

Bureau of Customs and Border Protection

CBP Decisions

19 CFR PART 12

[CBP Dec. 05-33]

RIN 1505-AB61

EXTENSION OF IMPORT RESTRICTIONS IMPOSED ON CERTAIN CATEGORIES OF ARCHAEOLOGICAL MATERIAL FROM THE PRE-HISPANIC CULTURES OF THE REPUBLIC OF NICARAGUA

AGENCY: Customs and Border Protection, Homeland Security;
Treasury.

ACTION: Final rule.

SUMMARY: This document amends Title 19 of the Code of Federal Regulations (19 CFR) to reflect the extension of the import restrictions on certain categories of archaeological material from the Pre-Hispanic cultures of the Republic of Nicaragua that were imposed by T.D. 00-75. The Acting Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has determined that conditions continue to warrant the imposition of import restrictions. Accordingly, the restrictions will remain in effect for an additional 5 years, and Title 19 of the CFR is being amended to reflect this extension. These restrictions are being extended pursuant to determinations of the United States Department of State made under the terms of the Convention on Cultural Property Implementation Act in accordance with the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. T.D. 00-75 contains the Designated List of archaeological material representing Pre-Hispanic cultures of Nicaragua.

EFFECTIVE DATE: October 20, 2005.

FOR FURTHER INFORMATION CONTACT: For legal aspects, George McCray, (202) 572-8710. For operational aspects, Michael Craig, Chief, Other Government Agencies Branch, (202) 344-1684.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to the provisions of the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention, codified into U.S. law as the Convention on Cultural Property Implementation Act (Pub. L. 97-446, 19 U.S.C. 2601 et seq.), the United States entered into a bilateral agreement with the Republic of Nicaragua on October 20, 2000, concerning the imposition of import restrictions on certain categories of archeological material from the Pre-Hispanic cultures of the Republic of Nicaragua. On October 26, 2000, Customs and Border Protection (CBP) published T.D. 00-75 in the **Federal Register** (65 FR 64140), which amended 19 CFR 12.104g(a) to reflect the imposition of these restrictions and included a list designating the types of articles covered by the restrictions.

Import restrictions listed in 19 CFR 12.104g(a) are “effective for no more than five years beginning on the date on which the agreement enters into force with respect to the United States. This period can be extended for additional periods not to exceed five years if it is determined that the factors which justified the initial agreement still pertain and no cause for suspension of the agreement exists” (19 CFR 12.104g(a)).

After reviewing the findings and recommendations of the Cultural Property Advisory Committee, the Acting Assistant Secretary for Educational and Cultural Affairs, United States Department of State, concluding that the cultural heritage of Nicaragua continues to be in jeopardy from pillage of Pre-Hispanic archaeological resources, made the necessary determination to extend the import restrictions for an additional five years on September 1, 2005. Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension of the import restrictions. The Designated List of Pre-Columbian (Pre-Hispanic) Archaeological Materials from Nicaragua covered by these import restrictions is set forth in T.D. 00-75. The Designated List and accompanying image database may also be found at the following Internet website address: <http://exchanges.state.gov/culprop>. The restrictions on the importation of these archaeological materials from the Republic of Nicaragua are to continue in effect for an additional 5 years. Importation of such material continues to be restricted unless:

(1) Accompanied by appropriate export certification issued by the Government of Nicaragua; or

(2) With respect to Pre-Columbian material from archaeological sites throughout Nicaragua, documentation exists that exportation from Nicaragua occurred prior to October 26, 2000.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE

This amendment involves a foreign affairs function of the United States and is, therefore, being made without notice or public procedure (5 U.S.C. 553(a)(1)). In addition, CBP has determined that such notice or public procedure would be impracticable and contrary to the public interest because the action being taken is essential to avoid interruption of the application of the existing import restrictions (5 U.S.C. 553(b)(B)). For the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

REGULATORY FLEXIBILITY ACT

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

EXECUTIVE ORDER 12866

This amendment does not meet the criteria of a “significant regulatory action” as described in Executive Order 12866.

SIGNING AUTHORITY

This regulation is being issued in accordance with 19 CFR 0.1(a)(1).

LIST OF SUBJECTS IN 19 CFR PART 12

Cultural property, Customs duties and inspection, Imports, Prohibited merchandise.

AMENDMENT TO CBP REGULATIONS

For the reasons set forth above, part 12 of Title 19 of the Code of Federal Regulations (19 CFR part 12), is amended as set forth below:

PART 12 — SPECIAL CLASSES OF MERCHANDISE

1. The general authority citation for part 12 and the specific authority citation for § 12.104g continue to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

* * * * *

2. In § 12.104g(a), the table of the list of agreements imposing import restrictions on described articles of cultural property of State Parties is amended in the entry for Nicaragua by removing the reference to “T.D. 00–75” in the column headed “Decision No.” and adding in its place the language “T.D. 00–75 extended by CBP Dec. 05–33”.

ROBERT C. BONNER,
Commissioner,
Bureau of Customs and Border Protection.

Approved: October 17, 2005

TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, October 20, 2005 (70 FR 61031)]

General Notices

Automated Commercial Environment (ACE): Creation of Non-Portal Accounts for Importers; Automatic ACE Participation for C-TPAT Members

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

ACTION: General notice.

SUMMARY: This notice announces the creation of Non-portal Accounts for importers wishing to participate in the Automated Commercial Environment (ACE) test, but not seeking the benefits that inure to parties that establish Portal Accounts. This notice also announces that all importers who are certified partners in the voluntary Customs-Trade Partnership Against Terrorism (C-TPAT) Program, and are not holders of ACE Portal Accounts, are automatically established as ACE Non-portal Accounts and are eligible to participate in the Periodic Monthly Statement test. This Notice further announces that importers who are not certified partners in C-TPAT may still become Non-portal Accounts by accurately completing a Customs and Border Protection Form (CBP Form) 5106 and then submitting that document to a customs broker who is participating in ACE via a Portal Account. The broker will then submit that information to CBP. Finally, the document states that any current C-TPAT certified partners who are owners of Portal Accounts and are not participating in Periodic Monthly Statement (PMS) may im-

mediately participate in PMS directly with CBP, or through a customs broker with an ACE Portal Account, by providing to CBP those importer of record numbers that are part of the Portal Account and that have been previously designated to C-TPAT.

EFFECTIVE DATES: The provisions of this Notice are effective immediately.

ADDRESSES: Comments concerning this notice should be submitted to Mr. Michael Maricich via email at Michael.Maricich@dhs.gov.

FOR FURTHER INFORMATION CONTACT: For questions regarding this Notice: Mr. Michael Maricich via email at Michael.Maricich@dhs.gov, or by telephone at (703) 921-7520. Information is also available at the CBP website, cbp.gov, regarding the procedures to follow in order to establish the accounts described in this notice, such as the submission of forms, information, etc.

SUPPLEMENTARY INFORMATION:

Background

On May 1, 2002, CBP published a General Notice in the **Federal Register** (67 FR 21800) announcing a plan to conduct a National Customs Automation Program (NCAP) test of the first phase of the Automated Commercial Environment. In this notice, CBP stated that it planned to select approximately forty importer accounts from the list of qualified applicants for the initial deployment of this test. The test would allow importers and authorized parties to access their customs data via a web based Account Portal. In order to be eligible for participation, an importer was required to become a member of the Customs-Trade Partnership Against Terrorism (C-TPAT) Program and had to have the ability to connect to the internet. Each participant had to designate one person as the account owner for the company's portal account information, with that account owner being responsible for safeguarding the company's portal account information, controlling all disclosures of that information to authorized persons, authorizing user access to the Account Portal and ensuring that access to the company's portal account information by authorized persons is strictly controlled. Each importer wishing to participate was required to fill out an application and, while not expressly stated in the Notice, each applicant was also required to agree to a set of terms and conditions.

On June 18, 2002, CBP extended the application period for those desiring to be one of the initial importer participants by publishing a second General Notice in the **Federal Register** (67 FR 41572). That notice emphasized that applications to be an initial participant had to be submitted to CBP prior to August 1, 2002. Applications would be accepted after that date, but parties who so applied would be

placed on a waiting list and considered for participation pending expansion of the technology.

On February 4, 2004, CBP published a General Notice in the **Federal Register** (69 FR 5362) announcing the next step toward the full electronic processing of commercial importations in ACE, with a focus on identifying authorized importers and brokers to participate in the test to implement the Periodic Monthly Statement (PMS) Process. Under the test as described in this Notice, participating importers and their designated brokers are allowed to deposit estimated duties and fees no later than the 15th calendar day of the month following the month in which the goods are either entered or released, whichever comes first. (See section 383 of the Trade Act of 2002, Pub. L. 107-210, dated August 6, 2002, which amended section 505(a) of the Tariff Act of 1930 (19 U.S.C. 1505(a)). Brokers are permitted to establish broker accounts in the secure data portal in order to submit Periodic Monthly Statements on behalf of their clients eligible to participate.

The February 4, 2004, General Notice further stated that participants in this test would benefit by having access to operational data through the ACE Secure Data Portal ("Portal"), enjoying the capability of being able to interact electronically with CBP, and making payments of duties and fees on a periodic monthly basis. Pursuant to this Notice, an importer wishing to designate a broker to make Periodic Monthly Statement payment on his behalf can do so only after first establishing himself as an importer ACE Portal account by meeting the basic criteria set forth in the **Federal Register** notices of May 1, 2002 (67 FR 21800) plus two new additional requirements, i.e., having the ability to make periodic payment via ACH Credit or ACH Debit and having the ability to file entry/entry summary via ABI (Automated Broker Interface). Also, designated brokers wishing to participate in this test and make Periodic Monthly Statement payment on behalf of participating importers also had to establish individual broker ACE Portal Accounts, also meeting those same requirements. In addition, in order for customs brokers to apply, they had to provide names of the initial forty-one importers participating in the test who had designated or would designate them as the authorized broker.

On September 8, 2004, CBP published a General Notice in the **Federal Register** (69 FR 54302), reminding the public that importers and their designated brokers may still apply to establish ACE Portal accounts so as to participate in the Periodic Monthly Statement Process. The Notice again invited customs brokers to participate in the ACE Portal test generally.

On February 1, 2005, CBP published a General Notice in the **Federal Register** (70 FR 5199) modifying the eligibility requirements for the establishment of an ACE portal account and announced that applicants seeking to establish importer or broker accounts so as to

access the ACE Portal, or to participate in any test, were no longer required to provide a statement certifying participation in the Customs Trade Partnership Against Terrorism (C-TPAT).

On August 8, 2005, CBP published a General Notice in the **Federal Register** (70 FR 45736) changing the time period allowed for the deposit of the duties and fees from the 15th calendar day to the 15th working day of the month following the month in which the goods are either entered or released. That change was made in order to comply with the provisions of section 2004 of the Miscellaneous Trade and Technical Corrections Act of 2004, Public Law 108-429, which extended the time of deposit of those estimated duties and fees. The document also advised that entries containing Census errors are eligible to be placed on a Periodic Daily Statement and designated for monthly payment. Finally, the document described those situations where liquidated damages would be imposed for failing to pay estimated duties in a timely manner.

On September 22, 2005, CBP published a General Notice in the **Federal Register** (70 FR 55632) eliminating the requirement that participants in the Periodic Monthly statement test provide a bond rider covering the periodic payment of estimated duties and fees. The Notice indicated that nonpayment or untimely payment of estimated duties and fees may result in action by CBP to impose sanctions on the delinquent importer of record or to allow the surety to terminate its basic importation bond. If the bond principal is a participant in the Periodic Monthly Statement test, sureties will be allowed, under certain conditions, to terminate bonds with 3 business days notice to the bond principal and CBP.

Description of Changes

Removal of Requirement for Participation in Periodic Monthly Statement

In order to encourage maximum participation, CBP will no longer require that importers first establish ACE Portal Accounts in order to deposit estimated duties and fees as part of Periodic Monthly Statement (PMS). Previous releases of ACE involved testing the ability of importers and authorized parties to access their CBP data via the Portal, with a focus on defining and establishing the Importer Account structure. Among other things, the requirement to establish an ACE Portal Account was considered a benefit to participants because it provides them with access to their operational data through the ACE Portal.

CBP recognizes that some importers, while wishing to deposit estimated duties and fees on a monthly basis, would prefer to designate a broker to perform this role, and may choose not to access their data via the Portal. As such, CBP has decided that in lieu of the requirement to establish an importer ACE Portal account prior to participa-

tion in periodic monthly payment, CBP will only require an importer to establish a Non-portal Account.

Non-Portal Accounts

Through this Notice, CBP announces the establishment of Non-portal Accounts in ACE. At this point during the ACE test, Non-portal Accounts will only be afforded to importers.

Importers desiring to participate in ACE through Non-portal Accounts will not be required to meet the application requirements outlined to date, but will be required to provide information related to identity (unless they are C-TPAT certified partners, automatically becoming ACE Non-portal Accounts, as described later in this document). Importers establishing Non-portal Accounts will be eligible to participate in the Periodic Monthly Statement test and pay estimated duties and fees on a monthly basis. In order to participate in the Periodic Monthly Statement test consistent with the provisions of this General Notice, a Non-portal Account importer must have its duty and fee deposits guaranteed by a continuous basic importation bond. Ultimately, it is CBP's intention to permit the filing of single transaction bonds for those importers wishing to participate in the payment of estimated duties in the Periodic Monthly Statement test. However, at this stage in the test development, in order to ensure that all Non-portal Account participants receive some fiscal scrutiny, continuous bonds will be required.

In order to participate as a Non-portal Account, a party must submit to its customs broker a CBP Form 5106, Notification of Importer's Number or Notice of Change of Name or Address, with accurate information. Brokers with Portal Accounts are eligible to establish Non-portal Accounts on behalf of their clients. Brokers who accept CBP Form 5106 information from a client and submit that information to CBP in order to establish a Non-portal Account on behalf of that client should exercise due diligence to ensure that all information provided by the client that is used in the processing of merchandise is accurate. Under the procedures for establishing Non-portal Accounts for the test, the broker shall be obligated to maintain an accurately completed power of attorney on file on behalf of that importer. The broker will be required to exercise responsible supervision and control over customs business as required by the provisions of title 19, United States Code, section 1641.

Upon completion of the aforementioned requirements, holders of Non-portal Accounts may participate in Periodic Monthly Statement via a broker with a portal account.

Automatic Participation in ACE for C-TPAT Certified Partners

All importer certified partners in the voluntary Customs Trade Partnership Against Terrorism (C-TPAT) who do not have portal accounts are automatically considered to be ACE Non-portal Accounts

eligible to participate in the Periodic Monthly Statement test. C-TPAT is an initiative between business and government to protect global commerce from terrorism. Importers applying to participate in C-TPAT, among other things, are required to be active U.S. importers or non-resident Canadian importers into the United States, have a business office staffed in the United States or Canada and have active U.S. importer of record ID(s) in any of the following formats: 1) U.S. Social Security Number; 2) U.S. Internal Revenue Service assigned ID(s); or 3) CBP assigned Importer ID.

Accordingly, inasmuch as this information is provided to CBP in the application process, C-TPAT certified partners automatically designated as Non-portal Accounts are not required to follow the Non-portal Account process described earlier in this Notice. Also, brokers with C-TPAT clients will not be required to submit the completed CBP Form 5106. Necessary powers of attorney must be maintained. In order to apply for PMS participation, the C-TPAT Non-portal Account must use a broker with an ACE Portal Account to designate to CBP the Non-portal Account as a C-TPAT certified partner and provide CBP with the importer of record IDs that have been previously designated to C-TPAT.

C-TPAT importers are encouraged to apply to become ACE Portal Accounts as described in the May 1, 2002, and February 4, 2004, **Federal Register** Notices described earlier.

C-TPAT Portal Accounts Currently Not Participating in Periodic Monthly Statement

C-TPAT certified partners who hold ACE Portal Accounts and are not taking advantage of Periodic Monthly Statement estimated duty and fee payments may do so directly with CBP, or through a customs broker with an ACE Portal Account, by providing to CBP those U.S. importer of record IDs that are part of the Portal Account and have been previously designated to C-TPAT. No further participation requirements need be met.

Previous Notices and Suspension of Regulations

All requirements and aspects of the ACE test discussed in previous notices are hereby incorporated by reference into this notice and continue to be applicable, unless changed by this notice. Examples of such requirements and aspects are the rules regarding misconduct under the test and the required evaluation of the test (both of which are detailed in the notices published at 67 FR 21800 and 69 FR 5362).

During the testing of the Periodic Monthly Statement process, CBP is suspending provisions in Parts 24, 141, 142, and 143 of the CBP Regulations (Title 19 Code of Federal Regulations) pertaining to financial, accounting, entry procedures, and deposit of estimated duties and fees. Absent any specified alternate procedure, the cur-

rent regulations apply. All of the terms of the test and criteria for participation therein, as announced in the previous notices identified above, continue to be applicable unless changed by this notice.

Dated: October 19, 2005

ROBERT C. BONNER,
Commissioner,
Customs and Border Protection.

[Published in the Federal Register, October 24, 2005 (70 FR 60096)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, October 19, 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.*

19 CFR PART 177

PROPOSED MODIFICATION AND REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF GLASS RODS/PREFORMS USED TO MAKE OPTIC FIBERS

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

ACTION: Notice of proposed modification of a ruling letter, proposed revocation of another ruling letter and revocation of treatment relating to the tariff classification of glass rods/preforms used to make optic fibers under the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA").

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection ("CBP") intends to modify one ruling and to revoke one ruling concerning the tariff classification of glass rods/preforms used to make optic fibers and to revoke any treatment CBP has previously accorded to substantially identical merchandise. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before December 2, 2005.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations & Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex,

Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 572-8768.

FOR FURTHER INFORMATION CONTACT: Andrew M. Langreich, Tariff Classification and Marking Branch: (202) 572-8776.

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 that 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 Headquarters Ruling Letter ("HQ") 960948, dated September 11, 1998, and to modify HQ 964879, dated March 21, 2002. In HQ 960948, merchandise described as glass preforms used to make optic fiber was classified under subheading 7020.00.60, HTSUS, which provides for other articles of glass. In HQ 964879, merchandise described as glass rod or cane that was the precursor to the glass preforms was classified under subheading 7002.20.10, HTSUS, which provides for other unworked glass rods. In reaching these conclusions, we reasoned, on the basis of the ENs to heading 7002, HTSUS, and the court's analysis of the term "further worked" in *Winter-Wolff, Inc., v. United States*, 996 F. Supp.1258, 1264 (1998), that the articles in HQ 960948 were worked beyond the extent contemplated by heading 7002, HTSUS, and in HQ 964879, that the articles were not further

worked according to a similar analysis. HQs 960948 and 964879 are set forth as "Attachment A" and "Attachment B," respectively, to this document.

Although in this notice CBP is specifically referring to two rulings, this notice covers any rulings on similar merchandise that may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases; 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, other than the referenced rulings (see above), should advise CBP during this notice period.

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

Pursuant to 19 U.S.C. §1625(c)(1), CBP intends to revoke HQ 960948 and to modify HQ 964879 as they pertain to the classification of glass cane, rods or preforms, and any other ruling not specifically identified, to reflect the proper classification of the merchandise under subheading 7002.20.10, HTSUS, which provides for other unworked glass rods pursuant to the analysis set forth in proposed HQs 967058 (revoking HQ 960948) and 967059 (modifying HQ 964879)(*see* "Attachment C" and "Attachment D", respectively, 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: October 17, 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 960948
September 11, 1998
CLA-2 RR:CR:GC 960948 PH
CATEGORY: Classification
TARIFF NO.: 7002.20.10; 7020.00.60; 9001.10.00

MS. MARY E. GILL
LUCENT TECHNOLOGIES
Guilford Center 1 - 3A10
5420 Millstream Road
Greensboro, NC 27420

RE: NY B85983 revoked; glass rods; unworked; other articles of glass; optical fiber; preforms; incomplete or unfinished; essential character; Note 2(a), Chapter 70; GRI 2(a); ENs Rule 2(a)(II); 70.02; 90.01; *Blakley Corp. v. United States*; *Ugg International, Inc. v. United States*; *Winter-Wolff, Inc., v. United States*; *Sharp Microelectronics Technology, Inc. v. United States*; *Superior Wire v. United States*

DEAR MS. GILL:

On June 18, 1997, New York Ruling Letter (NY) B85983 was issued to you concerning "glass preforms" made from fused silica. You were advised that the merchandise was classifiable in subheading 7002.20.1000, Harmonized Tariff Schedule of the United States (HTSUS), as glass rods, unworked, of fused quartz or other fused silica.

This letter is to inform you that NY B85983 no longer reflects the view of Customs. 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, 2186), notice of the proposed revocation of NY B85983 was published on July 1, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 26. Our position, set forth below, addresses the comments received in response to the notice.

FACTS:

NY B85983 described the merchandise, "glass preforms", as solid glass rods made from fused silica. According to NY B85983, the glass preforms are the rods from which glass optical fiber is fabricated.

Optical fiber consists of "[a] long thin strand of transparent glass, plastic, or other material usually consisting of a fiber optical core and a fiber optical cladding capable of conducting light along its axial length by internal reflection" (U.S. International Trade Commission (USITC) Publication 2851, February 1995, Industry & Trade Summary, Optical Fiber, Cable, and Bundles, B-2). The core and the cladding of optical fibers always have a different refractive index ("[a] key design feature of all optical fibers is that the refractive index of the core is higher than the refractive index of the cladding" (Fiber Optic Reference Guide, David R. Goff (1996), 11). A glass preform such as those under consideration is ". . . a magnified version of the fiber to be drawn from it" (USITC Publication 2851, supra, B-2). That is, the optical

characteristics (including attenuation, dispersion, single or multi-mode, and wavelength (Fiber Optic Reference Guide, *supra*, at 20–30; Just the Facts, A basic overview of fiber optics, Corning (1995), at 15–19; McGraw-Hill Encyclopedia of Science & Technology (6th ed. 1987), vol. 12, 414–415, Optical fibers)) of the optical fiber which will be drawn from the preform are determined by the preform.

The manufacturing process for producing preforms is generally described as follows in the Kirk-Othmer Encyclopedia of Chemical Technology (4th ed., vol. 4 (1994) Glass, 555, 615):

. . . [P]ure chlorides are entrained in an oxygen carrier-gas system, accurately metered, transported, and then react at temperatures about 1500°C. The chloride reaction with oxygen, to form the desired oxides plus chlorine gas, is virtually homogeneous and produces a finely divided particulate glass material commonly called soot. . . . The glass soot is formed into solid inclusion-free glass bodies, which are then heated to temperatures where the glass is fluid enough to be drawn into optical fibers.

The preforms under consideration are produced by a two-step process. In the first step, the core layer of the preform is produced by a method called “Vapor Axial Deposition” (VAD). Extremely fine “dusts” or “soots” of silica tetrachloride and additional chemicals are grown or deposited on the end of a “target” rod, forming a column of the “dust” or “soot” material. The column is drawn through a furnace, fusing it into a rod and releasing the chlorine. In the second step, the cladding layer of the preform is added by fusing to the outside of the core rod a layer of silica dioxide powder. Such a two-step production process is described in Kirk-Othmer, *supra*, 616, as follows:

. . . Sometimes a two-step process can be employed for efficiency. A preform is made which is roughly half core and half cladding. The sintered preform is then drawn into rod and then overclad with pure silica soot to obtain the appropriate core/clad ratio.

After deposit of the silica dioxide powder or soot to form the cladding layer of the preform, the “target” rod on which the core layer was deposited or grown is removed. This phase of the process is described in Fiber Optic Reference Guide, *supra*, 16, as follows:

. . . When the deposition is complete, the rod is removed, and the deposited material is placed into a consolidation furnace. The water vapor is removed, and the preform is collapsed to become dense, transparent glass.

The core and cladding of the preform consist of glass with different refractive indexes. Kirk-Othmer, *supra*, at 615, describes the respective refractive indexes and materials of a typical single-mode fiber (according to Kirk-Othmer, *supra*, at 614, more than 90% of the optical fiber market is comprised of single-mode fiber) as follows:

The core, which has a step refractive index profile, is an 8 wt % GeO₂ + 92 wt % SiO₂ glass. The germania raises the refractive index to about 1.4585. The refractive index of the pure silica cladding is about 1.4534. That difference in refractive index is sufficient to guide the laser light with minimum distortion.

The resulting article, in the form of a rod approximately 62 millimeters in diameter and 1500 millimeters in length, may be flame polished using an oxyhydrogen flame to achieve a smooth surface, if necessary.

To produce optical fiber from the preform, the preform is heated and drawn into a continuous strand of “hair-thin” optical fiber (Fiber Optic Reference Guide, *supra*, at 15). In USITC Publication 2851, *supra*, the process is described as follows:

. . . The preform descends from a platform just below the top of a vertical draw tower into a furnace heated at very high temperatures to soften the glass. The softened glass is drawn by gravity to produce a fiber that is captured on spinning capstans and wheels [at 1, footnote 3].

A single preform can yield more than 30 miles of fiber (see Collier’s Encyclopedia (1996), vol. 9, Fiber optics, “[a] two-foot (60-cm) tube can yield more than 30 miles (50 km) of fiber”).

The optical fiber which is drawn from the preform is then protectively coated. See Fiber Optic Reference Guide, *supra*, at 15–16:

The optical fiber is encased in several protective layers to ensure integrity under various conditions. The first layer is applied to the glass fiber as it is drawn from the preform. This coating is generally made of ultraviolet-curable acrylate or silicone, and it serves as a moisture shield and as mechanical protection during the early stages of cable production. A secondary buffer is often extruded over the primary coating to further improve the fiber’s strength.

See also, Just the Facts, A basic overview of fiber optics, *supra*, p. 8, Coating.

The subheadings under consideration are as follows:

7002.20.10: Glass in balls (other than microspheres of heading 7018), rods or tubes, unworked: . . .

Rods: Of fused quartz or other fused silica.

The 1998 general column one rate of duty for goods classifiable under this provision is 0.9% ad valorem.

7020.00.60: Other articles of glass: . . . Other.

The 1998 general column one rate of duty for goods classifiable under this provision is 5.3% ad valorem.

9001.10.00: Optical fibers and optical fiber bundles:

optical fiber cables other than those of heading 8544 . . . : Optical fibers, optical fiber bundles and cables.

The 1998 general column one rate of duty for goods classifiable under this provision is 7% ad valorem.

ISSUE:

Whether the glass preforms are classifiable as unworked glass in rods in subheading 7002.20.10, HTSUS, other articles of glass in subheading 7020.00.60, HTSUS, or optical fibers in subheading 9001.10.00, HTSUS.

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states, in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative sec-

tion or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 2(a) provides, in pertinent part, that:

(a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. . . .

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise. Customs believes the ENs should always be consulted. See T.D. 89-80, published in the Federal Register August 23, 1989 (54 FR 35127, 35128).

The preforms have the shape of a rod (see Webster's New World Dictionary (3rd Coll. Ed. 1988) rod "3 any straight, or almost straight, stick, shaft, bar, staff, etc., of wood, metal, or other material . . ."). To be classifiable as glass in rods in subheading 7002.20.10, the preforms must be "unworked." Note 2(a), Chapter 70, HTSUS, provides that:

For the purposes of headings 7003, 7004 and 7005 . . . [g]lass is not regarded as "worked" by reason of any process it has undergone before annealing[.] As for the issue of whether this definition applies to heading 7002, the Court in *Blakley Corp. v. United States*, CIT Slip Op. 98-94 (CUSTOMS BULLETIN, July 29, 1998, vol. 32, no. 30, 45), considered a similar issue (whether the definition of the term "slab" in Additional U.S. Note 1 of Chapter 68, HTSUS, applies throughout Chapter 68 or only for purposes of heading 6802, as provided in the Note). The Court stated that "Congress' intent to limit the descriptions contained in Notes 1 and 2 [defining "tiles" for purposes of heading 6810] could scarcely be made more clear" (CUSTOMS BULLETIN, July 29, 1998, vol. 32, no. 30, at 50). Similarly, in this case, Congress' intent to limit the description contained in Note 2(a) to the named headings (not including heading 7002) could scarcely be made more clear. The limitation of "worked" in Note 2(a), Chapter 70, HTSUS, is inapplicable to heading 7002, HTSUS. EN 70.02 states, in part, that:

This heading covers . . . [g]lass rods and tubing of various diameters, which are generally obtained by drawing (combined with blowing in the case of tubing); they may be used for many purposes (e.g., for chemical or industrial apparatus; in the textile industry; for further manufacture into thermometers, ampoules, electric or electronic bulbs and valves, or ornaments). Certain tubes for fluorescent lighting (used mainly for advertising purposes) are drawn with partitions running through the length.

. . .

Balls of this heading must be unworked; similarly rod and tubing must be unworked (i.e., as obtained direct from the drawing process or merely cut into lengths the ends of which may have been simply smoothed).

The heading excludes balls, rod and tubing made into finished articles or parts of finished articles recognizable as such; these are classified under the

appropriate heading (e.g., heading 70.11, 70.17 or 7018, or Chapter 90). If worked, but not recognisable as being intended for a particular purpose, they fall in heading 70.20.

This heading includes tubes (whether or not cut to length) of glass which has had fluorescent material added to it in the mass. On the other hand, tubes coated inside with fluorescent material, whether or not otherwise worked, are excluded (heading 70.11).

Basically, the preforms under consideration are manufactured by depositing a powder or soot of silica tetrachloride and additional chemicals on a "target" glass rod to form a column of silica tetrachloride powder (with the additional chemicals). The column is drawn through a furnace, resulting in a rod of fused silica dioxide and the additional chemicals and the release of the chlorine gas. Onto this rod is deposited powder or soot of silica dioxide which is fused on the outside of the core rod. The "target" rod is removed and the result is a solid rod of silica glass consisting of a core and cladding, each of different materials and with a different refractive index. This solid rod may be flame polished to achieve a smooth surface.

The preforms are not "unworked", as that term is defined in EN 70.02. That is, discounting "work" on the "target" rod which is removed from the preform and is not imported, according to the importer's description, a rod of the core soots is created in the first step of manufacture. That rod is then "worked" by the addition to it of cladding soots which are fused onto it. These cladding soots make up a layer of glass over the core rod which has different characteristics than the core rod. The core rod with cladding is then further "worked" by the removal of the "target" rod. Clearly, the preform is not "as obtained directly from the drawing process" (EN 70.02, above). Instead of being an article as obtained directly from a simple manufacturing process, as described in EN 70.02 (e.g., moulding, pressing, drawing, blowing), the preform is obtained from a complex manufacturing process in which a rod is first created and then "worked" (in this regard, see, e.g., the distinction in the EN between tubes of glass which have had fluorescent material added to in the mass, included in heading 7002, and tubes coated inside with fluorescent material, excluded from heading 7002). Furthermore, even after the core rod is "worked" with the addition of the cladding layer and the removal of the "target" rod, according to the importer the article may be further "worked" by flame polishing (in this regard, we note the limitation in EN 70.02 on the working of articles in heading 7002 to "merely cut[ting] into lengths the ends of which may have been simply smoothed" (emphasis added; note that this provision permits only "the ends" to be simply smoothed)).

This interpretation of the term "unworked" in heading 7002 is consistent with the general treatment of merchandise in different stages of manufacture (see Ruth Sturm, *Customs Law & Administration*, 3rd ed. (1993), ¶54.3, "[t]here is often a progression of increasing duties from the raw material through various intermediate stages to the article manufactured from the original material"; see also, *Ugg International, Inc. v. United States*, 17 CIT 79, 85–86, 813 F. Supp. 848 (1993)). It is also consistent with a recent case of the Court of International Trade. In *Winter-Wolff, Inc., v. United States*, CIT Slip Op. 98–15 (*Customs Bulletin and Decisions*, March 25, 1998, vol. 32, no. 12, 71), the Court interpreted the term "further worked" as it appears in subheading 7607.11.30, HTSUS. After determining that the

common meaning of the term was applicable (ibid at 74–75, on the basis of the presumption that the commercial meaning of a term is the same as its common meaning unless the party who argues that the meanings are different proves that “there is a different commercial meaning in existence which is definite, uniform, and general throughout the trade”), the Court reviewed the dictionary meaning of the words. The Court concluded:

When cobbled together, this dictionary meaning amounts to the following: to form, fashion, or shape an existing product to a greater extent.” [ibid at 79.]

The production process for the preforms exactly meets this definition. An existing product (the core rod) is formed, fashioned, or shaped to a greater extent (by deposition of cladding soots on it and fusing of those soots to it, removal of the “target” rod, and after that by flame polishing as necessary).

Accordingly, on the basis of EN 70.02 and the Court’s analysis of “further worked” in Winter-Wolff, supra (based on the common and commercial meaning of the term), we conclude that the preforms do not qualify as “unworked” for purposes of heading 7002, HTSUS. Therefore, they may not be classified under subheading 7002.20.10, HTSUS.

We note that this position is not inconsistent with the history of consideration of this issue at the Customs Co-operation Council (CCC) during the drafting of the EN (see CCC Documents 31.738, August 31, 1984; 31.820, September 21, 1984; and 32.550/32.551, Annex D/9). CCC Document 31.738 is a report of a proposal by the Canadian administration that glass preforms such as those under consideration be classified in heading 7020 and that the EN for that heading be amended to specifically so provide. According to the CCC Document, the Secretariat was of the opinion that the preforms were classifiable in heading 7002 and that heading 7020 could be discounted. The CCC Document states that if the view of the Secretariat was accepted, a reference should be added to EN 70.02, stating that the heading includes the glass preforms.

As stated above, CCC Document 31.738 contains a proposal regarding the classification of glass preforms. Subsequent CCC documents describe the action taken in response to this proposal. CCC Document 31.820, September 21, 1984, reported that consideration of the question was being deferred for further study. CCC Document 32.550/32.551, Annex D/9 reported the final action on the proposal, stating that the Nomenclature Committee had decided, by a 9 to 4 vote, that the preforms were classifiable in heading 7020 and that the Interim Harmonized System Committee (IHSC) had decided, by a 6 to 5 vote, that they were classifiable in heading 7002. In view of this situation, the document reports that “it was decided that the question should remain outstanding and no reference be made in the [EN].” Thus, this history is inconclusive as to classification of the glass preforms in heading 7002 or 7020.

Optical fibers covered by subheading 9001.10.00, HTSUS, are described in EN 90.01 as follows:

Optical fibres consist of concentric layers of glass or plastics of different refractive indices. Those drawn from glass have a very thin coating of plastics, invisible to the naked eye, which renders the fibres less prone to fracture. Optical fibres are usually presented on reels and may be several kilometers in length. . . .

Because a preform is “. . . a magnified version of the fiber to be drawn from it” (USITC Publication 2851, *supra*, B-2) and determines the optical characteristics of the optical fiber which will be drawn from it (see above), it may be argued that, on the basis of GRI 2(a), the preforms are classifiable in sub-heading 9001.10.00, HTSUS, as incomplete or unfinished optical fiber. To be classified as an incomplete or unfinished article under GRI 2(a), the article must have the essential character of the complete or finished article.

In determining the essential character of an article under the HTSUS, the Courts have looked to the function or use of the article. See *Sharp Microelectronics Technology, Inc. v. United States*, 932 F. Supp. 1499, 1504-1505 (CIT 1996), affirmed 122 F.3d 1446 (1997), in which the Court cited the applicable EN to determine that the essential character, for purposes of GRI 2(a), of automatic data processing machines under heading 8471 is given by “. . . the ability to process data. . . .” See also *Mita Copystar America, Inc. v. United States*, CIT Slip Op. 97-73 (1997); *Better Home Plastics Corp. v. United States*, CIT Slip Op. 96-35 (1996), affirmed, CAFC Appeal No. 96-1322 (1997); and *Vista International Packaging Co., v. United States*, 19 CIT 868 (1995), in which the Court looked to the role of the constituent material in relation to the use of the goods of which the material was a part in determining essential character, for purposes of GRI 3(b).

The function or use of optical fibers is to transmit information in the form of light through very thin flexible strands (see *Random House Unabridged Dictionary* (2d ed. 1993), “optical fiber, a very thin flexible glass or plastic strand along which large quantities of information can be transmitted in the form of light pulses: used in telecommunications, medicine, and other fields”; see also USITC Publication 2851, *supra*, B-2, defining “Optical Fiber” as “[a] long thin strand of transparent glass, plastic, or other material usually consisting of a fiber optical core and a fiber optical cladding capable of conducting light along its axial length by internal reflection”; and *Fiber Optic Reference Guide*, *supra*, at 11 (“[o]ptical fibers are extremely thin strands of ultra-pure glass designed to transmit light from a transmitter to a receiver”).

Although the optical characteristics of the optical fiber may be determined by the preform from which the fiber is drawn, the preform does not have the essential physical characteristics necessary for practical use as optical fiber. It is neither thin nor flexible (in regard to the latter, we understand that “the recognized industry-standard bend diameter” provides for the looping of fiber with bend diameters as small as two inches (*Just the Facts, A basic overview of fiber optics*, *supra*, page 15, *Bending Parameters*)). These characteristics (thinness and flexibility) are necessary for the usages of optical fibers (see USITC Publication 2851, *supra*, at 1, wherein it is stated “[o]ptical fiber systems now carry the bulk of long-distance telecommunications traffic in the United States,” and other communication uses are described; the relatively thick, inflexible preform simply could not be so used). The statement in EN 90.01 that “[o]ptical fibres are usually presented on reels and may be several kilometers in length” supports the treatment of thinness and flexibility as essential characteristics of optical fibers.

EN GRI Rule 2(a)(II) provides that:

The provisions of this Rule also apply to blanks unless these are specified in a particular heading. The term “blank” means an article, not ready for direct

use, having the approximate shape or outline of the finished article or part, and which can only be used, other than in exceptional cases, for completion into the finished article or part (e.g., bottle preforms of plastics being intermediate products having tubular shape, with one closed end and one open end threaded to secure a screw type closure, the portion below the threaded end being intended to be expanded to a desired size and shape).

Semi-manufactures not yet having the essential shape of the finished articles (such as is generally the case with bars, discs, tubes, etc.) are not regarded as "blanks".

The preforms may not be classified as incomplete or unfinished optical fiber under EN GRI Rule 2(a)(II) because they do not have the approximate shape or outline of the finished article (the preforms are relatively thick and inflexible; optical fiber is very thin and flexible). Preforms are "[s]emi-manufactures not yet having the essential shape of the finished articles", just as in the second paragraph of EN GRI Rule 2(a)(II), above (note the reference to semi-manufactures such as "bars" above, note also that the dictionary definition of "rod", supra, includes bars). This also supports treatment of the preforms as other than incomplete or unfinished optical fiber. Furthermore, we note that the parenthetical exception for bottle preforms of plastics in the first paragraph of EN GRI Rule 2(a)(II), added to the EN by amendment in 1997 (CCC Document 41.285 E, August 7, 1997) adds support to the position that the glass preforms in this case are not incomplete or unfinished optical fiber (i.e., the ENs were specifically amended to provide for the classification of the bottle preforms as incomplete or unfinished articles and although the analogous issue for the glass preforms was quite thoroughly considered (see CCC Documents 31.738, 31.820, and 32.550/32.551, Annex D/9, referred to above), no such provision was made for the glass preforms).

A comment received in response to the notice in the July 1, 1998, CUSTOMS BULLETIN cited Court decisions (principally *Superior Wire v. United States*, 11 CIT 608, 669 F. Supp. 472 (1987), affirmed 7 Fed. Cir. (T) 43, 867 F.2d 1409 (1989)) on substantial transformation in regard to classification of the glass preforms as incomplete or unfinished optical fiber in subheading 9001.10.00, HTSUS. We do not believe that such decisions are necessarily relevant. In any case, we believe that the facts in *Superior Wire* are distinguished from the facts in this case. In *Superior Wire*, the Court held that wire rod which had been cold drawn into wire, with a reduction in cross-sectional area of about 30% but the strength characteristic unchanged, as metallurgically predetermined in the manufacture of the wire rod, was not substantially transformed for purposes of the applicability of a voluntary restraint agreement (VRA). Cold drawing of wire is a relatively simple process, basically involving only the drawing (or pulling) of material through dies (see McGraw-Hill Encyclopedia of Science & Technology, vol. 5, 406 (1987), Drawing of metal). The production of optical fiber from a preform involves drawing the preform through a furnace heated at very high temperatures and the encasement of the glass fiber in several protective layers (see FACTS, above). The effect of the cold drawing on the form of the wire rod in *Superior Wire*, was a reduction in its cross-sectional area of approximately 30%, whereas the preforms are reduced in diameter from 62 millimeters to a "hair-thin strand" (USITC Publication 2851, supra, 1; see also Fiber Optic Reference Guide, supra, at 27, describing popular fiber core/cladding sizes).

As noted above, the length of the preforms is also very significantly changed (a single preform can yield more than 30 miles of fiber).

Accordingly, the preforms may not be classified as unworked glass in rods in subheading 7002.20.10, HTSUS, because they are worked. Neither may the preforms be classified in subheading 9001.10.00, HTSUS, as incomplete or unfinished optical fiber (because the preforms do not have the essential character of optical fiber, and on the basis of EN GRI Rule 2(a)(II)). Therefore, we conclude that the preforms are classifiable under the provision for other articles of glass, other, in subheading 7020.00.60, HTSUS.

HOLDING:

The glass preforms are classifiable as other articles of glass in subheading 7020.00.60, HTSUS, and not as unworked glass in rods in subheading 7002.20.10, HTSUS, or incomplete or unfinished optical fibers in subheading 9001.10.00, HTSUS.

EFFECT ON OTHER RULINGS:

NY B85983 dated June 18, 1997, is REVOKED. In accordance with 19 U.S.C. 625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Publication of rulings or decisions pursuant to 19 U.S.C. 625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 964879
March 21, 2002
CLA-2 RR:CR:GC 964879 AML
CATEGORY: Classification
TARIFF NO.: 7002.20.10

MR. FREDERICK L. IKENSON
MR. LARRY HAMPSEL
FREDERICK L. IKENSON, P.C.
1621 New Hampshire Avenue, N.W.
Washington, D.C. 20009-2584

RE: Glass rod used to create optic fibers

DEAR MESSRS. IKENSON AND HAMPSEL:

This is in reference to your letter to the National Commodity Specialist Division, New York, dated March 8, 2001, on behalf of Corning, Inc., regarding the tariff classification of certain glass rod under the Harmonized Tariff Schedule of the United States (HTSUS). As you know, the request, together

with a sample, was forwarded to this office for reply. In preparing this ruling, consideration was given to a supplemental submission from Corning Inc., dated March 13, 2002, clarifying the manufacturing process.

FACTS:

The articles under consideration are glass rods to be used to create optic fibers, and are described as follows:

The product is a particular type of glass rod that is known in the optical fiber production sector as "cane". Cane — which is drawn from a consolidated "core preform" — is used by the importer for the production in the United States of glass products known as optical fiber preforms. Optical fiber preforms are subsequently drawn into glass optical fiber.

* * * "Cane" is that drawn rod of core glass that emerges from the first step of the optical fiber preform production process described in HQ 960948 (infra). When the core soots are deposited on the bait rod (followed by some amount of cladding soot), the bait rod is removed, the soot "blank" is sintered or consolidated in a furnace (into core preform), and cane is drawn from the core preform and cut to rod lengths for use in the subsequent step (where the amount of cladding actually required to produce an optical fiber preform is added).

The fiber core is manufactured first by depositing layer after layer of microscopic glass particles called "soot" onto a ceramic target (bait) rod. This soot is a combination of both pure silica and an additive, germania. The soot is formed by burning the appropriate chemical vapors in a gas flame. Once the core material is deposited, a layer of cladding material (pure silica) is added. This small amount of cladding material, upon consolidation, protects the core region from mechanical damage such as nicks and scratches, and from chemical contamination. The resulting object is a cylindrical porous structure with a chalky consistency called a "core preform." Once the deposition process is completed, the bait rod is removed and the core preform is placed in an oven for consolidation. This process causes the chalky core preform to become both smaller and denser, and to become clear.

This clear glass core preform is then lowered into a furnace and drawn into a glass rod of smaller diameter and longer length. The resulting rod is called a cane. It is cut to convenient lengths and can be stored for later use on site, or it can be transferred between locations.

On March 13, 2002, you provided a supplemental submission that elaborated upon the manufacturing process. It provides, in pertinent part, as follows:

With respect to your request for clarification regarding the application of silica cladding material to the glass rod forming optical fiber cane:

Optical fiber, in the simplest of terms, is comprised of two primary glass constituents — the core and the cladding. The first stage in the manufacture of the optical fiber is the formation of the core. In a typical two-stage manufacturing process, a core preform is formed by chemical vapor deposition, consolidated into a clear glass preform, and drawn into glass rod approximately 1.25 centimeters (cm) in diameter. This rod, when cut to length, is referred to as "cane" and serves as the starting member for the subsequent deposi-

tion of cladding glass. When the cladding deposition is completed and the overlaid cane is consolidated, the resulting optical fiber preform can be drawn into optical fiber.

The core of an optical fiber serves as the light-guiding structure. Consequently, proper attributes, values, and tolerances for the core are critical. Moreover, core glass may be stored for prolonged periods of time before final deposition of cladding. To ensure proper operation of an optical fiber manufactured from a starting core, a small amount of cladding material is deposited during initial formation of the core preform. The core rod, having a thin layer of cladding glass, constitutes cane [emphasis in original].

The initial layer of cladding serves dual protective purposes. Most importantly, it provides a degree of mechanical protection and continuity, preventing surface defects at the critical core surface that could interfere with the performance of fiber made from such cane. This initial cladding layer on the core also affords a level of protection against various chemical species that are known to affect optical fiber performance[.] The Headquarters Customs Laboratories and Scientific Services (“CLSS”) offered the following guidance:

With regard to the Corning “cane” glass fiber, the product is basically a drawn rod of core glass (with a small amount of cladding applied) that emerges from the first step of the optical fiber preform production process. Corning indicates that the cladding applied is equivalent to approximately [a very small percentage] of the total cladding that will be required to when the optical fiber preform is produced and is applied for mechanical protection and chemical resistance.

The opinion of CLSS concluded with the observation that “the minimal amount of cladding that is applied to the core does not constitute a “worked” product.”

ISSUE:

Whether the subject merchandise is classifiable under heading 7002, HTSUS, which provides for, inter alia, unworked glass rods, or heading 7020, HTSUS, which provides for other articles of glass.

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states, in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The HTSUS provisions under consideration are as follows:

7002.20.10 Glass in balls (other than microspheres of heading 7018), rods or tubes, unworked: . . . Rods: Of fused quartz or other fused silica.

* * * 7020.00.60 Other articles of glass: . . . Other.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classifica-

tion of merchandise. Customs believes the ENs should always be consulted. See T.D. 89-80, published in the Federal Register August 23, 1989 (54 FR 35127, 35128).

The cane has the shape of a rod (see Webster's New World Dictionary (3rd Coll. Ed. 1988) which defines "rod" as "any straight, or almost straight, stick, shaft, bar, staff, etc., of wood, metal, or other material[.]"). To be classifiable as glass in rods in subheading 7002.20.10, the preforms must be "unworked." Note 2(a), Chapter 70, HTSUS, provides that:

For the purposes of headings 7003, 7004 and 7005 ... [g]lass is not regarded as "worked" by reason of any process it has undergone before annealing[.] As for the issue of whether this definition applies to heading 7002, the Court in *Blakley Corp. v. United States*, CIT Slip Op. 98-94 (CUSTOMS BULLETIN, July 29, 1998, vol. 32, no. 30, 45), considered a similar issue (whether the definition of the term "slab" in Additional U.S. Note 1 of Chapter 68, HTSUS, applies throughout Chapter 68 or only for purposes of heading 6802, as provided in the Note). The Court stated that "Congress' intent to limit the descriptions contained in Notes 1 and 2 [defining "tiles" for purposes of heading 6810] could scarcely be made more clear" (CUSTOMS BULLETIN, July 29, 1998, vol. 32, no. 30, at 50). Similarly, in this case, Congress' intent to limit the description contained in Note 2(a) to the named headings (not including heading 7002) could scarcely be made clearer. The limitation of "worked" in Note 2(a), Chapter 70, HTSUS, is inapplicable to heading 7002, HTSUS. The ENs to heading 7002, HTSUS, provide, in pertinent part, that:

This heading covers . . . [g]lass rods and tubing of various diameters, which are generally obtained by drawing (combined with blowing in the case of tubing); they may be used for many purposes (e.g., for chemical or industrial apparatus; in the textile industry; for further manufacture into thermometers, ampoules, electric or electronic bulbs and valves, or ornaments). Certain tubes for fluorescent lighting (used mainly for advertising purposes) are drawn with partitions running through the length.

* * * Balls of this heading must be unworked; similarly rod and tubing must be unworked (i.e., as obtained direct from the drawing process or merely cut into lengths the ends of which may have been simply smoothed).

The heading excludes balls, rod and tubing made into finished articles or parts of finished articles recognisable as such; these are classified under the appropriate heading (e.g., heading 70.11, 70.17 or 7018, or Chapter 90). If worked, but not recognisable as being intended for a particular purpose, they fall in heading 70.20.

This heading includes tubes (whether or not cut to length) of glass which has had fluorescent material added to it in the mass. On the other hand, tubes coated inside with fluorescent material, whether or not otherwise worked, are excluded (heading 70.11).

Basically, the cane under consideration is manufactured by depositing a powder or soot on a "target" glass rod. The column is drawn through a furnace, resulting in a rod of fused silica dioxide and the additional chemicals and the release of the chlorine gas. Onto this rod is deposited powder or soot of silica dioxide which is fused on the outside of the core rod. The "target"

rod is removed and the result is a solid rod of silica glass consisting of a core and cladding, each of different materials and with a different refractive index. This solid rod may be flame polished to achieve a smooth surface.

In your original submission, you state that the rod in question contains a small amount of cladding that serves as a protective layer for the cane during shipment and storage. This is reiterated in the supplemental submission and is verified in the opinion of the Customs Laboratory.

Headquarters Ruling Letter (HQ) 960948, dated September 11, 1998, addresses Customs position on the classification of “preforms” that are derived from the cane/glass rods under consideration. See also HQ 560660, dated April 9, 1999 and HQ 561774 dated January 29, 2001 (wherein Customs analyzed the optical fiber production process involving the articles in question vis-à-vis country of origin and substantial transformation determinations). In HQ 960948, the preforms that are manufactured from the cane were classified under heading 7020, HTSUS, as other articles of glass. In HQ 960948, we reasoned that the “preforms” were “further worked” as interpreted by United States Court of International Trade in *Winter-Wolff, Inc., v. United States*, 996 F. Supp.1258, 1264 (1998). There, the CIT determined, based upon common meaning gleaned from dictionary definitions, that the definition of “further worked”, for purposes of classification within the HTSUS, “amounts to the following: to form, fashion, or shape an existing product to a greater extent.” *Id.*

In HQ 960948 we stated in regard to the preforms that are derived from the cane at issue that:

The preforms are not “unworked”, as that term is defined in EN 70.02. That is, discounting “work” on the “target” rod which is removed from the preform and is not imported, according to the importer’s description, a rod of the core soots is created in the first step of manufacture [emphasis added]. That rod is then “worked” by the addition to it of cladding soots that are fused onto it. These cladding soots make up a layer of glass over the core rod that has different characteristics than the core rod. The core rod with cladding is then further “worked” by the removal of the “target” rod. Clearly, the preform is not “as obtained directly from the drawing process” (EN 70.02, above). The cane is an article obtained directly from a simple manufacturing process, as described in EN 70.02 (e.g., moulding, pressing, drawing, blowing) [emphasis added]. Optical fiber is obtained from a complex manufacturing process in which the cane - a rod - is first created and then “worked” (in this regard, see, e.g., the distinction in the EN between tubes of glass which have had fluorescent material added to in the mass, included in heading 7002, and tubes coated inside with fluorescent material, excluded from heading 7002).

In HQ 561774, we summarized the production process of the cane as follows:

You state that Corning’s production of optical fiber preforms can be accomplished by either a two-step process or a continuous, single step process. The two-step process in this case is as follows:

A) Production of Cane The fiber core is manufactured first by depositing layer after layer of microscopic glass particles called “soot” onto a ceramic target (bait) rod. This soot is a combination of both pure silica and an additive, germania. The soot is formed by burning the appropriate chemical vapors in a gas flame. Once the core material is deposited, a layer of cladding

material (pure silica) is added. This small amount of cladding material, upon consolidation, protects the core region from mechanical damage such as nicks and scratches, and from chemical contamination. The resulting object is a cylindrical porous structure with a chalky consistency called a “core preform.” Once the deposition process is completed, the bait rod is removed and the core preform is placed in an oven for consolidation. This process causes the chalky core preform to become both smaller and denser, and to become clear.

This clear glass core preform is then lowered into a furnace and drawn into a glass rod of smaller diameter and longer length. The resulting rod is called a cane. It is cut to convenient lengths and can be stored for later use on site, or it can be transferred between locations.

We conclude, in accordance with HQs 960948 and 561774, that the articles in question are “unworked” (and are not “further worked”) as required by heading 7002, HTSUS, and the ENs thereto.

This interpretation of the term “unworked” in heading 7002 is consistent with the general treatment of merchandise in different stages of manufacture (see Ruth Sturm, *Customs Law & Administration*, 3rd ed. (1993), §54.3, “[t]here is often a progression of increasing duties from the raw material through various intermediate stages to the article manufactured from the original material”; see also, *Ugg International, Inc. v. United States*, 17 CIT 79, 85–86, 813 F. Supp. 848 (1993)). The critical aspect of the analysis is that the cane results from being drawn into the shape of a rod. Any “working” of the cane precedes its being created or manufactured. The drawn rod constitutes the initial phase of the optical fiber manufacturing process. In accordance with the ENs to heading 7002, HTSUS, we find that the cane constitutes “glass rod . . . which [is] generally obtained by drawing[.]” “. . . [S]imilarly rod and tubing must be unworked (i.e., as obtained direct from the drawing process or merely cut into lengths the ends of which may have been simply smoothed)[emphasis added].” See the ENs to heading 7002, HTSUS, *supra*.

HOLDING:

The glass cane used to create optical fiber is classifiable as unworked glass in rods under subheading 7002.20.10, HTSUS.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967058
CLA-2 RR:CTF:TCM 967058 AML
CATEGORY: Classification
TARIFF NO.: 7002.20.1000

MS. MARY E. GILL
LUCENT TECHNOLOGIES
Guilford Center 1 - 3A10
5420 Millstream Road
Greensboro, NC 27420

RE: Glass preforms used to create optic fibers; HQ 960948 revoked

DEAR MS. GILL:

This is in reference to Headquarters Ruling Letter (“HQ”) 960948, dated September 11, 1998, issued to you on behalf of Lucent Technologies, Inc. (“Lucent”), regarding the tariff classification of certain glass preforms under the Harmonized Tariff Schedule of the United States Annotated (“HTSUSA”). We have taken the opportunity to revisit the decision made in HQ 960948, as well as the rationale of that decision, and have determined that the conclusions reached therein are incorrect. This letter sets forth the correct classification of the glass preforms.

FACTS:

The glass preforms and their method of manufacture were described extensively in HQ 960948. The description of the manufacturing process described in HQ 960948 is incorporated by reference. In simplest terms, silica dioxide powder is deposited or accumulated and then sintered (defined below) to form a layered glass rod which, following importation, will be subjected to an intricate process to produce kilometers of hair-like optic fiber.

Based on the fact that the preforms at issue were created through a two step process and reasoning that the articles were “further worked” for purposes of Chapter 70 of the HTSUS, we concluded in HQ 960948 that the preforms were classified under subheading 7020.00.60, HTSUS, which provides for other articles of glass, other.

ISSUE:

Whether the subject merchandise is classifiable under heading 7002, HTSUS, which provides for, *inter alia*, unworked glass rods, or heading 7020, HTSUS, which provides for other articles of glass.

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (“GRIs”). GRI 1 states, in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The HTSUS provisions under consideration are as follows:

7002 Glass in balls (other than microspheres of heading 7018), rods or tubes, unworked:

* * *

7002.20	Rods:
7002.20.10	Of fused quartz or other fused silica.
	* * *
7020	Other articles of glass:
	* * *
7020.00.60	Other.

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise. Customs and Border Protection (“CBP”) believes the ENs should always be consulted. See T.D. 89–80, published in the Federal Register August 23, 1989 (54 FR 35127, 35128).

CBP’s classification of glass preforms has focused on the notes to Chapter 70 regarding whether, in the creation of the glass preforms, the articles are “worked” for tariff purposes. See HQ 964879, dated March 21, 2002. *See also* HQ 560660, dated April 9, 1999 and HQ 561774 dated January 29, 2001 (wherein Customs analyzed the optical fiber production process involving the articles in question vis-à-vis country of origin and substantial transformation determinations).

In HQ 960948, we stated in regard to the manufacture of preforms “*a rod of the core soots [microscopic glass particles] is created in the first step of manufacture [emphasis added] [and] that rod is then “worked” by the addition to it of cladding soots that are fused onto it.*” We now believe this is in error and this process is not “working” for tariff purposes.

While we acknowledged that the preforms are articles that result from a unique process of manufacture (*i.e.*, chemical vapor deposition), we did not distinguish between drawing and sintering in the manufacturing process. Generally speaking, “drawing” is a process in glass production in which molten or heated glass is shaped by pressing or drawing through rollers or other apparatus. The term “sinter” is defined as causing to become a coherent mass by heating without melting. *Webster’s New Collegiate Dictionary*, G & C Merriam Co., 1979, p. 1076. “Sintering” generally describes the process through which pure chemicals are accumulated and heated to remove impurities and form glass, such as the vapor axial deposition process, which is described at length in both HQ 960948 and HQ 964879 cited above.

CBP has considered the concept of the working of glass in several rulings and has uniformly considered the process to have been performed on an extant article of glass, rather than during the process of creation or manufacture. In HQ 960274, dated October 9, 1997, we stated:

Chapter 70, Note 2(a), authorizes, but does not identify, processes to which glass can be subjected before the annealing stage that will not exclude it from heading 7003. However, certain ENs at p. 1015, include within heading 7006, glass of heading 7003 that is edge-worked or otherwise worked, and list as examples glass that has been ground, polished, rounded, notched, chamfered, beveled, profiled, etc. (Emphasis added). In our opinion, to accord proper deference to the mandate of

Note 2(a), the polishing or rounding operations listed in the heading 7006 ENs must be limited to those which occur after the annealing stage.

We conclude based on our reexamination of the language above from Chapter 70, the relevant headings and ENs, that working of glass contemplates the mechanical or physical alteration of glass following the annealing stage. That is, the “working” of glass articles occurs after their creation. The manufacture of preforms is a process that requires multiple steps; the articles are not complete until the desired layers are created and the articles are sintered to form a pure, solid whole. Thus, we no longer consider the creation of preforms to be “working” for tariff purposes because the products are being formed into a glass rod from raw material during the vapor deposition process. This interpretation comports with the ENs to heading 7002, HTSUS.

The ENs to heading 7002, HTSUS, provide, in pertinent part, that:

This heading covers . . . [g]lass rods and tubing of various diameters, which are *generally obtained* by drawing (combined with blowing in the case of tubing); they may be used for many purposes (*e.g.*, for chemical or industrial apparatus; in the textile industry; for further manufacture into thermometers, ampoules, electric or electronic bulbs and valves, or ornaments)[emphasis added].

* * *

Balls of this heading must be unworked; similarly rod and tubing must be unworked (*i.e.*, as obtained direct from the drawing process or merely cut into lengths the ends of which may have been simply smoothed).

The heading excludes balls, rod and tubing made into finished articles or parts of finished articles recognisable as such; these are classified under the appropriate heading (*e.g.*, heading 70.11, 70.17 or 7018, or Chapter 90). If worked, but not recognisable as being intended for a particular purpose, they fall in heading 70.20.

The General ENs to Chapter 70 list nine separate methods of glass manufacturing processes (casting, rolling, floating, moulding, blowing, drawing or extruding, pressing, lampworking, and cutting out) which “vary considerably.” HTSUS ENs at 1156. None of these exemplars remotely describes or includes the vapor axial deposition process. To hold that the term “glass rod” is restricted to the traditional concept of ordinary glass produced via conventional means is to ignore an important function of the tariff schedule, namely, to provide *eo nomine* classification for most of the articles in international trade. HQ 086626, dated January 15, 1991. “Tariff provisions should be open to the invention of new and different products.” *Id.* “Congress could not have intended to foreclose future innovations in [goods] from classification under the [*eo nomine*] provisions.” *Simmon Omega, Inc. v. United States*, 83 Cust.Ct. 14, C.D. 4815 (1979). “To hold otherwise would result in the classification of any and every new product in the basket provisions of the nomenclature.” HQ 086626 as quoted in HQ 964985, dated July 15, 2002. Although the preforms are not drawn, they are produced by vapor axial deposition and composed of silica. Nothing in either heading 7002 or the related legal or explanatory notes restricts classification thereunder to

products that result from a one-step process of manufacture. We conclude that the subject preforms are rods of glass for classification purposes.

HOLDING:

The glass rods/preforms produced via vapor axial deposition are classified as unworked glass in rods under subheading 7002.20.1000, HTSUSA. The general, column 1 duty rate is *free*.

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

EFFECT ON OTHER RULINGS:

HQ 960948 is revoked.

MYLES B. HARMON,

Director,

Commercial and Trade Facilitation Division.

cc: National Commodity Specialist Division
NIS Bunin



[ATTACHMENT D]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967059
CLA-2 RR:CTF:TCM 967059 AML
CATEGORY: Classification
TARIFF NO.: 7002.20.1000

MR. FREDERICK L. IKENSON
MR. LARRY HAMPSEL
FREDERICK L. IKENSON, P.C.
1621 New Hampshire Avenue, N.W.
Washington, D.C. 20009-2584

RE: HQ 964879 modified; glass rod used to create optic fibers

DEAR MESSRS. IKENSON AND HAMPSEL:

This is in reference to Headquarters Ruling Letter ("HQ") 964879, dated March 21, 2002, issued to you on behalf of Corning, Inc., regarding the tariff classification of certain glass rod under the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"). We have reconsidered the rationale employed to reach the determination reached in HQ 964879. While this letter does not affect the classification determination made in HQ 964879, it clarifies the factual predicates and sets forth the proper rationale for the classification decision made therein.

FACTS:

We described at length the glass rods and their method of manufacture in HQ 964879, and incorporate those descriptions herein by reference. Based on those facts, analyses made in prior rulings, and reasoning that the articles were not "worked" for purposes of Chapter 70 of the HTSUSA, we concluded in HQ 964879 that the "cane" was classified under subheading 7002.20.10, HTSUSA, set forth below.

ISSUE:

Whether the subject merchandise is classifiable under heading 7002, HTSUS, which provides for, *inter alia*, unworked glass rods, or heading 7020, HTSUS, which provides for other articles of glass.

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (“GRIs”). GRI 1 states, in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The HTSUS provisions under consideration are as follows:

7002	Glass in balls (other than microspheres of heading 7018), rods or tubes, unworked:
	* * *
7002.20	Rods:
7002.20.10	Of fused quartz or other fused silica.
	* * *
7020	Other articles of glass:
	* * *
7020.00.60	Other.

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise. Customs and Border Protection (“CBP”) believes the ENs should always be consulted. See T.D. 89–80, published in the Federal Register August 23, 1989 (54 FR 35127, 35128).

CBP’s classification of glass preforms has focused on the notes to Chapter 70 regarding whether, in the creation of the glass preforms, the articles are “worked” for tariff purposes. See HQ 964879, dated March 21, 2002. *See also* HQ 560660, dated April 9, 1999 and HQ 561774 dated January 29, 2001 (wherein Customs analyzed the optical fiber production process involving the articles in question vis-à-vis country of origin and substantial transformation determinations).

In HQ 960948, we stated in regard to the manufacture of preforms “*a rod of the core soots [microscopic glass particles] is created in the first step of manufacture [emphasis added] [and] that rod is then “worked” by the addition to it of cladding soots that are fused onto it.*” We now believe this is in error and this process is not “working” for tariff purposes.

While we acknowledged that the preforms are articles that result from a unique process of manufacture (*i.e.*, chemical vapor deposition), we did not distinguish between drawing and sintering in the manufacturing process. Generally speaking, “drawing” is a process in glass production in which molten or heated glass is shaped by pressing or drawing through rollers or other apparatus. The term “sinter” is defined as causing to become a coherent mass by heating without melting. Webster’s New Collegiate Dictionary, G &

C Merriam Co., 1979, p. 1076. “Sintering” generally describes the process through which pure chemicals are accumulated and heated to remove impurities and form glass, such as the vapor axial deposition process, which is described at length in both HQ 960948 and HQ 964879 cited above.

CBP has considered the concept of the working of glass in several rulings and has uniformly considered the process to have been performed on an extant article of glass, rather than during the process of creation or manufacture. In HQ 960274, dated October 9, 1997, we stated:

Chapter 70, Note 2(a), authorizes, but does not identify, processes to which glass can be subjected before the annealing stage that will not exclude it from heading 7003. However, certain ENs at p. 1015, include within heading 7006, glass of heading 7003 that is edge-worked or otherwise worked, and list as examples glass that has been ground, polished, rounded, notched, chamfered, beveled, profiled, etc. (Emphasis added). In our opinion, to accord proper deference to the mandate of Note 2(a), the polishing or rounding operations listed in the heading 7006 ENs must be limited to those which occur after the annealing stage.

We conclude based on our reexamination of the language above from Chapter 70, the relevant headings and ENs, that working of glass contemplates the mechanical or physical alteration of glass following the annealing stage. That is, the “working” of glass articles occurs after their creation. The manufacture of preforms is a process that requires multiple steps; the articles are not complete until the desired layers are created and the articles are sintered to form a pure, solid whole. Thus, we no longer consider the creation of preforms to be “working” for tariff purposes because the products are being formed into a glass rod from raw material during the vapor deposition process. This interpretation comports with the ENs to heading 7002, HTSUS.

The ENs to heading 7002, HTSUS, provide, in pertinent part, that:

This heading covers . . . [g]lass rods and tubing of various diameters, which are *generally obtained* by drawing (combined with blowing in the case of tubing); they may be used for many purposes (*e.g.*, for chemical or industrial apparatus; in the textile industry; for further manufacture into thermometers, ampoules, electric or electronic bulbs and valves, or ornaments)[emphasis added].

* * *

Balls of this heading must be unworked; similarly rod and tubing must be unworked (*i.e.*, as obtained direct from the drawing process or merely cut into lengths the ends of which may have been simply smoothed).

The heading excludes balls, rod and tubing made into finished articles or parts of finished articles recognizable as such; these are classified under the appropriate heading (*e.g.*, heading 70.11, 70.17 or 7018, or Chapter 90). If worked, but not recognizable as being intended for a particular purpose, they fall in heading 70.20.

Both the “cane” and the preforms, composed of pure silica, are essentially forms of the same product — the precursor to optic fiber. We consider our distinction between “cane” and “preforms” to have been overstated; the distinction appears to be unique to you and your client and commercially there

appears to be no distinction made between preforms in various stages of manufacture. We no longer distinguish between “cane” and preforms for tariff classification purposes.

The General ENs to Chapter 70 list nine separate methods of glass manufacturing processes (casting, rolling, floating, moulding, blowing, drawing or extruding, pressing, lampworking, and cutting out) which “vary considerably.” HTSUS ENs at 1156. None of these exemplars remotely describes or includes the vapor axial deposition process. To hold that the term “glass rod” is restricted to the traditional concept of ordinary glass produced via conventional means is to ignore an important function of the tariff schedule, namely, to provide *eo nomine* classification for most of the articles in international trade. HQ 086626, dated January 15, 1991. “Tariff provisions should be open to the invention of new and different products.” *Id.* “Congress could not have intended to foreclose future innovations in [goods] from classification under the [*eo nomine*] provisions.” *Simmon Omega, Inc. v. United States*, 83 Cust.Ct. 14, C.D. 4815 (1979). “To hold otherwise would result in the classification of any and every new product in the basket provisions of the nomenclature.” HQ 086626 as quoted in HQ 964985, dated July 15, 2002. Although the preforms are not drawn, they are produced by vapor axial deposition and composed of silica. Nothing in either heading 7002 or the related legal or explanatory notes restricts classification thereunder to products that result from a one-step process of manufacture. We conclude that the subject preforms are rods of glass for classification purposes.

HOLDING:

The glass rods/preforms produced via vapor deposition and used to create optical fiber are classifiable as unworked glass in rods under subheading 7002.20.1000, HTSUSA. The general, column 1 duty rate is free.

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

EFFECT ON OTHER RULINGS:

HQ 964879 is modified as described above but the classification determination made therein remains unchanged.

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

cc: National Commodity Specialist Division
NIS Bunin

19 CFR PART 177

**REVOCATION OF A 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: Revocation of a ruling letter 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 revoking a ruling letter pertaining to the tariff classification of white sauce under the Harmonized Tariff Schedule of the United States (“HTSUS”). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the Customs Bulletin, Volume 39, Number 35, on August 24, 2005. In response to the notice, comments were received on September 23, 2005, from counsel on behalf of International Custom Products (“ICP”).

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after (60 days from the date of publication of notice in the Customs Bulletin).

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 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, as amended (19 U.S.C. 1625(c)(1)), a notice was published in the *Customs Bulletin*, Volume 39, Number 35, on August 24, 2005, proposing to revoke NY D86228, which involved the tariff classification of “white sauce.” In response to the notice, comments were received on September 23, 2005, from counsel on behalf of International Custom Products (“ICP”).

As stated in the proposed notice, this revocation will cover any rulings on the subject merchandise, which 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 protest review) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In NY D86228, dated January 20, 1999, CBP classified the “white sauce” in subheading 2103.90.90, 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 Custom 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 the merchandise. The government’s position was that NY D86228 only was applicable to goods meeting its terms, including physical properties and use. In addition, because the factual circumstances relating to the entries under the Notice of Action were materially different from the circumstances described in NY D86228, such ruling does not apply to merchandise in the entries subject to the notice of action.

CBP’s administrative ruling letters rely on the accuracy and completeness 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. *See* 10 C.F.R. § 177.9(b)(1). As discussed in ample detail in the ruling, the imported product differs in important ways from the product described in the NY 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 a 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.

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 meet its obligation to properly classify imported merchandise and protect the revenue of the United States, we proposed to modify our previous ruling. Having fully examined the matter and analyzed the comments received, we have determined that revocation of the ruling is appropriate at this time.¹

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 imported merchandise or substantially similar merchandise, based on the analysis set forth in HQ 967780, 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.”

On a number of procedural grounds, the commenter believes our proposed revocation is unlawful. First, the commenter notes that while it was given 30 days in which to file comments, CBP denied its request for a 30-day extension of the comment period. The commenter states that this denial is invalid and that the proposed revocation is legally deficient.

In order to provide interested parties sufficient time to comment on all proposed modifications and revocations of interpretative rulings, 19 U.S.C. § 1625(c) creates a comment period of “at least 30 days”. Section 177.12 (b)(1) of the CBP Regulations implements the statute by fixing the comment period at 30 days. Accordingly, as the commenter was accorded the period of time prescribed in the regulations, we find that the commenter’s argument that the period was insufficient is without merit. We note that the commenter was able to submit a 33-page submission accompanied by more than 70 pages of exhibits within the prescribed time frame.

¹The United States does not concede that NY D86228 has to be revoked before CBP may liquidate entries of the imported merchandise as 0405.20.30, HTSUS.

Second, the commenter claims that the proposed revocation is being made without a compelling reason to do so, that is, there is no change in the applicable law or pertinent facts. See T.D. 89-74, 54 Fed. Reg., 31511, 31514 (1989). The standard invoked by the commenter is set forth in a 1989 Treasury Decision, and was incorporated in 19 C.F.R. § 177.10(b), a provision which has since been revoked. The applicable CBP Regulation governing modification and revocation of rulings is 19 C.F.R. § 177.12(a), which states that an interpretative ruling “if found to be in error or not in accord with the current views of Customs, may be modified or revoked by an interpretative ruling issued under this section.” Thus, under 19 U.S.C. § 1625 and 19 C.F.R. § 177.12, CBP has the authority to modify or revoke rulings, which are considered erroneous as a matter of legal interpretation. CBP believes that the revocation of the NY ruling is lawful and appropriate.

Third, the commenter states that it relied on the NY interpretative ruling to build its business, and its reliance precludes us from changing the classification of its product. We note that the statute takes reliance into consideration by requiring CBP to publish notice of a proposed modification or revocation and to allow for interested parties to submit comments. 19 U.S.C. § 1625(c). Further, to give affected parties sufficient time to alter or change their business practices, the statute requires a 60-day delayed effective date. We find that the commenter’s appropriate concern regarding reliance is addressed by the statute, and find that our process is fully in compliance with the statute.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY D86228, and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in HQ 967780, attached. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

DATED: October 28, 2005

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

Attachments

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

HQ 967780
October 28, 2005
CLA-2 RR:CTF:TCM 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.

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, 2186 (1993), notice of the proposed modification of NY D86228 was published on August 24, 2005 in the Customs Bulletin, Volume 39, Number 35. Comments were received on September 23, 2005 from counsel on behalf of International Custom Products ("ICP"). Our response to those comments is incorporated in the Law and Analysis section below and the notice of final revocation published herewith.

FACTS:

Your request to the National Commodity Specialist Division (NCS), U.S. Customs and Border Protection (CBP), for a binding ruling, including a sample and content breakdown by percentage range, dated December 21, 1998, identified the product at issue as:

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.

On the basis of this description, the Director, NCS, New York, NY, issued NY D86228 to ICP. The ruling classified the white sauce in subheading 2103.90.9060, HTSUS, as "Sauces and preparations therefor; 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.

Thereafter in accordance with its obligations under 19 CFR 117.9(b)(1),¹ the Port of Philadelphia requested a laboratory analysis of merchandise which was imported and which was 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% milkfat 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 that raised concerns about the claimed use of the imported product, 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 the 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.” Our reconsideration of NY D86228 follows.

ISSUE:

Is the “white sauce” properly classified in heading 0405, HTSUS, covering butter and other fats and oils derived from milk and dairy spreads, or in heading 2103, HTSUS, covering sauces and preparations therefor, mixed condiments and mixed seasonings?

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:

¹ 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. . . .”

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:
0405.20.10	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:
	Other:
2103.90.90	Other.
	* * * * * *

Note 2 to chapter 4 provides as follows:

For the purposes of heading 0405:

(a) The term “butter” means natural butter, whey butter or recombined butter (fresh, salted or rancid, including canned butter) derived exclusively from milk, with a milkfat content of 80 percent or more but not more than 95 percent by weight, a maximum milk solids-not-fat content of 2 percent by weight and a maximum water content of 16 percent by weight. Butter does not contain added emulsifiers, but may contain sodium chloride, food colors, neutralizing salts and cultures of harmless lactic-acid-producing bacteria.

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

The Explanatory Notes to heading 04.05 describes 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 milkfat as the only fat in the product, and having a milkfat content of 39% or more but less than 80% by weight (see Note 2(b) to this Chapter). Dairy spreads may contain optional ingredients such as cultures of harmless lactic-acid producing bacteria, vi-

tamins, sodium chloride, sugars, gelatine, starches; food colours; flavours; emulsifiers; thickening agents and preservatives.

The imported product meets all of the requirements of a dairy spread in heading 0405.

An examination of the imported product reveals that it falls squarely within the terms of note 2(b) to chapter 4. It meets each of the requirements of that note as verified by CBP laboratory analysis. It is a spreadable emulsion of the water-in-oil type, contains milkfat as the only fat, and has a milkfat content within the specified range of the product. It thus meets the terms of the legal text for dairy spreads.

In addition to the milkfat and water, according to the commenter, the imported product contains small amounts of additives, vinegar (and/or lactic acid and/or citric acid), xanthan gum, carboxymethylcellulose, sodium phosphate (and/or sodium citrate). The Explanatory Notes to heading 0405 expressly allow for dairy spreads to contain certain additives as optional ingredients. Some of these commonly found additives include flavours; emulsifiers; thickening agents and preservatives. The additives mentioned by the commenter are consistent with the description in the Explanatory Notes of additives for dairy spreads. For example, xanthan gum and carboxymethylcellulose are thickeners and stabilizers. Sodium citrate is an emulsifier and a stabilizer. These additives enable the milkfat and water to remain in mixture and to be transported and maintained in storage. Moreover, the additives in the imported product are of the kind identified in the Explanatory Notes as those commonly found in dairy spreads.

In a footnote to its comments, the commenter states that it does not concede that the imported product meets the terms of heading 0405. However, the commenter has provided no argument, information or rationale for why the imported product does not satisfy the requirements for that heading.

As indicated above, our conclusion is that on the basis of GRI 1, the product is *prima facie* classifiable in heading 0405. We shall determine whether any other heading merits consideration under the GRIs.

Heading 2103 definition of sauce

Heading 2103 covers both sauces and preparations for making sauces. In the instant case, the commenter argues that the imported product is classifiable in heading 2103 as a preparation for sauces.

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), the court concluded that the common meaning of "other tomato sauces" is based on the common meaning of the term "sauce." The *Nestle* court stated, "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.

While the imported product is referred to repeatedly by the commenter as white sauce, there appears to be no issue that the imported product is not a finished sauce for purposes of heading 2103 since it is not usable in its imported condition as a sauce². It is undisputed that in its condition as imported, the instant product is not usable as a sauce. Accordingly, under the test developed by the courts, the instant product does not meet the above criteria for being a sauce.

Definition of a "preparation" for sauce

In addition to covering sauces, heading 2103 also includes preparations for use in making a sauce. The commenter contends that this term properly describes the instant product. In *Nestle Refrigerated Food Co v. United States*, cited above, the court provided important insight into the meaning of the term "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 specifi-

²The commenter refers to the imported product as "white sauce." *Websters's Third New International Dictionary*, 1993, defines a white sauce as: A sauce in which the thickening agent (as flour) has not been browned, which consists essentially of milk, cream, or stock with flour and seasoning and which forms the basis for various sauces . . . A similar definition is presented in *The American Heritage Dictionary of the English Language: Fourth Edition*, 2000: A sauce made with butter, flour, and milk, cream, or stock, used as a base for other sauces. A host of other references to "white sauce" yield similar results, for example:

Béchamel sauce, also known as **white sauce**, is a basic sauce that is used as the base for other sauces. . . . This basic sauce, one of the mother sauces of French cuisine, is usually made today by whisking scalded milk gradually into a white flour-butter roux, though it can also be made by whisking a kneaded flour-butter *beurre manie* into scalded milk.

www.edinformatics.com/culinaryarts/food_encyclopedia/bechamel_sauce.htm

White Sauce — A term for light white or blond sauces. In its simplest form, white sauce is cream or milk mixed into a white roux (a combination of butter and flour which isn't browned). This basic French sauce is called "béchamel."

www.nutribase.com/sauces.shtml

The most basic white sauce, from which numerous other sauces stem. White sauce is made with a roux of butter and flour mixed with milk and cooked over a gentle heat until smooth and slightly thick.

www.bbc.co.uk/food/glossary/w.shtml?white_sauce

The imported product does not contain the roux described in the white sauces above. Accordingly, the imported product is not a white sauce as commonly understood and described above.

cally made to be used as a **substantially advanced base or intermediate of a sauce.**" See *Nestle*, 18 C.I.T. 674 (1994) (Emphasis added).

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. Accordingly, the appropriate test is whether the imported product is a substantially finished food preparation, rather than merely an ingredient in sauce or any other food preparations.

The commenter argues that CBP has misread the *Nestle* case as requiring that the preparation be substantially advanced. In the commenter's view, CBP has injected a legal requirement that is not present in the tariff. We do not agree. As discussed above, the *Nestle* court specifically emphasized that a preparation for sauce must be substantially advanced. There is nothing about the context of the *Nestle* case that detracts from this holding.

In our proposed revocation we identified CBP's previous rulings and examined a number of white sauce products, which demonstrate the physical characteristics of sauces and sauce preparations in contrast to the imported product. These products all contained substantial ingredients in addition to fat and water³. The commenter argues that these products in the previous rulings are different in composition from one another and that therefore they cannot be representative of sauce preparations. We disagree. These products all 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). By contrast, the imported product requires substantial amounts of vital additional ingredients and contains nothing more than ingredients found in a dairy spread.

The imported product is 78% milkfat and 21% moisture together with a very small amount of additives. In fact, but for 2 percent less milkfat and 5 percent more water, this product is butter and its composition is no more than a dairy spread. It is not a substantially advanced base for the manufacture of sauce. Rather, the imported product is a multipurpose versatile common ingredient suitable for use in any number of food preparations. It is a processed product, but so are many food products, including the dairy spreads of heading 0405. Accordingly, the imported product fails to meet the criteria articulated by the court for a sauce preparation of heading 2103.

Therefore, we conclude that on the basis of GRI 1, the imported product does not satisfy the requirements of heading 2103 as a sauce preparation. Since we have already concluded that the product does meet the terms of heading 0405, our classification is complete at the four-digit level. Therefore,

³For instance, see the following rulings concerning sauces: 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. 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.

it is not necessary for us to address the extensive comments by the commenter about the use of the imported product in support of classification in heading 2103. However, in order to provide as much analysis as possible we will address those comments.

Commenter's contentions about the class or kind of goods to which the imported product belongs

In addition to the *Nestle* requirement that a preparation must be a substantially advanced base for the making of sauces, the court has 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). Accordingly, in addition to demonstrating that the imported product is sufficiently advanced to be classifiable in heading 2103, the evidence must show that the imported product is part of a class or kind of product that is principally used in the making of sauces. Given its contention, it is the commenter's burden to provide evidence proving that the imported product is a member of such class or kind of product. See, *Universal Elecs. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997)

Additional Rule of Interpretation (ARI) 1(a), HTSUS, 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 presented by the importer 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.

The commenter's basic contention is that the imported product belongs to the class or kind of "fat-based preparations" used to make sauces and dressings. We shall examine this contention in light of the *Carborundum* factors above.

General physical characteristics of the merchandise

The commenter states that the composition of the imported product is consistent with the type of products that are traditionally used in the manufacture of sauces. The commenter concludes that the physical characteristics of the product are of that class or kind.

The imported product is a water-in-oil type emulsion comprised of 78% milkfat and 21% moisture. 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 composition, in short, all of the general physical characteristics of this product, mirror the physical characteristics of dairy spreads. Thus, while we do not dispute that dairy spreads can be used as an ingredient to make sauces of heading 2103,

we conclude that there is nothing in the composition and physical characteristics of the imported product which identifies it as being of a kind used in the production of sauces. On the contrary, its composition is consistent with use in a wide variety of products including bakers' wares of chapter 19, ice cream, confectionery products, and other dairy products.

Purchaser expectations

The commenter states that commercial food producers expect white sauce to be used as a base for the production of sauces. White sauces, according to the commenter, provide characteristics such as flavor and texture to the finished sauce.

As indicated above, the imported product does not contain the attributes of white sauce. See footnote 2, *infra*. Moreover, because of its high milkfat content, this product is suitable for many other applications besides sauce. It would appear to be virtually interchangeable with butter in its commercial applications. Similar products, classified as dairy spreads, have been imported for use in various sections of the food processing industry. See, for example, NY R00313, May 24, 2004, which classified in subheading 0405.20, HTSUS, a dairy spread from Canada, containing 76–78 percent butterfat, 15 percent moisture, 5 percent added salt or sugar and 1.5–2.0 percent nonfat milk solids. This product was intended for use “in bakery, confectionery and other food applications.” NY H81047, May 21, 2001, similarly classified another dairy spread from Singapore, containing 78.9 percent milkfat, 15 percent moisture, 5 percent sugar and 1.1 percent non-fat milk solids, imported for sale at the wholesale level to be used as an ingredient in baking bread.

In short, there is nothing in the composition of the imported product that would limit the purchasers' expectations to use in the making of sauces as opposed to other food products. Again, the customers of the instant product could be manufacturers or processors in the various segments of the food industry (*i.e.*, producers of bakery, confectionery, dairy, and numerous other food products that utilize butter or milkfat as an ingredient in their products). In fact, information of which we are aware is that a customer of ICP viewed the product it was purchasing as milkfat for use in making cheese.

Channels of trade, recognition in the trade

The commenter concedes that in the United States most major food producers have an integrated production process to make sauce. However, the commenter states that other manufacturers purchase white sauce rather than make the sauce themselves. As discussed above, there is nothing in the commenter's submission that indicates that commercially the product is limited to the making of sauce. Therefore, the evidence falls short of that needed to establish the claimed class or kind.

Environment of sale

The commenter states that white sauce is not typically advertised. Rather sales are made via a sales force. Accordingly, this does not represent supporting evidence of the commenter's claimed class or kind.

The use of the merchandise

With respect to the use of the imported product, the commenter merely indicates that production has not yet begun for its manufacturing facility. It presents no information about actual use other than a reference to the fact that a customer is “evidently manufacturing cheese products” from the imported product.

On this issue, information has come to our attention in this case which indicates that the instant merchandise is actually used to make cheese, rather than as an ingredient in the preparation of sauces. In fact, the only documented evidence of commercial use of the importer's merchandise is 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 both in determining the class or kind to which the imported product belongs and in determining principal use. *See Carborundum, supra.*

For the reasons discussed above, the evidence presented by the commenter falls short of demonstrating that the imported product belongs to what is referred to as the class or kind of fat based preparations used in the manufacture of sauces. This is due to the fact that the physical characteristics of the merchandise strongly indicate the identity of the product as a dairy spread and none of the claimed information about purchasers' expectations or channels of trade provides any basis to exclude the product from being considered a dairy spread. Finally, the only information about actual use of the merchandise is not consistent with the commenter's claimed class or kind. We conclude that the burden of linking this product to the class or kind of fat based preparations used to make sauce has not been met.

Principal Use of the class to which the imported product belongs

Because we have concluded that the commenter has failed to demonstrate that the imported product belongs to a class or kind of products known as fat based sauce preparations, it is not necessary for us to address the principal use of the claimed class or kind. Nevertheless, once more, in the interest of providing a complete analysis, we will comment on the information provided.

As we understand the commenter's submission, the commenter's conclusion that the imported product is principally used to make sauce proceeds from the following lengthy set of assumptions. The commenter estimated the total industrial use of fat based preparations by "working back from the current consumption of sauces, dressings and related products." Thereafter five categories of products were identified as manufactured from "such sauce preparations." This was supposed to yield the annual industrial consumption of fat from fat based sauce preparations used to make sauces, dressings, etc. This is said to have yielded, conservatively, 1.345 billion pounds for the industrial use of fat based food preparations.

With respect to the retail sector, the commenter picked eight product categories, analyzed ingredient labels to determine the amount of fat in the products sold in grocery stores and derived an amount of 856 million pounds to the retail market. When added to the figure for industrial use of fat-based preparations, the result is 2.201 billion pounds.

This latest figure is compared to the 77 million pounds that ICP sells annually to the customer that is "evidently manufacturing cheese products". Since two billion is 30 times more than 77 million, the commenter believes its principal use argument is made.

To the extent that we are able to follow the commenter's analysis, we believe that the commenter's analysis is fatally flawed for two important reasons. The first is that the commenter assumes that since products sold at retail and for commercial use contain fat as an ingredient, one can conclude that the volume of fat based sauce preparations equals the amount of fat found in the final product. This seems fanciful since there is no showing that

these products were all produced from fat based preparations. In fact, the commenter concedes that most companies make their own sauce and do not purchase fat based preparations. Secondly, the commenter appears to have undertaken no research with respect to the volume of products such as the imported product used as dairy spreads or as an ingredient in the making of cheese, ice cream or other food products other than sauces. Instead, the product categories are limited to sauce preparations. There is also no showing that the fat used in all of the surveyed products is similar to that present in the imported product.

Of course, there is no dispute that fats and oils are ingredients in making sauce. They are also ingredients in many other products. The commenter's argument proves too much: following this reasoning it could be logically suggested that butter is a fat based preparation classified in heading 2103, rather than in heading 0405. This is a distortion of the principal use analysis. In short, ICP's white sauce is no more a member of a unique class of goods known as the "fat phase" of sauce production or "fat-based preparations used to create sauces and dressings" than is vegetable oil, butter, or any number of high-fat products. In other words, there is nothing in the composition of the product that limits it to making sauce.

For these reasons, we reject the commenter's contention that the principal use of the class or kind to which the imported product belongs is as sauce preparations. In light of the above, we again reaffirm that classification in heading 2103 does not merit consideration.

Relative specificity of headings 0405 and 2103

For the reasons described above, the imported product does not meet the requirements for classification in heading 2103. Nonetheless, if analysis were required at GRI 3(a), it 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, for purposes of this issue and 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.

The commenter submits that CBP's "otherwise in balance" analysis is flawed because it is not based on the descriptive character of the competing provision, but rather on which heading is more specific. GRI 3(a) requires a relative specificity test. Our analysis is fully consistent with that requirement.

The commenter cites to HQ 964846, dated September 11, 2002, where we classified a food preparation known as "Preparation 101" which serves as

the base for cheese sauces and dressings. The commenter states that in that ruling we found that heading 2103 and heading 0406, HTSUS, “Cheese and curd,” were equally descriptive and thus, the use provision was more specific. The commenter asks how it is possible that heading 0406 was considered to be less specific than 2103 in our previous ruling while heading 0405 is considered more specific. The commenter also notes that classification of cheese involves a legal note to chapter 4, which defines whey cheese, just as there is a legal note that describes dairy spreads.

We find the instant case to be distinguishable from that presented in our previous ruling. The legal note cited by the commenter, which governs whey cheese, was not at all involved in our previous ruling. Rather the ruling presented the question of the meaning of cheese, which has no legal note definition in the tariff. By contrast the legal note defining dairy spreads is very much at issue in the classification of the imported product since it covers and describes it completely.

The commenter further states that the term “preparations” for sauce under heading 2103 is more difficult to satisfy and describes its “white sauce” with the greatest degree of accuracy and certainty. A preparation, the commenter states, involves some degree of processing or addition of ingredients and implies a specific or intended purpose. In this regard, the commenter cites to CBP’s Informed Compliance Publication and states that under Rule 3(a) a more specific description generally occurs when a description “more clearly identifies a product”. U.S. Customs and Border Protection, *What Every Member of the Trade Community Should Know About: Tariff Classification* at 17 (May 2004).

We do not agree that heading 2103 more clearly identifies the imported product than does heading 0405. The commenter has itself argued that heading 2103 is very broad and encompasses any preparation used in the making of sauces. By contrast, a dairy spread of heading 0405 must meet very precise compositional requirements set forth in note 2(b) to chapter 4. In this respect, the provision can be distinguished from heading 2002, the provision at issue in *Orlando*. Moreover, 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. Accordingly, because of the specific *eo nomine* requirements set forth in heading 0405, HTSUS, and Legal Note 2 (b) to chapter 4, the competing headings are not in balance, as they are in *Orlando*. Heading 0405 is the more specific provision, is more difficult to satisfy and best describes the imported product. Accordingly, on the basis of GRI 3(a), even if the imported product were considered to meet the requirements of heading 2103 which we do not so find, the goods would nevertheless be classifiable in heading 0405, HTSUS.

Proper classification of the product at issue

In light of its composition and physical state, the imported product meets all the requirements of note 2(b) to Chapter 4 to be a dairy spread enumerated at the four-digit level as classifiable in heading 0405, at GRI 1. Having discussed and chosen the proper heading of the merchandise, we turn our attention to the appropriate subheading. 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 en-

tered for non-commercial uses and do not enter 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.

HOLDING:

At GRI 1, and in view of the above facts and analysis, the white sauce is classified under heading 0405, specifically 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. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

MYLES B. HARMON,
Director;

Commercial and Trade Facilitation Division.

c/c: Simeon M. Kriesberg
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, DC 20006-1101