

Bureau of Customs and Border Protection

General Notices

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

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

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

PROPOSED MODIFICATION OF A RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE CLASSIFICATION OF GREENHOUSE FILM

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

ACTION: Notice of proposed modification of a ruling letter and revocation of treatment relating to the classification of greenhouse film.

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

DATE: Comments must be received on or before February 23, 2007.

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

FOR FURTHER INFORMATION CONTACT: Heather K. Pinnock, Tariff Classification and Marking Branch, at (202) 572-8828.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to modify one ruling letter relating to the tariff classification of Hyplast greenhouse film. Although in this notice CBP is specifically referring to the modification of New York Ruling Letter (NY) H89973, dated April 22, 2002 (Attachment A), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the rulings identified above. No further rulings

have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during this notice period.

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

In NY H89973, CBP classified greenhouse film in subheading 3920.10.0000, HTSUSA, which provides for: "Other plates, sheets, film, foil and strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials: Of polymers of ethylene." Based on our recent review of NY H89973, we have determined that the tariff classification set forth for the greenhouse film is incorrect. It is now CBP's view that the proper tariff classification is subheading 8436.99.00, HTSUSA, which provides for, *inter alia*: Other agricultural, horticultural, forestry, poultry-keeping or bee-keeping machinery, including germination plant fitted with mechanical or thermal equipment; . . . parts thereof: Parts: Other."

Pursuant to 19 U.S.C. §1625(c)(1), CBP intends to modify NY H89973 and any other ruling not specifically identified that is contrary to the determination set forth in this notice to reflect the proper tariff classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Ruling Letters (HQ) W968283 (Attachment B). Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions that are contrary to the determination set forth in this notice. Before taking this action, consideration will be given to any written comments timely received.

DATED: January 5, 2007

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

[ATTACHMENT A]

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

NY H89973

April 22, 2002

CLA-2-39:RR:NC:SP:221 H89973

CATEGORY: Classification

TARIFF NO.: 3920.10.0000; 3917.32.0020; 9817.00.5000

MR. KENNETH J. HERNER
KLERK'S PLASTIC PRODUCTS MFG. INC.
546 L&C Distribution Park
Richburg, SC 29729

RE: The tariff classification of greenhouse film and silage bags from Belgium.

DEAR MR. HERNER:

In your undated letter, received in this office April 1, 2002, you requested a tariff classification ruling.

Samples and sales literature were provided with your letter. The greenhouse film is composed of ethylene butyl acrylate (EBA). The ethylene predominates by weight. The film will be imported in rolls or cut into sheets of various lengths. The film will also be imported in the form of lay flat tubing for use as silage bags.

The applicable subheading for the greenhouse EBA film, when imported in rolls or cut to rectangular shape, will be 3920.10.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for other plates, sheets, film, foil and strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials: of polymers of ethylene. The rate of duty will be 4.2 percent ad valorem.

The applicable subheading for the polyethylene silage bags will be 3917.32.0020, HTS, which provides for tubes, pipes and hoses . . . not reinforced or otherwise combined with other materials, without fittings, of polyethylene. The rate of duty will be 3.1 percent ad valorem.

In the alternative, the silage bags may be eligible for duty free entry under subheading 9817.00.5000, HTS, which provides for machinery, equipment and implements to be used for agricultural or horticultural purposes, upon compliance with the actual use requirements of sections 10.131 through 10.139, Customs Regulations.

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 Joan Mazzola at 646-733-3023.

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

[ATTACHMENT B]

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

HQ W968283

CLA-2 RR:CTF:TCM W968283 HkP**CATEGORY:** Classification**TARIFF NO.:** 8436.99.00

PHILIP YALE SIMONS, ESQ.
SIMONS AND WISKIN, ATTORNEYS AT LAW
924 Route 9 South
South Amboy, NJ 08879

RE: Modification of NY H89973; greenhouse film from Belgium

DEAR MR. SIMONS:

This is in reference to New York Ruling Letter ("NY") H89973, issued to your client, Klerk's Plastic Products Manufacturing, Inc. ("KPPM"), on April 22, 2002, in which greenhouse film made of ethylene butyl acrylate (EBA) was classified under the Harmonized Tariff of the United States ("HTSUS"). We have reconsidered NY H89973 and determined that the tariff classification of the greenhouse film is incorrect. This letter sets forth the correct classification.

In reaching our decision we have taken into consideration information provided by you in your original reconsideration request, dated May 4, 2006, in additional submissions, dated August 25, and 30, 2006, made in response to requests from this office, and in several telephone conversations.

FACTS:

In New York Ruling Letter ("NY") H89973, U.S. Customs and Border Protection ("CBPP") classified greenhouse film made of EBA and in which ethylene predominated by weight, in subheading 3920.10.0000, HTSUSA, which provides for: "Other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials: of polymers of ethylene." In addition, CBP did not find the film eligible for duty-free treatment accorded to agricultural machinery, equipment and implements under subheading 9817.00.5000, HTSUSA. You contend that the greenhouse film is properly classified under subheading 8436.99.00, HTSUSA, which provides for, *inter alia*: "Other agricultural, horticultural, . . . machinery, . . . ; parts thereof: Parts, other." In the alternative, you contend that the film is entitled to duty-free entry under subheading 9817.00.5000, HTSUSA.

In your letter of May 4, 2006, received by CBP on May 22, 2006, requesting reconsideration of NY H89973, you informed CBP that KPPM imports a variety of plastic film products for use exclusively in the agricultural industry. One type of greenhouse film, "Hypalst films" manufactured by Hypalst NV in Belgium, is the subject of this reconsideration request. The film is imported in rolls between 1,600 and 3,200 feet in length, depending on the width of the roll. The importer only cuts the film to size before it is sold. KPPM also imports greenhouse films of standard sizes – 100 feet and 150 feet in length, which are sold as imported without any post-importation op-

erations performed by KPPM. You state that KPPM agricultural film is used as greenhouse roofs and to enclose greenhouses.

According to the information provided, the subject greenhouse films are specially made to control the environment in a greenhouse. These films are made by a process known as co-extrusion blown film process, in which plastic pellets or flakes and additives, if any, are premixed, melted into an extruder, propelled into a die which causes the molten material to flow around a mandrel and emerge through a ring-shaped opening in the form of a tube. A die with multiple flow channels is used in co-extrusion to form multiple individual layers. Air is introduced into the tube causing it to expand and bubble. The air is contained in the bubble by the die at one end and by nip rollers at the other end. Even air pressure is maintained to ensure uniform thickness of the bubble. Airflow around the outside of the bubble cools and solidifies the melt. The bubble is stretched to orient the plastic and improve its strength and properties. After solidification the film bubble moves into a set of pinch rollers to flatten and roll the material onto a winder. The Hyplast website (<http://www.hyplast.be/html/faq.php>) describes a substantially similar process for manufacturing their films.

You state that greenhouse films typically contain three layers of extruded plastic with special additives used in certain of the layers to impart specific properties to the greenhouse films, and that films with up to seven individual layers can be produced. By mixing additives with the plastic polymer, multi-layer films can be made with specific additives in specific layers of the film to tailor-make the film to the particular needs of a customer. In a typical three-layer film, the outer layer will have anti-dusting and UV stabilizers, the middle layer will have diffusion additives and UV stabilizers, and the inner layer will have anti-drip and UV stabilizers.

According to the information provided, the Hyplast films under consideration are specially manufactured and feature:

- (1) UV-stabilization – UV stabilizers and UV absorbers are added to the raw materials and neutralize the negative effects of ultraviolet radiation on the films and extend the lifetime of the films;
- (2) Thermicity barriers – mineral fillers and/or co-polymers are added to form a barrier to long wavelength infrared radiation to prevent large temperature drops due to radiation loss from the greenhouse;
- (3) Infrared fillers – the use of infrared fillers scatters light in different directions so that diffuse light enters the greenhouse;
- (4) Anti-drip Additives – additives are used to produce films with special anti-condensation properties;
- (5) Energy saving – use of special pigments that retard infra-red light and hold in radiant heat.

You have provided samples of five types of greenhouse film: K50 IR/AC, K50 CLR, K50 WHT 55%, KL380, and HYTITHERMIC, which vary in degrees of translucency. However, we note that although NY H89973 states that samples and literature were provided as part of the prospective ruling request, we are not told which variety of Hyplast film is the subject of the ruling request.

In addition, you told us that greenhouse film is not commercially interchangeable with films used to wrap foods or with other films, such as construction films. This is because the plastic used to make food wrap is different than the plastic used to make greenhouse film and is usually made much thinner than greenhouse film. Greenhouse film typically cost twice as much as the cost of construction or silage film.

In response to CBP's request for further information regarding the manner in which the film is attached to greenhouses, you state in a letter dated August 25, 2006, that:

There are several ways in which greenhouse films are attached to a greenhouse: These include tie down ropes, plastic poly clips, batten taps (for use with wooden greenhouses), wiggle wire, and fastening systems in which the film is pinched between metal plates. . . .

The type of system used is up to the individual greenhouse owner and [KPPM] does not sell or recommend which attachment system to use. The choice is left to the greenhouse owner and the system used depends upon the type of green house. However, you should be aware that KPPM's greenhouse films are used as received by greenhouse owners and no additional processing, other than cutting to length, is required by the greenhouse owner before installing the film.

By letter dated August 30, 2006, in response to CBP's query regarding whether the greenhouse films under consideration are used with mechanical equipment on greenhouses, you informed us that the films are used with retractable greenhouse roof systems or side-wall systems.

ISSUE:

Whether the film is "parts" of agricultural or horticultural equipment properly classified in subheading 8436.99.00, HTSUSA, or whether it is classified in subheading 3920.00.10, HTSUSA, as films of polymers of ethylene.

Whether the film is eligible for duty-free importation into the U.S. under subheading 9817.00.50, HTSUSA.

LAW AND ANALYSIS:

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

The HTSUS provisions under consideration are as follows:

- | | |
|--------------|---|
| 3920 | Other plates, sheets, film, foil and strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials: |
| 3920.10.0000 | Of polymers of ethylene |

8436 Other agricultural, horticultural, forestry, poultry-keeping or bee-keeping machinery, including germination plant fitted with mechanical or thermal equipment; . . . ; parts thereof:

* * *

Parts:

* * *

8436.99.00 Other

9817.00.50 Machinery, equipment and implements to be used for agricultural or horticultural purposes

You contend that KPPM's agricultural films are exclusively used as greenhouse roofs and as sides of greenhouse walls for retractable greenhouse systems and, as such, are classifiable under subheading 8436.99.00, HTSUS, which provides for, among other things, parts of agricultural machinery. You base your argument on the U.S. Court of International Trade ("CIT") case Ludvig Svensson, Inc. v. United States, ("Ludvig Svensson") 62 F. Supp 2d 1171 (C.I.T. 1999), in which the court found that specialized plastic laminated screens imported in rolls several hundred feet long and used as greenhouse roofs were parts of agricultural machinery. The court had to consider whether these goods in their condition as imported were sufficiently advanced so as to be considered parts of agricultural equipment. In particular, the court noted that the imported goods used as greenhouse roofs were incorporated into shade and heat retention systems, which consisted of screens, drive motors, cables, aluminum and steel supports, brackets, pulleys, fasteners, and support wires. The court noted further, shade and heat retention systems are installed inside almost all commercial greenhouses. Greenhouse manufacturers either produce greenhouses with the shade and heat retention system installed as original equipment or build greenhouses with enough space in the roof area to accommodate such a system. At 1174. The court found "no question that greenhouses are used in agriculture and that the shade and heat retention systems, which incorporate some of the imported screens . . . are used to regulate and control the environment within a greenhouse." *Id.* at 1177-78.

In considering whether the specialized plastic laminated goods were "parts" the Ludvig Svensson court had to determine: first, whether the imported good was "an integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article" (quoting United States v. Willoughby Camera Stores, ("Willoughby Camera") 21 C.C.P.A. 322, 324 (1933); and second, whether the imported good was dedicated solely for use with the article in question (following United States v. Pompeo, 43 C.C.P.A 9 (1955)). Applying this two-part test, the court found that "without the screens, the walls in commercial greenhouses would be bare, adorned only by the skeleton of shade and heat retention systems, i.e. drive motors, cables, aluminum and steel supports, brackets, pulleys, fasteners, and support wires; there would be no control of temperature and humidity and no shade and heat retention system". The court also found that the imported goods were in an advanced state of manufacture, and had no other commercial use. The court took into consideration the fact that the goods

were "products of high technology, design and planning," that is, they were complex goods incorporating several different types of materials, manufactured for the specific goal of controlling various aspects of a greenhouse environment. Moreover, each type of good could only have been used for the purpose for which it was manufactured, and the function and purpose of each good was clearly identifiable upon importation.

CBP previously classified the greenhouse film at issue in subheading 3920.10.0000, HTSUS, which provides for, among other things, other sheets and film of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials: of polymers of ethylene. However, in reaching this decision, CBP did not consider the applicability of the decision in Ludvig Svensson to the product being classified. As previously stated, the film under consideration is specially manufactured and features UV-stabilization, thermicity barriers, infrared fillers, anti-drip additives, and energy saving pigments. These features prevent the film from being commercially interchangeable with film used to wrap foods or with other film, such as construction film. Further, the film is used with retractable greenhouse roof and side-wall systems. Based on the samples and the information provided, we find the film at issue to be substantially similar to the specialized plastic imported in rolls for use as greenhouse screens classified in Ludvig Svensson. For this reason, it is our view that the greenhouse film was incorrectly classified under heading 3920, HTSUS. We now find that the film is classified under heading 8436, HTSUS, as parts of agricultural machinery, specifically under subheading 8436.99.00, HTSUSA.

Finally, because subheading 8436.99.00, HTSUSA, is a duty-free provision we need not address your alternative argument that the film is entitled to duty-free treatment under subheading 9817.00.50, HTSUSA.

HOLDING:

We find that the greenhouse film at issue is classified under heading 8436, HTSUS, and is specifically provided for under subheading 8436.99.00, HTSUSA, which provides for: "Other agricultural, horticultural, forestry, poultry-keeping or bee-keeping machinery, including germination plant fitted with mechanical or thermal equipment; . . . parts thereof: Parts: Other."

EFFECT ON OTHER RULINGS:

NY H899735, dated April 22, 2002, is hereby modified with respect to the classification of greenhouse film composed of EBA. The classification of the other item described therein is unchanged.

MYLES B. HARMON,

Director;

Commercial and Trade Facilitation Division.

