U.S. Customs and Border Protection

ACCREDITATION OF KING LABORATORIES, INC., AS A COMMERCIAL LABORATORY

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

ACTION: Notice of accreditation of King Laboratories, Inc., as a commercial laboratory.

SUMMARY: Notice is hereby given, pursuant to CBP regulations, that King Laboratories, Inc., has been accredited to test petroleum and certain petroleum products for customs purposes as of February 15, 2017.

EFFECTIVE DATES: The accreditation of King Laboratories, Inc., as commercial laboratory became effective on February 15, 2017. The next triennial inspection date will be scheduled for September 2018.

FOR FURTHER INFORMATION CONTACT: Approved Gauger and Accredited Laboratories Manager, Laboratories and Scientific Services Directorate, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Suite 1500N, Washington, DC 20229, tel. 202–344–1060.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to 19 CFR 151.12, that King Laboratories, Inc., 1300 E. 223rd St., #401, Carson, CA 90745, has been accredited to test petroleum and certain petroleum products for customs purposes, in accordance with the provisions of 19 CFR 151.12.

King Laboratories, Inc., is accredited for the following laboratory analysis procedures and methods for petroleum and certain petroleum products set forth by the U.S. Customs and Border Protection Laboratory Methods (CBPL) and American Society for Testing and Materials (ASTM):

CBPL No.	ASTM	Title
	ASTM D7153	Standard Test Method for Freezing Point of Aviation Fuels (Automatic Laser Method).

Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquiries regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *CBPGaugersLabs@cbp.dhs.gov.* Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. *http://www.cbp.gov/about/labs-scientific/commercial-gaugers-and-laboratories.*

Dated: April 7, 2017.

IRA S. REESE,
Executive Director,
Laboratories and Scientific
Services Directorate.

[Published in the Federal Register, April 14, 2017 (82 FR 18004)]

PROPOSED MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF ALUMINUM FERRULE/PLASTIC BUTTON COMBINATIONS

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

ACTION: Notice of proposed modification of one ruling letter and revocation of treatment relating to the tariff classification of aluminum ferrule/plastic button combinations for use, after further processing, as closures for vials.

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 one ruling letter concerning tariff classification of aluminum ferrule/plastic button combinations under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before June 02, 2017.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: Nicholai Diamond, Tariff Classification and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0292.

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

Pursuant to 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 letters pertaining to the tariff classification of aluminum ferrule/plastic button combinations. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N260351, dated January 16, 2015 (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 N260351, CBP classified aluminum ferrule/plastic button combinations in heading 3923, HTSUS, specifically subheading 3923.50.00, HTSUS, which provides for "Articles for the conveyance or packing of goods, or plastics; stoppers, lids, caps and other closures, of plastics: Stoppers, lids, caps and other closures." CBP has reviewed NY N260351 and has determined the ruling letter to be partially in error. It is now CBP's position that aluminum ferrule/plastic button combinations are properly classified, by operation of GRIs 1 and 3(c), in heading 8309, HTSUS, specifically in subheading 8309.90.00, HTSUS, which provides for "Stoppers, caps and lids (including crown corks, screw caps and pouring stoppers), capsules for bottles, threaded bungs, bung covers, seals and other packing accessories, and parts thereof, of base metal: Other."

Pursuant to 19 U.S.C. §1625(c)(1), CBP is proposing to modify NY N260351 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H271369, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: March 15, 2017

ALLYSON MATTANAH
for
MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N260351

January 16, 2015
CLA-2–83:OT:RR:NC:N1:121
CATEGORY: Classification
TARIFF NO.: 8309.90.0000; 3923.50.0000

MS. JULIE VAIR
EXPEDITORS TRADEWIN, LLC
1015 THIRD AVENUE
12TH FLOOR
SEATTLE, WA 98104

RE: The tariff classification of an aluminum ferrule and an aluminum/plastic flip cap from Denmark and Germany

DEAR MS. VAIR:

In your letter dated December 19, 2014, on behalf of West Pharmaceutical Services Inc., you requested a tariff classification ruling. Representative samples were submitted for our review and will be returned as requested.

The merchandise under consideration is identified in your letter as two types of seals, an aluminum ferrule or aluminum shell and an aluminum/plastic flip cap. The aluminum ferrule is described as an aluminum shell with the central target area exposed. In condition as imported, the ferrule consists of a round aluminum shell with a hole in the center. You stated in your letter that the ferrule is a packaging component that is present to hold a stopper or other rubber seal in place, however, the aluminum ferrule is imported separately. The typical uses are veterinary, parenteral products, chromatography and cartridges. The second article in question is an aluminum/plastic flip cap that consists of an aluminum ferrule with a plastic button style cap. You stated that the plastic button serves as a dust cap and acts as the lever to activate the seal.

You suggested classification for the subject aluminum/plastic flip cap in heading 8309, Harmonized Tariff Schedule of the United States (HTSUS), which provides for...caps of 8309, HTSUS, which are limited to those with an essential character of metal. However, the plastic component acts as the cap/closure/sealing element in this composite good. Therefore, the plastic component imparts the essential character. Consequently, the aluminum/plastic flip cap is not classified in heading 8309, HTSUS.

The applicable subheading for the aluminum ferrule will be 8309.90.0000, HTSUS, which provides for stoppers, caps and lids...and parts thereof, of base metal, other. The rate of duty will be 2.6 percent ad valorem.

The applicable subheading for the aluminum/plastic flip cap will be 3923.50.0000, HTSUS, which provides for stoppers, lids, caps and other closures, of plastics. The rate of duty will be 5.3 percent ad valorem.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is

imported. If you have any questions regarding the ruling, contact National Import Specialist Barbara Kaiser at barbara.kaiser@cbp.dhs.gov.

Sincerely,

GWENN KLEIN KIRSCHNER
Director
National Commodity Specialist Division

ATTACHMENT B

HQ H271369
CLA-2 OT:RR:CTF:TCM H271369 NCD
CATEGORY: Classification
TARIFF NO.: 8309.90.0000

JULIE VAIR
SENIOR CONSULTANT
EXPEDITORS TRADEWIN, LLC
1015 THIRD AVENUE
12TH FLOOR
SEATTLE, WA 98104

RE: Modification of NY N260351; Classification of aluminum ferrule/plastic button combinations

DEAR MS. VAIR:

This is in response to your letter of November 11, 2015, in which you request, on behalf of West Pharmaceutical Services, Inc., reconsideration of New York Ruling Letter (NY) N260351 ("reconsideration request"). NY N260351, issued to you by U.S. Customs and Border Protection (CBP) on January 16, 2015, involves classification of aluminum ferrules, as well as combinations of the ferrules with plastic buttons ("ferrule/button combinations" of "subject merchandise"), under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed NY N260351 and determined that it is incorrect with respect to classification of the ferrule/ button combinations. For the reasons set forth below, we are modifying that ruling letter.

FACTS:

The subject merchandise consists of aluminum ferrules, in ring form, atop which thin plastic buttons have been affixed by means of numerous aluminum "bridges." In conjunction with rubber stoppers to which they are joined following importation, the ferrule/button combinations form closures for glass vials used as repositories for medicinal products and other substances. The specific function of the ferrule/button combination vis-à-vis the full closure is to crimp and secure in place the rubber stopper residing in the mouth of the vial (see Figure 1 below).

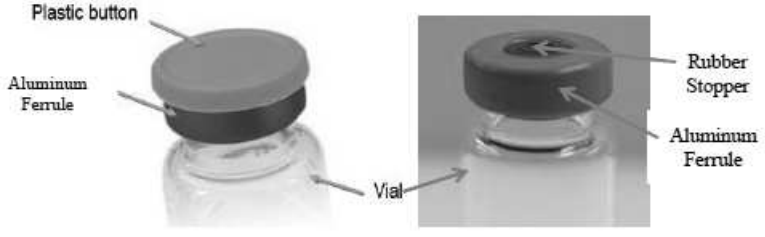

Figure 1

When the ferrule/button combination is placed atop the rubber stopper, the complete closure renders the glass vial impenetrable unless and until the plastic cap's removal, which can be effected by the application of pressure

with the thumb so as to sever the aluminum bridges (see Figure 2 below). Removal of the plastic button exposes the underlying stopper, which can be penetrated by a syringe to extract the substance contained in the vial. You state in your reconsideration request that the plastic button "acts as a dust cover for the injection site" and that the aluminum ferrule's function "is to hold the rubber stopper in place on the vial creating container closure integrity."

Figure 2

In NY N260351, CBP ruled that the subject ferrule/button combinations are classified in heading 3923, HTSUS, specifically subheading 3923.50.00, HTSUS, which provides for "Articles for the conveyance or packing of goods, or plastics; stoppers, lids, caps and other closures, of plastics: Stoppers, lids, caps and other closures." CBP additionally ruled that the aluminum ferrules, when imported alone, are classified in heading 8309, HTSUS, specifically subheading 8309.90.00, HTSUS, which provides for "Stoppers, caps and lids (including crown corks, screw caps and pouring stoppers), capsules for bottles, threaded bungs, bung covers, seals and other packing accessories, and parts thereof, of base metal: Other."

Subsequently, following issuance of NY N260351 and our receipt of your reconsideration request, we requested and received from you a supplemental submission ("supplemental submission") detailing the respective weights, densities, and surface areas of the plastic caps and aluminum ferrules.[1] It was indicated in the submission that the articles are of two sizes, one of which includes a plastic button measuring 13 mm in diameter ("13 mm cap type") and the other of which includes a plastic button measuring 20 mm in diameter ("20 mm cap type"). Your supplemental submission, along with samples of the subject merchandise, was submitted to a CBP laboratory for verification. The report issued by the laboratory ("CBP laboratory report") indicates that the samples contained plastic buttons measuring between 20.6 and 20.7 mm in diameter. As such, it can be assumed for the purpose of this ruling that the samples provided to CBP were of the 20 mm button type.

The information provided in your submission, as well as the results of the CBP laboratory's analysis, are detailed in the below table:

[1] The supplemental submission also includes the buttons' purchase prices and the ferrules' production costs. However, these figures could not be substantiated and, even if they could, do not provide an accurate basis for comparison of the components' values. Accordingly, we do not take them into consideration in the instant decision.

	Supplemental Submission				*CBP Laboratory Report*	
Type	**13 mm button**		**20 mm button**		**20 mm button**	
Component	Button	Ferrule	Button	Ferrule	Button	Ferrule
Material	Polyether propyl	Aluminum 3003 Alloy	Polyether propyl	Aluminum 3003 Alloy	Plastic	Aluminum Alloy
Mass/ Weight	245.33 mg	417.103 mg	437.398 mg	420.784 mg	0.51 g	0.37-.39 g
Density	1.02 mg per cubic cm	270 mg per cubic cm	270 mg per cubic cm	270 mg per cubic cm	-	2.67 mg per cubic mm
Surface Area	1503.844 square mm	531.87 square mm	1464.611 square mm	1465.487 square mm	-	-

ISSUE:

Whether the aluminum ferrule/plastic cap combinations are properly classified as plastic caps in heading 3923, HTSUS, or as base metal parts of seals in heading 8309, HTSUS.

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 2(b) states, in pertinent part, that "[a]ny reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance" and that "classification of goods consisting of more than one material or substance shall be according to the principles of rule 3." GRI 3 provides that "composite goods consisting of different materials or made up of different components" are to be classified "as if they consisted of the material or component which gives them their essential character," and where this is not possible, "under the heading which occurs last in numerical order among those which equally merit consideration."

In addition, in interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The 2017 HTSUS provisions under consideration are as follows:

3923	Articles for the conveyance or packing of goods, or plastics; stoppers, lids, caps and other closures, of plastics:
3923.50.00	Stoppers, lids, caps and other closures
8309	Stoppers, caps and lids (including crown corks, screw caps and pouring stoppers), capsules for bottles, threaded bungs, bung covers, seals and other packing accessories, and parts thereof, of base metal:
8309.90.00	Other

At the outset, we note that the subject merchandise consists of two components, i.e., the plastic buttons and aluminum ferrules, which are integrated into a single article. With respect to classification of the plastic buttons, we consider heading 3923, HTSUS, which provides, *inter alia*, for plastic caps and other closures. However, the term cap is not defined in the heading, the pertinent chapter or section notes, or elsewhere in the HTSUS. It is well-established that when a tariff term is not defined by the HTSUS or its legislative history, its correct meaning is its common or commercial meaning, which can be ascertained by reference to "dictionaries, scientific authorities, and other reliable information sources and 'lexicographic and other materials." *See Rocknell Fastener, Inc. v. United States*, 267 F.3d 1354, 1356–57 (Fed. Cir. 2001). "Cap" is commonly defined in various dictionaries as an object that provides protective cover for a separate object. [citation] As CBP has previously ruled, however, it is well-established that caps and other closures of heading 3923, while contributive to the "primary closure" of a container, need not necessarily cover the "entirety of the mouth of a container." *See* Headquarters Ruling Letter (HQ) H257146, dated January 22, 2016.

Here, the "buttons," which are indisputably comprised of plastic, are conjoined with the aluminum ferrules and, in turn, the rubber stoppers to form a closure for the vials. While the buttons do not in and of themselves cover the vials' entire mouths, they do cover the rubber stopper as necessary to prevent inadvertent penetration of the stopper. Moreover, as you contend in your reconsideration request, they shield the stopper from dust particles so as to ensure that the latter remains sanitary when penetrated by a syringe. We therefore find that the buttons satisfy the definition of plastic caps for purposes of classification in heading 3923. However, while the button components of the subject merchandise are classifiable in the heading, the aluminum ferrule components are not. As such, the subject merchandise is described only in part by heading 3923 and cannot be classified there by application of GRI 1.

As to classification of the aluminum ferrules, we consider heading 8309, HTSUS, which provides, *inter alia*, for base metal parts of seals. Like the term "cap," the terms "seal" and "part" are both left undefined in the HTSUS. With respect to the former, CBP has repeatedly ruled, based upon consultation of dictionary definitions, that "seal" denotes "something that firmly closes or secures: as...(1) a tight and perfect closure (as against the passage of gas or water)" or "[a]ny means of preventing the passage of gas or liquid into or out of something, esp. at a place where two surfaces meet." *See* HQ H103227, dated July 29, 2010 (citing HQ 951510, dated August 7, 1992). With

respect to the latter term, courts have developed two distinct, yet fully consistent, tests for determining whether a particular item can be described as such. *Bauerhin Techs. Ltd. Pshp. v. United States*, 110 F.3d 774, 779 (Fed. Cir. 1997). Under the first of these, initially promulgated in *United States v. Willoughby Camera Stores, Inc.*, 21 C.C.P.A. 322, 324 (1933), an imported item can be described as part if it is an "integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article." *Bauerhin*, 110 F.3d at 779.[2] In view of these definitions, the aluminum ferrules can be describes as a part of a seal if, when joined to the remaining components, they form a closure through which substances cannot pass.

Here, it is undisputed that the aluminum ferrules are comprised of base metal. Because they are ringed, they do not constitute a complete closure capable of preventing the passage of substances. They therefore cannot in and of themselves be described as a seal. However, they do form a complete, effective seal when combined with the rubber stoppers, insofar as they fasten the otherwise unsecured stoppers in place. The stoppers are merely inserted into the vials' mouths, and consequently lack the stability to function as long-term sealants in the absence of the ferrules with which they are crimped. The ferrules are thus an integral component of the complete seal, without which the seal could not function as such. In effect, the aluminum ferrules qualify as base metal parts of seals within the meaning of heading 8309, HTSUS. However, because the ferrules are also conjoined with plastic buttons of heading 3923 to form the subject merchandise, the merchandise cannot be classified in heading 8309 by application of GRI 1.

As articles whose components are classifiable in different headings, i.e., heading 3923 and heading 8309, the subject ferrule/button combinations are classified pursuant to GRI 3. As stated above, GRI 3(b) provides that composite articles are classified "as if they consisted of the material...which gives them their essential character." With respect to "essential character" for purposes of GRI 3(b), EN (VIII) to GRI 3(b) states as follows:

> 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.

Insofar as the "essential character test" requires a fact-intensive analysis, courts have consistently applied some or all of the above-listed factors, as needed, to ascertain the essential characters of various articles. *See Home Depot, U.S.A., Inc. v. United States*, 427 F. Supp. 2d 1278, 1295–1356 (*Home Depot I*), aff'd 491 F.3d 1334 (Fed. Cir. 2007) *(Home Depot II); see also Pomeroy Collection, Ltd. v. United States*, 893 F. Supp. 2d 1269, 1287–88 (Ct. Int'l Trade 2013). In some cases, therefore, the essential character of a given composite article has been identified as that which corresponds to the predominant component in terms of weight, value, surface area, and/or other

[2] Under the second test, set forth in *United States v. Pompeo*, 43 C.C.P.A. 9, 14 (1955), a good qualifies as a part if it is "dedicated solely for use" with a particular article. *Bauerhin*, 110 F.3d at 779 (citing *Pompeo*, 43 C.C.P.A. at 14). Whether the "Willoughby" or "Pompeo" test applies in a given case depends upon on the specific facts of that case. *See id.* (applying principle from *Pompeo* upon determining that "[t]he facts in *Willoughby Camera* are considerably different from those presented here"). Here, because the aluminum ferrules satisfy the former, we need not apply the latter.

measurable properties. *See Home Depot I*, 427 F. Supp. 2d at 1292–1356; *Home Depot II*, 491 F.3d at 1336. In others, the relative importance of the components to the effective functioning of the whole article has ultimately proven determinative of essential character. *See Pomeroy*, 893 F. Supp. 2d at 1288; *Structural Industries v. United States*, 360 F. Supp. 2d 1330, 1337–1338 (Ct. Int'l Trade 2005); and *Conair Corp. v. United States*, 29 C.I.T. 888 (2005). However, where none of these factors or any others conclusively indicate the constituent component that imparts the essential character, the composite article at issue cannot be classified in accordance with GRI 3(b). *See, e.g.,* HQ H179843, dated March 14, 2012 (determining that a lighted floral arrangement could not be classified pursuant to GRI 3(b) because constituent components accounted for relatively similar values, bulks, and surface areas, and played equally important roles with respect to the use of the arrangement).

Here, read together, your supplemental submission and the CBP laboratory report provide varying and ultimately inconclusive indicia as to which component of the subject merchandise imparts the merchandise's essential character. Your supplemental submission does indicate, consistent with the CBP laboratory report, that the ferrules are universally denser than the buttons. However, it also indicates that the 13 mm buttons predominate significantly by surface area but are much lighter than the ferrules, and that the 20 mm buttons predominate only slightly by mass but have a surface area almost equal to that of the corresponding ferrules. Moreover, the mass/weight measurements provided in the supplemental submission are not entirely consistent with the CBP laboratory report, which indicates that the 20 mm button is significantly heavier than its corresponding ferrule.[3] Therefore, given that the bulk of the buttons' and ferrules' properties are either relatively equal or altogether unverifiable, it cannot be conclusively stated that either component is quantifiably predominant.

Nor can it be said, despite your assertions to the contrary, that either plays a greater role than the other in relation to the use of the subject article. While neither component provides a complete, permanent closure, both are indispensable to the functioning of the whole good as an effective, sanitary closure. As discussed above, the ferrule does not in and of itself cover the entire mouth of the vial, but it does enable the rubber stopper's capacity to effectively and continuously do so. For its part, the button spans the entire diameter of the vial's mouth but remains in position atop the mouth only until such time as the vial's contents need to be extracted. While in position, however, the button ensures that the entire seal remains completely impenetrable and free of contaminants. Since neither component forms the complete seal, it cannot be determined which of the two imparts the essential character of the subject merchandise in its condition as imported.

Because the merchandise cannot be classified by reference to GRI 3(b), we accordingly apply GRI 3(c), which requires classification of the subject

[3] It is "well settled that the methods of weighing, measuring, and testing merchandise used by customs officers and the results obtained are presumed to be correct." *Aluminum Co. of America v. United States*, 60 C.C.P.A. 148, 151, 477 F.2d 1396, 1398 (1973) ("Alcoa"). Absent a conclusive showing that the testing method used by the CBP laboratory is in error, or that the Customs' laboratory results are erroneous, there is a presumption that the results are correct. *See Exxon Corp. v. United States*, 462 F. Supp. 378, 81 Cust. Ct. 87, C.D. 4772 (1978). If and only if a *prima facie* case is made out, "the presumption is destroyed, and the Government has the burden of going forward with the evidence." *Alcoa*, 477 F.2d at 1399; *American Sporting Goods*, 27 C.I.T. 450, 456 (Ct. Int'I Trade 2003).

ferrule/button combinations under the heading which occurs last in numerical order. Of the two headings at issue in the instant case, heading 8309 occurs last in numerical order. The subject ferrule/button combinations are therefore classified in heading 8309, HTSUS. *See* HQ H179843, *supra*.

HOLDING:

By application of GRIs 1 and 3(c), the subject aluminum ferrule/plastic button combinations are properly classified in heading 8309, HTSUS. They are specifically classified in subheading 8309.90.0000, HTSUSA (Annotated), which provides for: "Stoppers, caps and lids (including crown corks, screw caps and pouring stoppers), capsules for bottles, threaded bungs, bung covers, seals and other packing accessories, and parts thereof, of base metal: Other." The 2017 column one general rate of duty is 2.6% *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/tata/hts/*.

EFFECT ON OTHER RULINGS:

New York Ruling Letter N260351, dated January 16, 2015, is hereby MODIFIED with respect to the classification of the ferrule/button combinations, but the classification of ferrules entered without buttons remains in effect.

Sincerely,

MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division

19 CFR PART 177

REVOCATION OF HQ 955639 RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF REUSABLE BAGS OF WOVEN POLYPROPYLENE STRIPS USED FOR YARD WASTE AND RECYCLING

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

ACTION: Notice of revocation of HQ 955639 ruling letter and of revocation of treatment relating to the tariff classification of reusable bags of woven polypropylene strips used for yard waste and recycling.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking HQ 955639 ruling letter concerning tariff classification of reusable bags of woven polypropylene strips used for yard waste and recycling under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 50, No. 48, on November 30, 2016. No comments supporting the proposed revocation were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 03, 2017.

FOR FURTHER INFORMATION CONTACT: Michele A. Boyd, Tariff Classification and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0136.

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

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the *Customs Bulletin*, Vol. 50, No. 48, on November 30, 2016, proposing to revoke one ruling letter pertaining to the tariff classification of reusable bags of woven polypropylene strips used for yard waste and recycling. As stated in the proposed notice, this action will cover Headquarters Ruling Letter ("HQ") 955639, dated April 5, 1994, as well as 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 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 notice.

In HQ 955639, CBP classified reusable bags of woven polypropylene strips used for yard waste and recycling in heading 6307, HTSUS, specifically in subheading 6307.90.9986, HTSUSA, which provides for "other made up articles, other, other, other, other, other." CBP has reviewed HQ 955639 and has determined the ruling letter to be in error. It is now CBP's position that reusable bags of woven polypropylene strips used for yard waste and recycling are properly classi-

fied, by operation of GRI 1, in heading 6305, HTSUS, specifically in subheading 6305.32.0010, HTSUSA, which provides for "Sacks and bags, of a kind used for the packing of goods: Of man-made textile fibers: Flexible intermediate bulk containers, weighing more than one kg or more."

Pursuant to 19 U.S.C. §1625(c)(1), CBP is revoking HQ 955639 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H275824, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: March 13, 2017

ALLYSON MATTANAH
for
MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H275824
March 13, 2017
CLA-2 OT:RR:CTF:TCM H275824 MAB
CATEGORY: Classification
TARIFF NO: 6305.32.0010

THE BAG CONNECTION
1013 TAMARAC DRIVE
CARPENTERSVILLE, IL 60110
ATTN: CUSTOMS SPECIALIST

RE: Revocation of HQ 955639; tariff classification of reusable bags of woven polypropylene strips used for yard waste and recycling

DEAR PORT DIRECTOR:

On April 5, 1994, U.S. Customs and Border Protection (CBP) issued HQ 955639. This ruling pertains to the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) of reusable bags of woven polypropylene strips used for yard waste and recycling. We have reviewed additional information and have found HQ 955639 to be in error with respect to the tariff classification.

Pursuant to Section 6125(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 CBP is revoking the above noted ruling concerning the classification of reusable bags of woven polypropylene strips used for yard waste and recycling, under the HTSUS. Similarly, CBP is revoking any treatment previously accorded by it to substantially identical transactions. Notice of the proposed revocation was published on November 30, 2016, in Volume 50, Number 48, of the *Customs Bulletin*. No comments were received in response to the proposed notice.

FACTS:

In HQ 955639, CBP stated in pertinent part, the following:

> You submitted a sample of a reusable yard waste bag of woven polypropylene strips which are less than 5 mm in width; the bag measures approximately 41 inches by 14.75 inches by 13.5 inches when fully expanded. The bag is open at the top with snaps as closures which are placed in a position to permit the top to expand to its fullest width. Located near the bottom of the bag at both sides are pockets with hook and loop closures, which will be filled approximately one pound of ballast (such as sand) to prevent the bags from being blown away after they have been emptied. To facilitate carrying the bag, two web strap handles are sewn to the top of the bag and two web strap handles are attached to each bottom pocket. The bags will be used initially by the City of Seattle to hold yard waste or other articles which will be recycled. Eventually the bags will be distributed to the public and used by homeowners to store yard waste and left at curbside for pickup by the city recycling trucks.
>
> In addition, we do not believe that the subject bag is classifiable in heading 6305....[t]he bag at issue is not used for commercial merchandise

and is not for merchandise being transported or stored for sale. It cannot be considered a sack or bag, for the packing of goods, and is therefore not classifiable in Heading 6305.

ISSUE:

Whether the reusable bags of woven polypropylene strips used for yard waste and recycling are considered bags under heading 4202, HTSUS, or under heading 6305, HTSUS, or as other made-up articles of heading 6307, HTSUS?

LAW AND ANALYSIS:

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

The HTSUS provisions at issue are as follows:

6305	Sacks and bags, of a kind used for the packing of goods:
	* * *
6307	Other made up articles, including dress patterns:
	* * *

Additional U.S. Rule of Interpretation 1(a), HTSUS, provides, in relevant part, that:

> In the absence of special language or context which otherwise requires:
>
> ... a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

* * *

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System. While not legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System at the international level and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

EN 63.05 provides, in pertinent part, as follows:

> This heading covers textile sacks and bags of a kind normally used for the packing of goods for transport, storage or sale.
>
> These articles, which vary in size and shape, include in particular flexible intermediate bulk containers, coal, grain, flour, potato, coffee or similar sacks, mail bags, and small bags of the kind used for sending samples of merchandise by post. The heading also includes such articles as tea sachets.

Subheading 6305.32

Flexible intermediate bulk containers are usually made of polypropylene or polyethylene woven fabrics and generally have a capacity ranging from 250 kg to 3,000 kg. They may have lifting straps at the four top corners and may be fitted with openings at the top and bottom to facilitate loading and unloading. They are generally used for packing, storage, transport and handling of dry, flowable materials.

* * *

EN 63.07 provides, in pertinent part, as follows:

This heading covers made up articles of any textile material which are **not included** more specifically in other headings of Section XI or elsewhere in the Nomenclature.

* * *

Heading 6305, HTSUS, covers sacks and bags of a kind used for the packing of goods. In *The Pomeroy Collection, Ltd. v. United States*, 559 F.Supp. 2d 1374, 1394 n. 23 (Ct. Int'l Trade 2008), the Court of International Trade (CIT) described different types of HTSUS provisions as follows:

A "use" provision is "a provision describing articles by the manner in which they are used as opposed to by name," while an *eo nomine* provision is one "in which an item is identified by name." *Len-Ron Mfg. Co. v. United States,* 334 F.3d 1304, 1308 (Fed. Cir. 2003). And there are two types of "use" provisions — "actual use" and "principal (formerly known as "chief") use." An "actual use" provision is satisfied only if "such use is intended at the time of importation, the goods are so used and proof thereof is furnished within 3 years after the date the, goods are entered." *See* Additional U.S Rule of Interpretation ("ARI") 1(b) (*quoted in Clarendon Mktg., Inc. v. United States,* 144 F.3d 1464, 1467 (Fed. Cir. 1998)). In contrast, a "principal use" provision functions essentially "as a controlling legal label, in the sense, that even if a particular import is proven to be actually used inconsistently with its principal use, the import is nevertheless classified according to its principal use." *Clarendon Mktg.,* 144 F.3d at 1467.

In *Primal Lite, Inc. v. United States,* 22 C.I.T. 697, 700 (1998), the CIT described one method to identify principal use provisions as follows:

The use of the term "of a kind" is nothing more than a statement of the traditional standard for classifying importation[s] by their use, namely, that it need not necessarily be the actual use of the importation but is the use of the kind of merchandise to which the importation belongs.

Heading 6305, HTSUS, includes the tariff term "of a kind," which means that it is a principal use provision. Under Additional U.S. Rule of Interpretation 1(a) (AUSR 1(a)), tariff classification under a principal use provision must be determined in accordance with the use in the United States of that class or kind to which the imported goods belong.

Thus, in order to be classified as a sack or bag of a kind used for packing, the reusable bags of woven polypropylene strips used for yard waste and recycling must belong to the same kind or class of goods as those used for packing. In *United States v. Carborundum Co.*, 536 F.2d 373, 377 (CCPA

1976) (*Carborundum*), the U.S. Court of Customs and Patent Appeals stated that in order to determine whether an article is included in a particular class or kind of merchandise, the court must consider a variety of factors, including: (1) the general physical characteristics of the merchandise; (2) the channels, class or kind of trade in which the merchandise moves (where the merchandise is sold); (3) the expectation of the ultimate purchasers; (4) the environment of the sale (i.e., accompanying accessories and marketing); (5) usage, if any, in the same manner as merchandise which defines the class; (6) the economic practicality of so using the import; and (7) the recognition in the trade of this use. *Id.* While these factors were developed under the Tariff Schedule of the United States (predecessor to the HTSUS), the courts have also applied them under the HTSUS. *See, e.g. Aromont USA, Inc. v. United States*, 671 F.3d 1310 (Fed. Cir. 2012), *Essex Manufacturing, Inc. v. United States*, 30 C.I.T.1 (2006).

In regard to the physical characteristics of the reusable waste bags of woven polypropylene strips used for yard waste and recycling, they have the same characteristics of a flexible intermediate bulk container (FIBC) in that they consist of woven polypropylene and polyethylene fabric strips which are less than 5 mm in width. They are said to measure 41 inches by 14.75 inches by 13.5 inches when fully expanded. The bags are open at the top with snaps as closures which are placed in a position to permit the top to expand to its fullest width. Located near the bottom of the bags on both sides are pickets with hook and loop closures, which will be filled with approximately one pound of ballast (such as sand) to prevent the bags from being blown away after they have been emptied. To facilitate carrying the bags, two web strap handles are sewn to the top of the bags and two web straps handles are attached to each bottom pocket. In terms of channels of trade, the City of Seattle would initially use the bags to hold yard waste or other article which will be recycled. Eventually the bags were to be distributed to the public. As such, the ultimate users of the bags will use them to store yard waste and left at curbside for pickup by the city recycling trucks. The bags are environmentally practical for use to pack and transport this recycled material and are recognizable for this use.

CBP has issued numerous rulings which describe and classify FIBCs and similar types of bags used for the packing of goods. In New York Ruling N267169, dated August 25, 2015, CBP examined a woven sleeve composed of polypropylene strips. The sleeve is glued on each side and left open on each end. CBP determined its essential character was an unfinished FIBC bag and classified it under subheading 6305, HTSUS. In New York Ruling N257467, dated September 19, 2014, CBP ruled on an FIBC constructed from woven polypropylene strips. It contains a separate but sewn-in liner of plastic sheeting specifically made and shaped to fit inside. The fitted plastic liner would be considered a composite good for tariff purposes with the essential character imparted by the FIBC, wherein CBP noted GRI 3(b), HTSUS, and classified it under heading 6305, HTSUS. *See also* N255320, dated August 4, 2014 (woven polypropylene strips bag measuring 60" x 48" with an opening at one end for filling and the other end is folded over and sewn closed classified under 6305, HTSUS); N216187, dated May 25, 2012 (an FIBC composed of woven polypropylene strips with looped straps at each top corner weighing more than one kilogram classified under heading 6305, HTSUS); N199020, dated January 25, 2012 (laminated polypropylene woven sack with a

hemmed bottom measuring 34.5" x 15" and printed with the company's name and butterflies classified under heading 6305, HTSUS).

At the Headquarters level, there are several rulings on FIBCs and similar articles. In HQ 963508, dated December 21, 2000, this office considered an FIBC woven polypropylene bag that is circular in shape and used to transport sand, classifying it under heading 6305, HTSUS. In HQ 961938, dated June 11, 1999, we examined an FIBC woven from polypropylene fabric with a lining also used to transport sand, classifying it under heading 6305, HTSUS. In ruling HQ H238478, dated September 4, 2014, we applied the *Carborundum* factors to an Aqui–Pak which is made of absorbent nonwoven textile fabric which is then folded on itself and heat sealed, creating partitions between each pouch for the safe transport of laboratory specimen tubes. Finding that the Aqui-Pak is of the same class or kind as bags used for packing goods, CBP classified it under heading 6305, HTSUS.

Hence, there is no requirement that sacks or bags of heading 6305, HTSUS, must transport or store only commercial merchandise for sale. This proposition is not supported by the text of heading 6305, the EN thereto, or our rulings.

For all of the aforementioned reasons, we find that the instant reusable bags of woven polypropylene strips used for yard waste and recycling are of the same class or kind as bags used for packing goods. Therefore, the instant merchandise is classified under heading 6305, HTSUS. As heading 6307, HTSUS, only provides for "other" made up articles which are not classified elsewhere, the reusable bags of woven polypropylene strips used for yard waste and recycling are not classifiable under heading 6307, HTSUS. *See also* EN 63.07.

HOLDING:

By application of GRI 1, the reusable bags of woven polypropylene strips used for yard waste and recycling are classified under heading 6305, HTSUS. They are specifically classified under subheading 6305.32.0010, HTSUSA, which provides, in pertinent part, for "Sacks and bags, of a kind used for the packing of goods: Of man-made textile fibers: Flexible intermediate bulk containers, weighing more than one kg or more." The duty rate is 8.5 percent *ad valorem*.

Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the U.S. International Trade Commission's website at *www.usitc.gov*.

EFFECT ON OTHER RULINGS:

HQ 955639, dated April 5, 1994, is REVOKED.

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

Sincerely,

ALLYSON MATTANAH
for
MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division

REVOCATION OF TWO RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF REUSABLE DIAPER COVERS

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

ACTION: Notice of revocation of two ruling letters and revocation of treatment relating to the tariff classification of reusable diaper covers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking two ruling letters concerning tariff classification of reusable diaper covers under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 51, No. 6, on February 8, 2017. One comment supporting the proposed action was received on March 6, 2017.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 03, 2017.

FOR FURTHER INFORMATION CONTACT: Tatiana Salnik Matherne, Tariff Classification and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0351.

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) ("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 commu-

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

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the *Customs Bulletin*, Vol. 51, No. 6, on February 8, 2017, proposing to revoke two ruling letters pertaining to the tariff classification of reusable diaper covers. As stated in the notice, this action will cover New York Ruling Letter (NY) N266884, dated August 13, 2015, and NY N266899, dated August 15, 2015, as well as 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 two 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 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 notice.

In NY N266884 and NY N266899, CBP classified the reusable diaper covers and plastic liners at issue in heading 9619, HTSUS, which provides for "Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material." CBP has reviewed NY N266884 and NY N266899, and has determined those ruling letters to be in error. It is now CBP's position that reusable diaper covers are properly classified, by operation of GRIs 1, 3(b) and 6, in heading 6111, HTSUS. The diaper covers at issue in NY N266884 are classified in subheading 6111.20.60, HTSUS, which provides for "Babies' garments and clothing accessories, knitted or cro-

cheted: Of cotton: Other: Other." The diaper covers at issue in NY N266899 are classified in subheading 6111.30.50, HTSUS, which provides for "Babies' garments and clothing accessories, knitted or crocheted: Of synthetic fibers: Other."

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking NY N266884 and NY N266899, and revoking or modifying any other ruling not specifically identified, to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H271286, set forth as an Attachment to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: April 04, 2017

IEVA K. O'ROURKE
for
MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H271286

April 04, 2017
CLA-2 OT:RR:CTF:TCM H271286 TSM
CATEGORY: Classification
TARIFF NO.: 6111.20.60

MR. MATTHEW CLARK
SEKO CUSTOMS BROKERAGE INC.
1100 ARLINGTON HEIGHTS ROAD
ITASCA, IL 60143

RE: Revocation of NY N266884 and NY N266899; Classification of Reusable Diaper Covers.

DEAR MR. CLARK:

This letter is in response to your request for reconsideration of New York Ruling Letter (NY) N266884, issued to gDiapers on August 13, 2015, concerning the tariff classification of reusable diaper covers. In that ruling, U.S. Customs and Border Protection ("CBP") classified the subject merchandise in subheading 9619.00.21, Harmonized Tariff Schedule of the United States ("HTSUS"), which provides for "Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material: Of textile wadding: Of cotton." Furthermore, CBP classified the subject detachable interior pouches in subheading 9619.00.05, HTSUS, which provides for "Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material: Of plastics."

For the reasons set forth below we hereby revoke NY N266884. In addition, we hereby revoke NY N266899, dated August 19, 2015, which classified washable diaper covers in subheading 9619.00.74, HTSUS, which provides for "Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material: Other, of textile materials: Other: Of man-made fibers."

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published in the *Customs Bulletin*, Volume 51, No. 6, on February 8, 2017, proposing to revoke NY N266884 and NY N266899, and revoke any treatment accorded to substantially identical transactions. One comment supporting the proposed action was received on March 6, 2017.

FACTS:

The gDiaper system consists of three components. The first component (GD207) is the outer shell, which is made of 92% cotton and 8% spandex jersey knit fabric. The second component (GL100) is a liner which snaps into the outer shell. The liner is made of woven nylon fabric coated with polyurethane. This liner is designed to prevent leakage. The third component is an absorbent insert (GC100). We note that our office received samples of the instant merchandise. The gDiaper system absorbent inserts are made in the United States and sold separately from the outer shell and the liner. Therefore, this ruling letter only addresses the tariff classification of the outer shell and the liner, which are imported together.

ISSUE:

What is the tariff classification of the reusable diaper covers and liners at issue under the HTSUS?

LAW AND ANALYSIS:

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

GRI 2(b) provides, in pertinent part, that the classification of goods consisting of more than one material or substance shall be according to the principles of rule 3. GRI 3 states that, when goods are *prima facie* classifiable under two or more headings, classification shall be effected as follows:

(a) ...when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods...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.

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

The HTSUS provisions under consideration are as follows:

6111	Babies' garments and clothing accessories, knitted or crocheted:
6111.20	Of cotton:
	Other:
6111.20.60	Other
	* * *
6111.30	Of synthetic fibers:
6111.30.50	Other
	* * *
9619.00	Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material:
9619.00.05	Of plastics
	* * *
	Of textile wadding:
9619.00.21	Of cotton
	* * *
	Diapers of other textile materials:
	Of cotton:
9619.00.31	Of knitted or crocheted textile fabric
	* * *

Babies' garments and clothing accessories are provided for in heading 6111, HTSUS. Note 1(u) to Section XI, which covers Chapter 61 and heading 6111, HTSUS, provides the following:

This section does not cover:

> Articles of chapter 96 (for example, brushes, travel sets for sewing, slide fasteners, typewriter ribbons, sanitary towels (pads) and tampons, napkins (diapers) and napkin liners for babies).

In your submission, you argue that, as composite goods, the diaper outer shells and interior liners (Styles GD207 and GL100) are classified in subheading 9619.00.31, HTSUS, which provides for "Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material: Diapers of other textile materials: Of cotton: Of knitted or crocheted textile fabric." You allege that the shells and the liners are not classified in subheading 9619.00.21, HTSUS, as "Sanitary towels (pads) and tampons, diapers and diaper liners for babies and similar articles, of any material: Of textile wadding: Of cotton," since neither component of the gDiaper system is made up of wadding.

As referenced above, heading 9619, HTSUS, provides for, among other items, diapers and diaper liners for babies, and similar articles. The term "diapers" is not defined in the HTSUS or ENs. In cases where tariff terms are undefined, they are to be construed in accordance with their common and commercial meanings which are presumed to be the same (*Nippon Kogaku, Inc. v. United States*, 69 CCPA 89, 92, 673 F.2d 380 (1982); *see also Nylos Trading Company v. United States*, 37 CCPA 71, 73, C.A.D. 423 (1949), and *Winter-Wolff, Inc., v. United States*, CIT Slip Op. 98–15 (Customs Bulletin and Decisions, March 25, 1998, vol. 32, no. 12, 71, at 74, "When, however, a tariff term is not clearly defined by the statute or its legislative history, it is also fundamental that the correct meaning of the tariff term is 'presumed to be the same as its common or dictionary meaning in the absence of evidence to the contrary'").

The term "diaper" is defined, in Webster's NewWorld Dictionary, Second College Edition © 1986, as follows:

> **diaper** – *n.* kind of ornamented cloth **1.** *a)* org., cloth or fabric with a pattern of repeated small figures, such as diamonds *b)* a napkin, towel, etc. of such cloth *c)* such a pattern, as in art **2.** A soft, absorbent cloth folded and arranged between the legs and around the waist of a baby.

The Fairchild Dictionary of Textiles, 8th edition, © 2014, defines the term "diaper" as follows:

> **diaper** – (diaper cloth) 1. A soft, absorbent fabric used for diapers or (British usage) baby napkins; it may be made in bird's-eye weave, plain weave cotton flannel, twill, double plain, or knit. When made of linen in a small diamond pattern, it is called *diaper linen*.

We note that while the knit fabric and the use of the fabric as being "arranged between the legs and around the waist of a baby" are contemplated by the above definitions, each definition also provides for a certain degree of absorbency.

In addition, in interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper

interpretation of the Harmonized System at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The EN to heading 9619, HTSUS, also provides the following:

> This heading covers sanitary towels (pads) and tampons, napkins (diapers) and napkin liners for babies and similar articles, including absorbent hygienic nursing pads, napkins (diapers) for adults with incontinence and pantyliners, of any material.
>
> In general, the articles of this heading are disposable. Many of these articles are composed of (a) an inner layer (e.g., of nonwovens) designed to wick fluid from the wearer's skin and thereby prevent chafing; (b) an absorbent core for collecting and storing fluid until the product can be disposed of; and (c) an outer layer (e.g., of plastics) to prevent leakage of fluid from the absorbent core. The articles of this heading are usually shaped so that they may fit snugly to the human body. This heading also includes similar traditional articles made up solely of textile materials, which are usually re-usable following laundering.
>
> This heading **does not cover** products such as disposable surgical drapes and absorbent pads for hospital beds, operating tables and wheelchairs or non-absorbent nursing pads or other non-absorbent articles (in general, classified according to their constituent material).

The above definitions of the term "diaper" and pertinent ENs show that heading 9619, HTSUS, provides for absorbent articles. Upon review, we find that the diaper shells and liners at issue are not designed to be absorbent in and of themselves. Effectively, they amount to no more than diaper covers. The component which provides absorbency - the absorbent insert, is made in the United States and not imported with the diaper shells and liners. Therefore, we conclude that the diaper shells and liners (diaper covers) lack the essential absorbent component required for classification in heading 9619, HTSUS. Accordingly, we find that they are not "diapers" of heading 9619, HTSUS, and are not classified in this heading.[1]

As discussed above, the diaper covers at issue consist of the diaper outer shells and liners. The outer shells are always imported with the interior liners, constituting a system. The liner snaps into the outer shell. Both items are dysfunctional and useless if used individually. In this regard, GRI 2(b) states, in pertinent part, that the classification of goods consisting of more than one material or substance shall be made according to the principles of GRI 3.

Upon review, we conclude that the diaper covers at issue are composite goods within the meaning of GRI 3(b), since they consist of two components - the outer shells and the interior liners. Under GRI 3(b), the merchandise must be classified as if it consisted of the component which gives the merchandise its essential character. The term "essential character" is not defined within the HTSUS, GRIs or ENs. However, EN VIII to GRI 3(b) gives guidance, stating that: "[T]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined

[1]In your submission, you argued that the diaper shells and liners at issue are not classified in subheading 9619.00.21, HTSUS, since neither component of the gDiaper system is made up of wadding, defined as "soft materials used for stuffing or padding." We agree with your argument that the diaper shells and liners at issue are not made up of wadding.

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 good."

In Treasury Decision (T.D.) 91–78, effective December 11, 1991, CBP set forth its policy that while linings, interlinings or nonwoven insulating layers do impart desirable and, sometimes, necessary features to garments, it is usually the outer shell which imparts the essential character to the garment because the outer shell normally creates the garment. Accordingly, the classification of the diaper covers is determined by the classification of the outer shells.

Upon review, we find that the diaper shells (composed of 92% cotton and 8% spandex, finished with rib knit fabric), at issue in NY N266884, are knitted babies' garments. Therefore, we conclude that they are classified in heading 6111, HTSUS, and specifically in subheading 6111.20.60, HTSUS, which provides for "Babies' garments and clothing accessories, knitted or crocheted: Of Cotton: Other: Other." *See* NY N061196, dated May 20, 2009. Since the essential character of the diaper covers (consisting of the diaper shells and liners) is determined by the diaper shells, when imported together with the shells the liners are also classified in subheading 6111.20.60, HTSUS. The diaper covers at issue in NY N266899 are substantially similar, but they are comprised of knitted polyester fabric. Therefore, these diaper covers are classified in subheading 6111.30.50, HTSUS, which provides for "Babies' garments and clothing accessories, knitted or crocheted: Of synthetic fibers: Other."

HOLDING:

By application of GRIs 1, 3(b) and 6, the diaper covers, consisting of the diaper shells and liners, at issue in NY N266884, are classified in subheading 6111.20.60, HTSUS, which provides for "Babies' garments and clothing accessories, knitted or crocheted: Of Cotton: Other: Other." The 2017 column one, general rate of duty is 8.1% *ad valorem*.

By application of GRIs 1, 3(b) and 6, the diaper covers at issue in NY N266899 are classified in subheading 6111.30.50, HTSUS, which provides for "Babies' garments and clothing accessories, knitted or crocheted: Of synthetic fibers: Other." The 2017 column one, general rate of duty is 16% *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/tata/hts/*.

EFFECT ON OTHER RULINGS:

NY N266884, dated August 13, 2015, and NY N266899, dated August 15, 2015, are hereby REVOKED.

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

Sincerely,

IEVA K. O' ROURKE
for
MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division

19 CFR PART 177

REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE COUNTRY OF ORIGIN MARKING FOR DENTAL INSTRUMENTS

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

ACTION: Notice of revocation of one ruling letter, and of revocation of treatment relating to the country of origin marking for dental instruments.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning country of origin marking for dental instruments. Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 51, No. 6, on February 8, 2017. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 03, 2017.

FOR FURTHER INFORMATION CONTACT: Parisa J. Ghazi, Tariff Classification and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0272.

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

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the *Customs Bulletin*, Vol. 51, No. 6, on February 8, 2017, proposing to revoke one ruling letter pertaining to the country of origin marking for dental instruments. As stated in the notice, this action will cover New York Ruling Letter ("NY") A81309, dated April 19, 1996, as well as 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 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 notice.

In NY A81309, CBP considered the country of origin marking of a dental instrument wherein the handle was imported from Pakistan and it was assembled in the United States with the United States' manufactured working end. CBP determined that after the light manufacturing processes undertaken in the United States, the handle retained its own identity and therefore the country of origin for marking purposes of the handle was Pakistan. CBP has reviewed NY A81309 and has determined the ruling letter to be in error. It is now CBP's position that the imported handles are substantially

transformed in the United States when they are combined with the U.S. manufactured function-specific working ends. Therefore, Hu-Friedy is the ultimate purchaser of the handles and the handles are excepted from marking. The outermost container in which the handles ordinarily reach the ultimate purchaser must be marked in accordance with 19 C.F.R. § 134.22, 134.24(d)(1) and 134.35(a).

Pursuant to 19 U.S.C. §1625(c)(1), CBP is revoking NY A81309 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H278602, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: April 04, 2017

ELIZABETH JENIOR
for
MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H278602
April 04, 2017
CLA-2 OT:RR:CTF:TCM H278602 PJG
Category: Marking

ERIC R. ROCK
ROCK TRADE LAW LLC
77 W. WASHINGTON STREET, SUITE 400
CHICAGO, ILLINOIS 60602

Re: Revocation of NY A81309; Country of origin marking for dental instruments

DEAR MR. ROCK:

This is in response to your request for reconsideration dated June 20, 2016, of New York Ruling Letter ("NY") A81309, dated April 19, 1996, issued to Mr. Herb Simon, on behalf of Hu-Friedy Manufacturing Company, LLC ("Hu-Friedy"). In NY A81309, U.S. Customs and Border Protection ("CBP") considered the country of origin marking of a dental instrument wherein the handle was imported from Pakistan and it was assembled in the United States with the United States' manufactured working end. CBP determined that after the light manufacturing processes undertaken in the United States, the handle retained its own identity and therefore the country of origin for marking purposes of the handle was Pakistan. We have reviewed NY A81309 and find it to be in error. For the reasons set forth below, we hereby revoke NY A81309.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on February 8, 2017, in Volume 51, Number 6, of the *Customs Bulletin*. No comments were received in response to this notice.

FACTS:

The merchandise at issue is described in NY A81309 as follows:

> The samples you furnished consist of one finished Elevator, one finished and two unfinished handles. The Elevator is a dental instrument used to loosen a tooth from the periodontal ligament and ease extraction. It consists of a handle and a blade. The blade is referred to in your catalog as a shank with working end.
>
> The finished Dental Elevator sample you furnished measures 5 5/8 inches in overall length. The hollow handle is 3 3/4 inches long with a tapered body from 3 1/8 to 2 1/8 inches in circumference. It has been polished and sandblasted for a non-slip grip. The 1 7/8 inch long blade (measured on a straight line) has a curved and flattened tip.
>
> Of the three handles furnished, one is completely finished, another has been polished but not sandblasted, and the third grip has been neither polished nor sandblasted. All three handles have pre-formed holes to receive the blade shank.

> The blade is to be manufactured entirely in the United States, but you plan to import the handle from Pakistan either completely finished or semi-finished as described above and attach the blade by gluing.

In NY A81309, CBP determined that "the light manufacturing processes undertaken in the U.S. would not change the character of the handle which retains its own identity. 'Handle made in Pakistan' die stamped or engraved in the handle would be an acceptable form of marking."

The manufacturing and assembly scenario that you describe in your request for reconsideration is as follows:

- Hu-Friedy purchases semi-manufactured steel components called turnings from a vendor in the United States. The turnings consist of steel bar stock that has been cut to length and tapered at one end. The bar stock used by the vendor as the input material in the turnings is manufactured in the United States from U.S. steel.
- The turnings are machined and punched to form a specific shape and, depending on the elevator model, are bent to exacting dimensions to form the working ends of the elevators.
- The working ends are heat-treated to retain their hardness. The heat treating operations are either performed by Hu-Friedy in its manufacturing facility in Chicago or performed by a third-party vendor in the United States.
- After heat treatment, the ends are burnished through a 'speed shine' process and/or electro-polished to form a smooth shine.

At this point, the working ends are ready to be assembled to the imported handles. The assembly process is outlined below:

- The handles are imported with a hole at one end to receive the working ends. A bonding agent is inserted into the hole. The bonding agent serves as both a sealant to prevent moisture from entering the hole where the working end is assembled and an adherent to the working end.
- The handle is placed into an arbor press and press fit to the working end. At this time, the handle and working end are irreversibly joined. There is no expectation that the components would be subsequently separated by the end-user.
- The assembled elevator is laser marked with a part code, date code and Hu-Friedy's logo.
- The elevator is cleaned, and any excess material is removed.
- The elevator is placed into an oven to cure the bonding agent and seal the assembly joint.
- After curing, the elevator is buffed to make it shine, polished to make the final working end sharp, and cleaned again.

You submitted three samples with your request and we note that the "function-specific working end, or 'point'" to the handles are marked "MADE IN U.S.A." and there are no country of origin markings on the handles. In your submission, you note that "these items did not have handles sourced in Pakistan, and were manufactured in the U.S. from U.S. materials."

ISSUE:

Whether substantial transformation occurs when dental instrument handles that are imported from Pakistan are assembled in the United States with working ends that are manufactured in the United States from United States' steel, thereby excepting the components from country of origin marking.

LAW AND ANALYSIS:

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

Part 134 of Title 19 of the Code of Federal Regulations (19 C.F.R. Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. § 1304. Section 134.14(a) and (c) (19 C.F.R. § 134.14(a) and (c)) provide as follows:

> (a) *Articles combined before delivery to purchaser*. When an imported article is of a kind which is usually combined with another article after importation but before delivery to an ultimate purchaser and the name indicating the country of origin of the article appears in a place on the article so that the name will be visible after such combining, the marking shall include, in addition to the name of the country of origin, words or symbols which shall clearly show that the origin indicated is that of the imported article only and not that of any other article with which the imported article may be combined after importation.
>
> * * *
>
> (c) *Applicability.* This section shall not apply to articles of a kind which are ordinarily so substantially changed in the United States that the articles in their changed condition become products of the United States. An article excepted from marking under subpart D of this part is not within the scope of section 304(a)(2), Tariff Act of 1930, as amended (19 U.S.C. 1304(a)(2)), and is not subject to the requirements of this section.

Section 134.35(a) of the C.F.R. (19 C.F.R. § 134.35(a)) states as follows:

> (a) *Articles other than goods of a NAFTA country*. An article used in the United States in manufacture which results in an article having a name, character, or use differing from that of the imported article, will be within the principle of the decision in the case of United States v. Gibson-Thomsen Co., Inc., 27 C.C.P.A. 267 (C.A.D. 98). Under this principle, the manufacturer or processor in the United States who converts or combines the imported article into the different article will be considered the "ultimate purchaser" of the imported article within the contemplation of section 304(a), Tariff Act of 1930, as amended (19 U.S.C. 1304(a)), and the article shall be excepted from marking. The outermost containers of the imported articles shall be marked in accord with this part.

Section 134.41(b) (19 C.F.R. § 134.41(b)), mandates that the ultimate purchaser in the U.S. must be able to find the marking easily and read it without strain. In order to satisfy the requirements of 19 U.S.C § 1304, a dental

instrument must be legibly marked with the name of the country of manufacture of the dental instrument in a conspicuous place.

In addition, section 134.43(a) (19 C.F.R. § 134.43(a)), places special marking requirements on certain products, including dental instruments. In pertinent part, 19 C.F.R. § 134.43(a), states as follows:

> articles of a class or kind listed below shall be marked legibly and conspicuously by die stamping, cast-in-the-mold lettering, etching (acid or electrolytic), engraving, or by means of metal plates which bear the prescribed marking and which are securely attached to the article in a conspicuous place by welding, screws, or rivets: knives, forks, steels, cleavers, clippers, shears, scissors, safety razors, blades for safety razors, surgical instruments, *dental instruments*, scientific and laboratory instruments, pliers, pincers, nippers and hinged hand tools for holding and splicing wire, vacuum containers, and parts of the above articles. (emphasis added)

Two court cases have considered whether imported parts combined in the U.S. with domestic parts were substantially transformed for country of origin marking purposes: *United States v. Gibson-Thomsen Co.*, 27 C.C.P.A. 267 (1940), and *Uniroyal, Inc. v. United States*, 3 Ct. Int'l Trade 220 (1982), aff'd 702 F.2d 1022 (Fed. Cir. 1983). In *Gibson-Thomsen*, the court held that imported wood brush block and toothbrush handles which had bristles inserted into them in the United States lost their identity as such and became new articles having "a new name, character and use." 27 C.C.P.A. at 273. However, in *Uniroyal*, imported shoe uppers were found to be the "essence of the completed shoe" and, therefore, were not substantially transformed when combined with domestic soles in the United States. 702 F.2d at 1022.

In *National Hand Tool Corp. v. United States*, 16 Ct. Int'l Trade 308, 309, the court determined that mechanics' hand tool components which "it used to produce flex sockets, speeder handles, and flex handles" were imported from Taiwan and "processed and assembled in the United States" were not substantially transformed in the United States and therefore were not excepted from the country of origin marking requirements of 19 U.S.C. § 1304. Specifically, the court found "that the name, character or use of the merchandise did not change by post-importation processing, and no substantial transformation occurred." *Id*. In *National Hand Tool Corp.*, most of "[t]he components were cold-formed or hot-forged in Taiwan into their final shape before importation .... [t]he grip components of flex handles ... were knurled in the United States.... [s]ome of the articles ... were heat-treated in the United States while others ... underwent heat treatment in Taiwan", similarly, "[s]ome articles ... were electroplated in the United States while other articles ... were electroplated in Taiwan." The manual assembly of the components occurred in the United States. *Id*. at 310. Ultimately, "[t]he Court found that pre-importation processing of cold-forming and hot-forging required more complicated functions than post-importation processing." *Id*. The Court found that "the name of each article as imported has the same name in the completed tool," the heat treatment, electroplating and assembly did not alter the character of the articles, and "the form of the components remained the same since each component was either hot-forged or cold-formed into its final shape in Taiwan, except for the speeder handle bars," and finally, "[t]he use of the imported articles was predetermined at the time of importation." *Id*. at 311. Importantly, the court notes that "the determination of substantial transformation must be based on the totality of the evidence." *Id*. at 312.

You argue that "the manufacturing processes that define the finished product are the processes of forming the elevator points" because of the skill and precision involved in that process. You also note that each of the elevators is used for a particular purpose depending on their form and argue that the instruments "must be carefully shaped to exacting specification in order to perform their intended function." You further argue that "the process of manufacturing the working ends of the dental elevators is the process that defines the name, character, and use of the finished product" rather than handles or the final assembly and that the "handles themselves lose their separate identity as handles when assembled to the functional ends." You claim that "the handles do not have a predestined use with any specific model of dental elevator at the time of importation" and that they "do not contribute to the functionality of the working elevator points." You also state that "[t]he finished product is identified by the working point, regardless of what kind of handle is assembled to that point."

In support of your arguments, you cite to HQ 560303, dated August 19, 1997, and HQ H229158, dated November 14, 2012. In HQ 560303, CBP considered whether welded handles were imported from Germany to be combined with function-specific ends of medical/surgical instruments underwent a substantial transformation in the United States. In that ruling, CBP held that the imported handles underwent a substantial transformation in the United States, and the handle's name, character, and use are changed in the United States as a result of the operations performed in the United States.

In HQ H229158, CBP considered several scenarios to determine whether the assembly of imported parts and subassemblies to parts of U.S. origin in the United States would amount to a substantial transformation in the United States. CBP also considered whether imported subassemblies that were "entirely operational" underwent substantial transformation in the United States. With regard to Scenario A, CBP found that the merchandise was substantially transformed in the United States when it was assembled into finished tools because the imported parts and components were "unfinished and lack essential components of tool assemblies, namely one of the fully-functional core components." CBP held that "[s]ince the components have no independent functionality, they lose their separate identity by incorporation into the U.S. assembly operations." With regard to the Scenarios B through F, CBP found that "the most complex function-specific operations are performed abroad, clearly impact the essential character to the finished tool" and that "the assembly operations ...in the U.S. ...mainly attaching and threading unto one another – are not sufficiently complex to change the name, character or use of the imported parts." You argue that these two rulings should have resulted in a revocation of NY A81309.

The instant dental instruments' manufacturing process closely resembles the brushes in *Gibson*, the surgical tools in HQ 560303, and Scenario A of HQ H229158. Like these products, there is a change to the name, character, and use of the subject imported article. After the "handle" is imported into the United States and assembled with the "working end", the complete article is called a "dental instrument," or as you refer to it, a "dental elevator." Like the merchandise in Scenario A of HQ H229158, the handles lack the essential components of the dental instrument – the working end. The imported handles alone are not functional and their use is determined after they are attached to the working end as a result of the U.S. assembly operation.

Unlike the tools in *National Hand Tool Corp.* and the merchandise in Scenarios B through F of H229158, the processing performed in the United States involves more than just assembly and finishing operations. The bar stock used to develop the function-specific ends is purchased in the United States and is bent, heat-treated, polished, and finished in the United States. Considering the totality of the facts, we find that substantial transformation occurred in the United States. Pursuant to 19 C.F.R. § 134.35(a), Hu-Friedy is the ultimate purchaser of the handles, and so the handles are excepted from marking. Only the outermost containers of the imported handles are required to be marked at importation.

With regard to merchandise whose origin is the United States, 19 U.S.C. § 1304 is inapplicable and no country of origin marking is required by the provision. The Federal Trade Commission ("FTC") has jurisdiction concerning the use of the phrase "Made in the U.S.A.," or similar words denoting U.S. origin. Consequently, any inquiries regarding the use of such phrases reflecting U.S. origin should be directed to the FTC, at the following address: Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

HOLDING:

The imported handles are substantially transformed in the United States when they are combined with the U.S. manufactured function-specific working ends as described above. Therefore, Hu-Friedy is the ultimate purchaser of the handles and the handles are excepted from marking. The outermost container in which the handles ordinarily reach the ultimate purchaser must be marked in accordance with 19 C.F.R. § 134.22, 134.24(d)(1) and 134.35(a).

EFFECT ON OTHER RULINGS:

NY A81309, dated April 19, 1996, is hereby REVOKED.

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

Sincerely,

ELIZABETH JENIOR
for
MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division

PROPOSED REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF DRIED ALGAE POWDER

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

ACTION: Notice of proposed revocation of one ruling letter and revocation of treatment relating to the tariff classification of dried algae powder.

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

DATE: Comments must be received on or before June 02, 2017.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: Nicholai Diamond, Tariff Classification and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0292.

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

Pursuant to 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 dried algae powder. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N128055, dated October 22, 2010 (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 N128055, CBP classified dried algae powder in heading 1212, HTSUS, specifically in subheading 1212.20.00 of the 2010 HTSUS, which provided for "Locust beans, seaweeds and other algae, sugar beet and sugar cane, fresh, chilled, frozen or dried, whether or not ground; fruit stones and kernels and other vegetable products (including unroasted chicory roots of the variety *Cichorium intybus sativum*) of a kind used primarily for human consumption, not elsewhere specified or included: Seaweeds and other algae: Other." CBP

has reviewed NY N128055 and has determined the ruling letter to be in error. It is now CBP's position that the subject dried algae powder is properly classified, by operation of GRI 1, in heading 2102, HTSUS, specifically in subheading 2102.20.60, HTSUS, which provides for "Yeasts (active or inactive); other single-cell microorganisms, dead (but not including vaccines of heading 3002); prepared baking powders: Inactive yeasts; other single-cell microorganisms, dead: Other."

Pursuant to 19 U.S.C. §1625(c)(1), CBP is proposing to revoke NY N128055 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H284445, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: April 05, 2017

ALLYSON MATTANAH
for
MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N128055

October 22, 2010
CLA-2–12:OT:RR:NC:232
CATEGORY: Classification
TARIFF NO.: 1212.20.0000

MR. DONALD S. STEIN
GREENBERG TRAURIG, LLP
2101 L STREET
SUITE 1000
WASHINGTON, D.C. 20037

RE: The tariff classification of certain dried algae powder from Australia

DEAR MR. STEIN:

In your letter dated October 12, 2010 you requested a tariff classification ruling on behalf of your client, Aurora Algae.

The subject merchandise is described as dried algae powder. According to descriptive literature provided with your request, the dried algae powder is prepared in the following manner. Algae cultures of Nannochloropsis sp., cultivated in Karratha, Western Australia are concentrated via centrifugation. The resulting paste is then dried at a temperature greater than 150 degrees Centigrade by passing through a milling flash dryer. After completing the drying process, the dried algae powder is packed in plastic totes, boxed and stored cold until it is ready to be loaded for transportation to the United States. Upon importation into the United States, the dried algae powder will be processed into omega-3 oils and protein biomass raw materials using a solvent based extraction procedure. These raw materials will be refined into omega-3 oils which are intended to be used as ingredients for dietary supplements and fortified food, or into protein biomass that can be used as feed ingredient for aquaculture.

The applicable subheading for the dried algae powder will be 1212.20.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for seaweeds and other algae. The rate of duty will be 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 World Wide Web at http://www.usitc.gov/tata/hts/.

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling FDA at 301–575–0156, or at the Web site www.fda.gov/oc/bioterrorism/bioact.html.

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 Frank Troise at (646) 733–3031.

Sincerely,

ROBERT B. SWIERUPSKI
Director
National Commodity Specialist Division

ATTACHMENT B

HQ H284445
CLA-2 OT:RR:CTF:TCM H284445 NCD
CATEGORY: Classification
TARIFF NO.: 2102.20.6000

DONALD STEIN
GREENBERG TRAURIG, LLP
2101 L STREET, N.W.
SUITE 1000
WASHINGTON, D.C. 20037

RE: Revocation of NY N128055; Classification of dried algae powder

DEAR MR. STEIN:

This is in reference to New York Ruling Letter (NY) N128055, which was issued to you by U.S. Customs and Border Protection (CBP) on October 22, 2010. NY N128055 was issued in response to your October 12, 2010 request, filed on behalf of Aurora Algae, for a determination by CBP as to the classification of a dried algae powder under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed NY N128055 and determined that it is incorrect. For the reasons set forth below, we are revoking that ruling letter.

FACTS:

NY N128055 states as follows with respect to the dried algae powder at issue:

> According to descriptive literature provided with your request, the dried algae powder is prepared in the following manner. Algae cultures of Nannochloropsis sp., cultivated in Karratha, Western Australia are concentrated via centrifugation. The resulting paste is then dried at a temperature greater than 150 degrees Centigrade by passing through a milling flash dryer. After completing the drying process, the dried algae powder is packed in plastic totes, boxed and stored cold until it is ready to be loaded for transportation to the United States. Upon importation into the United States, the dried algae powder will be processed into omega-3 oils and protein biomass raw materials using a solvent based extraction procedure. These raw materials will be refined into omega-3 oils which are intended to be used as ingredients for dietary supplements and fortified food, or into protein biomass that can be used as feed ingredient for aquaculture.

The above-described dried algae powder was classified in heading 1212, HTSUS, specifically in subheading 1212.20.00 of the 2010 HTSUS, which provided for "Locust beans, seaweeds and other algae, sugar beet and sugar cane, fresh, chilled, frozen or dried, whether or not ground; fruit stones and kernels and other vegetable products (including unroasted chicory roots of the variety *Cichorium intybus sativum*) of a kind used primarily for human consumption, not elsewhere specified or included: Seaweeds and other algae: Other."

ISSUE:

Whether the dried algae powder is classified as "other algae" in heading 1212, HTSUS, or as "other dead single-cell microorganisms" in heading 2102, HTSUS.

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

In addition, in interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The 2017 HTSUS provisions under consideration are as follows:

1212	Locust beans, seaweeds and other algae, sugar beet and sugar cane, fresh, chilled, frozen or dried, whether or not ground; fruit stones and kernels and other vegetable products (including unroasted chicory roots of the variety *Cichorium intybus sativum) of a kind used primarily for human consumption, not elsewhere specified or included:*
	Seaweeds and other algae:
1212.29.00	Other[*]
2102	Yeasts (active or inactive); other single-cell microorganisms, dead (but not including vaccines of heading 3002); prepared baking powders:
2102.20	Inactive yeasts; other single-cell microorganisms, dead:
2102.20.60	Other

At the outset, we note that Note 5(a) to Chapter 12 states: "For the purposes of heading 1212, the term "seaweeds and other algae" does not include...Dead single-cell microorganisms of heading 2102." *See also* EN 12.12 ("The heading **excludes**...Dead single-cell algae (**heading 21.02**)." Consequently, if the subject dried algae powder qualifies as a "dead single-cell microorganism" within the meaning of heading 2102, HTSUS, it cannot be classified in heading 1212, HTSUS.

[*] As part of the 2012 amendments to the HTSUS, subheading 1212.20.00 was re-designated subheading 1212.29.00. Because the subheadings are identical in language, we consider whether the subject dried algae powder is classifiable in subheading 1212.29.00, HTSUS, which remains in effect.

Heading 2102, HTSUS, specifically describes, *inter alia*, "dead single-cell microorganisms." EN 21.02 states as follows with respect to such:

> (B) **OTHER SINGLE-CELL MICRO-ORGANISMS, DEAD**
>
> This category covers single-cell micro-organisms such as bacteria and unicellular algae, which are **not** alive. *Inter alia*, covered here are those which have been obtained by cultivation on substrates containing hydrocarbons or carbon dioxide. These products are particularly rich in protein and are generally used in animal feeding.
>
> Certain products of this group may be put up as food supplements for human consumption or animal feeding (e.g., in powder or tablet form) and may contain small quantities of excipients, e.g., stabilising agents and anti-oxidants. Such products remain classified here **provided** that the addition of such ingredients does not alter their character as micro-organisms.

According to the above-cited portion of EN 21.02, heading 2102 applies to non-living unicellular algae put up in powder form. In the instant case, the dried algae powder at issue consists of *nannochloropsis* sp. cultures that have undergone concentration by centrifugation and, subsequently, concurrent drying and milling in a milling flash dryer. It is indisputable that *nannochloropsis* sp. is a single-cell algal microorganism. *See* Olivier Kilian et. al., High-efficiency Homologous Recombination in the Oil-producing Alga *Nannochloropsis* sp. 108–52 Proc. Nat'l Acad. U.S. 21266 (2011) (characterizing *Nannochloropsis* sp. as a unicellular microalga in analysis authored in part by affiliate of Aurora Algae). Moreover, a report issued by the World Customs Organization's Scientific Sub-Committee (SSC) indicates that microalgae is unable to survive the combination of concentration, drying, and milling. *See*Annex A/8 to SSC Doc. NS0102E1a (SSC/20/Jan. 2005), A/8; *see also* Annex G/3 to Harmonized System Committee (HSC) Doc. NC938E1b (HSC/35/March 2005), G/3/1 Rev (relying on the SSC's analysis in classifying cultures of *Spirulina platensis*, a unicellular alga, in heading 2102). Lastly, because it is entered as a non-supplemented powder, the subject merchandise takes a form that, according to EN 21.02, is permissible for purposes of classification in heading 2102.

The subject dried algae powder is therefore classified in heading 2102, insofar as it falls within the scope of the heading and is consequently excluded from heading 1212, HTSUS. We note that this determination is consistent with several prior CBP rulings pertaining to similarly-produced microalgal products. *See* NY N110542, dated July 1, 2010; NY H84826, dated August 14, 2001; NY F83405, dated March 7, 2000 and NY 895933, dated April 5, 1994 (all classifying powders made up of unicellular microalgae in heading 2102).

HOLDING:

By application of GRI 1, the subject dried algae powder is properly classified in heading 2102, HTSUS. It is specifically classified in subheading 2102.20.6000, HTSUSA (Annotated), which provides for "Yeasts (active or inactive); other single-cell microorganisms, dead (but not including vaccines of heading 3002); prepared baking powders: Inactive yeasts; other single-cell microorganisms, dead: Other." The 2017 column one general rate of duty is 3.2% *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/tata/hts/*.

EFFECT ON OTHER RULINGS:

New York Ruling Letter N128055, dated October 22, 2010, is hereby REVOKED in accordance with the above analysis.

Sincerely,

MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division

PROPOSED MODIFICATION OF A RULING LETTER RELATED TO THE VALUATION OF CERTAIN MERCHANDISE

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

ACTION: Notice of proposed modification of one ruling letter relating to, among other things, the dutiability of certain commission payments made by an importer.

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 one ruling letter concerning, among other things, the dutiability of certain commission payments made by an importer. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before June 02, 2017.

ADDRESS: Written comments are to be addressed to the U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: Cynthia Reese, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–0046.

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

Pursuant to 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 modify one ruling letter concerning, among other things, the dutiability of certain commission payments made by an importer. The reason for this modification is specific to Headquarters Ruling Letter (HQ) H271308, dated November 20, 2016, as it involves two misstatements in the ruling. Therefore, this notice does not cover any other ruling.

In HQ H271308, CBP determined that certain commission payments made by the importer to purported agents should be included in the price actually paid or payable because we concluded that the information presented to us did not indicate the parties were *bona fide* agents. In addition, CBP determined that payment for fabric development, inspection fees, and advance payments should be included in the price actually paid or payable. After issuance of the decision, counsel for the importer raised concerns about various statements in the decision. Many of these statements were based upon the Office of Regulatory Audit's Referral Audit Report on the importer. As such, the statements are accurate. However, two misstatements do appear in the decision. The decision erred in stating that a purported agent instructed the importer's customers when to make payment. In addition, the decision misconstrued an argument regarding the purported agent's services as a buying agent for the importer and stated that, in that situation, the importer was the seller. In order to correct these misstatements, CBP proposes to modify HQ H271308 by issuance of proposed HQ H284364. We note that our proposed modification of HQ H271308 is to correct only the two misstatements which have been identified and will not have any effect on CBP's holding in the decision.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is proposing to modify HQ H271308 (Attachment "A") to reflect the analysis contained in the proposed HQ H284364 set forth as Attachments "B" to this notice.

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

Dated: March 23, 2017

YULIYA GULIS
for
MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

HQ H271308
November 30, 2016
OT:RR:CTF:VS H271308 GaK
CATEGORY: Valuation

AREA PORT DIRECTOR
U.S. CUSTOMS & BORDER PROTECTION
1 EAST BAY ST.
SAVANNAH, GA 31401

RE: Internal Advice Request; Dutiability of buying commissions, fabric development charges, inspection fees, and advance payments

DEAR PORT DIRECTOR:

This is in response to your memorandum dated November 20, 2015, in which you forwarded the Office of Regulatory Audit's ("ORA") Referral Audit Report ("Report") on Key Apparel Inc. ("Key" or "importer") and Key's response to the Audit, which also included Key's request for internal advice. Key's response, dated September 29, 2014, was prepared in response to the Report findings on the dutiability of foreign payments to purported agents and potential indirect payments for the imported merchandise. The Report also included ORA's rejoinder to Key's response, dated November 19, 2014.

FACTS:

Key is an importer, wholesaler, and manufacturer of textiles and sells its apparel to customers in the U.S. Key was referred to ORA by the Textile/Apparel Policy Division based on the potential for undervaluation. The scope of the audit included Calendar Year ("CY") 2012 imports, and with respect to foreign payments to purported agents, the scope was expanded to include CY 2009 through CY 2012.

The audit was conducted in accordance with generally accepted government auditing standards, except for the following limitations: ORA was unable to perform additional testing of Key's accounting records to fully quantify the violations disclosed during the audit due to the unreliability and inconsistencies in Key's responses and the financial data. Specifically, when ORA requested a Purchase Reconciliation from CBP ACS data for the importer's purchases, Key provided a revised CY 2012 Trial Balance and made significant adjustments/reclassifications to its Purchase account. Key was unable to provide documentary evidence for purported commission payments, client reports to substantiate the accounting entries, and written agreements on advances paid to the manufacturer. Key provided inconsistent explanations as to how fees are paid to purported agents, and how the agents are involved in the import process. Further, ORA noted unaudited financial statements and found commission invoices. As a result, ORA's loss of revenue calculation is limited to the following documents:

- Reconciliation of Purchases to CBP data,
- Commission and fabric development cost schedule,
- Agency agreement between Key and alleged buying agent, Shanghai Nex-T International Co. Ltd. ("SNT"),
- CY 2012 tax return,

- CY 2012 bank statements,
- Schedule of advance payments to Key's related seller, Nex-T Cambodia Co. Ltd. ("NAC"), and
- CY 2012 Buying Expense Account.

The audit found the following: 1) foreign payments to purported agents were not bona fide buying commissions, 2) foreign payments for fabric development charges were indirect payments for imported merchandise, 3) foreign payments for purported inspection fees were an undeclared indirect payment for imported merchandise, and 4) advance payments to NAC were undeclared additional payments for imported merchandise. ORA concluded that Key did not report accurate and complete transaction value information to CBP, violating 19 C.F.R. § 152.102(f) and 152.103(b). Despite the scope limitation identified, ORA identified a specified amount in undervaluation of the imported merchandise resulting in a specified loss of revenue in duty for CY 2012. ORA also identified an additional undervaluation and resultant loss of revenue in duty for CY 2009 through CY 2011. Key responded to ORA's results on September 29, 2014 and ORA included its rejoinder in the Report, dated November 19, 2014.

During the audit scope period, Key purchased merchandise from a seller in China, and NAC in Cambodia. Key used alleged related buying agents, SNT and Hong Kong Nex-T Inc. Limited ("HKNT"), located in Shanghai and Hong Kong, respectively.

I. Buying Commissions

ORA stated that the fees paid to SNT and HKNT were not bona fide buying commissions. ORA based this on the fact that SNT's related party[1] paid the salary of Key's CEO/President. The total entered value from manufacturers related to both Key and SNT represented 70 percent of Key's total importations, which ORA interpreted as SNT not being financially detached from the manufacturer or seller. ORA also did not find SNT to be involved in the transactions between the manufacturers and Key, but rather in the transactions between Key and its customers in the U.S. SNT had access to Key's shared drive, which SNT used to record Key's customers' orders. In addition, the agency agreement between Key and SNT was not being followed: there were no commission invoices and SNT was not paid upon receipt of payment from Key's customers. Lastly, payments were made to SNT, who is identified as a manufacturer on the Automated Commercial System ("ACS") manufacturer report.

Regarding HKNT, Key and HKNT did not have an agency agreement. ORA also found that the buying commission was based on eight percent of the merchandise resale price to Key's U.S. customers, rather than based on the sale between Key and the sellers. Furthermore, buying commissions were pre-paid and/or carried over to subsequent years, and could not be correlated to import entries. Key states that because HKNT is SNT's branch office, a separate agency agreement was not necessary. Key also emphasizes that there was no relationship between SNT and the sellers and the lack of reference to SNT in the commercial documents support a sale to Key from the seller, not from SNT to Key. Key submitted copies of periodic debit notices

[1] SNT is owned by Jung Yoon Suk, who is the CEO of Nex-T America. Nex-T America paid Key's CEO/President's salary.

issued by SNT in lieu of commission invoices, which became due when Key received payment from its U.S. customers. With respect to the buying commission being based on the resale price to Key's U.S. customers, Key states that while it may be unorthodox, it is not an indication that the commission is dutiable. In addition, Key states that pre-payment or late payment is nothing more than an element of commercial dealings of the parties, which has no effect on the bona fides of the principal-buying agent relationship. Lastly, Key states that the fact that commission payments cannot be tied to entries is of no consequence.

ORA states that debit notes in lieu of commission invoices were not mentioned or referenced prior to Key's response to the Report. In addition, the debit notes provided with Key's response state that payment should be made to the account of "HK Jak Factory Limited," and Key was unable to explain the entity's involvement in the import transactions. ORA's review of the CY 2012 Trial Balance Account also did not disclose debit notes. ORA found that SNT was in control of the import transaction. SNT received Key's customers' orders and instructed Key when to remit the commission payments. Furthermore, through discussions with Key personnel, ORA found that Key did not have extensive knowledge of the import transaction and its role was to receive the customers' payment and record the payment details onto an excel spreadsheet maintained on a shared drive accessible by Key and SNT.

II. Indirect Payments

A. Fabric Development Charges

ORA states that foreign payments made by Key to HKNT for fabric development were not for garment samples, but undeclared indirect payments to HKNT. ORA traced the payments identified in Key's commission payment schedule and the trial balance sample development cost payable account, directly to HKNT. ORA requested invoices and entries to verify whether the payments were declared to CBP as sample merchandise; however, Key was unable to provide them. ORA concluded that the evidence submitted did not support that the payments relate to fabric development costs for imported mutilated samples. ORA's review also disclosed that Key did not pay the manufacturers the amount due and the amounts were often rounded up or down, and commercial invoice amounts were carried over and payable the following year. Key also did not furnish evidence that duty was paid on left over fabric used in production of imported merchandise.

Key states that the fabric used in samples were all mutilated and therefore classified under subheading 9811.00.60, Harmonized Tariff Schedule of the United States ("HTSUS")[2] and duty free. According to Key, just because it could not provide entry documents for this fabric did not mean the merchandise should be dutiable. Key explained that samples were typically imported by means of a courier who made entry, and Key did not have access to entry information. Key states that the payments were booked to Sample Development Costs because they related to samples, and because the sample garments were mutilated and not subject to duty, there was no loss of revenue.

[2] Subheading 9811.00.60, HTSUS provides for "[a]ny sample (except samples covered by heading 9811.00.20 or 9811.00.40), valued not over $1 each, or marked, torn, perforated or otherwise treated so that it is unsuitable for sale or for use otherwise than as a sample, to be used in the United States only for soliciting orders for products of foreign countries."

Key also referenced the prior disclosure, filed on May 9, 2013 by Key, that addressed the fabric development fee. Key did not provide any additional supporting documents.

ORA reviewed the CBP entry data, and found that Key did not enter goods under 9811.00.60, HTSUS, during the scope period. ORA did *see* mutilated sample garments at Key's office, but according to Key, some of the samples were purchased domestically. ORA was unable to correlate any of the sample garments to import documentation. ORA was not advised that the overseas development costs were related to the merchandise in any way, and could not find entries/invoices for samples. Further, the evidence did not demonstrate that the payments related to fabric development costs for imported mutilated samples. With regard to Key's May 9, 2013 prior disclosure, ORA states that Key did not tender the loss of revenue relating to the subject prior disclosure. The prior disclosure only included lump sum totals in regard to assists, and did not provide supporting schedules or documentation. Therefore, ORA was unable to verify that the payments made to HKNT during the scope period were included in the disclosure.

B. Inspection Fees

ORA also found that Key made undeclared payments to Empire, a third party, for inspection fees on behalf of Key's customer, Kandy Kiss. Key was unable to provide any contracts regarding the purported inspection fee for merchandise entered for sale to Kandy Kiss. ORA found that Key recorded the inspection fee in its commission account, even though the payment was not made to SNT or HKNT. ORA reviewed an invoice from Empire to Key, showing a charge of five cents per piece, which Key explained was for the post import charge and commission paid to Empire for inspection services on behalf of Kandy Kiss. Key submitted an e-mail from Kandy Kiss from August 2013, in which Kandy Kiss stated that Empire provided garment and factory inspection for Kandy Kiss, and Key was required to pay Empire. Key states that because Kandy Kiss is no longer a customer, they are not able to obtain supporting documentation. The e-mail string shows that Key wrote to Kandy Kiss on August 8, 2013, but Kandy Kiss's response was sent on August 7, 2013, which is also the date that ORA received the e-mails from Key. ORA determined that the date of the e-mails is questionable and concluded that Key was unable to provide sufficient and appropriate evidence to support that the payments related to inspection fees, and, as such, they should be dutiable as an undeclared indirect payment.

Key responded by repeating that the payments to Empire were required by Kandy Kiss and the inspection fee was built into Key's price to Kandy Kiss. Key did not provide additional documents aside from the August 2013 e-mails between Key and Kandy Kiss.

C. Advance to a Manufacturer

ORA found that Key made advance payments to NAC, a related seller. Key did not have any written agreements regarding "advances," the invoices did not identify the payments as "advances," and advance payments were also recorded in Key's purchase account. Key admitted that they did not have a written agreement, but an oral agreement. Key states that it determined it was best that NAC remained a viable supplier while NAC was experiencing difficulty with labor strikes; therefore, advance payments were made. In

support of their oral agreement, Key submitted a statement from NAC stating that it received the advances from Key and acknowledging its obligation to repay Key. NAC began to amortize the advance by shipping merchandise without requiring payment or accepting partial payment. An amortization schedule, with invoice numbers, was provided to ORA. Key states that amortization was suspended because of the labor strike that persisted up until 2014. ORA reviewed the advance set-offs which included four invoices that were also listed on the schedule of advances provided by Key, which disclosed that the offsetting was not identified on the invoices. Based on the lack of documentation of the advances and repayment of the advances, ORA concluded that the advances made to NAC were undeclared indirect payments.

Key repeated their reason for making payments to NAC and provided related news articles and pictures of the strike causing NAC's difficulties. Key also submitted an undated amortization schedule and three NAC invoices from July 2013, each set-off against the advance.

ISSUES:

1. Whether the commission payments made by the importer to its agents are bona fide buying commissions.
2. Whether the payment for fabric development, inspection fees, and advance payments are indirect payments for the imported merchandise.

LAW AND ANALYSIS:

Merchandise imported into the United States is appraised in accordance with section 402 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. § 1401a). The primary method of appraisement is transaction value, which is defined as "the price actually paid or payable for the merchandise when sold for exportation to the United States," plus five enumerated additions. 19 U.S.C. § 1401a(b)(1). The price actually paid or payable shall be increased by the amounts attributable to the five statutory additions enumerated in 19 U.S.C. § 1401a(b)(1)(A) through (E) only to the extent that each such amount is not otherwise included within the price actually paid or payable. 19 U.S.C. § 1401a(b)(1). The term "price actually paid or payable" is defined in pertinent part as "the total payment (whether direct or indirect...) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller." 19 U.S.C. § 1401a(b)(4).

I. Buying Commissions

The enumerated additions to the price actually paid or payable include the value of any selling commissions incurred by the buyer with respect to the imported merchandise. A "selling commission" is any commission paid to the seller's agent, who is related to or controlled by, or works for or on behalf of, the manufacturer or the seller. 19 C.F.R. § 152.102(b). Bona fide buying commissions, however, are not included in transaction value as part of the price actually paid or payable or as an addition thereto. *See Pier 1 Imports, Inc. v. United States*, 708 F. Supp. 351, 354 (CIT 1989); *Rosenthal-Netter, Inc. v. United States*, 679 F. Supp. 21, 23 (CIT 1988), aff'd, 861 F.2d 261 (Fed. Cir. 1988); and *Jay-Arr Slimwear, Inc. v. United States*, 681 F. Supp. 875, 878 (CIT 1988). The existence of a bona fide buying commission depends upon the

relevant factors of the individual case. *J.C. Penney Purchasing Corp. v. United States*, 451 F. Supp. 973, 983 (Cust. Ct. 1978). However, the importer has the burden of proving that a bona fide agency relationship exists and that payments to the agent constitute bona fide buying commissions. *Pier 1 Imports, Inc.*, 13 Ct. Int'l Trade at 164; *Rosenthal-Netter, Inc*., 12 Ct. Int'l Trade at 78; and *New Trends, Inc. v. United States*, 645 F. Supp. 957, 960 (CIT 1986). The totality of the evidence must demonstrate that the purported agent is in fact a bona fide buying agent and not a selling agent or an independent seller. Headquarters Ruling Letter ("HQ") 542141, dated September 29, 1980, also cited as TAA No. 7.

Although no single factor is determinative, the primary consideration in determining whether an agency relationship exists is the right of the principal to control the agent's conduct with respect to those matters entrusted to the agent. *Pier 1 Imports, Inc*., 13 Ct. Int'l Trade at 164; *Rosenthal-Netter, Inc*., 12 Ct. Int'l Trade at 79; and *Jay-Arr Slimwear*, 12 Ct. Int'l Trade at 138. In addition, the courts have examined such factors as the existence of a buying agency agreement; whether the importer could have purchased directly from the manufacturers without employing an agent; whether the agent was financially detached from the manufacturer of the merchandise; and the transaction documents. *See J.C. Penney Purchasing Corp*., 80 Cust. Ct. at 95–98. The courts have also examined whether the purported agent's actions were primarily for the benefit of the principal; whether the agent bore the risk of loss for damaged, lost or defective merchandise; whether the agent was responsible for the shipping and handling and the costs thereof; and whether the intermediary was operating an independent business, primarily for its own benefit. *See New Trends, Inc*., 10 Ct. Int'l Trade 640–643.

In the instant case, the transaction documents indicate that Key did not control the agent's conduct. As previously noted, the agency agreement between Key and SNT was provided. The agreement specifies that SNT will bill Key and Key shall pay SNT 15 days after Key's receipt of the merchandise. However, SNT issued periodic debit notes in lieu of commission invoices. The debit notes provided by Key covered two to three month periods of "collections," which were the sale prices of all merchandise sold to Key's U.S. customers, and SNT required payment of eight percent of the collections, in accordance with the agency agreement, as the service charge. The debit notes state that payment should be made to the account of "HK Jak Factory Limited," a party who was not identified in any of Key's submissions. Furthermore, the fact that the service charge is based on the resale price to Key's U.S. customer suggests that the purported agent's actions were not primarily for the benefit of the principal, but for itself as well. *See New Trends, Inc*., 10 Ct. Int'l Trade 640–643; and HQ 544423, dated June 3, 1992. We disagree with Key's argument that a buying commission based on the resale price to Key's customers has no bearing on the bona fides of the principal-agent relationship. As stated above, SNT was in control of receiving Key's customers' orders, issued debit notes to Key based on the customer orders, and instructed Key's customers when to make payment. SNT's involvement with Key's resale of the merchandise shows that SNT was involved in other aspects of Key's business, and their relationship exceeded that of a principal-buying agent relationship.

Counsel cites to CBP's "Buying and Selling Commissions" ICP, which states that one of the services of a buying agent is "informing the seller of the desires of the buyer," as a justification for SNT's access to Key's shared drive.

However, a buying agent acts on behalf of the buyer, and counsel quotes the ICP to address SNT's access to the shared drive with Key that was used to record the resale of merchandise to Key's U.S. customers. In that situation, Key was the seller; therefore, SNT's role of informing Key of its buyer/customer's desires is irrelevant. Accordingly, we find that Key did not control the agent, SNT was not a bona fide buying agent, and the commission payments should be included in the price actually paid or payable.

II. Indirect Payments

The term "price actually paid or payable" is defined as the "total payment [...] made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller." 19 U.S.C. § 1401a(b)(4)(A). There is a rebuttable presumption that all payments made by a buyer to a seller, or a party related to a seller, are part of the price actually paid or payable. *See* HQ 545663 dated July 14, 1995. This position is based on the meaning of the term "price actually paid or payable" as addressed in *Generra Sportswear Co. v. United States*, 905 F.2d 377 (CAFC 1990). In *Generra*, the court considered whether quota charges paid to the seller on behalf of the buyer were part of the price actually paid or payable for the imported goods. In reversing the decision of the lower court, the appellate court held that the term "total payment" is all-inclusive and that "as long as the quota payment was made to the seller in exchange for merchandise sold for export to the United States, the payment properly may be included in transaction value, even if the payment represents something other than the per se value of the goods." The court also explained that it did not intend that Customs engage in extensive fact-finding to determine whether separate charges, all resulting in payments to the seller in connection with the purchase of imported merchandise, were for the merchandise or something else.

Although the presumption that payments made directly or indirectly by a buyer to or for the benefit of a seller are part of the price actually paid or payable is rebuttable, the burden of establishing that the payments are unrelated to the imported merchandise rests on the importer. *See id.* HQ 547532; *see also Chrysler Corp. v. United States*, 17 C.I.T. 1049 (1993).

A. Fabric Development Charges

Key made payments to HKNT, stated to be a branch of SNT, for fabric development and samples, which mostly related to fabric used in samples. Key states that it was not able to connect the fabric development charges because the samples were entered by a courier and Key did not have access to the entry information. The fabric samples are claimed to be classified under subheading 9811.00.60, HTSUS, as duty free. However, Key did not enter any items under subheading 9811.00.60, HTSUS, during the scope period. In addition, Key has not provided any documents such as purchase orders, invoices, or contracts to support that the fabric samples were actually exchanged in relation to the sale. No information has been presented to establish that the costs are not part of the price actually paid or payable for the imported merchandise.

B. Inspection Fees

Key cites to HQ W563469, dated March 21, 2006; and HQ 547006, dated April 28, 1998, to support its argument that inspection fees are not dutiable

unless they are paid to the seller or employees of the seller. In HQ W563469, CBP determined that payments made by the importer to a company unrelated to the supplier and the importer for inspection services, were not part of the price actually paid or payable for the merchandise. The services provided included validating that the merchandise met the importer's requirements.

In the instant case, Key states that its customer, Kandy Kiss, requested that Key pay Kandy Kiss's buying commission to Empire, their foreign Hong Kong agent, as a condition of the contract between Key and Kandy Kiss. Empire issued an invoice to Key for services at the rate of five cents per item. The invoice did not refer to Kandy Kiss, purchase order numbers associated with the products, or describe the purpose of the invoice. Key did not provide any documents to support the arrangement or describe Empire's duties as Kandy Kiss' agent. In addition, Key provided conflicting descriptions of Empire's services as being a buying agent service paid on Kandy Kiss' behalf, a post import charge, and an inspection fee. Furthermore, the payment to Empire was recorded in Key's commission account as "HK Customer commission," even though the payment was not made to its own agent.

CBP has previously examined the question of whether payments made for testing and consulting services are part of the price actually paid or payable. In HQ 547033, dated June 25, 1998, a garment importer hired an independent overseas fabric consultant. The consultant's primary duties included acting as mill liaison for the importer and helping the importer ensure that woven fabric purchased by the garment manufacturers from the mills conformed to the importer's stringent quality specifications. One of the consultant's quality control functions was to assist with fabric testing. The importer paid the consultancy fees directly to the consultant. The ruling noted that as a general proposition, CBP considers fees paid to third parties, to the extent that they are similar to bona fide buying commissions, generally not to be part of the price actually paid or payable for the imported merchandise.

However, in the case at hand, the documents provided do not sufficiently support that the services provided by Empire to Kandy Kiss reflect bona fide buying commissions and that the associated fees are not part of the price actually paid or payable. The documents also lack sufficient information to determine the extent of Empire's services and whether they related to the design or development of the product. Accordingly, we find that the purported inspection fee should be included in the price actually paid or payable.

C. Advance to a Manufacturer

Key stated that it made advance payments to NAC, a related manufacturer, in order to enable NAC to remain a viable manufacturer. Key cites to HQ W548475, dated March 25, 2004, as support that repaying advances by setting them off against merchandise shipments is evidence that the advances were not supplemental payment for the merchandise. In HQ W548475, CBP considered whether loan payments were part of the price actually paid or payable. The buyer did not provide a loan agreement, documents establishing repayment, or proof of repayment by the seller. CBP held that the buyer did not establish that the payments made to the seller were unrelated to the merchandise, and found that all financial transfers characterized as loans should be included in the transaction value. While Key describes HQ W548475 to be representative of the fact that repaying advances by setting them off against merchandise shipments is evidence that

the advances were not supplemental payments for the merchandise, we find that this characterization is not accurate. Rather, HQ W548475 supports the argument that the advance payments made to NAC are part of the price actually paid or payable.

CBP has previously examined the question of whether advance payments made to a seller are part of the price actually paid or payable. In HQ 544375, dated July 6, 1990, CBP noted that if an advance is paid in order for the seller to begin production of the merchandise, the advances will be dutiable. In the case at hand, while the advance may not have been for production of specific merchandise Key intended to order at the time, it was provided for the purpose of maintaining NAC as a viable producer of the merchandise. *See also* HQ 545032, dated December 4, 1993 (cash advance from the buyer to seller constitutes part of the price actually paid or payable).

As noted above, there is a rebuttable presumption that all payments made by a buyer to a seller, or a party related to a seller, are part of the price actually paid or payable. Similar to HQ W548475, Key did not have a written agreement with NAC with regard to the advances and the means of recovering the advances were unclear. *See* HQ 544375 *supra.* The amortization schedule that Key provided is simply a record of invoices that have been set-off against the advance and does not indicate that there was any structure or schedule to the repayment. The amortization and sample invoices provided by Key shows that NAC was repaying the advance in accordance with the orders placed by Key, in lieu of a structured repayment schedule. Further amortization had also been suspended, which also indicates a lack of repayment structure. Furthermore, advance payments to NAC were entered as purchases in Key's accounting records. *See generally* HQ 548332, dated October 31, 2003; and HQ 546430, dated January 6, 1997. Although the payments are characterized as advances, Key has not provided advance agreements or specific method of repayment by the seller. Therefore, all financial transfers characterized by the parties as advances should be included in the price actually paid or payable.

HOLDING:

The information presented does not indicate that the purported agents are bona fide agents and commission payments made by the importer should be included in the price actually paid or payable. The payment for fabric development, inspection fees, and advance payments should also be included in the price actually paid or payable.

You are to mail this decision to the internal advice requester no later than 60 days from the date of the decision. At that time, Regulations and Rulings of the Office of International Trade will make the decision available to CBP personnel, and to the public on the CBP Home Page on the World Wide Web at www.cbp.gov, by means of the Freedom of Information Act, and other methods of public distribution.

Sincerely,

MONIKA R. BRENNER,
Chief
Valuation & Special Programs Branch

ATTACHMENT B

HQ H284364
OT:RR:CTF:VS H284364
CATEGORY: Valuation

AREA PORT DIRECTOR
U.S. CUSTOMS & BORDER PROTECTION
1 EAST BAY ST.
SAVANNAH, GA 31401

RE: Internal Advice Request; Dutiability of buying commissions, fabric development charges, inspection fees, and advance payments

DEAR PORT DIRECTOR:

This is in response to your memorandum dated November 20, 2015, in which you forwarded the Office of Regulatory Audit's ("ORA") Referral Audit Report ("Report") on Key Apparel Inc. ("Key" or "importer") and Key's response to the Audit, which also included Key's request for internal advice. Key's response, dated September 29, 2014, was prepared in response to the Report findings on the dutiability of foreign payments to purported agents and potential indirect payments for the imported merchandise. The Report also included ORA's rejoinder to Key's response, dated November 19, 2014.

FACTS:

Key is an importer, wholesaler, and manufacturer of textiles and sells its apparel to customers in the U.S. Key was referred to ORA by the Textile/Apparel Policy Division based on the potential for undervaluation. The scope of the audit included Calendar Year ("CY") 2012 imports, and with respect to foreign payments to purported agents, the scope was expanded to include CY 2009 through CY 2012.

The audit was conducted in accordance with generally accepted government auditing standards, except for the following limitations: ORA was unable to perform additional testing of Key's accounting records to fully quantify the violations disclosed during the audit due to the unreliability and inconsistencies in Key's responses and the financial data. Specifically, when ORA requested a Purchase Reconciliation from CBP ACS data for the importer's purchases, Key provided a revised CY 2012 Trial Balance and made significant adjustments/reclassifications to its Purchase account. Key was unable to provide documentary evidence for purported commission payments, client reports to substantiate the accounting entries, and written agreements on advances paid to the manufacturer. Key provided inconsistent explanations as to how fees are paid to purported agents, and how the agents are involved in the import process. Further, ORA noted unaudited financial statements and found commission invoices. As a result, ORA's loss of revenue calculation is limited to the following documents:

- Reconciliation of Purchases to CBP data,
- Commission and fabric development cost schedule,
- Agency agreement between Key and alleged buying agent, Shanghai Nex-T International Co. Ltd. ("SNT"),
- CY 2012 tax return,
- CY 2012 bank statements,

- Schedule of advance payments to Key's related seller, Nex-T Cambodia Co. Ltd. ("NAC"), and
- CY 2012 Buying Expense Account.

The audit found the following: 1) foreign payments to purported agents were not bona fide buying commissions, 2) foreign payments for fabric development charges were indirect payments for imported merchandise, 3) foreign payments for purported inspection fees were an undeclared indirect payment for imported merchandise, and 4) advance payments to NAC were undeclared additional payments for imported merchandise. ORA concluded that Key did not report accurate and complete transaction value information to CBP, violating 19 C.F.R. § 152.102(f) and 152.103(b). Despite the scope limitation identified, ORA identified a specified amount in undervaluation of the imported merchandise resulting in a specified loss of revenue in duty for CY 2012. ORA also identified an additional undervaluation and resultant loss of revenue in duty for CY 2009 through CY 2011. Key responded to ORA's results on September 29, 2014 and ORA included its rejoinder in the Report, dated November 19, 2014.

During the audit scope period, Key purchased merchandise from a seller in China, and NAC in Cambodia. Key used alleged related buying agents, SNT and Hong Kong Nex-T Inc. Limited ("HKNT"), located in Shanghai and Hong Kong, respectively.

I. Buying Commissions

ORA stated that the fees paid to SNT and HKNT were not bona fide buying commissions. ORA based this on the fact that SNT's related party[1] paid the salary of Key's CEO/President. The total entered value from manufacturers related to both Key and SNT represented 70 percent of Key's total importations, which ORA interpreted as SNT not being financially detached from the manufacturer or seller. ORA also did not find SNT to be involved in the transactions between the manufacturers and Key, but rather in the transactions between Key and its customers in the U.S. SNT had access to Key's shared drive, which SNT used to record Key's customers' orders. In addition, the agency agreement between Key and SNT was not being followed: there were no commission invoices and SNT was not paid upon receipt of payment from Key's customers. Lastly, payments were made to SNT, who is identified as a manufacturer on the Automated Commercial System ("ACS") manufacturer report.

Regarding HKNT, Key and HKNT did not have an agency agreement. ORA also found that the buying commission was based on eight percent of the merchandise resale price to Key's U.S. customers, rather than based on the sale between Key and the sellers. Furthermore, buying commissions were pre-paid and/or carried over to subsequent years, and could not be correlated to import entries. Key states that because HKNT is SNT's branch office, a separate agency agreement was not necessary. Key also emphasizes that there was no relationship between SNT and the sellers and the lack of reference to SNT in the commercial documents support a sale to Key from the seller, not from SNT to Key. Key submitted copies of periodic debit notices issued by SNT in lieu of commission invoices, which became due when Key

[1] SNT is owned by Jung Yoon Suk, who is the CEO of Nex-T America. Nex-T America paid Key's CEO/President's salary.

received payment from its U.S. customers. With respect to the buying commission being based on the resale price to Key's U.S. customers, Key states that while it may be unorthodox, it is not an indication that the commission is dutiable. In addition, Key states that pre-payment or late payment is nothing more than an element of commercial dealings of the parties, which has no effect on the bona fides of the principal-buying agent relationship. Lastly, Key states that the fact that commission payments cannot be tied to entries is of no consequence.

ORA states that debit notes in lieu of commission invoices were not mentioned or referenced prior to Key's response to the Report. In addition, the debit notes provided with Key's response state that payment should be made to the account of "HK Jak Factory Limited," and Key was unable to explain the entity's involvement in the import transactions. ORA's review of the CY 2012 Trial Balance Account also did not disclose debit notes. ORA found that SNT was in control of the import transaction. SNT received Key's customers' orders and instructed Key when to remit the commission payments. Furthermore, through discussions with Key personnel, ORA found that Key did not have extensive knowledge of the import transaction and its role was to receive the customers' payment and record the payment details onto an excel spreadsheet maintained on a shared drive accessible by Key and SNT.

II. Indirect Payments

D. Fabric Development Charges

ORA states that foreign payments made by Key to HKNT for fabric development were not for garment samples, but undeclared indirect payments to HKNT. ORA traced the payments identified in Key's commission payment schedule and the trial balance sample development cost payable account, directly to HKNT. ORA requested invoices and entries to verify whether the payments were declared to CBP as sample merchandise; however, Key was unable to provide them. ORA concluded that the evidence submitted did not support that the payments relate to fabric development costs for imported mutilated samples. ORA's review also disclosed that Key did not pay the manufacturers the amount due and the amounts were often rounded up or down, and commercial invoice amounts were carried over and payable the following year. Key also did not furnish evidence that duty was paid on left over fabric used in production of imported merchandise.

Key states that the fabric used in samples were all mutilated and therefore classified under subheading 9811.00.60, Harmonized Tariff Schedule of the United States ("HTSUS")[2] and duty free. According to Key, just because it could not provide entry documents for this fabric did not mean the merchandise should be dutiable. Key explained that samples were typically imported by means of a courier who made entry, and Key did not have access to entry information. Key states that the payments were booked to Sample Development Costs because they related to samples, and because the sample garments were mutilated and not subject to duty, there was no loss of revenue.

[2] Subheading 9811.00.60, HTSUS provides for "[a]ny sample (except samples covered by heading 9811.00.20 or 9811.00.40), valued not over $1 each, or marked, torn, perforated or otherwise treated so that it is unsuitable for sale or for use otherwise than as a sample, to be used in the United States only for soliciting orders for products of foreign countries.

Key also referenced the prior disclosure, filed on May 9, 2013 by Key, that addressed the fabric development fee. Key did not provide any additional supporting documents.

ORA reviewed the CBP entry data, and found that Key did not enter goods under 9811.00.60, HTSUS, during the scope period. ORA did *see* mutilated sample garments at Key's office, but according to Key, some of the samples were purchased domestically. ORA was unable to correlate any of the sample garments to import documentation. ORA was not advised that the overseas development costs were related to the merchandise in any way, and could not find entries/invoices for samples. Further, the evidence did not demonstrate that the payments related to fabric development costs for imported mutilated samples. With regard to Key's May 9, 2013 prior disclosure, ORA states that Key did not tender the loss of revenue relating to the subject prior disclosure. The prior disclosure only included lump sum totals in regard to assists, and did not provide supporting schedules or documentation. Therefore, ORA was unable to verify that the payments made to HKNT during the scope period were included in the disclosure.

E. Inspection Fees

ORA also found that Key made undeclared payments to Empire, a third party, for inspection fees on behalf of Key's customer, Kandy Kiss. Key was unable to provide any contracts regarding the purported inspection fee for merchandise entered for sale to Kandy Kiss. ORA found that Key recorded the inspection fee in its commission account, even though the payment was not made to SNT or HKNT. ORA reviewed an invoice from Empire to Key, showing a charge of five cents per piece, which Key explained was for the post import charge and commission paid to Empire for inspection services on behalf of Kandy Kiss. Key submitted an e-mail from Kandy Kiss from August 2013, in which Kandy Kiss stated that Empire provided garment and factory inspection for Kandy Kiss, and Key was required to pay Empire. Key states that because Kandy Kiss is no longer a customer, they are not able to obtain supporting documentation. The e-mail string shows that Key wrote to Kandy Kiss on August 8, 2013, but Kandy Kiss's response was sent on August 7, 2013, which is also the date that ORA received the e-mails from Key. ORA determined that the date of the e-mails is questionable and concluded that Key was unable to provide sufficient and appropriate evidence to support that the payments related to inspection fees, and, as such, they should be dutiable as an undeclared indirect payment.

Key responded by repeating that the payments to Empire were required by Kandy Kiss and the inspection fee was built into Key's price to Kandy Kiss. Key did not provide additional documents aside from the August 2013 e-mails between Key and Kandy Kiss.

F. Advance to a Manufacturer

ORA found that Key made advance payments to NAC, a related seller. Key did not have any written agreements regarding "advances," the invoices did not identify the payments as "advances," and advance payments were also recorded in Key's purchase account. Key admitted that they did not have a written agreement, but an oral agreement. Key states that it determined it was best that NAC remained a viable supplier while NAC was experiencing difficulty with labor strikes; therefore, advance payments were made. In

support of their oral agreement, Key submitted a statement from NAC stating that it received the advances from Key and acknowledging its obligation to repay Key. NAC began to amortize the advance by shipping merchandise without requiring payment or accepting partial payment. An amortization schedule, with invoice numbers, was provided to ORA. Key states that amortization was suspended because of the labor strike that persisted up until 2014. ORA reviewed the advance set-offs which included four invoices that were also listed on the schedule of advances provided by Key, which disclosed that the offsetting was not identified on the invoices. Based on the lack of documentation of the advances and repayment of the advances, ORA concluded that the advances made to NAC were undeclared indirect payments.

Key repeated their reason for making payments to NAC and provided related news articles and pictures of the strike causing NAC's difficulties. Key also submitted an undated amortization schedule and three NAC invoices from July 2013, each set-off against the advance.

ISSUES:

3. Whether the commission payments made by the importer to its agents are bona fide buying commissions.
4. Whether the payment for fabric development, inspection fees, and advance payments are indirect payments for the imported merchandise.

LAW AND ANALYSIS:

Merchandise imported into the United States is appraised in accordance with section 402 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. § 1401a). The primary method of appraisement is transaction value, which is defined as "the price actually paid or payable for the merchandise when sold for exportation to the United States," plus five enumerated additions. 19 U.S.C. § 1401a(b)(1). The price actually paid or payable shall be increased by the amounts attributable to the five statutory additions enumerated in 19 U.S.C. § 1401a(b)(1)(A) through (E) only to the extent that each such amount is not otherwise included within the price actually paid or payable. 19 U.S.C. § 1401a(b)(1). The term "price actually paid or payable" is defined in pertinent part as "the total payment (whether direct or indirect...) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller." 19 U.S.C. § 1401a(b)(4).

I. Buying Commissions

The enumerated additions to the price actually paid or payable include the value of any selling commissions incurred by the buyer with respect to the imported merchandise. A "selling commission" is any commission paid to the seller's agent, who is related to or controlled by, or works for or on behalf of, the manufacturer or the seller. 19 C.F.R. § 152.102(b). Bona fide buying commissions, however, are not included in transaction value as part of the price actually paid or payable or as an addition thereto. *See Pier 1 Imports, Inc. v. United States*, 708 F. Supp. 351, 354 (CIT 1989); *Rosenthal-Netter, Inc. v. United States*, 679 F. Supp. 21, 23 (CIT 1988), aff'd, 861 F.2d 261 (Fed. Cir.

1988); and *Jay-Arr Slimwear, Inc. v. United States*, 681 F. Supp. 875, 878 (CIT 1988). The existence of a bona fide buying commission depends upon the relevant factors of the individual case. *J.C. Penney Purchasing Corp. v. United States*, 451 F. Supp. 973, 983 (Cust. Ct. 1978). However, the importer has the burden of proving that a bona fide agency relationship exists and that payments to the agent constitute bona fide buying commissions. *Pier 1 Imports, Inc.*, 13 Ct. Int'l Trade at 164; *Rosenthal-Netter, Inc*., 12 Ct. Int'l Trade at 78; and *New Trends, Inc. v. United States*, 645 F. Supp. 957, 960 (CIT 1986). The totality of the evidence must demonstrate that the purported agent is in fact a bona fide buying agent and not a selling agent or an independent seller. Headquarters Ruling Letter ("HQ") 542141, dated September 29, 1980, also cited as TAA No. 7.

Although no single factor is determinative, the primary consideration in determining whether an agency relationship exists is the right of the principal to control the agent's conduct with respect to those matters entrusted to the agent. *Pier 1 Imports, Inc*., 13 Ct. Int'l Trade at 164; *Rosenthal-Netter, Inc*., 12 Ct. Int'l Trade at 79; and *Jay-Arr Slimwear*, 12 Ct. Int'l Trade at 138. In addition, the courts have examined such factors as the existence of a buying agency agreement; whether the importer could have purchased directly from the manufacturers without employing an agent; whether the agent was financially detached from the manufacturer of the merchandise; and the transaction documents. *See J.C. Penney Purchasing Corp*., 80 Cust. Ct. at 95–98. The courts have also examined whether the purported agent's actions were primarily for the benefit of the principal; whether the agent bore the risk of loss for damaged, lost or defective merchandise; whether the agent was responsible for the shipping and handling and the costs thereof; and whether the intermediary was operating an independent business, primarily for its own benefit. *See New Trends, Inc*., 10 Ct. Int'l Trade 640–643.

In the instant case, the transaction documents indicate that Key did not control the agent's conduct. As previously noted, the agency agreement between Key and SNT was provided. The agreement specifies that SNT will bill Key and Key shall pay SNT 15 days after Key's receipt of the merchandise. However, SNT issued periodic debit notes in lieu of commission invoices. The debit notes provided by Key covered two to three month periods of "collections," which were the sale prices of all merchandise sold to Key's U.S. customers, and SNT required payment of eight percent of the collections, in accordance with the agency agreement, as the service charge. The debit notes state that payment should be made to the account of "HK Jak Factory Limited," a party who was not identified in any of Key's submissions. Furthermore, the fact that the service charge is based on the resale price to Key's U.S. customer suggests that the purported agent's actions were not primarily for the benefit of the principal, but for itself as well. *See New Trends, Inc*., 10 Ct. Int'l Trade 640–643; and HQ 544423, dated June 3, 1992. We disagree with Key's argument that a buying commission based on the resale price to Key's customers has no bearing on the bona fides of the principal-agent relationship. As stated above, SNT was in control of receiving Key's customers' orders and issued debit notes to Key based on the customer orders. SNT's involvement with Key's resale of the merchandise shows that SNT was involved in other aspects of Key's business, and their relationship exceeded that of a principal-buying agent relationship.

Counsel cites to CBP's "Buying and Selling Commissions" ICP, which states that one of the services of a buying agent is "informing the seller of the

desires of the buyer," as a justification for SNT's access to Key's shared drive. A buying agent acts on behalf of the buyer. Counsel quotes the ICP to address SNT's access to the shared drive with Key, and asserts that having access to the shared computer drive and having Key's customers' purchase orders assisted SNT in carrying out its responsibilities as a buying agent. However, the shared drive was also used to record the resale of merchandise to Key's U.S. customers. As stated above, SNT's involvement in Key's purchase and resale of merchandise leads us to find that Key did not control the agent. Thus, SNT was not a *bona fide* buying agent, and the commission payments should be included in the price actually paid or payable.

II. Indirect Payments

The term "price actually paid or payable" is defined as the "total payment [...] made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller." 19 U.S.C. § 1401a(b)(4)(A). There is a rebuttable presumption that all payments made by a buyer to a seller, or a party related to a seller, are part of the price actually paid or payable. *See* HQ 545663 dated July 14, 1995. This position is based on the meaning of the term "price actually paid or payable" as addressed in *Generra Sportswear Co. v. United States*, 905 F.2d 377 (CAFC 1990). In *Generra*, the court considered whether quota charges paid to the seller on behalf of the buyer were part of the price actually paid or payable for the imported goods. In reversing the decision of the lower court, the appellate court held that the term "total payment" is all-inclusive and that "as long as the quota payment was made to the seller in exchange for merchandise sold for export to the United States, the payment properly may be included in transaction value, even if the payment represents something other than the per se value of the goods." The court also explained that it did not intend that Customs engage in extensive fact-finding to determine whether separate charges, all resulting in payments to the seller in connection with the purchase of imported merchandise, were for the merchandise or something else.

Although the presumption that payments made directly or indirectly by a buyer to or for the benefit of a seller are part of the price actually paid or payable is rebuttable, the burden of establishing that the payments are unrelated to the imported merchandise rests on the importer. *See id.* HQ 547532; *see also Chrysler Corp. v. United States*, 17 C.I.T. 1049 (1993).

A. Fabric Development Charges

Key made payments to HKNT, stated to be a branch of SNT, for fabric development and samples, which mostly related to fabric used in samples. Key states that it was not able to connect the fabric development charges because the samples were entered by a courier and Key did not have access to the entry information. The fabric samples are claimed to be classified under subheading 9811.00.60, HTSUS, as duty free. However, Key did not enter any items under subheading 9811.00.60, HTSUS, during the scope period. In addition, Key has not provided any documents such as purchase orders, invoices, or contracts to support that the fabric samples were actually exchanged in relation to the sale. No information has been presented to establish that the costs are not part of the price actually paid or payable for the imported merchandise.

B. Inspection Fees

Key cites to HQ W563469, dated March 21, 2006; and HQ 547006, dated April 28, 1998, to support its argument that inspection fees are not dutiable unless they are paid to the seller or employees of the seller. In HQ W563469, CBP determined that payments made by the importer to a company unrelated to the supplier and the importer for inspection services, were not part of the price actually paid or payable for the merchandise. The services provided included validating that the merchandise met the importer's requirements.

In the instant case, Key states that its customer, Kandy Kiss, requested that Key pay Kandy Kiss's buying commission to Empire, their foreign Hong Kong agent, as a condition of the contract between Key and Kandy Kiss. Empire issued an invoice to Key for services at the rate of five cents per item. The invoice did not refer to Kandy Kiss, purchase order numbers associated with the products, or describe the purpose of the invoice. Key did not provide any documents to support the arrangement or describe Empire's duties as Kandy Kiss' agent. In addition, Key provided conflicting descriptions of Empire's services as being a buying agent service paid on Kandy Kiss' behalf, a post import charge, and an inspection fee. Furthermore, the payment to Empire was recorded in Key's commission account as "HK Customer commission," even though the payment was not made to its own agent.

CBP has previously examined the question of whether payments made for testing and consulting services are part of the price actually paid or payable. In HQ 547033, dated June 25, 1998, a garment importer hired an independent overseas fabric consultant. The consultant's primary duties included acting as mill liaison for the importer and helping the importer ensure that woven fabric purchased by the garment manufacturers from the mills conformed to the importer's stringent quality specifications. One of the consultant's quality control functions was to assist with fabric testing. The importer paid the consultancy fees directly to the consultant. The ruling noted that as a general proposition, CBP considers fees paid to third parties, to the extent that they are similar to bona fide buying commissions, generally not to be part of the price actually paid or payable for the imported merchandise.

However, in the case at hand, the documents provided do not sufficiently support that the services provided by Empire to Kandy Kiss reflect bona fide buying commissions and that the associated fees are not part of the price actually paid or payable. The documents also lack sufficient information to determine the extent of Empire's services and whether they related to the design or development of the product. Accordingly, we find that the purported inspection fee should be included in the price actually paid or payable.

C. Advance to a Manufacturer

Key stated that it made advance payments to NAC, a related manufacturer, in order to enable NAC to remain a viable manufacturer. Key cites to HQ W548475, dated March 25, 2004, as support that repaying advances by setting them off against merchandise shipments is evidence that the advances were not supplemental payment for the merchandise. In HQ W548475, CBP considered whether loan payments were part of the price actually paid or payable. The buyer did not provide a loan agreement, documents establishing repayment, or proof of repayment by the seller. CBP held that the buyer did not establish that the payments made to the seller were

unrelated to the merchandise, and found that all financial transfers characterized as loans should be included in the transaction value. While Key describes HQ W548475 to be representative of the fact that repaying advances by setting them off against merchandise shipments is evidence that the advances were not supplemental payments for the merchandise, we find that this characterization is not accurate. Rather, HQ W548475 supports the argument that the advance payments made to NAC are part of the price actually paid or payable.

CBP has previously examined the question of whether advance payments made to a seller are part of the price actually paid or payable. In HQ 544375, dated July 6, 1990, CBP noted that if an advance is paid in order for the seller to begin production of the merchandise, the advances will be dutiable. In the case at hand, while the advance may not have been for production of specific merchandise Key intended to order at the time, it was provided for the purpose of maintaining NAC as a viable producer of the merchandise. *See also* HQ 545032, dated December 4, 1993 (cash advance from the buyer to seller constitutes part of the price actually paid or payable).

As noted above, there is a rebuttable presumption that all payments made by a buyer to a seller, or a party related to a seller, are part of the price actually paid or payable. Similar to HQ W548475, Key did not have a written agreement with NAC with regard to the advances and the means of recovering the advances were unclear. *See* HQ 544375 *supra.* The amortization schedule that Key provided is simply a record of invoices that have been set-off against the advance and does not indicate that there was any structure or schedule to the repayment. The amortization and sample invoices provided by Key shows that NAC was repaying the advance in accordance with the orders placed by Key, in lieu of a structured repayment schedule. Further amortization had also been suspended, which also indicates a lack of repayment structure. Furthermore, advance payments to NAC were entered as purchases in Key's accounting records. *See generally* HQ 548332, dated October 31, 2003; and HQ 546430, dated January 6, 1997. Although the payments are characterized as advances, Key has not provided advance agreements or specific method of repayment by the seller. Therefore, all financial transfers characterized by the parties as advances should be included in the price actually paid or payable.

HOLDING:

The information presented does not indicate that the purported agents are bona fide agents and commission payments made by the importer should be included in the price actually paid or payable. The payment for fabric development, inspection fees, and advance payments should also be included in the price actually paid or payable.

You are to mail this decision to the internal advice requester no later than 60 days from the date of the decision. At that time, Regulations and Rulings of the Office of International Trade will make the decision available to CBP personnel, and to the public on the CBP Home Page on the World Wide Web at www.cbp.gov, by means of the Freedom of Information Act, and other methods of public distribution.

Sincerely,

MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division