

Bureau of Customs and Border Protection

CBP Decisions

(CBP Dec. 05-27)

BONDS

APPROVAL TO USE AUTHORIZED FACSIMILE SIGNATURES AND SEALS

The use of facsimile signatures and seals on Customs bonds by the following corporate surety has been approved effective this date:

Navigators Insurance Company

Authorized facsimile signatures on file for:

Stanley A. Galanski, Attorney-in-fact

Paul D. Amstutz, Attorney-in-fact

Matthew L. Zehner, Attorney-in-fact

The corporate surety has provided U.S. Customs and Border Protection with a copy of the signature to be used, a copy of the corporate seal, and a certified copy of the corporate resolution agreeing to be bound by the facsimile signatures and seals. This approval is without prejudice to the surety's right to affix signatures and seals manually.

DATE: August 3, 2005

GLEN E. VEREB,

Chief,

Entry Procedures and Carriers Branch.

GRANT OF "LEVER-RULE" PROTECTION

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

ACTION: Notice of grant of "Lever-Rule" protection.

SUMMARY: Pursuant to 19 CFR §133.2(f), this notice advises interested parties that CBP has granted “Lever-Rule” protection to Canon USA, Inc. for certain gray market fax toner cartridges bearing the “FX” trademark. Notice of the receipt of an application for “Lever-Rule” protection was published in the Customs Bulletin on June 9, 2004.

FOR FURTHER INFORMATION CONTACT: Rachel Bae, Esq., Intellectual Property Rights Branch, Office of Regulations & Rulings, (202) 572-8710.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR § 133.2(f), this notice advises interested parties that CBP has granted “Lever-Rule” protection for said fax toner cartridges bearing the “FX” trademark.

In accordance with the holding in the Eleventh Circuit case of *Davidoff & CIE v. PLD Int'l Corp.* 263 F. 3d 1297 (11th Cir. 2001), CBP has determined that the aforementioned gray market products differ physically and materially from the fax toner cartridges authorized for sale in the United States in a number of respects including in the type of documents provided and the language used in the documents, as well as in the identification codes used.

ENFORCEMENT

Importation of the subject “FX” fax toner cartridges is restricted, *unless* the labeling requirements of 19 CFR §133.23(b) are satisfied.

Dated: August 4, 2005

GEORGE FREDERICK MCCRAY, ESQ.,
Chief,
Intellectual Property Rights Branch
Office of Regulations & Rulings.

**Clarification of the National Customs Automation Program
Test Regarding Reconciliation; Latent Defects**

AGENCY: Customs and Border Protection, Homeland Security.

ACTION: General notice.

SUMMARY: This document clarifies the Customs and Border Protection Automated Commercial System Reconciliation prototype test by setting forth that the issue of value allowances for alleged latent

manufacturing defects made pursuant to 19 CFR 158.12 or any other provision is not among the issues eligible for Reconciliation. Entry summaries cannot be flagged for Reconciliation to account for latent manufacturing defects discovered after importation. All other aspects of the test remain the same as set forth in previously published **Federal Register** notices.

DATES: The two-year testing period of this Reconciliation prototype commenced on October 1, 1998, and was extended indefinitely starting October 1, 2000. Applications to participate in the test will be accepted throughout the duration of the test.

ADDRESSES: Written inquiries regarding participation in the Reconciliation prototype test and/or applications to participate should be addressed to Mr. Richard Wallio or Ms. Marla Bianchetta, Reconciliation Team, Bureau of Customs and Border Protection, 1300 Pennsylvania Ave. NW, Room 5.2A, Washington, D.C. 20229-0001. Inquiries regarding the test also may be made by email: Recon.Help@dhs.gov.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Wallio at (202) 344-2556 or Ms. Marla Bianchetta at (202) 344-2693.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Initially, it is noted that on November 25, 2002, the President signed the Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*, Pub. L. 107-296 (the HS Act), establishing the Department of Homeland Security and, under section 403(1) (6 U.S.C. 203(1)), transferring the U.S. Customs Service, including functions of the Secretary of the Treasury relating to the Customs Service, to the new department, effective on March 1, 2003. Also, under the HS Act and the Reorganization Plan Modification for the Department of Homeland Security that was signed on January 30, 2003, the U.S. Customs Service was renamed the Bureau of Customs and Border Protection (CBP). The agency will be referred to by that name in this document, unless reference to the Customs Service (or Customs) is appropriate in a given context.

Reconciliation, a planned component of the National Customs Automation Program (NCAP), as provided for in Title VI (Subtitle B) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057 (December 8, 1993)), is currently being tested by CBP under the CBP Automated Commercial System (ACS) Prototype Test. Customs initially announced and explained the test in a general notice document published in the **Federal Register** (63 FR 6257) on February 6, 1998. Clarifications and operational changes were announced in several subsequent **Federal Register** notices: 63 FR 44303, published on August 18, 1998; 64 FR

39187, published on July 21, 1999; 64 FR 73121, published on December 29, 1999; 66 FR 14619, published on March 13, 2001; 67 FR 61200, published on September 27, 2002; 67 FR 68238, published on November 8, 2002; 69 FR 73730, published on September 2, 2004; and 70 FR 1730, published on January 10, 2005. A **Federal Register** (65 FR 55326) notice published on September 13, 2000, extended the prototype indefinitely.

For application requirements, see the **Federal Register** notices published on February 6, 1998, and August 18, 1998. Additional information regarding the test can be found at http://www.customs.gov/xp/cgov/import/cargo_summary/reconciliation/.

Reconciliation Generally

Reconciliation is the process that allows an importer, at the time an entry summary is filed, to identify undeterminable information (other than that affecting admissibility) to CBP and to provide that outstanding information at a later date. The importer identifies the outstanding information by means of an electronic “flag” which is placed on the entry summary at the time the entry summary is filed. Prior to this clarification, the issues for which an entry summary could be “flagged” (for the purpose of later reconciliation) were limited to: (1) value issues; (2) classification issues, on a limited basis; (3) issues concerning value aspects of entries filed under heading 9802, Harmonized Tariff Schedule of the United States (HTSUS; 9802 issues); and (4) post-entry claims under 19 U.S.C. 1520(d) for the benefits of the North American Free Trade Agreement (NAFTA) or the United States – Chile Free Trade Agreement (US–CFTA) for merchandise as to which such claims were not made at the time of entry.

Under the test procedure, the flagged entry summary (the underlying entry summary) is liquidated for all aspects of the entry except those issues that were flagged. The means of providing the outstanding information at a later date relative to the flagged issues is through the filing of a Reconciliation entry. Thus, the flagging of an entry summary constitutes the importer’s declaration of intent to file a Reconciliation entry. The flagged issues will be liquidated at the time the Reconciliation entry is liquidated. Any adjustments in duties, taxes, and/or fees owed will be made at that time. (The Reconciliation test procedure for making post-entry NAFTA claims is explained in the February 6, 1998, and December 29, 1999, **Federal Register** notices.)

Reconciliation and Defective Merchandise Claims – 19 CFR 158.12

Under § 158.12 of the Customs and Border Protection (CBP) regulations (19 CFR 158.12), importers may request an allowance in value for merchandise found by the port director to be partially damaged at the time of importation. For example, if the port director

finds that the imported merchandise contains defective zippers, an allowance in value may be granted to the extent of the defect. Reconciliation is an acceptable method of reporting the change in value if it is known at the time of importation that the merchandise at issue is defective but the extent of the defect is not known. Thus, as in the above example, if the importer does not have sufficient information to determine the extent of the known defect when the entry is filed (e.g. because it is not yet known whether the zippers can be repaired, and if so, the cost of such repairs), the entry can be flagged for Reconciliation. The importer can file a Reconciliation entry once the extent of the known defect is established.

Some importers have requested an allowance in value under § 158.12 for imported merchandise that allegedly contains a latent manufacturing defect. A latent manufacturing defect is a defect that exists at the time of manufacture, and thus at the time of importation, but is invisible, hidden, or concealed. The defect is not discovered until some time later (in many cases, long after importation), usually when a consumer requests a repair under a consumer warranty pertaining to the imported article. The importer's claim for a defective merchandise allowance is generally based on the costs of the warranty repairs. Recently, some of these importers have flagged entry summaries for Reconciliation on the issue of latent manufacturing defects so that information may be submitted after any latent defects are revealed (for example, information regarding the nature of the latent defects, the identity of the defective merchandise, and the extent of the defects based on warranty repair costs or other data). Thus, the question has arisen as to whether these types of claims are value issues eligible for Reconciliation. The purpose of this notice is to clarify that CBP does not consider claims for latent defects value issues eligible for Reconciliation and will not accept Reconciliation entries based on such claims. Because the importer does not know that a latent defect in the merchandise exists at the time of entry summary, the importer cannot flag the entry summary for later resolution through Reconciliation.

CBP notes that the issue of whether these latent defect claims fall within the scope of § 158.12, and if so, the evidence needed to support these claims, is still under review by the courts. There have been several preliminary court rulings on the subject, but several cases addressing these issues are still pending at the Court of International Trade and the Court of Appeals for the Federal Circuit (Volkswagen of America, Inc. v. United States, Court No. 96-01-00132, Court of International Trade; Saab Cars USA Inc. v. United States, Court Nos. 04-1268 and 04-1416, Court of Appeals for the Federal Circuit). Regardless of the final outcome of the court cases, the Reconciliation procedure cannot be used with regard to latent defect claims made pursuant to § 158.12 or any other provision.

TEST CLARIFICATION

Reconciliation may not be used with respect to claims for value allowances made pursuant to § 158.12 or any other provision based on alleged latent manufacturing defects. Thus, to clarify, the Reconciliation test covers the following issues: (1) value issues other than claims based on latent manufacturing defects; (2) classification issues, on a limited basis; (3) issues concerning value aspects of entries filed under heading 9802, Harmonized Tariff Schedule of the United States (HTSUS; 9802 issues); and (4) post-entry claims under 19 U.S.C. 1520(d) for the benefits of the North American Free Trade Agreement (NAFTA) or the United States – Chile Free Trade Agreement (US–CFTA) for merchandise as to which such claims were not made at the time of entry. CBP considers this a clarification of the test procedure because CBP never contemplated latent defect claims to be value issues eligible for Reconciliation.

Dated: August 3, 2005

DENISE CRAWFORD,
*Acting Assistant Commissioner,
Office of Field Operations.*

[Published in the Federal Register, August 11, 2005 (70 FR 46882)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, August 10, 2005

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

Sandra L. Bell for MICHAEL T. SCHMITZ,
*Assistant Commissioner,
Office of Regulations and Rulings.*



General Notices

19 CFR PART 177

PROPOSED REVOCATION OF TWO RULING LETTERS AND TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN THREE-LAYER FABRIC AND GARMENTS WITH ACTIVATED CARBON PARTICLES IN ONE LAYER

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

ACTION: Notice of proposed revocation of two tariff classification ruling letters and revocation of treatment relating to the classification of certain three-layer fabric and garments with activated carbon particles in one layer.

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 two ruling letters relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain three-layer fabric and garments with activated carbon particles in one layer. Similarly, CBP proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before September 23, 2005.

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

FOR FURTHER INFORMATION CONTACT: Brian Barulich, Tariff Classification and Marking Branch, at (202) 572-8883.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke two ruling letters relating to the tariff classification of certain three-layer fabric and garments with activated carbon particles in one layer. Although in this notice CBP is specifically referring to the revocation of New York Ruling Letter (NY) F83890, dated March 24, 2000 (Attachment A), and NY G86317, dated January 25, 2001 (Attachment B), 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 ones identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to substantially identical merchandise. Any person involved with 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 F83890, CBP ruled that "a laminated fabric consisting of an outer polyester knit fabric and an inner non-woven fabric impregnated with carbon, for use in manufacturing scent eliminating clothes" was classified in subheading 6815.10.0000, HTSUSA, which provides for: "Articles of stone or of other mineral substances (including carbon fibers, articles of carbon fibers and articles of peat), not elsewhere specified or included: Nonelectrical articles of graphite or other carbon." In NY G86317, CBP ruled that a "pullover top and stretch waistband pants" made of the fabric that was the subject of NY F83890 was also classified in subheading 6815.10.0000, HTSUSA.

Based on our review of these two rulings, new samples of the fabric and garments that were subject of those rulings, and the scope of heading 6815 and Section XI, HTSUSA, we now believe that the fabric and garments are classified in Section XI, HTSUSA, as textile fabric and articles of apparel, respectively.

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke NY F83890 and NY G86317 and any other ruling not specifically identified that is contrary to the determination set forth in this notice to reflect the proper classification of the merchandise pursuant to the analyses set forth in proposed Headquarters Ruling Letter (HQ) 967321 (Attachment C) and HQ 967320 (Attachment D). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions that are contrary to the determination set forth in this notice. Before taking this action, consideration will be given to any written comments timely received.

DATED: August 8, 2005

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

Attachments



[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY F83890
March 24, 2000
CLA-2-68:RR:NC:2:237 F83890
CATEGORY: Classification
TARIFF NO: 6815.10.0000

MR. KEVIN EGAN
E. BESLER & CO.
115 Martin Lane
Elk Grove Village, Illinois 60007

RE: The classification of carbon impregnated fabric from England.

DEAR MR. EGAN:

In your letter dated February 24, 2000 you requested a tariff classification ruling for a laminated fabric consisting of an outer polyester knit fabric and an inner non-woven fabric impregnated with carbon, for use in manufacturing scent eliminating hunting clothes.

The applicable subheading for the carbon impregnated fabric will be 6815.10.0000, HTSUS, which provides for nonelectrical articles of graphite or other carbon. The rate of duty is free. This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Frank Cantone at 212-637-7018.

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

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY G86317
January 25, 2001
CLA-2-68:RR:NC:2:237 G86317
CATEGORY: Classification
TARIFF NO.: 6815.10.0000

MR. KEVIN EGAN
E. BESLER & COMPANY
*115 Martin Lane
Elk Grove Village, Illinois 60007-1309*

RE: The tariff classification of activated carbon lined "ScentBlocker" clothing from China.

DEAR MR. EGAN:

In your letter dated January 5, 2001, on behalf of Robinson Laboratories, you requested a tariff classification ruling.

The submitted sample is activated carbon lined clothing consisting of a pullover top and stretch waistband pants. The included literature describes the purpose of the lining is to absorb human odor.

The applicable subheading for the activated carbon lined clothing will be 6815.10.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for articles of stone or of other mineral substances (including carbon fibers, articles of carbon fibers and articles of peat), not elsewhere specified or included: nonelectrical articles of graphite or other carbon. The rate of duty will be free.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Frank Cantone at 212-637-7018.

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

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967321
CLA-2:RR:CR:TE: 967321 BtB
CATEGORY: Classification
TARIFF NO.: 6006.34.0040

DAVID A. RIGGLE, ESQ.
RIGGLE AND CRAVEN
8430 West Bryn Mawr Avenue
Suite 525
Chicago, IL 60631

RE: Revocation of NY F83890; certain ScentBlocker® three-layer fabric with activated-carbon particles embedded in one layer

DEAR MR. RIGGLE:

This is in reconsideration of New York Ruling Letter (NY) F83890, dated March 24, 2000, issued to the Customs broker for Robinson Laboratories Inc. ("Robinson") by the U.S. Customs Service, now the Bureau of Customs and Border Protection (hereinafter "CBP"), concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of certain ScentBlocker® fabric made in England. As you now represent Robinson in this matter, this letter is addressed to you.

We have reviewed NY F83890 and have determined that the classification of the fabric provided is incorrect. This ruling sets forth the correct classification of the fabric.

FACTS:

On February 24, 2000, Robinson's Customs broker requested a tariff classification ruling on the ScentBlocker® fabric that is the subject of NY F83890. In NY F83890, this fabric is described as "a laminated fabric consisting of an outer polyester knit fabric and an inner non-woven fabric impregnated with carbon for use in manufacturing scent eliminating hunting clothes." The original sample of the fabric and any accompanying literature were destroyed on September 11, 2001, in our former 6 World Trade Center office in New York City.

Notice of Proposed Revocation of NY F83890 was originally published in the *Customs Bulletin*, Volume 38, Number 21, on May 19, 2004. As the original sample and literature were destroyed, the proposed ruling by CBP to revoke NY F83890 (Headquarters Ruling (HQ) 966423) was drafted using the limited available information about the fabric. During the Notice and Comment Period of Proposed Revocation, you contacted and informed us that several of our statements in HQ 966423 regarding the construction of the ScentBlocker® fabric that is the subject of NY F83890 were not accurate. On Robinson's behalf, you provided samples of garments made with the fabric (the garments that are the subject of Proposed HQ 967320) and literature to this office on July 20, 2004, along with arguments against revocation of NY F83890. A Withdrawal of Proposed Revocation of NY F83890 was published in the *Customs Bulletin*, Volume 38, Number 34, on August 18, 2004. We met with you on February 3, 2005 to discuss your arguments and you provided CBP with additional information and arguments against revocation on February 21, 2005.

A sample of the fabric was taken from the garments that you provided. Laboratory analysis of this fabric showed that it is composed of three layers, not two layers as set forth in NY F83890. The fabric's outer layer, printed in a camouflage pattern, is made of a weft knit interlock construction and is composed wholly of polyester. The middle layer is composed of activated carbon particles embedded in a nonwoven polyester construction. The inner layer has a weft knit construction and is composed wholly of polyester. The three layers are held together with adhesive material that is not visible in the cross section. The fabric has the following composition by weight of the entire fabric: top printed layer: 50.9%, middle nonwoven layer: 15.4%, inner layer: 21.8%, activated carbon and binder: 11.9%.

The fabric is used to manufacture garments designed to be worn while hunting. The activated carbon particles in the fabric block the human scent of the wearer from wildlife while hunting. Information that you provided states that the scent blocking properties of the carbon particles do not become exhausted. Rather, these properties last for the life of the garments made of the fabric and are reactivated by drying the garments in the dryer following each washing.

In NY F83890, CBP classified the fabric in subheading 6815.10.0000, HTSUSA, which provides for "Articles of stone or of other mineral substances (including carbon fibers, articles of carbon fibers and articles of peat), not elsewhere specified or included: Nonelectrical articles of graphite or other carbon." For reasons set forth below, you argue that the fabric was properly classified in NY F83890.

ISSUE:

Whether the fabric is properly classified in heading 6815, HTSUSA, as an article of other mineral substances not elsewhere specified or included, or in Section XI, HTSUSA, as textile fabric.

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the Harmonized System at the international level (for the 4-digit headings and the 6-digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. While neither legally binding nor dispositive of classification issues, the EN provide commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. See T.D. 89-80, 54 Fed. Reg. 35127-28 (Aug. 23, 1989).

The fabric at issue cannot be classified pursuant to GRI 1 since more than one heading describes it. Three headings describe the fabric. First, heading 6815, HTSUSA, which provides for "Articles of stone or of other mineral substances (including carbon fibers, articles of carbon fibers and articles of peat), not elsewhere specified or included;" second, heading 6006, HTSUSA, which provides for "Other knitted and crocheted fabrics;" and finally, heading 5603, HTSUSA, which provides for "Nonwovens, whether or not impregnated, coated, covered, or laminated" describe the fabric. However, while the first part of heading 6815, HTSUSA, describes the fabric as an article of other mineral substances, the fabric is not an article of carbon fibers (as it contains carbon particles, not carbon fibers) and therefore, the parenthetical part of the heading does not describe the fabric.

We do not consider the fabric to be described by heading 3802, HTSUSA (which provides for, among other things, activated carbon), since this provision does not cover articles of activated carbon, but merely the substance itself. Also, we do not consider the fabric to be described by heading 5903, HTSUSA (which provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902") because there is not plastic visible in its cross section.

As the articles cannot be classified pursuant to GRI 1, we apply the remaining GRI, in order. GRI 2(a) pertains to incomplete or unfinished articles and is not relevant in this instance. GRI 2(b) states:

Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances [and] any 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. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

The fabric at issue is a good consisting of more than one material or substance, those being knitted polyester, nonwoven polyester and carbon particles. By application of GRI 2(b), they are *prima facie* classifiable under more than one heading. Specifically, the fabric is *prima facie* classifiable under heading 6815, HTSUSA, as an article of other mineral substances not elsewhere specified or included, heading 6006, HTSUSA, as other knitted fabric, and heading 5603, HTSUSA, as impregnated nonwoven fabric. Accordingly, classification must be made according to the principles of GRI 3. GRI 3(a) states, in pertinent part:

3. When by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
 - (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the 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 different components . . . which cannot be classified by reference to 3(a), shall be classified by as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

* * *

Under GRI 3(a), the three headings that refer to the fabric must be regarded as equally specific since each refers to only part of the materials from which the fabric is made. Since the headings are to be considered equally specific, classification must be determined by application of GRI 3(b). The pertinent portions of the EN to GRI 3(b) provide as follows:

(VII) In all these cases the goods are to be classified as if they consisted of the material or component **which gives them their essential character**, insofar as this criterion is applicable.

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

The literature that you provided and Robinson's website refer to the article at issue as "fabric." The patent grants issued on articles of apparel ("odor absorbing clothing") made with the fabric also refer to the article at issue as "fabric." Nevertheless, you argue that the article at issue is not properly classified as fabric because its "essential character" is imparted by the activated carbon particles in it. In support of this position, you have emphasized that the fabric (all three layers) is merely a medium for delivering the scent blocking properties of the carbon particles. Also, in support of this position, you have provided information emphasizing that fabric incorporating activated carbon particles is substantially more expensive than fabric without such particles.

In searching for the material that gives the fabric its essential character, we must review each of the fabric's layers. The essential character of the fabric's outer and inner layers is imparted by the knitted polyester, the only material in those layers. The middle layer, however, is composed of activated carbon particles and nonwoven polyester. The EN to heading 5603, in pertinent part, states that:

Nonwovens may be dyed, printed, impregnated, coated, covered or laminated. Those covered on one or both surfaces (by sewing, gumming or by any other process) with textile fabric or with sheets of any other material are classified in this heading only if they derive their essential character from the nonwoven.

The EN states, that heading 5603 excludes: "Nonwovens, impregnated, coated or covered with substances or preparations . . . where the textile material is present merely as a carrying medium." In the case at hand, we find that the nonwoven in the middle layer functions only as a carrying medium for the activated carbon particles. Therefore, we do not find that the nonwoven imparts the essential character into the middle layer. Rather, we find that the activated carbon particles impart the essential character into the middle layer. Accordingly, the middle layer of the fabric would separately be classifiable under heading 6815, HTSUSA.

We recognize that the activated carbon particles embedded in the middle layer of the fabric provide it with its scent blocking properties, the feature that would likely prompt purchase and use of the fabric. We also accept the validity of the information that you presented stating that fabric incorporating activated carbon particles is substantially more expensive than similar fabric without such particles. And, we acknowledge that the fabric does act as a medium for delivering scent blocking properties of the carbon particles.

However, the merchandise at issue is, in and of itself, fabric that will be used to manufacture clothing designed for hunting. This is how the article at issue is described by Robinson and in patent grants on articles of apparel made with the fabric. While the merchandise does act as a medium for the carbon's properties, it could be used as fabric even without the carbon par-

ticles in the middle layer. Furthermore, based on our research and information submitted by the patent-holder of the technology that Robinson incorporates in the fabric, we understand that garments could not be constructed wholly of carbon fibers, as they are too brittle and could not be constructed into a garment. Limitations on the use of carbon fibers in garments therefore necessitate using constructions like that of the fabric at issue, with carbon particles embedded in a textile layer. The outer layer's knit fabric is more substantial than any of the other layers, weighing more than double the inner layer, which is the next heaviest layer. The outer layer forms the surface of the fabric and its camouflage printing adds to the fabric's marketing appeal and functionality of the garments that will be made from the fabric. In light of the above, we find that it is the outer layer of the fabric that gives its essential character to it. Accordingly, the fabric is classified as if it consisted solely of the material in the outer layer, the knitted polyester, in heading 6006, HTSUSA.

Having concluded that the fabric falls within the scope of a heading in Section XI, we must examine whether the fabric is excluded from classification in that Section by any relative section or chapter notes. Note 1(q) to Section XI excludes, among other things, "carbon fibers or articles of carbon fibers of heading 6815." While one layer of the fabric does contain carbon, it contains activated carbon particles, not fibers. In light of the above, we find that Note 1(q) to Section XI does not exclude the fabric from classification in Section XI, HTSUSA.

HOLDING:

NY F83890 is hereby revoked.

The ScentBlocker® fabric is classified under 6006.34.0040, HTSUSA, which provides for: "Other knitted or crocheted fabrics: Of synthetic fibers: Printed: Of double knit or interlock construction: Of polyester." The 2005 column 1, "General" duty rate for this merchandise is 10 percent *ad valorem*.

The ScentBlocker® fabric falls within textile category 222. Quota/visa requirements are no longer applicable for merchandise which is the product of World Trade Organization (WTO) member countries. The textile category number above applies to merchandise produced in non-WTO member countries. Quota and visa requirements are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information on quota and visa requirements applicable to this merchandise, we suggest you check, close to the time of shipment, the "Textile Status Report for Absolute Quotas" which is available on our web site at www.cbp.gov. For current information regarding possible textile safeguard actions on goods from China and related issues, we refer you to the web site of the Office of Textiles and Apparel of the Department of Commerce at otexa.ita.doc.gov.

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

[ATTACHMENT D]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967320
CLA-2:RR:CR:TE: 967320 BtB
CATEGORY: Classification
TARIFF NO.: 6105.20.2010, 6103.43.1520

DAVID A. RIGGLE, ESQ.
RIGGLE AND CRAVEN
8430 West Bryn Mawr Avenue
Suite 525
Chicago, IL 60631

RE: Revocation of NY G86317; certain ScentBlocker® Underguard™ three-layer garments with activated-carbon particles embedded in one layer

DEAR MR. RIGGLE:

This is in reconsideration of New York Ruling Letter (NY) G86317, dated January 25, 2001, issued to the Customs broker for Robinson Laboratories Inc. ("Robinson") by the U.S. Customs Service, now the Bureau of Customs and Border Protection (hereinafter "CBP"), concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of certain ScentBlocker® garments made in China. As you now represent Robinson in this matter, this letter is addressed to you.

We have reviewed NY G86317 and have determined that the classification of the garments provided is incorrect. This ruling sets forth the correct classification of the garments.

FACTS:

On January 5, 2001, Robinson's Customs broker requested a tariff classification ruling on the ScentBlocker® garments that are the subject of NY G86317. In NY G86317, these garments are described as "activated carbon lined clothing consisting of a pullover top and stretch waistband pants." The original samples of the garments and any accompanying literature were destroyed on September 11, 2001, in our former 6 World Trade Center office in New York City.

Notice of Proposed Revocation of NY G86317 was originally published in the *Customs Bulletin*, Volume 38, Number 21, on May 19, 2004. As the original samples and literature were destroyed, the proposed ruling by CBP to revoke NY G86317 (Headquarters Ruling (HQ) 966422) was drafted using the limited available information about the garments. During the Notice and Comment Period of Proposed Revocation, you contacted and informed us that several of our statements in HQ 966422 regarding the construction of the ScentBlocker® garments that are the subject of NY G86317 were not accurate. On Robinson's behalf, you provided new samples and literature to this office on July 20, 2004, along with arguments against revocation of NY G86317. A Withdrawal of Proposed Revocation of NY G86317 was published in the *Customs Bulletin*, Volume 38, Number 34, on August 18, 2004. We met with you on February 3, 2005 to discuss your arguments and you provided CBP with additional information and arguments against revocation on February 21, 2005.

The new samples are identified as the ScentBlocker® Underguard™ Top ("top") and ScentBlocker® Underguard™ Bottom ("bottom"). While the

models in NY G86317 are not identified by model name, you represented that these new samples are the current versions of the garments classified in NY G86317. Laboratory analysis of this fabric from the samples showed that the garments are composed of three layers, not lined as stated in NY G86317. Their outer layer, printed in a camouflage pattern, is made of a weft knit interlock construction and is composed wholly of polyester. The middle layer is composed of activated carbon particles embedded in a non-woven polyester construction. The inner layer has a weft knit construction and is composed wholly of polyester. The three layers are held together with adhesive material that is not visible in the cross section. The fabric has the following composition by weight of the entire fabric: top printed layer: 50.9%, middle nonwoven layer: 15.4%, inner layer: 21.8%, activated carbon and binder: 11.9%. The top has a black polyester stretch ribbed collar and cuffs. The collar can be loosened by unzipping two zippers that run from the top front of the collar to approximately halfway to the armpit. The bottom has a black polyester stretch ribbed waist and ankle cuffs.

The activated carbon particles in the top and bottom block the human scent of the wearer from wildlife while hunting. Information that you provided states that the scent blocking properties of the carbon particles do not become exhausted. Rather, these properties last for the life of the garments and are reactivated by drying the garments in the dryer following each washing.

In NY G86317, CBP classified the top and bottom in subheading 6815.10.0000, HTSUSA, which provides for "Articles of stone or of other mineral substances (including carbon fibers, articles of carbon fibers and articles of peat), not elsewhere specified or included: Nonelectrical articles of graphite or other carbon."

You argue that the top and bottom are properly classified in subheading 6815.10.0000, HTSUSA, because their "essential character" is imparted by the activated carbon particles in them. Alternatively, you argue that if the garments are not classified in subheading 6815.10.0000, HTSUSA, they are classified in subheading 9507.90.8000, HTSUSA, which provides for "Fishing rods, fish hooks and other line fishing tackle; fish landing nets, butterfly nets and similar nets; decoy "birds" (other than those of heading 9208 or 9705) and similar hunting or shooting equipment; parts and accessories thereof: Other: Other, including parts and accessories: Other, including parts and accessories."

ISSUE:

Whether the top and bottom are properly classified in heading 6815, HTSUSA, as articles of other mineral substances not elsewhere specified or included; in Section XI, HTSUSA, as textile articles of apparel; or in heading 9507, HTSUSA, as other articles of hunting equipment.

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the Harmonized System at the international level (for the 4-digit headings and the 6-digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. While neither legally binding nor dispositive of classification issues, the EN provide commentary on the scope of each heading of the

HTSUSA and are generally indicative of the proper interpretation of the headings. See T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989).

GRI 1, in its entirety, states:

1. The table of contents, alphabetical index, and titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according [to the remaining GRIs, in order].

Part III of the EN to GRI 1 states, in pertinent part, that:

The second part of [GRI 1] provides that classification shall be determined:

- (a) according to the terms of the headings and any relative Section or Chapter Notes, and
- (b) where appropriate, **provided the headings or Notes do not otherwise require**, according to the provisions of Rules 2, 3, 4, and 5.

Part IV of the EN to GRI 1 emphasizes that:

Provision (III) (a) is self-evident, and many goods are classified in the Nomenclature without recourse to any further consideration of the Interpretative Rules (e.g., live horses (heading 01.01), pharmaceutical goods specified in Note 4 to Chapter 30 (heading 30.06)).

The literature that you provided and Robinson's website refer to the articles at issue, respectively, as a "shirt" and "pant." The articles are also referred to collectively in the literature as "clothing." Furthermore, the patents on the technology that Robinson incorporates in the top and bottom all apply to "odor absorbing clothing." Nevertheless, you argue that the top and bottom are not properly classified as a "shirt" and "pant" because their "essential character" is imparted by the activated carbon particles in them.

"Essential character" is a term used in GRI 3(b). The essential character of an article is determinative only when classification of the article is determined pursuant to that GRI. Where the article is classified pursuant to the GRIs that precede GRI 3(b), the "essential character" of the article is not determinative unless the term appears in legal notes relevant to the articles being classified.

The top and bottom are both constructed of knit polyester (See Proposed HQ 967321 classifying the fabric with which the garments are made as a textile fabric). Any garments made from this fabric, therefore, are textile articles of apparel. Consequently, we find that there are headings in Section XI that specifically provide for the articles. Heading 6105, HTSUSA, which provides for, among other articles, men's knitted shirts, specifically provides for the top. Heading 6103, HTSUSA, which provides for, among other articles, men's knitted trousers provides for the bottom.

Having concluded that the top and bottom are specifically captured by headings in Section XI, we must examine whether the top and bottom are excluded from classification in that Section by any relative section or chapter notes. Note 1(q) to Section XI excludes, among other things, "carbon fibers or articles of carbon fibers of heading 6815." While one layer of the top and bottom does contain carbon, it contains activated carbon particles, not fibers. Based on our research and information submitted by the patent-

holder of the technology that Robinson incorporates in the top and bottom, it would not be possible to make the top and bottom with carbon fibers, as carbon fibers are too brittle and could not be constructed into a garment.

In light of the above, we find that Note 1(q) to Section XI does not exclude the top and bottom from classification in Section XI, HTSUSA. We find the top and bottom are classified as what they are described as in the literature that you provided and on Robinson's website, that is, a "shirt" and a "pant." The top is classified in heading 6105, HTSUSA, as a men's knitted shirt. The bottom is classified in heading 6103, HTSUSA, as men's knitted trousers. The presence of activated carbon particles in one layer of the garments does not remove the articles from the scope of the headings.

Your alternative assertion is that the top and bottom are classified in subheading 9507.90.8000, HTSUSA, which provides for, among other things, other articles of hunting equipment. You argue that the garments are classifiable in this provision because they are "specifically designed for use in the sport of hunting." You cite the holding of the recent Court of Appeals for the Federal Circuit ("CAFC") case, *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246 (Fed. Cir., 2004), as support for this argument.

In the *Bauer* case, the CAFC held that two styles of hockey pants were classified as ice hockey equipment under subheading 9506.99.25, HTSUSA. In making the determination that the pants were *prima facie* classifiable in this provision, the CAFC stated: "[b]ecause it is undisputed that Bauer's pants were specifically designed and intended for use only while playing ice hockey, we hold . . . that the pants are *prima facie* classifiable under subheading 9506.99.25 as ice-hockey equipment." You argue that the same definition of "equipment" applied by the CAFC in regard to subheading 9506.99.25, HTSUSA, is applicable to subheading 9507.90.8000, HTSUSA.

First, we note the structural difference between heading 9506 and 9507, HTSUSA. Heading 9506, HTSUSA, in its entirety, reads:

Articles and **equipment** for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof. [Emphasis added].

And, heading 9507, HTSUSA, in its entirety, reads:

Fishing rods, fish hooks and other line fishing tackle; fish landing nets, butterfly nets and similar nets; decoy "birds" (other than those of heading 9208 or 9705) and similar hunting or shooting **equipment**; parts and accessories thereof. [Emphasis added].

While "equipment" appears in the words of particular description in heading 9506, HTSUSA, it appears in the general terms of heading 9507, HTSUSA. Whereas the definition of "equipment" applied by the CAFC in *Bauer* affects the words of particular description in heading 9506, HTSUSA, the definition does not affect the words of general description in heading 9507, HTSUSA. Rather, we find the rule of *ejusdem generis* to be determinative of whether articles not specifically covered by heading 9507, HTSUSA, are classified in this heading. In *Van Dale Industries v. United States*, 18 C.I.T. 247 (Ct. Int'l Trade, 1994), *aff'd* 50 F.3d 1012 (Fed. Cir. 1995), in discussing *ejusdem generis*, the court affirmed that:

[o]ne rule of statutory construction is *ejusdem generis*, which means "of the same kind, class, or nature." Black's Law Dictionary 464 (5th ed.

1979). This rule applies “whenever a doubt arises as to whether a given article not specifically named in the statute is to be placed in a class of which some of the individual subjects are named.” [citing *United States v. Damrak Trading Co.*, 43 C.C.P.A. 77, 79 (C.C.P.A., 1956)].

Under *ejusdem generis*, where particular words of description are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described. *Id.* The court in *Sports Graphics v. United States*, 24 F. 3d 1390 (Fed. Cir., 1994), affirmed this principle when it held that, “[a]s applicable to classification cases, *ejusdem generis* requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* in order to be classified under the general terms.”

In the case at hand, the top and bottom at issue do not fall within the class of merchandise particularly described in heading 9507, HTSUSA. The exemplars listed in heading 9507, HTSUSA, are articles that are requisite for sport, instruments directly used to hunt, attract, or capture fish, butterflies, etc. Comparatively, the top and bottom are not directly used to hunt animals. While they mask the human scent of the wearer, they in no way attract animals. Additionally, they in no way resemble any of the exemplars and do not share their physical characteristics.

The EN to heading 9507 further support that the garments at issue are not classifiable in heading 9507, by identifying the “similar hunting or shooting equipment” that is covered by heading 9507. The EN states, in relevant part, that:

This heading covers:

- * * * * *
- (4) **Certain hunting or shooting requisites** such as decoy “birds” (but **not including** decoy calls of all kinds (**heading 92.08**) or stuffed birds of **heading 97.05**) and lark mirrors.

The EN names only certain requisites for hunting, none of which remotely resemble the top and bottom at issue.

For these reasons, we find that the definition of “equipment” applied by the CAFC in *Bauer* does not affect the classification of the top and bottom at issue. Additionally, the principle of *ejusdem generis* does not support classification of the top and bottom in heading 9507, HTSUSA, as the top and bottom are not in the same class as the specifically named exemplars in the heading or the articles described in the EN to that heading.

HOLDING:

NY G86317 is hereby revoked.

The ScentBlocker® Underguard™ Top is classified under subheading 6105.20.2010, HTSUSA, which provides for: “Men’s or boys’ shirts, knitted or crocheted: Of man-made fibers: Other: Men’s.” The 2005 column 1, “General” duty rate for this merchandise is 32 percent *ad valorem*.

The ScentBlocker® Underguard™ Bottom is classified under subheading 6103.43.1520, HTSUSA, which provides for: “Men’s or boys’ suits, ensembles, suit-type jackets, blazers, trousers, bib and brace overalls, breeches and shorts (other than swimwear), knitted or crocheted: Trousers, bib and brace overalls, breeches and shorts: Of synthetic fibers: Trousers, breeches and shorts, Other, Trousers and Breeches: Men’s.” The 2005 column 1, “General” duty rate for this merchandise is 28.2 percent *ad valorem*.

The ScentBlocker® Underguard™ Top falls within textile category 638 and the ScentBlocker® Underguard™ Bottom falls within textile category 647. Quota/visa requirements are no longer applicable for merchandise which is the product of World Trade Organization (WTO) member countries. The textile category number above applies to merchandise produced in non-WTO member countries. Quota and visa requirements are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information on quota and visa requirements applicable to this merchandise, we suggest you check, close to the time of shipment, the "Textile Status Report for Absolute Quotas" which is available on our web site at www.cbp.gov. For current information regarding possible textile safeguard actions on goods from China and related issues, we refer you to the web site of the Office of Textiles and Apparel of the Department of Commerce at otexa.ita.doc.gov.

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

19 CFR PART 177

**PROPOSED REVOCATION OF RULING LETTER AND
TREATMENT RELATING TO THE TARIFF
CLASSIFICATION OF YTTRIA C**

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security

ACTION: Notice of proposed revocation of tariff classification ruling letter and treatment relating to the classification of Yttria C.

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 Customs and Border Protection ("CBP") intends to revoke a ruling concerning the tariff classification of Yttria C, under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments are invited on the correctness of the proposed actions.

DATE: Comments must be received on or before September 23, 2005.

ADDRESS: Written comments are to be addressed to Bureau of Customs and Border Protection, Office of Regulation and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at 799 9th St. N.W. during regular business hours. Arrangements to in-

spect submitted comments should be made in advance by calling Joseph Clark at (202) 572-8768.

FOR FURTHER INFORMATION CONTACT: Allyson Mattanah, General Classification Branch, (202) 572-8784.

SUPPLEMENTARY INFORMATION:

Background

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

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that CBP intends to revoke a ruling pertaining to the tariff classification of Yttria C. Although in this notice CBP is specifically referring to Headquarter Ruling Letter (HQ) 962804, dated July 20, 2001, 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. This notice will cover any rulings on this merchandise that may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP in-

tends 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 his agents for importations of merchandise subsequent to this notice.

In HQ 962804, the merchandise was classified in subheading 2846.90.20, HTSUS, the provision for "Compounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium, or of mixtures of these metals: Other: Other," because the sintering aid added to the compound was considered a permissible impurity in the substance. HQ 962804 is set forth as Attachment "A" to this document.

We now find that because the sintering aid was added to the yttrium oxide intentionally, and cannot be removed once the larger particle yttrium is formed, it cannot be considered an impurity. Although miniscule, there does appear to be the presence of a completely separate compound, not found in the starting material and not a rare earth oxide, mixed with the yttrium oxide, which causes the product to be classified in heading 3824, HTSUS, rather than heading 2846, HTSUS.

CBP, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke HQ 962804 and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 967300, which is set forth as Attachment "B" to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: August 8, 2005

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

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 962804
July 30, 2001
CLA-2 RR:CR:GC 962804AM
CATEGORY: Classification
TARIFF NO.: 2846.90.80

PORT DIRECTOR
U.S. CUSTOMS SERVICE
P.O. Box 55580
Portland, OR 97238-5580

Re: Protest 2904-99-100020; Yttria C

DEAR PORT DIRECTOR:

This is our decision on Protest 2904-99-100020, filed by counsel on behalf of Grand Northern Products against your decision in the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of Yttria C, a large particle yttrium oxide product. In preparing this ruling, consideration was given to supplemental submissions filed by counsel dated March 30, 1999, October 5, 1999 and December 23, 1999.

FACTS:

Both entries pertaining to the subject protest were liquidated on November 27, 1999. The subject protest was filed March 1, 2000.

To understand the classification issues, it is necessary to set forth information concerning yttrium oxide. Because it is thermodynamically stable in the presence of most reactive engineering metals, Yttrium oxide (Y₂O₃) is an important and useful metal casting refractory. Metal casting refractories are the materials used to make the molds in which metal castings are made. However, the total effectiveness of yttrium oxide as a metal casting refractory is limited because of its affinity for moisture and carbon dioxide. Contamination of yttrium oxide with carbon dioxide results in the formation of chemically undesirable yttrium carbonates. Hydration of yttrium oxide forms yttrium hydroxides that have a high pH. Increases in pH cause most binder systems commonly used in conjunction with yttrium oxide to gel and/or experience very short useful lives. These hydration/carbonation problems are associated with the small particle size (2 microns or less) of commercially available yttrium oxide. As a result of this small particle size, there is a great amount of exposed surface area where hydration/carbonation can occur. One method for the elimination of problems associated with small particle yttrium oxide involves fusing the yttrium oxide and grinding it to a larger particle size more suitable for use as a metal casting refractory. The cost of fused yttrium oxide is high, almost twice that of the unfused product. Another, less costly method to create larger particle yttrium oxide, is by sintering (heating to below the melting point) the yttrium oxide.

Yttria C, the article subject to this protest, is a sintered larger particle yttrium oxide product used as a metal casting refractory. Lab

Report 2-96-21505-001, dated April 12, 1996, analyzing previous entries of Yttria C, by Grand Northern Products, states, in pertinent part, "The importer indicates that a small amount of [sintering aid] is blended and fired with the yttrium oxide resulting in crystals of increased particle size. This denotes a single compound." Lab Report 2-1999-22129, dated November 15, 1999, states, in pertinent part, "... the sample, a fine off-white powder, is yttrium oxide containing a small amount of [sintering aid]. Information from the manufacturer indicates that this product contains approx. 2300 PPM (0.23%) [sintering aid]." Lab Report SF20010085, dated June 4, 2001, states, in pertinent part, the following:

This sample is a pale yellow powder named "Yttria C." Laboratory analysis and information from the maker indicates that it is composed of 99± percent yttrium oxide and approximately .25 percent [of a dopant that functions as a sintering aid]. In our opinion, this material is not a mixture of chemical compounds. The [sintering aid] that was added functions as a sintering aid (. . .) that is used to densify the original yttrium oxide powder and to reduce its surface area. It apparently reacts with the yttrium oxide to either a solid solution (as claimed by the maker) or a mixed oxide of yttrium and [the sintering aid]. The latter is regarded as an unwanted impurity. This and other information (. . .) clearly indicate that the [sintering aid] is used in the manufacturing process for Yttria C. Otherwise, it has no functional role in Yttria C. . . . [Thus, Yttria C is] a lower cost alternative to fused yttrium oxide.

Protestant entered the product under subheading 3824.90.39, HTSUS, the provision for "... chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; . . . : [O]ther: [M]ixtures of two or more inorganic compounds: [O]ther." The merchandise was liquidated under subheading 2846.90.80, HTSUS, the provision for "[C]ompounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium, or of mixtures of these metals: [O]ther: [O]ther". Protestant requests an alternative classification of 2846.90.20, HTSUS, the provision for "[C]ompounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium, or of mixtures of these metals: [O]ther: [M]ixtures of rare-earth oxides or of rare-earth chlorides."

ISSUES:

Was the protest timely filed? What is the correct classification of Yttria C under the HTSUS?

LAW AND ANALYSIS:

PROTEST PROCEDURE

Under 19 U.S.C. 1514(c)(3)(A) and 19 CFR 174.12(e)(1), a protest shall be filed with the Customs Service within 90 days after the notice of liquidation. Both entries pertaining to the subject protest were liquidated on November 27, 1999, as indicated on both the Protest, CF 19, and the Customs Protest and Summons Information Report, CF 6445A. The CF 19 reflects that the protest was received by your office on March 1, 2000, i.e., that date is written in on the "date received" line. March 1, 2000 is 93 days after the date of liquidation,

November 27, 1999 (three days in November, not including the date of liquidation, November 27, 1999, 31 days in December, 31 days in January, and 28 days in February).

Pursuant to 19 CFR 174(f): "The date on which a protest is received by the Customs officer with whom it is required to be filed shall be deemed the date on which it is filed." Thus, the protest was filed on March 1, 2000.

For an example of the judicial treatment of a protest filed one day after the 90-day period for filing a protest, see *Penrod Drilling Co. v. United States*, 13 CIT 1005, 727 F. Supp. 1463, rehearing dismissed, 14 CIT 281, 740 F. Supp. 858 (1990), affirmed, 9 Fed. Cir. (T) 60, 925 F. 23d 406 (1991).

Inasmuch as the protest was not timely filed, it must be denied. However, in the event there are other protests which were timely filed, we have also addressed the classification issue.

CLASSIFICATION

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 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and, *mutatis mutandis*, to the GRIs.

In understanding the language of 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 HTSUS provisions under consideration are the following:

2846	Compounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium, or of mixtures of these metals:
2846.90	Other: [than Cerium compounds]
2846.90.20	Mixtures of rare-earth oxides or of rare-earth chlorides
	Other: [than Mixtures of rare-earth oxides or of rare-earth chlorides]
2846.90.80	Other [than Yttrium bearing materials and compounds containing by weight more than 19 percent but less than 85 percent yttrium oxide equivalent]

* * * * *

3824 Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included:

Section note 1(b) to Section VI, HTSUS, provides as follows: "Subject to paragraph (a) above, goods answering to a description in heading 2843 or 2846 are to be classified in those headings and in no other heading of this section." Chapter Note 1(a) to chapter 28 states, in pertinent part, "[E]xcept where the context otherwise requires, the headings of this chapter apply only to: (a) [S]eparate chemical elements and separate chemically defined compounds, whether or not containing impurities, . . ." The EN's to Chapter Note 1 to chapter 28 state, in pertinent part, the following:

(A) Chemically defined elements and compounds.

(Chapter Note 1)

Separate chemical elements and separate chemically defined compounds containing impurities, or dissolved in water, remain classified in Chapter 28.

The term "impurities" applies exclusively to substances whose presence in the single chemical compound results solely and directly from the manufacturing process (including purification). The substances may result from any of the factors involved in the process and are principally the following:

- (a) Unconverted starting materials.
- (b) Impurities present in the starting materials.
- (c) Reagents used in the manufacturing process (including purification).
- (d) By-products.

It should be noted, however, that such substances are not in all cases regarded as "impurities" permitted under Note 1 (a). When such substances are deliberately left in the product with a view to rendering it particularly suitable for specific use rather than for general use, they are not regarded as permissible impurities.

* * * * *

(C) Products which remain classified in Chapter 28, even when they are not separate chemical elements nor separate chemically defined compounds. There are certain exceptions to the rule that this Chapter is limited to separate chemical elements and separate chemically defined compounds. These exceptions include the following products: . . .

Heading 28.46-Compounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium or of mixtures of these metals.

* * * * *

EN 28.46 states, in pertinent part, the following:

This heading covers the inorganic or organic compounds of yttrium, of scandium or of the rare-earth metals of heading 28.05 (lanthanum, cerium, praseodymium, neodymium, samarium, europium, gadolinium, terbium, dysprosium, holmium, erbium, thulium, ytterbium, lutetium). The heading also covers compounds derived directly by chemical treatment from mixtures of the elements. This means that the heading will include mixtures of oxides or hydroxides of these elements or mixtures of salts having the same anion (e.g., rare-earth metal chlorides), but not mixtures of salts having different anions, whether or not the cation is the same. The heading will not therefore, for example, cover a mixture of europium and samarium nitrates with the oxalates nor a mixture of cerium chloride and cerium sulphate since these examples are not compounds derived directly from mixtures of elements, but are mixtures of compounds which could be conceived as having been made intentionally for special purposes and which, accordingly, fall in heading 38.24.

* * * * *

The compounds of this heading include: . . .

(2) Other rare-earth metal compounds. Yttrium oxide (yttria), terbium oxide (terbia), mixtures of ytterbium oxides (ytterbia) and of oxides of other rare-earth metals of commerce are reasonably pure. The heading includes mixtures of salts derived directly from such mixtures of oxides.

In accordance with the section note quoted above, if the merchandise is classifiable in heading 2846, HTSUS, it can not be classified in heading 3824, HTSUS, because heading 3824, HTSUS, also falls in section VI, HTSUS. Furthermore, in accordance with Chapter note 28(C), even if the compound is not "a separately defined chemical compound," there is a preference elicited by the ENs for it to remain in heading 2846, HTSUS.

In fact, the terms of heading 2846, HTSUS, describe the instant merchandise. The merchandise consists of 99+% yttrium oxide. The two other substances allegedly found in the product are impurities in that they "result[s] solely and directly from the manufacturing process." While the sintering aid is not technically any of the enumerated exemplars of an impurity (unconverted starting material, impurity in the starting material, reagent or byproduct), it need not be so listed to be considered an impurity. The important point is that it is added to aid in the manufacture of the yttrium oxide product, Yttria C, and has no use as such in the final use of the merchandise, much like a reagent. (See submission dated March 30, 1999, p.4, ". . . Yttria C is a substantially transformed product, utilizing [the sintering aid] to create a new type of Yttrium Oxide.") Hence, the sintering aid functions in the creation and manufacture of larger particle yttrium oxide but is not left in the product for any specific purpose. Rather, it is an impurity resulting from a particular, less expensive, manufacturing process of larger particle yttrium oxide. (See Lab Report SF20010085).

Therefore, protestant's argument that the sintering aid is not a permissible impurity because it is "deliberately left in the product with a view to rendering it particularly suitable for specific use rather than for general use" is spurious. (See submission dated March 30, 1999, pp. 21-22.) The sintering aid facilitates a change in particle size of the yttrium oxide. The change in particle size and surface area is the result of the agglomeration process, the manufacturing process through which yttrium oxide becomes the patented product, Yttria C, a less expensive, larger particle yttrium oxide product. However, as present in Yttria C, the sintering aid does not aid in the metal casting process. Therefore, although "deliberately introduced" (Id. at 21) to the yttrium oxide to aid in the sintering process used to manufacture larger particle yttrium oxide, a product better suited to metal casting than small particle yttrium oxide, the sintering aid is not "deliberately left in the product."

Protestant claims that language in the ENs regarding the permissible addition of stabilizers "provided that the quantity added in no case exceeds that necessary to achieve the desired result and that the addition does not alter the character of the basic product and render it particularly suitable for specific use rather than for general use," supports the argument that substances added to render a compound suitable for a specific use can not be regarded as impurities.

Protestant is incorrect. Anti-caking agents, anti-dusting agents and coloring substances are all added to substances after they are fully manufactured. The sintering aid in the instant case is added in order to manufacture the final larger particle yttrium oxide product and is not useful in the functioning of the product as a metal casting refractory once it has performed its function in aiding the sintering operation. Hence, the sintering aid is not a stabilizer and is not analogous to a stabilizer. It has nothing to do with the noted examples of permissible and impermissible additions to Chapter 28 substances. Rather, the sintering aid meets the definition of an impurity in that it "results solely and directly from the manufacturing process."

Protestant also states that the language of EN 28.46 prohibits classification of the instant product in that heading (Id. at 18-19.) Simply stated, the EN describes some of the mixtures that are included in the heading. A mixture of the compounds cerium chloride and cerium sulphate are not included because they consist of "mixtures of salts having different anions" even though the cation is the same. Such mixtures of salts are conceivably made intentionally for special purposes. Conversely, the instant product is 99+% yttrium oxide mixed with a sintering aid whose function in the product has expired well before importation of the subject merchandise. The minute amount of sintering aid left in the product meets the definition of an impurity rather than that of a substance added "intentionally for special purposes" vis-à-vis the use of Yttria C as a metal casting refractory. As the ENs go on to state, "[T]he compounds of this heading include: . . . Yttrium Oxide . . . reasonably pure." Yttria C is undisputedly reasonably pure yttrium oxide. As such, it falls within the meaning of the terms of the heading.

Protestant also erroneously claims that HQ 960556, dated February 13, 1998, supports classification in heading 3824, rather than in heading 2846. (submission October 5, 1999, p. 3-5.) In that case, the issue was whether heading 3206, HTSUS, the provision for "... inorganic products of a kind used as luminophores ..." applied to a product which, as imported, did not luminesce and one that luminesced only crudely and must undergo several more manufacturing procedures to be considered as a luminophore. Heading 3824, HTSUS, was found to be the appropriate classification, the provision for "mixtures of two or more inorganic compounds." The ruling found that classification under heading 3206, HTSUS, occurred using GRI 2(a), and that classification under heading 3824, HTSUS, occurs using GRI 1, making it the correct classification. In the instant case, classification in heading 2846, HTSUS, occurs under GRI 1 and precludes classification under 3824, HTSUS, in accordance with the section note.

Furthermore, protestant misreads the Draft Harmonized Rules of Origin, Second Examination, Chapters 28 and 29, Technical Committee on Rules of Origin (Document 41-497 E) Brussels, 28, July 1997, as support for the position that a change in particle size should accompany a change in classification of the product. *Id.* at p.23-24. In fact, the subject of the cited document is the rules of origin present under the North American Free Trade Agreement (NAFTA), not the classification of goods. The document simply states that "the TCRO also discussed various processes or combinations thereof which might confer origin in the absence of a tariff shift." (emphasis added)(p. 41.497E.) The language suggesting that substantial transformation has occurred if the particle size of a substance is altered is an example of the technical committee's recommendations regarding rules of origin without an accompanying change in classification. Hence, the submitted document actually disproves protestant's argument.

Lastly, we note that protestant's argument would result in two essentially identical substances, larger particle yttrium oxide as a result of a fusion process, and larger particle yttrium oxide as a result of a sintering process, being classified in two completely different headings of the tariff. This was not the intention of the drafters of the tariff and would result in an administratively untenable situation.

At GRI 6, neither the sintering aid or the yttrium oxide is a rare earth oxide. (See HQ 96102, dated August 24, 1999). The merchandise can not therefore be described as a "mixture of rare earth oxides" in subheading 2846.90.20, HTSUS.

HOLDING:

The protest is DENIED. Yttria C is classified in subheading 2846.90.80, HTSUS, the provision for "[C]ompounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium, or of mixtures of these metals: [O]ther: [O]ther: [O]ther."

In accordance with Section 3A(11)(b) of Customs Directive 099 3550-065, dated August 4, 1993, Subject: Revised Protest Directive, you are to mail this decision, together with the Customs Form 19, to the

protestant no later than 60 days from the date of this letter. Any reliquidation of the entry or entries in accordance with the decision must be accomplished prior to mailing the decision.

Sixty days from the date of the decision, the Office of Regulations and Rulings will make the decision available to Customs personnel, and to the public on the Customs Home Page on the World Wide Web at www.customs.gov, by means of the Freedom of Information Act, and other methods of public distribution.

**JOHN A. DURANT,
Director,
Commercial Rulings Division.**

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967300
CLA-2 RR:CR:GC 967300 AM
CATEGORY: CLASSIFICATION
TARIFF NO.: 3824.90.3900

MR. GEORGE R. TUTTLE
*Three Embarcadero Center, Suite 1160
San Francisco, CA 94111*

Re: tariff classification of Yttria C; Revocation of HQ 962804

DEAR MR. TUTTLE:

This is in regard to Headquarters Ruling Letter (HQ) 962804, dated July 20, 2001, regarding the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of Yttria C. That ruling held that the product was classified in subheading 2846.90.20, HTSUS, the provision for "Compounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium, or of mixtures of these metals: Other: Other." We have reviewed HQ 962804 and find it to be incorrect. Hence, we intend to revoke HQ 962804.

HQ 962804 is a Headquarters ruling on Protest 2904-99-100020. Under *San Francisco Newspaper Printing Co. v. United States*, 9 CIT 517, 620 F. Supp. 738 (1985), the liquidation of the entries covering the merchandise which was the subject of Protest 2904-99-100020 was final on both the protestant and CBP. Therefore, this decision has no effect on those entries.

FACTS:

Yttria C is a pale yellow powder consisting of more than 99% yttrium oxide and approximately .25 percent of a dopant that functions as a sintering aid. The sintering aid is used to create a larger particle yttrium oxide specifically for use in the metal casting industry. The sintering aid does not consist of a compound including yttrium, scandium or rare-earth metals of heading 2805, HTSUS.

Lab Report 2-96-21505-001, dated April 12, 1996, analyzing previous entries of Yttria C, by Grand Northern Products, states, in pertinent part, "The

importer indicates that a small amount of [sintering aid] is blended and fired with the yttrium oxide resulting in crystals of increased particle size. This denotes a single compound.” Lab Report 2–1999–22129, dated November 15, 1999, states, in pertinent part, “. . . the sample, a fine off-white powder, is yttrium oxide containing a small amount of [sintering aid]. Information from the manufacturer indicates that this product contains approx. 2300 PPM (0.23%) [sintering aid].”

Lab Report SF20010085, dated June 4, 2001, states, in pertinent part, the following:

This sample is a pale yellow powder named “Yttria C.” Laboratory analysis and information from the maker indicates that it is composed of 99+ percent yttrium oxide and approximately .25 percent [of a dopant that functions as a sintering aid]. In our opinion, this material is not a mixture of chemical compounds. The [sintering aid] that was added functions as a sintering aid (. . .) that is used to densify the original yttrium oxide powder and to reduce its surface area. It apparently reacts with the yttrium oxide to either a solid solution (as claimed by the maker) or a mixed oxide of yttrium and [the sintering aid]. The latter is regarded as an unwanted impurity. This and other information (. . .) clearly indicate that the [sintering aid] is used in the manufacturing process for Yttria C. Otherwise, it has no functional role in Yttria C. . . . [Thus, Yttria C is] a lower cost alternative to fused yttrium oxide.

ISSUE:

Is a greater than 99% yttrium oxide product excluded from classification in Chapter 28 by virtue of having a minute amount of another chemical added to it as a processing aid?

LAW AND ANALYSIS:

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

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any related section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. See T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

Furthermore, “it is a well-established principle that classification of an imported article must rest upon its condition as imported.” *E. T. Horn Company v. United States*, Slip Op. 2003–20, (CIT, 2003), (citing *Carrington Co. v. United States*, 61 CCPA 77, 497 F.2d 902, 905 (CCPA 1974), *United States v. Baker Perkins, Inc.*, 46 CCPA 128, (1959)).

The HTSUS provisions under consideration are as follows:

2846	Compounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium, or of mixtures of these metals:
2846.90	Other:
	Other:
2846.90.80	Other
*	* * * * * *
3824	Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included:
3824.90	Other:
	Other:
	Mixtures of two or more inorganic compounds:
3824.90.39	Other

Section note 1(b) to Section VI, HTSUS, provides as follows: "Subject to paragraph (a) above, goods answering to a description in heading 2843 or 2846 are to be classified in those headings and in no other heading of this section." Chapter Note 1(a) to chapter 28 states, in pertinent part, "[E]xcept where the context otherwise requires, the headings of this chapter apply only to: (a) [S]eparate chemical elements and separate chemically defined compounds, whether or not containing impurities, . . ."

In *USR Optonix, Inc. v. United States*, slip op. 05-27, February 18, 2005, the court relied on EN 28.46 to define the scope of the term "compounds" in heading 2846. The court found that the term "compounds" used in heading 2846, is sufficiently broad enough to include both a non-stoichiometric compound or a mixture of yttrium oxide and europium oxide without deciding factually whether the substance was a compound or a mixture. *Id.* at 22. However, the case is silent on the matter of a mixture of yttrium oxide and a compound including elements other than yttrium, scandium or those rare-earth metals of heading 2805, HTSUS.

EN 28.46 states, in pertinent part, the following:

This heading covers the inorganic or organic compounds of yttrium, of scandium or of the rare-earth metals of heading 28.05 (lanthanum, cerium, praseodymium, neodymium, samarium, europium, gadolinium, terbium, dysprosium, holmium, erbium, thulium, ytterbium, lutetium). The heading also covers compounds derived directly by chemical treatment from mixtures of the elements. This means that the heading will include mixtures of oxides or hydroxides of these elements or mixtures of salts having the same anion (e.g., rare-earth metal chlorides), but not mixtures of salts having different anions, whether or not the cation is the same. The heading will not therefore, for example, cover a mixture of europium and samarium nitrates with the oxalates nor a mixture of cerium chloride and cerium sulphate since these examples are not compounds derived directly from mixtures of elements, but are mixtures of

compounds which could be conceived as having been made intentionally for special purposes and which, accordingly, fall in heading 38.24.

In HQ 962804, we believed that, to the extent the Yttria C consisted of more than one compound, heading 2846 was broad enough to encompass that mixture under Section note 1(b) to Section VI and Chapter 28, note 1(a). Hence, we found that the miniscule amount of remaining sintering aid present in the yttrium oxide constituted an impurity.

However, the unique mixture found in Yttria C has been made intentionally for the special purpose of creating a larger particle yttrium oxide. Therefore, using EN 28.46, the mixture falls in heading 3824, HTSUS. Furthermore, because the sintering aid is not found in the starting material and is not a rare earth oxide, the holding in *USR Optonix, supra*, does not apply to these facts.

Yttria C is classified in subheading 3824.90.39, HTSUS, the provision for, "Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: Other: Other: Mixtures of two or more inorganic compounds: Other." This proposed revocation is consistent with a Harmonized System Committee decision to classify the substance in subheading 3824.90, HTS (HSC/34, Annex IJ/1 to Doc NC0892B2, Oct. 2004, pg. VI/11E).

However, this ruling is confined to the facts represented herein and does not diminish the scope of heading 2846, HTSUS, as outlined in *USR Optonix, supra*. Yttrium products will continue to be classified on a case by case basis.

HOLDING:

HQ 962804 is revoked. Yttria C is classified in subheading 3824.90.3900, HTSUSA (annotated), the provision for, "Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: Other: Other: Mixtures of two or more inorganic compounds: Other." The General column one rate of duty is free.

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

EFFECT ON OTHER RULINGS:

HQ 962804 is revoked.

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

19 CFR PART 177

**PROPOSED REVOCATION OF RULING LETTER AND
REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF WHITE SAUCE**

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

ACTION: Notice of proposed revocation of ruling letters and revocation of treatment relating to the tariff classification of certain white sauce.

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 Customs and Border Protection (CBP) is proposing to revoke a ruling letter pertaining to the tariff classification of white sauce under the Harmonized Tariff Schedule of the United States ("HTSUS"). Similarly, CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. CBP invites comments on the correctness of the proposed action.

DATE: Comments must be received on or before September 23, 2005.

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

FOR FURTHER INFORMATION CONTACT: Michelle Garcia, Tariff Classification and Marking Branch (202) 572-8745.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

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

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), this notice advises interested parties that CBP intends to revoke NY D86228 regarding the tariff classification of white sauce. Although in this notice CBP is specifically referring to one ruling, NY D86228, 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 additional rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or protest review) on the merchandise subject to this notice should advise CBP during this notice period.

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

In NY D86228, dated January 20, 1999, set forth as Attachment A, CBP classified the white sauce in subheading 2103.90.90, of the Harmonized Tariff Schedule of the United States (HTSUS), as "sauces and preparations therefor; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard; Other; Other; Other." On May 9, 2005, a civil action was commenced by the ruling requester, International Customs Products, asserting that classification of the merchandise is governed by NY D86228 and challenging a Notice of Action by CBP in which we rate advanced merchandise. The government's position was that NY D86228 applies to goods meeting its terms, including physical properties and use. However, because the factual circumstances relating to the entries under the

Notice of Action were materially different from the circumstances described in NY D86228 with regard to the physical properties and use of this product, NY D85228 does not apply to merchandise in the entries subject to the notice of action. In a decision dated June 2, 2005, the United States Court of International Trade (CIT) held that the merchandise which was subject to the Notice of Action was covered by NY D86228, that the Notice of Action was a “decision” and a “ruling revocation” for purposes of 19 U.S.C. § 1625(c), and therefore, CBP was required to formally modify or revoke the ruling in accordance with 19 U.S.C. § 1625(c) and 19 C.F.R. § 177.12.

The United States has appealed the decision of the Court of International Trade. In light of the decision of the Court of International Trade and the uncertainty as to the final outcome of this matter, and in order to protect the revenue of the United States, we have determined that revocation of the ruling is appropriate at this time. The United States does not concede that NY D86228 has to be revoked before CBP may liquidate entries of the subject merchandise as 0405.2030, HTSUS. Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke NY D86228 and any other ruling not specifically identified, to reflect the proper classification of the subject merchandise or substantially similar merchandise, based on the analysis set forth in HQ 967780 (Attachment B), which revokes NY D86228. As set forth in HQ 967780, the white sauce is classified in subheading 0405.20.3000, HTSUS, which provides for “Butter and other fats and oils derived from milk; dairy spreads: Dairy spreads: Butter substitutes, whether in liquid or solid state: Containing over 45 percent by weight of butterfat: Other.”

Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical merchandise. Before taking this action, we will give consideration to any written comments timely received.

DATED: August 11, 2005

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

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY D86228 January 20, 1999
CLA-2-21:RR:NC:2:228 D86228
CATEGORY: Classification
TARIFF NO.: 2103.90.9060

MR. JULIAN B. HERON, JR.
TUTTLE TAYLOR & HERON
Suite 407 West
1025 Thomas Jefferson St., NW
Washington, DC 20007-5201

RE: The tariff classification of a white sauce from Israel.

DEAR MR. HERON:

In your letter dated December 21, 1998, on behalf of International Customs Products, Inc., Dubois, PA, you requested a tariff classification ruling.

A sample and descriptive literature were submitted with your letter. The sample was examined and disposed of. The product known as "white sauce", is an off-white colored, thick liquid consisting of milkfat, water, vinegar (and/or lactic acid and/or citric acid), xanthan gum, carboxymethylcellulose, sodium phosphate (and/or sodium citrate) packed in 25 kg. containers. It is used as a base for the commercial production of gourmet sauces and dressings.

The applicable subheading for the white sauce will be 2103.90.9060, HTS, which provides for sauces and preparations therefor . . . other . . . other. The rate of duty will be 6.6 percent ad valorem.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Stanley Hopard at 212-466-5760.

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

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967780
CLA-2 RR:CR:GC 967780
CATEGORY: Classification
TARIFF NO.: 0405.20.3000

JULIAN B. HERON, JR.
TUTTLE TAYLOR & HERON
Suite 407 West
1025 Thomas Jefferson St., NW
Washington, DC 20007-5201

RE: Revocation of NY D86228; white sauce

DEAR MR. HERON:

This concerns NY ruling D86228, dated January 20, 1999, on the classification of a product described as "white sauce" under the Harmonized Tariff Schedule of the United States (HTSUS). Upon further review of this matter, and in light of additional information that has come to our attention, we have determined that the classification indicated in the ruling does not apply to that merchandise. This ruling letter sets forth the correct classification of the subject merchandise.

FACTS:

The Director, National Commodity Specialist Division (NCSO), U.S. Customs and Border Protection, New York, NY, issued NY D86228 to your client International Customs Products ("ICP"). The ruling classified the white sauce in subheading 2103.90.9060, (HTSUS), as "Sauces and preparations thereof: mixed condiments and mixed seasonings: mustard flour and meal and prepared mustard: Other: Other: Other." at a duty rate of 6.6% *ad valorem* (it is currently 6.4%). The file for NY D86228 was destroyed in the World Trade Center tragedy on September 11, 2001.

In describing the subject merchandise, NY D86228 made reference to the descriptive information provided with the ruling request:

A sample and descriptive literature were submitted with your letter. The sample was examined and disposed of. The product known as white sauce is an off-white colored, thick liquid consisting of milkfat, water, vinegar (and/or lactic acid and/or citric acid), xanthan gum, carboxymethylcellulose, sodium phosphate (and/or sodium citrate) packed in 25 kg. containers. It is used as a base for the commercial production of gourmet sauces and dressings.

Thereafter in accordance with its obligations under section 177.9(b)(1), Customs and Border Protection Regulations, the Port of Philadelphia, requested a laboratory analysis of a product claimed to have been imported pursuant to the ruling, hereafter the imported product.

According to lab reports, dated January 19, 2001, and October 12, 2004, the imported product consists of 78% milk fat and 21% moisture with very small amounts of additives. At room temperature, the imported product has the appearance of butter and is capable of being spread in a fashion similar to soft butter or mayonnaise. In light of these reports and information which raised concerns about the claimed use of the imported white sauce, the Port

requested the advice of the NCSA with respect to the classification of the product, on November 17, 2004. A subsequent laboratory analysis dated January 26, 2005, revealed that the product was in the form of a water in oil emulsion.

Based on this latest information, the NCSA sought our reconsideration of classification of the imported product in heading 0405, HTSUS, as a dairy spread. Specifically, the NCSA recommends classification in subheading 0405.20.30, HTSUS, which provides for "Butter and other fats and oils derived from milk; dairy spreads: Dairy spreads: Butter substitutes, whether in liquid or solid state: Containing over 45 percent by weight of butterfat: Other."

ISSUE:

What is the proper classification of the instant product?

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the remaining GRIs.

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff at the international level. The ENs, although neither dispositive nor legally binding, facilitate classification by providing a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. See T.D. 89-80.

The HTSUS provisions under consideration are as follows:

0405	Butter and other fats and oils derived from milk; dairy spreads:
0405.20	Dairy spreads: Butter substitutes, whether in liquid or solid state: Containing over 45 percent by weight of butterfat: Described in general note 15 of the tariff schedule and entered pursuant to its provisions:
0405.20.20	Described in Additional U.S. note 14 to this chapter and entered pursuant to its provisions:
0405.20.30	Other.
* * * * *	
2103	Sauces and preparations therefor; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard:
2103.90	Other:
2103.90.90	Other:
2103.90.90	Other.
* * * * *	

Note 2(b), to chapter 4, provides as follows:

2. For the purposes of heading 0405:

...

(b) The expression “dairy spreads” means a spreadable emulsion of the water-in-oil type, containing milk fat as the only fat in the product, with a milk fat content of 39% or more but less than 80% by weight.

The Explanatory Notes to heading 04.05 further describe the type of product described by the term “dairy spread” as follows:

This heading covers:

(B) Dairy spreads.

This group covers dairy spreads i.e., spreadable emulsions of the water in oil type, containing milk fat as the only fat in the product, and having a milk fat content of 39% or more but less than 80% by weight (see Note 2(b) to the Chapter). Dairy spreads may contain optional ingredients such as cultures of harmless lactic-acid producing bacteria, vitamins, sodium chloride, sugars, gelatine, starches; food colours; flavours; emulsifiers; thickening agents and preservatives.”

Classification in Heading 0405

According to CBP’s laboratory analysis, the imported product is a water in oil type emulsion consisting of 78% milk fat and 21% moisture with very small amounts of additives. At room temperature, the product has the appearance of butter and is spreadable. Therefore, in light of its composition and physical state, this product falls squarely within the scope of note 2(b) to Chapter 4. It is thus *prima facie* classifiable in heading 0405, specifically, subheading 0405.20.

Your request to the NCSO for a binding ruling dated December 21, 1998, identified the white sauce as a product to be used as a base for the commercial production of gourmet sauces and dressings. Based on your representation regarding the use of the product, the NCSO issued NY D86228, classifying the white sauce in subheading 2103.90.90, HTSUS as a preparation for sauce. It remains to be determined whether classification in heading 2103 is appropriate.

Heading 2103 covers sauces and preparations therefor. The courts have had occasion to construe these terms for tariff purposes. In *Nestle Refrigerated Food Co v. United States*, 18 C.I.T. 661, 668 (1994), a case decided under the HTSUS, the court concluded that the common meaning of “other tomato sauces” is based on the common meaning of the term “sauce.” In 1894, the U.S. Supreme Court reviewed the common meaning of the term “sauce” and determined that:

The word “sauce,” as commonly used, designates a condiment, generally but not always of liquid form, eaten as an addition to and together with a dish of food, to give it flavor and make it more palatable; and is not applied to anything which is eaten, alone or with a bit of bread, either for its own sake only, or to stimulate the appetite for other food to be eaten afterwards.

Bogle v. Magone, 152 U.S. 623, 625–26 (1894) (subsequently followed by *Del Gaizo Distrib. Corp. v. United States*, 24 CCPA 64, T.D. 48,376 (1936); *United States v. Neuman & Schwiers Co.*, 18 CCPA 1, T.D. 43,971 (1930)).

The court in *Nestle*, following the seminal *Bogle* case and its progeny, determined that in ascertaining whether a product fits within the common meaning of sauce, the court will examine a variety of key features, including its ingredients, flavor, aroma, texture, consistency, actual and intended use, and marketing. See, e.g., *Neuman & Schwiers Co.*, 18 CCPA at 3. The court further concluded that of these key features, actual and intended use are of paramount importance and that a product is a sauce if it can be used “as is,” that is, if it may be eaten as an accompaniment to other foods to make such foods more flavorful and palatable. Whether a product is fit for use as a sauce depends upon more than the mere possibility of use; rather, substantial actual use as a sauce must be demonstrated. See *Wah Shang Co. v. United States*, 44 CCPA 155, 159, C.A.D. 654 (1957). Also, according to *Nestle*, a product’s physical features are also considered in light of their effect on the product’s ability to be used as a sauce.

It is clear that the instant product does not meet the above criteria for being a sauce. It is not usable as a sauce in its condition as imported. However, it is also necessary to examine whether the product can be considered a preparation for use in making a sauce.

The *Nestle* court also elaborated on the meaning of “preparation for sauce”. The court stated that because the term “preparation for sauce” is not defined by the HTSUS, the term should be understood on the basis of its common meaning which “refers to a product that is produced from raw material by a definite series of steps, and is specifically made to be used as a substantially advanced base or intermediate of a sauce.” See *Nestle*, 18 C.I.T. 674 (1994). The court further stated that sauce preparations are substantially finished products that lack an ingredient (i.e., milk or water), or require further processing such as mixing, and serve as a base in order to become what is commonly understood to be a sauce. See also *Del Gaizo Distrib. Corp.*, 24 CCPA at 67. The test is whether the subject merchandise is a substantially finished food preparation that can be used as a sauce and not a mere input material to be used as an ingredient in other food preparations.

The imported product is essentially 78% milkfat and 21% moisture. It can hardly be considered a sufficiently processed product that can be used as a base for a sauce, or used as a substantially advanced preparation for a sauce. Accordingly, in its condition as imported, the imported product fails to meet the court made criteria for classification in heading 2103.

Use and Heading 2103

In addition to taking into account the degree to which a product has been processed the court has also held that the term “preparations” for sauces is a use provision insofar as heading 2103 provides for preparations for sauces. *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998). Thus, although the composition alone would appear to preclude classification in heading 2103, we will consider the issue of use.

HTSUS, Additional Rule of Interpretation (ARI) 1(a) states 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. Accordingly, whether the instant merchandise meets the terms of heading 2103 depends on the principal use in the United States of goods of that class or kind to which the imported goods belong at or immediately prior to the date of the

importation. *Lenox Coll. v. United States*, 20 CIT 194 (1996). Furthermore, in determining the class or kind of goods to which an article belongs, CBP may consider all pertinent evidence as to use. These factors may include: (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchaser; (3) the channels of trade in which the merchandise moves; (4) the environment of sale (accompanying accessories, manner of advertisement and display); and (5) the usage of the merchandise. *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F.2d 373 (1976), *cert. denied*, 429 U.S. 979. We shall examine these factors in turn.

With regard to the general physical characteristics of the merchandise, we note that the imported product is a water in oil type emulsion comprised of 78% milkfat and 21% moisture. In fact, at room temperature the product has the appearance of butter and is capable of being spread in a fashion similar to soft butter or mayonnaise. The consistency, texture, fat content and general physical characteristics of this product rather than indicative of the class or kind of products used as sauces or sauce preparations more closely resemble those of a dairy spread.

CBP's previous rulings have examined a number of "white sauce" products, which demonstrate the physical characteristics of sauces and sauce preparations in contrast to the imported product. For instance, the white sauce products of NY J84280, dated May 28, 2003, NY J80559, dated February 27, 2003; NY H85465, dated September 6, 2001; NY J84280, dated May 28, 2003; and NY 892563, dated December 9, 1993 were composed of markedly different ingredients. The white sauce of NY J84280 contained over 64 percent water, approximately 12 percent fat, and various other ingredients (flour, starch, beef extract, and spice). The white sauce of NY J80559 contained a minimum of 69 percent moisture, between 10.0 and 11.5 percent fat and other ingredients such as butter oil, flour, starch, vegetable oil, salt, and pepper. The white sauce of NY H85465 was composed of butter, cream, mushrooms, walnuts, cheese, truffles, salt, garlic, and flavoring. The powdered white sauce preparation of NY 892563 consisted of salt, sugar, starch, maltodextrin, chicken fat, flavors, spices, and other ingredients. All products represented archetypal sauces and sauce preparations (*i.e.*, finished or substantially finished food products in fluid or powder form, ready to use as sauces or only requiring dilution with a liquid to create the sauce).

The products in H85465 and 892563 were sold for the retail and food service industry, respectively. Also, we note that given the complexity of the formulation, the size of the packaging (*i.e.*, no. 10 can, pouch) and the advertising literature, the products of J84280 and J80559 were also directed to food service customers who want a ready-to-use sauce or sauce base requiring little additional processing to make a different flavored finished product. The channels of trade, advertisement and the expectations of the ultimate consumers are clearly different from the instant merchandise, which is packaged in 25 kg. plastic-lined corrugated containers and is destined as an intermediary product or ingredient for the industrial manufacturing of other products and not the retail and food service industry.

Hence, the general physical characteristics, the channels of trade, the expectation of the ultimate purchasers, the environment of sale, the advertisement, the use of the kinds of goods we have classified as white sauce or white sauce preparations (and the recognition by the trade of such use), are very different from those of the instant merchandise under our consideration.

With regard to actual use of this merchandise, information has come to our attention in this case, which indicates that the instant merchandise is actually used in order to make cheese, rather than as an ingredient in the preparation of sauces. Upon investigation the documented evidence confirmed that the importer's merchandise was only used as an ingredient in cheese making. While the actual use of the merchandise is not dispositive of the principal use of the class or kind to which the merchandise belongs, it is important evidence of principal use. See *Carborundum*, supra. By contrast, no evidence beyond an assertion has been provided demonstrating that the principal use of the merchandise is as an ingredient in the production of sauce. Therefore, the importer has failed to meet its burden of proof that the imported product is a member of the class or kind of product which is commonly used as a base in the production of sauce.

In the absence of such evidence, we must conclude that principal use as a base or preparation for sauce has not been demonstrated. Accordingly, the merchandise fails to meet the terms of heading 2103.¹

As stated above, the product meets the description of the term "dairy spread" as set forth in Legal note 2 (b) to chapter 4. Dairy spreads of 0405.20, HTSUS, are further subdivided based on a number of criteria. The superior subdivision text to 0405.20.10–0405.20.30, HTSUS covers "Butter substitutes, whether in liquid or solid state: Containing over 45 percent by weight of milkfat." Because the white sauce product shares so many of the qualities of butter (*i.e.*, it is a water-in-oil emulsion that contains almost the same milk fat content as butter and appears to be similar to butter in suitability for use as a spread, or as a milk fat ingredient in cheese or other products), and in light of its milkfat content, it meets the terms of this text.

Subheading 0405.20.1000, HTSUS, provides for goods otherwise subject to quota at low tier tariff rate quota duty rates, without meeting quota requirements or being subject to other quota restrictions. Goods entered under this subheading are generally entered for non-commercial uses and do not enter

¹Even if we found the principal use of the product to be an ingredient in the production of sauces and dressings and *prima facie* classifiable in heading 2103, the merchandise would still fail to be finally classified in heading 2103. GRI 3(a) provides that if merchandise is *prima facie* classifiable in two or more headings, a heading which more specifically describes a good takes precedence over a more general provision. Under this so-called rule of relative specificity, we look to the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty. Accordingly, assuming, without conceding, that the merchandise at issue is *prima facie* classifiable in both headings 0405 and 2103, a comparison of the terms of heading 2103 and heading 0405 is in order.

Heading 0405 describes the imported product by name while heading 2103 is a use provision. Absent legislative intent to the contrary, a product described by both a use provision and an *eo nomine* provision is generally more specifically provided for under the use provision. However, this principle, applies where the competing provisions are **otherwise in balance**. (Emphasis provided) *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998) In *Orlando*, the court applied this principle and concluded that the competing *eo nomine* and use provisions (*i.e.*, HTSUS, heading 2002, as "Tomatoes prepared or preserved" and heading 2103, as "Sauces and preparations therefor," respectively) were in balance. However, unlike the situation in *Orlando*, the specific *eo nomine* requirements set forth in heading 0405, HTSUS and Legal note 2 (b) to chapter 4, regarding the physical characteristics of the instant merchandise (*i.e.*, the water in oil emulsion and butterfat content) are compellingly more stringent, and difficult to satisfy than the *eo nomine* requirements of heading 2002, HTSUS, for prepared or preserved tomatoes. Because the *eo nomine* requirements of heading 0405, HTSUS, are clearly more specific and difficult to satisfy than the use provision requirements of heading 2103, HTSUS, the competing headings in the instant case are therefore not in balance. Heading 0405 is the more specific provision and on the basis of GRI 3(a), the goods would therefore be classifiable in heading 0405, HTSUS.

the commerce of the United States. Because the white sauce was entered for commercial purposes into the United States, the terms of this subheading are not met.

Subheading 0405.20.2000, HTSUS, provides for entry at the low tier tariff rate quota duty rate for goods that meet the requirements of additional U.S. note 14 to chapter 4. One requirement of additional U.S. note 14 is that the merchandise be entered under an import license issued to the importer by the U.S. Department of Agriculture. Because the instant goods were not entered under such an import license, the terms of this subheading are not met.

Subheading 0405.20.3000, HTSUS, provides for goods which are subject to quota but must be entered under the high tier duty rate associated with this provision, because (like the instant white sauce product) they are entered without an import license. The instant merchandise is fully described by this provision.

Status of the prior ruling

19 C.F.R. § 177.9(b)(1) provides that:

“Each ruling letter is issued on the assumption that all of the information furnished in connection with the ruling request and incorporated in the ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect. The application of a ruling letter by a Customs Service field office to the transaction to which it is purported to relate is subject to the verification of the facts incorporated in the ruling letter, a comparison of the transaction described therein to the actual transaction, and the satisfaction of any conditions on which the ruling was based . . .”

CBP’s administrative ruling letters rely on the accuracy of the particular facts as presented by the ruling requester regarding the product for which a ruling is being sought. Thus, in order for a ruling to be applicable to an import transaction, the relevant facts must be verified to be present in that transaction. In the instant case, the imported product differs in important ways from the product described in the ruling. First, the white sauce was described as a liquid when in fact it was an oil in water emulsion. Second, the white sauce product was claimed to be a base for gourmet sauces and dressings when the actual use of the merchandise is as an ingredient in the making of cheese. Finally, the fact that the request for ruling made no mention of the use of the product in the making of cheese shows that the information provided in the ruling request was not accurate and complete as required in the above regulation.

HOLDING:

In view of the above facts and analysis, the white sauce is classified under subheading 0405.20.3000, HTSUS, which provides for “Butter and other fats and oils derived from milk: dairy spreads: Dairy spreads: Butter substitutes, whether in liquid or solid state: Containing over 45 percent by weight of butterfat: Other.” Goods imported under this subheading are subject to duty at \$1.996 per kilogram and an additional safeguard duty under tariff subheadings 9904.05.37–.47, based on the CIF price per kilogram.

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

EFFECT ON OTHER RULINGS:

NY D86228 dated January 20, 1999 is REVOKED.

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

