

Bureau of Customs and Border Protection

General Notices

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, November 2, 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.

Myles B. Harmon for MICHAEL T. SCHMITZ,
*Assistant Commissioner,
Office of Regulations and Rulings.*

19 CFR PART 177

PROPOSED REVOCATION OF THREE RULING LETTERS, MODIFICATION OF TWO RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF PLASTIC RUBBING TEMPLATES

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

ACTION: Notice of proposed revocation of three ruling letters and treatment relating to tariff classification of plastic rubbing templates.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection (“CBP”) intends to revoke three ruling letters and modify two ruling letters pertaining to the tariff classification of plastic rubbing templates un-

der the Harmonized Tariff Schedule of the United States (“HTSUS”). CBP also intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments are invited on the correctness of the proposed actions.

DATE: Comments must be received on or before December 16, 2005.

ADDRESS: Written comments (~~preferably in triplicate~~) are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at 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: Ieva O’Rourke, Tariff Classification and Marking Branch, (202) 572-8803.

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)), this notice advises interested parties that CBP intends to revoke three ruling letters and modify two ruling letters pertaining to the classification of plastic rubbing templates. Although in this notice CBP is specifically referring to the revocation of Headquarters Ruling Letter (HQ) 952413, dated February 17, 1993,

(Attachment A), New York Ruling Letter (NY) J88507, dated October 6, 2003 (Attachment B), NY 885655, dated June 4, 1993 (Attachment C), and the modification of NY G88117, dated March 27, 2001 (Attachment D), and NY 811162, dated June 20, 1995 (Attachment E), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the ones identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during this notice period.

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

In HQ 952413, NY J88507, NY 885655, NY G88117, and NY 811162, set forth as Attachments A through E to this document, CBP classified plastic rubbing templates in heading 9503, HTSUS, as: "Other toys," with the subheadings varying depending on the facts in the individual rulings. It is now CBP's position that plastic rubbing templates are classified under heading 3926, specifically subheading 3926.90.98, HTSUS, as "[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: Other."

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke HQ 952413, NY J88507, and NY 885655, and modify NY G88117, and NY 811162, and revoke or modify any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 967800 (Attachment F), HQ 967797 (Attachment G), HQ 967798 (Attachment H), HQ 967796 (Attachment I), and HQ 967799 (Attachment J). 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, we will give consideration to any written comments timely received.

DATED: October 26, 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 952413

February 17, 1993

CLA-2 CO:R:C:F 952413 GGD

CATEGORY: Classification

TARIFF NO.: 9503.90.6000

MR. JERROLD E. ANDERSON
KATTEN, MUCHIN & ZAVIS
525 West Monroe Street, Suite 1600
Chicago, Illinois 60661-3693

RE: "Rub 'N' Draw templates;" Not Drawing Instruments

DEAR MR. ANDERSON:

This letter is in further response to your inquiry of July 9, 1992, on behalf of your client, concerning the tariff classification of four separate articles identified as "Balance Builders," an "Animation Wheel," a "Rainbow Viewer," and "Rub 'N' Draw templates," to be imported from China by M-B Sales. In New York Ruling Letter (**NYRL**) **876199** you were notified as to the classification of the first three articles. Your inquiry and a sample of the "Rub 'N' Draw templates" were forwarded to this office for a response.

FACTS:

The articles at issue are six flat pieces of hard plastic, each measuring approximately 3 inches by 2 inches, and having various raised designs (of animals, scenery, celestial bodies, musical instruments, etc.) on their tops and bottoms. Whether joined together or placed individually on a hard surface, the "templates" are used by placing paper over them, then coloring the paper with a pencil or crayon in a random hand motion to produce a picture or design.

ISSUE:

Whether the plastic articles should be classified in heading 9017, HTSUSA, the provision for drawing instruments; or in heading 9503, HTSUSA, the provision for other toys.

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied. The Explanatory Notes (EN's) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the in-

ternational level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI's.

It is apparent that these articles will be classified according to the terms of the headings of the tariff schedule. Heading 9017, HTSUSA, provides for “[d]rawing, marking-out or mathematical calculating instruments (for example, drafting machines, pantographs, protractors, drawing sets, slide rules, disc calculators); instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, calipers), not specified or included elsewhere in this chapter; parts and accessories thereof. . . .”

The EN to heading 9017 indicates that, among other instruments, the heading covers drawing instruments. In addition to drawing instruments such as pantographs and eidographs, drafting machines, drawing compasses, rulers, drawing curves, various squares (set, adjustable, and “T” types), and protractors, the specific language of the EN states that heading 9017 covers “[s]tencils of a kind clearly identifiable as being specialised as drawing instruments.” (emphasis in original)

It is clear that the only kind of stencils classifiable in heading 9017 are those which are specialized as drawing instruments. The words “stencil” and “template” have somewhat similar definitions. The American College Dictionary (1970), defines “stencil” as “a thin sheet of cardboard or metal cut through in such a way as to reproduce a design or ornament when color is rubbed through it.” “Template” or “templet” is defined as “a pattern, mold, or the like, usually consisting of a thin plate of wood or metal, serving as a gauge or guide in mechanical work.”

While we do not believe that the “Rub ‘N’ Draw templates” precisely fit the definition of template, we do find these articles to be similar to the essential character component of a “Stencils and Pencils” set we classified as a toy (not a drawing instrument) in Headquarters Ruling Letter (**HRL**) **950926**, dated March 31, 1992.

Heading 9503, HTSUSA, provides for “[o]ther toys; reduced-size (“scale”) models . . . and accessories thereof. . . .” The notes to chapter 95 indicate that the chapter covers toys of all kinds, whether designed for the amusement of children or adults. The EN to heading 9503 indicates, in pertinent part, that certain toys may be capable of a limited “use,” but are generally distinguishable by their size and limited capacity to function as real machines, instruments, etc.

Although having some limited capacity for use as drawing instruments, we note from the sample articles submitted that they are clearly designed for the amusement of children and are not identifiable as specialized drawing instruments. The impression produced by the packaging and the articles themselves, is rich in color, smiles, and movement. A child may utilize various types of drawing instruments on the overlying paper to reproduce any of the articles’ raised figures. In comparing headings 9017 and 9503, HTSUSA, it appears that heading 9503 most accurately describes the templates.

It is our determination that the “Rub ‘N’ Draw templates” are classified in subheading 9503.90.6000, HTSUSA, the provision for other toys . . . (except models), not having a spring mechanism.

HOLDING:

The “Rub ‘N’ Draw templates” are classified under subheading 9503.90.6000, HTSUSA, the provision for “[o]ther toys. . . :

[o]ther: [o]ther: [o]ther toys (except models), not having a spring mechanism,” dutiable at the general column one rate of 6.8 percent ad valorem.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

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

NY J88507
October 6, 2003
CLA-2-95:RR:NC:SP:225 J88507
CATEGORY: Classification
TARIFF NO.: 9503.70.0000

MR. KEVIN MAHER
C-AIR CUSTOMHOUSE BROKERS
181 South Franklin Avenue
Valley Stream, NY 1158

RE: The tariff classification of a “Fashion Maker” from China.

DEAR MR. MAHER:

In your letter dated September 4, 2003, on behalf of RoseArt, you requested a tariff classification ruling.

You submitted a sample of a “Fashion Maker” identified as style number 4740. The toy set consists of 12 plastic plates with 24 images, 14 colored pencils, 1 crayon with holder, and paper packaged together in a cardboard box with a window display. To use, a child 5 years of age and older places a sheet of paper over a plastic plate. The plate depicts an image of a face, a torso, arms, legs, a handbag, a flower, etc. The plate is then placed inside the plastic frame, which holds the paper in place so the paper does not move as the child rubs the paper with the crayon. This rubbing action transfers the image on the plate to the paper. By mixing and matching the various plates, a child can create dozens of figures wearing various designs. The pencils are used to add additional colors to the finished design. All of the articles work together for the use of a child in imaginative role-play as a fashion designer “creating” dozens of their own fashions.

Your sample is being returned as requested.

The applicable subheading for the “Fashion Maker” identified as style number 4740 will be 9503.70.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for “Other toys, put up in sets or outfits, and parts and accessories thereof.” The rate of duty will be free.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Alice Wong at 646-733-3026.

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

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY 885655
June 4, 1993
CLA-2-95:S:N:N8:225 885655
CATEGORY: Classification
TARIFF NO.: 9503.70.8000

MS. MAUREEN SHOULE
J.W. HAMPTON, JR. & CO.
15 Park Row
New York, New York 10038

RE: The tariff classification of a plastic template set from China

DEAR MS. SHOULE:

In your letter dated May 4, 1993, you requested a tariff classification ruling on behalf of your client F.W. Woolworth, Co.

The two samples submitted with your inquiry, "Cyborg Body Works" and "Fashion Designer Portfolio Drawing Set", are identified by item number 8090. The first product "Cyborg Body Works" consists of 12 double-sided, plastic templates, 12 colored pencils, 2 crayons, paper and a plastic holder. The plates come in sizes less than 4 1/2 by 3 1/2 inches. They have various raised designs on both sides. The holder measures 9 1/2 by 6 inches and, in addition to serving as a storage case for the templates and crayons, serves as a work area for coloring. The holder functions by placing a piece of paper over the template and inserting both under a plastic frame. The frame holds all items in place and by rubbing a crayon over the paper an outline of the desired picture is obtained. With the outline established the template may be removed and the child may color the picture. Both items are identical in nature with the only difference being in design sketches. The "Cyborg Body Works" contains various templates representing robotic like figures and the "Fashion Designer Portfolio Drawing Set" comprises illustrations depicting female figures in various wardrobe. Your samples are being returned as requested.

The applicable subheading for the "Cyborg Body Works" and the "Fashion Designer Portfolio Drawing Set" will be 9503.70.8000, Harmonized Tariff Schedule of the United States (HTS), which provides for other toys, put up in sets or outfits, and parts and accessories thereof:

other: other. The duty rate will be 6.8 percent ad valorem.

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

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
*Area Director,
New York Seaport.*

[ATTACHMENT D]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY G88117
March 27, 2001
CLA-2-49:RR:NC:SP:234 G88117
CATEGORY: Classification
TARIFF NO.: 4903.00.0000; 4901.99.0092;
4823.90.6500; 4823.90.8500; 9503.49.0000;
9504.40.0000; 9503.90.0000; 9609.90.8000;
4911.99.8000; 6307.90.9989; 4202.12.2035

MS. KATE MILLER
LADDERS TO LEARNING INC.
*Box 1498 Almonte,
Ontario CANADA K0A 1A0*

RE: The tariff classification of a children's activity kit from Canada.

DEAR MS. MILLER:

In your letter dated February 23, 2001, you requested a tariff classification ruling.

A sample of a children's "reading activity kit" identified as "One Gray Mouse" was submitted and will be retained for reference. It consists of several items put up together in a clear, 27 x 34 cm plastic portfolio with inserted retail labels. Although the various components are said to share a thematic connection relating to numbers and colors, they are nevertheless meant to be employed in diverse activities (e.g., arts & crafts, looking at pictures, playing with toys, etc.). For tariff purposes, they are therefore not considered "goods put up in sets for retail sale," and will be classified separately. The individual items are listed below, each followed by its applicable sub-heading in the Harmonized Tariff Schedule of the United States (HTS), general rate of duty, and tariff description:

Paperback children's book, "One Gray Mouse," containing a series of captioned pictures. 4903.00.0000/ Free. (Children's picture, drawing or coloring books.)

Staple-bound parent/teacher "resource booklet" printed with instructions, suggestions for activities, etc. 4901.99.0092/ Free. (Other printed books . . .)

A bookmark made of coated paper. 4823.90.6500/ 1.7%. (Other coated paper, cut to size or shape.)

Two 6"-square sheets of paper for origami or other arts and crafts. 4823.90.8500/ 1.6%. (Other paper, cut to size or shape.)

A mouse finger puppet made of textile fabric and other materials. 9503.49.0000/ Free. (Other toys representing animals or non-human creatures.)

"Matching Mice," a competitive memory game consisting of 20 printed cards. 9504.40.0000/ Free. (Playing cards.)

"Terrific Tracks Rubbing Plate," a plastic template to be used with pencils, crayons or the like to make rubbings depicting animal tracks. 9503.90.0000/ Free. (Other toys.)

A packet of 4 crayons. 9609.90.8000/ Free. (Other crayons.)

A selection of small flash cards made of non-lithographically printed paper laminated with clear plastic. Most are printed with words or numerals, while the others bear drawings of animals. They are to be used in an activity identified as "fun felt numbers." 4911.99.8000/ 1.5%. (Other printed matter.)

A palette-shaped board, made of textile fabric backed with paperboard, to be used with the above-described flash cards in the "fun felt numbers" activity. 6307.90.9989/ 7%. (Other made-up textile articles.)

The portfolio, made of clear PVC plastic sheeting (10 Mil thick), in which all of the above items are packed. It has a flap closure with three plastic snaps. All edges are stitched. The interior is fitted with three sleeves for storage and organization of labels and other accessories. It is suitable for repetitive use and is designed to provide storage, protection, organization and portability for papers and various other items. 4202.12.2035/ 20%. (Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels and similar containers: with outer surface of plastics: other than structured, rigid on all sides: attache cases, briefcases, and similar containers.)

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Carl Abramowitz at 212-637-7060.

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

[ATTACHMENT E]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY 811162
June 20, 1995
CLA-2-95:S:N:N7:225 811162
CATEGORY: Classification
TARIFF NO.: 9503.90.0030; 6815.99.4000

MR. FRED SHAPIRO
FASCO (USA) LTD.
39 E. Hanover Avenue
Morris Plains, N.J. 07950

RE: The tariff classification of various children's activity sets from China, Taiwan and Hong Kong

DEAR MR. SHAPIRO:

In your letter dated June 1, 1995 you requested a tariff classification ruling. A sample of each product was submitted with your inquiry. The first item is called "Polly Pocket Crayon By Number Activity Caddy". The article consists of 6 double sided plastic plates, 8 crayons, one plastic caddy, a blank paper roll and 2 printed paper rolls. The plastic plates, or "rubbing plates" as they are called, measure 4 3/4 inches by 4 inches and have various raised scenic designs. The plastic caddy measures 11 1/2 by 7 1/2 inches. It serves as a work area and storage container for the plates, crayons and paper rolls. The caddy is specially constructed to hold the blank paper rolls and plates in place. To operate, the child inserts a "rubbing plate" in the frame portion of the caddy, unwinds a blank piece of paper over the "rubbing plate" and closes the plastic frame. The frame holds all items in place and by rubbing a crayon over the paper an outline of the desired picture is obtained. With the outline established the plate may be removed and the child may color the picture.

The "Polly Pocket Sand Art" includes a plastic tray, one sand dispenser with stand, 6 pre-cut pictures, 7 bags of sand and 1 plastic spoon. The user selects up to 4 colors of sand and pours them into the hand held sand dispenser unit. The pre-cut, specially constructed, picture is placed in the plastic tray. As sections of the picture are peeled away a sticky surface is revealed. Sand is distributed over the exposed area, adhering to the surface, and excess is simply shaken to the side. This process is repeated until a completed picture is created. The "Polly Pocket Light-Up Desk" is composed of a plastic portable desk, 6 colored pencils, 6 printed paper sheets and 12 pieces of drawing paper. The portable desk contains a light which illuminates the desk surface. The light feature assists the child in tracing over printed designs. The "Art To Go, Pencils and Stencils" set consists of 6 colored pencils, 6 plastic stencils, 1 pad of paper and a folding plastic carry case. The stencils depict various human and animal figures and impart the essential character of this retail packaged set. The applicable subheading for the "Polly Pocket Crayon By Number Activity Caddy" and "Art To Go, Pencils and Stencils" will be 9503.90.0030, Harmonized Tariff Schedule of the United States (HTS), which provides for other toys (except models), not having a spring mechanism. The rate of duty will be free.

The applicable subheading for the "Polly Pocket Sand Art" will be 6815.99.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for articles of stone or of other mineral substances (including articles of peat), not elsewhere specified or included: other: other. The duty rate will be 3.6 percent ad valorem.

The question of classification for the "Polly Pocket Light Up Desk", item #48004, is being referred to the Office of Regulations and Rulings, U.S. Customs Service Headquarters, 1301 Constitution Avenue, N.W., Washington D.C. 20229. A ruling will be issued to you from that office.

The subject "Polly Pocket" may constitute an infringement of a registered trademark under 15 U.S.C. 1124. Importations of this merchandise may be subject to the provisions of Section 133 of the Customs Regulations if it copies or simulates a registered trademark recorded with the Customs Service. You should contact your local Customs office to determine the status of this toy before you finalize any purchasing contracts.

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

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director;
New York Seaport.

[ATTACHMENT F]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967800
CLA-2-RR:CTF:TCM 967800 IOR
CATEGORY: Classification
Tariff No. 3926.90.9880

JERROLD E. ANDERSON, ESQ.
KATTEN, MUCHIN & ZAVIS
525 West Monroe St.
Suite 1600
Chicago, IL 60661-3693

Re: Rubbing Templates; HQ 952413 revoked

DEAR MR. ANDERSON:

In HQ 952413, which Headquarters, Customs and Border Protection (CBP), issued to you on February 17, 1993, on behalf of M-B Sales, "Rub 'N' Draw templates" were found to be classifiable as other toys . . . (except models), not having a spring mechanism, in subheading 9503.90.60 (now 9503.90.00), Harmonized Tariff Schedule of the United States (HTSUS). HQ 952413 is incorrect and no longer represents the position of CBP on the classification of this merchandise.

FACTS:

In HQ 952413, the facts were stated as follows:

The articles at issue are six flat pieces of hard plastic, each measuring approximately 3 inches by 2 inches, and having various raised designs (of animals, scenery, celestial bodies, musical instruments, etc.) on their tops and bottoms. Whether joined together or placed individually on a hard surface, the “templates” are used by placing paper over them, then coloring the paper with a pencil or crayon in a random hand motion to produce a picture or design.

ISSUE:

What is the classification of the “Rub ‘N’ Draw templates” under the HTSUS.

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that most goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
3926.90	Other:
3926.90.98	Other
9017	Drawing, marking-out or mathematical calculating instruments (for example, drafting machines, pantographs, protractors, drawing sets, slide rules, disc calculators); instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, calipers), not specified or included elsewhere in this chapter; parts and accessories thereof:
9017.20	Other drawing, marking-out or mathematical calculating instruments:
9017.20.80	Other
9503	Other toys; reduced-size (“scale”) models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof:
9503.90.00	Other

The issue before us is whether the subject rubbing templates are toys. Articles of Chapter 95, HTSUS, are not classifiable in Chapter 39, or 90, HTSUS. *See* Note 2(v), Chapter 39 and Note 1(k), Chapter 90. In HQ 952413 we stated that the rubbing templates were designed to amuse children and thus classified as a toy in heading 9503, HTSUS. In HQ 952413 we determined that the templates were more accurately described as toys than drawing instruments of heading 9017, HTSUS.

The term “toy” is not defined in the HTSUS. In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The General EN for Chapter 95 states that the “Chapter covers toys of all kinds whether designed for the amusement of children or adults.” The U.S. Court of International Trade (CIT) construes heading 9503, HTSUS, as a “principal use” provision, insofar as it pertains to “toys.” *See Minnetonka Brands v. United States*, 110 F. Supp. 2d 1020, 1026 (CIT 2000). Thus, to be a toy, the “character of amusement involved [is] that derived from an item which is essentially a plaything.” *Wilson’s Customs Clearance, Inc. v. United States*, 59 Cust. Ct. 36, C.D. 3061 (1967). It has been CBP’s position that the amusement requirement means that toys should be designed and used principally for amusement.

For articles governed by principal use, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that, in the absence of special language or context which otherwise requires, such 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.” In other words, the article’s principal use at the time of importation determines whether it is classifiable within a particular class or kind.

While Additional U.S. Rule of Interpretation 1(a), HTSUS, provides general criteria for discerning the principal use of an article, it does not provide specific criteria for individual tariff provisions. However, the CIT has provided factors which are indicative but not conclusive, to apply when determining whether merchandise falls within a particular class or kind. They include: general physical characteristics, the expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. *See United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), cert. denied, 429 U.S. 979 (hereinafter *Carborundum*).

For articles that are both amusing and functional, we look to *Ideal Toy Corp. v. United States*, 78 Cust. Ct. 28 (1977), in which the court stated that “when amusement and utility become locked in controversy, the question becomes one of determining whether amusement is incidental to the utilitarian purpose, or whether the utility purpose is incidental to the amusement.” Drawing and coloring are activities capable of providing amusement, but the ENs exclude from heading 9503, HTSUS, many articles that are used in drawing, coloring and other art activities. EN 95.03 states, in part, that heading 9503 excludes:

- (a) Paints put up for children’s use (heading 32.13).
- (b) Modelling pastes put up for children’s amusement (heading 34.07).
- (c) Children’s picture, drawing or colouring books of heading 49.03.

(d) Transfers (heading 49.08).

...

(h) Crayons and pastels for children's use, of heading 96.09.

(ij) Slates and blackboards, of heading 96.10.

These exclusions provide that articles and sets comprised of articles used for drawing or coloring are not classifiable as toys or as toy sets (classified according to GRI 1 under subheading 9503.70.00). The fact that the drafters of the Harmonized System upon which the US tariff schedule is based provided for the above-listed articles *eo nomine* in headings other than heading 9503, HTSUS, evinces an intent by the drafters that they not be considered toys. To that end, CBP has long construed the scope of heading 9503, HTSUS, to exclude such articles and sets. In HQ 085267, dated May 9, 1990, CBP found that, with respect to the above items listed in the ENs, "[a]lthough they may tend to amuse those who use them, such amusement is incidental to their primary purpose." That is, not all merchandise that provides amusement is properly classified in a toy provision. The listed items were further described as having primarily a drawing and craft function.

CBP has never considered writing, coloring, drawing or painting to have significant "manipulative play value," for purposes of classification as a toy. Nor does CBP classify the tools for writing, coloring, drawing or painting as toys since those tools are not designed to amuse. *See* HQ 966198, dated July 21, 2003 (ruling that a plastic stencil depicting a farm and farm animals is not a toy but a stencil designed to create tracings of a farm and farm animals); HQ 959189, dated September 25, 1996 (plastic stencils were designed primarily to make decorations, not to provide amusement); HQ 958063, dated February 13, 1996 (classifying a battery-operated drawing pad with pen for children as a drawing instrument of heading 9017 and not a toy because it was designed to facilitate drawing, not to amuse); HQ 953922, dated November 17, 1993 (classifying the "Video Painter" and "Design Studio Accessory Kit," which included several stencils under heading 9017 for the same reason); HQ 962327, dated June 23, 2000, (articles in an art activity set were not put up in a form indicating their use as toys and thus the set was not classifiable as a toy set at GRI 1, and the individual items were not classifiable as toys, including a stencil); HQ 958152, dated April 2, 1996 (classifying light-up desk with designs for tracing as a drawing instrument) and HQ 958805, dated February 8, 1996 (classifying "Trace N' Color" in heading 9017).

The activity performed with the rubbing template is similar to that performed with a stencil or by tracing. It involves following a design pattern to create a design which can be then colored.

The amusement derived from art-related activities is secondary to utility because those articles and sets used for drawing, coloring and other art-related activities are not "essentially playthings." The articles are not designed to amuse, but "rather are designed to facilitate some kind of art or drawing activity." *See* HQ 962327, *supra*. Exceptions may exist where the activity achieved from a set is role-play, such as playing fashion designer.

For purposes of determining whether the rubbing templates fall within the class or kind of merchandise as toys, we apply the Carborundum factors as follows:

The general physical characteristics of a rubbing template is hard plastic with a raised design on each side of the plastic to be used for creating designs with crayons or pencils.

The expectation of the ultimate purchaser is to create the designs on the rubbing templates by using crayons and pencils.

We do not have information regarding the channels of trade.

Regarding the environment of sale (accompanying accessories, manner of advertisement and display), the instructions on use for the rubbing templates describe how “to create a picture.” We do not have information on the manner of advertisement or display.

The use is not the same as toys because the use is creating designs by use of the rubbing templates.

The economic practicality of using the templates for the creation of designs is clear, and it is unlikely any other use is recognized by the trade.

The foregoing application of the Carborundum criteria indicates that the rubbing templates are not goods of a kind designed for amusement, and therefore the principal use of the rubbing templates is not amusement.

In HQ 952413, *supra*, we concluded that the rubbing templates were similar in character to a “Stencils and Pencils” set that had been classified as a toy as opposed to a drawing instrument, in HQ 950926, dated March 31, 1992. HQ 966197, dated July 21, 2003, revoked HQ 950926, concluding that the subject set was not designed for amusement, but had the essential character of the stencil, a drawing instrument, classified in heading 9017, HTSUS.

With respect to the rubbing templates, we do not find they are classified in heading 9017, HTSUS. The ENs to heading 9017, include among drawing instruments 1) pantographs and eidographs, 2) drafting machines, 3) drawing compasses, dividers, reduction compasses, spring bows, mathematical drawing pens, dotting wheels, etc., 4) set squares, adjustable squares, T squares, drawing curves, rulers, 5) protractors, and 6) stencils. In HQ 952413, we stated that templates and stencils have similar definitions, however the subject rubbing templates did not “precisely” fit the definition of a template. In HQ 952413, a “template” was defined as “a pattern, mold, or the like, usually consisting of a thin plate of wood or metal, serving as a gauge or guide in mechanical work.” We find that the rubbing templates at issue do not fit the definition of the type of template that is similar to a stencil.

The “Rub ‘N’ Draw templates” rubbing templates are articles made of plastics. Articles of plastics are classified in Chapter 39, HTSUS. As no specific heading in Chapter 39 describes these articles, the “Rub ‘N’ Draw templates” rubbing templates are classified in heading 3926, HTSUS, specifically in subheading 3926.90.98, HTSUS, as “[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other.” The plastic rubbing templates are consistent with the plastic articles listed in the EN 39.26(12), such as “beads . . . , figures and letters.”

HOLDING:

By application of GRI 1 the “Rub ‘N’ Draw templates” rubbing templates are classified in heading 3926, specifically in subheading 3926.90.9880, HTSUSA, as “[o]ther articles of plastics and articles of other materials of

headings 3901 to 3914: Other: Other,” with a column one, general duty rate of 5.3% *ad valorem*. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at www.usitc.gov/tata/hts/.

EFFECT ON OTHER RULINGS:

HQ 952413, dated February 17, 1993, is revoked.

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

[ATTACHMENT G]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967797
CLA-2-RR:CTF:TCM 967797 IOR
CATEGORY: Classification
Tariff No. 3926.90.9880

KEVIN MAHER
C-AIR CUSTOMHOUSE BROKERS
181 South Franklin Avenue
Valley Stream, NY 11581

Re: Fashion Maker; Rubbing Templates; NY J88507; revoked

DEAR MR. MAHER:

On October 6, 2003, the Director, National Commodity Specialist Division issued to you, on behalf of RoseArt, New York Ruling Letter (NY) J88507, classifying a “Fashion Maker” under the Harmonized Tariff Schedule of the United States (HTSUS). The “Fashion Maker,” which included plastic rubbing templates, was classified as a toy set under subheading 9503.70.00, HTSUS. We have reconsidered NY J88507 and have determined the classification of the “Fashion Maker” to be incorrect.

FACTS:

In NY J88507, the “Fashion Maker,” identified as style number 4740, was described as follows:

The toy set consists of 12 plastic plates with 24 images, 14 colored pencils, 1 crayon with holder, and paper packaged together in a cardboard box with a window display. To use, a child 5 years of age and older places a sheet of paper over a plastic plate. The plate depicts an image of a face, a torso, arms, legs, a handbag, a flower, etc. The plate is then placed inside the plastic frame, which holds the paper in place so the paper does not move as the child rubs the paper with the crayon. This rubbing action transfers the image on the plate to the paper. By mixing and matching the various plates, a child can create dozens of figures wearing various designs. The pencils are used to add additional colors to the finished design. All of the articles work together for the use of a child in imaginative role-play as a fashion designer “creating” dozens of their own fashions.

As is apparent from the description above, the “Fashion Maker” also includes a plastic frame.

ISSUE:

What is the classification of the “Fashion Maker” under the HTSUS.

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that most goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
3926.90	Other:
3926.90.98	Other
9017	Drawing, marking-out or mathematical calculating instruments (for example, drafting machines, pantographs, protractors, drawing sets, slide rules, disc calculators); instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, calipers), not specified or included elsewhere in this chapter; parts and accessories thereof:
9017.20	Other drawing, marking-out or mathematical calculating instruments:
9017.20.80	Other
9503	Other toys; reduced-size (“scale”) models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof:
9503.90.00	Other

The issue before us is whether the “Fashion Maker” is classifiable within heading 9503, HTSUS as other toys, or whether it is classifiable as a set elsewhere. Articles of Chapter 95, HTSUS, are not classifiable in Chapter 39, or 90, HTSUS. *See* Note 2(v), Chapter 39 and Note 1(k), Chapter 90. In NY J88507 we concluded that the articles “work together for the use of a child in imaginative role-play as a fashion designer,” and classified it as “[o]ther toys, put up in sets or outfits, and parts and accessories thereof,” in subheading 9503.70, HTSUS.

The term “toy” is not defined in the HTSUS. In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The General EN for Chapter 95 states that the “Chapter covers toys of all kinds whether designed for the amusement of children or adults.” The U.S. Court of International Trade (CIT) construes heading 9503, HTSUS, as a “principal use” provision, insofar as it pertains to “toys.” See Minnetonka Brands v. United States, 110 F. Supp. 2d 1020, 1026 (CIT 2000). Thus, to be a toy, the “character of amusement involved [is] that derived from an item which is essentially a plaything.” Wilson’s Customs Clearance, Inc. v. United States, 59 Cust. Ct. 36, C.D. 3061 (1967). It has been CBP’s position that the amusement requirement means that toys should be designed and used principally for amusement.

For articles governed by principal use, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that, in the absence of special language or context which otherwise requires, such 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.” In other words, the article’s principal use at the time of importation determines whether it is classifiable within a particular class or kind.

While Additional U.S. Rule of Interpretation 1(a), HTSUS, provides general criteria for discerning the principal use of an article, it does not provide specific criteria for individual tariff provisions. However, the CIT has provided factors which are indicative but not conclusive, to apply when determining whether merchandise falls within a particular class or kind. They include: general physical characteristics, the expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. See United States v. Carborundum Company, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), cert. denied, 429 U.S. 979 (hereinafter Carborundum).

For articles that are both amusing and functional, we look to Ideal Toy Corp. v. United States, 78 Cust. Ct. 28 (1977), in which the court stated that “when amusement and utility become locked in controversy, the question becomes one of determining whether amusement is incidental to the utilitarian purpose, or whether the utility purpose is incidental to the amusement.” Drawing and coloring are activities capable of providing amusement, but the ENs exclude from heading 9503, HTSUS, many articles that are used in drawing, coloring and other art activities. EN 95.03 states, in part, that heading 9503 excludes:

- (a) Paints put up for children’s use (heading 32.13).
- (b) Modelling pastes put up for children’s amusement (heading 34.07).
- (c) Children’s picture, drawing or colouring books of heading 49.03.
- (d) Transfers (heading 49.08).
- ...
- (h) Crayons and pastels for children’s use, of heading 96.09.
- (ij) Slates and blackboards, of heading 96.10.

These exclusions provide that articles and sets comprised of articles used for drawing or coloring are not classifiable as toys or as toy sets (classified according to GRI 1 under subheading 9503.70.00). The fact that the drafters

of the Harmonized System upon which the U.S. tariff schedule is based provided for the above-listed articles *eo nomine* in headings other than heading 9503, HTSUS, evinces an intent by the drafters that they not be considered toys. To that end, CBP has long construed the scope of heading 9503, HTSUS, to exclude such articles and sets. In HQ 085267, dated May 9, 1990, CBP found that, with respect to the above items listed in the ENs, “[a]lthough they may tend to amuse those who use them, such amusement is incidental to their primary purpose.” That is, not all merchandise that provides amusement is properly classified in a toy provision. The listed items were further described as having primarily a drawing and craft function.

CBP has never considered writing, coloring, drawing or painting to have significant “manipulative play value,” for purposes of classification as a toy. Nor does CBP classify the tools for writing, coloring, drawing or painting as toys since those tools are not designed to amuse. *See* HQ 966198, dated July 21, 2003 (ruling that a plastic stencil depicting a farm and farm animals is not a toy but a stencil designed to create tracings of a farm and farm animals); HQ 959189, dated September 25, 1996 (plastic stencils were designed primarily to make decorations, not to provide amusement); HQ 958063, dated February 13, 1996 (classifying a battery-operated drawing pad with pen for children as a drawing instrument of heading 9017 and not a toy because it was designed to facilitate drawing, not to amuse); HQ 953922, dated November 17, 1993 (classifying the “Video Painter” and “Design Studio Accessory Kit,” which included several stencils under heading 9017 for the same reason); HQ 962327, dated June 23, 2000, (articles in an art activity set were not put up in a form indicating their use as toys and thus the set was not classifiable as a toy set at GRI 1, and the individual items were not classifiable as toys, including a stencil); HQ 958152, dated April 2, 1996 (classifying light-up desk with designs for tracing as a drawing instrument) and HQ 958805, dated February 8, 1996 (classifying “Trace N’ Color” in heading 9017).

The activity performed with the rubbing template is similar to that performed with a stencil or by tracing. It involves following a design pattern to create a design which can be then colored.

The amusement derived from art-related activities is secondary to utility because those articles and sets used for drawing, coloring and other art-related activities are not “essentially playthings.” The articles are not designed to amuse, but “rather are designed to facilitate some kind of art or drawing activity.” *See* HQ 962327, *supra*. We have stated that exceptions may exist where the activity achieved from a set is role-play, such as playing fashion designer. However, in this instance, where the set is entirely composed of articles which are excluded from classification in heading 9503, HTSUS, as articles used for art-related activities, and the art-related activity is the primary purpose of the set, we do not find the item to be primarily for role play.

For purposes of determining whether the “Fashion Maker” falls within the class or kind of merchandise as toys, we apply the *Carborundum* factors as follows:

The general physical characteristics of the “Fashion Maker” is a plastic rubbing template with a raised design to be placed under paper in a frame and used for creating designs with crayons or pencils.

The expectation of the ultimate purchaser is to create the designs on the rubbing templates by using crayons and pencils.

We do not have information regarding the channels of trade.

We do not have any information regarding the environment of sale (accompanying accessories, manner of advertisement and display).

The use is not the same as toys because the use is creating designs by use of the rubbing template.

The economic practicality of using the articles for the creation of designs is clear, and it is unlikely any other use is recognized by the trade.

The foregoing application of the Carborundum criteria indicates that the "Fashion Maker" is not a good of a kind designed for amusement, and therefore the principal use of the "Fashion Maker" is not amusement, and it is not classified in heading 9503, HTSUS.

The subheading EN for subheading 9503.70 provides:

Subject to substantiated classification in heading 95.03 and for the purpose of this subheading:

(i) "Sets" are two or more different types of articles (principally for amusement), put up in the same packing for retail sale without repacking. Simple accessories or objects of minor importance intended to facilitate the use of the articles may also be included.

(ii) "Outfits" are two or more different articles put up in the same packing for retail sale without repacking, specific to a particular type of recreation, work, person or profession.

The subheading EN is subject to substantiated classification in heading 95.03. In this case, because the articles within the set consist of articles for art-related activities, articles excluded from heading 9503, HTSUS, classification in the heading has not been substantiated.

In HQ 952413, dated February 17, 1993, we had concluded that similar rubbing templates, were similar in character to the stencils in a "Stencils and Pencils" set that had been classified as a toy as opposed to a drawing instrument, in HQ 950926, dated March 31, 1992. HQ 966197, dated July 21, 2003, revoked HQ 950926, concluding that the subject set was not designed for amusement, but had the essential character of the stencil, a drawing instrument, classified in heading 9017, HTSUS.

With respect to the rubbing templates, we do not find they are classified in heading 9017, HTSUS. The ENs to heading 9017, include among drawing instruments 1) pantographs and eidographs, 2) drafting machines, 3) drawing compasses, dividers, reduction compasses, spring bows, mathematical drawing pens, dotting wheels, etc., 4) set squares, adjustable squares, T squares, drawing curves, rulers, 5) protractors, and 6) stencils. In HQ 952413, *supra*, we stated that templates and stencils have similar definitions, however in that case found that the subject rubbing templates did not "precisely" fit the definition of a template. In HQ 952413, a "template" was defined as "a pattern, mold, or the like, usually consisting of a thin plate of wood or metal, serving as a gauge or guide in mechanical work." We find that the rubbing templates at issue do not fit the definition of the type of template that is similar to a stencil, and are not described in heading 9017, HTSUS.

We find that the rubbing templates within the “Fashion Maker” are classified in heading 3926, HTSUS, specifically in subheading 3926.90.98, HTSUS, as “[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other.”

No single heading covers the subject “Fashion Maker” which consists of several different articles, therefore classification must be accomplished by other than GRI 1. Goods that are, *prima facie*, classifiable under two or more headings, are classifiable in accordance with GRI 3. GRI 3(a) states in part that when two or more headings each refer to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific, even if one heading gives a more precise description of the goods.

GRI 3(b) states, in relevant part, that goods put up in sets for retail sale shall be classified as if consisting of the material or component which gives them their essential character, insofar as this criterion is applicable. Explanatory Note (X) to GRI 3(b), on p. 5 (2002) states that for purposes of Rule 3(b) the term “goods put up in sets for retail sale” means goods which: (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings; (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and, (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

The subject merchandise consists of 12 plastic rubbing templates with 24 images, 14 colored pencils, 1 crayon with holder, a plastic frame, and paper, all packaged together in a box. The items are *prima facie* classifiable in more than two different headings. The items packaged together, consist of articles put up together to carry out the specific activity of creating images on paper. The articles are put up in a manner suitable for sale directly to users without repacking. Therefore the kit in question is within the term “goods put up in sets for retail sale.” GRI 3(b) states in part that goods put up in sets for retail sale, which cannot be classified by reference to 3(a), are to be classified as if they consisted of the component which gives them their essential character.

The factor or factors which determine essential character will vary with the goods. EN Rule 3(b)(VIII) lists as factors the nature of the material or component, their bulk, quantity, weight or value, and the role of a constituent material in relation to the use of the goods. In this case, we find that the rubbing templates, for purposes of GRI 3(b), impart the essential character of the set as they provide the designs to be drawn, the motif, and comprise the bulk of the set. *See* EN VIII, GRI 3(b); *see also* Better Home Plastics Corp. v. U.S., 916 F. Supp. 1265 (CIT 1996), *aff'd* 119 F. 3d 969 (Fed. Cir. 1997).

Because the rubbing templates impart the essential character of the “Fashion Maker” set, they control the classification of the set. The rubbing templates are articles made of plastics. Articles of plastics are classified in Chapter 39, HTSUS. As no specific heading in Chapter 39 describes these articles, the rubbing templates are classified in heading 3926, HTSUS, specifically in subheading 3926.90.98, HTSUS, as “[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other.” The plastic rubbing templates are consistent with the plastic articles listed in the EN 39.26(12), such as “beads . . . , figures and letters.”

HOLDING:

By application of GRI 3(b), the “Fashion Maker,” is classified in heading 3926, specifically subheading 3926.90.9880, HTSUSA, as “[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other,” with a column one, general duty rate of 5.3% *ad valorem*. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at www.usitc.gov/tata/hts/.

EFFECT ON OTHER RULINGS:

NY J88507, dated October 6, 2003, is hereby revoked.

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

[ATTACHMENT H]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967798
CLA-2-RR:CTF:TCM 967798 IOR
CATEGORY: Classification
Tariff No. 3926.90.9880

MAUREEN SHOULE
J.W. HAMPTON, JR. & Co.
15 Park Row
New York, NY 10038

Re: Rubbing Template Sets; NY 885655; revoked

DEAR MS. SHOULE:

On June 4, 1993, this office issued to you, on behalf of F.W. Woolworth, Co., New York (NY) 885655, classifying “Cyborg Body Works” and “Fashion Designer Portfolio Drawing Set” under the Harmonized Tariff Schedule of the United States (HTSUS). The products, which included plastic rubbing templates, were classified as toy sets under subheading 9503.70.80 (now 9503.70.00), HTSUS. We have reconsidered NY 885655 and have determined the classification of the sets to be incorrect.

FACTS:

In NY 885655, the articles were described as follows:

The two samples submitted with your inquiry, “Cyborg Body Works” and “Fashion Designer Portfolio Drawing Set”, are identified by item number 8090. The first product “Cyborg Body Works” consists of 12 double-sided, plastic templates, 12 colored pencils, 2 crayons, paper and a plastic holder. The plates come in sizes less than 4 1/2 by 3 1/2 inches. They have various raised designs on both sides. The holder measures 9 1/2 by 6 inches and, in addition to serving as a storage case for the templates and crayons, serves as a work area for coloring. The holder functions by placing a piece of paper over the template and inserting both under a plastic frame. The frame holds all items in place and by rubbing a

crayon over the paper an outline of the desired picture is obtained. With the outline established the template may be removed and the child may color the picture. Both items are identical in nature with the only difference being in design sketches. The “Cyborg Body Works” contains various templates representing robotic like figures and the “Fashion Designer Portfolio Drawing Set” comprises illustrations depicting female figures in various wardrobe.

ISSUE:

What is the classification of the “Cyborg Body Works” and “Fashion Designer Portfolio Drawing Set” under the HTSUS.

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that most goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
3926.90	Other:
3926.90.98	Other
9017	Drawing, marking-out or mathematical calculating instruments (for example, drafting machines, pantographs, protractors, drawing sets, slide rules, disc calculators); instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, calipers), not specified or included elsewhere in this chapter; parts and accessories thereof:
9017.20	Other drawing, marking-out or mathematical calculating instruments:
9017.20.80	Other
9503	Other toys; reduced-size (“scale”) models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof:
9503.90.00	Other

The issue before us is whether the “Cyborg Body Works” and “Fashion Designer Portfolio Drawing Set” are classifiable within heading 9503, HTSUS as other toys, or whether they are classifiable as sets elsewhere. Articles of Chapter 95, HTSUS, are not classifiable in Chapter 39, or 90, HTSUS. See Note 2(v), Chapter 39 and Note 1(k), Chapter 90.

The term “toy” is not defined in the HTSUS. In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the

scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. *See* T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The General EN for Chapter 95 states that the “Chapter covers toys of all kinds whether designed for the amusement of children or adults.” The U.S. Court of International Trade (CIT) construes heading 9503, HTSUS, as a “principal use” provision, insofar as it pertains to “toys.” *See Minnetonka Brands v. United States*, 110 F. Supp. 2d 1020, 1026 (CIT 2000). Thus, to be a toy, the “character of amusement involved [is] that derived from an item which is essentially a plaything.” *Wilson’s Customs Clearance, Inc. v. United States*, 59 Cust. Ct. 36, C.D. 3061 (1967). It has been CBP’s position that the amusement requirement means that toys should be designed and used principally for amusement.

For articles governed by principal use, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that, in the absence of special language or context which otherwise requires, such 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.” In other words, the article’s principal use at the time of importation determines whether it is classifiable within a particular class or kind.

While Additional U.S. Rule of Interpretation 1(a), HTSUS, provides general criteria for discerning the principal use of an article, it does not provide specific criteria for individual tariff provisions. However, the CIT has provided factors which are indicative but not conclusive, to apply when determining whether merchandise falls within a particular class or kind. They include: general physical characteristics, the expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. *See United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), cert. denied, 429 U.S. 979 (hereinafter *Carborundum*).

For articles that are both amusing and functional, we look to *Ideal Toy Corp. v. United States*, 78 Cust. Ct. 28 (1977), in which the court stated that “when amusement and utility become locked in controversy, the question becomes one of determining whether amusement is incidental to the utilitarian purpose, or whether the utility purpose is incidental to the amusement.” Drawing and coloring are activities capable of providing amusement, but the ENs exclude from heading 9503, HTSUS, many articles that are used in drawing, coloring and other art activities. EN 95.03 states, in part, that heading 9503 excludes:

- (a) Paints put up for children’s use (heading 32.13).
- (b) Modelling pastes put up for children’s amusement (heading 34.07).
- (c) Children’s picture, drawing or colouring books of heading 49.03.
- (d) Transfers (heading 49.08).
- ...
- (h) Crayons and pastels for children’s use, of heading 96.09.
- (i) Slates and blackboards, of heading 96.10.

These exclusions provide that articles and sets comprised of articles used for drawing or coloring are not classifiable as toys or as toy sets (classified according to GRI 1 under subheading 9503.70.00). The fact that the drafters of the Harmonized System upon which the US tariff schedule is based provided for the above-listed articles *eo nomine* in headings other than heading 9503, HTSUS, evinces an intent by the drafters that they not be considered toys. To that end, CBP has long construed the scope of heading 9503, HTSUS, to exclude such articles and sets. In HQ 085267, dated May 9, 1990, CBP found that, with respect to the above items listed in the ENs, “[a]lthough they may tend to amuse those who use them, such amusement is incidental to their primary purpose.” That is, not all merchandise that provides amusement is properly classified in a toy provision. The listed items were further described as having primarily a drawing and craft function.

CBP has never considered writing, coloring, drawing or painting to have significant “manipulative play value,” for purposes of classification as a toy. Nor does CBP classify the tools for writing, coloring, drawing or painting as toys since those tools are not designed to amuse. *See* HQ 966198, dated July 21, 2003 (ruling that a plastic stencil depicting a farm and farm animals is not a toy but a stencil designed to create tracings of a farm and farm animals); HQ 959189, dated September 25, 1996 (plastic stencils were designed primarily to make decorations, not to provide amusement); HQ 958063, dated February 13, 1996 (classifying a battery-operated drawing pad with pen for children as a drawing instrument of heading 9017 and not a toy because it was designed to facilitate drawing, not to amuse); HQ 953922, dated November 17, 1993 (classifying the “Video Painter” and “Design Studio Accessory Kit,” which included several stencils under heading 9017 for the same reason); HQ 962327, dated June 23, 2000, (articles in an art activity set were not put up in a form indicating their use as toys and thus the set was not classifiable as a toy set at GRI 1, and the individual items were not classifiable as toys, including a stencil); HQ 958152, dated April 2, 1996 (classifying light-up desk with designs for tracing as a drawing instrument) and HQ 958805, dated February 8, 1996 (classifying “Trace N’ Color” in heading 9017).

The activity performed with the rubbing template is similar to that performed with a stencil or by tracing. It involves following a design pattern to create a design which can be then colored.

The amusement derived from art-related activities is secondary to utility because those articles and sets used for drawing, coloring and other art-related activities are not “essentially playthings.” The articles are not designed to amuse, but “rather are designed to facilitate some kind of art or drawing activity.” *See* HQ 962327, *supra*. We have stated that exceptions may exist where the activity achieved from a set is role-play, such as playing fashion designer.

For purposes of determining whether the rubbing template falls within the class or kind of merchandise as toys, we apply the Carborundum factors as follows:

The general physical characteristics of the “Cyborg Body Works” and “Fashion Designer Portfolio Drawing Set” is a plastic rubbing template with a raised design to be placed under paper in a frame and used for creating designs with crayons or pencils.

The expectation of the ultimate purchaser is to create the designs on the rubbing templates by using crayons and pencils.

We do not have information regarding the channels of trade.

We do not have any information regarding the environment of sale (accompanying accessories, manner of advertisement and display).

The use is not the same as toys because the use is creating designs by use of the rubbing template.

The economic practicality of using the articles for the creation of designs is clear, and it is unlikely any other use is recognized by the trade.

The foregoing application of the Carborundum criteria indicates that the “Cyborg Body Works” and “Fashion Designer Portfolio Drawing Set” are not goods of a kind designed for amusement, and therefore the principal use of the articles is not amusement, and they are not classified in heading 9503, HTSUS.

The subheading EN for subheading 9503.70 provides:

Subject to substantiated classification in heading 95.03 and for the purpose of this subheading:

- (i) “Sets” are two or more different types of articles (principally for amusement), put up in the same packing for retail sale without repacking. Simple accessories or objects of minor importance intended to facilitate the use of the articles may also be included.
- (ii) “Outfits” are two or more different articles put up in the same packing for retail sale without repacking, specific to a particular type of recreation, work, person or profession.

The subheading EN is subject to substantiated classification in heading 95.03. In this case, because the articles within the set consist of articles for art-related activities, articles excluded from heading 9503, HTSUS, classification in the heading has not been substantiated.

In HQ 952413, dated February 17, 1993, we had concluded that similar rubbing templates, were similar in character to the stencils in a “Stencils and Pencils” set that had been classified as a toy as opposed to a drawing instrument, in HQ 950926, dated March 31, 1992. HQ 966197, dated July 21, 2003, revoked HQ 950926, concluding that the subject set was not designed for amusement, but had the essential character of the stencil, a drawing instrument, classified in heading 9017, HTSUS.

With respect to the rubbing templates, we do not find they are classified in heading 9017, HTSUS. The ENs to heading 9017, include among drawing instruments 1) pantographs and eidographs, 2) drafting machines, 3) drawing compasses, dividers, reduction compasses, spring bows, mathematical drawing pens, dotting wheels, etc., 4) set squares, adjustable squares, T squares, drawing curves, rulers, 5) protractors, and 6) stencils. In HQ 952413, *supra*, we stated that templates and stencils have similar definitions, however in that case found that the subject rubbing templates did not “precisely” fit the definition of a template. In HQ 952413, a “template” was defined as “a pattern, mold, or the like, usually consisting of a thin plate of wood or metal, serving as a gauge or guide in mechanical work.” We find that the rubbing templates at issue do not fit the definition of the type of

template that is similar to a stencil, and are not described in heading 9017, HTSUS.

We find that the rubbing templates within the “Cyborg Body Works” and “Fashion Designer Portfolio Drawing Set” are classified in heading 3926, HTSUS, specifically in subheading 3926.90.98, HTSUS, as “[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other.”

No single heading covers the “Cyborg Body Works” and “Fashion Designer Portfolio Drawing Set” which consist of several different articles, therefore classification must be accomplished by other than GRI 1. Goods that are, *prima facie*, classifiable under two or more headings, are classifiable in accordance with GRI 3. GRI 3(a) states in part that when two or more headings each refer to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific, even if one heading gives a more precise description of the goods.

GRI 3(b) states, in relevant part, that goods put up in sets for retail sale shall be classified as if consisting of the material or component which gives them their essential character, insofar as this criterion is applicable. Explanatory Note (X) to GRI 3(b), on p. 5 (2002) states that for purposes of Rule 3(b) the term “goods put up in sets for retail sale” means goods which: (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings; (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and, (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

Each of the subject articles consist of 12 double-sided plastic rubbing templates, 12 colored pencils, 2 crayons, paper, and a plastic holder. The items are *prima facie* classifiable in more than two different headings. The items packaged together, consist of articles put up together to carry out the specific activity of creating images on paper. The articles are put up in a manner suitable for sale directly to users without repacking. Therefore the kits in question are within the term “goods put up in sets for retail sale.” GRI 3(b) states in part that goods put up in sets for retail sale, which cannot be classified by reference to 3(a), are to be classified as if they consisted of the component which gives them their essential character.

The factor or factors which determine essential character will vary with the goods. EN Rule 3(b)(VIII) lists as factors the nature of the material or component, their bulk, quantity, weight or value, and the role of a constituent material in relation to the use of the goods. In this case, we find that the rubbing templates, for purposes of GRI 3(b), impart the essential character of the sets because they provide the designs to be drawn, the motif, and comprise the bulk of the set. *See* EN VIII, GRI 3(b); *see also* Better Home Plastics Corp. v. U.S., 916 F. Supp. 1265 (CIT 1996), *aff'd* 119 F.3d 969 (Fed. Cir. 1997).

Because the rubbing templates impart the essential character of the “Cyborg Body Works” and “Fashion Designer Portfolio Drawing Set” sets, they control the classification of the set. The rubbing templates are articles made of plastics. Articles of plastics are classified in Chapter 39, HTSUS. As no specific heading in Chapter 39 describes these articles, the rubbing templates are classified in heading 3926, HTSUS, specifically in subheading 3926.90.98, HTSUS, as “[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other.” The plastic rubbing tem-

plates are consistent with the plastic articles listed in the EN 39.26(12), such as “beads . . . , figures and letters.”

HOLDING:

By application of GRI 3(b), the “Cyborg Body Works” and “Fashion Designer Portfolio Drawing Set” are each classified in heading 3926, specifically subheading 3926.90.9880, HTSUSA, as “[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other,” with a column one, general duty rate of 5.3% *ad valorem*. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at www.usitc.gov/tata/hts/.

EFFECT ON OTHER RULINGS:

NY 885655, dated June 4, 1993 is hereby revoked.

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

[ATTACHMENT I]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967796
CLA-2-RR:CTF:TCM 967796 IOR
CATEGORY: Classification
Tariff No. 3926.90.9880

KATE MILLER
LADDERS TO LEARNING, INC.
Box 1498
Almonte, Ontario
CANADA K0A 1A0

Re: Rubbing Templates; NY G88117; modified

DEAR MS. MILLER:

On March 27, 2001, this office issued to you New York (NY) G8817, classifying various products which were components of a children’s “reading activity kit” identified as “One Gray Mouse,” under the Harmonized Tariff Schedule of the United States (HTSUS). One of the products, a plastic rubbing template, was classified as a toy under subheading 9503.90.00, HTSUS. We have reconsidered NY G88117 and have determined the classification of the rubbing template to be incorrect.

FACTS:

In NY G88117, the rubbing template was described as a “Terrific Tracks Rubbing Plate,” a plastic template to be used with pencils, crayons or the like to make rubbings depicting animal tracks.

ISSUE:

What is the classification of the “Terrific Tracks Rubbing Plate” under the HTSUS.

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that most goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
3926.90	Other:
3926.90.98	Other
9017	Drawing, marking-out or mathematical calculating instruments (for example, drafting machines, pantographs, protractors, drawing sets, slide rules, disc calculators); instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, calipers), not specified or included elsewhere in this chapter; parts and accessories thereof:
9017.20	Other drawing, marking-out or mathematical calculating instruments:
9017.20.80	Other
9503	Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof:
9503.90.00	Other

The issue before us is whether the subject rubbing template is a toy. Articles of Chapter 95, HTSUS, are not classifiable in Chapter 39, or 90, HTSUS. *See* Note 2(v), Chapter 39 and Note 1(k), Chapter 90. The term "toy" is not defined in the HTSUS. In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. *See* T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The General EN for Chapter 95 states that the "Chapter covers toys of all kinds whether designed for the amusement of children or adults." The U.S. Court of International Trade (CIT) construes heading 9503, HTSUS, as a "principal use" provision, insofar as it pertains to "toys." *See Minnetonka Brands v. United States*, 110 F. Supp. 2d 1020, 1026 (CIT 2000). Thus, to be a toy, the "character of amusement involved [is] that derived from an item which is essentially a plaything." *Wilson's Customs Clearance, Inc. v. United States*, 59 Cust. Ct. 36, C.D. 3061 (1967). It has been CBP's position that the amusement requirement means that toys should be designed and used principally for amusement.

For articles governed by principal use, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that, in the absence of special language or context which otherwise requires, such 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.” In other words, the article’s principal use at the time of importation determines whether it is classifiable within a particular class or kind.

While Additional U.S. Rule of Interpretation 1(a), HTSUS, provides general criteria for discerning the principal use of an article, it does not provide specific criteria for individual tariff provisions. However, the CIT has provided factors which are indicative but not conclusive, to apply when determining whether merchandise falls within a particular class or kind. They include: general physical characteristics, the expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. *See United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), cert. denied, 429 U.S. 979 (hereinafter *Carborundum*).

For articles that are both amusing and functional, we look to *Ideal Toy Corp. v United States*, 78 Cust. Ct. 28 (1977), in which the court stated that “when amusement and utility become locked in controversy, the question becomes one of determining whether amusement is incidental to the utilitarian purpose, or whether the utility purpose is incidental to the amusement.” Drawing and coloring are activities capable of providing amusement, but the ENs exclude from heading 9503, HTSUS, many articles that are used in drawing, coloring and other art activities. EN 95.03 states, in part, that heading 9503 excludes:

- (a) Paints put up for children’s use (heading 32.13).
- (b) Modelling pastes put up for children’s amusement (heading 34.07).
- (c) Children’s picture, drawing or colouring books of heading 49.03.
- (d) Transfers (heading 49.08).
- ...
- (h) Crayons and pastels for children’s use, of heading 96.09.
- (ij) Slates and blackboards, of heading 96.10.

These exclusions provide that articles and sets comprised of articles used for drawing or coloring are not classifiable as toys or as toy sets (classified according to GRI 1 under subheading 9503.70.00). The fact that the drafters of the Harmonized System upon which the US tariff schedule is based provided for the above-listed articles *eo nomine* in headings other than heading 9503, HTSUS, evinces an intent by the drafters that they not be considered toys. To that end, CBP has long construed the scope of heading 9503, HTSUS, to exclude such articles and sets. In HQ 085267, dated May 9, 1990, CBP found that, with respect to the above items listed in the ENs, “[a]lthough they may tend to amuse those who use them, such amusement is incidental to their primary purpose.” That is, not all merchandise that provides amusement is properly classified in a toy provision. The listed items were further described as having primarily a drawing and craft function.

CBP has never considered writing, coloring, drawing or painting to have significant “manipulative play value,” for purposes of classification as a toy. Nor does CBP classify the tools for writing, coloring, drawing or painting as toys since those tools are not designed to amuse. *See* HQ 966198, dated July 21, 2003 (ruling that a plastic stencil depicting a farm and farm animals is not a toy but a stencil designed to create tracings of a farm and farm animals); HQ 959189, dated September 25, 1996 (plastic stencils were designed primarily to make decorations, not to provide amusement); HQ 958063, dated February 13, 1996 (classifying a battery-operated drawing pad with pen for children as a drawing instrument of heading 9017 and not a toy because it was designed to facilitate drawing, not to amuse); HQ 953922, dated November 17, 1993 (classifying the “Video Painter” and “Design Studio Accessory Kit,” which included several stencils under heading 9017 for the same reason); HQ 962327, dated June 23, 2000, (articles in an art activity set were not put up in a form indicating their use as toys and thus the set was not classifiable as a toy set at GRI 1, and the individual items were not classifiable as toys, including a stencil); HQ 958152, dated April 2, 1996 (classifying light-up desk with designs for tracing as a drawing instrument) and HQ 958805, dated February 8, 1996 (classifying “Trace N’ Color” in heading 9017).

The activity performed with the rubbing template is similar to that performed with a stencil or by tracing. It involves following a design pattern to create a design which can be then colored.

The amusement derived from art-related activities is secondary to utility because those articles and sets used for drawing, coloring and other art-related activities are not “essentially playthings.” The articles are not designed to amuse, but “rather are designed to facilitate some kind of art or drawing activity.” *See* HQ 962327, *supra*. Exceptions may exist where the activity achieved from a set is role-play, such as playing fashion designer.

For purposes of determining whether the rubbing template falls within the class or kind of merchandise as toys, we apply the Carborundum factors as follows:

The general physical characteristics of a rubbing template is plastic with a raised design to be used for creating designs with crayons or pencils.

The expectation of the ultimate purchaser is to create the designs on the rubbing templates by using crayons and pencils.

We do not have information regarding the channels of trade.

We do not have any information regarding the environment of sale (accompanying accessories, manner of advertisement and display).

The use is not the same as toys because the use is creating designs by use of the rubbing template.

The economic practicality of using the template for the creation of designs is clear, and it is unlikely any other use is recognized by the trade.

The foregoing application of the Carborundum criteria indicates that the rubbing template is not a good of a kind designed for amusement, and therefore the principal use of the rubbing template is not amusement, and the rubbing template is not classified in heading 9503, HTSUS.

In HQ 952413, dated February 17, 1993, we had concluded that similar rubbing templates therein, were similar in character to a “Stencils and Pencils” set that had been classified as a toy as opposed to a drawing instrument, in HQ 950926, dated March 31, 1992. HQ 966197, dated July 21, 2003, revoked HQ 950926, concluding that the subject set was not designed for amusement, but had the essential character of the stencil, a drawing instrument, classified in heading 9017, HTSUS.

With respect to the rubbing template, we do not find it is classified in heading 9017, HTSUS. The ENs to heading 9017, include among drawing instruments 1) pantographs and eidographs, 2) drafting machines, 3) drawing compasses, dividers, reduction compasses, spring bows, mathematical drawing pens, dotting wheels, etc., 4) set squares, adjustable squares, T squares, drawing curves, rulers, 5) protractors, and 6) stencils. In HQ 952413, *supra*, we stated that templates and stencils have similar definitions, however in that case found that the subject rubbing templates did not “precisely” fit the definition of a template. In HQ 952413, a “template” was defined as “a pattern, mold, or the like, usually consisting of a thin plate of wood or metal, serving as a gauge or guide in mechanical work.” We find that the rubbing template at issue does not fit the definition of the type of template that is similar to a stencil, and is not described in heading 9017, HTSUS.

The “Terrific Tracks Rubbing Plate,” rubbing template is an article made of plastics. Articles of plastics are classified in Chapter 39, HTSUS. As no specific heading in Chapter 39 describes this article, the “Terrific Tracks Rubbing Plate” rubbing template is classified in heading 3926, HTSUS, specifically in subheading 3926.90.98, HTSUS, as “[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other.” The plastic rubbing template is consistent with the plastic articles listed in the EN 39.26(12), such as “beads . . . , figures and letters.”

HOLDING:

By application of GRI 1 the “Terrific Tracks Rubbing Plate,” rubbing template is classified in heading 3926, specifically in subheading 3926.90.9880, HTSUSA, as “[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other,” with a column one, general duty rate of 5.3% *ad valorem*. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at www.usitc.gov/tata/hts/.

EFFECT ON OTHER RULINGS:

NY G88117, dated March 27, 2001, is hereby modified.

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

[ATTACHMENT J]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967799
CLA-2-RR:CTF:TCM 967799 IOR
CATEGORY: Classification
Tariff No. 3926.90.9880

FRED SHAPIRO
FASCO (USA) LTD.
39 E. Hanover Avenue
Morris Plains, NJ 07950

Re: Rubbing Templates; NY 811162; modified

DEAR MR. SHAPIRO:

On June 20, 1995, the Director, National Commodity Specialist Division issued to you New York Ruling Letter (NY) 811162, classifying various products under the Harmonized Tariff Schedule of the United States (HTSUS). One of the products, a "Polly Pocket Crayon By Number Activity Caddy," was classified as a toy under subheading 9503.90.00, HTSUS. We have reconsidered NY 811162 and have determined the classification of the "Polly Pocket Crayon By Number Activity Caddy," to be incorrect.

FACTS:

In NY 811162, the "Polly Pocket Crayon By Number Activity Caddy," was described as follows:

The article consists of 6 double sided plastic plates, 8 crayons, one plastic caddy, a blank paper roll and 2 printed paper rolls. The plastic plates, or "rubbing plates" as they are called, measure 4 3/4 inches by 4 inches and have various raised scenic designs. The plastic caddy measures 11 1/2 by 7 1/2 inches. It serves as a work area and storage container for the plates, crayons and paper rolls. The caddy is specially constructed to hold the blank paper rolls and plates in place. To operate, the child inserts a "rubbing plate" in the frame portion of the caddy, unwinds a blank piece of paper over the "rubbing plate" and closes the plastic frame. The frame holds all items in place and by rubbing a crayon over the paper an outline of the desired picture is obtained. With the outline established the plate may be removed and the child may color the picture.

ISSUE:

What is the classification of the "Polly Pocket Crayon By Number Activity Caddy" under the HTSUS.

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that most goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

- 3926 Other articles of plastics and articles of other materials of headings 3901 to 3914:
- 3926.90 Other:
- 3926.90.98 Other
- 9017 Drawing, marking-out or mathematical calculating instruments (for example, drafting machines, pantographs, protractors, drawing sets, slide rules, disc calculators); instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, calipers), not specified or included elsewhere in this chapter; parts and accessories thereof:
- 9017.20 Other drawing, marking-out or mathematical calculating instruments:
- 9017.20.80 Other
- 9503 Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof:
- 9503.90.00 Other

The issue before us is whether the "Polly Pocket Crayon By Number Activity Caddy" is classifiable within heading 9503, HTSUS as other toys, or whether it is classifiable as sets elsewhere. Articles of Chapter 95, HTSUS, are not classifiable in Chapter 39, or 90, HTSUS. See Note 2(v), Chapter 39 and Note 1(k), Chapter 90.

The term "toy" is not defined in the HTSUS. In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The General EN for Chapter 95 states that the "Chapter covers toys of all kinds whether designed for the amusement of children or adults." The U.S. Court of International Trade (CIT) construes heading 9503, HTSUS, as a "principal use" provision, insofar as it pertains to "toys." See Minnetonka Brands v. United States, 110 F. Supp. 2d 1020, 1026 (CIT 2000). Thus, to be a toy, the "character of amusement involved [is] that derived from an item which is essentially a plaything." Wilson's Customs Clearance, Inc. v. United States, 59 Cust. Ct. 36, C.D. 3061 (1967). It has been CBP's position that the amusement requirement means that toys should be designed and used principally for amusement.

For articles governed by principal use, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that, in the absence of special language or context which otherwise requires, such 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." In other words, the article's

principal use at the time of importation determines whether it is classifiable within a particular class or kind.

While Additional U.S. Rule of Interpretation 1(a), HTSUS, provides general criteria for discerning the principal use of an article, it does not provide specific criteria for individual tariff provisions. However, the CIT has provided factors which are indicative but not conclusive, to apply when determining whether merchandise falls within a particular class or kind. They include: general physical characteristics, the expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. *See United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), cert. denied, 429 U.S. 979 (hereinafter *Carborundum*).

For articles that are both amusing and functional, we look to *Ideal Toy Corp. v United States*, 78 Cust. Ct. 28 (1977), in which the court stated that “when amusement and utility become locked in controversy, the question becomes one of determining whether amusement is incidental to the utilitarian purpose, or whether the utility purpose is incidental to the amusement.” Drawing and coloring are activities capable of providing amusement, but the ENs exclude from heading 9503, HTSUS, many articles that are used in drawing, coloring and other art activities. EN 95.03 states, in part, that heading 9503 excludes:

- (a) Paints put up for children’s use (heading 32.13).
- (b) Modelling pastes put up for children’s amusement (heading 34.07).
- (c) Children’s picture, drawing or colouring books of heading 49.03.
- (d) Transfers (heading 49.08).
- ...
- (h) Crayons and pastels for children’s use, of heading 96.09.
- (i) Slates and blackboards, of heading 96.10.

These exclusions provide that articles and sets comprised of articles used for drawing or coloring are not classifiable as toys or as toy sets (classified according to GRI 1 under subheading 9503.70.00). The fact that the drafters of the Harmonized System upon which the U.S. tariff schedule is based provided for the above-listed articles *eo nomine* in headings other than heading 9503, HTSUS, evinces an intent by the drafters that they not be considered toys. To that end, CBP has long construed the scope of heading 9503, HTSUS, to exclude such articles and sets. In HQ 085267, dated May 9, 1990, CBP found that, with respect to the above items listed in the ENs, “[a]lthough they may tend to amuse those who use them, such amusement is incidental to their primary purpose.” That is, not all merchandise that provides amusement is properly classified in a toy provision. The listed items were further described as having primarily a drawing and craft function.

CBP has never considered writing, coloring, drawing or painting to have significant “manipulative play value,” for purposes of classification as a toy. Nor does CBP classify the tools for writing, coloring, drawing or painting as toys since those tools are not designed to amuse. *See* HQ 966198, dated July 21, 2003 (ruling that a plastic stencil depicting a farm and farm animals is not a toy but a stencil designed to create tracings of a farm and farm ani-

mals); HQ 959189, dated September 25, 1996 (plastic stencils were designed primarily to make decorations, not to provide amusement); HQ 958063, dated February 13, 1996 (classifying a battery-operated drawing pad with pen for children as a drawing instrument of heading 9017 and not a toy because it was designed to facilitate drawing, not to amuse); HQ 953922, dated November 17, 1993 (classifying the "Video Painter" and "Design Studio Accessory Kit," which included several stencils under heading 9017 for the same reason); HQ 962327, dated June 23, 2000, (determining that articles in an art activity set were not put up in a form indicating their use as toys and thus the set was not classifiable as a toy set at GRI 1, and the individual items were not classifiable as toys, including a stencil); HQ 958152, dated April 2, 1996 (classifying light-up desk with designs for tracing as a drawing instrument) and HQ 958805, dated February 8, 1996 (classifying "Trace N' Color" in heading 9017).

The activity performed with the rubbing template is similar to that performed with a stencil or by tracing. It involves following a design pattern to create a design which can be then colored.

The amusement derived from art-related activities is secondary to utility because those articles and sets used for drawing, coloring and other art-related activities are not "essentially playthings." The articles are not designed to amuse, but "rather are designed to facilitate some kind of art or drawing activity." See HQ 962327, *supra*. We have stated that exceptions may exist where the activity achieved from a set is role-play, such as playing fashion designer.

For purposes of determining whether the "Polly Pocket Crayon By Number Activity Caddy" falls within the class or kind of merchandise as toys, we apply the Carborundum factors as follows:

The general physical characteristics of the "Polly Pocket Crayon By Number Activity Caddy" is a plastic rubbing template with a raised design to be placed under paper in a frame and used for creating designs with crayons.

The expectation of the ultimate purchaser is to create the designs on the rubbing templates by using crayons and pencils.

We do not have information regarding the channels of trade.

We do not have any information regarding the environment of sale (accompanying accessories, manner of advertisement and display).

The use is not the same as toys because the use is creating designs by use of the rubbing template.

The economic practicality of using the articles for the creation of designs is clear, and it is unlikely any other use is recognized by the trade.

The foregoing application of the Carborundum criteria indicates that the "Polly Pocket Crayon By Number Activity Caddy" is not a good of a kind designed for amusement, and therefore the principal use of the "Polly Pocket Crayon By Number Activity Caddy" is not amusement, and it is not classified in heading 9503, HTSUS.

The subheading EN for subheading 9503.70 provides:

Subject to substantiated classification in heading 95.03 and for the purpose of this subheading:

- (i) "Sets" are two or more different types of articles (principally for amusement), put up in the same packing for retail sale without repacking. Simple accessories or objects of minor importance intended to facilitate the use of the articles may also be included.
- (ii) "Outfits" are two or more different articles put up in the same packing for retail sale without repacking, specific to a particular type of recreation, work, person or profession.

The subheading EN is subject to substantiated classification in heading 95.03. In this case, because the articles within the set consist of articles for art-related activities, articles excluded from heading 9503, HTSUS, classification in the heading has not been substantiated.

In HQ 952413, dated February 17, 1993, we had concluded that similar rubbing templates therein, were similar in character to a "Stencils and Pencils" set that had been classified as a toy as opposed to a drawing instrument, in HQ 950926, dated March 31, 1992. HQ 966197, dated July 21, 2003, revoked HQ 950926, concluding that the subject set was not designed for amusement, but had the essential character of the stencil, a drawing instrument, classified in heading 9017, HTSUS.

With respect to the rubbing templates, we do not find they are classified in heading 9017, HTSUS. The ENs to heading 9017, include among drawing instruments 1) pantographs and eidographs, 2) drafting machines, 3) drawing compasses, dividers, reduction compasses, spring bows, mathematical drawing pens, dotting wheels, etc., 4) set squares, adjustable squares, T squares, drawing curves, rulers, 5) protractors, and 6) stencils. In HQ 952413, *supra*, we stated that templates and stencils have similar definitions, however in that case found that the subject rubbing templates did not "precisely" fit the definition of a template. In HQ 952413, a "template" was defined as "a pattern, mold, or the like, usually consisting of a thin plate of wood or metal, serving as a gauge or guide in mechanical work." We find that the rubbing templates at issue do not fit the definition of the type of template that is similar to a stencil, and are not described in heading 9017, HTSUS.

We find that the rubbing templates are classified in heading 3926, HTSUS, specifically in subheading 3926.90.98, HTSUS, as "[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other."

No single heading covers the subject "Polly Pocket Crayon By Number Activity Caddy" which consists of several different articles, therefore classification must be accomplished by other than GRI 1. Goods that are, *prima facie*, classifiable under two or more headings, are classifiable in accordance with GRI 3. GRI 3(a) states in part that when two or more headings each refer to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific, even if one heading gives a more precise description of the goods.

GRI 3(b) states, in relevant part, that goods put up in sets for retail sale shall be classified as if consisting of the material or component which gives them their essential character, insofar as this criterion is applicable. Explanatory Note (X) to GRI 3(b), on p. 5 (2002) states that for purposes of Rule 3(b) the term "goods put up in sets for retail sale" means goods which: (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings; (b) consist of products or articles put up together

to meet a particular need or carry out a specific activity; and, (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

The subject merchandise consists of 6 plastic double sided rubbing templates, 8 crayons, a plastic frame/caddy, a blank paper roll and 2 printed paper rolls. The items are *prima facie* classifiable in more than two different headings. The items packaged together, consist of articles put up together to carry out the specific activity of creating images on paper. The articles are put up in a manner suitable for sale directly to users without repacking. Therefore the kit in question is within the term “goods put up in sets for retail sale.” GRI 3(b) states in part that goods put up in sets for retail sale, which cannot be classified by reference to 3(a), are to be classified as if they consisted of the component which gives them their essential character.

The factor or factors which determine essential character will vary with the goods. EN Rule 3(b)(VIII) lists as factors the nature of the material or component, their bulk, quantity, weight or value, and the role of a constituent material in relation to the use of the goods. In this case, we find that the rubbing templates, for purposes of GRI 3(b), impart the essential character of the set as they provide the designs to be drawn, and the motif of the set. See EN VIII, GRI 3(b); see also *Better Home Plastics Corp. v. U.S.*, 916 F. Supp. 1265 (CIT 1996), *aff'd* 119 F. 3d 969 (Fed. Cir. 1997).

Because the rubbing templates impart the essential character of the “Polly Pocket Crayon By Number Activity Caddy” set, they control the classification of the set. The rubbing templates are articles made of plastics. Articles of plastics are classified in Chapter 39, HTSUS. As no specific heading in Chapter 39 describes these articles, the rubbing templates are classified in heading 3926, HTSUS, specifically in subheading 3926.90.98, HTSUS, as “[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other.” The plastic rubbing templates are consistent with the plastic articles listed in the EN 39.26(12), such as “beads . . . , figures and letters.”

HOLDING:

By application of GRI 3(b) the “Polly Pocket Crayon By Number Activity Caddy” is classified in heading 3926, specifically subheading 3926.90.9880, HTSUSA, as “[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other,” with a column one, general duty rate of 5.3% *ad valorem*. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at www.usitc.gov/tata/hts/.

EFFECT ON OTHER RULINGS:

NY 811162, dated June 20, 1995, is hereby modified.

MYLES B. HARMON,
Director,

Commercial and Trade Facilitation Division.

19 CFR PART 177**WITHDRAWAL OF MODIFICATION OF RULING LETTER
AND REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF SILYMARIN (MILK
THISTLE) AND LEUCOANTHOCYANIN**

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

ACTION: Notice of withdrawal of modification of a tariff classification ruling letter and revocation of treatment relating to the classification of silymarin (milk thistle) and leucoanthocyanin.

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 CBP is withdrawing the modification and revocation of rulings concerning the tariff classification of silymarin (milk thistle) and leucoanthocyanin, under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is withdrawing its revocation of any treatment previously accorded by CBP to substantially identical transactions.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the September 28, 2005, CUSTOMS BULLETIN, Volume 39, Number 40, revoking Headquarters Ruling Letter (HQ) 964338, dated March 28, 2001, and modifying New York Ruling Letter (NY) 814027, dated February 2, 1996, and to revoke any treatment accorded to substantially identical merchandise. That notice indicated that no comments had been received in response to the proposed modification and revocation published in the June 22, 2005, CUSTOMS BULLETIN, Volume 39, Number 26. In fact, one comment was timely received by CBP, but it was not considered because it did not reach the Office of Regulations and Rulings. Hence, we are obliged to withdraw the revocation/modification, referenced above, in order to consider these timely filed comments.

FOR FURTHER INFORMATION CONTACT: Allyson Mattanah, Commercial and Trade Facilitation, (202) 572-8784.

Dated: October 26, 2005

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

