U.S. Customs and Border Protection

19 CFR PART 177

MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF THE TARIFF CLASSIFICATION AND COUNTRY OF ORIGIN OF A PET BOWL MAT

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

ACTION: Notice of modification of one ruling letter and of revocation of treatment relating to the tariff classification of a pet bowl mat.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying one ruling letter concerning tariff classification of a pet bowl mat 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. 57, No. 33, on September 13, 2023. 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EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 22, 2024.

FOR FURTHER INFORMATION CONTACT: John Rhea, Food, Textiles & Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0035.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obli-

gation 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. 57, No. 33, on September 13, 2023, proposing to modify one ruling letter pertaining to the tariff classification of a pet bowl mat. 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") N307920, dated December 18, 2019, CBP classified a pet bowl mat in heading 5705, HTSUS, specifically in subheading 5705.00.20, HTSUS, which provides for "Other carpets and textile floor coverings, whether or not made up: Other." CBP has reviewed NY N307920 and has determined the ruling letter to be in error. It is now CBP's position that the pet bowl mat is properly classified, in heading 6307, HTSUS, specifically in subheading 6307.90.98, HTSUS, which provides for "Other made up articles, including dress patterns: Other: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N307920 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H325602, 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*.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H325602
February 2, 2024
OT:RR:CTF:FTM H325602 JER
CATEGORY: Classification
TARIFF NO.: 6307.90.98

MR. ROBERT SHAPIRO
THOMPSON COBURN, LLP
1909 K STREET, NW, SUITE 600
WASHINGTON, DC 20006

RE: Modification of NY N307920; Tariff Classification and Country of Origin of Pet Bowl Mat

DEAR MR. SHAPIRO:

This is with respect to your request for reconsideration, dated April 12, 2021, filed by Thompson Coburn LLP, on behalf of Schroeder & Tremayne, Inc., concerning U.S. Customs and Border Protection's ("CBP") decision in New York Ruling ("NY") N307920, dated December 18, 2019. The decision in NY N307920 concerned the tariff classification, under the Harmonized Tariff Schedule of the United States ("HTSUS"), and country of origin of a microfiber towel (Item No. 853400), a pet bowl mat (Item No. 535900), and a door mat. Your request for reconsideration pertains only to the tariff classification of the pet bowl mat, which was classified under heading 5705, HTSUS, and specifically in subheading 5705.00.20, HTSUS, which provides for "Other carpets and other textile floor coverings, whether or not made up: Other." Based on this classification, the country of origin of the pet bowl mat in NY N307920 was determined to be Vietnam. Upon further review, we have reviewed NY N307920 and determined it to be in error with respect to the tariff classification and country of origin of the pet bowl mat, Item No. 535900. For the reasons set forth below, NY N307920 is herein modified with respect to the tariff classification and country of origin of the pet bowl mat.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on September 13, 2023, in Volume 57, Number 33, of the *Customs Bulletin*. No comments were received in response to this notice.

FACTS:

In NY N307920, the pet bowl mat was described, in relevant part, as follows:

> The pet bowl mat, Item No. 535900, is a knitted floor covering consisting of three layers laminated together: a printed, knit pile face fabric of 100 percent polyester followed by a layer of foam and a 100 percent polyester knit backing fabric with polyvinyl chloride dots applied 3/8" apart from one another on one side to create a non-skid backing for the mat. The mat measures 10 x 20 inches and is finished along the four edges with an overlock stitch. The mat is folded and a cardboard sleeve is placed over the mat.

A sample was provided in connection with the 2019 ruling request and CBP determined that the layer of foam measures ⅛ inches (4 millimeters) thick.

The cardboard sleeve of the retail packaging includes a photograph of a dog lying on the floor with the mat in the foreground underneath a water and food bowl. The back of the cardboard sleeve states, in part:

> The Kitchen Basics® Pet Bowl Mat is the solution to the age old tradition of cleaning up after a pet that eats and drinks...well, like an animal. The unique, laminated design combines a thin layer of foam between a top layer of high quality, super absorbent microfiber and an anti-skid, water resistant bottom layer.
>
> - Superior absorbency; holds 3 times its weight in water
> - Helps protect floors from splashes and spills
> - Anti-skid bumps help keep the mat in place
> - Cushions water and food bowls
> - Machine washable and highly durable
> - Folds and stores easily

The manufacturing operations for the Pet Bowl Mat are as follows:

China

- Yarn is formed for the face and backing fabrics.
- Face and backing fabrics are knitted.
- Face fabric is dyed and printed.
- Backing fabric is dyed.
- PVC anti-slip dots are applied to one side of the backing fabric.
- Fabrics are exported to Vietnam.

Vietnam

- Fabrics are cut to size.
- Foam is formed.
- Face fabric, foam and backing fabric are laminated together.
- The mat is finished with an overlock stitch around the edges.
- Mat is folded and packaged under a printed cardboard sleeve and exported to the United States.

ISSUES:

(1) Whether the subject pet bowl mat is classified as an "other textile floor covering[]" under heading 5705, HTSUS, or as an "[o]ther made up article[]" under heading 6307, HTSUS.

(2) What is the country of origin of the subject pet bowl mat?

LAW AND ANALYSIS:

(1) CLASSIFICATION

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRI"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the

goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The 2024 HTSUS provisions under consideration are as follows:

5705	Other carpets and other textile floor coverings, whether or not made up:
	* * *
5705.00.20	Other...
	* * *
6307	Other made up articles, including dress patterns:
	* * *
6307.90	Other:
	* * *
	Other:
	* * *
6307.90.98	Other...

Note 1 to Chapter 57, HTSUS, provides as follows:

> For the purposes of this chapter, the term "*carpets and other textile floor coverings*" means floor coverings in which textile materials serve as the exposed surface of the article when in use and includes articles having the characteristics of textile floor coverings but intended for use for other purposes.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the "official interpretation of the Harmonized System" at the international level. *See* 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989). 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 id.*

The ENs to Chapter 57 provides, in pertinent part:

GENERAL

> This Chapter covers carpets and other textile floor coverings in which textile materials serve as the exposed surface of the article when in use. It includes articles having the characteristics of textile floor coverings (e.g., thickness, stiffness and strength) but intended for use for other purposes (for example, as wall hangings or table covers or for other furnishing purposes).
>
> The above products are classified in this Chapter whether made up (i.e., made directly to size, hemmed, lined, fringed, assembled, etc.), in the form of carpet squares, beside rugs, hearth rugs, or in the form of carpeting for installation in rooms, corridors, passages or stairs, in the length for cutting and making up.

* * *

The ENs to 57.05 provides, in pertinent part:

> This heading covers carpets and textile floor coverings, **other than** those covered by a more specific heading of this Chapter.

* * *

At issue is whether the subject pet bowl mat, Item No. 535900, was properly classified as "other textile floor covering[]" under heading 5705, HTSUS, or whether it is classified in heading 6307, HTSUS, as an "[o]ther made up article[]," which is a basket (or residual) provision. Classification in a basket provision is only appropriate if there is no tariff category that covers the merchandise more specifically. *See E.M. Industries v. United States, 22 Ct. Int'l Trade 156, 999* F. Supp. 1473, 1480 (1998) ("'Basket' or residual provisions of HTSUS Headings ... are intended as a broad catch-all to encompass the classification of articles for which there is no more specifically applicable subheading.") Accordingly, if the subject pet bowl mat satisfies the requirements for classification as an "other textile floor covering[]" under heading 5705, HTSUS, or is more specifically provided for elsewhere, it would not be eligible for classification in the residual provision of heading 6307, HTSUS.

To examine classification of the subject pet bowl mat under heading 5705, HTSUS, we consider Note 1 to Chapter 57, HTSUS, which states that, "the term 'carpets and other textile flooring coverings' means floor coverings in which textile materials serve as the exposed surface of the article when in use and includes articles having the characteristics of textile floor coverings but intended for use for other purposes." The General EN to Chapter 57 explains that the "characteristics" of textile floor coverings include for example, "thickness, stiffness and strength."

CBP has previously stated that, as a guideline, generally, floor coverings should measure more than four square feet "to indicate suitability for use as a floor covering." *See* Headquarters Ruling Letter ("HQ") 952233, dated February 10, 1993 (*citing* HQ 951216 (March 31, 1992) (stating that "[a]ccording to a trade survey, as a rule of thumb, this type of upholstery fabric or "carpeting" must measure over 4 square feet in area to be considered useful for its intended purpose and to distinguish a floor covering from merchandise destined for other uses")). In HQ 952233, we emphasized that the minimum 4 square feet standard was "not a hard and fast rule," but rather, that "[t]he size of the 'floor' to be covered is also a factor in determining what minimum measurement is necessary to qualify as a floor covering."

It follows that the subject pet bowl mat must meet the following criteria to be classifiable in heading 5705, HTSUS: (1) the textile material must be the exposed surface of the article when in use; and (2) it must have the characteristics of a textile floor covering, e.g., it must have some level of thickness, stiffness, and strength. Moreover, the size of the floor to be covered by the pet bowl mat compared to the size of the product itself should be considered in making the classification determination. *See* HQ 952233 (discussed *supra*, wherein CBP discussed the size of the floor covering relative to the floor being covered). These factors contribute to the article's capacity to function as a floor covering.

In applying these factors to the subject pet bowl mat, we note that it meets the first factor. Specifically, the textile material (which is 100% knit pile polyester fabric) is the exposed surface of the subject pet bowl mat when it is used to protect the floor from splashes and spills. The subject pet bowl mat, however, does not meet the second factor as it is thin and flimsy. While it appears strong and sturdy, it is only ⅛ inch (4 millimeters) thick and it is not stiff. Hence, the pet bowl mat does not have the capacity to provide the durability and safety of a floor covering.

With regard to the square footage factor provided by HQ 952233, we note that the subject pet bowl mat measures 10 x 20 inches and has a square foot measurement less than four square feet at 1.3889 square feet. Although the four-square foot minimum measurement is not a hard and fast rule, the subject article falls short of the recommended measurement factor. Due to its small size, the subject pet bowl mat can only provide water absorption immediately beneath the pet's food bowl area and thus cannot safeguard against spills or waste beyond its 1.3889 square feet dimensions. To wit, the square footage of less than one and a half feet is far less than the four-square feet requirement discussed in HQ 952233. Furthermore, the article's intended use is that of a place mat (for a pet during meals) and thus its design and purpose are similar to a table or dinner placemat (that humans use while dining). As a placemat, the pet's food and/or water bowl are placed atop the subject pet bowl mat to help protect floors from splashes and spills. Accordingly, a pet bowl food mat or similar placemat does not serve the purpose of a floor covering and does not have the functionality or characteristics of a floor covering. Lastly, the subject pet bowl mat is not marketed as a floor covering. On the retail label of this article, the indicia "Kitchen Basics" appears in bold print, indicating that it is marketed and sold amongst kitchen items rather than among carpets, tiles, rugs, or other floor coverings. The retail labeling also states that the pet bowl mat is "machine washable" and "foldable," indicating that it is intended to be removed from the floor with some regularity. Accordingly, we find that the subject pet bowl mat does not meet the criteria for floor coverings of Chapter 57, HTSUS, and is therefore not classified under heading 5705, HTSUS.

Next, we consider whether there is a more appropriate heading in which to classify the subject pet bowl mat. As previously stated, the pet bowl mat performs a similar function as table placemats. CBP has previously classified placemats made of textile under heading 6302, HTSUS, which provides for "Bed linen, table linen, toilet linen and kitchen linen," and specifically, in subheadings that provide for table linens or other table linens. *See e.g.*, NY I80551, dated April 29, 2002; NY K80218, dated November 18, 2003; NY N080236, dated October 30, 2009. The subject pet bowl mat is intended for use on the floor to cushion pet water and food bowls and to protect against pet splashes and spills. As such, it is not used on or near a table surface and therefore cannot be classified under a provision which provides for table linen *eo nomine*.

CBP previously classified articles that were substantially similar to the subject pet bowl mat under heading 6307, HTSUS, a residual provision. In NY K89162, dated August 31, 2004, for example, CBP classified, in relevant part, two pet placemats under heading 6307, HTSUS. The two pet placemats in NY K89162, were in the shape of a fish and a bone, were made of 65 percent polyester and 35 percent cotton, contained a thin layer of polyurethane foam between the top and bottom layers of fabric, and had a non-skid surface of rubber dots on the bottom. Much like the subject pet bowl mat, the pet placemats were designed to be used on the floor, under a pet's food dish and water bowl. Similarly, in NY F81208, dated January 7, 2000, CBP classified a pet placemat that was designed to be used under pet dishes, under heading 6307, HTSUS. The pet placemats in NY F81208 were described as being made of two 100 percent polyester woven fabric panels sewn together with a

fabric binder. One side of the place mat featured printed words and various animal designs and overall article measured approximately 17–1/2 inches in length and 14 inches in width.

In keeping with our previous decisions concerning substantially similar pet bowl placemats and because the subject articles are not more specifically provided for elsewhere, we find that the subject pet bowl mat, Item No. 535900, is properly classified under heading 6307, HTSUS, and specifically, in subheading 6307.90.98, HTSUS, which provides for "Other made up articles, including dress patterns: Other: Other: Other."

(2) COUNTRY OF ORIGIN

Section 334 of the Uruguay Round Agreements Act (URAA) (codified at 19 U.S.C. § 3592), enacted on December 8, 1994, provide the rules of origin for textiles and apparel products entered, or withdrawn from warehouse for consumption, on and after July 1, 1996. Section 102.21 of the Code of Federal Regulations (19 C.F.R. § 102.21), implements the URAA. The country of origin of a textile or apparel product shall be determined by the sequential application of the general rules set forth in paragraphs (c)(1) through (5) of Section 102.21. *See* 19 C.F.R. § 102.21(c).

Paragraph (c)(1) states, "The country of origin of a textile or apparel product is the single country, territory, or insular possession in which the good was wholly obtained or produced." The fabric for the subject pet bowl mat is produced in China starting with the formation of the face and backing fabrics from yarn. Thereafter, the face and backing fabrics are knitted and dyed. Finally, PVC anti-slip dots are applied to the backing fabric. However, the production and final assembly of the product occurs in Vietnam wherein the fabric is cut to size and laminated together with a foam layer between the face and backing fabrics. The mat is then finished with overlock stitches around the edges before being packaged for retail. Because the formation of the fabric and the final assembly of the finished product occur in two different countries, the subject pet bowl mat is not wholly obtained and produced in a single country. As the subject merchandise is not wholly obtained or produced in a single country, territory or insular possession, paragraph (c)(1) of Section 102.21 is inapplicable.

Paragraph (c)(2) states, "Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) of this section, the country of origin of the good is the single country, territory, or insular possession in which each of the foreign materials incorporated in that good underwent an applicable change in tariff classification, and/or met any other requirement, specified for the good in paragraph (e) of this section:"

Paragraph (e) states in pertinent part:

> The following rules shall apply for purposes of determining the country of origin of a textile or apparel product under paragraph (c)(2) of this section:

HTSUS	Tariff shift and/or other requirements
6307.90	The country of origin of a good classifiable under subheading 6307.90 is the country, territory or insular possession in which the fabric comprising the good was formed by the fabric-making process.

In NY N307920, CBP applied the rules of origin under 19 C.F.R. § 102.21(c) to determine the country of origin of the subject pet bowl mat. However, NY N307920 incorrectly classified the subject pet mat under heading 5705, HTSUS, and therefore, applied the tariff shift rule for that heading to determine the country of origin. As stated in the above classification analysis, the subject pet bowl mat is not classifiable under heading 5705, HTSUS, as it is not a carpet or other textile floor covering. Instead, the merchandise is classified in heading 6307, HTSUS.

Because the subject pet bowl mat is classified in heading 6307, HTSUS, under 19 C.F.R. § 102.21(c), the rule of origin provides that, "the country of origin for a good classifiable under subheading 6307.90 is the country, territory or insular possession in which the fabric comprising the good was formed by a fabric-making process." Pursuant to 19 C.F.R. § 102.21(b)(2), "a fabric-making process is any manufacturing operation that begins with polymers, fibers, filaments (including strips), yarns, twine, cordage, rope, or fabric strips and results in a textile fabric." According to the facts in NY N307920, the fabric-making process occurs in China. Therefore, since the fabric is formed by the fabric-making process in a single country, the country of origin of the subject pet bowl mat is China.

HOLDING:

By application of GRI 1 and 6, the subject pet bowl mat is classified in heading 6307, HTSUS. Specifically, the pet bowl mat is classified in subheading 6307.90.98, HTSUS, which provides for "Other made up articles, including dress patterns: Other: Other: Other." The general, column one rate of duty is 7% *ad valorem*.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 6307.90.98, HTSUS, unless specifically excluded, are subject to an additional 7.5 percent *ad valorem* rate of duty.

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 at https://hts.usitc.gov/.

EFFECT ON OTHER RULINGS:

NY N307920, dated December 18, 2019, is hereby MODIFIED.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

PROPOSED REVOCATION OF FIVE RULING LETTERS AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF GLASS CONTAINERS IMPORTED WITH LIDS

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

ACTION: Notice of proposed revocation of five ruling letters and proposed revocation of treatment relating to the tariff classification of glass containers imported with lids.

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

DATE: Comments must be received on or before March 22, 2024.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Shannon L. Stillwell, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. CBP is also allowing commenters to submit electronic comments to the following email address: *1625Comments@cbp.dhs.gov*. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Arrangements to inspect submitted comments should be made in advance by calling Ms. Shannon Stillwell at (202) 325–0739.

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

SUPPLEMENTARY INFORMATION:

BACKGROUND

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), this notice advises interested parties that CBP is proposing to revoke five ruling letters pertaining to the tariff classification of glass containers imported with lids. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N094595, dated March 2, 2010 (Attachment A), NY N266863, dated July 28, 2015 (Attachment B), NY N260440 dated January 26, 2015 (Attachment C), Headquarters Ruling Letter ("HQ") 950426 dated June 19, 1992 (Attachment D), and HQ 957982, dated August 3, 1995 (Attachment E), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the five identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this 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 the final decision on this notice.

In NY N094595, NY N266863, NY N260440, CBP classified glass containers imported with lids in heading 9405, HTSUS, specifically in

subheading 9405.50.40, HTSUS, which provides for "Luminaires and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included: Non-electrical luminaires and lighting fittings: Other: Other." In HQ 950426, and HQ 957982, CBP classified the glassware at issue in heading 7013, HTSUS, subheading 7013.99.50, HTSUS, which provides for "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): Other glassware: Other: Votive-candle holders." CBP has reviewed NY N094595, NY N266863, NY N260440, HQ 950426, and HQ 957982 and has determined the ruling letters to be in error. It is now CBP's position that glass containers imported with lids are properly classified, in heading 7010, HTSUS, specifically in subheading 7010.90.50, HTSUS, which provides for "Carboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods; preserving jars of glass; stoppers, lids and other closures, of glass: Other: Other containers (with or without their closures)."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N094595, NY N266863, NY N260440, HQ 950426, and HQ 957982 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H285657, set forth as Attachment F to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

N094595

March 2, 2010
CLA-2–94:OT:RR:NC:1:110
CATEGORY: Classification
TARIFF NO.: 9405.50.4000

MR. DONALD S. SIMPSON
BARTHCO
5101 SOUTH BROAD STREET
PHILADELPHIA, PA 19112

RE: The tariff classification of a glass candle holder from France.

DEAR MR. SIMPSON:

In your letter dated February 8, 2010, you requested a tariff classification ruling on behalf of your client, ARC International North America.

The merchandise under consideration is item number G2051 (4 oz. glass candle holder). A representative sample of the article in its imported condition was submitted with your ruling request and will be returned to you.

The candle holder is a cup-like container measuring approximately 2 ½ inches high with an outside diameter of 2 ¾ inches, and is designed for the production of filled candles. A filled candle, as defined by the American Society for Testing and Materials (ASTM), is a candle produced and used within the same vessel. As imported, this candle holder is a disposable vessel made of thin, clear glass. From the information you provided, upon importation into the United States by ARC International, the candle vessels are sent to the customer's facility, where they will be filled with wax and a wick and packaged for retail sale. You provided laboratory test results which indicated that this item is in compliance with ASTM F2179, a standard for glass containers that are produced for use as candle vessels.

The applicable subheading for the 4 oz. glass candle holder, item number G2051, will be 9405.50.4000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Lamps and lighting fittings...: Non-electrical lamps and lighting fittings...: Other: Other." The general rate of duty will be 6 percent ad valorem.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Thomas Campanelli at (646) 733–3016.

Sincerely,

ROBERT B. SWIERUPSKI
Director
National Commodity Specialist Division

N266863
July 28, 2015
CLA-2–94:OT:RR:NC:N4:110
CATEGORY: Classification
TARIFF NO.: 9405.50.4000

MS. SUZANNE MCCAFFERY
FOLLICK & BESSICH ATTORNEYS AT LAW
33 WALT WHITMAN ROAD, SUITE 310
HUNTINGTON STATION, NY 11746

RE: The tariff classification of glass candle holders from China

DEAR MS. MCCAFFERY:

In your letter dated July 18, 2015, on behalf of your client Alene Candles LLC, you requested a tariff classification ruling.

The merchandise under consideration is identified as the Large 14 ounce candle vessel, Item Number HG 1029, the Small 5 ounce glass candle vessel, Item Number HG 1030 and the Mini 1.25 ounce glass candle vessel, Item Number 3KG. Representative samples were submitted with your request and will be returned to you.

Based on the information that you have provided, the three glass vessels are candle holder made of clear glass. The candle holders are identical in construction however, they differ in size. Item Number HG 1029 is a 14 ounce glass candle holder measuring approximately 4 inches tall with a diameter of 3.875 inches. Item Number HG 1030 is a 5 ounce glass candle holder measuring approximately 2.375 inches tall with a diameter of 3.25 inches. Item Number 3KC is a 1.25 ounce glass candle holder measuring approximately 1.625 inches tall with a diameter of 1.75 inches. The glass candle holders are imported without the wax fragranced candles. You have stated that upon importation into the United States, the candle holders are sent to the customer's facility where they will be filled with wax and wick, fitted with a matching lid and packaged for retail sale. A filled candle, as defined by the American Society for Testing and Materials (ASTM), is a candle produced and used within the same vessel. As imported, this candle holders are disposable vessels made of thin, clear glass. You have also stated that this item is in compliance with ASTM (F2179), a standard for glass containers that are produced for use as candle vessel.

The applicable subheading the candle vessels Item Number HG 1029, Item Number HG 1030 and Item Number 3KC, will be 9405.50.4000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Lamps and lighting fittings...: Non-electrical lamps and lighting fittings...: Other: Other." The general rate of duty will be 6 percent ad valorem.

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

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

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

Sincerely,

GWENN KLEIN KIRSCHNER
Director
National Commodity Specialist Division

N260440
January 26, 2015
CLA-2–94:OT:RR:NC:N4:110
CATEGORY: Classification
TARIFF NO.: 9405.50.4000

MS. PATRICIA FARRELL
EXPORT-IMPORT SERVICES
BETHANY COMMONS BLDG. #5, SUITE 61
ONE BETHANY ROAD
HAZLET, NJ 07730

RE: The tariff classification of a glass candle holder from France

DEAR MS. FARRELL:

In your letter dated December 19, 2014, you requested a tariff classification ruling on behalf of your client ARC International North America.

The article under consideration is item number E3041, a 14.5 oz. glass candle holder. A representative sample was submitted with your request and will be returned to you.

The article is a glass jar candle holder measuring approximately 3.5 inches high with an outside diameter of 4 inches. You have stated that upon importation into the United States, the candle holders are sent to the customer's facility where they will be filled with wax and wick, and fitted with a matching lid and packaged for retail sale. A filled candle, as defined by the American Society for Testing and Materials (ASTM), is a candle produced and used within the same vessel. As imported, this candle holder is a disposable vessel made of thin, clear glass. You have also stated that this item is in compliance with ASTM F2179, a standard for glass containers that are produced for use as candle vessel.

The applicable subheading for item number E3041, 14.5 oz. glass candle holder, will be 9405.50.4000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Lamps and lighting fittings...: Non-electrical lamps and lighting fittings...: Other: Other." The general rate of duty will be 6 percent ad valorem.

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

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

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

Sincerely,

GWENN KLEIN KIRSCHNER
Director
National Commodity Specialist Division

HQ 950426
June 19, 1992
CLA-2 CO:R:C:M 950426 KCC
CATEGORY: Classification
TARIFF NO.: 7013.99.35

DISTRICT DIRECTOR
U.S. CUSTOMS SERVICE
300 SOUTH FERRY ST TERMINAL ISLAND
ROOM 2017
SAN PEDRO, CALIFORNIA 90731

RE: Protest No. 2704–91–102479; glass container; glass candle holder; use provisions; principal use; Additional U.S. Rule of Interpretation 1(a); 7010.90.50; EN 70.10; commonly used commercially for the conveyance or packing of goods; votive; 088123; 088742; 950245; CIE 322/64; T.D. 56111(75); sanctuary lamp

DEAR SIR:

This is in response to the request for Further Review of Protest No. 2704–91–102479, dated May 16, 1991, regarding the tariff classification of glass containers under the Harmonized Tariff Schedule of the United States (HTSUS). Samples of the glass containers were submitted for examination.

FACTS:

The articles under consideration are glass containers imported into the U.S. empty and then filled with candle wax. In some cases, the glass containers are silk screened before they are filled with candle wax. The glass containers are cylindrical in shape and are approximately 8 1/2 inches in height and 2 11/16 inches in diameter. They are made from low quality clear glass which holds 610 CC of wax. The protestant, "Candle Corporation of America", states that the glass containers are designed and used exclusively as a candle container. The protestant contends that the glass container should be classified under subheading 7010.90.50, HTSUS, which provides for "Carboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods; preserving jars of glass; stoppers, lids and other closures, of glass...Other...Other containers (with or without their closures)."

Upon importation into the U.S., you liquidated the glass containers under subheading 7013.99.35, HTSUS, as "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018)...Other glassware...Other...Other...Votive-candle holders."

ISSUE:

Are the glass containers classified as other glass containers for the conveyance or packing of goods under subheading 7010.90.50, HTSUS, or as votive-candle holders under subheading 7013.99.35, HTSUS?

LAW AND ANALYSIS:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states in part that "for legal purposes, classification shall be determined according to the terms

of the headings and any relative section or chapter notes....” Headings 7010 and 7013, HTSUS, are both considered “use” provisions. A tariff classification controlled by use (other than actual use) is governed by principal use. Additional U.S. Rule of Interpretation 1(a), HTSUS.

Heading 7010, HTSUS, provides for bottles, vials and other containers of glass which are of a kind used commercially for the conveyance or packing of goods. Explanatory Note (EN) 70.10 of the Harmonized Commodity Description and Coding System (HCDCS) states that heading 7010 “covers all glass containers of the kinds commonly used commercially for the conveyance or packing of liquids or of solid products (powders, granules, etc.).” HCDCS, p. 933. The types of containers covered by this heading include:

(A) Carboys, demijohns, bottles (including syphon vases), phials and similar containers, of all shapes and sizes, used as containers for chemical products (acids, etc.), beverages, oils, meat extracts, perfumery preparations, pharmaceutical products, inks, glues, etc.

(B) Jars, pots and similar containers for the conveyance or packing of certain foodstuffs (condiments, sauces, fruit, preserves, honey, etc.), cosmetic or toilet preparations (face creams, hair lotions, etc.), pharmaceutical products (ointments, etc.), polishes, cleaning preparations, etc.

(C) Ampoules, usually obtained from a drawn glass tube, and intended to serve, after sealing, as containers for serums or other pharmaceutical products, or for liquid fuels (e.g., ampoules of petrol for cigarette lighters), chemical products, etc.

(D) Tubular containers and similar containers generally obtained from lamp-worked glass tubes or by blowing, for the conveyance or packing of pharmaceutical products or similar uses.

HCDCS, p. 933–934. The Explanatory Notes, although not dispositive, are to be looked to for the proper interpretation of the HTSUS. 54 Fed. Reg. 35127, 35128 (1989).

The key phrase in this instance is “commonly used commercially for the conveyance” of solid products. The root word of “commercially” is commerce which is described as the exchange or buying and selling of commodities. Webster’s Third New International Dictionary (1986) and The Random House Dictionary of the English Language (1983). The root word of “conveyance” is convey which is described as to carry, bring or take from one place to another; transport; bear. The Random House Dictionary of the English Language (1983) and Webster’s Third New International Dictionary (1986).

The glass containers at issue are not principally used as the class or kind of merchandise contemplated by heading 7010, HTSUS, are used. The types of containers found in heading 7010, HTSUS, are principally used to convey a product to the consumer who uses the product in the container and then discards the container. The glass containers at issue are not principally used to commercially convey candle wax. The glass containers are necessary for the consumer to use the product, candle wax. In use, the glass containers support the candle wax. The glass containers are not merely used as containers to convey the candle wax to the consumer and then discarded but, additionally, they serve a decorative purpose as 60 percent of the glass containers are silk screened with a design. The glass containers in this case are designed to be used with the product as well as to hold the product.

Moreover, the protestant states that refills for the glass containers are available. However, we note that only one percent of the glass containers are refilled (for every 100 candles sold, approximately one refill is sold). As glass containers at issue hold the wax while it is being burned and are capable of being refilled for the same purpose, they are not properly classified under heading 7010, HTSUS.

Subheading 7013.99.35, HTSUS, provides for glass votive candle holders. We have held that a glass votive candle holder is a glass holder chiefly used in churches, where the candles are burned for devotional purposes. See, HRL 088123 dated February 25, 1991, HRL 088742 dated April 22, 1991, and HRL 950245 dated December 10, 1991.

The principal use of the glass containers is as a candle holder for devotional purposes. According to the figures provided by the protestant, approximately 75 percent of the glass containers are decorated with religious ornamentation and are sold for use in religious settings. This type of tall candle holder is commonly known as a sanctuary lamp which is uniquely suited for devotional purposes. Votive candle glasses are generally of two types, large glasses which contain candles that burn for about a week and small glasses which hold candles that burn for a few hours. The large glasses are also known as "sanctuary lamps" and are sold with candles molded into them See, CIE 322/64 dated February 20, 1964, T.D. 56111 (75), 99 Treas. Dec. 108 (1964). The candle holders in this case are pictured on a catalogue page that portrays "Novena Candles". "Novena" is defined as "a devotion consisting of prayers or services on nine consecutive days" in the Roman Catholic Church. The Random House Dictionary of the English Language (1983). The candle holders are portrayed with devotional pictures of Mary, Jesus, and prayers, such as the Lord's Prayer. The glass containers are glass votive candle holders which are properly classified in subheading 7013.99.35, HTSUS.

HOLDING:

The glass containers are properly classified under subheading, 7013.99.35, HTSUS, as "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018)...Other glassware...Other...Other...Votive-candle holders."

This protest should be denied in full. A copy of this decision should be attached to the Customs Form 19 and provided to the protestant as part of the notice of action on the protest.

Sincerely,

JOHN DURANT,
Director
Commercial Rulings Division

HQ 957982
August 3, 1995
CLA-2 R:C:M 957982 MMC
CATEGORY: Classification
TARIFF NO.: 7013.90.35

MR. BRUCE MELILLO
RIVERSIDE SALES COMPANY
600 COLUMBUS AVENUE RM 7M
NEW YORK, NEW YORK 10024

RE: Glass candle holders; HRLs 088742, 950245 and 950426; CIE 322/64 , T.D. 56111 (75).

DEAR MR. MELILLO:

This is in response to your letters dated April 6, and 22, 1995, requesting a binding ruling, for glass candle holders under the Harmonized Tariff Schedule of the United States (HTSUS). Samples were submitted.

FACTS:

The articles are cylindrical glass vessels made from low quality clear glass. Your estimated cost of each vessel is between 15 and 20›. They are imported into the U.S. empty and then filled with a wick and candle wax. Both styles have a fired lip, mold seams and knurling on the bottom. One style is approximately 8" tall and 2" in diameter. The second style measures approximately 4" tall with a 2«" diameter. It has a beveled diamond pattern half way up its exterior. After importation, a "Yahrzeit Memorial Lamp" label, written in both English and Hebrew, is added.

You state that in their finished condition both articles are sold to be burned in a house of worship or a home for religious or memorial purposes, such as the memory of a deceased family member.

ISSUE:

What is the proper classification of the glass vessels?

LAW AND ANALYSIS:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes.

Subheading 7013.99.35, HTSUS, provides for glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018)...other glassware...other...other...votive-candle holders. Subheading 7013.99.35, HTSUS, is considered a use provision. In other words, an article's principal use at the time of importation determines whether it is classifiable within a particular class or kind.

In Headquarters Ruling Letter(HRL) 088742 dated April 22, 1991, and HRL 950245 dated December 10, 1991, Customs explained that a glass votive candle holder is chiefly used in houses of worship or in the home for devotional or memorial purposes. Additionally, Customs has held that votive candle holders are generally of two types, large vessels which contain candles that burn for about a week and smaller vessels which hold candles that burn for a few hours. The large glasses are also known as "sanctuary lamps" and

are sold with candles molded into them See, CIE 322/64 dated February 20, 1964, T.D. 56111 (75), 99 Treas. Dec. 108 (1964).

The principal use of the subject glass vessels is as candle holders for devotional purposes. According to the importer, the subject articles will be combined with candle wax and a wick and used as a religious or memorial candle. They will be sold to houses of worship and in retail stores to be burned for the purposes of prayer or in memory of a deceased family member.

The physical form of the 8" vessel indicates that it is the type of candle holder commonly known as a sanctuary lamp which is uniquely suited for devotional purposes. In Headquarters Ruling Letter (HRL) 950426 dated June 19,1992, Customs held that 8" candle holders described as "Novena Candles" were sanctuary lamps. "Novena" is defined as "a devotion consisting of prayers or services on nine consecutive days" in the Roman Catholic Church. The Random House Dictionary of the English Language (1983). The 8" sample in this case is identical to those classified in HRL 950426.

Furthermore, we believe the described dedicated use of the 4" candle, together with the after importation label pasted on the vessel, indicate that it belongs to the class of smaller devotional candle holders referred to above.

HOLDING:

The subject candle holders are votive for tariff purposes and therefore, are classifiable under subheading 7013.99.35, HTSUS, with a column one rate of duty of 6.6% ad valorem.

Sincerely,

JOHN DURANT,
Director
Commercial Rulings Division

HQ H285657
OT:RR:CTF:CPMMA H285657 CKG
CATEGORY: Classification
TARIFF NO.: 7010.90.50

MR. WILLIAM BALDWIN
JOEL R. JUNKER & ASSOCIATES
435 MARTIN ST., STE. 3060
BLAINE, WA 98230

RE: Revocation of NY N094595, NY N266863, NY N260440, HQ 950426, and HQ 957982; tariff classification of glassware imported with lid; household decorative article.

DEAR MR. BALDWIN:

This ruling is in reference to New York Ruling Letter (NY) N036984, issued to Olympic Mountain and Marine Products on September 25, 2008, regarding the classification of an article identified as a "Dome-Top Candle Jar" under the Harmonized Tariff Schedule of the United States (HTSUS). In NY N036984, U.S. Customs and Border Protection (CBP) classified the subject article as a candleholder under subheading 9405.50.40, HTSUS, which provides for, in pertinent part, other non-electric lamps and lighting fittings. Since the issuance of that ruling, we have reviewed the classification of substantially identical articles and have determined that NY N036984 is in error.

In addition, CBP has also reviewed NY N110556, dated July 17, 2010, NY N094595, NY N266863, NY N260440, and NY N266863 which involved the classification of substantially identical glassware under subheading 9405.50.40, HTSUS, as well as HQ 950426 and HQ 957982, which involved the classification of glass containers as votive candle holders in heading 7013 (subheading 7013.99.50), HTSUS. As with NY N036984, we have determined that the tariff classification of the subject merchandise in these rulings is incorrect.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice proposing to revoke NY N036984 and NY N110556 was published on July 11, 2018, in Volume 52, Number 28 of the *Customs Bulletin*. Two comments were received in response to this notice, and are addressed herein. Due to the time elapsed since the ;publication of the notice of proposed revocation, we are republishing the notice and the proposed revocation to give the public the opportunity to comment.

FACTS:

In HQ 957982, CBP classified two styles of cylindrical glass vessels in subheading 7013.99.35, HTSUS, as votive candle holders. The style at issue is approximately 8" tall and 2" in diameter, and made from low quality clear glass, and featuring a fired lip, mold seams and knurling on the bottom. The estimated cost is between 15 and 20 cents per container›. It is imported into the United States empty and then filled with a wick and candle wax.

In HQ 950426, CBP classified cylindrical glass containers in subheading 7013.99.35, HTSUS, as votive candle holders. The containers measure approximately 8 1/2 inches in height and 2 11/16 inches in diameter and are imported into the United States empty and then filled with candle wax. In some cases, the glass containers are silk screened before they are filled with

candle wax. The protestant, "Candle Corporation of America", states that the glass containers are designed and used exclusively as a candle container.

In NY N266863, the items at issue are as follows: Item HG 1030, which is a 5 ounce glass vessel measuring approximately 2.375 inches tall with a diameter of 3.25 inches; and 3KG, which is a 1.25 ounce glass candle vessel. Upon importation into the United States, the candle holders are sent to the customer's facility where they will be filled with wax and wick, fitted with a matching lid and packaged for retail sale. As imported, this candle holders are disposable vessels made of thin, clear glass and are stated to be in compliance with ASTM (F2179), a standard for glass containers that are produced for use as candle vessel.

In NY N260440, CBP classified the following in heading 9405, HTSUS: Item number E3041, a 14.5 oz. glass candle holder. The article is a glass jar candle holder measuring approximately 3.5 inches high with an outside diameter of 4 inches. Upon importation into the United States, the candle holders are sent to the customer's facility where they will be filled with wax and wick, and fitted with a matching lid and packaged for retail sale. As imported, this candle holder is a disposable vessel made of thin, clear glass.... This item complies with ASTM F2179, a standard for glass containers that are produced for use as candle vessel.

In NY N211675, CBP classified a "Jar Candle Container", identified as style G38M, in heading 9405, HTSUS. This square candle container is made from borosilicate glass and measures 80 mm x 80 mm x 80 mm. After importation, this article will be filled with candle wax and a wick at a U.S. manufacturing facility. A copy of a thermal shock test report indicating that the subject candle container meets the requirements of the American Society for Testing and Materials (ASTM) for candle containers.

The style at issue in NY N094595 is a cuplike container measuring approximately 2 ½ inches high with an outside diameter of 2 ¾ inches, and is designed for the production of filled candles. As imported, this candle holder is a disposable vessel made of thin, clear glass. Upon importation into the United States by ARC International, the candle vessels are sent to the customer's facility and filled with wax and a wick and packaged for retail sale. The item complies with ASTM F2179.

ISSUE:

Whether the subject articles are classifiable as other non-electrical lamps and lighting fittings of subheading 9405.50.40, HTSUS, other glass containers for the conveyance or packing of goods under subheading 7010.90.50, HTSUS, or as other glassware of a kind used for indoor decoration under subheading 7013.99.50, HTSUS.

LAW AND ANALYSIS:

Classification under the HTSUS is in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods will 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 will then be applied in order.

The 2024 tariff provisions under consideration in this ruling are set forth below:

7010	Carboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods;
7013	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018):
7013.37	Other drinking glasses, other than of glass-ceramics:
7013.41	Glassware of a kind used for table (other than drinking glasses) or kitchen purposes, other than of glass-ceramics:
7013.99	Other glassware: Other:
7013.99.35	Votive-candle holders
7013.99.50	Other: Other: Valued over $0.30 but not over $3 each
	* * * *
9405	Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included;
	* * * *

Note 1(e) to Chapter 70, HTSUS, excludes "[L]amps or lighting fittings, illuminated signs, illuminated name-plates or the like, having a permanently fixed light source, or parts thereof of heading 9405."

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 94.05 provides, in pertinent part:

(I) LAMPS AND LIGHTING FITTINGS, NOT ELSEWHERE SPECIFIED OR INCLUDED

Lamps and lighting fittings of this group can be constituted of any material (**excluding** those materials described in Note 1 to Chapter 71) and use any source of light (candles, oil, petrol, paraffin (or kerosene), gas, acetylene, electricity, etc.). Electrical lamps and lighting fittings of this heading may be equipped with lamp-holders, switches, flex and plugs, transformers, etc., or, as in the case of fluorescent strip fixtures, a starter or a ballast.

This heading covers in particular:

(1) **Lamps and lighting fittings normally used for the illumination of rooms**, e.g.: hanging lamps; bowl lamps; ceiling lamps; chandeliers; wall lamps; standard lamps; table lamps; bedside lamps; desk lamps; night lamps; water-tight lamps.

...

(6) **Candelabra, candlesticks, candle brackets, e.g., for pianos**.

* * * * *

As Note 1(e) to Chapter 70, HTSUS, excludes articles of heading 9405, HTSUS, the initial issue is whether the subject articles are lamps or lighting fittings classifiable in heading 9405, HTSUS.

In *Pomeroy Collection, Ltd. v. United States*, 893 F. Supp. 2d 1269, at 1281 (Ct. Int'l. Trade 2013) ("*Pomeroy IV*"), the Court of International Trade (CIT) held:

> As an *eo nomine* tariff provision, heading 9405 generally encompasses all forms of the article. *See*, *e.g.*, *Pomeroy* II, 32 CIT at 549, 559 F. Supp. 2d at 1396 (concluding that heading 9405 "is clearly identifiable as an *eo nomine* provision," not a principal use provision); Pl.'s Brief at 6, 15, 16 (stating that heading 9405 is *eo nomine* provision); Def.'s Reply Brief at 5 (same); *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (explaining that *eo nomine* provisions ordinarily cover all forms of named article).[1]

In *Pomeroy IV*, the CIT cited to various dictionary definitions to determine the scope of the legal text of heading 9405, HTSUS. Citing *Merriam-Webster's Collegiate Dictionary* (10th edition, 1997), the court noted:

> [A] 'lamp' is defined as 'any of various devices for producing light or sometimes heat'... '[L]ighting' is synonymous with 'illumination,' and 'fitting' is defined as 'a small often standardized part,' *e.g.*, an electrical fitting... Dictionary terms are similarly instructive in interpreting terms such as 'candlestick' and 'candelabra.' One dictionary defines 'candlestick' as 'a holder with a socket for a candle' and defines 'candelabra' as a 'branched candlestick or lamp with several lamps'... [A]nother dictionary defines a 'candlestick as 'a holder with a cup or spike for a candle' and 'candelabrum' as 'a large decorative candlestick having several arms or branches.

Id. at 1283.

EN 94.05 lists candelabras, candlesticks, or candle brackets as exemplars of candle holders classified as light fixtures of heading 9405. As discussed by the CIT in *Pomeroy*, these exemplars possess physical features that would serve to hold a candle securely in place such as sockets, cups or spikes. In our proposed revocation of NY N036984 and NY N110556, we concluded that the instant glass articles did not possess the features required for candle holders of heading 9405, HTSUS—that is, a cup, spike, socket or similar feature that would secure a candle in place.

Comments received in response to the proposed revocation argue that the glass container itself can hold the candle securely in place; unlike votive candle holders, these glasses are intended to be filled with hot wax so that the candle assumes the shape of the glass. We agree that, when filled with molten wax, the instant glasses would therefore hold the candle securely in place. However, we maintain that without a feature specific to candle holders such as those discussed in *Pomeroy*, the instant merchandise is not *eo nomine* provided for in heading 9405.

The instant glass containers possess no particular distinguishing feature that would establish their identity or use as candle holders as opposed to other ordinary glass containers used as conveyance articles or in the home for storage or as drinking glasses. Although the composition of the glasses is not

[1] "*Pomeroy* II" refers to *Pomeroy Collection, Ltd., v. United States*, 32 CIT at 549, 559 F. Supp. 2d at 1396 (Fed. Cir. 2008).

specified in the rulings at issue, the ASTM standard F2179 cited in support of classification in heading 9405, HTSUS, covers annealed soda-lime-silicate glass containers. Annealed soda-lime glass construction is typical of ordinary houseware. *See* https://www.sciencedirect.com/topics/chemistry/soda-lime-glass (last visited, April 6, 2023).

ASTM F2179 describes a method of determining the stress tolerance of annealed glass. Most container glass--drinking glasses, vases, pitchers, etc. --is annealed (a process of slowly cooling hot glass after formation to relieve residual stress introduced during manufacturing), and most container glass is manufactured to the same standard as specified in ASTM F2179—i.e., to a tempering number of 4 or below. The most relevant factors pertaining to thermal tolerance of glass are the composition, thickness and whether the glass is tempered. In particular, borosilicate glass (which contains boron trioxide) is known to have superior thermal shock resistance as compared to ordinary soda-lime glass. There is no indication that the instant glass containers are constructed of other than ordinary soda-lime glass or that they have been subjected to an additional tempering process.

We are therefore not persuaded that the instant products possess any characteristics unique to light fixtures of heading 9405, HTSUS. As the CIT concluded in *Pomeroy*,

> "At the time of importation, none of the articles here contained candles. Therefore, at the time of importation, none of the articles were capable of providing illumination, as contemplated by heading 9405. Nor do any of the articles have physical features that are specifically designed to hold a candle in place – no "sockets," "cups," or "spikes," or anything else remotely akin to the specific features of the items (candelabra, candlesticks, and candle brackets) listed in the Explanatory Notes to heading 9405...the term "candle holder" is synonymous with "candlestick" – an article that not only holds a candle, but holds it securely. If it were otherwise, *any* relatively flat, non-slippery object could at least theoretically be referred to as a "candle holder" for flat-bottomed candles, and thus would be *prima facie* classifiable under heading 9405 – a patently absurd result.."

The court also noted that, as *Pomeroy* had admitted, all of the glass articles at issue therein "can readily be used to hold a wide range of items, including, for example, "colored glass, fruit, or perhaps a wine bottle."' *See Pomeroy III at 1282–1283*. For these reasons, the conclusion of the CIT in *Pomeroy* applies also to the instant merchandise. Similarly, the glass articles the subject of NY N266863, NY N260440, NY N266863, HQ 950426, and HQ 957982 are not *prima facie* classifiable as a lamp or lighting fitting of heading 9405, HTSUS.

As the subject articles are not classified in heading 9405, HTSUS, the next determination is whether they are described in Chapter 70. Heading 7013, HTSUS, provides for "[G]lassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018)." As the heading text to 7013 specifically excludes glass articles classifiable in heading 7010, HTSUS, we must first consider whether the instant articles are "of heading 7010."

As heading 7010, HTSUS, provides for containers "of a kind used" for the conveyance or packing of goods, it is a "principal use" provision and a classification analysis utilizing Additional U.S. Rule of Interpretation (AUSRI) 1(a) is appropriate. AUSRI 1(a) provides for classification "in accordance with

the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong," and specifies that "the controlling use is the principal use." The CIT has provided indicative factors to apply when determining whether particular merchandise falls within a class or kind. They include: general physical characteristics, the expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. *See Kraft, Inc, v. United States*, USITR, 16 CIT 483 (June 24, 1992); *G. Heilman Brewing Co. v. United States*, USITR, 14 CIT 614 (Sept. 6, 1990); and *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F.2d 373 (1976), *cert. denied*, 429 U.S. 979.

Additionally, in *Primal Lite v. United States*, 15 F. Supp. 2d 915 (CIT 1998); *aff'd* 182 F. 3d 1362 (Fed. Cir. 1999), the CIT, in discussing principal use, held that "it is the use of the class or kind of goods being imported that is controlling, rather than the specific use to which the importation itself is put," i.e., goods need not be actually used in the same manner as the entire class or kind in order to recognized as part of that class or kind. CBP has repeatedly upheld this analysis by defining principal use as the use of the class or kind of the merchandise at issue that exceeds any other use.

The EN to 70.10 provides that the heading "covers all glass containers of the kinds commonly used commercially for the conveyance or packing of liquids or of solid products (powders, granules, etc.). The 2017 online Oxford Dictionary defines the term "conveyance" to mean, in pertinent part, "the action or process of transporting or carrying someone or something from one place to another." *See https://en.oxforddictionaries.com/definition/conveyance* (site last visited December 1, 2017). The same lexicographic source defines, in pertinent part, the term "packing" as "material used to protect fragile goods in transit" and the term "commercial" as "concerned with or engaged in commerce," which is the exchange or buying and selling of commodities.

The Court of International Trade has provided more specific guidance with regard to heading 7010, HTSUS. In *Latitudes Int'l Fragrance, Inc. v. United States*, 931 F. Supp. 2d 1247 (Ct. Int'l Trade 2013), in which the CIT reviewed CBP's classification of empty glass "diffuser bottles" that, once imported, were filled with fragranced oil, fitted with stoppers and diffuser reeds, and packaged for sale as "diffuser kits" used for the dispersion of fragrances in enclosed spaces. *Id.* at 1250. The court determined that the principal use of the diffuser bottles was as vessels for the conveyance of fragranced oils of heading 7010, HTSUS, rather than as glassware for indoor decoration of subheading 7013.99.50, HTUS. The court noted in particular that the diffuser bottles were specially designed to contain the fragranced oil, were sent to market only when filled with the oil, that the price of the bottles with their contents at retail was much higher than the cost of the bottles alone, and that while refill kits for the fragranced oil were available from third party vendors, the plaintiff did not sell any refills itself, and there was no evidence that diffuser bottles were sold empty at retail. Based on this determination, the court concluded that the bottles were properly classified in heading 7010, HTSUS. *Id*. at 1257.

Similarly, in *Dependable Packaging Sols., Inc. v. United States*, No. 10–00330, 2013 Ct. Int'l. Trade LEXIS 28 (Ct. Int'l Trade Feb. 20, 2013), the

Court found the fact that the glass vases at issue were designed with a closure was "probative as to . . . [the article's] principal use as a container for the conveyance or packing of goods." *Dependable Packaging, 2013 Ct. Int'l. Trade LEXIS 28, Slip Op. 13–23 at 9 [**15] (citing Accurate Plastic Moulding, Inc. v. United States, 26 CIT 1201, 1204 n.3*).

The distinction between products principally used for packaging or conveyance and products principally used as storage articles has also been discussed in numerous Headquarters rulings. In general, CBP has classified glass containers in heading 7010, HTSUS, where such containers were not sold commercially, were disposable and were not decorative or ornamental. *See e.g.*, HQ 951991, dated March 2, 1993, HQ 958477, dated February 14, 1996; HQ 953952, dated September 21, 1994; and HQ 956470, dated September 28, 1994. In contrast, CBP has consistently held that a glass item with a form that indicates principal use as a storage article is classifiable as table/kitchen glassware in heading 7013, HTSUS, not as a conveyance or packing container in heading 7010, HTSUS. *See e.g.*, HQ H127116, dated January 25, 2012; HQ H032715, dated March 08, 2010; HQ 967204, dated September 8, 2004; HQ 963665, dated April 24, 2000; HQ 087779, dated December 27, 1990. Furthermore, CBP has specifically addressed the classification of glass containers used as candle holders in HQ 088123, dated February 25, 1991, and HQ 951391, dated August 10, 1992, finding that they were classified in heading 7013, HTSUS, based on their principal use as household glassware. In HQ 088123, CBP concluded that "[t]he sample of the imported glass shows it to be a type of drinking glass; nothing in its appearance gives any indication that it is dedicated to any specific use. The fact that it is going to be filled with wax subsequent to importation and used for possible commemorative or religious purposes does not change the classification. While both headings 7010 and 7013 may be considered "use" provisions, it is the principal use, as distinguished from the Actual Use, which controls. The principal use of this class or kind of glass is as a drinking glass."

In summary, the types of containers found in heading 7010, HTSUS, are solely used to convey a product to the consumer who uses the product in the container and then discards the container. If the form of the item does not indicate that it belongs to a class or kind of merchandise that will be principally used in this manner, the product cannot be classified as a container in heading 7010, HTSUS, even if the specific imported article will actually be used this way.

There is no particular physical feature that characterizes or distinguishes conveyance containers for candles; rather, it is household storage jars and drinking glasses that fall within certain typical parameters for size and shape. As the items at issue are all filled with wax and a wick after importation and subsequently used to convey candles to the ultimate consumer, if their physical form indicates that they are not of a class or kind with articles used either as votive candle holders or in the home for decoration, storage, or consumption of food or beverages, then we will consider them to belong the class or kind of articles used for the conveyance of candles.

In HQ 957982 and HQ 950426, CBP classified various styles of glass containers as votive candle holders in subheading 7013.99.35, HTSUS. The style at issue from HQ 957982 is 8" tall with a diameter of 2", with a fired lip, molded seams and knurling on the bottom. The containers at issue in HQ 950426 similarly measure approximately 8 1/2 inches in height and 2 11/16 inches in diameter. The subject articles, in their condition as imported, do not

exhibit any features that distinguish them as being for devotional purposes so as to warrant classification as votive-candle holders in subheading 7013.99.35, HTSUS. *See* HQ H275806, dated April 24, 2017, and HQ 088742, dated April 22, 1991. In those rulings, additional information was submitted to CBP after entry that stated that the glass vessels were filled with a wick and poured wax after importation, affixed with religious motifs or labels, and sold predominantly to consumers who use them for devotional purposes. CBP held that while this additional information was informative, it was not determinative of how, at the time of importation, the merchandise was distinguishable as being for devotional purposes. Here too, there is no indicia of use at the time of importation as a votive-candle holder for the glass articles at issue. In their condition as imported, they are merely decorative glass vessels for general home storage.

Furthermore, the containers at issue in HQ 957982 and HQ 950426 are not decorative in nature, nor do they have the physical characteristics of either drinking glasses or other household storage containers; they are taller and narrower than glasses commonly sold as beverage/ drinking glasses, and they lack any decorative features. Additionally, they lack a lid for storage and preservation of their contents.

The merchandise at issue in NY N260440 is a 14.5 oz. glass candle measuring approximately 3.5 inches high with an outside diameter of 4 inches. The size and the wide diameter of the article, are atypical of articles sold commercially as household storage jars or drinking glasses, whereas the greater width than height is suggestive of use as a candle container. Similarly, Item Number HG 1030, at issue in NY N266863, is wider than it is tall, with a height of 2.375 inches and a diameter of 3.25 inches. With a volume of 5 ounces, item HG 1030 further lacks sufficient capacity to act as a useful household storage article or drinking glass. Similarly, glass container at issue in NY N094595, at approximately 2 ½ inches high with an outside diameter of 2 ¾ inches, is slightly wider than it is tall, lacks a lid, and is smaller than a typical household storage container. The square glass jar at issue in NY N211675 similarly lacks the characteristics of conventional household glassware; its square shape precludes classification as a drinking glass, and lacking a lid, it is unlikely to be used as a storage container.

As the articles at issue in the above-referenced rulings do not belong to the class or kind of articles used for in-home decoration, storage or consumption, and they are used for the conveyance of poured candles and are marketed and sold as filled candles, we find that they belong to the class or kind of goods principally used for the conveyance of goods.

HOLDING:

By application of GRIs 1 and 6, the specified articles at issue in NY N094595, NY N266863, NY N260440, NY N266863, HQ 950426, and HQ 957982 are classified in heading 7010, HTSUS, specifically subheading 7010.90.50, HTSUS, which provides for "Carboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods; preserving jars of glass; stoppers, lids and other closures, of glass: Other: Other containers (with or without their closures)." The 2023, 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 https://hts.usitc.gov/current.

EFFECT ON OTHER RULINGS:

NY N094595, NY N266863, NY N260440, NY N266863, HQ 950426, and HQ 957982 are hereby revoked or modified in accordance with the above analysis.

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

Sincerely,

YULIYA A, GULIS,
Director
Commercial and Trade Facilitation Division

19 CFR PART 177

MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF 9817.00.96, HTSUS, TO CERTAIN TRANSDUCER ARRAYS

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

ACTION: Notice of modification of one ruling letter and of revocation of treatment relating to the applicability of subheading 9817.00.96, HTSUS, Harmonized Tariff Schedule of the United States (HTSUS) to certain transducer arrays.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying one ruling letter concerning the applicability of subheading 9817.00.96, HTSUS, to certain transducer arrays. 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. 57, No. 18, on May 10, 2023. 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 April 22, 2024.

FOR FURTHER INFORMATION CONTACT: Uzma Bishop-Burney, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–3782.

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. 57, No. 18, on May 10, 2023, proposing to modify one ruling letter pertaining to the applicability of subheading 9817.00.96, HTSUS to certain transducer arrays. 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") N319324, dated May 25, 2021, CBP granted 9817.00.96, HTSUS treatment to certain transducer arrays. CBP has reviewed N319324 and has determined the ruling letter to be in error. It is now CBP's position that the transducer arrays are not eligible for 9817.00.96, HTSUS treatment.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying N319324 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (HQ") H330926, 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*.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H330926
February 2, 2024
OT:RR:CTF:VS HQ H330926 UBB
CATEGORY: Classification

STEVE ZISSER
ZISSER CUSTOMS LAW GROUP, STE 1
9355 AIRWAY ROAD
SAN DIEGO, CA 92154

RE: Articles for the handicapped; Subheading 9817.00.96; Transducer arrays

DEAR MR. ZISSER,

This is in reference to one ruling letter issued to your law firm on behalf of your client, Providien Device Assembly, LLC, concerning the tariff classification of a transducer array under the Harmonized Tariff Schedule of the United States ("HTSUS"). Specifically, in New York Ruling Letter ("NY") N319324, dated May 25, 2021, the merchandise was determined to be eligible for subheading 9817.00.96, HTSUS, treatment as an article for the handicapped.

We have reviewed the ruling and find it to be in error regarding the applicability of subheading 9817.00.96, HTSUS, which provides for "articles for the handicapped." For the reasons set forth below, we are modifying the ruling with respect to the classification under 9817.00.96, HTSUS.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on May 10, 2023, in Volume 57, Number 18, of the Customs Bulletin. One comment was received in response to this notice.

FACTS:

NY N319324 addresses the tariff classification of a transducer array used as a part of the Novocure Therapy Delivery System. The ruling describes the array as multiple interconnected electrical transducers designed to be adhered directly to the head or other area where an individual has been diagnosed with cancer. The ruling states that while connected to the electrical field generator within the system, the transducer arrays create an alternating field that attracts and repels charged proteins during cancer cell division. The transducers do not electrically stimulate nerves or muscles, and they do not heat tissue. The ruling further states that the Novocure system (within which the transducers are incorporated) is portable and allows the user to go about their day-to-day life while getting treatment for their disease. The introduction of the electrical field effectively inhibits tumor growth, potentially killing existing tumors. According to the ruling, in your ruling request you had noted that the arrays are specifically designed for use with the Novocure Therapy Delivery System, and that the system was intended for use by individuals who suffer from cancer, a disease that can cause chronic pain and substantial limitations to an individual's life.

NY N319324 classified the transducer arrays under subheading 8543.70.4500, HTSUS, which "Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter;

parts thereof: Other machines and apparatus: Electric synchros and transducers; flight data recorders; defrosters and demisters with electric resistors for aircraft: Other."

NY N319324 also confirmed a secondary classification for the transducer arrays under subheading 9817.00.96, HTSUS, which applies to articles and parts specially designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped. Chapter 98, Subchapter XVII, U.S. Note 4(a), HTSUS, defines the term "blind or other physically or mentally handicapped persons" as including "any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking breathing, learning, or working."

In the proposed modification of NY N319324, CBP discussed the issues pertaining to the eligibility of the transducer arrays under subheading 9817.00.96, HTSUS. In response to the proposed notice, CBP received one (1) comment disagreeing with the proposed modification (and the analysis of proposed HQ H330926). The commenter argues that U.S. Note 4(b)(i) (articles for acute or transient disability) and 4(b)(iii) (therapeutic and diagnostic articles) to Subchapter XVII, Chapter 98, HTSUS, do not exclude the transducer arrays from classification under the subheading 9817.00.96, HTSUS. The commenter argues that cancer is not an acute or transient disability and that the transducer arrays are not a therapeutic or diagnostic article. We disagree.

ISSUE:

Whether the transducer arrays are eligible for duty-free treatment under subheading 9817.00.96, HTSUS, as "articles specially designed or adapted for the handicapped."

LAW AND ANALYSIS:

The Nairobi Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials of 1982, Pub. L. No. 97–446, 96 Stat. 2329, 2346 (1983) established the duty-free treatment for certain articles for the handicapped. Presidential Proclamation 5978 and Section 1121 of the Omnibus Trade and Competitiveness Act of 1988, provided for the implementation of the Nairobi Protocol into subheadings 9817.00.92, 9817.00.94, and 9817.00.96, HTSUS.

Subheading 9817.00.96, HTSUS, covers: "Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles . . . Other." In *Sigvaris, Inc. v. United States*, 227 F. Supp 3d 1327, 1336 (CIT 2017), *aff'd*, 899 F.3d 1308 (Fed. Cir. 2018), the U.S. Court of International Trade ("CIT") explained that:

> The term "specially" is synonymous with "particularly," which is defined as "to an extent greater than in other cases or towards others." Webster's Third New International Dictionary 1647, 2186 (unabr. 2002). The dictionary definition for "designed" is something that is "done, performed, or

made with purpose and intent often despite an appearance of being accidental, spontaneous, or natural." Webster's Third New International Dictionary 612 (unabr. 2002).

Subheading 9817.00.96, HTSUS, excludes "(i) articles for acute or transient disability; (ii) spectacles, dentures, and cosmetic articles for individuals not substantially disabled; (iii) therapeutic and diagnostic articles; or, (iv) medicine or drugs." U.S. Note 4(b), Subchapter XVII, Chapter 98, HTSUS. Thus, eligibility within subheading 9817.00.96, HTSUS, depends on whether the article is "specially designed or adapted for the use or benefit of the blind or physically and mentally handicapped persons," and whether it falls within any of the enumerated exclusions under U.S. Note 4(b), Subchapter XVII, Chapter 98, HTSUS.

The subject transducer arrays are specially designed for use with the Novocure Therapy Delivery System and are intended for use by individuals who suffer from cancer. While we recognize that cancer can cause chronic pain and substantial limitations to an individual's life activities, we do not agree that it constitutes a permanent or chronic physical or mental impairment, as described by Chapter 98, Subchapter XVII, U.S. Note 4(a), HTSUS. Rather, as a disease that is often treatable, disabilities resulting from the illness fit within the definition of "acute or transient disabilt[ies]," and as such, articles that are designed for acute or transient disability are specifically excluded from subheading 9817.00.96, HTSUS. U.S. Note 4(b)(i), Subchapter XVII, Chapter 98, HTSUS. Furthermore, materials submitted with the ruling request note that the Novocure Therapy Delivery System (also referred to as the Tumor Treating Field (TTF) Therapy Delivery System) is specially designed to treat and manage the cancerous tumors, and the description of the operation of the Novocure Therapy Delivery System indicates that it is used to treat the disease. As such, the transducer arrays are also excluded from classification under 9817.00.96 as "therapeutic or diagnostic articles." U.S. Note 4(b)(iii), Subchapter XVII, Chapter 98, HTSUS. Therefore, whether or not the transducer arrays are specially designed or adapted for the use or benefit of the blind or physically and mentally handicapped persons, they are specifically excluded from subheading 9817.00.96, HTSUS, by operation of U.S. Note 4(b)(i) and (iii), Subchapter XVII, Chapter 98, HTSUS.

As noted above, CBP received one comment in response to the notice of proposed modification. The commenter, who is the manufacturer of the transducer arrays and the party to whom NY N319324 was issued, argues that the transducer arrays are not excluded from classification by operation of U.S. Note 4(b)(i) and (iii) to Subchapter XVII, Chapter 98, HTSUS. We will address each argument in turn.

The commenter argues that cancer is not an acute or transient disability under Subchapter XVII, Chapter 98, U.S. Note 4(b)(i) and that the transducer arrays are specially designed to treat glioblastoma ("GBM"), which has a 5-year survival rate of 13%. In support of this argument, the comment states that cancer causes chronic pain, substantially limits the lives of its victims and is virtually impossible to overcome without treatment. The commenter states that cancer causes pain, extreme fatigue, weight and appetite disruptions, fevers, nausea, vomiting, diarrhea, and other symptoms, and that cancer treatment can lead to chronic and permanent side effects, including bone loss, cognition and memory problems, infertility, breathing problems, heart disease, and hearing loss. According to the commenter, "[t]he

symptoms of cancer and side effects of cancer treatment regularly prevent cancer patients from performing basic daily tasks, including working, attending school, walking and exercising, eating normally, and sleeping." The commenter argues that the U.S. Court of International Trade in *Sigvaris, Inc. v. United States*, endorsed a definition of chronic as "suffering from a disease or ailment of long duration or frequent recurrence" or "marked by long duration, by frequent recurrence over a long time, and often by slowly progressing seriousness" and stated that for the purposes of tariff classification, it is sufficient for a condition to physically impair some persons to such a degree that their inability to care for themselves or perform manual tasks is substantially limited. 227 F. Supp. 1327, 1336 n. 12, 1341 (CIT 2017). The commenter noted that the Centers for Disease Control ("CDC") defines chronic diseases as conditions that last one year or more and require ongoing medical attention and/or limit activities of daily living, and that U.S. courts have recognized that cancer is a disability under the Americans with Disabilities Act ("ADA"). Finally, the commenter states that CBP itself has found that diseases which can be life threatening and for which there is no cure to be physical handicaps, citing to the example of sleep apnea (*see* NY N059778, dated May 29, 2009).

The commenter argues that cancer, by virtue of causing a myriad of serious side effects (of disease and treatment) and of being a disease of often long duration or recurrence, qualifies as a permanent or chronic impairment and not as an acute or transient disability. We disagree. We note at the outset that categorizing cancer as an acute or transient disability in no way minimizes the amount of suffering that cancer or its treatment might cause. However, cancer, by itself is an extremely broad category. It is often treatable and affects individuals differently in the degree to which it impacts their ability to continue with daily functions. The commenter notes that according to the CIT decision in *Sigvaris*, for the purposes of tariff classification, it is sufficient for a condition to physically impair some persons to such a degree that their inability to care for themselves or perform manual tasks is substantially limited, but that not all individuals affected by a condition need to be so impaired. However, the *Sigvaris* decision by the CIT was appealed to the Federal Circuit, and the Federal Circuit specifically noted that this approach was too broad (and that it ignored the "specially designed" language of the heading). *Sigvaris, Inc. v. United States,* 899 F.3d 1308, 1314 (Fed. Cir. 2018). More recently, the CIT has again cautioned against adopting an overbroad construction of the terms of 9817.00.96, HTSUS. *Nutricia North America, Inc. v. United States*, Slip Op. 23–170 (Dec. 4, 2023) at 36–37. The Federal Circuit in *Sigvaris* clarified that the heading focuses the inquiry on the "persons" for whose use and benefit the articles are "specially designed" and not on any disorder that may incidentally afflict persons who use the subject merchandise and that is where we must focus our own inquiry. The question of whether the transducer arrays are specially designed to treat GBM is not in question. However, an article can be specially designed and yet not meet the eligibility requirements of 9817.00.96, HTSUS, either by virtue of failing the *Sigvaris* five-factor analysis or because, as is the case here, it is specifically excluded by operation of U.S. Note 4(b) to Subchapter XVII, Chapter 98, HTSUS.

The commenter argues that cancer is not excludable under U.S. Note 4 because it is a chronic disease. The commenter argues that the CDC has defined "chronic" diseases as conditions that last one year or more and

require ongoing medical attention and/or limit activities of daily living. The commenter notes that U.S. courts have also recognized cancer as a disability under the ADA. We note that, while the CDC definition may be a useful consideration, it is not dispositive for the purposes of tariff classification. The same CDC web page that defines chronic disease as one lasting for one year or more also notes that six in ten adults in the U.S. have a chronic disease, and that four in ten have two or more. Once again, this creates an overbroad category. Similarly, the fact that the ADA may consider cancer as a disability does not automatically mean that it is a disability for tariff purposes. *See Danze, Inc. v. United States*, 319 F. Supp.3d 1312, 1325 (CIT 2018).[1] The purposes served by the CDC (public health) and the ADA (non-discrimination) are not identical to the purpose of tariff classification and the grant of duty-free entry to certain types of merchandise and are not at issue in this ruling. The commenter also cites to the CIT decision in *Sigvaris* to argue that "chronic" is understood as an ailment or disease long duration, frequent recurrence, and/or slowly progressing seriousness. However, the CIT in that case does not offer clear guidance on how terms such as "long duration" or "frequent recurrence" might be interpreted. In the context of cancer, these are relative terms. Some cancers may be treated relatively quickly and lead to permanent remission, or at the very least, remission of a very long period. Others may not. Therefore, any analysis of whether an impairment is chronic has to proceed on a case-by-case basis.

Finally, the plain language of U.S. Note 4 states that "the term 'blind or other physically or mentally handicapped persons' includes any person suffering from a permanent or chronic physical or mental *impairment* . . ." (emphasis added). The plain language of the text directs us to consider the actual impairment that is causing the disability in question, rather than the disease that may be the cause of the impairment. In the context of the arguments raised by the commenter, this means that in the event that the cancer or its treatment causes impairments, we need to consider the actual impairment itself (e.g. pain, nausea, specific impacts of surgery such as amputation, etc.), whether it is acute or transient, chronic or permanent, and we need to evaluate whether the merchandise in question is an article adapted to ameliorate the effects of that impairment. Any such analysis would proceed on a case-by-case basis, and we would apply the terms of the subheading, relevant notes and the five-factor test confirmed by the *Sigvaris* decisions.

The commenter also argues that the transducer arrays are not a therapeutic article under U.S. Note 4(b)(iii) to Subchapter XVII, Chapter 98, HTSUS. The commenter states that the electric fields produced by the transducer

[1] Speaking to the question of whether compliance with ADA standards was sufficient to demonstrate eligibility for classification under subheading 9817.00.96, HTSUS, the Court noted that

> Congress passed the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The ADA prohibits discrimination against individuals with disabilities in the sectors of employment, public services, public accommodations, and other sectors of society. *See generally* ADA. Congress intended that the ADA be construed broadly. While the court is mindful that the ADA is to be construed broadly in favor of individuals seeking protection under that law, this is not the issue before the court. The issue before the court is whether the subject merchandise is entitled to duty-free treatment simply because it is ADA compliant.

arrays (the "TTFields treatment") can destroy cancer cells, but they are not expected to cure or eliminate the underlying disease as they cannot remedy the genetic or environmental sources that may have caused the cancers to develop. They provide that the TTFields treatment has been approved for use by the Food and Drug Administration ("FDA") for use in treatment of GBM and that the treatments slow disease progression and add months of survival. The treatments slow down or stop cancer cell division, inhibit tumor growth, and potentially destroy existing cancerous cells. The commenter states that CBP has construed the term "therapeutic" narrowly and that treatments capable of eliminating the symptoms or consequences of a condition have not been considered therapeutic. In support, commenter cites to a number of examples of such treatments, including prosthetic hip implants, dental implants, sacral simulator implants, and articles that correct deformities of and/or treat trauma to the spine. As such, commenter argues that only treatments that are expected to heal or cure an underlying condition are considered therapeutic and that articles that merely control or help individuals adapt to a handicap are not therapeutic. The commentator states that considering the high recurrence and poor survival outlook for patients of GBM, the TTFields treatment (which is delivered using the transducer arrays) does not heal or cure it.

CBP has previously held that therapeutic articles are articles whose purpose is the complete or *partial* elimination of disease. HQ H275827 (August 6, 2018), HQ H285358 (August 6, 2018) (emphasis added). The commenter argues that in order to be considered "therapeutic" under 9817.00.96, HTSUS, the treatment must result in a complete and permanent cure, including a cure of the underlying causes of the disease. According to the commenter, in the context of cancer this means that the treatment must remedy the genetic or environmental sources that may have caused the cancer to develop. We disagree that complete and permanent eradication of disease, including the underlying causes of disease, is the standard that a treatment must reach in order to be considered therapeutic. By that standard and under the commenter's own characterization of the disease of cancer (setting aside, *arguendo*, our position that cancer as a whole is not properly categorized as a disability, although the type and degree of disease and/or its treatment may result in impairments that meet the requirements of disability under the tariff provision), practically no treatment currently available would qualify as therapeutic. By the commenter's own descriptions, the TTFields delivered using the transducer arrays slow down and/or stop cancer cell division, thereby inhibiting tumor growth and potentially destroying cancer cells. This is an example of therapy, even if it is not completely and permanently curative. The commenter states that the TTFields behave in analogous ways to permanent hip implants or dental implants (for example) in that they eliminate the symptoms of certain conditions. However, the commenter's own description of the operation of the TTFields is the destruction of cancer cells and/or slowing down of cancer cell division. In the example of severe hip arthritis that necessitates a hip replacement, the proper analogy would be to a therapy that slows down the progression of or reverses arthritis, not the prosthetic implant that is used to accommodate for a damaged hip joint as a result of the

arthritis.[2] Given the commenter's own description of how the transducer arrays impact the brain tumor of a GBM patient, it is our opinion that the merchandise meets the definition of a therapeutic article.

Given the foregoing, we find that the transducer arrays do not meet the requirements of subheading 9817.00.96, HTSUS.

HOLDING:

The transducer arrays identified in NY N319324 are ineligible for subheading 9817.00.96, HTSUS, which provides for "articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons . . . other."

EFFECT ON OTHER RULINGS:

NY N319324, dated May 25, 2021, is hereby **MODIFIED** in accordance with the above analysis.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial Trade and Facilitation

[2] The commenter pointed to a number of CBP rulings and court cases which, it claims, provides analogies that are instructive to the resolution of this case, namely: prosthetic hip implants (discussed in *Richards Medical Co. v. United States*, 720 F. Supp. 998 (CIT, 1989)), dental implants (discussed in *Nobelpharma U.S.A. v. United States*, 955 F. Supp. 1491 (CIT, 1997)), sacral simulator implants (NY N226995, dated Jul. 27, 2012), articles to correct deformities of and/or treat trauma to the spine (NY N201418, dated Feb. 17, 2012), certain microscopes used in surgery (HQ H561940, dated Feb. 28, 2002). With respect to HQ H561940, we will note that HQ H275827 revoked that ruling in entirety. The remaining examples are, as explained in the body of this ruling, distinguishable from the merchandise at issue in this ruling.

Slip Op. 24–12

NORCA INDUSTRIAL COMPANY, LLC, Plaintiff, and INTERNATIONAL PIPING & PROCUREMENT GROUP, LP, Consolidated Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 21–00192

[Sustaining the negative evasion determination of U.S. Customs and Border Protection under the Enforce and Protect Act.]

Dated: February 7, 2024

Peter Koenig, *Jeremy W. Dutra*, and *Christopher D. Clark*, of Squire Patton Boggs (US) LLP, Washington, D.C., for Plaintiffs Norca Industrial Company, LLC and International Piping & Procurement Group, LP.

Margaret J. Jantzen, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., and *Tamari J. Lagvilava*, Office of Chief Counsel, U.S. Customs and Border Protection, of Washington, D.C., for Defendant United States.

OPINION

Choe-Groves, Judge:

This case arises out of U.S. Customs and Border Protection's ("Customs") evasion determination under the antidumping order on certain carbon steel butt-weld pipe fittings from the People's Republic of China ("China"). Customs' Final Administrative Determination in Enforce and Protect Act (EAPA) Case No. 7335 (Mar. 22, 2021) ("Final Administrative Determination"), PR 379[1]; *see Certain Carbon Steel Butt-Weld Pipe Fittings From the People's Republic of China* ("Order"), 57 Fed. Reg. 29,702 (Dep't of Commerce July 6, 1992) (antidumping duty order and amendment to final determination of sales at less than fair value). Before the Court is the Final Remand Redetermination ("*Remand Redetermination*"), Final Remand Redetermination EAPA Consol. Case No. 7335, ECF No. 58, which the Court ordered in *Norca Indus. Co. v. United States*, 46 CIT __, 561 F. Supp. 3d 1379 (2022) ("*Norca I*"). For the following reasons, the Court sustains Customs' negative evasion determination in the *Remand Redetermination*.

[1] Citations to the administrative record reflect the public record ("PR"), ECF No. 18.

BACKGROUND

On November 6, 2020, Customs determined that substantial evidence demonstrated that Plaintiffs entered covered merchandise into the United States through evasion of the Order. Notice of Determination as to Evasion (Nov. 6, 2020) ("November 6 Determination") at 1–2, PR 368. Customs initiated on November 5, 2019 a parallel Enforce and Protect Act ("EAPA") investigation into whether Plaintiffs evaded the Order with their entries of merchandise into the United States based on allegations raised by Allied Group. *Id.* at 2. Allied Group alleged that BW Fittings, the former Vietnamese supplier of Plaintiffs' merchandise, did not produce carbon steel buttweld fittings in Vietnam, but transshipped such merchandise from China into the United States. *Id.*

Customs' Regulations and Rulings of the Office of Trade affirmed the November 6 Determination on March 22, 2021. *See* Final Administrative Determination. Plaintiffs filed separate suits challenging the November 6 Determination and Final Administrative Determination, which the Court consolidated. Order (June 8, 2021), ECF No. 14.

After Plaintiffs filed their respective Rule 56.2 motions, Defendant requested a remand of the Final Administrative Determination because Customs had recently learned that certain documents collected during the investigation were not provided to the Parties during the investigation or were not included as part of the record. Def.'s Mot. Voluntary Remand Suspend Current Br. Schedule ("Def.'s Mot. Voluntary Remand"), ECF No. 23; *see also* Pl.'s Rule 56.2 Mot. J. Agency R., ECF No. 20; Mem. Points Auth. Supp. Pl.'s Rule 56.2 Mot. J. Agency R., ECF No. 21 ("Pl.'s Rule 56.2 Mem."); Consol. Pl.'s Rule 56.2 Mot. J. Agency R., ECF No. 22. Defendant conceded that the administrative record was incomplete, stating that remand would allow an opportunity for a third party, who had submitted numerous photographs and videos from a November 2019 site visit of BW Fittings' Vietnam facility to Customs (but were excluded from the administrative record), to bracket the business confidential information in its submissions to Customs. Def.'s Mot. Voluntary Remand at 4; *see* Pl.'s Rule 56.2 Mem. at 5. On March 11, 2022, this Court remanded the Final Administrative Determination. *Norca I*, 46 CIT at __, 561 F. Supp. 3d at 1384.

The Court stayed this case while Customs referred a covered merchandise determination to the U.S. Department of Commerce ("Commerce") to determine whether Plaintiffs' Chinese-origin rough fittings purchased from BW Fittings were covered by the Order in two scenarios: (1) Chinese-origin rough fittings that only underwent the

third stage of production (*i.e.*, finishing processes) in Vietnam and (2) Chinese-origin rough fittings that underwent both the second and third stages of production in Vietnam. Customs' Covered Merchandise Referral Request for Merchandise Under EAPA Consolidated Case [No.] 7335 (Remand [No.] 7717), Imported by Norca Industrial Company, LLC and International Piping & Procurement Group, LP: Antidumping Duty Order on Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China (Sept. 6, 2022) at 4, ECF No. 53–1.

Commerce issued its final covered merchandise determination on September 29, 2023, stating that a rough fitting does not become covered merchandise (or an unfinished fitting) until after the second stage of production and is a material input used in the production of an unfinished fitting. Decision Mem. Final Results Covered Merchandise Inquiry – EAPA Inv. 7335: Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China (Dep't of Commerce Sept. 29, 2023) ("Final Covered Merchandise Determination") at 27, ECF No. 53–2. Commerce determined that the subject merchandise were outside the scope of the Order. *Id.*

In light of Commerce's covered merchandise determination, Customs filed a negative evasion determination on January 22, 2024. *See Remand Redetermination*. Plaintiffs filed comments asking the Court to sustain the *Remand Redetermination*. Pls.' Cmts. Remand Redetermination ("Pls.' Cmts."), ECF No. 61.

The Court held a status conference on January 29, 2024. Status Conference (Jan. 29, 2024), ECF No. 62.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to section 517 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1517(g), and 28 U.S.C. § 1581(c), which grant the Court jurisdiction over actions contesting determinations of evasion pursuant to the EAPA statute. The Court reviews Customs' evasion determination for compliance with all procedures under 19 U.S.C. §§ 1517(c) and (f) and will hold unlawful "any determination, finding, or conclusion [that] is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1517(c)(1)(A), (g)(2). The Court reviews determinations made on remand for compliance with the Court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT 727, 730, 992 F. Supp. 2d 1285, 1290 (2014), aff'd, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

Customs has authority under the EAPA to investigate and determine whether covered merchandise was entered into the customs

territory of the United States through evasion. 19 U.S.C. § 1517(c)(1)(A). "Evasion" is defined as:

> [E]ntering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.

Id. § 1517(a)(5)(A).

In *Norca I*, the Court remanded the Final Administrative Determination for Customs to correct the record and reconsider the allegations of evasion. *Norca I*, 46 CIT at __, 561 F. Supp. 3d at 1384. On remand, Customs placed new information on the record and made a covered merchandise referral to Commerce. *Remand Redetermination* at 1–3. Commerce's covered final merchandise referral concluded that the subject merchandise were outside the scope of the Order. Final Covered Merchandise Determination at 27. Based on Commerce's referral, Customs reconsidered its prior affirmative evasion determination, and in the *Remand Redetermination* made a final negative evasion determination.

Plaintiffs now ask the Court to sustain the *Remand Redetermination* and order the immediate liquidation of previously suspended entries. Pls.' Cmts. at 2–3. The Government did not file a response to Plaintiffs' comments, but does not oppose Plaintiff's request to sustain the *Remand Redetermination*. Status Conference (Jan. 29, 2024).

The Court concludes that Customs' *Remand Redetermination* is supported by substantial evidence and in accordance with law, and complies with the Court's remand order.

CONCLUSION

For the foregoing reasons, the Court sustains the *Remand Redetermination*. Judgment will enter accordingly.

Dated: February 7, 2024
New York, New York

/*s*/ *Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 24–13

AMERICAN MANUFACTURERS OF MULTILAYERED WOOD FLOORING, Plaintiff, v. UNITED STATES, Defendant, and JIANGSU GUYU INTERNATIONAL TRADING CO., LTD., et al., Defendant-Intervenors.

Court No. 21–00595
Before: M. Miller Baker, Judge

[The court sustains the Department of Commerce's remand redetermination.]

Dated: February 8, 2024

Mark Ludwikowski, *Kelsey Christensen*, and *Sally Alghazali*, Clark Hill PLC of Washington, DC, on the comments for Defendant-Intervenors.

Brian M. Boynton, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; *Tara K. Hogan*, Assistant Director; and *Brendan Jordan*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, on the comments for Defendant. Of counsel on the comments was *Alexander Fried*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

Timothy C. Brightbill, *Maureen E. Thorson*, *Stephanie M. Bell*, *Tessa V. Capeloto*, and *Theodore P. Brackemyre*, Wiley Rein LLP of Washington, DC, on the comments for Plaintiff.

OPINION

***Baker*, Judge:**

This matter returns following a remand for the Department of Commerce to reconsider its determination that a mandatory respondent in an administrative review of an antidumping order on Chinese wood flooring was ineligible for a separate rate. If the company were so eligible, Commerce then would have to recalculate the duty for separate-rate producers not selected as respondents.

On remand, Commerce concluded under protest that the mandatory respondent is eligible and accordingly recalculated the margin for non-investigated separate-rate companies. Finding that determination supported by substantial evidence, the court sustains it.

I

This case involves the 2018–2019 review of an antidumping order on multilayered wood flooring from China.[1] In the preceding review, Commerce found that the Fusong Jinlong Group (Jinlong) had shown independence from the Chinese government and was therefore eligible for a separate rate. *See Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Ad-*

[1] *See Multilayered Wood Flooring from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 76 Fed. Reg. 64,318, 64,321 (Dep't Commerce Oct. 18, 2011).

ministrative Review and New Shipper Review and Final Determination of No Shipments: 2017–2018, 85 Fed. Reg. 78,118, 78,119 (Dep't Commerce Dec. 3, 2020).

When the Department opened the review at issue here, it stated that companies "selected as mandatory respondents . . . will no longer be eligible for separate rate status unless they respond" to a questionnaire. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 6896, 6897 (Dep't Commerce Feb. 6, 2020), Appx1156.

Jinlong filed a "certification"—essentially, a form allowing for a streamlined renewal of its separate rate. Appx1075. The Department then selected it as a mandatory respondent and issued a questionnaire. In April 2020, the company advised that it was "unable to respond . . . for reasons associated with the ongoing COVID-19 health crisis." Appx1268.

Commerce denied the company's certification because of this failure. Appx1055–1056.[2] As a result, the Department calculated the separate rate for non-investigated entities based entirely on the zero percent duty assigned to the other mandatory respondent (which did receive a separate rate). Appx1057–1058.[3]

A group of domestic wood flooring producers then brought this suit challenging the Department's denial of Jinlong's certification and, relatedly, the calculation method used for the non-investigated separate-rate companies. If Jinlong were certified, its duty—if greater than zero—would have the domino effect of raising the separate-rate companies' margins. In effect, the battle over Jinlong's eligibility is a proxy war waged by the domestic producers against non-investigated Chinese producers eligible for a separate rate, several of whom intervened to defend Commerce's decision.[4]

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[2] Jinlong instead received the 85.13 percent China-wide rate that applies by default to producers not eligible for a separate rate. Appx1013–1014.

[3] Neither the Tariff Act of 1930, as amended, nor Commerce's regulations address how the Department should establish the separate rate for companies not individually examined in an antidumping investigation or review of imports from a country with a nonmarket economy. In a case involving a market-economy country, the statute requires the Department to calculate an "all others" rate for non–individually investigated exporters and producers; that margin is to be "an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated." 19 U.S.C. § 1673d(c)(5)(A). For a nonmarket-economy country such as China, Commerce uses the "all-others" mechanism to determine the separate rate. *See Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1011 (Fed. Cir. 2017); *see also New Am. Keg v. United States*, Ct. No. 20–00008, Slip Op. 21–30, at 9 n.6, 2021 WL 1206153,at *3 n.6 (CIT Mar. 23, 2021) (explaining that "the 'separate rate' applied to eligible producers and exporters . . . is analogous to the 'all-others rate' applied to non-investigated companies from market economy countries"). The Department's final determination here cited that mechanism. Appx1034–1035.

[4] Jinlong, however, did not intervene.

Following briefing and argument, the court found from the bench that the Department's denial of Jinlong's certification was unlawful. ECF 52, at 32:5–33:22 (transcript). "This is, by [the court's] lights, arbitrary and capricious under the [Administrative Procedure Act] because Commerce is treating similarly situated [entities[5]] differently" and because the Department failed to address the company's separate-rate certification on the merits. *Id.* at 33:13–18. "Rather[,] Commerce viewed it as inadequate . . . solely because [the company] had the bad luck to be chosen as [a] mandatory respondent and regardless of whether the certification would have been adequate had the company not been so chosen." *Id.* at 33:18–22. The court expressed concern that certification was sufficient for some companies but not for others: "Without a rational explanation, the [c]ourt cannot sustain Commerce's determination here." *Id.* at 34:3–9.

II

On remand, the Department reevaluated Jinlong's separate-rate eligibility under protest,[6] found it so eligible, and set a duty based on facts otherwise available with an adverse inference. Appx1300.[7] Commerce assigned the company a margin of 85.13 percent, the highest calculated rate for any respondent from a completed segment of the proceeding. Appx1307.[8]

The Department then had to calculate a margin for the companies that received separate rates without being individually investigated. The problem was that of the two mandatory respondents, one received a zero duty and the other (Jinlong) received a rate based entirely on facts otherwise available. Commerce noted that in such a circumstance, the statute allows it to "use any reasonable method . . . , including averaging the estimated weighted dumping margins determined for the exporters and producers individually investigated." Appx1308–1309 (quoting 19 U.S.C. § 1673d(c)(5)(B)). The Department added that the Statement of Administrative Action ac-

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[5] The court misspoke when it used the term "respondents" rather than "entities."

[6] "[W]hen Commerce advocates a position zealously and must abandon that position in order to comply with a ruling of the U.S. Court of International Trade, Commerce preserves its right to appeal if it adopts a complying position under protest." *Saha Thai Steel Pipe Pub. Co. v. United States*, 583 F. Supp. 3d 1350, 1353 (CIT 2021) (citing *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003)).

[7] For an explanation of facts otherwise available with an adverse inference, see *Hung Vuong Corp. v. United States*, 483 F. Supp. 3d 1321, 1336–39 (CIT 2020).

[8] This was the same rate assigned to the China-wide entity, *see above* note 2, so the net result for Jinlong remained unchanged.

companying the Uruguay Round Agreements Act (SAA)[9] states that the "expected method" in such cases "will be to weight-average" the zero, *de minimis*, and facts-otherwise-available margins, "provided that volume data is available." Appx1309 (quoting SAA, H.R. Doc. 103–316, vol. 1, at 873, 1994 U.S.C.C.A.N. 4040, 4201). If the "expected method" is not feasible, or results in a figure that is not reasonably reflective of potential dumping margins for non-investigated companies, the SAA allows the use of "other reasonable methods." SAA, H.R. Doc. 103–316, vol. 1, at 873, 1994 U.S.C.C.A.N. at 4201.

Because Jinlong did not answer the questionnaire, Commerce could not calculate a weighted average of the two rates. Appx1309. It therefore assigned the simple average—42.57 percent—as the separate rate for all eligible non-examined producers. *Id.*

In this litigation round, the private litigants have traded places. The domestic producers, who opposed the original determination, support the remand results, while Defendant-Intervenors, who supported that determination, now oppose them.

III

The domestic producers brought this suit under 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (B)(iii). Subject-matter jurisdiction is conferred by 28 U.S.C. § 1581(c).

The standard of review for a remand redetermination is the same as that on previous review. *Bethlehem Steel Corp. v. United States*, 223 F. Supp. 2d 1372, 1375 (CIT 2002). In § 1516a(a)(2) actions, "[t]he 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). That is, the question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record as a whole permits Commerce's conclusion.

> Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

[9] The SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States*, 66 F.4th 968, 972 (Fed. Cir. 2023) (quoting 19 U.S.C. § 3512(d)).

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (cleaned up).

IV

Defendant-Intervenors argue that Commerce did not act arbitrarily and capriciously in the first instance by denying Jinlong a separate rate. ECF 65, at 5–6. The court, however, declines to reconsider its prior ruling to the contrary.

Defendant-Intervenors do not challenge the Department's decision to accept the company's certification on its own merits. They instead argue that even if Commerce properly assigned Jinlong a separate rate, the agency improperly calculated their margins by averaging the company's rate with the other mandatory respondent's. *Id.* at 7. Despite raising several theoretical policy concerns, *id.* at 8–10, they fail to address Congress's mandate (in the market-economy context) that Commerce apply the methodology used here[10] where all mandatory respondents eligible for a separate rate receive duties that are zero, *de minimis*, or based entirely on facts otherwise available. *See above* note 3. Defendant-Intervenors thus "cannot contend that methodology employing [such] margins is disfavored when Congress has unmistakably explained that it is, in fact, preferred." *Albemarle Corp. v. United States*, 821 F.3d 1345, 1354 (Fed. Cir. 2016).[11] As Plaintiffs explain, "While Intervenors argue that it was inherently unfair for Commerce to rely in part on an adverse rate in determining the non-examined companies' margins, such a position cannot be squared with Congress's expressed expectation that [the Department] do just that." ECF 66, at 6.

The government correctly observes that Defendant-Intervenors make "no arguments outside of critiquing the expected method itself." ECF 67, at 14. In that respect, their avenue for relief lies with

[10] Commerce's only deviation from the "expected method" was that it used the simple average, rather than the weighted average, of the two rates assigned to the mandatory respondents. Appx1309. The Department explained that it did so because the lack of sales quantity and value data from Jinlong made calculating a weighted average impossible. *Id.* The SAA envisions this possibility by conditioning use of the "expected method" on whether "volume data is available." H.R. Doc. 103–316, vol. 1, at 873, 1994 U.S.C.C.A.N. at 4201. Commerce's reasoning therefore suffices to explain why the use of a simple average is a "reasonable method."

[11] The court also approvingly cited a case reasoning that because the statute specifically refers to averaging the zero, *de minimis*, and facts-otherwise-available rates "as the sole provided example of a 'reasonable method[,] . . .' [i]t is impermissible to interpret this provision as expressing a preference against the use of such methodology in such situations. This must particularly be the case when the SAA expressly states that the allegedly disfavored methodology is in fact the expected method in such cases." *Id.* at 1354 n.8 (cleaned up) (quoting *Amanda Foods (Vietnam) Ltd. v. United States*, 714 F. Supp. 2d 1282, 1291 (CIT 2010)).

Congress, not with this court. *See Wyeth v. Kappos*, 591 F.3d 1364, 1370 (Fed. Cir. 2010) ("[T]his court does not take upon itself the role of correcting all statutory inequities, even if it could. In the end, the law has put a policy in effect that this court must enforce, not criticize or correct.").

* * *

For the reasons outlined above, the court sustains Commerce's redetermination. A separate judgment will issue. *See* USCIT R. 58(a).

Dated: February 8, 2024
New York, NY

/s/ M. Miller Baker
JUDGE

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