

# Bureau of Customs and Border Protection

## *General Notices*

### **AGENCY INFORMATION COLLECTION ACTIVITIES: BONDED WAREHOUSE PROPRIETOR'S SUBMISSION**

**AGENCY:** Bureau of Customs and Border Protection (CBP), Department of Homeland Security.

**ACTION:** Proposed collection; comments requested.

**SUMMARY:** CBP has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: Bonded Warehouse Proprietor's Submission. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with a change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (70 FR 58457) on October 6, 2005, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

**DATES:** Written comments should be received on or before April 21, 2006.

**ADDRESSES:** Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Homeland Security Desk Officer, Washington, D.C. 20503. Additionally comments may be submitted to OMB via facsimile to (202) 395-7285.

### **SUPPLEMENTARY INFORMATION:**

The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of

1995 (Pub. L.104–13). Your comments should address one of the following four points:

- (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

**Title:** Bonded Warehouse Proprietor's Submission.

**OMB Number:** 1651–0033

**Form Number:** Form 300

**Abstract:** CBP Form 300 is prepared by Bonded Warehouse Proprietor's and submitted to CBP annually. The document reflects all bonded merchandise entered, released, and manipulated, and includes beginning and ending inventories.

**Current Actions:** This submission is being submitted to extend the expiration date with a change in the burden hours.

**Type of Review:** Extension (with change)

**Affected Public:** Business or other for-profit institutions

**Estimated Number of Respondents:** 1,800

**Estimated Time Per Respondent:** 24 hours and 18 minutes

**Estimated Total Annual Burden Hours:** 43,740

**Estimated Total Annualized Cost on the Public:** N/A

If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.2.C, Washington, D.C. 20229, at 202–344–1429.

Dated: March 15, 2006

TRACEY DENNING,  
*Agency Clearance Officer,  
Information Services Branch.*

**AGENCY INFORMATION COLLECTION ACTIVITIES  
DECLARATION OF PERSONS WHO PERFORMED REPAIRS  
OR ALTERATIONS**

**AGENCY:** Bureau of Customs and Border Protection (CBP), Department of Homeland Security.

**ACTION:** Proposed collection; comments requested.

**SUMMARY:** CBP has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: Declaration of Persons Who Performed Repairs or Alterations. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extension without a change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (70 FR 58458) on October 6, 2006, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

**DATES:** Written comments should be received on or before April 21, 2006.

**ADDRESSES:** Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Homeland Security Desk Officer, Washington, D.C. 20503. Additionally comments may be submitted to OMB via facsimile to (202) 395-7285.

**SUPPLEMENTARY INFORMATION:**

CBP encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L.104-13). Your comments should address one of the following four points:

- (1) Evaluate whether the proposed collection of information is necessary for the Proper performance of the functions of the agency/component, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;

- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other
- (5) forms of information technology, e.g., permitting electronic submission of responses.

**Title:** Declaration of Person Who Performed Repairs

**OMB Number:** 1651-0048

**Form Number:** None

**Abstract:** The Declaration of Person Who Performed Repairs is used by Customs to ensure duty-free status for entries covering articles repaired aboard. It must be filed by importers claiming duty-free status.

**Current Actions:** There are no changes to the information collection. This submission is being submitted to extend the expiration date.

**Type of Review:** Extension (without change)

**Affected Public:** Businesses or other for-profit.

**Estimated Number of Respondents:** 20,472

**Estimated Time Per Respondent:** 30 minutes

**Estimated Total Annual Burden Hours:** 10,236

**Estimated Total Annualized Cost on the Public:** N/A

If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.2.C, Washington, D.C. 20229, at 202-344-1429.

Dated: March 15, 2006

TRACEY DENNING,  
*Agency Clearance Officer,  
Information Services Branch.*

**LIMITATION OF THE APPLICATION OF THE DECISIONS  
OF THE COURT OF INTERNATIONAL TRADE AND THE  
COURT OF APPEALS FOR THE FEDERAL CIRCUIT IN  
PARK B. SMITH v. UNITED STATES  
25 C.I.T. 506 (2001),  
*affirmed in part, vacated in part, and remanded,*  
347 F. 3d 922 (Fed. Cir. 2003)**

**AGENCY:** U.S. Customs and Border Protection<sup>1</sup>, Department of Homeland Security

**ACTION:** Notice of Customs and Border Protection's limitation of the application of the decisions of the Court of Appeals for the Federal Circuit and the Court of International Trade in the case of *Park B. Smith, Ltd. v. United States*, 25 Ct. Int'l Trade 506 (2001), *affirmed in part, vacated in part, and remanded*, 347 F. 3d 922 (Fed. Cir. 2003), *reh'g denied* (Fed. Cir. March 16, 2004), to the entries before the courts in that litigation.

**SUMMARY:** Pursuant to section 625(d), Tariff Act of 1930, as amended (19 U.S.C. 1625(d)), and § 177.10(d) of the Customs and Border Protection (CBP) Regulations (19 C.F.R. 177.10(d)), this notice advises interested parties that Customs and Border Protection is limiting the application of the decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit in *Park B. Smith, Ltd. v. United States* to the specific entries before the courts in that litigation. Notice of the proposed action was published in the *Customs Bulletin*, Volume 39, Number 27, on June 29, 2005. Twelve comments were received in response to the notice.

**EFFECTIVE DATE:** This action is effective April 5, 2006.

**FOR FURTHER INFORMATION CONTACT:** Cynthia Reese, Tariff Classification and Marking Branch, at 202-572-8812.

**SUPPLEMENTARY INFORMATION:**

**Background**

Pursuant to § 625(d), Tariff Act of 1930, as amended (19 U.S.C. 1625(d)), and § 177.10(d), CBP Regulations (19 C.F.R. 177.10(d)), this notice advises interested parties that CBP is exercising its authority, as recognized by the courts<sup>2</sup> and specifically recognized by Congress in enacting 19 U.S.C. 1625(d), to limit the application of

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<sup>1</sup>For ease of reference, CBP will be used for all references to Customs and Border Protection, and its legacy agency, the U. S. Customs Service.

<sup>2</sup>See, *United States v. Stone & Downer*, 274 U.S. 225, 71 L. Ed. 1013, 47 S. Ct. 616 (1927); See also, *Schott Optical Glass, Inc. v. United States*, 750 F.2d 62, 64 (1984).

the decisions in *Park B. Smith, Ltd. v. United States* to the specific entries before the courts in that litigation. Notice of the proposed action was published in the *Customs Bulletin*, Volume 39, Number 27, on June 29, 2005. Twelve comments were received in response to the notice.

In the interest of brevity, we will not repeat the considerable history of this matter. Instead, we refer those who are not familiar with the background to the above cited notice of proposed action. This notice will address the comments received in response to the notice of proposed action and will set forth the reasons that CBP has determined to finalize its proposal to limit the application of the decisions of the courts in *Park B. Smith* to the entries before the courts.

Twelve comments were received in response to CBP's notice of proposed action. Of those twelve comments, eleven commenters were opposed to CBP's proposal and one commenter merely sought clarification of the scope of the proposal.

*Comment:* One commenter sought clarification regarding the classification of Christmas tree skirts and asked whether such goods would be affected by CBP's proposal to limit the application of the courts' decisions in *Park B. Smith*. Headquarters Ruling Letter (HQ) 088601 of April 22, 1991 is cited by the commenter in support of the argument to maintain classification of Christmas tree skirts in heading 9505 of the Harmonized Tariff Schedule of the United States (HTSUS) as festive articles. As pointed out by the commenter, CBP determined that the Christmas tree skirts at issue therein, along with Christmas stocking hangers, "are traditionally used at Christmas" and that "neither is the type of article available year-round in a wide variety of motifs." See HQ 088601. The commenter argues that Christmas tree skirts should not be affected by a limitation of the application of the court decisions and that such goods are primarily decorative and not utilitarian. Confirmation that Christmas tree skirts will remain classified in heading 9505, HTSUS, as "festive articles" is sought by this commenter.

*CBP Response:* The commenter need not be concerned regarding the classification of Christmas tree skirts as classification of such merchandise is not affected by the limitation of the application of the courts' decisions in *Park B. Smith* to the entries before the court. CBP agrees with the commenter that Christmas tree skirts are primarily decorative, and not utilitarian, and therefore fall within the scope of merchandise CBP has classified in heading 9505 as "festive articles" under its interpretation and application of the decision in *Midwest of Cannon Falls, Inc. v. United States*, 20 Ct. Int'l Trade 123 (1996), *aff'd in part, rev'd in part*, 122 F.3d 1423 (Fed. Cir. 1997). Additionally, Christmas tree skirts are not within the scope of merchandise described in the recent amendment to the Explanatory Note for heading 9505 which clarified the intended scope of heading

9505. Thus, Christmas tree skirts remain classified in heading 9505, HTSUS.

The remaining discussion is derived from the submissions by the eleven commenters in opposition to CBP's proposal to limit the application of the courts' decisions in *Park B. Smith*.

*Comment:* Four commenters argued the proposed action should not go forward as the doctrine of *stare decisis* requires the courts to follow the decisions in *Midwest* and *Park B. Smith*. Three commenters argue *stare decisis* applies "unless the government provides new evidence which clearly and convincingly demonstrates that those decisions were erroneous." In support of their argument, these commenters cite to selections of text from *Schott Optical Glass, Inc. v. United States*, 750 F.2d 62 (1984), *United States v. Dodge & Olcott, Inc.*, 47 C.C.P.A. 100, C.A.D. 737 (1960), *E.T.I.C. v. United States*, 26 Ct. Int'l Trade 1293 (2002), *United States v. Mercantil Distribuidora, S.A.*, 45 C.C.P.A. 20 (1957), and other cases citing to *Schott Optical*. The commenters assert that the amendment to the Explanatory Notes to heading 9505 is neither new evidence nor clear and convincing evidence that the decisions in *Midwest* and *Park B. Smith* were erroneously decided. One commenter points out that CBP has not alleged that "the court's interpretation of tariff heading 9505 in *Midwest of Cannon Falls* was clearly erroneous or that the court erroneously rejected the application of the non-utilitarian test for classifying articles under 9505."

*Response:* *Stare decisis* means "[t]o abide by, or adhere to, decided cases."<sup>3</sup> It is a principle of respect for precedent. However, *stare decisis* does not apply when a new issue is raised. *Corning Glass Works v. United States*, 79 Cust. Ct. 72, 448 F. Supp. 262 (1977), citing, *Neumann-Endler, Inc. v. United States*, 27 CCPA 53, C.A.D. 61 (1939); *Rico Import Co. v. United States*, 65 Cust. Ct. 554, C.D. 4138, 320 F.Supp. 989 (1970), *aff'd*, 60 CCPA 15, C.A.D. 1075, 469 F.2d 699 (1972). Nor should *stare decisis* control "where additional facts are presented in a later case, remedying the deficiency of proof in the earlier one and compelling a different conclusion. . . ." *Axelrod & Co. v. United States*, 70 Cust. Ct. 117, 123 (1973) citing, *Adolphe Hurst & Co., Inc. v. United States*, 33 CCPA 96, C.A.D. 322 (1946).

The amendment to the Explanatory Notes to heading 9505 is a new issue and provides additional information which needs to be addressed by the court. The amended Explanatory Notes allow for a departure from *stare decisis* and the mechanical application of prior "festive articles" cases. As the court stated in *Axelrod & Co.*, at 123, 124:

. . . when the occasion arises and the court has before it more persuasive evidence, it has been recognized that "the better

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<sup>3</sup> *Black's Law Dictionary*, Sixth Edition (1990), at 1406.

course is to reevaluate, rather than merely to perpetuate.” *William Adams, Inc. v. United States*, 56 Cust. Ct. 429, 439, C.D. 2670 (1966).

CBP respects precedent, however, we also believe that precedent exists for departing from *stare decisis*. In *Avenues in Leather v. United States*, 317 F.3d 1399 (Fed. Cir. 2003), the Federal Circuit reversed the decision of the Court of International Trade precluding the importer from litigating the classification of two styles of its Calcu-Folios. In acknowledging that the merchandise at issue was similar to that at issue in a prior case, the Court stated:

... the doctrine of issue preclusion does not hold sway over classification disputes under Customs law. Long ago, in *United States v. Stone & Downer Co.*, 274 U.S. 225, 71 L. Ed. 1013, 47 S. Ct. 616, Treas. Dec. 42211 (1927), the Supreme Court held that collateral estoppel does not prevent an importer from successive litigation over the classification of merchandise, **even when the subsequent importations involve the “same issue of fact and the same question of law.”** *Id.* at 234. Under the public policy adopted by the Supreme Court in *Stone & Downer*, **each new entry is a new classification cause of action**, giving the importer a new day in court. See *id.* at 236–37 [emphasis added.]

The Court later noted in its decision that “the doctrine of *stare decisis* indeed tempers the rule of *Stone & Downer*, but we also held that a well recognized exception to *stare decisis* applies to customs litigation: a court will reexamine and overrule a previous legal determination that is clearly erroneous. *Schott Optical Glass*, 750 F.2d at 64.” *Avenues in Leather*, 317 F.3d at 1403.

CBP believes that the court decisions in *Park B. Smith* were clearly erroneous, as well as the decision in *Midwest*. The amended Explanatory Notes to heading 9505 support the long-standing position of the agency that utilitarian articles are precluded from classification in heading 9505. We believe “*stare decisis*” does not stand as an impediment to further consideration by the court of this important classification issue. However, it is for the court to decide whether this doctrine stands as a bar to a reconsideration of the scope of the term “festive articles.” We note, the enactment of 19 U.S.C. 1625(d) would indicate that Congress did not view *stare decisis* as an impediment to the relitigation of a customs issue. There would be little point to empower the agency with the authority to limit the application of a court decision if *stare decisis* barred such action. We note that in *Brother International Corp. v. United States*, 248 F. Supp. 2d 1224, 1232 (2002), the Court addressed the issue of *stare decisis* as follows:

**“The applicability of the doctrine of stare decisis is within the discretion of the Court.”** *De Laval Separator Co. v. United States*, 1 C.I.T. 144, 148, 511 F. Supp. 810, 814 (1981). Certainly, the Court recognizes the general principle that “stare decisis is bottomed on the sound public policy that there must be an end to litigation and that, therefore, questions formerly determined should not be readjudicated except on a showing of clear and convincing error in the former holding.” *Schott Optical Glass, Inc. v. United States*, 7 C.I.T. 36, 38, 587 F. Supp. 69, 70–71 (1984), *rev’d* 3 Fed. Cir. (T) 35, 750 F.2d 62 (1984). However, **the doctrine presents special problems in the context of classification cases.** It is a well-established principle that “in customs classification cases a determination of fact or law with respect to one importation is not *res judicata* as to another importation of the same merchandise to the same parties.” *Schott Optical Glass, Inc. v. United States*, 3 Fed. Cir. (T) 35, 750 F.2d 62 (1984) (citing *United States v. Stone & Downer Co.*, 274 U.S. 225, 236, 71 L. Ed. 1013, 47 S. Ct. 616, *Treas. Dec.* 42211 (1927)). **At a minimum, the party opposing the application of stare decisis must be afforded an opportunity to show that the prior decision was clearly erroneous.** *Schott Optical*, 3 Fed. Cir. (T) at 37–38, 750 F.2d at 64–65. [Emphasis added].

With regard to the commenters’ reliance upon *Schott Optical*, we note that the commenters did not bring out that in that case, the Federal Circuit reversed the Court of International Trade and remanded the case so that the plaintiff would have the opportunity to introduce additional evidence that it believed would establish that the prior case, cited as *stare decisis* in the matter, was clearly erroneous. In fact, the Federal Circuit stated in its opinion that “[i]n a number of cases, including several that the Court of International Trade cited, the parties were permitted to relitigate the common meaning of tariff terms, with or without the introduction of new evidence. See *John C. Rogers & Co. v. United States*, 63 C.C.P.A. 10, 524 F.2d 1220 (CCPA 1975); *United States v. Dodge & Olcott, Inc.*, 47 C.C.P.A. 100 (1960); *United States v. Mercantil Distribuidora, S.A.*, 45 C.C.P.A. 20 (1957); *Adolphe Hurst & Co. v. United States*, 33 C.C.P.A. 96 (1946).”

In *E.T.I.C.*, cited by commenters, the court stated that the “defendant’s discussion of *stare decisis* and *res judicata* in classification matters [had] no relevance.” *E.T.I.C.* at 1294. The court stated that the defendant offered no new evidence in the case to distinguish the product from the product ruled upon in *Orlando Food Corp. v. United States*, 21 Ct. Int’l Trade 187 (1997), *aff’d*, 140 F.3d 1437 (Fed. Cir. 1998). CBP believes *E.T.I.C.* is distinguishable from the action being taken by CBP with regard to the decisions in *Park B. Smith*. In *E.T.I.C.*, there was a failure or lack of evidence upon which

to base arguments for distinguishing the facts and law therein from the prior case. CBP has new arguments to offer on this matter and the amended Explanatory Notes provide support for those arguments.

Finally, the court in *Dodge & Olcott, Inc.* stated that it was “unwilling to find error in a prior decision where, as here, the only reason advanced is that the party asserting the error does not agree with our prior decision.” *Dodge & Olcott, Inc.* 47 C.C.P.A. at 103. CBP has explained the reasons why it is limiting the application of the decisions of the courts in *Park B. Smith* so as to relitigate the meaning of “festive articles” and the scope of heading 9505. It is clear that this action is not being taken simply because the agency does not agree with the decisions of the courts.

*Comments:* Five commenters took issue with CBP’s reliance on *Jewelpak*, 950 F. Supp. 343, (CIT 1996), *aff’d* 297 F.3d 1326 (Fed. Cir. 2002) and argued reliance on that decision for support of CBP’s argument for limiting *Park B. Smith* to allow consideration of the amended Explanatory Notes by the courts to be misplaced. These commenters argue that *Jewelpak* is distinguishable as it did not involve prior judicial decisions which were contrary to the Explanatory Notes at issue; *stare decisis* was not a consideration, absent prior judicial decisions, as it does not apply to CBP administrative decisions; and, *Jewelpak* involved the prospective revocation of CBP rulings in light of the amended Explanatory Notes. Additionally, it is asserted that the courts have rejected a utilitarian limitation for articles classifiable in heading 9505 and therefore, the amendment to the Explanatory Notes is of no consequence as the court decisions will override the conflicting Explanatory Notes.

*Response:* CBP disagrees with the commenters. We believe that *Jewelpak* stands as valid support for the position for which it was cited, *i.e.*, that an amendment to the Explanatory Notes, made subsequent to an enactment of tariff terms, should be considered in determining the scope of a heading. We disagree with assertions that the amendment to the Explanatory Notes is of no consequence. We do not believe, as the commenters appear to believe, that when the Federal Circuit stated in its opinion in *Jewelpak* that “the law is clear that it was wholly appropriate to reference the Amended Explanatory Note . . . to help define the proper scope of the tariff term” that its view extended only to the agency’s consideration of the Explanatory Notes.<sup>4</sup> We believe this view is intended to apply to the court’s utilization of the Explanatory Notes also.

CBP recognizes that the statutory language controls and the Explanatory Notes are merely instructive as to the scope of a heading. However, as repeatedly stated by the courts, the Explanatory Notes

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<sup>4</sup> *Jewelpak Corporation v. United States*, 297 F.3d 1326, 1336 (Fed. Cir. 2002), citing *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994)

are generally indicative of the proper interpretation of provisions within the HTSUS and should be taken into consideration in determining the scope of a heading.

*Comment:* All but one of the eleven commenters cited the decision in *Midwest of Cannon Falls, Inc. v. United States*, 20 Ct. Int'l Trade 123 (1996), *aff'd in part, rev'd in part*, 122 F.3d 1423 (Fed. Cir. 1997) as a basis for opposing CBP's proposed action. They argue that *Midwest* established the scope of heading 9505 and that *Midwest* and *Park B. Smith* "represent the controlling definitions of the term 'festive articles' as it appears in HTS heading 9505." One commenter asserts that the scope of "festive articles" as defined by the courts in *Midwest* was affirmed in *Park B. Smith* and *Russ Berrie & Company, Inc. v. United States*, 381 F. Supp. 1334 (Fed. Cir. 2004). It is argued that the courts have determined that articles, including utilitarian articles, may be classified as festive articles provided they meet the test set forth by the court of being closely associated with a festive occasion and used and displayed principally during that festive occasion. The commenters state that the courts have spoken clearly and that utilitarian articles can be festive articles and that there are no grounds to conclude that utilitarian articles should be excluded from "festive articles" or limited to three-dimensional articles. One commenter observes that the HTSUS is a statute and that the determination of the scope of a tariff provision is a question of law. Another claims that CBP is usurping the courts role in making classification decisions. Further, commenters argue that CBP cannot ignore judicial decisions and that the proposed action, if made final, would overrule *Park B. Smith* and *Midwest*. Finally, one commenter points out that limiting *Park B. Smith* does not affect the decision of the court in *Midwest* and importers would still be able to rely on the holding in that case.

*Response:* The proposal to limit the application of the courts' decisions in *Park B. Smith* is a decision by the agency to apply the decisions only to the entries before the courts. Of course, CBP does not seek to overrule the courts as this is neither appropriate nor possible. Rather, pursuant to section 1625(d), the agency is specifically vested with the authority to limit the application of a court decision.<sup>5</sup> For the reasons discussed in this document, CBP believes that exercise of this authority is appropriate in this case in order to provide

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<sup>5</sup>February 15, 1989 was the last time CBP limited a court decision. We limited, in part, the decision of the Court of International Trade in *Madison Galleries, Ltd. v. United States*, 12 Ct. Int'l Trade 485, 688 F. Supp. 1544 (1988) by notice, Treasury Decision 89-21. See 23 *Customs Bulletin* 157. Three commenters incorrectly asserted that CBP had limited the decision of the Court of International Trade in *Nestle Refrigerated Food Co. v. United States*, 18 Ct. Int'l Trade 661 (1994). CBP proposed to limit the decision by notice published in the *Customs Bulletin*, Vol. 29, No. 44, dated November 1, 1995. The proposal to limit the decision in *Nestle* was never finalized by CBP.

an opportunity to persuade the court to reconsider its interpretation of the term “festive articles.”

As correctly asserted by a commenter, limiting the application of *Park B. Smith* has no effect on the decision of the court in *Midwest*. CBP has interpreted the *Midwest* decision to apply only to merchandise of substantially the same nature as the merchandise before the court in that case. With regard to utilitarian articles, CBP has classified utilitarian articles as “festive articles” only if, like the merchandise at issue in *Midwest*, the utilitarian article is a three-dimensional representation of an accepted symbol for a recognized holiday. However, *Park B. Smith*, greatly broadens the scope of merchandise classifiable as “festive articles.”

CBP believes the interpretation of the term “festive article” as used in heading 9505 is critical to the proper classification of merchandise currently classified in other chapters throughout the tariff schedule. As the decisions in *Park B. Smith* could have a pervasive effect on the classification of merchandise throughout the tariff schedule, CBP is limiting the application of those decisions in order to litigate this vital interpretative issue more fully.

It is well settled that in customs law, and pointed out by the lower court in *Park B. Smith*, it is the purview of the courts to definitively interpret the law. The courts are tasked with determining the correct classification of merchandise before the court.<sup>6</sup> “The proper scope and meaning of a tariff classification term is a question of law to be reviewed de novo [by the courts], while determining whether . . . [specific goods] fall within a particular tariff term as properly construed is a question of fact.”<sup>7</sup> CBP acknowledges and deeply respects this role of the courts.

Yet, in fulfilling its role of interpreting the law, *i.e.*, the tariff schedule, the courts have held that deference is owed to CBP’s classification rulings “in accordance with the principles set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134, 89 L. Ed. 124, 65 S. Ct. 161 (1944).”<sup>8</sup> The Court of Appeals for the Federal Circuit in its decision in *Park B. Smith* concluded that although no formal decision had been issued in the case by CBP, *Skidmore* weight should be given to CBP’s position.

In *Skidmore* the Court held that “the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do consti-

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<sup>6</sup> *USR Optonix, Inc. v. United States*, 362 F. Supp. 2d 1365, 1369 (2005) citing *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878, *reh’g denied*, 739 F.2d 628 (Fed. Cir. 1984).

<sup>7</sup> *Brother International Corp. v. United States*, 248 F. Supp. 2d 1224, 1226 (2002), citing *Franklin v. United States*, 289 F.3d 753, 757 (Fed. Cir. 2002) (citations omitted).

<sup>8</sup> *Brother*, at 1227, citing *Franklin*, 289 F.3d at 757 (citing *United States v. Mead Corp.*, 533 U.S. 218, 234–35, 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001); *Mead Corp. v. United States*, 283 F.3d 1342, 1346 (Fed. Cir. 2002)).

tute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” [*Skidmore*, 323 U.S. 134, 140 (1944)]. Although [Park B. Smith] argues that even *Skidmore* deference should not apply here because Customs issued no formal decision when it classified this merchandise, and proffered no analysis until this litigation, we conclude that *Skidmore* weight should be given to Customs’ position. *Park B. Smith*, 347 F.3d 922, 925 (Fed. Cir. 2003). See *United States v. Mead Corp.*, 533 U.S. 218, 234–35, 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001) wherein the Supreme Court determined that Customs Service classification rulings are entitled to *Skidmore* deference.

However, in deciding *Midwest*, the Federal Circuit “independently review[ed] the trial court’s and Customs’ decisions,” citing *Universal Electronics Inc. v. United States*, 112 F.3d 488, 493 (“On questions of law, we defer to neither Customs’ nor the Court of International Trade’s interpretations; we decide such questions afresh.”); and, *Rollerblade, Inc. v. United States*, 112 F.3d 481, 484 (Fed. Cir. 1997) (“No deference attaches to Customs’ classification decisions . . . where there are no disputed issues of material fact.”). *Midwest* was decided in 1997 well before the Supreme Court’s decision in *Mead Corp. v. United States*, in which the Supreme Court found that CBP rulings are entitled to *Skidmore* deference, *i.e.*, according to a ruling’s “power to persuade.”<sup>9</sup> Therefore, although in *Park B. Smith* the Federal Circuit concluded that CBP’s position was entitled to *Skidmore* deference and apparently concluded that the plaintiff had met its “burden of establishing that the Customs ruling is incorrect,”<sup>10</sup> the *Midwest* decision upon which the Federal Circuit’s determination was almost exclusively based was a decision in which CBP received no deference for its position as *Midwest* was decided well before *Mead*. After further consideration of these cases and consideration of the comments received in response to the notice of proposed action, CBP believes that the agency’s entitlement to *Skidmore* deference provides another important basis for limiting the application of the decisions in the *Park B. Smith* cases under 19 U.S.C. 1625(d). CBP hopes to receive *Skidmore* deference anew in the next litigation of the interpretation of the term “festive articles.” In relitigating the meaning of “festive articles”, CBP will argue for adoption by the

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<sup>9</sup> *Mead*, at 235.

<sup>10</sup> *Park B. Smith*, 347 F.3d at 925.

court of the scope of the heading as clarified by the amended Explanatory Note. How the outcome of such a case will affect the *Midwest* decision is for the courts to decide.

CBP believes *Russ Berrie* is distinguishable from *Midwest* and *Park B. Smith* in that the decision in *Russ Berrie* turned upon the interpretation and application of an exclusionary note in Chapter 71, *i.e.*, Note 3(n), Chapter 71, and not on whether the merchandise at issue, lapel pins and earring sets, met the *Midwest* standard for “festive articles.” The court found the legal note not applicable and thus classification of the merchandise was determined by application of General Rule of Interpretation 3(a) – selecting the heading which provided the more specific description. The court determined the merchandise more specifically described as imitation jewelry of heading 7117 of the Harmonized Tariff Schedule of the United States (HTSUS). As the facts and legal analysis in *Russ Berrie* differ significantly from the analysis in *Midwest* and *Park B. Smith*<sup>11</sup>, CBP believes the commenter is mistaken to place reliance upon that case in arguing against limiting the decisions in *Park B. Smith*.

*Comment:* Several commenters expressed views that CBP’s proposal was a codification of an amendment to the *Harmonized Commodity Description and Coding System, Explanatory Notes*. The amendment was adopted in May 2003 and became effective in August 2003<sup>12</sup> during the time the parties to *Park B. Smith* were awaiting the decision of the Federal Circuit. Commenters assert that CBP views amendments to the Explanatory Notes as having the same force and effect as a statutory amendment to the HTSUS. It is also asserted that CBP is attempting to make a non-binding amended Explanatory Note binding and accelerate the implementation of a binding Chapter Note. Others point out that the Explanatory Notes are only the Harmonized System Committee’s interpretation of the Harmonized System and “are not binding to the US and should not be used only when it benefits the government.” Addition-

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<sup>11</sup> *Midwest* and *Park B. Smith* are the major “festive articles” cases. *Russ Berrie* as noted in the discussion, while dealing with the question of “festive articles,” is distinguishable; as is *Rubie’s Costumes v. United States*, 196 F. Supp. 2d 1320 (C.I.T. 2002), *rev’d* 337 F.3d 1350 (Fed. Cir. 2003) dealing with the classification of textile costumes and cited by some commenters for support in their arguments. The only other “festive articles” case of which CBP is aware is *Club Distribution, Inc. v. United States*, 20 Ct. Int’l Trade 839 (1996) which involved the classification of an item referred to as “Christmas Carollers.”

<sup>12</sup> See Article 8 of the *International Convention on the Harmonized Commodity Description and Coding System* which provides that, among other things, Explanatory Notes prepared during a session of the HSC shall be deemed approved no later than the end of the second month following the month the session was closed, provided no contracting party requests the matter be referred to the Council. The amended Explanatory Note was adopted at the May 2003 session of the HSC. See 31st Session, Harmonized System Committee, Report to the Customs Co-Operation Council, NC0730E2 (HSC/31/May 2003). Therefore, under Article 8 to the HS Convention, a decision to amend the Explanatory Notes becomes final at the end of two months following the month it was adopted.

ally, it is observed that the courts have held that the Explanatory Notes are not legally binding. Commenters assert the amended Explanatory Note is not effective until the year 2007 and CBP is attempting to apply it to retroactively revoke established law. Three commenters maintain that implementation of the Explanatory Note change requires action by the International Trade Commission because it substantively changes United States law.

*Response:* It is clear from the submitted comments that there is much confusion among the commenters regarding the amendment to the Explanatory Notes for heading 9505 and the addition of legal note (v) to Note 1 of Chapter 95 (which will become effective on January 1, 2007). Many commenters are confused as to the significance of each change and the process by which each occurs.

In this case, the amendment to the Explanatory Notes is an amendment to the descriptive or explanatory language of the scope, *i.e.*, inclusiveness and exclusiveness, of heading 9505. As stated in CBP's proposed notice of June 29, 2005, the purpose of the amendments to the Explanatory Notes was to **clarify**, not change, the scope of heading 9505. The Harmonized System Committee initially sought to align the texts of the English and French versions of the Explanatory Notes to the heading. This work began at the 30th Session of the Harmonized System Committee (HSC) in the fall of 2002. As part of the alignment of texts, the English text for Part (A)(1) of heading 9505 was to be amended.<sup>13</sup> Another contracting party, not the United States, was concerned that the amendment to Part (A)(1) would be interpreted as broadening the scope of heading 9505 and therefore sought an additional amendment to restore the intended scope of heading 9505. In the working document reflecting this proposed additional amendment,<sup>14</sup> along with other amendments to the Explanatory Notes to heading 9505, the WCO Secretariat commented that:

The Secretariat wishes to draw the Committee's attention to the fact that, as indicated in Doc. NC0704E1, **the amendments under consideration are not intended to result in**

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<sup>13</sup>The language of Part (A)(1) read, prior to being amended: "Decorations such as festoons, garlands, Chinese lanterns, etc., as well as various decorative articles made of paper, metal foil, glass fibre, etc., for Christmas trees (e.g., tinsel, stars, icicles), artificial snow, coloured balls, bells, lanterns, etc. Cake and other decorations (e.g., animals, flags) which are traditionally associated with a particular festival are also classified here." The language of Part (A)(1) now reads: "Festive decorations used to decorate rooms, tables, etc. (such as garlands, lanterns, etc.); decorative articles for Christmas trees (tinsel, coloured balls, animals and other figures, etc); cake decorations which are traditionally associated with a particular festival (e.g., animals, flags)."

<sup>14</sup>The language of the amendment is as follows: The heading also **excludes** articles that contain a festive design, decoration, emblem or motif and have a utilitarian function, e.g., tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen.

**a change of scope.** An examination of the comments reproduced above reveals that the purpose of the proposal is to further clarify the legal text of heading 95.05. Thus, the proposed texts put forward by . . . – to be inserted as exclusions – serve to supplement the existing Explanatory Notes.

Therefore, the Secretariat considers that these new indications will make it possible to avoid any risk of misclassification in this heading of articles (other than toys) which fall to be classified elsewhere in the Nomenclature.

[Emphasis added.] See 31st Session, Harmonized System Committee, Working Documents, NC0716E1 (HSC/31/April 2003).<sup>15</sup>

As noted in the notice of proposed action, the Court of International Trade and the Court of Appeals for the Federal Circuit did not have an opportunity to fully consider the clarifying amendment to the Explanatory Notes for heading 9505 in reaching their decisions in *Park B. Smith*. The Government in a footnote in its response to plaintiff's request for a rehearing did note the amendment of the Explanatory Notes;<sup>16</sup> however, the effect of the amendment was never fully vetted before the courts or directly addressed by the courts.

The assertions that CBP views amendments to the Explanatory Notes as binding on the United States or having the same force and effect as a statutory amendment are mistaken. Classification rulings classifying merchandise under the Harmonized Tariff Schedule of the United States issued by the Office of Regulations and Rulings, Washington, D.C., Headquarters office virtually always clearly state that:

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 Explanatory Notes provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of

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<sup>15</sup> CBP notes an error in the number of contracting parties cited in the notice of proposed action published in the *Customs Bulletin*, Volume 39, Number 27, on June 29, 2005. The statement in error is: "The amendment was accepted by consensus and implemented by the over 160 contracting parties to the Harmonized System. See Working Documents, NC0730E2 (HSC/31/May 2003)." The amendment was accepted by consensus with 59 contracting members present. At the time of the 31st Session of the Harmonized System Committee, there were 112 contracting parties to the Harmonized System. CBP regrets the error in the notice of proposed action and believes it arose from inadvertently looking to the membership of the World Customs Organization of which there are over 169 members.

<sup>16</sup> Some commenters argue that the fact the Government had raised the amended Explanatory Note in a footnote in the Government's response to the plaintiff's request for a rehearing means the court had notice of the Government's position and therefore the amendment to the Explanatory Note cannot be used as a reason to limit the courts' decisions.

these headings. See, T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

CBP recognizes the difference between a change in the Explanatory Notes, which helps us understand the intended scope of the headings of the *Harmonized System*, and a change in the legal notes of the HTSUS which has legal effect.

We agree with commenters that the courts have held that the Explanatory Notes are not legally binding. However, as noted in the notice of proposed action, the courts have consistently stated that the Explanatory Notes are instructive in interpreting the scope of the headings of the HTSUS. The Court of International Trade in *Sabritas, S.A. de C.V. and Frito-Lay v. United States*, 22 Ct. Int'l Trade 59, 998 F. Supp. 1123 (1998) stated that "in determining whether an item is properly classified under a particular heading in the HTSUS, the Explanatory Notes are persuasive authority for the Court when they specifically include or exclude an item from a tariff heading." In *Bausch & Lomb, Inc. v. United States*, 21 Ct. Int'l Trade 166, 174, 957 F. Supp. 281, 288 (1997) the court looked to the Explanatory Notes and found them persuasive because they expressly included electric toothbrushes under heading 8509. More recently, in *Simon Marketing, Inc. v. United States*, 395 F. Supp. 2d 1280 (September 1, 2005), the court looked to the Explanatory Notes for Chapters 91 and 95 in determining that the merchandise at issue, a Pop Topper, could not be excluded from classification under Chapter 91. The court obviously gave thoughtful consideration to the Explanatory Notes in that case and concluded that CBP had properly read the Explanatory Notes together.<sup>17</sup> CBP believes the consideration of the clarified Explanatory Notes to heading 9505 by the courts and the opportunity to fully argue the significance of this clarification and its relation to the interpretation of the scope of heading 9505 is extraordinarily important to the proper classification of merchandise currently classified outside of heading 9505, but arguably affected by the decisions in *Park B. Smith*.

In addition to the amendment to the Explanatory Note for heading 9505, the Harmonized System Committee agreed to certain amendments to the Harmonized System nomenclature including a new provision (v) to be added to Note 1 of Chapter 95. This change in the nomenclature will become effective for contracting parties to the Convention on January 1, 2007 pursuant to Articles 3 and 16 of the Convention. Note 1(v) of Chapter 95 will provide – "This chapter

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<sup>17</sup> CBP notes that the Court in *Simon Marketing, Inc.* stated with regard to the Explanatory Notes: "Additionally the Explanatory Notes are not legally binding on the United States, yet they 'generally indicate the 'proper interpretation' of provisions within the HTSUS. . . . [and] **are persuasive authority for the Court when they specifically include or exclude an item from a tariff heading.**' *Sabritas*, 22 CIT at 62, 998 F. Supp at 1127; see also *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994)."

does not cover: Tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles having a utilitarian function (classified according to their constituent material).”

A review of the HSC documents regarding the change in the nomenclature, that is, the change to legal Note 1 of Chapter 95, indicates that the Secretariat of the Harmonized System was of the opinion that the amended text for Note 1 of Chapter 95 would not result in the change in classification of any goods. See 32nd Session, Harmonized System Committee, Working Documents, NC0743E1 (HSC/32/October 2003). In the document reflecting the proposal to amend the legal text introduced in the Harmonized System Review Sub-Committee (RSC), the proponent of the amendment acknowledged concern over arguments that the scope of the phrase “festive articles” should be broadly interpreted and stated that its proposal “will maintain the **current scope** of the heading and provide legal backing for the Explanatory Notes.” See 28th Session, Harmonized System Review Sub-Committee, Working Documents, NR0451E1 (RSC/28/July 2003). As the Secretariat noted in its comments in the proposal document, the proposal “would make the present text of the Explanatory Note to heading 95.05, page 1917, adopted by the Committee at its 31st Session, into a legal Note. This new text would clarify the scope of heading 95.05.” *Id.* Clearly, the new legal note language was viewed as nothing more than a clarification of the existing scope of the heading.

Subtitle B of Title I of the Omnibus Trade and Competitiveness Act of 1988 (the 1988 Act) approved the United States’ accession to the International Convention on the Harmonized Commodity Description and Coding System, which was completed in Brussels on June 14, 1983, under the auspices of the Customs Cooperation Council. Pursuant to the provisions of sections 1205 and 1206 of the 1988 Act, codified at 19 U.S.C. 3005 and 3006, an administrative procedure was created that allows the President to proclaim certain types of modifications to the HTS, including changes needed to bring the HTS into conformity with proposed amendments of the HS nomenclature. The amendment of Note 1 of Chapter 95 is just such a change. It is that change, the change in the language of the legal note, and not the change in the Explanatory Note, that requires action by the International Trade Commission and the President as it is a change to the HTSUS, which is codified at 19 U.S.C. 1202.

Accordingly, CBP is not seeking to apply the amended Explanatory Note retroactively or retroactively revoking established law. CBP continues to apply its interpretation of the decision of the court in *Midwest*. However, CBP views the clarification of the Explanatory Note as supportive of the interpretation that CBP has held from the implementation of the HTSUS regarding the classification of utili-

tarian articles as not “festive articles” of heading 9505.<sup>18</sup> Moreover, several pending court cases regarding the classification of “festive articles” reflect the fact that the issue is not resolved at this time.

*Comment:* Some commenters raised the notice by the International Trade Commission (ITC), published in the *Federal Register*, 69 Fed. Reg. 55461 (September 14, 2004), entitled *Proposed Modifications to the Harmonized Tariff Schedule of the United States*, as evidence that the scope of heading 9505 will not be legally changed until Note 1(v) of Chapter 95 becomes effective in the year 2007. These commenters argue that the legal note change is evidence that the Explanatory Note change is more than a “clarification” of the scope of heading 9505. Additionally, the legal note change will be effective *only if* the President proclaims the modification. The President may accept or reject the recommendations of the ITC. Three commenters stated: “Now that *Park B. Smith* has become final, the ITC is in the process of preparing breakouts in order to ensure that merchandise falling under the purview of *Park B. Smith* remains nondutiable after new Note 1(v) becomes effective. Thus, the ITC itself recognizes that new Note 1(v) will **change**, rather than **clarify**, the tariff schedule, and that its implementation is subject to the formal procedures mandated by 19 U.S.C. § 3005 in connection with substantive changes in the law. Indeed, the only legal way to effect the change sought by the *Proposal* is through the ITC protocol.”

*Response:* CBP has addressed much of this comment in the preceding comment response; in particular, the differences in the effect of the changes in the Explanatory Note for heading 9505 and the legal note change for Chapter 95. However, some points remain to be addressed. The three commenters who assert that the ITC recognizes new Note 1(v) to be a change, rather than a clarification, of the tariff schedule and “is in the process of preparing breakouts in order to ensure that merchandise falling under the purview of *Park B. Smith* remains non-dutiable after new Note 1(v) becomes effective” appear to have prematurely drawn conclusions about the outcome of

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<sup>18</sup>A review of rulings issued by CBP prior to the decision in *Midwest* shows the longstanding view of the agency that utilitarian articles were excluded from heading 9505, HTSUS. See, e.g., HQ 086768 of July 5, 1990 (classifying a Christmas basket as basketwork of heading 4602, HTSUS); HQ 087105 of May 20, 1991 (classifying a Halloween ceramic candy dish described as being in the shape and color of a pumpkin and with a jack o’ lantern face in heading 6912, HTSUS, which provides for “ceramic tableware, kitchenware, other household articles and toilet articles, other than of porcelain or china”); HQ 089147 of August 9, 1991 (classifying “Decorative Christmas Gift Boxes” as other made-up textile articles of heading 6307, HTSUS); HQ 089158 of August 16, 1991 (classifying a “Pumpkin Power” lantern with a jack o’ lantern face painted on it as a portable electric lamp of heading 8513, HTSUS); and HQ 951621 of August 14, 1992 (classifying decorated ceramic trivets (flying reindeer with two children in winter attire on its back and adorned with bells, candy canes and ornaments; poinsettias; holly on a red background; and a rocking horse with a holly wreath around its neck) in heading 6912, HTSUS, which provides for “ceramic tableware, kitchenware, other household articles and toilet articles, other than of porcelain or china”).

the 1205 Investigation No. 1205–6. Simply put, the ITC has not concluded its investigation and has not issued a report to the President under 19 U.S.C. 3005 regarding its recommendations for changes in the HTSUS. Until the ITC finalizes its report, we do not know what conclusions it may have or will reach.

Regarding the commenters' assertion that the legal note change, Note 1(v) of Chapter 95, will become effective only if the President proclaims it and he may accept or reject the recommendations of the ITC, the commenters are correct that the President decides what changes will be proclaimed. Under 19 U.S.C. 3006, the President may proclaim modifications to the HTSUS, based on the recommendations made by the ITC under 19 U.S.C. 3005, if the President determines that the modifications "[ ] are in conformity with United States obligations under the Convention; and [ ] do not run counter to the national economic interest of the United States." 19 U.S.C. 3006. The statute also provides for a lay-over period which begins on the date the President submits a report to the House Ways and Means Committee and the Senate Finance Committee. However, whether the President will or will not proclaim a change to the HTSUS to adopt this new Note 1(v) of Chapter 95 is not relevant to CBP's proposal to limit the application of the courts' decisions in *Park B. Smith*.

Some commenters argue the only legal way to effect the change sought by the *Proposal* is through the ITC "protocol". CBP is not attempting to accomplish what these commenters would ascribe to it. CBP's proposal was quite simple, to limit the application of the decisions of the courts in *Park B. Smith* in order to have an additional opportunity to present its views regarding the meaning of the term "festive articles" before the court. As already stated in this document, CBP is seeking *Skidmore* deference for its position and wants the opportunity to request the court consider the impact of the clarification of the Explanatory Notes to heading 9505.

*Comment:* One commenter claims that "CBP turned to the World Customs Organization, and proposed amendments to the Explanatory Note to Heading 9505." The commenter quotes from a WCO document regarding the proposed change to the Explanatory Note, and although the commenter acknowledges that the public versions of WCO documents are redacted so that the identities of contracting parties advocating a position are not revealed, the commenter is certain that the proponent of the proposed change is the U.S. administration. This commenter claims that CBP put forward the proposal for the Explanatory Notes and is now relying upon the acceptance of that proposal and amendment of the Explanatory Notes to justify limiting the decisions in *Park B. Smith*. Three more commenters state that they "understand that U.S. Executive Branch representatives at the World Customs Organization ("WCO") may have used their influence to secure the amendment and insert the specific ex-

amples of excluded utilitarian items into the amended Note (such as those items at issue in *Park B. Smith*.)”

*Response:* The commenters are mistaken. The United States did not propose the amendment to the Explanatory Notes to heading 9505, nor did the United States propose the amendment to Note 1 of Chapter 95. Another administration sought these changes and proposed the language for each change.

*Comment:* One commenter states that the amendment to the Explanatory Notes was proposed by Canada and reflects Canadian law, not U.S. law. This commenter argues that the amendment reflects the current law of Canada. Others argue that the amendment was “engineered partly at the behest of the Canadian government in order to resolve linguistic tensions between the French and English versions of the Canadian tariff schedule” and therefore “falls far from illuminating the intent of the U.S. Congress.” These commenters cite to the Federal Circuit’s decision in *Park B. Smith* wherein the court concluded that its reading of Exclusionary Note 1(t) of Section XI of the HTSUS, along with other Notes exempting “festive articles” from various classifications throughout the tariff, supported an interpretation that congressional intent was to favor “festive articles” for tariff purposes and exempt such articles from classification in a heading other than 9505, except those articles explicitly excluded from Chapter 95. See *Park B. Smith*, 347 F.3d at 927–928. Other commenters take issue with CBP raising the decisions of other customs administrations regarding the classification of various articles as other than “festive articles” although the articles exhibited symbols or motifs of Christmas. These commenters argue the notice of proposed action “incorrectly seeks to buttress its legal argument by reliance on precedent in other countries”; however, they do acknowledge that these administrative decisions referenced by CBP may be instructive. The commenters further argue though that these foreign decisions are of no consequence as “[t]he United States surrendered no sovereignty when it acceded to the [Harmonized System], and it is not obligated to apply the Harmonized System uniformly with the other Contracting Parties. ‘Guidance For Interpretation of Harmonized System’, 23 *Cust. Bull.* 379–380, T.D. 89–80.” *Jewelpak Corp. v. United States*, 950 F. Supp. 343, 350 (CIT 1996), *aff’d* 297 F.3d 1326 (Fed. Cir. 2002).

*Response:* With regard to the commenters who infer that the amendment to the Explanatory Notes was only a matter of importance to Canada, and in particular with regard to the commenter who stated that it is a reflection of Canadian law, these commenters exhibit a lack of understanding of the Harmonized System and the role of the Harmonized System Committee which determined the amendment should be adopted. As explained by the Court of International Trade in *Cummins Incorporated v. United States*, 377 F. Supp. 2d 1365 (decided May 17, 2005), *appeal pending*.

. . . The HTSUS is predicated on the HTS which was the culmination of an **international effort** to create a single commodity coding system (tariff classification system) across nations. See *Faus Group Inc. v. United States*, 28 CIT , , 358 F. Supp. 2d 1244, 1247 n.5 (2004). Two of the harmonized system's essential purposes are to (1) facilitate the computation of trade statistics and (2) establish a standard product descriptor to provide a basis for trade concessions and predictability for international commerce. See GATT, Analytical Index: Guide to GATT Law and Practice 101 (6th ed. 1994). . . . [Emphasis added].

*Cummins*, 377 F. Supp. 2d at 1368.

There are currently 119 contracting parties to the Harmonized System Convention.<sup>19</sup> To assert that a single contracting party is responsible for the committee action indicates a lack of understanding for the HSC process and disparages the role of the remaining contracting parties.

As to the comments regarding the intent of Congress, with regard to the Explanatory Notes to the Harmonized System, the Court of International Trade stated in *Bausch & Lomb*, 957 F. Supp. at 288:

“It is well settled that tariff acts must be construed to carry out the intent of the legislature.” [citations omitted.] The intent of the legislature is manifested in Congress's endorsement of the Customs Cooperation Council's (“CCC”) Explanatory Notes, and the Explanatory Notes under Subheading 8509 included the precise merchandise at issue: “(B)(7) Electric tooth brushes”. . . . The Court finds that the Explanatory Notes are persuasive because they expressly include electric toothbrushes under Heading 8509. . . .

As noted in the notice of proposed action, in *Jewelpak Corporation v. United States*, 20 Ct. Int'l Trade 1402, 950 F. Supp. 343 (1996), the Court of International Trade cited the *Report of the Joint Comm. On The Omnibus Trade and Competitiveness Act*, P.L. 100-418, H. Conf. Rep. No. 100-576, 100th Cong., 2nd Sess., at 549, wherein Congress stated, in relevant part:

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<sup>19</sup>“The Harmonized Commodity Description and Coding System, generally referred to as “Harmonized System” or simply “HS”, is a multipurpose international product nomenclature developed by the World Customs Organization (WCO). It comprises about 5,000 commodity groups, each identified by a six digit code, arranged in a legal and logical structure and is supported by well-defined rules to achieve uniform classification. **The system is used by more than 177 countries and economies** as a basis for their Customs tariffs and for collection of international trade statistics. Over 98% of the merchandise in international trade is classified in terms of the HS.” [Emphasis added]. See, General Information, *Convention on the Harmonized Commodity Description and Coding System*, at the web site for the WCO: [www.wcoomd.org/ie/En/Conventions/conventions.html](http://www.wcoomd.org/ie/En/Conventions/conventions.html).

The Explanatory Notes were drafted subsequent to the preparation of the Harmonized System nomenclature itself, and will be modified from time to time by the CCC's [Customs Cooperation Council] Harmonized System Committee. Although generally indicative of proper interpretation of the various provisions of the Convention, the Explanatory Notes, like other similar publications of the Council, are not legally binding on the contracting parties to the Convention. Thus, while they should be consulted for guidance, the Explanatory Notes should not be treated as dispositive.

*Jewelpak*, 20 Ct. Int'l Trade at 1410.

The court specifically noted that "Congress recognized that the Explanatory Notes would be occasionally modified, and could still be 'consulted for guidance.'" *Id.*, at 1411.

Returning to the court's discussion in *Cummins* of the HTSUS and its relation to the Harmonized System, the court stated therein: "From this brief survey of the statutory landscape it is clear that Congress intended, in large measure, to harmonize United States tariff classifications with the recommendations of the WCO." *Cummins* at 1369. The court discussed the value of the Explanatory Notes, stating that they had particular relevance in that case as the heading at issue was drafted at the international level. Additionally, the court expressed its view of the importance of classification opinions issued by the WCO as part of its Compendium of Classification Opinions.<sup>20</sup>

For the United States to defect from the international norm would frustrate the objectives of a harmonized tariff system. See 19 U.S.C. 3005(a)(2). This, in turn, would create uncertainty in international trade and commerce which the WCO was created to avoid. [footnote omitted]. Furthermore, it is unlikely that Congress would have established procedures for seeking guidance from the WCO, see 19 U.S.C. §§ 3010(b)(2)(C) & 3010(c), only to have the Court entirely ignore this guidance. [footnote omitted]. . . . Additionally, as the chief architect of the HTS(US), the WCO's objective interpretations of the language it devised should be given respect.

*Cummins* 377 F. Supp. 2d at 1375–1376.

Thus, CBP has concluded that the intent of Congress was for serious consideration to be given to the language of the Explanatory

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<sup>20</sup> CBP has taken the position that "[w]hen a decision of the HSC is published in the Compendium it should receive the same weight as ENs. They constitute the official interpretation of the HS in consideration of a particular issue placed before the HSC." See "Guidance For Interpretation of Harmonized System", 23 *Customs Bulletin*. 379, Treas. Dec. 89–80.

Notes and any amendments to those Notes in determining the proper classification of merchandise. While the Explanatory Notes are not legally binding, as the Court noted in *Cummins*, the Explanatory Notes are important guidance and, like the Classification Opinions of the Harmonized System Committee, changes in the Explanatory Notes should be given respect.

CBP notes that in CBP's notice, "Guidance For Interpretation of Harmonized System", 23 *Customs Bulletin*. 379, Treas. Dec. 89-80, cited by some commenters, CBP also stated that while "[t]here is, as such, no obligations on Contracting Parties for uniform application of the HS[,] [t]here is, however, an obligation on Contracting Parties to 'not modify the scope of the sections, chapters, headings or subheadings of the Harmonized System.'"<sup>21</sup> The obligation not to modify the scope of a heading is another reason that CBP is choosing to take this action to limit the application of the courts' decisions in *Park B. Smith* and seek reconsideration of the meaning of "festive articles" by the court in light of the amended language of the Explanatory Notes for heading 9505 and the clarification of the intended scope of that heading.

As to the objections raised against CBP's reference to classification decisions of other customs administrations in which various articles exhibiting recognized symbols or motifs of Christmas were classified as articles in provisions of the Harmonized System other than the provision for "festive articles" of heading 9505, the purpose in citing these decisions was to illustrate the understanding of the scope of heading 9505, before the amendment to the Explanatory Notes and after the amendment, by other customs administrations utilizing the Harmonized System. We reject the assertions of commenters that citation of these decisions was improper and that these decisions are of no consequence. While such decisions are by no means binding, they are, as the commenters themselves acknowledge, instructive and serve to reveal how other customs administrations interpret the scope of heading 9505. This information is useful in determining whether classification decisions may be at risk of modifying the scope of the sections, chapters, headings or subheadings of the Harmonized System in violation of Article 3 of the Convention as it reveals how our trading partners utilizing the Harmonized System view the scope of a particular heading.

*Comment:* Some commenters reject as without merit CBP's contention in the notice of proposed action that failure to limit the decisions in *Park B. Smith* would present CBP with extraordinary administrative difficulties. They argue that CBP is in the business of examining merchandise and making multifaceted use determinations to classify merchandise properly. The commenters argue that

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<sup>21</sup> See Article 3 of the *International Convention on the Harmonized Commodity Description and Coding System*.

examining imported merchandise to determine its classification is a responsibility of importers and CBP. Commenters assert that administrative difficulty is an insufficient reason for CBP ignoring settled law and limiting the courts' decisions.

*Response:* CBP agrees with the commenters that administrative difficulty alone would be insufficient reason for CBP to limit the application of decisions of the courts. However, as discussed in this document, there are many reasons CBP is taking this action. Also, we believe the commenters did not understand the point which CBP was making in the notice of proposed action which was that the scope of merchandise subject to the two-prong test as applied in *Park B. Smith* grew expansively with the decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit to arguably encompass merchandise never before considered to be, or for which classification had been sought as, "festive articles." Under the *Park B. Smith* decisions, the range of articles subject to possible classification as "festive articles" has grown to encompass nearly the entire tariff schedule. Like the court in discussing the classification of toys in *Simon Marketing, Inc. v. United States*, 395 F. Supp. 2d 1280 (September 1, 2005) wherein it stated that "[t]o classify every eye-catching, child-friendly article as a toy, simply because it enhances a child's imagination, is to unacceptably blur the HTSUS headings defeating their purpose and leading to absurd results[.]" CBP fears such a blurring of headings if the *Park B. Smith* decisions are not limited in application.<sup>22</sup>

*Comment:* One commenter stated that "articles that incorporate holiday symbols, themes, or motifs that meet the *Midwest of Cannon Falls* two-part test for inclusion in heading 9505, HTSUS, are easy to identify because the typical holiday symbol is so pervasive and ingrained in American culture that such a symbol is universally recognized as related to a particular holiday." Another commenter argues that typical holiday symbols are easy to identify, are pervasive throughout American culture, are ingrained in the American psyche and are universally recognized as related to a particular holiday.

*Response:* As already stated in this document, CBP is limiting the application of the decisions of the courts in *Park B. Smith*, not in *Midwest*. CBP continues to apply the *Midwest* decision to merchandise of substantially the same nature as the merchandise before the court in that case. However, as to the ease of identifying holiday symbols, on the basis of its experience in this area, CBP must disagree with the commenters. It is true that some symbols like Santa

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<sup>22</sup> See also *Processed Plastic Company v. United States*, 395 F. Supp. 2d 1296, 1302 n.9 (Ct. Int'l Trade 2005), wherein the court stated: "The mere fact that an article incorporates graphics of popular children's characters does not necessarily make that article a 'toy' for tariff purposes. A child's sweater does not become a 'toy' simply because it is decorated with images of Winnie the Pooh or Barbie."

Claus or jack-o-lanterns are easily recognizable symbols. However, the United States is a constantly changing diverse, multicultural society. As such, there are holidays recognized today which were little known in this country fifty or even twenty years ago.<sup>23</sup> Nevertheless, the commenters are correct that CBP and importers must make determinations regarding holidays and holiday symbols regardless of whether *Park B. Smith* is limited.

*Comment:* One commenter asserts that CBP has violated a Treasury Decision in which CBP took the position that the agency would give effect to adverse final court decisions unless it issued a limiting ruling within 180 days. The commenter quoted a sentence from the Treasury Decision wherein it was stated: “Neither T.D. 78–302 nor the Customs Regulations intended in any way to question the binding effect of a final adverse judicial decision, or the obligation of the Customs Service to abide by that decision, in respect to the entries which are the subject of the case before the court.” We note the commenter failed to include the language at the end of the statement after the comma.

*Response:* First we note that the commenter was quoting from Treasury Decision 78–141, dated November 29, 1978, and published in the *Federal Register* on December 6, 1978 (43 Fed. Reg. 57208). That decision modified Treasury Decision 78–302 and restated the procedures to be followed regarding unliquidated entries and pending protests not specifically the subject of a judicial decision adverse to the government, but to which the principles of the decision would apply. The commenter is correct that the Treasury Decision specified that “the limiting ruling shall be published as soon as practicable, but not later than 180 days after issuance of the adverse decision.”

As CBP stated in the notice of proposed action, the *Park B. Smith* litigation had a long history which did not come to an end until the Stipulated Judgment Order was issued on April 6, 2005. It was not until that point in time, when the litigation came to an end, that CBP believed it appropriate to go forward with a notice of proposed action. CBP’s notice of proposed action to limit the application of the decisions in *Park B. Smith* was published in the *Customs Bulletin* on June 29, 2005.<sup>24</sup> A period of 84 days passed between the issuance of the Stipulated Judgment Order and the publication of the notice of proposed action. To have issued a notice of proposed action to limit

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<sup>23</sup>Today, a segment of the American society celebrates Kwanzaa, a celebration of traditional African values begun in 1966. See <http://www.tike.com/celeb-kw.htm>. We have had postage stamps issued to commemorate Eid, an Islamic holiday that marks the end of Ramadan. See Wikipedia, the free encyclopedia at [http://en.wikipedia.org/wiki/Eid\\_ul-Fitr](http://en.wikipedia.org/wiki/Eid_ul-Fitr). These stamps were first issued on September 1, 2001. More recently, it was reported in various news sources that there is a movement to have the Lunar New Year, also known as Chinese New Year, declared a federal holiday.

<sup>24</sup>39 *Customs Bulletin* 33 (June 29, 2005).

the application of the decisions prior to the litigation coming to an end would have been improper, premature and disruptive of the judicial process.

Additionally, CBP notes that the Treasury Decision cited by the commenter predates the statutory authority upon which CBP relies in taking this action. The language of 19 U.S.C. 1625(d) does not impose a time frame upon CBP for taking action in limiting the application of a court decision. It only requires publication in the *Customs Bulletin* of CBP's proposed action and opportunity for public comment prior to issuance of a final decision. CBP has met this statutory requirement.

*Comment:* One commenter expressed the view that CBP's decision to limit the application of the decisions in *Park B. Smith* was premature as the effect or applicability of the amended Explanatory Notes on the classification of articles under heading 9505 was not discussed. Additionally, this commenter suggests that CBP extend liquidation of all entries of goods entered as "festive articles" and postpone decisions on any relevant protests pending a final decision in another festive articles case where CBP has asserted the Explanatory Notes amendment. The commenter claims grounds for extension of liquidation under 19 U.S.C. 1504 are clearly present.

*Response:* CBP disagrees with the commenter's assertion that this action is premature. We believe it is timely and appropriate. As to the suggestion that liquidations be extended for entries of all goods entered as "festive articles", we believe the commenter's suggestion is overly broad. On June 28, 2005, one day prior to the publication of the notice of proposed action, CBP's Office of Regulations and Rulings issued a Notice to Directors in the Office of Field Operations providing guidance on the classification of festive articles pending resolution of the notice of proposed action. This memorandum is available to the public on the CBP web site. The notice advised importers seeking classification as "festive articles" of merchandise which fell within the descriptions of merchandise subject to pending court cases or seeking classification of merchandise as "festive articles" based on the court decisions in *Park B. Smith* that they may request suspension of liquidation of their entries or file a protest against liquidation of their merchandise in provisions of the tariff schedule other than as "festive articles" of heading 9505. Therefore, we believe the concerns of the commenter regarding entries of merchandise as "festive articles" in which there may be disagreement between CBP and the importer have been addressed.

*Comment:* Five commenters disputed CBP's view expressed in the notice of proposed action that U.S. industries competing with importers receiving a "festive articles" classification denied U.S. exporters of like merchandise by our trading partners would find themselves at a disadvantage. They all argue that the argument is without merit. They state that "festive articles" under the HTSUS

must incorporate symbols of recognized U.S. holidays and therefore a market for such products does not exist outside the United States. Regarding holidays such as Christmas, Easter, Valentine's Day, Chanukah and Halloween, two commenters state that these holidays have religious origins and are not celebrated worldwide. The commenters argue that the worldwide market, or overseas markets, for products with symbols associated with these holidays is limited. Three commenters view CBP's argument as speculative and assert that CBP offered no proof of differences in pertinent duty rates.

*Response:* Upon reflection, CBP believes that comparisons between United States and foreign treatment should be confined to comparisons of the tariff classification of merchandise. However, duty rates are a matter of record.<sup>25</sup> The observation was included in the notice of proposed action, not as a basis for taking the action, but simply to point out that the effect of the decision in *Park B. Smith* would be for the United States to be classifying merchandise in a manner incompatible with other administrations.

*Comment:* Several commenters argue that if CBP finalizes its proposed action it is taking an action which is frowned upon by the courts. Commenters argue that CBP is simply refusing to accept the courts' decisions and that the courts have warned CBP against ignoring court decisions in *Boltex Manufacturing Company, L.P. v. United States*, 140 F.Supp. 2d 1339 (Ct. Int'l Trade 2000) and *Orlando Food Corp. v. United States*, 21 Ct. Int'l Trade 187 (1997), *aff'd*, 140 F.3d 1437 (Fed. Cir. 1998).

*Response:* CBP believes the situation in this case is clearly distinguishable from the circumstances in *Boltex* and *Orlando Food*. In *Orlando Food*, the Court of International Trade relied upon its decision in *Nestle Refrigerated Food Co. v. United States*, 18 Ct. Int'l Trade 661. CBP had proposed to limit the decision of the court in *Nestle* and the court made known its disapproval of CBP's action in its decision in *Orlando Food*. Although *Nestle* had been appealed, a stipulated settlement was reached before the Federal Circuit heard the case. The proposal to limit *Nestle* was viewed by the court as a circumvention of the judicial process in that case. The court's decision reflects that it believed an appeal was the appropriate action for CBP to take, not a proposal to limit the court's decision.

The situation is clearly different in *Park B. Smith*. CBP did appeal the decision of the Court of International Trade to the Federal Circuit. As the Federal Circuit affirmed in part, vacated in part, and remanded the case, CBP is limiting the decisions in *Park B. Smith* of the Court of International Trade and the Federal Circuit. Additionally, we note that the proposal to limit *Nestle* was never finalized.

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<sup>25</sup> CBP reviewed tariff rates for woven cotton table linen and festive articles in other countries' tariff schedules including the Canadian Customs Tariff Schedule, the Australian Customs Tariff Schedule, and the European Union Common Customs Tariff.

In *Boltex*, the action taken by CBP was not publication of a limiting decision, but publication of the agency's interpretation of the effect of various court decisions on the distinction between producers' goods and consumers' goods in determining the country of origin of goods for marking purposes. Based upon the agency's reading of various court cases, CBP decided to no longer apply the producers' goods – consumers' goods analysis articulated in *Midwood Industries Inc. v. United States*, 313 F. Supp. 951 (Cust. Ct. 1970), *appeal dismissed* 57 CCPA 141 (1970). Boltex Manufacturing challenged CBP's decision. The court found that CBP had failed to provide the factual analysis to support the position it was taking, *i.e.*, "that imported forgings are not substantially transformed in the United States by the processes performed in converting them to pipe fittings and flanges."<sup>26</sup> The court viewed CBP's action, not as limiting a court decision<sup>27</sup>, but as abrogating *Midwood*, and thus beyond the authority of the agency.

In this case, CBP has adhered to the requirements of 19 U.S.C. § 1625 and has endeavored to present a well-reasoned explanation for our decision to take this action. We are not ignoring *Park B. Smith*, but exercising our authority to limit the decision. It will be for the court to decide "if it finds a rational connection between the agency's factfinding and [our] ultimate action." *See Boltex* 140 F.Supp. 2d at 1347.

*Comment:* All of the commenters expressed the view that should CBP limit the application of the courts' decisions in *Park B. Smith* it simply would not be fair. Importers need certainty and importers

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<sup>26</sup> *Boltex Manufacturing Company, L.P. v. United States*, 140 F.Supp. 2d 1339, 1353 (Ct. Int'l Trade 2000).

<sup>27</sup> Indeed, the court recognized CBP's authority to limit a court decision citing to "*J.E. Bernard & Co., Inc. v. United States*, 66 Cust. Ct. 545, 550, 324 F. Supp. 496, 503 n.9 (1971) (noting that each importation is a separate cause of action)" and "19 U.S.C. § 1514(c) (1994) (providing for filing a protest for each entry)." *Boltex*, 140 F.Supp. 2d at 1346. In discussing 19 U.S.C. 1625(d), the statutory authority by which CBP may limit a court decision, and the authority CBP is exercising in this action, the court stated, at 1346 – 1347:

... Whereas before the statute's enactment, Customs could exercise that authority [the authority to limit a court decision] without providing an opportunity for notice and comment; in passing § 1625(d), Congress intended to, and did, impose a notice and comment requirement whenever Customs chose to limit a court decision.

The legislative history of § 1625(d) explains that the purpose of the statute is to "provide assurances of transparency concerning Customs rulings and policy directives through publication in the Customs Bulletin or other easily accessible source." H.R. REP. NO. 103-361 at 124 (1993), reprinted in 1993 U.S.C.C.A.N. 2552, 2674. The requirement of publishing and soliciting comments on a decision to limit a judicial holding also acts to alert any importers that could be adversely affected by the limitation to challenge the limitation administratively, and if unsuccessful, to seek prompt review in this court pursuant to 28 U.S.C. § 1581(h). [footnote omitted.] It therefore embodies within the statute an early warning system for aggrieved importers, and notifies the agency that it may be required to defend its decisions before this court. As discussed, the court will affirm any contested limitation decisions if it finds a rational connection between the agency's factfinding and its ultimate action. [citation omitted.]

will be disadvantaged. They argue orders have been placed based on the law as defined by *Midwest* and *Park B. Smith* and they will be significantly harmed if their goods are classified as other than “festive articles.” Among other things, they claim that CBP is using 19 U.S.C. 1625(d) to avoid an unfavorable court decision, attempting to legislate and overrule prior judicial decisions, exercising an inappropriate use of its authority, making an egregious attempt to abrogate the law of the land, seeking to achieve an unlawful change to the statute and violating congressional intent, committing an affront to the separation of powers and violating the principles of our Constitution, and engendering more litigation thus violating the fundamental policy of having litigation come to an end. One commenter stated that only an act of Congress could limit a court decision. Some commenters argue that CBP is merely making classification of merchandise more difficult, replacing a determination of whether something is “festive” with whether it is decorative or utilitarian. Commenters also argue that CBP has no meaningful likelihood of success before the court.

*Response:* As already discussed in this document, Congress, in 19 U.S.C. 1625(d), authorized CBP to issue decisions limiting court decisions with a requirement that such decisions be published and subject to public notice and comment. CBP has met the requirements of 19 U.S.C. 1625(d). We recognize that limiting the application of the decisions in *Park B. Smith* will impact some importers, but as already stated earlier in this document, we do not believe the issue of classification of merchandise as “festive articles” is an area of settled law. There are currently several pending court cases on various products for which classification of “festive articles” is the issue before the court. An importer exercising reasonable care would not only be aware of the decided cases issued by the courts, but also of the pending cases which may impact the classification of his merchandise. As stated in the response to the previous comment, CBP believes we have valid reasons for taking this action and we will leave it to the court to decide.

*Comment:* One commenter stated “if Customs seeks to limit the decision in *Park B. Smith* to the entries at issue in that test case, and refuses to apply the CAFC’s decision to *Park B. Smith*’s other entries involving goods that are identical in all material respects to the merchandise at issue in the test case, Customs would be severely frustrating the Court of International Trade’s administrative procedures, which are designed to streamline litigation and avoid clogging the court with a mass of full-blown, duplicative litigation. [footnote omitted].”

*Response:* CBP recognizes the importance of the administrative procedures of the court under Rule 84 and Rule 85 which set forth the rules for the Suspension Calendar and Suspension Disposition Calendar, respectively. There are certain procedures to be followed

under Rule 85 for removal of cases from the Suspension Disposition Calendar which is established for actions suspended under a test case after the test case is finally determined, dismissed or discontinued. Rule 85(c) provides that:

An action may be removed upon (1) filing of a complaint, (2) filing of a demand for an answer when a complaint previously was filed, (3) granting of a motion for consolidation pursuant to Rule 42, (4) granting of a motion for suspension under another test case pursuant to Rule 84, (5) filing of a stipulation for judgment on an agreed statement of facts pursuant to Rule 58.1, (6) granting of a dispositive motion, (7) filing of a request for trial, or (8) granting of a motion for removal.

The decision of CBP to limit the application of a court decision to the entries at issue before the court in a specific case cannot be affected by whether or not the case under consideration has been designated as a test case. A decision to limit the application of a court decision is not taken lightly, but CBP must be clear on the scope of the limiting decision. Under Rule 85, USCIT Rules, there are options available to plaintiffs in cases which were placed on the Suspension Disposition Calendar, including moving for suspension of cases under another test case pursuant to Rule 84. As has already been mentioned, there are several cases pending before the Court of International Trade involving the classification of merchandise wherein the plaintiffs are claiming classification of the merchandise as “festive articles.” No doubt, the meaning of the term “festive articles” and the scope of heading 9505 will be addressed in the decisions of the court on these cases. While we understand the frustration of a plaintiff who finds a decision limited to the entries before the court, we believe there are options available to such plaintiff under Rule 85, USCIT Rules.

*Comment:* Three commenters assert that the courts will not accord any deference to CBP in relitigation of the meaning of “festive articles.” These commenters claim that “the question of whether utilitarian items are encompassed by the common meaning of ‘festive articles’ is a question of statutory interpretation, and courts do not extend deference to the agency’s position on a pure question of law[.]” The commenters cite to language from the Court of Appeals for the Federal Circuit’s opinion in *Fujitsu Compound Semiconductor, Inc. v. United States*, 363 F.3d 1230, 1232–33 (Fed. Cir. 2004) and conclude that the courts will afford no deference to CBP in connection with litigation arising from any adoption of the proposed notice of action.

*Response:* CBP agrees with the commenters that the meaning of “festive articles” is a question of statutory interpretation, however we believe they are mistaken regarding whether the courts will afford CBP deference in future litigation related to this action. CBP

believes the commenters' reliance upon *Fujitsu* is misplaced. In the language from the opinion which the commenters' quote, it is clear that *Fujitsu* dealt with the "interpretation of an unambiguous statute; a question of law, including the placement of the burdens of compliance with statute and regulation. . . ." However, the court therein also stated:

Plenary review is accorded to statutory and regulatory interpretation by the Customs Service, with deference as warranted in appropriate circumstances. As explained in *United States v. Haggard Apparel Co.*, 526 U.S. 380, 394, 143 L. Ed. 2d 480, 199 S. Ct. 1392 (1999), when the Customs Service has officially and reasonably construed a statute or regulations whose provisions can reasonably be viewed as ambiguous in the application at issue, the agency's interpretation receives judicial deference, in accordance with *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

Although CBP classification ruling letters are not accorded *Chevron* deference, but accorded a lesser degree of deference, that is *Skidmore* deference (meriting respect based upon a ruling's power to persuade)<sup>28</sup>, a consideration of *National Cable & Telecommunications Association v. Brand X Internet Services*, 162 L. Ed. 2d 820, 838-839, 125 S. Ct. 2688, 2700-2701 (2005) wherein the Court addresses statutory ambiguity and deference is instructive. The Court stated, in relevant part:

*Chevron* established a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." [citation omitted]. Yet allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's. *Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps. [citation omitted]. The better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore, contains no gap for the

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<sup>28</sup>In *Mead Corp. v. United States*, 533 U.S. 218, 234-35 (2001), the Supreme Court held that, although not entitled to *Chevron* deference, CBP classification ruling letters are entitled to *Skidmore* deference.

agency to fill, displaces a conflicting agency construction.

A contrary rule would produce anomalous results. It would mean that whether an agency's interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the order in which the interpretations issue: . . . . The Court of Appeals' rule, moreover, would "lead to the ossification of large portions of our statutory law," [citation omitted], by precluding agencies from revising unwise judicial constructions of ambiguous statutes. Neither *Chevron* nor the doctrine of *stare decisis* requires these haphazard results.

The Court stated in its opinion that its prior decisions:

. . . had held that a court's interpretation of a statute trumps an agency's under the doctrine of *stare decisis* only if the prior court holding 'determined a statute's clear meaning.' *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131, 111 L. Ed. 2d 94, 110 S. Ct. 2759 (1990) (emphasis added); see also *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536–537, 117 L. Ed. 2d 79, 112 S. Ct. 841 (1992). Those decisions allow a court's prior interpretation of a statute to override an agency's interpretation only if the relevant court decision held the statute unambiguous.

*National Cable & Telecommunications Association*, 125 S. Ct. at 2701.

The term "festive articles" is not defined in the Harmonized Tariff Schedule and CBP believes the term to be ambiguous. In *Four Seasons Produce, Inc. v. United States*, 25 Ct. Int'l Trade 1395 (December 20, 2001), the Court of International Trade determined that a CBP ruling letter (Headquarters Ruling Letter 546217 of April 8, 1998) was entitled to *Skidmore* deference. The court stated therein with regard to CBP's interpretation of the term "about" in 19 U.S.C. 1401a(c):

The word "about" is not sufficiently precise to answer this question by itself. [Whether a hierarchical distinction should be applied to exportation dates solely "about" the time the Plaintiff's merchandise was exported]. Therefore, the language of the Act is ambiguous on this point. To resolve this ambiguity, the Government urges that Customs' interpretation found in the Decision Letter be accorded deference under the United States Supreme Court's holding in *Chevron*. . . . This the court declines to do. However, because Customs' interpretation of the phrase "at or about the time" is persuasive the court finds that it merits respect under *Skidmore*.

In *Warner-Lambert Company v. United States*, 425 F.3d 1381 (Fed. Cir. 2005), the court referenced *National Cable* and stated: "Al-

though *National Cable* involved *Chevron* rather than the lesser *Skidmore* deference, that does not preclude according appropriate weight to the Customs' ruling." Finally, in *Cathedral Candle Company v. United States International Trade Commission*, 400 F. 3d 1352, 1365 (Fed. Cir. 2005), the court stated: "While the *Skidmore* standard does not entail the same degree of deference to administrative decisionmaking as the *Chevron* standard, it nonetheless requires courts to give some deference to informal agency interpretations of ambiguous statutory dictates, with the degree of deference depending on the circumstances." In discussing the scope of *Skidmore* deference, the court stated: "[W]e believe the Supreme Court intends for us to defer to an agency interpretation of the statute that it administers if the agency has conducted a careful analysis of the statutory issue, if the agency's position has been consistent and reflects agency-wide policy, and if the agency's position constitutes a reasonable conclusion as to the proper construction of the statute, even if we might not have adopted that construction without the benefit of the agency's analysis." *Cathedral Candle Company* at 1366.

In summary, our interpretation of the term "festive articles" is due judicial deference in accordance with *Mead*, *Skidmore*, *Four Seasons Produce*, *Warner-Lambert Company*, *National Cable & Telecommunications Association* and *Cathedral Candle Company*. CBP regards the amended Explanatory Note as clarifying the scope of heading 9505 to not include articles having a utilitarian function. That amendment is supportive of the agency's long-held position that utilitarian articles should not be classifiable as "festive articles" of heading 9505. We are limiting the applicability of the decisions in *Park B. Smith*. We seek an opportunity to relitigate the meaning of the term "festive articles" and the scope of heading 9505 of the HTSUS based on the new Explanatory Note text. CBP will seek deference for our interpretation of "festive articles."

For the reasons set forth above in the responses to the comments received in response to CBP's notice of proposed action, CBP is limiting the application of the decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit in *Park B. Smith* to the entries which were the subject of that litigation. This action is effective upon the date of publication in the *Customs Bulletin*.

Dated: March 23, 2006

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

DEPARTMENT OF HOMELAND SECURITY,  
OFFICE OF THE COMMISSIONER OF CUSTOMS.

*Washington, DC, March 21, 2006*

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

Harold M. Singer for SANDRA L. BELL,  
*Acting Assistant Commissioner,  
Office of Regulations and Rulings.*

**PROPOSED REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CD SOFTCASE WITH INTEGRATED LOUDSPEAKER**

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

**ACTION:** Proposed revocation of a tariff classification ruling letter and revocation of treatment relating to the classification of a CD softcase with integrated loudspeaker.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), this notice advises interested parties that the Bureau of Customs and Border Protection (CBP) is proposing to revoke one ruling letter relating to the tariff classification of a CD softcase with integrated loudspeaker under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). CBP is also proposing to revoke any treatment previously accorded by it to substantially identical merchandise.

**DATE:** Comments must be received on or before May 6, 2006.

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

**FOR FURTHER INFORMATION CONTACT:** Kelly Herman,  
Tariff Classification and Marking Branch: (202) 572-8713.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of a CD softcase with integrated loudspeaker. Although in this notice, CBP is specifically referring to the revocation of New York Ruling Letter (NY) J84601, dated June 10, 2003 (Attachment A), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during the notice period.

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

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

In NY J84601, CBP ruled that the "I'm A Speaker" CD softcase with integrated loudspeaker was classified in subheading 8518.21.0000, HTSUSA, which provides for "Loudspeakers, whether or not mounted in their enclosures; Single loudspeakers, mounted in their enclosures." Since the issuance of that ruling, CBP has reviewed the classification of this item and has determined that the cited ruling is in error, and that the CD softcase with integrated loudspeaker should be classified in subheading 4202.92.9050, HTSUS, which provides for "Trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper: Other: With outer surface of sheeting of plastic or of textile materials: Other: Other: Other: Cases designed to protect and transport compact disks (CD's), CD ROM disks, CD players, cassette players and/or cassettes."

Pursuant to 19 U.S.C. 1625(c)(1), CBP is proposing to revoke NY J84601 and is proposing to revoke or modify any other ruling not specifically identified, to reflect the proper classification of the CD softcase with integrated loudspeaker according to the analysis contained in Headquarters Ruling Letter (HQ) 968051, set forth as Attachment B to this document. 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, we will give consideration to any written comments timely received.

**DATED:** March 16, 2006

Gail A. Hamill for MYLES B. HARMON,  
*Director,*  
*Commercial and Trade Facilitation Division.*

Attachments

## [ATTACHMENT A]

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

NY J84601  
June 10, 2003  
CLA-2-85:RR:NC:MM:109 J84601  
CATEGORY: Classification  
TARIFF NO.: 8518.21.0000

MR. RAHUL DO  
TDK ELECTRONICS CORPORATION  
3190 East Miraloma Avenue  
Anaheim, CA 92806

RE: The tariff classification of "I'm A Speaker" Softcase with Integrated Speaker from China

DEAR MR. DO:

In your letter dated May 12, 2003, you requested a tariff classification ruling.

The merchandise is described in your letter as the "I'm A Speaker" Softcase with Integrated Loudspeaker. It is available in both Mono and Stereo Models. The "I'm A Speaker" is a single loudspeaker that is imported in its enclosure (softcase) with the capacity of storing up to 12 CD's within the softcase. A sample of this merchandise was submitted to this office for classification purposes.

The applicable subheading for the "I'm A Speaker" will be 8518.21.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for "Loudspeakers, whether or not mounted in their enclosures: Single loudspeakers, mounted in the same enclosure." The rate of duty will be 4.9 percent ad valorem.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Linda M. Hackett at 646-733-3015.

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

## [ATTACHMENT B]

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

HQ 968051  
CLA-2 RR:CTF:TCM 968051 KSH  
CATEGORY: Classification  
TARIFF NO: 4202.92.9050

MR. RAHUL DO  
TDK ELECTRONICS CORPORATION  
3190 East Miraloma Avenue  
Anaheim, CA 92806

RE: Revocation of NY J84601; "I'm A Speaker" Softcase with Integrated Speaker from China

DEAR MR. DO:

This letter is to inform you that the Bureau of Customs and Border Protection (CBP) has reconsidered New York Ruling Letter (NY) J84601, issued to you on June 10, 2003, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of an "I'm A Speaker" softcase with integrated speaker. The article was classified in subheading 8518.21.0000, HTSUSA, which provides for "Loudspeakers, whether or not mounted in their enclosures; Single loudspeakers, mounted in their enclosures." We have reviewed that ruling and found it to be in error. Therefore, this ruling revokes NY J84601.

FACTS:

The article described as the "I'm A Speaker" Softcase with Integrated Loudspeaker is available in both Mono and Stereo Models. The "I'm A Speaker" is a single loudspeaker that is imported within a softcase that has the capacity of storing up to 12 CD's within the softcase.

ISSUE:

Whether the item is properly classified under subheading 4202.92.9050, HTSUSA, as a CD case or under subheading 8518.21.0000, HTSUSA, as a single mounted loudspeaker.

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. See T.D. 89-80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Heading 4202, HTSUSA, provides for:

"Trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument

cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping-bags, wallets, purses, map cases, cigarette cases, tobacco-pouches, tool bags, sports bags, bottle-cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper.”

Heading 8518, HTSUSA, provides for:

“Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers; audio-frequency electric amplifiers; electric sound amplifier sets; parts thereof.”

The “I’m A Speaker” softcase with an integrated speaker is described by both headings 4202 and 8518, HTSUSA, as it is a case, as well as, as a loudspeaker. Because it is *prima facie* classifiable under two or more headings, it cannot be classified according to GRI 1. In pertinent part, GRI 2(b) provides that any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. However, GRI 2(b) adds that the classification of goods consisting of more than one material or substance shall be according to the principles of rule 3. Accordingly, GRI 3 is utilized when, by application of GRI 2(b), a good consists of materials or components which are *prima facie* classifiable under two or more headings.

GRI 3(a) states that when goods are *prima facie* classifiable under two or more headings, classification shall be effected as follows:

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

In this instance, headings 4202 and 8518, HTSUSA, are equally specific in relation to one another. As we cannot classify these goods pursuant to GRI 3(a), we turn to GRI 3(b) which states:

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

To determine whether the merchandise constitutes a composite good, we look to Explanatory Note IX to GRI 3(b), which states in pertinent part:

For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are

adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.

The portable speaker and the CD case components are attached to each other to form a practically inseparable whole. We find that the portable speaker/softcase is a composite good. Thus, we must determine which component imparts the essential character to the merchandise.

Explanatory Note (EN) VIII to GRI 3(b) states:

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

In situations in which containers of heading 4202, HTSUSA, incorporate electrical devices in their design, CBP has consistently held that the 4202 component imparts the essential character to the article as a whole. See Headquarters Ruling Letters (HQ) 087057, dated December 21, 1989; HQ 089901, dated April 2, 1992; HQ 955261, dated April 14, 1994; HQ 961240, dated February 12, 1990; New York Ruling Letters (NY) 841628, dated June 6, 1989; NY 853347, dated July 3, 1990; and NY L83346, dated March 17, 2005. In each of these cases, the article involved a fully functional carry case or bag of heading 4202, HTSUSA, and a complete electronic device. More on point, in HQ 967704, dated August 25, 2005, CBP held that pursuant to GRI 3(b), the essential character of a speaker/CD case was imparted by the 4202 component and the composite good was classified under subheading 4202.92.9050, HTSUSA. Similarly, in this instance, we find that it is the softcase which imparts the essential character to the article. A consumer's motivating impetus to purchase this article would primarily be the need or desire for a container which can store, protect and transport a CD player and CDs. The fact that this article can also amplify music directed into the amplifier and speakers from an external output source may make the case distinctive and more attractive to some. However it is unlikely that a consumer would purchase this article primarily for use as an amplifier. The essential character of the subject speaker/softcase is imparted by the 4202 component and the composite good is classified under subheading 4202.92.9050, HTSUSA.

**HOLDING:**

By application of GRI 3(b), the "I'm A Speaker" is classified in heading 4202, HTSUSA, specifically in subheading 4202.92.9050, HTSUSA, which provides for "Trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper: Other: With outer surface of sheeting of plastic or of textile materials: Other: Other: Cases designed to protect and transport compact disks (CD's),

CD ROM disks, CD players, cassette players and/or cassettes.” The general column one rate of duty is 17.6% *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at [www.usitc.gov](http://www.usitc.gov).

**EFFECT ON OTHER RULINGS:**

NY J84601, dated June 10, 2003, is hereby revoked.

MYLES B. HARMON,

*Director,*

*Commercial and Trade Facilitation Division.*

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**19 CFR PART 177**

**PROPOSED MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO CLASSIFICATION OF NECKLACES OF PLASTIC BEADS WITH METALLIC PAINT**

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

**ACTION:** Notice of proposed modification of a ruling letter and treatment relating to the classification of necklaces of plastic beads with metallic paint.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to modify a ruling letter pertaining to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of necklaces of plastic beads with metallic paint, among other things, and to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments are invited on the correctness of the proposed action.

**DATE:** Comments must be received on or before May 6, 2006.

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

**FOR FURTHER INFORMATION CONTACT:** Peter T. Lynch, Tariff Classification and Marking Branch, 202-572-8778.

**SUPPLEMENTARY INFORMATION:**

**Background**

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to modify a ruling letter pertaining to the tariff classification of necklaces of plastic beads with metallic paint. Although in this notice CBP is specifically referring to one ruling, New York Ruling Letter (NY) NY E87523, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

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

raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to this notice.

In NY E87523, dated September 14, 1999, five products were classified. One of those products, diamond metallic bead necklace, item #95110, was determined to be in heading 7117.19.9000, HTSUS, which provides for “[i]mitation jewelry: of base metal, whether or not plated with precious metal: other: other: other.” This ruling letter is set forth in “Attachment A” to this document. Since the issuance of that ruling, CBP has had a chance to review the classification of this merchandise and has determined that the classification is in error.

CBP, pursuant to 19 U.S.C. 1625(c)(1), intends to modify NY E87523, and any other ruling not specifically identified to reflect the proper classification of the necklace of plastic beads with metallic paint pursuant to the analysis set forth in proposed Headquarters Ruling Letter (HQ) 967788 (*see* “Attachment B” to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: March 16, 2006

Gail A. Hamill for MYLES B. HARMON,  
*Director,*  
*Commercial and Trade Facilitation Division.*

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.  
BUREAU OF CUSTOMS AND BORDER PROTECTION,  
NY E87523  
September 14, 1999  
CLA-2-73:RR:NC:1:115 E87523  
CATEGORY: Classification  
TARIFF NO.: 7326.20.0050, 7117.19.9000,  
7117.90.5500, 7117.90.7500, 9503.90.0045

MS. MAJORIE SHAPIRO  
SAMUEL SHAPIRO & COMPANY, INC.  
123 Chestnut Street Suite 400  
Philadelphia, PA 19106

RE: The tariff classification of Animal Puzzle Key Ring, Sport Bubble Pen Necklace, Puffy Insect Key Ring, Diamond Metallic Bead Necklace and Jewel Heart Necklace from China.

DEAR MS. SHAPIRO:

In your letter dated August 30, 1999 you requested a tariff classification ruling on behalf of your client Unique Industries, Inc.

Samples were submitted for the following items: 3-D Animal Puzzle Key Ring item# 4017 which is a square that has puzzle pieces when completed shows a Dolphin. Attached to the square is a split metal key ring. Butterfly made of fabric (called Puffy Insect Key Ring) item# 7409. Attached to the Butterfly is a split metal key ring. Sport Bubble Necklace item# 7333, Diamond Metallic Bead Necklace item# 95110 and a Jewel Heart Necklace item# 8605.

The applicable subheading for the Key Rings will be 7326.20.0050, Harmonized Tariff Schedule of the United States (HTS), which provides for Articles of iron or steel wire . . . Other. The rate of duty will be 3.9% ad valorem.

The applicable subheading for the Sport Bubble Necklace will be 9503.90.0045, Harmonized Tariff Schedule of the United States (HTS), which provides for Toys Other: Other: Other . . . Other toys and models. The rate of duty will be Free.

The applicable subheading for the Diamond Metallic Bead Necklace will be 7117.19.9000, Harmonized Tariff Schedule of the United States (HTS), which provides for Imitation Jewelry: Other: Other. The rate of duty will be 11% ad valorem.

The applicable subheading for the Jewel Heart Necklace will be 7117.9055, Harmonized Tariff Schedule of the United States (HTS), which provides for Imitation Jewelry: Other: Other: Valued not over 20 cents per dozen pieces or parts: Other. The rate of duty will be 7.2% ad valorem.

The applicable subheading for the Jewel Heart Necklace will be 7117.90.7500, Harmonized Tariff Schedule of the United States (HTS), which provides for Imitation Jewelry: Other: Other: Valued over 20 cents per dozen pieces or parts: Of Plastic. The rate of duty will be Free.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Melvyn Birnbaum at 212-637-7017.

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

## [ATTACHMENT B]

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

HQ 967788  
CLA-2 RR:CTF:TCM 967788ptl  
CATEGORY: Classification  
TARIFF NO.: 7117.90.7500

MS. JANE L. TAEGER  
COMPLIANCE MANAGER  
SAMUEL SHAPIRO & COMPANY, INC.  
401 East Pratt Street, Suite 500  
Baltimore, MD 21202

RE: Plastic Bead Necklace with Metallic Paint; NY E87523 Modified

DEAR MS. SHAPIRO:

This is in response to your letter, on behalf of your client, Unique Industries, Inc., dated June 14, 2005, in which you request modification of the portion of New York Ruling (NY) E87523, dated September 14, 1999, that classified item #95110, referred to as "Diamond Metallic Bead Necklace," in subheading 7117.19.9000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "[i]mitation jewelry: of base metal, whether or not plated with precious metal: other: other: other." You contend that the beads in the Diamond Metallic Bead Necklace are actually plastic and therefore the article should properly be classified in subheading 7117.90.7500, HTSUS, which provides for "[i]mitation jewelry: other: other: other: of plastics." To assist Customs and Border Protection (CBP) in ascertaining the composition of the product, you provided samples and laboratory analyses.

In addition to the Diamond Metallic Bead Necklace, NY E87523 also classified four other products. You are not requesting reconsideration of the classification provided for any of the other products and this ruling will not affect those classification determinations.

**FACTS:**

Although the products under consideration are called "Diamond Metallic Bead Necklaces," information you have provided indicates that the actual composition of the necklaces is black plastic beads that have been covered with a colored coating that is either purple, green, gold or silver. The CBP Laboratory tested two samples of the product you provided, and the results showed the products were composed of polystyrene plastic beads covered with paints that were either acrylic or polyurethane based. The CBP Laboratory reports are: NY20051149 and NY20051150, both dated 08/18/05.

Additional product information you have provided shows that the imported value of the necklaces is more than 20 cents per dozen.

**ISSUE:**

What is the classification of the necklaces made of plastic beads coated with metallic paint?

**LAW AND ANALYSIS:**

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that most goods are classified by application of GRI 1, that is, accord-

ing to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

The HTSUS subheadings under consideration are as follows:

7117 Imitation jewelry:  
     Of base metal, whether or not plated with precious metal:  
         \* \* \*  
 7117.19 Other:  
     Other:  
         \* \* \*  
 7117.19.9000 Other  
 7117.90 Other:  
     \* \* \*  
     Other:  
         \* \* \*  
     Valued over 20 cents per dozen pieces or parts:  
         \* \* \*  
     Other:  
 7117.90.7500 Of plastics

When the subject necklaces were initially classified in NY E87523, CBP did not have the benefit of the technical data regarding the composition of the product from the manufacturer, nor were tests performed on the goods by the CBP Laboratory. Classification in that ruling was made based upon the appearance of the product and information provided by the requester. Unfortunately, neither the appearance, the marketing designation ("Metallic Bead Necklace") nor available product data provided accurate information about the product.

Based on the product information currently before CBP, we have determined that the classification provided for the product identified as item #95110, called Diamond Metallic Bead Necklace, in NY E87523 is incorrect. The correct classification for the product is subheading 7117.90.7500, HTSUS.

**HOLDING:**

Item #95110, referred to as a "Diamond Metallic Bead Necklace," composed of plastic beads that have been coated with colored metallic-appearing paint is classified in subheading 7117.90.7500, HTSUS, which provides for: "Imitation jewelry: Other: Other: Valued over 20 cents per dozen pieces or parts: Other: Of plastics.

The 2006 column one duty rate for products of that subheading 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 World Wide Web at [www.usitc.gov](http://www.usitc.gov).

**EFFECT ON OTHER RULINGS:**

NY E87523, dated September 14, 1999, is modified.

MYLES B. HARMON,

*Director;*

*Commercial and Trade Facilitation Division.*

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**REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF EVEROLIMUS**

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

**ACTION:** Revocation of a tariff classification ruling letter and revocation of treatment relating to the classification of Everolimus.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), this notice advises interested parties that Customs and Border Protection (CBP) is revoking one ruling letter relating to the tariff classification of Everolimus under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). CBP is also revoking any treatment previously accorded by it to substantially identical merchandise. Notice of the proposed action was published on January 4, 2006, in Volume 40, Number 2, of the CUSTOMS BULLETIN. CBP received no comments in response to the notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 5, 2006.

**FOR FURTHER INFORMATION CONTACT:** Kelly Herman, Tariff Classification and Marking Branch: (202) 572-8713.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

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

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

Pursuant to section 625 (c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI, notice proposing to revoke one ruling letter pertaining to the tariff classification of Everolimus was published in the January 4, 2006, CUSTOMS BULLETIN, Volume 40, Number 2. No comments were received.

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

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

In NY R00794, CBP ruled that Everolimus was classified in subheading 2934.99.4700, HTSUSA, which provides for "Nucleic acids and their salts, whether or not chemically defined; Other heterocyclic compounds; Other: Other: Other: Drugs." Since the issuance of that ruling, CBP has reviewed the classification of this item and has determined that the cited ruling is in error, and that Everolimus should be classified in subheading 2941.90.5000, HTSUS, which provides for "Antibiotics: Other: Other: Other."

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking NY R00794 and any other ruling not specifically identified, to reflect the proper classification of Everolimus according to the analysis contained in Headquarters Ruling Letter (HQ) 967895, set forth as an Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

**DATED:** March 16, 2006

Gail A. Hamill for MYLES B. HARMON,  
*Director,*  
*Commercial and Trade Facilitation Division.*

Attachment

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

HQ 967895  
March 16, 2006  
CLA-2 RR:CTF:TCM 967895 KSH  
TARIFF NO.: 2941.90.5000

CARL D. CAMMARATA, ESQ.  
LAW OFFICES OF GEORGE R. TUTTLE  
*Three Embarcadero Center, Suite 1160*  
*San Francisco, CA 94111*

RE: Revocation of New York Ruling Letter (NY) R00794, dated September 16, 2004; Classification of Everolimus.

DEAR MR. CAMMARATA:

This is in response to your letter of August 15, 2005, on behalf of your client Guidant Corporation, in which you request reconsideration of New York Ruling Letter (NY) R00794, issued on September 16, 2004, concerning the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of Everolimus. Everolimus was classified in subheading 2934.99.4700, HTSUS, which provides for "Nucleic acids and their salts, whether or not chemically defined; other heterocyclic compounds: Other: Other: Other: Drugs." You assert that because the merchandise at issue exhibits antifungal properties, it is classified in subheading 2941.90.5000, HTSUS, which provides for "Antibiotics: Other: Other: Other." In accordance with your request for reconsideration of NY R00794, CBP has reviewed the classification of this item and has determined that the cited ruling is in error.

Pursuant to section 625(c), Tariff Act of 1930, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY R00794 was published in the Customs Bulletin, Vol. 40, No. 2, on January 4, 2006. No comments were received in response to the notice.

FACTS:

Everolimus is a macrocyclic lactone immunosuppressive drug being investigated for use in reducing graft vasculopathy. Everolimus is a semisynthetic derivative of Rapamycin, currently known as Sirolimus. It is

an organic compound which is stabilized with a second antioxidant organic compound. As such, Everolimus is a mixture of two organic compounds.

ISSUE:

Whether Everolimus is classified as an other heterocyclic compound of heading 2934, HTSUS, or as an antibiotic of heading 2941, HTSUS.

LAW AND ANALYSIS:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes (E.N.), constitute the official interpretation at the international level. While neither legally binding nor dispositive, the EN provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings.

Although Everolimus is a mixture of two organic compounds, Note 1 to Chapter 29, HTSUS, states that Chapter 29, HTSUS, includes single compounds with an added stabilizer. Inasmuch as the second compound is a stabilizer, a determination whether classification in Chapter 29, HTSUS, is proper is warranted.

Heading 2941, HTSUS, provides for antibiotics. The E.N. to 2941 states in relevant part:

Antibiotics are substances secreted by living micro-organisms which have the effect of killing other micro-organisms or inhibiting their growth. They are used principally for their powerful inhibitory effect on pathogenic micro-organisms, particularly bacteria or fungi, or in some cases on neoplasms. They can be effective at a concentration of a few micrograms per ml in the blood.

In *Lonza, Inc. v. U.S.*, 46 F.3d 1098 (Fed. Cir. 1995), the court stated that “antibiotics are commonly understood to mean substances, produced either naturally or synthetically, that exhibit an ability to kill or inhibit the growth of microorganisms.” *Id.*

You have submitted additional information in your request for reconsideration which was not included in your original request that evidences that Everolimus is an antibiotic that has bacteriostatic properties that kill or inhibit the growth of microorganisms.

Based on this additional evidence, Everolimus is *prima facie* classifiable in heading 2941, HTUS, and heading 2934, HTSUS. However, Note 3 to Chapter 29, HTSUS, states:

Goods which could be included in two or more of the headings of this chapter are to be classified in that one of those headings which occurs last in numerical order.

In accordance with Note 3 to Chapter 29, HTSUS, the E.N. to 2941, HTSUS, and *Lonza, supra*, Everolimus is classified in subheading 2941.90.5000, HTSUS.

**HOLDING:**

Everolimus is classified in subheading 2941.90.5000, HTSUS, which provides for "Antibiotics: Other: Other: Other." The general column one 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 World Wide Web at [www.usitc.gov](http://www.usitc.gov).

**EFFECT ON OTHER RULINGS:**

NY R00794, dated September 16, 2004, is hereby revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

Gail A. Hamill for MYLES B. HARMON,  
*Director;*  
*Commercial and Trade Facilitation Division.*