.S. In the U.S., the kit and pak will be subjected to a sterilization process without being removed from their packaging.

ISSUE:

1. What is the tariff classification of the "E-Z Prep Kit" and "Safe Start IV Start Pak"? 2. Whether the "E-Z Prep Kit" and "Safe Start IV Start Pak" will qualify for the duty exemptions available under HTSUS subheadings 9802.00.80 and 9801.00.10 when returned to the U.S.

LAW AND ANALYSIS:

I. Classification of "E-Z Prep Kit" and "Safe Start IV Start Pak" The General Rules of Interpretation (GRI's) set forth the manner in which merchandise is to be classified under the HTSUS. GRI 1 requires that classification be determined first according to the terms of the headings of the tariff and any relative section or chapter notes and, unless otherwise required, according to the remaining GRI's, taken in order.

GRI 3 states, in pertinent part:

When by application of Rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be affected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only . . . of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

Since the two kits at issue consist of, at least, both paper and plastic articles, which are separately provided for in the HTSUS, GRI 3(b) applies as follows:

[G]oods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The Explanatory Notes constitute the official interpretation of the HTSUS at the international level. Explanatory Note (X) to GRI 3(b) states that the term "goods put up in sets for retail sale" means goods which:

(a) consist of at least two different articles which are, prima facie, classifiable in different headings; (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; (c) are put up in a manner suitable for sale directly to users without repackaging.

In this case, the "E-Z Prep Kit" and the "Safe Start IV Start Pak" qualify as sets within the meaning of GRI 3. Both the "E-Z Prep Kit" and "Safe Start IV Start Pak" consist of at least two different articles which are classifiable in different headings. The kits contain products which are intended for use during specific medical procedures. And, although these kits as imported are "not suitable for sale directly to users" due to the fact that they must first be sterilized, sterilization of goods while still in the packages is not considered "constructive unpacking and repacking" so as to disqualify these kits as sets. See, Headquarters Ruling Letter 083137 (HRL) dated October 31, 1989.

Since the "E-Z Prep Kit" and the "Safe Start IV Start Pak" are sets, and classification of their component parts cannot be made pursuant to GRI 3(a), we must determine the essential character of each set in accordance with GRI 3(b).

Explanatory Note VIII to GRI 3(b) states that: The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

In this case, the essential characters of the "E-Z Prep Kit" and the "Safe Start IV Start Pak" are not readily apparent. Each component plays a role in the medical purpose for which the sets are designed. No single item imparts a unique character to the function of either set as a whole, and, moreover, none of the factors given prove determinative in any respect.

When, as in the instant case, the component which gives the goods at issue their essential character cannot be determined, classification is ascertained by utilizing GRI 3(c). GRI 3(c) provides as follows:

When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

The competing provisions for the "E-Z Prep Kit" are found under the following subheadings:

1. Hospital wraps 4823.90.65, HTSUS - articles of coated paper, other. 2. Urethane sponges 3005.90.50, HTSUS - wadding, gauze, bandages and similar articles, put up in forms or packings for retail sale for medical, surgical purposes, other, other. 3. Stick sponges 3926.90.90, HTSUS - other articles of plastics, other, other. 4. Plastic trays 3923.90.00, HTSUS - articles for the conveyance or packing of goods, of plastic, other. 5. Latex gloves 4015.10.00, HTSUS - articles of apparel and clothing accessories, for all purposes, of vulcanized rubber, other than hard rubber, gloves, surgical and medical. 6. Paper and blotting 4818.20.20, HTSUS - towels of paper. 7. Wooden applicator 4221.90.90, HTSUS - articles of stick wood, other, other.

The competing provision for the "Safe Start IV Start Pak" are found under the following subheadings: 1. Latex gloves 4015.10.00, HTSUS - articles of apparel and clothing accessories, for all purposes, of vulcanized rubber, other than hard rubber, gloves, surgical and medical. 2. Tegaderm transparent 3005.90.10, HTSUS - wadding, gauze, dressing/alcohol wipe bandages and similar articles, impregnated or coated with pharmaceutical substances, other, coated or impregnated with pharmaceutical substances. 3. Skin prep solution 3004.90.60.90, HTSUS - medicaments ointment containing consisting of mixed or unmixed povidine-iodine products for therapeutic or prophylactic uses, put up in measured doses for in forms or packings for retail sale, other, other, other. 4. Latex tourniquet 4014.90.50, HTSUS - hygienic or pharmaceutical articles, of vulcanized rubber other than hard rubber, other, other. 5. Gauze sponges 3005.90.50, HTSUS - wadding, gauze, bandage and similar articles put up in forms or packings for retail sale for medical, surgical purposes, other, other. 6. Plastic tape 3919.90.50.50, HTSUS - adhesive tape of plastic, other, other, other. 7. ID label 4821.10.40, HTSUS - for paper and paperboard labels of all kinds, whether printed or not printed, printed, other.

The classification of the products containing paper were based on visual examination of the products. Applying GRI 3(c), the "E-Z Prep Kit" is classified under Heading 4823, and the "Safe Start IV Start Pak" is classified under Heading 4821, both of which appear last in numerical order among the competing headings which equally merit consideration.

II. Applicability of subheadings 9802.00.80 and 9801.00.10, HTSUS HTSUS subheading 9802.00.80 provides a partial duty exemption for:

[a]rticles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubrication, and painting. . . .

All three requirements of HTSUS subheading 9802.00.80 must be satisfied before a component may receive a duty allowance. An article entered under this tariff provision is subject to duty upon the full value of the imported assembled article, less the cost or value of such U.S. components, upon compliance with the documentary requirements of section 10.24, Customs Regulations (19 C.F.R. § 10.24).

Section 10.16(a), Customs Regulations (19 C.F.R. § 10.16(a)), provides that the assembly operation performed abroad may consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing, or the use of fasteners.

The sonic welding operation is considered an acceptable assembly operation pursuant to 19 C.F.R. § 10.16(a). See also, HRL554885 dated February 23, 1990, which held that sonic welding is clearly analogous to the assembly operations enumerated in 19 C.F.R. § 10.16(a). Therefore, the stick sponge is entitled to an allowance in duty for the cost or value of the urethane head and plastic handle under HTSUS subheading 9802.00.80 when imported into the U.S. in the "E-Z Prep Kit." HTSUS subheading 9801.00.10 provides for the free entry of U.S. products that are exported and returned without having been advanced in value or improved in condition by any means while abroad, provided the documentary requirements of section 10.1, Customs Regulations (19 C.F.R. § 10.1), are met. In Superscope, Inc. v. United States, 13 CIT , 727 F.Supp. 629 (CIT 1989), the court found that glass panels of U.S. manufacture that were exported, packaged with other components of foreign origin to make unassembled stereo cabinets, and then imported into the U.S. as an entirety were not advanced in value or improved in condition while abroad, but were merely repacked. Therefore, the court held that the glass panels were entitled to duty free entry under item 800.00, Tariff Schedules of the United States (TSUS) (the precursor provision to HTSUS subheading 9801.00.10).

With the exception of the assembly of the stick sponges, the operations performed in Mexico to create the "E-Z Prep Kit" consist merely of repackaging the U.S. products with the Taiwanese latex gloves and the assembled stick sponge. We have previously held that blister packaging operations do not preclude the entry of the blister packaging material under item 800.00, TSUS. See, HRL 058345/ 058346 dated April 19, 1978. Therefore, as the mere packaging of U.S. products with other products does not advance in value or improve in condition the U.S. products, the portion of the Kit or Pak consisting of U.S. products (excluding the assembled stick sponge) will be eligible for the duty exemption under HTSUS subheading 9801.00.10. This assumes that the documentation requirements of 19 C.F.R. § 10.1 are met and that the district director of Customs at the port of entry is satisfied of the U.S. origin of each product claimed to be entitled to this duty exemption.

Based on the foregoing discussion, we find that the "E-Z Prep Kit" is dutiable on its full value (at the rate of 5.6 percent ad valorem under subheading 4823.90.65, HTSUS), less the cost or value of the urethane head and plastic handle comprising the assembled stick

sponge pursuant to subheading 9802.00.80, HTSUS. Additionally, a classification allowance may be made under subheading 9801.00.10, HTSUS, for the value of the U.S. articles that are merely repackaged abroad.

The "Safe Start IV Start Pak" is dutiable on its full value (at the rate of 4.2 percent ad valorem under subheading 4821.10.40, HTSUS), with a classification allowance for the value of the U.S. articles that are merely packaged abroad and returned under subheading 9801.00.10, HTSUS.

HOLDING:

On the basis of the information and samples provided, the "E-Z Prep Kit" is classified in accordance with GRI 3(c) under subheading 4823.90.65, HTSUS, dutiable at the rate of 5.6 percent ad valorem. Allowances in duty may be made for the cost or value of the urethane head and plastic handle under subheading 9802.00.80, HTSUS, and for the value of the U.S. articles that are merely packaged abroad under subheading 9801.00.10, HTSUS.

The "Safe Start IV Start Pak" is classified in accordance with GRI 3(c) under subheading 4821.10.40, HTSUS, dutiable at the rate of 4.2 percent ad valorem, with a classification allowance under subheading 9801.00.10, HTSUS, for the value of the U.S. articles that are merely packaged abroad.

The above allowances in duty presume compliance with the applicable documentation requirements of 19 C.F.R. § 10.1 and 19 C.F.R. § 10.24.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967207
CLA–2 RR:CR:GC 967207 AM
CATEGORY: CLASSIFICATION
TARIFF NO.: 4015.19.0550

BRIAN BURKE, ESQ.
RODE & QUALEY
295 Madison Ave.
New York, NY 10017

RE: HQ 555520; "Safe Start IV Start Pak"

DEAR MR. BURKE:

This is in reference to Headquarters Ruling Letter (HQ) 555520, issued to your client, Becton Dickinson and Company, on October 29, 1990, concerning the classification and qualification for duty exemptions available under chapter 98 of the Harmonized Tariff Schedule of the United States

(HTSUS), of the "Safe Start IV Start Pak" and the "E-Z Prep Kit." We have reviewed the decision in HQ 555520 and have determined that the classification set forth in that ruling for the "Safe Start IV Start Pak" is in error. This ruling modifies HQ 555520 with respect to the classification, under the HTSUS, of the "Safe Start IV Start Pak" only.

FACTS:

The "Safe Start IV Start Pak" consists of the following articles: a pair of seamless latex gloves, a Tegaderm® transparent dressing, an alcohol wipe, a povidine-iodine topical skin preparation solution, an ointment containing povidine-iodine, a latex tourniquet, gauze sponges, a roll of plastic tape, and an identification label.

The IV Start Pak is used in the following manner: the gloves are donned by the health care provider; the tourniquet is tied around the patient's arm to identify a suitable vein and then loosened; the skin is cleansed with the iodine solution and then wiped away with the alcohol wipe and possibly the gauze sponge; the tourniquet is retied and the IV catheter (not included) is inserted into the patient's vein, secured with the tape and possibly positioned with the gauze sponge; the ointment is applied to the insertion site and the Tegaderm® dressing is applied over it; the label is then filled out and applied on or near the dressing. The gauze and tape would also be used to cover the wound created if the IV insertion attempt was unsuccessful.

In HQ 555520, Customs and Border Protection ("CBP") classified the IV Start Pak as a "set" under GRI 3. Using GRI 3(c), the entire set was classified in heading 4821, HTSUS, the provision for the identification label. CBP reasoned that all of the articles in the set merited equal consideration and none provided the essential character of the set.

ISSUE:

Whether the identification label in a kit consisting of a pair of seamless latex gloves, a Tegaderm® transparent dressing, an alcohol wipe, a Povidine-iodine topical skin preparation solution, an ointment containing Povidine-iodine, a latex tourniquet, gauze sponges, a roll of plastic tape, and an identification label equally merits consideration in a GRI 3(c) analysis of the merchandise.

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 related 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 inter-

pretation of the HTSUSA. See T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

GRI 3(b) provides for the classification of goods put up in sets for retail sale. The rule states, in pertinent part, as follows:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Explanatory Note (X) (page 5) to GRI 3(b) states that the term "goods put up in sets for retail sale" means goods which:

> (a) consist of at least two different articles which are, prima facie, classifiable in different headings;
>
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
>
> (c) are put up in a manner suitable for sale directly to users without repacking.

GRI 3(c) states: "When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration."

The kit consists of products that, if imported separately, are classifiable in the following subheadings of the HTSUS (2004):

3004	Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale:
3004.90	Other:
3004.90.91	Other (Povidine-iodine ointment and solution)
* * * * * *	
3005	Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes:
3005.10	Adhesive dressings and other articles having an adhesive layer:
3005.10.50	Other (Tegaderm dressing)
* * * * * *	
3919	Self-adhesive plates, sheets, film, foil, tape, strip and other flat shapes, of plastics, whether or not in rolls:
3919.10	In rolls of a width not exceeding 20 cm:
3919.10.50	Other (plastic tape)

* * * * * *

4008	Plates, sheets, strip, rods and profile shapes, of vulcanized rubber other than hard rubber:
	Of noncellular rubber:
4008.21.00	Plates, sheets, and strip (tourniquet)

* * * * * *

4015	Articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanized rubber other than hard rubber:
	Gloves, mittens and mitts:
4015.19	Other:
4015.19.05	Medical (latex glove)

* * * * * *

4821	Paper and paperboard labels of all kinds, whether or not printed:
4821.10	Printed:
4821.10.40	Other (label)

As a preliminary matter, we stated in HQ 555520, that the tourniquet was classified in subheading 4014.90.50. HTSUS, the provision for "Hygienic or pharmaceutical articles . . . of vulcanized rubber other than hard rubber . . . : other: other." In NY H83191, dated July 17, 2001, we classified a latex rubber tourniquet in 4008.21.00, HTSUS, the provision for strips of noncellular rubber. We find the latter ruling, stating that the tourniquet is more specifically classified as a rubber strip, to be correct.

In HQ 953472, dated March 21, 1994, Customs articulated its position that in order to be classifiable as a set, the individual components must be "used together or in conjunction with another for a single purpose [need] or activity." All of the components in HQ 555520 are used in the process of starting an intravenous line in a patient as described above. Furthermore, the set is sold to health care facilities without the need for repacking. Hence, the IV start Pak is a set for purposes of GRI 3(b). The ruling then went on to classify the set in the last subheading in numerical order under GRI 3(c), finding that no one item gave the set its essential character.

GRI 3(c) directs us to consider which articles in the set merit consideration in determining the article that imparts the essential character to the set. While we agree with our determination in HQ 555520, that no one item gives this set its essential character, we find that not all of the articles equally merit consideration in the classification determination of this set. The kit is marketed as an IV Start Pak. The label is an informational device, not essential to the preparation, insertion or securing of the IV itself. In other words, it is ancillary in function to the start of the IV and de minimis in value.

Rather, the gloves, tourniquet, cleansing materials, and the dressing, are all essential to start and secure an IV and are of relatively equal size and

weight. Hence, by application of GRI 3(c), the instant set is classified in subheading 4015.19.05, HTSUS, the subheading that occurs last in numerical order among those provisions that merit consideration.

HOLDING:

The "Safe Start IV Start Pak" kit is classified in subheading 4015.19.0550, HTSUSA (annotated), the provision for " Articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanized rubber other than hard rubber: Gloves, mittens and mitts: Other: Gloves: Medical: Other. The rate of duty is "free." The tourniquet is classified in subheading 4008.21.0000, HTSUSA, the provision for "Plates, sheets, strip, rods and profile shapes, of vulcanized rubber other than hard rubber: Of noncellular rubber: Plates, sheets and strip." The rate of duty is "free."

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

EFFECT ON OTHER RULINGS:

HQ 555520 is modified in accordance with this ruling.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN BOYS' ATHLETIC-TYPE FOOTWEAR

AGENCY: Bureau of Customs and Border Protection; Department of Homeland Security.

ACTION: Notice of proposed modification of a tariff classification ruling letter and revocation of treatment relating to the classification of certain boy's athletic-type footwear.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625 (c)), this notice advises interested parties that Customs and Border Protection (CBP) intends to modify one ruling letter relating to the tariff classification of certain boys' athletic-type footwear under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). CBP also intends 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 December 10, 2004.

FOR FURTHER INFORMATION CONTACT: Kelly Herman, Textiles Branch: (202) 572–8713.

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

Pursuant to section 625 (c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to modify one ruling letter pertaining to the tariff classification of certain boy's athletic-type footwear. Although in this notice, CBP is specifically referring to the modification of New York Ruling Letter (NY) J87067, dated August 22, 2003 (Attachment A), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during 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 CBP 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, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise or the importer's or CBP's previous interpretation of the HTSUSA. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substan-

tially 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 its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY J87067, CBP ruled that certain boys' athletic-type footwear was classified in subheading 6402.99.80, HTSUSA, which provides for "Other footwear with outer soles and uppers of rubber or plastics: Other footwear: Other: Valued over $6.50 but not over $12/pair." Since the issuance of that ruling, CBP has reviewed the classification of this item and has determined that the cited ruling is in error as it pertains to children's shoes in sizes 11.5 through 13. We have determined that the boys' athletic-type footwear in sizes 11.5 through 13 is properly classified in subheading 6402.99.1871, HTSUSA, which provides for "Other footwear with outer soles and uppers of rubber or plastics: Other footwear: Other: Having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is rubber or plastics (except footwear having a foxing or a foxing-like band applied or molded at the sole and overlapping the upper and except footwear designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather): Other: Other: Other: Other."

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to modify NY J87067 and to revoke or modify any other ruling not specifically identified, to reflect the proper classification of the boy's athletic type footwear according to the analysis contained in proposed Headquarters Ruling Letter (HQ) 967128, set forth as Attachment B, to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

DATED: October 25, 2004

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY J87067
August 22, 2003
CLA–2–64:RR:NC:TA:347 J87067
CATEGORY: Classification
TARIFF NO.: 6402.99.80

MS. PATTY KITTEL
TARGET CUSTOMS BROKERS, INC.
Import Dept., TPS–0885
1000 Nicollet Mall
Minneapolis, MN 55403

RE: The tariff classification of footwear from China

DEAR MS. KITTEL:

In your letter dated August 4, 2003 you requested a tariff classification ruling.

The submitted half pair sample, identified as Style #4399 is as you state a boy's/child's athletic-type shoe that does not cover the ankle. The shoe has a functionally stitched plastic material upper with a padded plastic tongue, a lace closure and it has the plastic letters "SHAQ" on the outside back quarter of the shoe that light up when the heel strikes the ground. The shoe also has a cemented-on, molded rubber/plastic bottom that overlaps the upper at the sole by a variable height of 3/16-inch to as much as 1/2-inch or more around most of the lower perimeter of the shoe. We consider this shoe to have a foxing-like band. You have informed this office by telephone that the shoe will be valued at $6.95 per pair.

The applicable subheading for this shoe, identified as Style #4399 will be 6402.99.80, Harmonized Tariff Schedule of the United States (HTS), which provides for footwear, in which both the upper's and outer sole's external surface is predominately rubber and/or plastics; which is not "sports footwear"; which does not cover the ankle; in which the upper's external surface area measure over 90% rubber or plastics (including any accessories or reinforcements); which has a foxing or a foxing-like band; which is not designed to be a protection against water, oil, or cold or inclement weather; and which is valued over $6.50 but not over $12.00 per pair. The rate of duty will be 90 cents per pair plus 20% ad valorem.

We note that the shoe is marked "Made in China" at the bottom of a sewn on label on the inside of the tongue that also serves as the shoe sizing label. However, we do not consider the manner of this country of origin marking, which uses lettering under 1mm in size to be as legible and as conspicuous as the nature of the article will allow, especially since the letters and numbers indicating the shoe sizes, "US 13 MEX 20 UK12 EUR 31" on the same label use lettering at least twice as large and are set up to be easily seen.

The marking statute, section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. 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. We note that the sample shoe you have provided for this ruling request has not been marked in an acceptable, legible manner with its country of origin. Therefore, if imported as is, this shoe does not meet the country of origin marking requirements of the marking statute and will be considered not legally marked.

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 Richard Foley at 646–733–3042.

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

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967128
CLA–2 RR:CR:TE 967128 KSH
CATEGORY: Classification
TARIFF NO.: 6402.99.18; 6402.99.80

MS. PATRICIA KITTEL
TARGET CUSTOMS BROKERS, INC.
Import Dept., TPS–0885
1000 Nicollet Mall
Minneapolis, MN 55403

RE: Modification of NY J87067, dated August 22, 2003; Classification of boy's athletic footwear

DEAR MS. KITTEL:

This letter is in response to your request of April 7, 2004, for reconsideration of New York Ruling Letter (NY) J87067, dated August 22, 2003, as it pertains to the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of boy's athletic footwear from China. The footwear was classified in subheading 6402.99.80, HTSUSA, which provides for "footwear, in which both the upper's and outer sole's external surface is predominately rubber and/or plastics; which is not "sports footwear"; which does not cover the ankle; in which the upper's external surface area measures over 90% rubber or plastics (including any accessories or reinforcements); which has a foxing or foxing-like band; which is not designed to be a protection against water, oil, or cold or inclement weather; and which is valued over $6.50, but not over $12.00 per pair." The determination was

based upon an examination of a sample identified as Style 4399 and a finding that the shoes possessed a foxing-like band, i.e., the shoe's unit molded sole vertically overlapped the upper by 3/16 of an inch or more and the overlap substantially encircled the shoe. We have reviewed NY J87067 and found it to be in error as it pertains to the classification of children's American sizes 11.5 through 13. Therefore, this ruling modifies NY J87067. A sample athletic shoe and outer sole was submitted with your request.

FACTS:

The submitted sample shoe is a black and white lace-up athletic shoe which does not cover the ankle. The upper is composed of rubber/plastic material which comprises over 90 percent of the external surface area of the upper (ESAU). The sample has a unit molded sole which overlaps the upper by at least 3/16 of an inch when measured on a vertical plane. Measurements taken at the ball of the foot evidenced that the vertical overlap was 3/16 of an inch on the lateral side. The sidewalls and toe of the shoe overlap more than 3/16 of an inch. The foxing like band was determined to substantially encircle 58% of the perimeter of the shoe.

ISSUE:

Whether Style 4399 possesses a foxing like band which substantially encircles the entire perimeter of the shoe.

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). 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 Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

In T.D. 93–88, dated November 17, 1993, CBP stated that the typical "foxing band" is "a rubber tape, about 1 inch high by 1/16 inch thick, which covers the lower part of the upper and the edge of the rubber outersole. . . ." CBP defined the term "foxing-like band" as "a band around a substantial portion of the lower part of the upper which either has been attached (cemented, sewn, etc.) to the sole or is part of the same molded piece of rubber or plastics which forms the sole." In T.D. 83–116, dated June 22, 1983, CBP set forth guidelines relating to the characteristics of foxing and foxing-like bands. CBP noted that unit molded footwear is considered to have a foxing-like band if a vertical overlap of 1/4 of an inch or more exists from where the upper and the outer sole initially meet (measured on a vertical plane), and that if the overlap is less than 1/4 inch, the footwear is presumed not to have a foxing-like band.

In HQ 087098, dated June 12, 1990, CBP ruled that children's shoes having an overlap of 3/16 of an inch or more and infant's shoes having an overlap of 1/8 of an inch or more should be considered to have a foxing-like band. If the extent of the overlap covers between 40 percent and 60 percent of the perimeter of the shoe, the shoe may possess a foxing-like band. T.D. 92–108, dated November 10, 1992.

In T.D. 92–108, dated November 25, 1992, CBP set forth its position regarding the interpretation of the term "substantially encircle" as it relates to "foxing and foxing-like bands." In so doing, CBP formally adopted the "40–60" rule, which is described as a measurement used by CBP import specialists to assist in making a determination pertaining to encirclement. Generally, under this rule, an encirclement of less than 40% of the perimeter of the shoe by the band does not constitute foxing or a foxing-like band. An encirclement of between 40% to 60% of the perimeter of the shoe by the band may or may not constitute a foxing or a foxing-like band depending on whether the band functions or looks like a foxing. An encirclement of over 60% of the perimeter of the shoe by the band is always considered substantial encirclement. Submission of a separate outer sole in conjunction with a sample of the completed shoe will aid CBP's consideration of application of the 40–60 rule. However, an outer sole, submitted alone, will not be used to determine whether the foxing like band substantially encircles the perimeter of the shoe.

In your submission you have attached two independent laboratory test results which determined that the percentage of overlap of 3/16 of an inch or greater encircles less than 40% of the perimeter of the shoe. One of the lab results concluded that the foxing like band encircled 37% of the perimeter of the shoe and the other lab tested 3 separate samples which indicated an encirclement of 37.95, 37.31 and 36.78%. You attribute the discrepancy between the independent labs results and CBP results to CBP's presumed utilization of the high point rule. However, CBP did not employ the high point rule. Rather, the difference in measurements is due to the independent labs disregard for the lip running along the entire perimeter of the sole and its relationship to the upper when both components are joined together. When this portion of the foxing like band is considered the amount of substantial encirclement is 58% of the perimeter of the shoe.

As previously noted, the submitted sample yielded an overlap of at least 3/16 of an inch. However, inasmuch as the submitted sample is a children's size 13[1], an overlap of ¼ of an inch or more is required to find that the shoe possesses a foxing like band. See T.D. 83–116 which states, in relevant part, that unit molded footwear (i.e., footwear sized 11 ½ and larger) is considered to have a foxing-like band if a vertical overlap of 1/4 inch or more exists from where the upper and the outsole initially meet, measured on a vertical plane. Accordingly, the sample does not have a foxing like band. In contrast, style 4399 in children's sizes up to and including size 11 do possess a foxing like band which substantially encircles the perimeter of the shoe.

HOLDING:

NY J87067, dated August 22, 2003, is hereby modified.

Style #4399 in sizes up to and including children's size 11 are classified in subheading 6402.99.80, HTSUSA, which provides for "Other footwear with outer soles and uppers of rubber or plastics: Other footwear: Other: Valued over $6.50 but not over $12/pair." The rate of duty is $.90/pair + 20% *ad valorem*. Style #4399 in children's sizes 11.5 through 13 are classified in subheading 6402.99.18, HTSUSA, which provides for "Other footwear with

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[1] Additional U.S. Note 1(b) to Chapter 64, HTSUSA, provides: "The term 'footwear for men, youths and boys' covers footwear of American youths' size 11 ½ and larger for males, and does not include footwear commonly worn by both sexes."

outer soles and uppers of rubber or plastics: Other footwear: Other: Having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is rubber or plastics (except footwear having a foxing or a foxing-like band applied or molded at the sole and overlapping the upper and except footwear designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather): Other." The rate of duty is 6% *ad valorem*.

MYLES B. HARMON,
Director,
Commercial Rulings Division.