

U.S. Customs and Border Protection

General Notices

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, October 10, 2007

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

SANDRA L. BELL,
*Executive Director,
Regulations and Rulings Office of Trade.*

GENERAL NOTICE

19 CFR PART 177

REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN SINGLE MODE OPTICAL FIBERS

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

ACTION: Notice of revocation of treatment relating to the tariff classification of certain single mode optical fibers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is **revoking treatment** accorded to transactions of the importer identified in proposed HQ W968251, concerning the classification of single mode (SM) optical fibers under the Harmonized Tariff Sched-

ule of the United States (HTSUS). CBP also revokes any other treatment that it has previously accorded to substantially identical transactions of other importers. Notice of this proposed action was published in the Customs Bulletin, Vol. 40, No. 30, on July 19, 2006. Two comments were received in response to the notice. Based on one of those comments, we have enhanced our analysis of the basis for the correct classification of the subject merchandise.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 23, 2007.

FOR FURTHER INFORMATION CONTACT: Emily M. Simon, Tariff Classification and Marking Branch, at (202) 572-8867.

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)(2), Tariff Act of 1930 (19 U.S.C. §1625(c)(2)), as amended by section 623 of Title VI, a notice was published in the Customs Bulletin, Vol. 40, No. 30, on July 19, 2006, proposing to revoke treatment relating to transactions of the importer identified in proposed HQ W968251, concerning the classification of single mode (SM) optical fibers. Two comments were received in response to the notice. These comments are addressed in HQ W968251, which is attachment A. As stated in the notice of July 19, 2006, this revocation will revoke any other treatment previously accorded by CBP to substantially identical transactions. Any person in-

volved in substantially identical transactions should have advised CBP during the notice period. An importer's failure to advise CBP of substantially identical transactions may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this final decision.

Similarly, under section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), this proposal covers any rulings on this merchandise which may exist but have not been identified. CBP has undertaken reasonable efforts to search existing databases for rulings on this merchandise. None have been identified. Any person 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 have advised CBP during the notice period. CBP has not received any comments that identify interpretive rulings or decisions on this merchandise.

Pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded to a person relating to the transactions identified in HQ W968251 to reflect the proper tariff classification of the merchandise under heading 9001, HTSUS, specifically in sub-heading 9001.10.0030, HTSUS, which provides for optical fibers, optical fiber bundles and cables other than those of heading 8544. CBP is revoking the treatment concerning the classification of certain single mode (SM) optical fibers to reflect the proper classification of the goods pursuant to the analysis in HQ W968251, which is set forth as the Attachment to this document. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any other treatment it has previously accorded to any other substantially identical transactions.

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

DATED: October 3, 2007

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

Attachment

DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
HQ W968251
October 3, 2007
CLA-2 OT:RR:CTF:TCM W968251 EMS
CATEGORY: Classification
TARIFF NO.: 9001.10.0030

MR. JASON M. WAITE, ESQ.
601 Pennsylvania Avenue, N.W.
North Building, 10th Floor
Washington, D.C. 20004-2601

RE: Revocation of Treatment; Single Mode (SM) Optical Fibers

DEAR MR. WAITE:

This is in response to your letter of May 4, 2005, on behalf of OFS Fitel LLC, concerning the classification of certain single mode (SM) optical fibers under the Harmonized Tariff Schedule of the United States (HTSUS).

You contend that this merchandise has been imported by your client exclusively through the Atlanta Service Port over an extended period of time under the provision for optical fiber cables made up of individually sheathed fibers, in subheading 8544.70.0000, HTSUS, and that the entries were uniformly liquidated under this provision. Thus, in your opinion, a treatment for these goods exists with respect to your client's transactions and it cannot be modified or revoked except upon compliance with 19 U.S.C. § 1625(c)(2) and section 177.12(c)(2)(i), Customs and Border Protection (CBP) Regulations (19 C.F.R. § 177.12(c)(2)(i)).

CBP believes that any treatment that may exist with respect to your client's transactions, is in error and we are hereby revoking it. Pursuant to section 625(c), Tariff Act of 1930, (19 U.S.C. § 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation was published on July 19, 2006, in Volume 40, Number 30 of the Customs Bulletin. Two comments were received in response, and each one is addressed below.

FACTS:

The merchandise, individually sheathed single mode (SM) optical fibers, is used in long-distance telephony and cable television applications for voice and data transmissions. The merchandise consists of a glass core, which carries most of the light, surrounded by a glass cladding, which bends the light and confines it to the core. The whole is then covered by both a primary and secondary protective coating of acrylate or vinyl plastic. The acrylate coatings have a combined thickness of approximately 60 microns.

A Notice of Action (CBP Form 29) issued by the Atlanta Service Port (the Port) to OFS Fitel LLC on December 23, 2002, informed the company that the correct classification for its SM optical fibers was "HTSUS 8544.70.0000 @ Free rather than HTSUS 9001.10.0030 @ 6.7%." The notice instructed the company to classify future entries of SM optical fibers accordingly. Subsequently, another Notice of Action was issued to OFS Fitel on March 25, 2005, proposing to rate advance an entry of SM optical fiber cables entered

under subheading 8544.70.0000, HTSUS, because this classification was incorrect and the correct classification for optical fibers was under “HTS9001.10.00/6.7%.” In response, OFS Fitel submitted a letter to the Port on May 4, 2005, alleging that a treatment exists for the classification of its SM optical fibers under subheading 8544.70.0000, HTSUS.

The Port has identified approximately one hundred ten (110) entries of SM optical fibers made by OFS Fitel between May 4, 2003 and May 4, 2005. All of these entries were liquidated under subheading 8544.70.0000, HTSUS. At least ninety five (95) percent of the entries are estimated to have significant value and quantity. These entries were not on bypass and none were reviewed by an import specialist. The Port confirms that OFS Fitel has not made entries of SM optical fibers at any other port.

OFS Fitel filed seven (7) protests at the Port from February 12, 2003 through and including December 5, 2003, challenging CBP’s liquidation of entries of SM optical fibers under subheading 9001.10.0030, HTSUS, as optical fibers. These protests were allowed in June, 2003, through and including May 21, 2004, under subheading 8544.70.0000, HTSUS.

The HTSUS provisions under consideration are as follows:

8544	. . . optical fiber cables, made up of individually sheathed fibers, whether or not assembled with electric conductors or fitted with connectors:
8544.70.00	Optical fiber cables * * * *
9001	Optical fibers and optical fiber bundles; . . . :
9001.10.00	Optical fibers, optical fiber bundles and cables

ISSUES:

Whether SM optical fibers are goods of heading 9001; and, whether CBP has accorded a treatment to OFS Fitel LLC for the classification of these goods under subheading 8544.70.0000, HTSUS.

LAW AND ANALYSIS:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding and, therefore not dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are thus useful in ascertaining the classification of merchandise under the Harmonized System. CBP believes the ENs should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Initially, Section XVI, Note 1(m), HTSUS, excludes from that section articles of chapter 90 while Chapter 90, Note 1(h), HTSUS, excludes optical fiber cables of heading 8544. The 85.44 ENs describe “optical fibre cables, made up of individually sheathed fibres. . . . The sheathes are usually of dif-

ferent colours to permit identification of the fibres at both ends of the cable.” The 90.01 ENs describe optical fibers as “consist[ing] of concentric layers of glass or plastics of different refractive indices. Those drawn from glass have a very thin coating of plastics, invisible to the naked eye, which renders the fibres less prone to fracture. Optical fibres are usually presented on reels and may be several kilometers in length. They are used to make optical fibre bundles and optical fibre cables.” The SM optical fibers under consideration, consisting of a glass core plus glass cladding and two coatings of acrylate plastic, conform to the 90.01 EN description for optical fibers, and are classifiable in subheading 9001.10.0030, HTSUS.

One comment was received which indicated that the description of optical fibers in the 90.01 EN, as provided above, is “a very general definition.” The commenter requested that CBP distinguish the subject merchandise from that which was at issue in HQ 962322, dated April 3, 2001. We note that the optical fiber cables described in HQ 962322 were composed of two or more strands of glass optical fibers and each fiber was individually covered in a dual acrylate polymer coating with a thickness of 60 microns and an additional color coating. CBP classified these optical fiber cables under heading 8544, HTSUS, based on its finding that the optical fiber cables were “made up of individually sheathed fibers.” It is important to note that each optical fiber cable contained a varied number of individually sheathed optical fibers grouped in buffered tubes or similar coverings, accompanied by different types of insulation, which were all contained within a particular cable’s outermost layer or jacket. In fact, the merchandise in HQ 962322 is similar to many other optical fiber cables consisting of *multiple individually sheathed optical fibers*, all of which CBP has classified in heading 8544, HTSUS. See HQs 964632, 963256, 963213, 963016, 962445, all of which are dated April 3, 2001, and were affirmed in HQ 965593, dated July 16, 2003.

The SM optical fibers imported by OFS Fitel are, by contrast, single strands of optical fibers covered in only a dual acrylate coating of 60 microns in thickness. The subject merchandise may be considered “individually sheathed,” but it is readily distinguishable from the optical fiber cables described in HQ 962322 and the other cases cited above. In all of those cases, multiple individually sheathed optical fibers and/or bundles of such optical fibers were jacketed together with other materials providing mechanical and environmental protection and optical insulation. See HQ 964996, dated December 5, 2001 and HQ 964883, dated September 14, 2001. “In these rulings [dated April 3, 2001], CBP did not address whether a single optical fiber strand covered by such coatings [dual acrylate] alone, would constitute an optical fiber cable classifiable in heading 8544, HTSUS.” HQ 964996.

To merit classification as an optical fiber cable, made up of individually sheathed fibers, in heading 8544, HTSUS, under its common and commercial definition, an optical fiber cable must consist of one or more optical fibers and additional materials, including buffers, strengthening members, and jackets for protection. See e.g. HQ 964996. OFS Fitel’s SM optical fibers consist of single strands of optical fiber covered in a dual acrylate coating. These strands are not combined with any other materials, thus precluding classification in heading 8544. See HQ 964996 (finding that in the absence of any other materials, a dual acrylate or thermoplastic coating on a single

strand of optical fiber, even to a thickness of 900 microns, is not sufficient to create a cable of heading 8544). See also HQ 964883 (finding that merchandise consisting of single strand optical fibers individually jacketed, without the inclusion or use of any other protective buffers, coatings, or strengthening materials was properly classified in heading 9001); HQ 966619, dated October 21, 2003 (finding that individually sheathed optical fibers that do not possess additional protective materials, strengtheners, or jacketing are not cables within the meaning of heading 8544). Thus, Fitel's fibers are not classifiable in heading 8544.

As to OFS Fitel's claim of treatment under subheading 8544.70.0000, HTSUS, section 177.12(c)(1), CBP Regulations (19 C.F.R. § 177.12(c)(1)), sets forth the rules for determining whether a treatment was previously accorded by CBP to substantially identical transactions of a person. These rules require, among other things, evidence to establish that there was an actual determination by a CBP officer regarding the facts and issues involved in the claimed treatment, the CBP officer who made the determination was responsible for the subject matter on which the determination was made, and over a two-year period immediately preceding the claim of treatment, CBP consistently applied that determination on a national basis as reflected in liquidations of entries or reconciliations or other CBP actions with respect to all or substantially all of that person's CBP transactions involving materially identical facts and issues.

The determination of whether the requisite treatment occurred will be made by CBP on a case-by-case basis and will involve an assessment of all relevant factors. The Port's December 23, 2002 Notice of Action is the determination by the responsible CBP officer regarding the facts and issues involved in the claimed treatment. The claim of treatment for OFS Fitel was made in a letter, dated May 4, 2005, to the Port, in response to the Port's March 25, 2005 Notice of Action proposing to rate advance the entries under subheading 9001.10.0030, HTSUS. The record confirms that in the two-year period prior to May 4, 2005, the Port consistently liquidated one hundred ten (110) entries of OFS Fitel's SM optical fibers under subheading 8544.70.0000, HTSUS, and allowed seven (7) protests filed by OFS Fitel under that subheading. Under the facts presented, CBP had previously concluded in its notice of proposed revocation, dated July 19, 2006, that under section 177.12(c), CBP Regulations, a treatment exists for the classification of OFS Fitel's SM optical fibers as optical fiber cables, in subheading 8544.70.0000, HTSUS.

In response to the proposed notice of revocation of treatment, another comment was received which argued that CBP should find that OFS Fitel was not accorded a treatment for the reasons set forth in subsection 177.12(c)(iii), CBP Regulations. The commenter's contentions are being reviewed. Regardless of whether CBP ultimately concludes that a treatment existed, CBP is issuing this decision pursuant to 19 USC 1625 (c)(2) to ensure the proper classification of SM optical fibers and other substantially similar merchandise.

HOLDING:

Under the authority of GRI 1, the single mode (SM) optical fibers are provided for in heading 9001. They are classifiable as optical fibers, optical fiber

bundles and cables, in subheading 9001.10.0030, HTSUS. Pursuant to 19 U.S.C. §1625(c)(2), any treatment previously accorded OFS Fitel LLC's importations of this merchandise, is revoked. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

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