U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR PARTS 24

CBP DEC. 22–26

RIN 1515–AE39

REFUND OF ALCOHOL EXCISE TAX

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

ACTION: Interim final rule; request for comments.

SUMMARY: This document amends U.S. Customs and Border Protection regulations to implement certain changes made by the Taxpayer Certainty and Disaster Tax Relief Act of 2020, which amended the Craft Beverage Modernization Act provisions of the Tax Cuts and Jobs Act of 2017. Pursuant to these changes, the responsibility for administering refunds, reduced tax rates, and tax credits on imported alcohol is moving from U.S. Customs and Border Protection (CBP) to the U.S. Department of the Treasury, effective January 1, 2023.

DATES: This interim final rule is effective January 1, 2023; comments must be received by March 2, 2023.

ADDRESSES: You may submit comments, identified by docket number Docket No. USCBP–2018–0033, by one of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Due to COVID–19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking

process, see the 'Public Participation' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Due to the relevant COVID–19-related restrictions, CBP has temporarily suspended on-site public inspection of the public comments.

FOR FURTHER INFORMATION CONTACT: Kellee Gross, Branch Chief, Trade Processes Branch, Office of Trade, 202–815–1699, *kellee.m.gross@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Public Participation

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

II. Background

Sections 13801–13808 of the Tax Cuts and Jobs Act of 2017 (Pub. L. 115–97), signed December 22, 2017, commonly referred to as the Craft Beverage Modernization Act (CBMA), amended the Internal Revenue Code for two calendar years with respect to the tax treatment of alcoholic beverages, including beer, wine, and distilled spirits. The CBMA authorized reduced tax rates and tax credits for alcoholic beverages. On August 16, 2018, CBP published an interim final rule, CBP Dec. 18–09, in the **Federal Register** (83 FR 40675), updating the language of title 19 of the Code of Federal Regulations (CFR) to implement the CBMA and make other technical changes to 19 CFR part 24. Specifically, the interim final rule amended 19 CFR 24.36 to encompass CBP's authority to refund the difference between the full excise tax rate paid by an importer to CBP at the time of entry summary filing and the CBMA's lower effective tax rate. CBP solicited comments on this interim final rule. No comments were received. On December 19, 2019, the Further Consolidated Appropriations Act was signed, which extended the relevant provisions of the CBMA through calendar year 2020. *See* Public Law 116–94.

On December 27, 2020, the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Tax Relief Act) was enacted. *See* Public Law 116–260, Division EE, sections 106–110. The Tax Relief Act amended

and made permanent the CBMA. Section 107(e) of the Tax Relief Act directed that the Secretary of the Treasury (or the Secretary's delegate within the Department of the Treasury (Treasury)) shall implement and administer the new statutory provisions in coordination with CBP. In June 2021, Treasury informed Congress that it intended to delegate administration of the CBMA import refund program, formerly administered by CBP under 19 CFR 24.36(d)(10), to the Alcohol and Tobacco Tax and Trade Bureau (TTB) in the "Report to Congress on Administration of Craft Beverage Modernization Act Refund Claims for Imported Alcohol."[1] The authority subsequently was delegated to TTB.

On September 23, 2022, TTB published a temporary rule in the **Federal Register** (87 FR 58021) to implement regulations for the administration of the CBMA. Concurrent with the temporary rule, TTB published a Notice of Proposed Rulemaking in the **Federal Register** (87 FR 58043) proposing to make the temporary regulations final and soliciting comments.

Likewise, CBP is publishing this interim final rule to update the regulations issued in CBP Dec. 18–09 to reflect the transfer of authority for administration of the CBMA import refund program to TTB beginning on January 1, 2023, and to direct the public to the relevant TTB regulations regarding refunds administered by TTB. CBP is accepting comments on these changes to the regulations.

III. Discussion of Changes to § 24.36

Section 24.36 deals with refunds of excessive duties, taxes, fees, or interest. CBP is amending the introductory text to paragraph (d) to clarify the basis for TTB's authority to administer refunds arising under the CBMA beginning on January 1, 2023. CBP is amending paragraph (d)(10) to state that it applies to goods entered or withdrawn from warehouse on or before December 31, 2022, because after that date TTB will handle the refunds covered by the paragraph. CBP is also amending paragraph (d)(10) to reflect that the statutory authorities, giving CBP the authority to administer claims pertaining to these goods entered or withdrawn from warehouse on or before December 31, 2022, reauthorized the CBMA twice.[2] CBP is also amending paragraph (e) by removing the entirety of the existing paragraph and replacing it with revised paragraphs (e)(1) and (e)(2) to clearly

[1] "Report to Congress on Administration of Craft Beverage Modernization Act Refund Claims for Imported Alcohol," June 2021, available at *https://www.ttb.gov/images/pdfs/treasury-cbma-import-claims-report-june-2021.pdf*.

[2] The Further Consolidated Appropriations Act, Public Law 116–94 (December 20, 2019), reauthorized the CBMA for 2020. The Taxpayer Certainty and Disaster Tax Relief Act of 2020, Public Law 116–260 (December 27, 2020), made the CBMA permanent and gave CBP the authority to administer CBMA claims through December 31, 2022.

direct the public to the relevant TTB regulations. Paragraph (e)(1) directs the public to the TTB regulations governing refunds for overpayment of alcohol and tobacco excise taxes. Paragraph (e)(2) directs the public to the TTB regulations governing refunds for alcohol excise taxes on or after January 1, 2023, based on assignment of a reduced tax rate or tax credits to an importer by a foreign producer. The refunds described in paragraph (e) are administered by TTB.

IV. Statutory and Regulatory Requirements

A. Inapplicability of Notice and Delayed Effective Date

The Administrative Procedure Act (APA) requirements in 5 U.S.C. 553 govern agency rulemaking procedures. Section 553(b) of the APA generally requires notice and public comment before issuance of a final rule. In addition, section 553(d) of the APA requires that a final rule have a 30-day delayed effective date. The APA, however, provides exceptions from the prior notice and the public comment and the delayed effective date requirements, when an agency for good cause finds that such procedures are "impracticable, unnecessary, or contrary to the public interest." *See* 5 U.S.C. 553(b)(3)(B), (d)(3). Treasury and CBP find that prior notice and comment are unnecessary, and that good cause exists to issue these regulations effective on January 1, 2023. Prior notice and comment are unnecessary, as required in 5 U.S.C. 553(b)(3)(B), because the rule does not substantively alter the underlying rights or interests of importers or filers, but instead corrects the regulations to clarify that the authority to administer CBMA refund claims is being transferred from CBP to TTB on January 1, 2023, by statute. For the same reason, CBP finds that good cause exists for dispensing with the requirement for a delayed effective date as required in 5 U.S.C. 553(d)(3).

B. Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This interim final rule is not a "significant regulatory action," under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has not reviewed this regulation.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule. Since a general notice of proposed rulemaking is not necessary for this rule, CBP is not required to prepare a regulatory flexibility analysis for this rule.

D. Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this final rule, because this final rule does not trigger any new or revised recordkeeping or reporting.

E. Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the Secretary of the Treasury's authority (or that of his/her delegate) to approve regulations related to customs revenue functions.

Troy A. Miller, the Acting Commissioner of CBP, having reviewed and approved this document, has delegated the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects

19 CFR Part 24

Accounting, Claims, Harbors, Reporting and recordkeeping requirements, Taxes.

Amendments to the Regulations

For the reasons stated above, part 24 of Title 19 of the Code of Federal Regulations is amended as set forth below:

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

■ 1. The general and specific authority citations for Part 24 are revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1505, 1520, 1624; 26 U.S.C. 4461, 4462; 31 U.S.C. 3717, 9701; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*).

* * * * *

Section 24.36 also issued under 26 U.S.C. 5001(c)(4), 5041(c)(7), 5051(a)(6), 6423; Pub. L. 115–97; Pub. L. 116–260; 134 Stat. 3046.

* * * * *

■ 2. Amend § 24.36 by revising paragraph (d) introductory text, and paragraphs (d)(10) and (e) to read as follows:

§ 24.36 Refunds of excessive duties, taxes, etc.

* * * * *

(d) The authority of CBP to make refunds pursuant to paragraphs (a), (b), and (c) of this section of excessive deposits of alcohol or tobacco taxes, as defined in section 6423(d)(1), Internal Revenue Code of 1986, as amended (26 U.S.C. 6423(d)(1)), is confined to cases of the types which are excepted from the application of section 6423, Internal Revenue Code of 1986, as amended (26 U.S.C. 6423), and which are not administered by the Department of the Treasury under section 107(e) of Public Law 116–260, div. EE, title I (December 27, 2020). The excepted types of cases and, therefore, the types in which CBP is authorized to make refunds of such taxes are those in which:

* * * * *

(10) For alcohol excise taxes imposed under the Internal Revenue Code for goods entered or withdrawn from warehouse for consumption on or before December 31, 2022, the refund of tax is claimed pursuant to the assignment of a reduced tax rate or tax credit to an importer by a foreign producer in accordance with CBP implementation of sections 13801–13808 of Public Law 115–97 (December 22, 2017), as amended. For goods entered or withdrawn from warehouse for consumption after December 31, 2022, see the procedures provided in paragraph (e)(2) of this section.

(e) In any instance in which a refund of an alcohol or tobacco tax is not of a type covered by paragraph (d) of this section the following procedures will apply:

(1) Except as provided in paragraph (e)(2), a claim for refund of any overpayment of internal revenue tax on an entry must be filed with

the Alcohol and Tobacco Tax and Trade Bureau (TTB), in accordance with TTB regulations found in Part 70 of Title 27 of the Code of Federal Regulations.

(2) A claim for refund of alcohol excise taxes based on the assignment of a reduced tax rate or tax credit to an importer by a foreign good producer for goods entered or withdrawn from warehouse for consumption on or after January 1, 2023, and submitted pursuant to 26 U.S.C. 5001(c)(4), 5041(c)(7), and 5051(a)(6), must be filed with TTB, in accordance with TTB regulations found in Part 27, subpart P, of Title 27 of the Code of Federal Regulations.

ROBERT F. ALTNEU,
Director, Regulations & Disclosure Law Division, Regulations & Rulings, Office of Trade, U.S. Customs and Border Protection.

Approved:

THOMAS C. WEST JR.,
Deputy Assistant Secretary of the Treasury for Tax Policy.

[Published in the Federal Register, December 30, 2022 (85 FR 80442)]

19 CFR PART 177

REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF FASHION SHOW ITEMS FROM FRANCE

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

ACTION: Notice of revocation of one ruling letter, and of revocation of treatment relating to the tariff classification of runway haute couture wearing apparel, headwear, footwear, jewelry, and accessories from France.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of runway haute couture wearing apparel, headwear, footwear, jewelry, and accessories under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 36, on September 14, 2022. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after March 19, 2023.

FOR FURTHER INFORMATION CONTACT: Reema Bogin, Chemicals, Petroleum, Metals and Miscellaneous Articles Classification Branch, Regulations and Rulings, Office of Trade, at reemabogin@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section

484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 36, on September 14, 2022, proposing to revoke one ruling letter pertaining to the tariff classification of runway haute couture wearing apparel, headwear, footwear, jewelry, and accessories. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N297394, dated June 11, 2018, CBP classified runway haute couture wearing apparel, headwear, footwear, jewelry, and accessories in heading 9705, HTSUS, specifically in subheading 9705.00.0070, HTSUSA ("Annotated") (2018), which provides for "Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest ... Archaeological, historical, or ethnographic piece." CBP has reviewed NY N297394 and has determined the ruling letter to be in error. It is now CBP's position that runway haute couture wearing apparel, headwear, footwear, jewelry, and accessories are properly classified, in headings 4202 (certain accessories); 4203 (leather apparel and clothing accessories); 4203 (fur apparel and clothing accessories); 4303 (articles of artificial fur); various headings of chapter 61 and 62 (articles of apparel and clothing); 6402, 6403, 6404, and 6405 (footwear); 6504, 6505, and 6506 (various hats and headgear); and 7113 and 7116 (certain jewelry). In order to provide duty rates for the merchandise at issue, each item must be specifically described and identified for purposes of classification.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N297394 and revoking or modifying any other ruling not specifically identified

to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H305462, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

for

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H305462
January 4, 2023
OT:RR:CTF:CPMM H305462 RRB
CATEGORY: Classification
TARIFF NO.: Various

AMY J. JOHANNESEN
JOHANNESEN ASSOCIATES, PC
ATTORNEYS AT LAW
69 CHARLTON STREET
NEW YORK, NY 10014

RE: Revocation of NY N297394; tariff classification of fashion show items from France

DEAR MS. JOHANNESEN:

This letter is in reference to New York Ruling Letter ("NY") N297394, dated June 11, 2018, regarding the classification of Chanel, Inc.'s ("Chanel") runway haute couture wearing apparel, headwear, accessories, jewelry and footwear under the Harmonized Tariff Schedule of the United States ("HTSUS"). In NY N279394, U.S. Customs and Border Protection ("CBP") classified the runway haute couture items under subheading 9705.00.0070, HTSUSA ("Annotated") (2018), as "Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest ... Archaeological, historical, or ethnographic pieces." After reviewing the ruling in its entirety, we find it to be in error. For the reasons set forth below, we are revoking NY N297394.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice proposing to revoke NY N297394 was published on September 14, 2022, in Volume 56, Number 36 of the *Customs Bulletin*. No comments were received in response to the notice.

FACTS:

In NY N297394, the runway haute couture items were described as follows:

> The merchandise concerned as stated by Counsel is Chanel's, "one of a kind haute couture runway items," which include fashion apparel, accessories, jewelry and footwear. No specific year or semi-annual timeframe was mentioned for the runway showcases, nor were styles of identification mentioned for the clothing and accessory items paired together to create specific looks. These showcases occur twice yearly, one in January and one in July. Taken from the position paper filed by Counsel on behalf of Chanel, the haute couture runway apparel items are crafted by hand, some pieces require more than 600 hours to create, and use rare and in many cases one-of-a-kind fabrics and decorative elements.

Chanel is a member of the *Chambre Syndicale de la Haute Couture* ("*Chambre Syndicale*") in France. The *Chambre Syndicale* requires its members to adhere to specific criteria as part of its business structure, which includes designing made-to-order clothes for private clients, with more than one fitting, having an *atelier* (workshop) in Paris that employs at least fifteen staff members full-time; having twenty full-time technical workers in one of their workshops; and presenting a collection of at least fifty original

designs—both day and evening garments—to the public every fashion season, in January and July of each year.[1]

Nowhere in NY N297394, or in its original submission, did Chanel identify item numbers, product numbers, item descriptions, costs, or material build sheets for the merchandise at issue.

ISSUE:

Whether the Chanel runway haute couture wearing apparel, headwear, accessories, jewelry, and footwear are properly classified in heading 9705 as a collectors' piece of historical interest or in the HTSUS heading that corresponds to the constituent material of each item.

LAW AND ANALYSIS:

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

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, *mutatis mutandis*, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

The HTSUS headings under consideration are the following:

4202	Trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper
4203	Articles of apparel and clothing accessories, of leather or of composition leather
4303	Articles of apparel, clothing accessories and other articles of furskin
4304	Artificial fur and articles thereof
Various headings of chapter 61:	Articles of apparel and clothing accessories, knitted or crocheted
Various headings of chapter 62:	Articles of apparel and clothing accessories, not knitted or crocheted

[1] *BUSINESS OF FASHION (BOF)*. "Fashion A-Z: Haute Couture," https://www.businessoffashion.com/education/fashion-az/haute-couture (last visited July 19, 2021).

6402 Other footwear with outer soles and uppers of rubber or plastics

6403 Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather

6404 Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials

6405 Other footwear

6504 Hats and other headgear, plaited or made by assembling strips of any material, whether or not lined or trimmed

6505 Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hair-nets of any material, whether or not lined or trimmed

6506 Other headgear, whether or not lined or trimmed

7113 Articles of jewelry and parts thereof, of precious metal or of metal clad with precious metal

7116 Articles of natural or cultured pearls, precious or semiprecious stones (natural, synthetic or reconstructed)

9705 Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest

Note 1(c) to chapter 97, HTSUS, provides that the chapter does not cover "Pearls, natural or cultured, or precious or semiprecious stones (7101 to 7103)."

Note 4(a) to chapter 97, HTSUS, provides that "...articles of this chapter are to be classified in this chapter and not in any other chapter of the tariff schedule." Consequently, classification in heading 9705, HTSUS, must be considered before resorting to any other heading in the HTSUS. *See* Headquarters Ruling Letter ("HQ") H021886, dated August 6, 2008.

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

EN 97.05 states, in pertinent part, the following:

> These articles are very often of little intrinsic value but derive their interest from their rarity, their grouping or their presentation....
>
> ***
>
> (B) **Collections and collectors' pieces of historical, ethnographic, palaeontological or archaeological interest**, for example :
>
> (1) Articles being the material remains of human activity suitable for the study of the activities of earlier generations, such as mummies, sarcophagi, weapons, objects of worship, articles of apparel, articles which have belonged to famous persons.

(2) Articles having a bearing on the study of the activities, manners, customs and characteristics of contemporary primitive peoples, for example, tools, weapons or objects of worship.

(3) Geological specimens for the study of fossils (extinct organisms which have left their remains or imprints in geological strata), whether animal or vegetable....

***

Goods produced as a commercial undertaking to commemorate, celebrate, illustrate or depict an event or any other matter, whether or not production is limited in quantity or circulation, **do not fall** in this heading as collections or collectors' pieces of historical or numismatic interest unless the goods themselves have subsequently attained that interest by reason of their age or rarity.

There exists no strict standard or enumerated criteria for articles classified in heading 9705, HTSUS. The word "historic" is not defined by the tariff, nor by the ENs, and the dictionary definition is quite broad. The *OXFORD ENGLISH DICTIONARY* states that it is, "[a] historical work or subject; a history. Now rare," and "relating to history; concerned with past events"; "historic, n. and adj." *OED ONLINE*. Oxford University Press, July 2022, https://www.oed.com/view/Entry/87298?redirectedFrom=HISTORIC#eid (last visited July 14, 2022).

Translated directly from French, *couture* means "dressmaking," while *haute* means "high." A haute couture item is always created for an individual client, tailored specifically for the client's measurements and body proportions based on the couturier's unique and original design for a particular season.[2] The commercial undertaking in exhibiting Chanel haute couture twice a year in January and July during Paris Fashion Week serves a primary purpose of generating interest in the products displayed and in attracting prospective future business. A secondary objective is the expectation, solicitation, and acquiring of commercial and retail orders for future delivery. The main purpose of showcasing the subject merchandise as runway articles is to further Chanel's commercial undertaking of advertising and offering its custom haute couture pieces to prospective clients. Thus, haute couture items cannot be classified in heading 9705, HTSUS, as collections or collectors' pieces of historical interest unless the goods themselves have subsequently attained that interest by reason of their age or rarity.[3] Moreover, Customs stated in HQ 961279, dated November 5, 1998, that not all collections qualify for classification in heading 9705, HTSUS. In relation to the runway haute couture merchandise in NY N297394, although such merchandise is limited in circulation based on the specific business structure rules set forth by the *Chambre Syndicale*, such items are nevertheless produced by Chanel as a commercial undertaking and do not constitute a collection of pieces of historical interest.

Our analysis of how to classify merchandise in heading 9705. HTSUS, is further guided by prior CBP rulings. In HQ 961279, dated November 5, 1998,

[2] *FÉDÉRATION DE LA HAUTE COUTURE ET DE LA MODE*. "Haute Couture," https://fhcm.paris/en/haute-couture-2/ (last visited July 19, 2021).

[3] EN 97.05, HTSUS, provides that "goods produced as a commercial undertaking to commemorate, celebrate, illustrate, or depict an event or any other matter, whether or not production is limited in quantity or circulation" are excluded from heading 9705, HTSUS.

Customs held that two collector automobiles, one produced in 1929 and the other produced in 1936, did not qualify for classification in heading 9705, HTSUS. One automobile was a 1929 Bentley racing car. The other automobile was a 1936 Mercedes-Benz Special Roadster. Only 50 Bentleys of this type were produced; the first five were produced for racing purposes. It is estimated that less than 15 of the 1936 Mercedes-Benz Special Roadsters still exist. Both automobiles were owned by the Connor Living Trust that maintains a collection of unique and unusual automobiles, mainly produced during the late 1920's through the 1950's that are exhibited at museums and public exhibitions. However, there was no claim that the automobiles in HQ 961279 were connected to famous persons or a historical event.[4] Accordingly, they did not meet the criteria for classification in heading, 9705, HTSUS. Customs also stated in HQ 961279 that EN 97.05 describes a narrow interpretation of coverage that would not include all collection pieces and that heading 9705 is to be applied narrowly.

The runway haute couture wearing apparel, headwear, accessories, jewelry, and footwear present an interesting scenario in a heading 9705 analysis as apparel, headwear, fashion accessories, jewelry, and footwear, even luxury ones, are—generally speaking—mass-produced for commercial consumption. The EN 97.05 provides that "Goods produced as a commercial undertaking to commemorate, celebrate, illustrate or depict an event or any other matter whether or not product is limited in quantity or circulation, do not fall in this heading as collections or collectors' pieces of historical or numismatic interest unless the goods themselves have subsequently attained that interest by reason of their age or rarity." Thus, where an item is merely noteworthy, but not of historical significance, CBP will not classify such goods in heading 9705, HTSUS. For example, in HQ 961279, Customs denied duty-free treatment under heading 9705 to two vehicles: a 1929 Bentley Supercharger (Blower) 4 1/2 liter racing car and a 1936 Mercedes-Benz 500K "Special Roadster," noting that "[t]here is no claim of a specific incident or occurrence involving these automobiles in a significant historical event and there is no specific claim that these automobiles 'belonged to famous (historical) persons.'"

In reaching its conclusion in HQ 088031 that jewelry owned by the Duke and Duchess of Windsor was eligible for classification in heading 9705, HTSUS, Customs considered the following factors: 1) the articles belonged to famous people; 2) the individuals were not only famous, but historically significant; 3) the articles had a markedly increased value because of their historical significance[5]; 4) the jewelry was not just owned by the Duke and Duchess but was very closely associated with them[6]; and 5) jewelry in general, and this jewelry in particular, is useful in the study of earlier generations.

Applying EN 97.05, the factors considered in HQ 088031, and the above-cited CBP precedent for interpreting heading 9705, HTSUS, to the runway haute couture merchandise in NY N297394, we find that the subject merchandise was improperly classified in heading 9705, HTSUS, which is to be

[4] *See* NY 815818, dated December 7, 1995, in which CBP classified a 1938 Talbot Lago T-150 C Figoni Falaschi Goutte d' Eau automobile in heading 8703, HTSUS.

[5] In HQ 088031, the importer paid $117,000 for a pair of cufflinks owned by the Duke of Windsor, that would normally sell for $800.

[6] In HQ 088031, the Duke of Windsor personally designed many of the pieces at issue.

applied narrowly. Here, it is almost impossible to apply the factors that were considered in HQ 088031 or to otherwise analyze the historical significance of the runway haute couture merchandise in NY N297394 because no item numbers, product numbers, item descriptions, cost or material build sheets, or other inventory listing are set forth in the ruling. In addition, NY N297394 does not describe how any of the individual haute couture runway items rises to the level of specific historical interest, rarity or authenticity of ownership. Further, the ruling does not identify an individual item by its rarity, grouping, or presentation. While Chanel's founder, Coco Chanel, may be considered a historical famous person on the spectrum of fashion and design, there is no indication that any of the runway haute couture merchandise was designed by Coco Chanel herself, such that there would be a nexus or close association with a famous person. More contemporary designers employed by Chanel do not rise to the level of being historically significant for purposes of heading 9705, HTSUS, just because they design for Chanel. Neither is there an indication that any of the haute couture runway items was owned by or otherwise associated with a historical famous person.

Moreover, in HQ 089226, dated July 29, 1991, Customs found that a one-of-a kind watch, valued at $4,975,000.00, taking five years to design, four years to complete, consisting of 1,728 parts and made of 18 carat gold was not classified in heading 9705, HTSUS, because none of these factors associated with its high value established a "historical interest." Similarly, while Chanel haute couture runway items are one of a kind, high in value, take hours to craft by hand and consist of luxury materials, there is no indication that the exceptionally high value of a particular piece is tied to any historically famous person or specific historically significant event, as no specific pieces are identified in the ruling and the merchandise is only described broadly.

While Chanel itself may be considered an iconic fashion house, that alone does not bestow all of its haute couture runway merchandise with historical significance for purposes of classification in heading 9705, HTSUS. Ultimately, what Chanel has described in its underlying ruling request to NY N297394 is the business structure of a haute couture fashion house as part of a larger commercial undertaking. Chanel adheres to particular industry requirements set forth by the *Chambre Syndicale* pertaining to its business structure of engaging in the production of high end, customized fashion merchandise in which price is a factor contributing to an item's rarity. Although limited in circulation because of this business structure, Chanel runway haute couture merchandise is produced as a commercial undertaking. Beyond that, unless a particular piece is closely associated with a historically significant event or historically famous person, it does not qualify for classification in heading 9705, HTSUS.

Based on the foregoing, we find that the runway haute couture wearing apparel, headwear, footwear, jewelry, and accessories in NY N297394, none of which are specifically described or identified, were improperly classified in heading 9705, HTSUS. Rather, they are classified according to their constituent materials in headings 4202 (certain accessories); 4203 (leather apparel and clothing accessories); 4203 (fur apparel and clothing accessories); 4303 (articles of artificial fur); various headings of chapter 61 and 62 (articles of apparel and clothing); 6402, 6403, 6404, and 6405 (footwear); 6504, 6505, and 6506 (various hats and headgear); and 7113 and 7116 (certain jewelry).

HOLDING:

Pursuant to GRI 1, the Chanel runway haute couture wearing apparel, headwear, footwear, jewelry and accessories in NY N297394 are classified according to their constituent materials in headings 4202 (certain accessories); 4203 (leather apparel and clothing accessories); 4203 (fur apparel and clothing accessories); 4303 (articles of artificial fur); various headings of chapter 61 and 62 (articles of apparel and clothing); 6402, 6403, 6404, and 6405 (footwear); 6504, 6505, and 6506 (various hats and headgear); and 7113 and 7116 (certain jewelry). In order to provide duty rates for the merchandise at issue, each item must be specifically described and identified for purposes of classification.

The text of the most recent HTSUS and the accompanying duty rates are provided for at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY N297394 is revoked in accordance with the above analysis.

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

Sincerely,

ANDREW LANGREICH
for
YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

cc: NIS Dharmendra Lilia

19 CFR PART 177

REVOCATION OF 10 RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN CHAIR AND DINING TABLE GROUPINGS

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

ACTION: Notice of revocation of ten ruling letters and of revocation of treatment relating to the tariff classification of certain chair and dining table groupings.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking ten (10) ruling letters concerning tariff classification of certain chair and dining table groupings under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, *Customs Bulletin*, Vol. 56, No. 22, on June 8, 2022. One comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after March 19, 2023.

FOR FURTHER INFORMATION CONTACT: Karen S. Greene, Chemicals, Petroleum, Metals & Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0041.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 22, on June 8, 2022, proposing to revoke five ruling letters pertaining to the tariff classification of certain chair and dining table groupings. In response to one comment received, an additional six rulings were added (NY N021597, NY L80593, NY B85455, NY N084056, NY F82793, and NY N149696) and one ruling removed from the final ruling (NY N125879). Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In NY N255629, dated August 26, 2014, NY N004954, dated January 19, 2007, NY N028531, dated May 20, 2008, NY N021597, dated January 28, 2008, NY L80593, dated November 1, 2004, NY N085595, dated November 25, 2009, NY B85455, dated May 14, 1997, NY N084056, dated November 23, 2009, NY F82793, dated February 22, 2000, and NY N149696, dated March 16, 2011, CBP classified the dining tables in heading 9403, HTSUS, which provides for "Other furniture and parts thereof" and the chairs in heading 9401, HTSUS, which provides for "Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof."

CBP has reviewed NY N255629, NY N004954, NY N028531, NY N021597, NY L80593, NY N085595, NY B85455, NY N084056, NY F82793, and NY N149696, and has determined the ruling letters to be in error. It is now CBP's position that certain chair and table groupings are properly classified together, in heading 9403, HTSUS.

Specifically, the dining chair and wooden table sets of NY L80593, NY B85455, NY N084056, and NY N0255629 would be classified in subheading 9403.60.8040, HTSUS, which provides for "Other furniture and parts thereof: Other wooden furniture: Other: Dining tables."

The dining chairs and bistro table of NY F82793 would be classified in subheading 9403.70.8015, HTSUS, which provide for "Other furniture and parts thereof: Furniture of plastics: Other: Other household."

The dining chair and table sets of NY N021597, NY N028531 NY N085595, NY N004954, and NY N149696 would be classified in subheading 9403.89.6015, HTSUS, which provides for "Other furniture and parts thereof: Other: Other: Other household."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N255629, NY N004954, NY N028531, NY N021597, NY L80593, NY N085595, NY B85455, NY N084056, NY F82793, and NY N149696, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H271649, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

ANDREW M. LANGREICH
for
YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H271649
December 28, 2022
OT:RR:CTF:CPMMA:KSG H271649
CATEGORY: Classification
TARIFF NO.: 9403.60.8040, 9403.89.6015

ANDREA K. SWANGER
IMPORT DOCUMENTS & BILLING INTERCON, INC.
635 N. BILLY MITCHELL ROAD
SALT LAKE CITY, UT 84106

RE: Revocation of NY N004954, NY N028531, NY N021597, NY L80593, NY N085595, NY B85455, NY N255629, NY N084056, NY F82793, and NY N149696; tariff classification of dining tables sold as a unit with chairs

DEAR MS. SWANGER:

This letter is in reference to New York Ruling Letter ("NY") N255629, dated August 26, 2014, issued to you on behalf of Import Documents & Billing Intercon, Inc.

Upon review, we have also reconsidered NY N004954, dated January 19, 2007, NY N028531, dated May 20, 2008, NY N021597, dated January 28, 2008, NY L80593, dated November 1, 2004, NY N085595, dated November 25, 2009, NY B85455, dated May 14, 1997, NY N084056, dated November 23, 2009, NY F82793, dated February 22, 2000, and NY N149696, dated March 16, 2011.

In these rulings, dining chairs and a table were separately classified under the Harmonized Tariff Schedule of the United States (HTSUS), with the chairs being classified in heading 9401, HTSUS, and the table classified in heading 9403, HTSUS.

We have reviewed NY N004954, NY N028531, NY N021597, NY L80593, NY N085595, NY B85455, NY N255629, NY N084056, NY F82793, and NY N149696; and determined that the reasoning is in error. Accordingly, for the reasons set forth below, CBP is revoking NY N004954, NY N028531, NY N021597, NY L80593, NY N085595, NY B85455, NY N255629, NY N084056, NY F82793, and NY N149696.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice proposing to revoke NY N004954, NY N028531, NY N085595, and NY N255629, was published on June 8, 2022, in Volume 56, Number 22 of the Customs Bulletin.

In response to the publication, we received one comment that asked about additional rulings on outdoor furniture in which the set was determined not to meet the criteria of GRI 3(b) because they are packaged separately. Specifically, the commentor referenced the following rulings: NY N125879, dated October 29, 2010, NY F82793, dated February 22, 2000, NY N149696, dated March 16, 2011, and NY L89035, dated December 6, 2005. First, we note that a notice of proposed or final revocation also covers any rulings on the subject merchandise which may exist, but have not been specifically identified, as well as any treatment previously accorded by CBP to substantially identical transactions. However, in response to the concerns raised by the commenter, CBP has specifically identified and is revoking six additional rulings relating to the classification of outdoor patio furniture. Specifically, the following rulings are added to this revocation: NY N021597, NY L80593, NY B85455, NY N084056, NY F82793, and NY N149696.

As concerns NY L89035, dated December 6, 2005, (classifying three (3) bar stools, a canopy and a bar in headings 9403 and 9401, HTSUS), we have determined that the articles classified in NY L89035 are different than the dining table sets made up only of chairs and a table that are the subject of this revocation. This ruling is therefore not included in the revocation.

FACTS:

Two cases involve a dining group of two chairs and a bistro table. In NY F82793, dated February 22, 2000, two plastic chairs and a plastic bistro table were sold together as a grouping but packaged separately. In NY N149696, dated March 16, 2011, two chairs and a bistro table with a steel frame and glass top were sold together as a grouping but packaged separately.

Four cases involve a dining group of four chairs and a dining table. In NY N004954, an outdoor patio dining grouping was described as follows: Five (5) piece patio set consisting of four (4) chairs with removable cushions and one (1) table. There are four aluminum chairs with textile cushions and a table with a gas firepit insert that has a marble top and a resin base. In NY L80593, the dining grouping consisted of four chairs and a dining table with a wooden top and metal frame and legs. In NY N021597, the dining group was described as four chairs and a dining table with a stone top and metal base. In NY N028531, the dining group was described as four chairs and a dining table with a granite top and aluminum base.

Two cases involve six (6) chairs and a dining table. In NY B85455, there were six chairs and a wooden dining table. In NY N085595, there were six chairs and a dining table with a slate top and aluminum base.

Two cases involve eight (8) chairs and a dining table. In NY N084056, there were eight chairs and a wooden dining table. In NY N255629, there were eight wooden chairs and a wooden dining table.

In each of the ruling letters at issue, the merchandise consisted of one table and a defined number of chairs sold together at retail as a unit. The furniture is imported either fully assembled or partially unassembled and shipped in one combined shipment, in separate boxes. In all the cases, one dining table and chairs are sold together solely as a unit.

ISSUE:

Whether the subject dining table with chair groupings are properly classifiable separately, with the chairs classified in heading 9401, HTSUS, and the table classified in heading 9403 or are the chairs and table classified together as a GRI 3(b) set in heading 9403, HTSUS, as other furniture and parts thereof.

LAW AND ANALYSIS:

Classification determinations under the HTSUS are 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 GRIs may then be applied.

The HTSUS provisions under consideration are as follows:

9401	Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof:
	* * *
9403	Other furniture and parts thereof:
	* * *
9403.20.00	**Other metal furniture.....**
	Household:
9403.40	**Wooden furniture of a kind used in the kitchen:**
	* * *
9403.40.80	**Other.....**
9403.40.80.40	**Dining tables.....**
	* * *
9403.60	**Other wooden furniture:**
9403.89	**Other....**

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

The EN to 94.03 states, in pertinent part:

> This heading covers furniture and parts thereof, not covered by the previous headings. It includes furniture for general use (e.g., cupboards, showcases, tables...., etc.) and also furniture for special uses.

The EN to 94.01 states, in pertinent part :

> Subject to the exclusions mentioned below, this heading covers all seats (including those for vehicles, provided they comply with the conditioned prescribed in Note 2 to this Chapter)...[.]
>
> Separately presented cushions and mattresses ..... are excluded (heading 94.04)...[.]
>
> When these articles are combined with other parts of seats, however, they remain classified in this heading. They also remain in this heading when presented with the seats of which they form part.

GRI 3(b) provides 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.

The EN for GRI 3(b) provides that:

> (X) For the purposes of this Rule, the term "goods put up in sets for retail sale" shall be taken to mean goods which :

(a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule;

(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 end users without repacking (e.g., in boxes or cases or on boards).

"Retail sale" does not include sales of products which are intended to be re-sold after further manufacture, preparation, repacking, or incorporation with or into other goods.

The term "goods put up in sets for retail sale" therefore only covers sets consisting of goods which are intended to be sold to the end user where the individual goods are intended to be used together. For example, different foodstuffs intended to be used together in the preparation of a ready-to-eat dish or meal, packaged together and intended for consumption by the purchaser would be a "set put up for retail sale".

The EN for GRI 3(b) describes essential character as follows:

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

NY N125879, which includes ottomans and a sofa as well as chairs and a dining table, would not satisfy the requirement that articles be put up together to meet a particular need or carry out a specific activity and is therefore not a GRI 3(b) set. This grouping of furniture would meet more than a single particular need; dining, socializing, and seating are three different needs. Therefore, NY N125879 is affirmed and is not part of this revocation.

In NY N004954, NY N028531, NY N021597, NY L80593, NY N085595, NYB85455, NY N255629, NY N084056, NY F82793 and NY N149696, the dining table and chairs were classified separately and not as a set under GRI 3(b). In all of the rulings, the dining table and chair groupings were determined not to be a GRI 3(b) set only because the tables and chairs were packed in separate boxes.

This is inconsistent with two rulings in which dining table and chair groupings were determined to be a GRI 3(b) set although the goods were packaged for retail in more than one box. In NY N266674, dated August 12, 2015, CBP classified one table with a glass tabletop and four chairs sold only together as a unit, packaged either in one box or in two or more boxes, as a set pursuant to GRI 3(b). In NY N269023, dated October 16, 2015, CBP considered additional information that the units were only imported and sold for retail sale in three boxes and affirmed NY N266674. CBP stated that ...

There is no requirement that goods put up in sets for retail sale have to be packaged in one box, case, container, bag, etc., they only have to be put up in a manner suitable for sale directly to users without repacking. See Headquarters rulings HQ *962125* dated May 5, 2000 and HQ *965927* dated August 14, 2003, in which reference is made to "C.S.D. 92–11" stating that Customs concluded that components of a set need not be packaged together at time of entry in order to be considered classifiable as

a set, but all garments must be present in the entry and there must be an equal amount of components to make up the set in the shipment. Consistent with C.S.D. 92–11, we find the wicker patio set packaged in three separate boxes and ready for retail sale without repackaging and imported on the same shipment in equal quantities is not a dismissing factor when considering if goods qualify as sets for retail sale.

CBP erred when it stated in NY N085595 that "[t]aking into account that the dining set is imported in three boxes, the table and chairs will have to be separately classified." In our view, the individualized manner of retail packaging for articles of this size, imported with several large sized components, cannot be removed from the construct of retail sets simply because the table and chairs do not fit into one retail package.

The combination of a table and a defined number of chairs imported and sold together as a unit as provided for in these cases, are put up together to meet a particular need. The table and chairs are intended for use in conjunction with dining at a table, which satisfies the criteria of carrying out a specific activity. Further, the component pieces of dining tables and accompanying chairs in these cases were ready for retail sale without repackaging and imported in the same shipment and sold at retail only as a unit. Therefore, the dining groupings are a GRI 3(b) set.

Since the dining groupings are determined to be a GRI 3(b) set, they are classified as a unit based on the article that imparts the essential character to the set. In these cases, the essential character of the GRI 3(b) sets would be imparted by the dining table since the dining table would hold the food, plates, and glasses and therefore, enables a group of people to dine together. Considering the dining tables that are composite goods, (glass, plastic, stone, slate, marble or granite tabletops with an aluminum or steel frame), the tabletop would determine the essential character since the food and drinks are placed on the tabletop, and for the stone, slate, marble or granite tabletops, the tabletop is of greater value and weight than the frame. Therefore, pursuant to GRI 3(b), the dining table and chair sets are classified in heading 9403, HTSUS. Pursuant to GRI 6, the dining chair and wooden table sets of NY L80593, NY B85455, NY N084056, and NY N0255629 are classified in subheading 9403.60.8040, HTSUS. The dining chair and table sets of NY N021597, NY N028531 NY N085595, NY N004954, and NY N149696 are classified in subheading 9403.89.6015, HTSUS. The dining chairs and bistro table of NY F82793 are classified in subheading 9403.70.8015, HTSUS.

HOLDING:

Pursuant to GRI's 3(b) and 6, the dining chair and wooden table sets of NY L80593, NY B85455, NY N084056, and NY N0255629 are classified in subheading 9403.60.8040, HTSUS, which provides for "Other furniture and parts thereof: Other wooden furniture: Other, Dining tables." The 2022 column one, general rate of duty is Free.

Pursuant to GRI's 3(b) and 6, the dining chair and table sets of NY N021597, NY N028531 NY N085595 and NY N004954 and NY N149696 are classified in subheading 9403.89.6015, HTSUS, which provides for "Other furniture and parts thereof: Other: Other: Other household." The 2022 column one, general rate of duty is Free.

Pursuant to GRI's 3(b) and 6, the dining chair and table sets of NY F82793 are classified in subheading 9403.70.8015, HTSUS, which provides for "Other

furniture and parts thereof: Furniture of plastics: Other: Other household." The 2022 column one, general rate of duty is Free.

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

EFFECT ON OTHER RULINGS:

NY N004954, NY N028531, NY N021597, NY L80593, NY N085595, NY B85455, NY N255629, NY N084056, NY F82793, and NY N149696, are hereby revoked.

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

Sincerely,

ANDREW LANGREICH
for
YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

cc: NIS Dharmendra Lilia and NIS Seth Mazze, NCSD

U.S. Court of Appeals for the Federal Circuit

POKARNA ENGINEERED STONE LIMITED, Plaintiff M S INTERNATIONAL, INC., Plaintiff-Appellant v. UNITED STATES, CAMBRIA COMPANY LLC, Defendants-Appellees

Appeal No. 2022–1077

Appeal from the United States Court of International Trade in No. 1:20-cv-00127-LMG, Senior Judge Leo M. Gordon.

Decided: January 5, 2023

JONATHAN STOEL, Hogan Lovells US LLP, Washington, DC, argued for plaintiff-appellant. Also represented by MICHAEL JACOBSON, CRAIG A. LEWIS, NICHOLAS SPARKS.

JOSHUA E. KURLAND, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also represented by BRIAN M. BOYNTON, TARA K. HOGAN, PATRICIA M. MCCARTHY; VANIA WANG, Office of the Chief Counsel for Trade Enforcement & Compliance, United States Department of Commerce, Washington, DC.

LUKE A. MEISNER, Schagrin Associates, Washington, DC, argued for defendant-appellee Cambria Company LLC. Also represented by MICHELLE ROSE AVRUTIN, BENJAMIN JACOB BAY, NICHOLAS J. BIRCH, CHRISTOPHER CLOUTIER, ELIZABETH DRAKE, WILLIAM ALFRED FENNELL, JEFFREY DAVID GERRISH, KELSEY RULE, ROGER BRIAN SCHAGRIN.

Before MOORE, *Chief Judge*, LOURIE and PROST, *Circuit Judges*.

LOURIE, *Circuit Judge*.

MS International ("MSI") appeals from a decision of the United States Court of International Trade ("the Trade Court") sustaining the United States Department of Commerce's ("Commerce's") Final Determination in its Investigation of Quartz Surface Products ("QSPs") from India. *See Pokarna Engineered Stone Ltd. v. United States*, 547 F. Supp. 3d 1300 (Ct. Int'l Trade 2021) ("*Decision*"); *Certain Quartz Surface Products from India: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 85 Fed. Reg. 25,391 (Dep't of Commerce May 1, 2020) ("*Final Determination*"). For the reasons provided below, we affirm.

BACKGROUND

MSI is a U.S. importer of QSPs. QSPs are stone composite building materials that are used primarily for countertops. Production of QSPs involves (1) the creation of a QSP slab from raw materials and (2)

fabrication that transforms the slab into a finished product. In 2019, Cambria, a domestic quartz slab producer, filed a petition for imposition of antidumping duties on QSPs from India. MSI challenged Cambria's standing to file the petition, alleging that Cambria failed to include QSP "fabricators" as domestic industry "producers" in its industry support calculation.MSI's submission included letters that MSI had obtained from various fabricators that opposed Cambria's petition. MSI alleged that, if the views of "fabricators" were included in the industry support calculation, then there would be insufficient industry support to proceed with the petition.

Commerce initiated an investigation in May 2019. *Certain Quartz Surface Products from India and the Republic of Turkey: Initiation of Less-Than-Fair-Value Investigations*, 84 Fed. Reg. 25,529 (Dep't of Commerce June 3, 2019)("Initiation") and accompanying Initiation Checklist (May 29, 2019) ("Checklist"); J.A. 1002–1046. Commerce determined that the fabricators did not perform sufficient production-related activities to be considered "producers" for purposes of determining industry support. Commerce stated that the information Cambria had submitted made it "clear that there are significant differences in the level of complexity and capital investment, employment, training and technical expertise, production processes, and type of equipment, between quartz surface slab producers and fabricators." Checklist, Attachment II at 14; J.A. 1030. In particular, Commerce determined that the evidence established that "there are seven steps in the production of quartz surface products: (1) mixing raw materials, (2) combining, (3) dispensing and molding, (4) pressing, (5) curing, (6) cooling, and (7) polishing." Checklist, Attachment II at 15; J.A. 1031. In contrast, Commerce found that fabricators engage in a process where they "(1) consult with customers, (2) develop engineering diagrams, (3) perform intricate cutting, and (4) perform various edge and surface finishing operations." Checklist, Attachment II at 15; J.A. 1031.

In summary, Commerce found that fabricators have far lower capital investment, considerably less specialized knowledge, fewer employees, and utilize broadly available equipment compared to quartz slab production. In conclusion, Commerce found that "the fabrication process does not change the fundamental physical characteristics imparted during the slab production process," Checklist, Attachment II at 14; J.A. 1030, and that "producers" did not include "fabricators," Checklist, Attachment II at 16; J.A. 1032.

MSI and Pokarna Engineered Stone Ltd., a large Indian exporter of QSPs, independently sought judicial review by the Trade Court of Commerce's Final Determination. Their appeals were consolidated.

The Trade Court determined that the term "producers" is not defined in the statute and further stated that, "[w]ithout a definition, there is no clear statutory answer as to whether 'producers' is broadly defined so as to include QSP fabricators for purposes of Commerce's industry support analysis." *Decision*, 547 F. Supp. 3d at 1305. The Trade Court further held that Commerce's interpretation of "producers" as entities that have a stake in the domestic industry was reasonable, and that Commerce's reliance on the "sufficient production-related activities test" to interpret the term "producers" was lawful. *Id.* at 1305, 1306. The Trade Court further sustained Commerce's determination that fabricators are not producers for industry support purposes as having been supported by substantial evidence. *Id.* at 1309.

In summary, Commerce determined, and the Trade Court sustained, that the term "producer" did not include "fabricators" for purposes of the industry support calculation. MSI appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

DISCUSSION

Commerce must impose antidumping duties on imported goods that are being sold, or are likely to be sold, in the U.S. at "less than fair value," which could harm the U.S. domestic industry. 19 U.S.C. §§ 1673, 1677(34). Commerce initiates antidumping investigations based on a petition filed by the domestic industry alleging injury by unfairly traded imports. To initiate the investigation, Commerce must "determine if the petition has been filed by or on behalf of the industry" (*i.e.*, whether there is adequate industry support). 19 U.S.C. § 1673a(c)(1)(A)(ii).

The term "industry" is defined in the statute as "the producers . . . of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." 19 U.S.C. § 1677(4)(A). To be filed on behalf of the domestic industry, domestic producers or workers who support the petition must account for (1) at least 25 percent of the total production of the domestic like product and (2) more than 50 percent of the production of the domestic like product produced by the portion of the industry expressing support or opposition to the petition. 19 U.S.C. § 1673a(c)(4)(A). "Domestic producers or workers" is defined as "interested parties who are eligible to file a petition under [19 U.S.C. § 1673a(b)(1)]." 19 U.S.C. § 1673a(c)(5). "Interested parties" include "a manufacturer, producer, or wholesaler in the United States of a domestic like product." 19 U.S.C. § 1677(9)(C). The terms "manufacturer, producer, or wholesaler" are not defined by the statute.

MSI raises two challenges on appeal. First, MSI argues that Commerce erred in determining that the term "producer" in § 1677(9)(C) did not include "fabricators." Second, MSI contends that Commerce's finding that "fabricators" are not "producers" was not supported by substantial evidence. We address each argument in turn.

We uphold a Commerce determination unless it is unsupported by substantial record evidence or is otherwise unlawful. *Union Steel v. United States*, 713 F.3d 1101, 1106 (Fed. Cir. 2013) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)). A finding is supported by substantial evidence if a reasonable mind might accept the evidence as adequate to support the finding. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). "[W]here two different, inconsistent conclusions may reasonably be drawn from the evidence in record, an agency's decision to favor one conclusion over the other is the epitome of a decision that must be sustained upon review for substantial evidence." *In re Jolley*, 308 F.3d 1317, 1329 (Fed. Cir. 2002).

To determine whether a company engages in "sufficient production-related activities" to be considered a "producer," Commerce considers six factors. The International Trade Commission ("ITC") originated these factors and uses them in determining whether an entity is part of a domestic industry. The factors are as follows: (1) the source and extent of the entity's capital investment; (2) the technical expertise involved in its U.S. production activities; (3) the value added to the product in the U.S.; (4) employment levels; (5) the quantity and type of parts sourced in the U.S.; and (6) any other costs and activities in the U.S. directly leading to production of the like product. *See, e.g.*, Checklist, Attachment II at 10; J.A. 1026.

I

We first consider MSI's challenge to Commerce's determination that the term "producer" in §§ 1673a and 1677(9)(C) does not include "fabricators." MSI argues that Commerce acknowledged that "fabricators" are "producers" of the domestic like product and thus acted unlawfully by excluding "fabricators" from its industry support calculations. MSI asserts that § 1673a(c)(4)(B) provides two limited exceptions excluding U.S. producers from industry support calculations: (1) when producers are related to foreign producers and (2) when producers are importers. MSI contends that neither exception applies here, so Commerce was required under § 1673a(c)(4)(D) to gather additional information on industry support before initiating the investigation. In the absence of such additional information, Commerce was required to terminate the investigation.

MSI further contends that under *Chevron* step one, Commerce's decision to exclude certain U.S. producers of the domestic like product from its definition of the domestic industry and industry support calculation violated the clear terms of the statute. Even though "producer" is not defined in the statute, MSI asserts, the absence of a definition does not equate to ambiguity at *Chevron* step one. MSI asserts that the ordinary meaning of the term "producer" is sufficient, and thus proceeding to step two is not required.

Cambria and the government respond that MSI's claim that Commerce found "fabricators" to be "producers" and then excluded them from the industry support calculation without meeting a statutory exception is a mischaracterization of Commerce's findings. Cambria and the government further respond that Commerce did not act unlawfully by excluding QSP fabricators from its industry support calculations. Cambria and the government agree that the statute is silent with respect to the term "producer" and so Commerce lawfully proceeded to *Chevron* step two, filling the gap in the statute by reasonably interpreting "producer" to mean a company that performs sufficient production-related activities in the U.S. such that it has a stake in the domestic industry.

We first note that Cambria and the government are correct in stating that MSI's contention that Commerce found "fabricators" to be "producers" is a mischaracterization of Commerce's findings. Commerce did not find "fabricators" to be "producers." Instead, Commerce stated that "fabricators do not perform sufficient production-related activities to qualify as domestic producers of [QSPs]." Checklist, Attachment II at 16; J.A. 1032. To say that fabricators do not perform sufficient production-related activities to be considered producers does not equate with MSI's contention that Commerce found fabricators to be producers and then excluded them from the industry support calculation.

It is undisputed that the term "producers" is not defined in the statute. However, we need not employ a *Chevron* analysis as urged by MSI because our precedent has already interpreted the term "producers." In *Eurodif S.A. v. United States*, we held that Commerce's interpretation of the term "producer" as an entity with sufficient production-related activities such that it has a stake in the domestic industry in question was not unreasonable. 411 F.3d 1355, 1360–61 (Fed. Cir. 2005). At issue in *Eurodif* was whether domestic utilities or foreign enrichers of uranium were "producers" of low enriched uranium for purposes of determining whether there was sufficient industry support to begin an antidumping and countervailing duty inves-

tigation. *Id*. at 1358. Commerce determined that, "to be a producer, an entity must have a 'stake' in the domestic industry in question," further defining having a stake as "undertaking the actual production of the domestic like product within the United States." *Id*. at 1360 (citations and internal quotation marks omitted). The Trade Court sustained Commerce's determination, and we affirmed, holding that there was no basis to conclude that Commerce's interpretation of the term "producer" was unreasonable or not in accordance with the law. *Id*. at 1360–61. The question in *Eurodif* and the question here are the same: was Commerce's definition of "producer" for purposes of an industry support calculation reasonable? As in *Eurodif,* we answer here in the affirmative. Thus, *Eurodif* controls. Accordingly, we find no error in Commerce's defining a producer as one having a stake in the industry.

To determine whether fabricators had a sufficient "stake" in the industry to be considered producers of QSPs, Commerce employed the sufficient production-related activities test. In using the test, Commerce observed that QSP producers create QSPs by "(1) mixing raw materials, (2) combining, (3) dispensing and molding, (4) pressing, (5) curing, (6) cooling, and (7) polishing." Checklist, Attachment II at 15; J.A. 1031. In contrast, Commerce observed that QSP slab fabricators use what is already producer-made QSPs and "(1) consult with customers, (2) develop engineering diagrams, (3) perform intricate cutting, and (4) perform various edge and surface finishing operations" on already existing QSPs. Checklist, Attachment II at 15; J.A. 1031. Commerce concluded that the six factors did not support the conclusion that fabricators were producers of the domestic like product. We find no error in Commerce's use of the sufficient production-related activities test, and we further hold that the use of the test was reasonable in determining the definition of "producer" and whether fabricators had a sufficient "stake" in the U.S. industry to be considered producers.

In summary, we affirm Commerce's interpretation of the term "producers" as an entity that requires a stake in the domestic industry. We further affirm Commerce's use of the sufficient production-related activities test to determine that the fabricators did not have a sufficient stake in the domestic industry and thus did not qualify as "producers" for purposes of calculating industry support.

II

We next consider MSI's challenge to the Trade Court's holding that Commerce's finding that "fabricators" are not "producers" was supported by substantial evidence.

MSI contends that, even if Commerce could lawfully employ the sufficient production-related activities test, its decision was not supported by substantial evidence because Commerce failed to consider evidence and to articulate a satisfactory explanation for its decision. MSI asserts that none of Cambria's exhibits reveals a rational connection between Commerce's asserted facts and the choices it made, and that Commerce did not conduct a critical examination of Cambria's claims. MSI notes that the Trade Court acknowledged that Commerce could have reached an alternative finding.

MSI further contends that Commerce's findings are entitled to little deference because the ITC, which originated the sufficient production-related activities test, reached the opposite conclusion, determining that "fabricators" were "producers" in a related investigation. Further, MSI argues that the ITC issued U.S. producer questionnaires to fabricators in related antidumping investigations, which foreshadowed its findings that fabricators are producers.

Cambria and the government respond that MSI fails to meet the burden for establishing that Commerce's determination was not supported by substantial evidence. Cambria and the government contend that MSI merely asks for a reweighing of the evidence, which is not a valid basis for overturning Commerce's determination. Cambria and the government assert that Commerce analyzed and addressed all arguments and evidence and noted that Commerce is prohibited from reconsidering industry support after an investigation is initiated.

Cambria and the government further respond that Commerce and the ITC can reach separate determinations on the same issue, and that the ITC had sent producer questionnaires to fabricators in a separate investigation does not alone imply that the ITC would find the fabricators to be producers without further information.

We agree with Cambria and the government that Commerce's determination was supported by substantial evidence. Commerce carefully considered the record evidence, including Cambria's exhibits that contain multiple examples of differences between producers and fabricators. Commerce relied on several exhibits illustrating the differences in cost between establishing a QSP production plant and a fabrication shop. Pet'r's Resp. to MSI's Comments on Standing, Exs. 3–5; J.A. 944–968. Commerce also relied on several exhibits discussing business operations of successful fabrication businesses, the equipment fabrication businesses use, and the smaller number of employees fabrication businesses have compared to production companies. Pet'r's Resp. to MSI's Comments on Standing, Ex. 7; J.A. 971–976. We note, as did the Trade Court, that MSI is unable to point

to anything other than Commerce's adverse finding that fabricators are not producers as evidence of Commerce's alleged failure to consider the evidence in front of it. *Decision*, 547 F. Supp. 3d at 1308. Finally, that the Trade Court stated that Commerce could have reached an alternative finding is not sufficient to establish that Commerce's finding was not supported by substantial evidence. *Mitsubishi Heavy Indus. Ltd v. United States*, 275 F.3d 1056, 1062 (Fed. Cir. 2001) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."). In conclusion, MSI does not meet its burden in establishing that Commerce's determination was not based on substantial evidence.

We further note that there is no requirement that Commerce and ITC reach the same conclusion on the same issue. In fact, we have repeatedly held that Commerce and the ITC can reach separate determinations on the same issue. *Hosiden Corp. v. Advanced Display Mfrs. of Am.,* 85 F.3d 1561, 1568 ("The division of responsibility between the [ITC] and Commerce is integral to the statutory scheme," and this "division of labor has been upheld even where it has resulted in decisions which are difficult to reconcile . . . ." (citations omitted)); *Torrington Co. v. United States,* 747 F. Supp. 744, 748 (Ct. Int'l Trade 1990) (stating that Commerce and the ITC reaching two different conclusions is not unanticipated under the law), *aff'd*, 938 F.2d 1278 (Fed. Cir. 1991); *Algoma Steel Corp. v. United States*, 688 F. Supp. 639, 644 (Ct. Int'l Trade 1988) ("This division of labor has been upheld even where it has resulted in decisions which are difficult to reconcile."), *aff'd*, 865 F.2d 240 (Fed. Cir. 1989), *cert. denied*, 492 U.S. 919 (1989). Congress has indicated the same. Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, at 858 (1994) (stating that Commerce and the ITC could reach different decisions regarding which entities should be part of the domestic industry, "even where this may lead to somewhat different results in individual cases").

Commerce and the ITC perform different functions and have different goals. Here, Commerce has interpreted the term "producer" with the goal of determining which parties have a stake in the domestic industry and how to calculate that industry support. The ITC has, in contrast, interpreted the term "producer" to determine whether the domestic industry has suffered a material injury as a result of imports. Thus, the ITC's determination of the meaning of "producers" remains separate and apart from Commerce's, and any differences do not change the present outcome.

In summary, Commerce's determination was supported by substantial evidence, and that Commerce and the ITC may have come to different conclusions regarding whether fabricators were producers plays no role in our determination whether Commerce's determination was based on substantial evidence.

CONCLUSION

We have considered MSI's remaining arguments, but we find them unpersuasive. For the foregoing reasons, the decision of the Trade Court is affirmed.

AFFIRMED

U.S. Court of International Trade

Slip Op. 22–148

RISEN ENERGY CO., LTD., Plaintiff, and TRINA SOLAR CO., LTD. et al., Consolidated Plaintiffs, and SHANGHAI BYD CO., LTD. et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SUNPOWER MANUFACTURING OREGON, LLC, Defendant-Intervenor and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 20–03743
PUBLIC VERSION

[Sustaining the U.S. Department of Commerce's remand determination in the 2017–2018 administrative review of the antidumping duty order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China.]

Dated: December 20, 2022

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OPINION

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce") remand determination pursuant to the court's remand order, *see Risen Energy Co. v. United States*, 569 F. Supp. 3d 1315 (Ct. Int'l

Trade 2022) ("*Risen I*"), on Commerce's final determination in its 2017–2018 administrative review of the antidumping duty ("ADD") order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, ("solar cells") from the People's Republic of China ("China"). *See* Final Results of Redetermination Pursuant to Court Remand, A-570–979 (July 5, 2022), ECF Nos. 137–1, 138–1 ("Remand Results"); *see generally [Solar Cells from China]*, 85 Fed. Reg. 62,275 (Dep't Commerce Oct. 2, 2020) (final results of [ADD] admin. review and final deter. of no shipments; 2017–2018) ("*Final Results*") and accompanying Issues and Decision Mem., A-570–979 (Sept. 28, 2020), ECF No. 49–5 ("Final Decision Memo"); Order on Consent Mot. to Consol. Cases, Dec. 16, 2020, ECF No. 44 (consolidating Ct. Nos. 20–03757, 20–03761, 20–03797, 20–03802, 20–03804, and 20–03743). For the following reasons, the court sustains Commerce's determination on remand.

BACKGROUND

The court presumes familiarity with the facts of this case as set out in its previous opinion ordering remand to Commerce, *see Risen I*, 569 F. Supp. 3d 1315, and now recounts only those facts relevant to the court's review of the Remand Results. In the underlying review of the ADD order covering solar cells from China for a period of review covering December 1, 2017 through November 30, 2018, Commerce selected Risen Energy Co., Ltd. ("Risen") and Trina as mandatory respondents.[1] Mem. Re: Resp't Selection, PD 101, bar code 3830533–01 (May 6, 2019); *see also Risen I*, 569 F. Supp. 3d at 1319 nn.1–2, 1321. Commerce selected Malaysia as the primary surrogate country. *Risen I*, 569 F. Supp. 3d at 1321. The parties moved for judgment on the agency record, challenging Commerce's selection of Malaysia as the primary surrogate country, certain surrogate values

[1] Commerce determined that Risen (Wuhai) New Energy Co., Ltd.; Zhejiang Twinsel Electronic Technology Co., Ltd.; Risen (Luoyang) New Energy Co., Ltd.; Jiujiang Shengchao Xinye Technology Co., Ltd.; Jiujiang Shengzhao Xinye Trade Co., Ltd., Ruichang Branch; Risen Energy (Hong Kong) Co., Ltd.; and Risen Energy (Changzhou) Co., Ltd. ("the Risen Entities") were affiliated and treated the entities as a single collapsed entity for the purpose of the dumping margin calculation. Affiliation and Single Entity Status of [the Risen Entities] at 1–2, PD 411, bar code 3938677–01 (Jan. 31, 2020). Risen Energy Co., Ltd. challenges Commerce's final determination independently. *See* Compl. ¶¶ 1, 4–5, Oct. 28, 2020, ECF No. 7. Commerce determined that Trina Solar Co., Ltd. (formerly, Changzhou Trina Solar Energy Co., Ltd.) (TCZ); Trina Solar (Changzhou) Science and Technology Co., Ltd.(TST); Yancheng Trina Guoneng Photovoltaic Technology Co., Ltd (formerly, Yancheng Trina Solar Energy Technology Co., Ltd.) (TYC); Changzhou Trina Solar Yabang Energy Co., Ltd. (TYB); Turpan Trina Solar Energy Co., Ltd. (TLF); Hubei Trina Solar Energy Co., Ltd. (THB); Trina Solar (Hefei) Science and Technology Co., Ltd. (THFT); and Changzhou Trina Hezhong Photoelectric Co., Ltd. (THZ) (collectively, "Trina") were affiliated and treated the entities as a single collapsed entity for the purposes of Commerce's dumping margin calculation. Mem. Re: Affiliation and Single Entity Status of [Trina] at 1–2, PD 410, bar code 3938672–01 (Jan. 31, 2020).

for inputs, the surrogate financial ratio calculations, the partial application of facts otherwise available with an adverse inference, and calculation of the separate rate. *Id.* at 1320.

In *Risen I*, the court remanded Commerce's final determination on this ADD administrative review. 569 F. Supp. 3d at 1338. Specifically, the court remanded Commerce's: (i) decision to rely on the Malaysian import value for silver paste, *id.* at 1327–30; (ii) application of facts otherwise available with an adverse inference to Risen and Trina's review responses, *id.* at 1335–37; (iii) valuation for backsheet, *id.* at 1330–32; (iv) valuation for ethyl vinyl acetate ("EVA"), *id.*; and (v) calculation of the weighted-average antidumping margins for Risen and Trina for application to the separate rate respondents, *id.* at 1337–38.

Commerce filed its Remand Results on July 5, 2022. In the Remand Results, Commerce: (i) values silver paste using Malaysian import data for HTS 7106.92.00 rather than HTS 7115.90.1000, Remand Results at 9–11; (ii) under protest, applies partial neutral facts available instead of applying an adverse inference when selecting facts otherwise available in calculating Trina and Risen's dumping margins,[2] *id.* at 5–7; (iii) continues to value Risen's backsheet using import data from Malaysia's HTS 3920.62.1000, *id.* at 12–15; (iv) again values Risen's EVA using Malaysia's HTS 3920.10.1900, *id.* at 20–22; and (v) recalculates the dumping margins of the mandatory respondents and revises the weighted-average dumping margin for separate rate respondents, in light of the Court's remand order, *id.* at 27–28.

No party objects to Commerce's determination on remand regarding silver paste or its application of partial neutral facts available. *See* Remand Results at 7, 11. Risen argues that Commerce's surrogate value HTS classifications for backsheet and EVA are unsupported by substantial evidence. Pl.'s Comments on Remand Redetermination at 1–7, Aug. 4, 2022, ECF No. 142 ("Risen's Comments"). JA Solar, Canadian Solar, and BYD agree with Risen that Commerce's determinations on remand valuing backsheet and EVA are unsupported by substantial evidence and do not comply with the court's remand order. Comments on Final Remand Redetermination of Consol. Pls. & Pl.-Intervenors JA Solar Tech. Yangzhou Co., Ltd., Shanghai JA Solar Tech. Co., Ltd., & JingAo Solar Co., Ltd. at 2, Aug. 4,

[2] Under respectful protest in light of the court's remand order, Commerce determines not to apply an adverse inference on remand in selecting among the facts otherwise available for the missing factors of production consumption rates to calculate Risen and Trina's dumping margins. Remand Results at 5. Instead, Commerce applies partial neutral facts available, using the average consumptions rates reported by Risen and Trina for each input, to calculate the dumping margins. *Id.*

2022, ECF No. 141; Shanghai BYD Co., Ltd. & Canadian Solar Inc. et al.'s Comments on Final Results of Remand Redetermination at 5–9, Aug. 4, 2022, ECF No. 143. No party objects to Commerce's separate rate calculation based on changes Commerce made to the mandatory respondents' dumping margins on remand. Defendant United States argues that Commerce's determinations on remand are supported by substantial evidence in accordance with law and should be sustained. Def.'s Resp. Pls.' Comments on Remand Results at 5–16, Oct. 6, 2022, ECF Nos. 146–47.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction pursuant to section 516A of the Tariff Act of 1930,[3] as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2018), which grant the court authority to review actions contesting the final determination in an administrative review of an ADD order. "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 968 F. Supp. 2d 1255, 1259 (Ct. Int'l Trade 2014) (internal quotation marks omitted).

DISCUSSION

I. Valuation of Silver Paste

On remand, Commerce reconsiders its valuation of silver paste using Malaysian import data for HTS 7115.90.1000, and instead values silver paste using Malaysian import data for HTS 7106.92.00. Remand Results at 9–11. No party objects to Commerce's determination on remand. The court sustains Commerce's determination on remand to value silver paste using HTS 7106.92.00.

In *Risen I*, the court remanded Commerce's final determination regarding its valuation of silver paste, for further explanation or reconsideration in light of detracting evidence that the value is aberrant.[4] 569 F. Supp. 3d at 1327–30. Commerce disregards aberrational data because it is unreliable. *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,366 (Dep't Commerce May 19,

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

[4] Commerce values the factors of production from the primary surrogate country and resorts to a secondary surrogate country only if data from the primary surrogate country is unavailable or unreliable. 19 C.F.R. § 351.408(c)(1)–(2).

1997) (final rule). In determining whether an input's surrogate value is aberrational, Commerce "typically compares the prices for an input from all countries found to be at a level of economic development comparable to the [nonmarket economy] whose products are under review from the [period of review] and prior years." Final Decision Memo at 21. Commerce disregards "small quantity import data . . . when the per-unit value is substantially different from the per-unit values of the larger quantity imports of that product from other potential surrogate countries." *SolarWorld Americas, Inc. v. United States*, 962 F.3d 1351, 1358 (Fed. Cir. 2020) (quoting *Shakeproof Assembly Components Div. of Illinois Tool Works, Inc. v. United States*, 59 F. Supp. 2d 1354 (Ct. Int'l Trade 1999)) (internal quotations marks and brackets omitted).

Commerce's determination on remand must be supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)) (internal quotation marks omitted). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id.* at 488. In providing its explanation, Commerce must articulate a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). An agency's decision is arbitrary when, inter alia, it deviates from an established practice followed in similar circumstances and does not provide a reasonable explanation for the deviation. *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003); *see also SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001).

On remand, Commerce reopened the record and included data for Malaysian Harmonized Tariff Schedule ("HTS") number 7106.92.00. Remand Results at 2–3. Commerce values silver paste using the average unit import value ("AUV") of Malaysian import data using HTS 7106.92.00 because its description is more specific than HTS 7115.90.1000 to the silver paste Risen and Trina use and because the AUV of imports using that subheading is more consistent with the record benchmark data. *Id.* at 9. Commerce concludes HTS 7106.92.00 is more specific because HTS 7106.92.00 only covers forms of silver while HTS 7115.90.1000 covers other precious metals in addition to silver, including gold and platinum. *Id.* Additionally, Commerce determines that Malaysian customs officials classify the silver paste used in solar cell product under HTS 7106.92.00 instead of HTS

7115.90.1000. *Id.* at 9–10. Commerce also determines that the AUV of imports using Malaysia's HTS 7106.92.00 is reliable because the AUV of imports is consistent with the prices of silver paste in the market research report.[5] *Id.* at 10–11. Thus, Commerce's determination on remand is consistent with the court's remand order, is supported by substantial evidence, and is in accordance with law.

II. Application of Facts Available

On remand, Commerce reconsiders applying partial facts otherwise available with an adverse inference to calculate Risen and Trina's dumping margins. Remand Results at 5–7. Instead, Commerce, under respectful protest, revises its calculation of Risen and Trina's weighted-average dumping margins by applying partial neutral facts available. *Id.* at 7. No party objects to Commerce's determination on remand. *Id.* For the following reasons, the court sustains Commerce's application of partial neutral facts available.

When necessary information is not available on the record or a party or other person fails to provide requested information, Commerce uses the facts otherwise available to make its determination. 19 U.S.C. § 1677e(a); *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1380–81 (Fed. Cir. 2003). If Commerce finds that an interested party failed to cooperate to the best of its ability, Commerce may use an inference that is adverse to the interests of that party when selecting the facts otherwise available. 19 U.S.C. § 1677e(b). A party cooperates to the best of its ability when it does "the maximum it is able to do." *Nippon*, 337 F.3d at 1382. However, under 19 U.S.C. § 1677e(a) Commerce may use adverse inferences against a cooperative respondent, if doing so will yield an accurate rate, promote cooperation, and thwart duty evasion. *Mueller Comercial de Mexico v. United States*, 753 F.3d 1227, 1232–36 (Fed. Cir. 2014). When using the facts available with an adverse inference under *Mueller*, the predominant interest when determining the antidumping rate must be accuracy. *Id.* at 1235.

The court remanded Commerce's application of facts available with an adverse inference for reconsideration or additional explanation. *Risen I*, 569 F. Supp. 3d at 1335. Specifically, Commerce failed to demonstrate that Risen and Trina did not put forth the maximum effort to provide full and complete responses to inquiries from Com-

[5] During the period of review, the AUV for imports into Malaysia using HTS 7106.92.00 is 582.75 USD/kg while the AUV of imports into Malaysia using HTS 7115.90.1000 is 8,645.31 USD/kg. Prices of silver paste during the period of review in potential surrogate countries range from 599.60 USD/kg to 644.60 USD/kg for Brazil, from 614.90 USD/kg to 637.50 USD/kg for Malaysia, from 563.70 USD/kg to 584.30 USD/kg for Mexico, and from 563.70 USD/kg to 911.90 USD/kg for Russia. *Id.* at 10.

merce. *Id.* Commerce also failed to demonstrate that Risen and Trina have leverage to induce their non-cooperative unaffiliated suppliers to cooperate, that the non-cooperative unaffiliated supplies are evading their own duties by exporting subject merchandise through Risen or Trina, or that using the highest factor of production consumption rates on the record results in an accurate dumping margin. *Id.*

On remand, Commerce reconsiders its findings and under respectful protest revises its calculation of Risen and Trina's weighted-average dumping margins by applying partial neutral facts available instead of applying facts otherwise available with an adverse inference.[6] Remand Results at 7. Specifically, Commerce uses Risen and Trina's average reported consumption rates for each input as a substitute for the missing factor of production consumption rates to calculate their dumping margins. *Id.* Thus, Commerce's determination on remand is consistent with the remand order, is supported by substantial evidence, and is in accordance with law.

III. Valuation of Backsheet

On remand, Commerce continues to value backsheet using HTS 3920.62.1000, covering polyethylene in plates and sheets (not including film) rather than HTS 3920.62.9000 covering polyethylene in non-plates and sheets (including film) because the thickness of Risen's backsheets is consistent with sheet, rather than film. Remand Results at 12–15, 17–20. Risen objects and argues backsheet should be valued using the HTS heading that includes film. Risen Comments at 2–4. For the reasons that follow, the court sustains Commerce's remand decision to value backsheet using HTS 3920.62.1000 covering non-film polyethylene.

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[6] Commerce revises its determination under protest and argues that Risen and Trina are both experienced respondents that are aware of the importance of factor of production information to the accuracy of Commerce's dumping calculation. Remand Results at 6. Further, Commerce maintains that Risen and Trina did not cooperate to the best of their ability because the record contains no indication either company attempted to ensure reporting of necessary factor of production data by securing cooperation of unaffiliated suppliers prior to purchasing their products. *Id.* at 6.

As the court previously explained in *Risen I* however, none of Commerce's questionnaires to Risen and Trina asked either respondent to discuss whether they stopped doing business with a supplier because the supplier refused to provide them with the supplier's factors of production. 569 F. Supp. 3d at 1336 n.36. The best of its ability standard requires a respondent to "put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon*, 337 F.3d at 1382. Here, Commerce may not determine that a respondent failed to cooperate to the best of its ability because it did not provide information that Commerce did not request. Commerce could have requested information from the respondents on their efforts to leverage their suppliers into complying. Instead, Commerce chose to rely on partial neutral facts available. Remand Results at 5–7.

The court remanded Commerce's use of Malaysia's HTS 3920.62.1000 to value Risen's backsheet as not supported by substantial evidence and instructed Commerce to address evidence that detracted from its conclusion. *Risen I*, 569 F. Supp. 3d at 1331. The court also remanded Commerce's decision as arbitrary and requested Commerce explain why it considers backsheet to be a "sheet" using import data for Malaysia's HTS 3920.62.1000 in light of its past decisions to value backsheet using HTS descriptions comparable to Malaysia's HTS 3920.62.9000 (Poly(Ethylene Terephthalate): Other Than Plates And Sheets). *Id.* at 1331–32.

On remand, Commerce reopened and placed on the record ASTM abstracts from ASTM D4801 and ASTM D6988 relating to film and sheet. Remand Results at 13; *see* Joint Appendix at REM JA 8, Mem. Reopening the Record, Att. II (pdf 197205), A-570–979, REM PD 3–4, bar code 4234679–01 (Apr. 22, 2022), ECF Nos. 148–49. Commerce relies upon the ASTM abstracts to support its view that polyethylene sheets are those that are 0.25 mm and thicker; in contrast, film is a type of sheeting less than 0.25 mm thick. *See* Remand Results at 13. Commerce concludes that, under these definitions, Risen's backsheet constitutes sheet rather than film.[7] *Id.* at 13–14. No party submitted evidence rebutting the ASTM abstracts on sheet and film thickness or evidence regarding the meaning of plates, sheets, and film in Malaysia's HTS. *Id.* at 14.

Commerce's determination on remand that Risen's backsheet constitutes sheet is reasonable. The court asked Commerce to explain why backsheet is not film, despite it being thin and flexible. *Risen I*, 569 F. Supp. 3d at 1331. The ASTM abstracts support Commerce's analysis based on thickness, not flexibility. *See* Remand Results at 13. Although Risen provided marketing materials demonstrating that some companies in the solar power industry describe thicker backsheet as "film," *see id.* at 16, these materials provide a competing definition at best; they do not rebut Commerce's definition of sheet as plastic products 0.25 mm thick and greater, nor do they demonstrate that Commerce's determination is unreasonable.

Furthermore, Commerce's use of Malaysia's HTS 3920.62.1000 on remand is not arbitrary. The court asked Commerce to explain its determination when, in its prior administrative review, Commerce valued backsheet using import data for headings comparable to Malaysia's HTS 3920.62.9000 that included the description "other than sheet." *Risen I*, 569 F. Supp. 3d at 1331–32. Commerce may change its practice in similar circumstances if it provides a reasonable explana-

[7] Risen's backsheets during the POR have [[ ]] and thus are [[ ]]. *Id.*

tion for its deviation. *See Consol. Bearings Co.*, 348 F.3d at 1007. Here, Commerce explains that it did not have the ASTM definition of film on the record in the previous administrative review in this proceeding. Remand Results at 19–20. Commerce has explained its deviation from its prior determination and supported its determination with record evidence. Its determination regarding backsheet is sustained.

IV. Valuation of EVA

On remand, Commerce continues to value Risen's EVA using HTS 3920.10.1900 (Polymers of Ethylene: Plates And Sheets: Other Than Rigid) rather than HTS 3920.10.9000 (Polymers Of Ethylene – Other) because Risen's EVA does not meet the ASTM definition of film. Remand Results at 20–22, 24–27. For the following reasons, the court sustains Commerce's remand decision to value EVA using HTS 3920.10.1900 covering polyethylene other than rigid plates and sheets.

The court remanded for reconsideration or further explanation Commerce's decision to value its EVA using Malaysia's HTS 3920.10.1900. Specifically, the court requested Commerce address the evidence Risen submitted demonstrating that its EVA is flexible and described as film. *Risen I*, 569 F. Supp. 3d at 1332. The court also requested Commerce explain why its treatment of EVA differs from its historical treatment of EVA. *Id.*

On remand, Commerce concludes that no characteristics of EVA support defining it as film instead of sheet. Risen reported that its EVA is over 0.5 mm thick—over twice as thick as the maximum thickness for film in the ASTM description.[8] Remand Results at 21. Risen describes its EVA as flexible; however, Commerce determines that, because the description of HTS 3920.10.1900 is "Other than Rigid," it contains flexible plastic products such as Risen's EVA. *Id.* Although Risen submitted marketing materials that Risen argues show the term "film" to be broader than how Commerce defines it, *see* Risen Comments at 5, Commerce determines Risen's marketing materials describe the product as both "EVA film" and "EVA sheets." Remand Results at 22.

[8] Risen claims that the ASTM standard does not define film and sheet based on thickness and only suggests the term "sheet" may be used when addressing generic plastic product over 0.25 mm thick and is not specific to the solar industry. Risen Comments at 5. Contrary to Risen's argument, Commerce determines that the abstract defines film as sheeting no greater than 0.25 mm thick, which is in fact a definition of film based on thickness. Remand Results at 24–25. Commerce also determines there is no indication this standard is limited to certain types of plastics or does not cover products in the solar industry. *Id.* Risen's arguments ask this court to reweigh the evidence. The court will not do so.

Commerce's determination on remand that Risen's EVA constitutes "sheet" is reasonable. Commerce explains the ASTM abstracts provide definitions of sheet and film based on thickness, not flexibility, and under this definition EVA is sheet because it is over 0.25 mm thick. *See* Remand Results at 21. The marketing materials, which Commerce determines use the terms "film" and "sheet" inconsistently, *id.* at 22, at best provide a competing definition and do not rebut Commerce's definition of sheet as a plastic product 0.25 mm or greater in thickness or Commerce's finding that EVA meets the definition of sheet.

Furthermore, Commerce's use of HTS 3920.10.1900 is consistent with its past practice. In its remand order, the court requested that Commerce explain its departure from its historical treatment of EVA. *Risen I*, 569 F. Supp. 3d at 1332. However, here Commerce explains that in the past it used Thai HTS 3920.10.000.90, an "other" HTS category, covering "plates, sheets, film, foil and strips of polymers of ethylene." Remand Results at 25–26. Thus "Commerce did not use a Thai HTS category that covered film, and not plates and sheets." *Id.* at 26. Commerce further explains that Malaysia, unlike Thailand, has separate HTS categories for polyethylene in plates and sheets and for polyethylene in other forms such as film. *See id.* at 26–27. Based on the ASTM definitions, Commerce concludes that Risen's EVA does not meet the definition of film and thus values EVA using import data for plates and sheets. *Id.* Because Commerce now values EVA using Malaysia's HTS covering plates and sheets and in the past valued EVA using Thailand's HTS covering plates, sheets, film, foil, and strips, Commerce's reliance on Malaysia's HTS 3920.10.1900 is not inconsistent with its past practice.

V. Calculation of the Separate Rate

On remand, Commerce recalculates the separate rate in light of the changes made to the mandatory respondents' dumping margins. Remand Results at 27–28. No party objects to Commerce's determination on remand. *See id.* at 28. For the following reasons, the court sustains Commerce's recalculation of the separate rate on remand.

Specifically, the court requested Commerce recalculate the separate rate consistent with the rate it calculates for Risen and Trina on remand. *See Risen I*, 569 F. Supp. 3d at 1337–38. The separate rate is "the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under [19 U.S.C. § 1677e]." 19 U.S.C. § 1673d(c)(5)(A); *see also Final Results*, 85 Fed. Reg. at 62,276 n.6.

On remand, Commerce assigns a dumping margin to the separate rate respondents equal to the weighted average of the dumping margins Commerce calculates for the mandatory respondents. Remand Results at 27–28. Thus, Commerce's determination on remand is consistent with the court's remand order, is supported by substantial evidence, and is in accordance with law.

CONCLUSION

For the foregoing reasons, the Remand Results are supported by substantial evidence, are in accordance with law, comply with the court's order in *Risen I*, and, therefore, are sustained. Judgment will enter accordingly.

Dated: December 20, 2022
New York, New York

/*s*/ *Claire R. Kelly*
CLAIRE R. KELLY, JUDGE

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