

U.S. Customs and Border Protection

General Notices

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, December 26, 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.

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

GENERAL NOTICE

19 CFR PART 177

PROPOSED REVOCATION AND MODIFICATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO SUBHEADING 9801.00.20, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES

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

ACTION: Notice of proposed revocation and modification of ruling letters and revocation of treatment relating to subheading 9801.00.20, Harmonized Tariff Schedule of the United States (“HTSUS”).

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”) in-

tends to revoke and modify ruling letters pertaining to subheading 9801.00.20, 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 action.

DATE: Comments must be received on or before February 8, 2008.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs and Border Protection, Office of International Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments submitted may be inspected at the offices of 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: Gerry O'Brien, Valuation and Special Programs Branch Branch, (202) 572-8740.

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 and modify ruling letters pertaining to subheading 9801.00.20, HTSUS. Although in this notice CBP is specifically referring to a total of 23 rulings, this notice covers any rulings on this is-

sue which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing data bases for rulings in addition to the one 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.

Subheading 9801.00.20, HTSUS, provides for duty-free treatment in certain circumstances where goods were imported into the United States and duty paid, the goods were exported under lease or similar use agreements, and the goods are reimported into the United States without having been advanced in value or improved in condition by any process of manufacture or other means while abroad. The goods must also be reimported by or for the account of the person who imported them into, and exported them from, the United States. It is our view that our current interpretation of this provision is overly broad with respect to the requirement that the goods be exported under lease and similar use agreements. We now find that a “similar use agreement” must at a minimum involve a “use,” which is similar in nature to a lease.

Four rulings are set forth as Attachments A, B, C, and D to this notice. HQ 222863, dated July 1, 1991 (Attachment A) is proposed to be modified to provide that the goods described therein are eligible for treatment under subheading 9801.00.20, HTSUS, without respect to consideration of the bailment issue. HQ H019446, which proposes to modify HQ 222863 is set forth as Attachment E. HQ 562343, dated August 27, 2002 (Attachment B), is proposed to be modified to make clear that it did not address the applicability of subheading 9801.00.20, HTSUS, to the facts therein. HQ 562343 is a NAFTA inventory management ruling. HQ H019799, which proposes to modify HQ 562343, is set forth as Attachment F. HQ 546561, dated March 16, 1998 (Attachment C), is proposed to be modified with respect to subheading 9801.00.20, HTSUS, based upon our view that the goods described therein are not eligible for treatment under subheading 9801.00.20, HTSUS, because there is no lease or similar use agreement. HQ H019800, which proposes to modify HQ 546561, is set forth as Attachment G. HQ 560511, dated November 18, 1997 (Attachment D), is proposed to be modified with respect to subheading 9801.00.20, HTSUS, based upon our view that the goods described therein are not eligible for treatment under subheading 9801.00.20, HTSUS, because there is no lease or similar use agreement. HQ H019801, which proposes to modify HQ 560511, is set forth as Attachment H.

In addition, as part of this action, CBP proposes to revoke the following rulings pertaining to subheading 9801.00.20, HTSUS: NY K89371, dated October 12, 2004; NY L89361, dated February 15, 2006; NY M80904, dated March 8, 2006; NY M85334, dated August

9, 2006; NY M85607, dated August 8, 2006; NY M85619, dated September 7, 2006; NY M86009, dated September 7, 2006; NY M86159, dated September 26, 2006; NY M87375, dated October 31, 2006; NY N003900, dated December 21, 2006; NY N004153, dated December 26, 2006; NY N004253, dated January 5, 2007; NY N005187, dated January 23, 2007; NY N005700, dated January 26, 2007; N006857, dated February 14, 2007; and NY R02752, dated November 14, 2005.

Further, as part of this action, CBP proposes to modify the following rulings with respect to the subheading 9801.00.20, HTSUS issue: HQ 964960, dated September 4, 2002; HQ H016586, dated October 15, 2007; and NY L81087, dated December 23, 2004.

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. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the Harmonized Tariff Schedule of the United States. 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.

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke and modify any other ruling not specifically identified in order to reflect CBP's interpretation of subheading 9801.00.20, HTSUS. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by the CBP to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

DATED: December 20, 2007

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

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY,
U.S. CUSTOMS AND BORDER PROTECTION,
HQ 222863
July 1, 1991
CON-3-01 CO:R:C:E 222863 TLS
CATEGORY: Entry; Re-entry

MR. MICHAEL J. SPAIN
SONNEBERG, ANDERSON, O'DONNELL & RODRIGUEZ
200 West Adams Street Suite 2625
Chicago, Illinois 60606

RE: Reimportation of merchandise under heading 9801 of the Harmonized
Tariff Schedule of the United States Annotated

DEAR MR. SPAIN:

Your letter of October 3, 1990, requesting a binding ruling on the above-referenced matter has been forwarded to this office for consideration. We have considered the points raised in your submission and our decision follows.

FACTS:

You state that your client, Imperial World, Inc., is currently importing precious jewelry samples under heading 7113 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Included in these samples are gold rings, bracelets, necklaces, and pendants. Some of the articles are gem-set with precious or semiprecious stones, such as diamonds, sapphires, rubies, emeralds, topaz, and amethyst, among others.

Some of these articles are occasionally sent back to the factory where they were made so that they may be exhibited to customers visiting the manufacturing plant. You state that the merchandise sent back is used only for exhibition purposes; no further processing or manufacturing is done to these articles. You also state that Imperial World (hereafter, "Imperial" or "importer"), does this because it finds establishing inventories at both the manufacturing plant and in the United States to be too expensive.

After the merchandise has been exhibited at the manufacturing plant, Imperial reimports it back into U.S. Customs territory. The importer wishes to have the reimported merchandise classified under HTSUSA subheading 9801.00.20, which would entitle it to duty-free status. Imperial imports and reimports most of its jewelry through the port of Chicago and would like to have this ruling apply to prospective entries.

ISSUE:

Whether the articles as reimported into Customs territory after being exhibited abroad are entitled to duty free treatment under HTSUSA heading 9801.

LAW AND ANALYSIS:

Under HTSUSA, the following is provided for:

- 9801.00.20 Articles, previously imported, with respect to which duty was paid upon such previous importation or which were previously free of duty pursuant to the Caribbean Basin Economic Recovery Act or Title V of the Trade Act of 1974, if (1) reimported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad, after having been exported under lease or similar use agreements, and (2) reimported by or for the account of the person who imported it into, and exported it from, the United States. . . . Free (emphasis added.)

The predecessor of 9801.00.20 was item 801.00 of the Tariff Schedules of the United States (TSUS). That particular provision was amended in 1984 to provide for, *inter alia*, articles that had been exported under similar use agreements and leases to entities other than foreign manufacturers. Trade and Tariff Act of 1984, Pub. L. No. 98-573, 118, 98 Stat. 4922 (1984). Before the amendment, duty free treatment applied only to merchandise that had been exported under lease to foreign manufacturers.

In the present case, the importer makes no mention of a lease agreement between the manufacturer and itself. Rather, Imperial claims that it qualifies for the 9801 exemption under the similar use provision. The particular use in this case would be the exhibition of the articles at the manufacturing plant. The importer further states that the manufacturer does not pay for the use of the samples and that both parties benefit through customers' orders as a result of the exhibition. Upon reimportation, Imperial World is also the importer of record in this instance as well as during the original importing.

While there exists no court case precedent interpreting "similar use agreement" under 9801, and the legislative history of the provision does not provide a clear definition, we find "similar use agreement" to mean an agreement similar to that of a lease. We believe the provision was added to cover transactions that do not involve formal lease agreements but are very much like leases in most respects. In fact, in the legislative history of the House bill that introduced this particular amendment, it is stated that "[t]he intent of this legislation is to extend coverage of [801.00] to the reimportation of goods which were exported under lease to someone other than a foreign manufacturer . . ." H.R. Rep. No. 34, 98th Cong., 2d Sess. 157 (July 25, 1984). Given as much, we must now decide whether the agreement between Imperial and the manufacturer is similar to a lease agreement.

Imperial contends that the agreement between it and the manufacturer constitutes a "bailment" situation and further states that this is a type of similar use agreement referred to under 9801. The term "lease" has been defined as follows:

When used with reference to tangible personal property, [the] word "lease" means a contract by which one owning such property grants to another the right to possess, use and enjoy it for specified period of time in exchange for periodic payment of a stipulated price, referred to as rent. Black's Law Dictionary 800 (5th ed. 1979).

A lease may be distinguished from the present transaction by applying the following definition of "bailment":

A delivery of goods of personal property, by one person to another, in trust for the execution of a special object upon or in relation to such goods, beneficial to either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with purpose of the trust. (emphasis added). Black's Law Dictionary 179 (5th ed. 1979).

Specific kinds of bailment are further defined; a "gratuitous bailment" best describes the situation in the present case and it is defined as follows:

Another name for a depositum or naked bailment, which is made only for the benefit of the bailor and is not a source of profit to the bailee. Black's Law Dictionary 180 (5th ed. 1979).

The important distinction between the bailment situation the importer refers to and a formal lease agreement is the absence of a payment in a bailment arrangement. In this sense, a bailment is more like a use agreement. Referring back to the legislative history, we find that the expressed intent of the provision is to facilitate entry of the articles reimported without having been enhanced or further processed while abroad. In this sense, the distinction between those articles leased upon exportation and those merely subject to a "use" agreement of some kind is irrelevant to the purpose of the law. It is clear that with the 1984 amendment to 801.00 Congress intended to make the law less restrictive in meeting its goals. Accordingly, the spirit of the law indicates that we not concern ourselves with whether or not the importer leased the merchandise upon exportation. There is nothing in the law or legislative history, either expressed or implied, that suggests the application of 9801.00.20 hinged upon a transaction involving a payment. Therefore, in light of the importer's adherence to all of the requirements stated under the relevant law, we find that Imperial's reimportation of the subject merchandise is eligible for duty free status under subheading 9801.00.20.

HOLDING:

The reimportation of articles of jewelry is eligible for duty free status under HTSUSA subheading 9801.00.20, being that duty had been previously paid on the merchandise, they were not advanced in value or improved in condition while abroad, and they were reimported by the party who exported them from the United States under a similar use agreement.

JOHN DURANT,
Director

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY,
U.S. CUSTOMS AND BORDER PROTECTION,
HQ 562343
August 27, 2002
MAR-05 RR:CR:SM 562343 NL
CATEGORY: Classification

TERRIE A. GLEASON, ESQ.
BAKER & MCKENZIE
815 Connecticut Avenue, NW,
Washington, DC 20006-4078

RE: Inventory Management; FIFO; NAFTA Eligibility; U.S. General Note 20; 9801.00.20, HTSUS

DEAR MS. GLEASON:

This is in reply to your letter of February 27, 2002, in which you request a binding ruling on behalf of R.G. Barry Corporation (RG Barry).

FACTS:

This ruling request concerns the appropriate attribution of origin to goods of different countries of origin that are packaged for importation into the U.S. at a foreign distribution center.

A manufacturer and distributor of house slippers, RG Barry is opening a distribution center in Nuevo Laredo, Mexico. The slippers exported to the U.S. from this distribution center fall into several categories with respect to country of origin and Customs treatment.

A large proportion of this merchandise is of Mexican origin, eligible to be entered free of duty and fees under the NAFTA. A small proportion of the merchandise is manufactured in China. The Chinese-origin merchandise enters the distribution center after having been imported, duty paid, into the U.S. Also, certain Mexican-origin merchandise enters the Mexican distribution center after having been imported into the U.S. free of duty and fees under the NAFTA. The activity of importing into the U.S., re-exporting to the Nuevo Laredo distribution facility, and finally packing and shipping bulk containers for importation into the U.S. is conducted by RG Barry for its own account; no sales are involved.

The issue of attribution raised in the ruling request arises because a small portion of the Chinese-origin and Mexican-origin merchandise have the same style numbers. The ruling request seeks approval to identify the country of origin of such merchandise according to a first-in-first-out (FIFO) accounting method when preparing the merchandise for shipment to the U.S. It is understood that such identification, or constructive segregation, would be used in place of physical segregation according country of origin of the merchandise having the same style numbers.

It is submitted that identification of Chinese as opposed to Mexican merchandise on the basis of a FIFO accounting method should be acceptable because the accuracy of the respective quantities to be entered can be verified using invoices and style summary sheets. It is argued that by reason of such records, the quantity of each class of goods can be ascertained by Customs, such that the goods should not be treated as commingled within the meaning General Note 20, HTSUS (prior to 2002, General Note 19). It is suggested that physical segregation of the Chinese and Mexican merchandise

having the same style numbers is not necessary because the quantities may be determined by reference to packing lists and other documents filed at the time of entry.

RG Barry also argues that General Note 20 has no application under the circumstances because the rate of duty applicable to the merchandise under both the NAFTA and subheading 9801.00.20 is the same – zero.

You advise that with respect to the Mexican-origin, previously imported merchandise, the Customs Port Director at Laredo, Texas, has approved re-importation under subheading 9801.00.20, HTSUS. However, you state that the previously-entered, Mexican-origin goods will be re-entered into the U.S. under the applicable HTSUS provision for the slippers, free of duty and MPF under NAFTA, rather than subheading 9801.00.20, HTSUS. This Mexican-origin merchandise, having been imported into the U.S. by RG Barry, is delivered by RG Barry on a consignment basis to its Nuevo Laredo distribution center, and then re-imported by RG Barry for its own account.

Subheading 9801.00.20, HTSUS, provides for the duty-free treatment of goods that have been previously imported duty paid if: 1) the article is re-imported without having been advanced in value or improved in condition; 2) the article was exported under a lease or similar use agreement; and 3) the article is re-imported by or for the account of the person who imported it into, and exported it from, the United States.

In your letter requesting this ruling, you state that the Chinese-origin merchandise, we presume previously imported into the U.S. duty paid, consigned to the Mexican warehouse, and re-imported, would be eligible for treatment under subheading 9801.00.20.

ISSUE:

May the importer employ a FIFO accounting and inventory management method to constructively segregate Chinese-origin goods eligible for treatment under subheading 9801.00.20, HTSUS from Mexican-origin goods eligible for duty-free and MPF-free treatment under the NAFTA?

LAW & ANALYSIS:

Acceptable techniques to identify goods that are subject to differing treatment at entry are indicated in several sections of the Customs laws and Regulations. In this case, both General Note 20, HTSUS, and the inventory management methods permitted under the NAFTA (see, 19 CFR § 181 App., Schedule X) are applicable to the circumstances set forth.

General Note (GN) 20 prescribes the tariff treatment to be afforded to goods that are commingled. It provides, in relevant part, that:

- (a) Whenever goods subject to different rates of duty are so packed together or mingled that the quantity or value of each class of goods cannot be readily ascertained by customs officers (without physical segregation of the shipment or the contents of any entire package thereof), by one or more of the following means:
 - (i) sampling,
 - (ii) verification of packing lists or other documents filed at the time of entry, or
 - (iii) evidence showing performance of commercial settlement tests generally accepted in the trade and filed in such time and manner as may be prescribed by regulations of the Secretary of the Treasury,

the commingled goods shall be subject to the highest rate of duty applicable to any part thereof. (An additional provision concerns segregation under

Customs supervision following notification by Customs to the importer that goods are commingled. It does not appear that this is the procedure contemplated by RG Barry for the operations at issue.)

The Regulations for the administration of NAFTA eligibility and marking provide various possibilities for the treatment of commingled goods. In particular, commingled goods that are fungible may be accounted for by the use of specified inventory management methods. Section 102.12 of the NAFTA marking regulations (19 CFR § 102.12) provides that

When fungible goods of different countries of origin are commingled the country of origin of the goods: (a) Is the countries of origin of those commingled goods; or (b) If the good is fungible, has been commingled, and direct physical identification of the origin of the commingled good is not practical, the country or countries of origin may be determined on the basis of an inventory management method provided under the appendix to part 181 of the Customs Regulations.

For the purpose of identifying goods manufactured in Mexico that are to be imported under claims of eligibility as NAFTA originating goods, 19 CFR § 181 App., Section 7(16)(b) provides:

where originating goods and non-originating goods that are fungible goods are physically combined or mixed in inventory and prior to exportation do not undergo production or any other operation in the territory of the NAFTA country in which they were physically combined or mixed in inventory, other than unloading, reloading or any other operation necessary to preserve the goods in good condition or to transport the goods for exportation to the territory of another NAFTA country, the determination of whether the good is an originating good may, at the choice of the exporter of the good or the person from whom the exporter acquired the good, may be made on the basis of any of the applicable inventory management methods set out in Schedule X.

Part I, Section 11 of Schedule X (19 CFR § 181 App.), prescribes the FIFO method of inventory management as one of the four methods of inventory management acceptable for determining whether fungible goods are originating goods.

On the basis of the facts presented and these provisions of the Customs Regulations concerning claims of NAFTA eligibility, this office concludes that:

- The merchandise originating in China and the merchandise originating in Mexico that have the same style numbers are fungible goods for the purposes of inventory management;
- RG Barry's FIFO accounting as described is one of the inventory management methods acceptable for the purposes of determining and claiming NAFTA eligibility from among fungible goods physically combined in inventory; and
- Provided that the operations performed on the fungible goods the Nuevo Laredo distribution center are limited to those authorized in 19 CFR § 181 App., Section 7(16)(b), RG Barry may elect to employ its FIFO method for the attribution of Mexican origin and NAFTA eligibility to the goods.

With regard to Chinese-origin fungible merchandise to be entered under subheading 9801.00.20, HTSUS, you advise that in support of its claim under this subheading, RG Barry will maintain all copies of CF 7501 relating to the style at issue. It is understood that these would be available, pursuant to 19 CFR 10.108, to establish to the port director's satisfaction that duty was paid on previous importations of the goods into the U.S. Your submission indicates that the port director already has approved entry under subheading 9801.00.20 for certain Mexican-origin goods on the same basis.

With regard to the method of segregation, RG Barry submits that in most cases it will segregate the Chinese and Mexican merchandise according to packing lists or other documents filed at the time of entry as specified at U.S. General Note 20(a)(ii). In those cases where a single style number has two countries of origin, the FIFO inventory management method would be used.

Under these circumstances RG Barry's FIFO method would enable Customs officials to ascertain properly the quantity and value of the respective classes of goods.

HOLDING:

Upon consideration of the FIFO approach proposed by RG Barry to accomplish the necessary attribution of country of origin in connection with its Mexican distribution operations, we find that FIFO inventory management is consistent with the applicable NAFTA and HTSUS General Notes provisions, and is approved for attribution of origin as described herein.

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

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
HQ 546561
March 16, 1998
RR:IT:VA 546561 KCC
CATEGORY: Valuation

PORT DIRECTOR
U.S. CUSTOMS SERVICE
P.O. Box 3130
Laredo, Texas 78044-3130

RE: Internal Advice; parts and accessories of televisions and electronic articles; amending protest; 19 CFR §174.14(a) and 174.28; §402(b); transaction value; related parties; §402(g)(1); circumstances of the sale; sale for exportation; J.L. Wood v. United States; HRLs 544230, 545254, 546069, 544775, 543633 and 545474; §402(b)(1)(B); packing costs; §402(h)(3); buying commission; Pier 1 Imports, Inc. v. United

States; J.C. Penney Purchasing Corp. v. United States; Rosenthal-Netter, Inc. v. United States; destined for the U.S.; HRL 545368; 9801.00.20; 19 CFR §10.108; similar use agreement; bailment; HRL 222863

DEAR PORT DIRECTOR:

This is in regard to a memorandum from the Supervisor Import Specialist, Duty Assessment Branch II, dated November 7, 1996, forwarding a request for Internal Advice dated October 10, 1996, submitted by Baker & McKenzie on behalf of Zenith Electronics Corporation. The issues raised are whether the protestant can amend its Protests, whether the imported Products are entitled to duty-free treatment pursuant to subheading 9801.00.20, Harmonized Tariff Schedule of the United States ("HTSUS"), and whether the Products imported from Mexico are appraised under transaction value pursuant to §402(b) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 ("TAA"), codified at 19 U.S.C. §1401a, based on the purchase price between Zenith and the Asian vendors. Information obtained in a telephone conversation between Zenith's Counsel and a member of my staff on March 20, 1997, obtained at the July 15, 1997, meeting and contained in an additional submissions dated September 8, 1997, was taken into consideration in reaching this decision. We regret the delay in responding.

FACTS:

The Products at issue are various foreign origin replacement parts and accessories for Zenith's main products, televisions and numerous electronic products. Zenith imports the Products from unrelated vendors in various Asian countries, with the exception of Lucky Goldstar Electronics, Inc. ("Lucky Goldstar"), to whom Zenith is related. As of November 1995, Lucky Goldstar owns a fifty-seven percent (57%) interest in Zenith. Zenith states that it imports only a few articles from Lucky Goldstar and it is the parties' long-standing policy to sell products to each other at an arm's length price. As evidence of this practice, Zenith provided two sets of invoices for two different products. The invoices show that Zenith paid Lucky Goldstar the same price for each product before and after the parties became related. Thus, Zenith states the relationship with Lucky Goldstar had no effect on the prices charged by Lucky Goldstar to Zenith for the parts and accessories. Counsel states that Zenith employs two buying agents in Asia, Zenith Taiwan, a wholly-owned subsidiary of Zenith, and HMO, Inc. a subsidiary of GC Thorsen, Inc., who act on behalf of Zenith in seeking and securing vendors. Counsel states that Zenith provides these agents with product specifications and requirements and the terms which Zenith will accept.

Prior to July 1994, Zenith entered the Products into the Long Beach port for consumption under transaction value pursuant to §402(b) of the TAA based on the price Zenith paid the foreign vendors. The Products then entered Zenith's Chicago warehouse until they were resold to U.S. customers.

In July 1994, Zenith moved its warehouse operations to Partes de Television de Reynosa, S.A. de C.V. ("Partes"), a wholly owned Mexican subsidiary of Zenith, to save on freight, labor and real estate costs. The previously imported duty-paid Products contained in the Chicago warehouse were moved to Partes. Now, Zenith imports its Products through the Long Beach port to McAllen, Texas via a Transportation and Exportation Bond. Zenith submitted samples of Customs Form 7512, Transportation Entry and Manifest of

Goods Subject to Customs Inspection and Permit for Transportation and Exportation class of entry. The Products are then exported from the U.S. and proceed to the Partes warehouse.

At the Partes warehouse, the Products are unloaded and stored for a temporary period of time. When Zenith requires Products to fulfill U.S. customers orders, Partes simply repackages the Products for resale and ships them to the U.S. per Zenith's instructions. Zenith re-imports the Products and the U.S. customers either take title to the goods at entry or at customer specified locations. The U.S. customers pay Zenith for the goods. Partes does not receive money from the U.S. customers. Partes is paid by Zenith for its packing operation, including temporary storage and handling, through occasional lump-sum payments. Zenith has submitted samples of its invoices to the U.S. customers which make no mention of Partes or Mexico. Counsel states that the Products enter Mexico under bond and free of duty pursuant to Mexico's Maquiladora Program and, thus, they never enter Mexico's commerce. Zenith submitted copies of Zenith's Mexican Ministry of Commerce and Industrial Development Permits and Mexico's entry documents documenting the in-bond importation of various Products into Mexico. Counsel states that Zenith never planned to divert the Products into the Mexican commerce upon the occurrence of any particular contingency and Zenith does not transfer title to the Products to Partes or any other party. Counsel states that Zenith merely consigns the Products to Partes for temporary storage.

The terms of sale between Zenith and all the foreign vendors are "FOB Foreign Port." Counsel states that title and risk of loss to the Products pass from the foreign vendor to Zenith when the Products are laden aboard vessels bound for the U.S. in the foreign port specified by the parties in sales contracts. With regard to its buying agents, Zenith notes that title passes from the foreign vendors to the buying agents and then simultaneously to Zenith at the foreign port. Zenith has submitted representative samples of its purchase orders, packing lists, and commercial invoices as evidence that Zenith takes title in the foreign country and that the U.S. is the final destination of the Products. Additionally, Zenith has submitted bills of lading from shipping companies as evidence that the U.S. is the final destination of the Products and that Zenith is responsible for paying freight and related charges from Asia to the U.S.

Counsel states all of Zenith's foreign vendors are aware that the Products are being manufactured pursuant to Zenith's specifications for importation into the U.S. Zenith's specifications for the Products include the requirement that the Products meet all U.S. technical and safety standards and carry all required U.S. technical and safety labels. Zenith also requires that the Products be marked in accordance with U.S. Customs country of origin marking requirements. Moreover, Zenith's accessories require that Zenith's name and the Zenith product name be displayed in English on the product and product packing. Counsel stated in the March 20, 1997, telephone conversation that Zenith orders the Products from the foreign vendors for their own inventory. Counsel noted that Zenith orders its parts, i.e., transistors, and accessories, i.e., remote controls, based on their tracking information which analyzes the demand for their televisions. Thus, based on the number of televisions Zenith is making, Zenith can estimate the amount of parts and accessories they need to procure. Counsel maintains that all of the imported

Products are specifically produced for Zenith, a U.S. company, for resale in the U.S. market.

With regard to Zenith's importation from Partes, Zenith made entry under transaction value pursuant to §402(b) of the TAA and based the value of each Product on the full resale price paid to Zenith by its U.S. customer. Zenith now submits that the proper appraisalment of Products imported from Partes is transaction value pursuant to §402(b) of the TAA based on the price Zenith paid the foreign vendor. Additionally, in letters dated October 7 and 8, 1996, to the Supervisory Import Specialist, Counsel has requested to amend all Zenith's protests by adding an additional ground. Zenith submits that the Products previously entered into the U.S. duty-paid, which were warehoused in Chicago, and then moved to Partes, are entitled to duty-free treatment under subheading 9801.00.20, HTSUS. Counsel stated in the March 20, 1997, telephone conversation that Zenith has not claimed drawback on any of the Products eligible for subheading 9801.00.20, HTSUS, duty-free treatment.

ISSUE:

1. Whether the protestant can amend its Protests.
2. Whether the Products imported from Mexico should be appraised pursuant to transaction value of §402(b) of the TAA based on the purchase price between Zenith and the Asian vendors. If so, are the packing costs incurred in Mexico a statutory addition to the price actually paid or payable pursuant to §402(b)(1)(B) of the TAA.
3. Whether the imported Products are entitled to duty-free treatment pursuant to subheading 9801.00.20, HTSUS.

LAW AND ANALYSIS:

1. Amendment to Protest

With regard to whether Zenith may amend its protests, §174.14(a), Customs Regulations (19 CFR 174.14(a)), provides that:

A protest may be amended at any time prior to the expiration of the 90-day period within which such protest may be filed determined in accordance with §174.12(e). The amendment may assert additional claims pertaining to the administrative decision which is the subject of the protest, or may challenge an additional administrative decision relating to the same category of merchandise which is the subject of the protest. For the presentation of additional grounds or arguments in support of a valid protest after the 90-day period has expired see §174.28.

§174.28, Customs Regulations (19 CFR 174.28), which provides:

In determining whether to allow or deny a protest filed within the time allowed, a reviewing officer may consider alternative claims and additional grounds or arguments submitted in writing by the protesting party with respect to any decision which is the subject of a valid protest at any time prior to disposition of the protest

Zenith submits that the Products previously entered into the U.S. duty-paid, which were warehoused in Chicago, and then moved to Partes, are entitled to duty-free treatment under subheading 9801.00.20, HTSUS. Zenith has submitted its additional ground in writing in its letters dated October 7 and 8, 1996, to the Supervisory Import Specialist. For most of the entries under protest the October 7 and 8, 1996 additional ground was submitted to

Customs well after the 90-day period set forth in 19 CFR §174.14(a). Thus, Customs may consider Zenith's additional ground, as set forth in the October 7 and 8, 1996 letters, only if its an additional ground asserted against a valid claim set forth in its protests.

The representative protest submitted to this office asserts that the appraised value of all the imported merchandise was incorrect. Additionally, Zenith stated that ". . . in other cases, there was no 'importation' of the merchandise so that no duties would be owed." We do not find any language in the protest which raises the duty-free claim of subheading 9801.00.20, HTSUS. Thus, the protest does not "cryptic[ly], inartistic[ly], or poorly drawn," raise as a protested administrative decision the duty-free claim. See, *Mattel, Inc. v. United States*, 72 Cust. Ct. 257, C.D. 4547, 37 F. Supp. 955 (1974) and HRL 224447 dated September 26, 1996. Pursuant to the representative protest submitted, Zenith's letters claiming duty-free treatment pursuant to subheading 9801.00.20, HTSUS, were not timely submitted. Therefore, you may not consider this additional ground pursuant to 19 CFR §174.28.

2. Valuation

The preferred method of appraising merchandise imported into the U.S. is transaction value pursuant to §402(b) of the TAA. §402(b)(1) of the TAA provides, in pertinent part, that transaction value of imported merchandise is the "price actually paid or payable for the merchandise when sold for exportation to the United States," plus enumerated statutory additions including packing costs incurred by the buyer. §402(b)(1)(A) of the TAA.

-Related Parties:

Imported merchandise is appraised under transaction value only if the buyer and seller are not related, or if related, the transaction value is deemed to be acceptable. In this situation, one of Zenith's foreign vendors, Lucky Goldstar, is a related party pursuant to §402(g)(1) of the TAA. §402(b)(2)(B) of the TAA provides that transaction value between related parties is acceptable only if an examination of the circumstances of the sale indicates that the relationship between the parties does not influence the price actually paid or payable, or the transaction value of imported merchandise closely approximates the transaction value of identical or similar merchandise in sales to unrelated buyers in the U.S. or the deductive or computed value for identical or similar merchandise. Although you did not specifically seek advice regarding whether the relationship between Zenith and Lucky Goldstar affects the price of the imported merchandise, we feel a brief discussion of this issue is warranted.

Under the circumstances of sales approach, if the parties buy and sell from one another as if they were unrelated, transaction value will be considered acceptable. Thus, if the price is determined in a manner consistent with normal industry pricing practice, or with the way the seller deals with unrelated buyers, the price actually paid or payable will be deemed not to have been influenced by the relationship. Furthermore, the price will not be influenced if it is shown that the price is adequate to ensure recovery of all costs plus a profit that is equivalent to the firm's overall profit realized over a representative period of time in sales of merchandise of the same class or kind. Statement of Administrative Action, reprinted in Customs Valuation under the Trade Agreements Act of 1979, Department of the Treasury, U.S. Cus-

toms Service (October 1981) at 54; §152.103(j)(2), Customs Regulations (19 CFR 152.103(j)(2)).

Counsel states that Zenith and Lucky Goldstar buy and sell from one another as if they were unrelated. As evidence of this practice, Zenith provided two sets of invoice for two different products. The invoices show that Zenith paid Lucky Goldstar the same price for each product before (invoice dated September 6, 1995, for part number 597-106A; and invoice dated September 22, 1995, for part number 521-250S) and after the parties became related (invoice dated January 24, 1996, for part number 597-106A; and invoice dated January 1, 1996, for part number 521-250S). Thus, Counsel contends that transaction value is acceptable between Zenith and its related foreign vendor, Lucky Goldstar.

A similar argument was raised in HRL 545272 dated August 17, 1995, in which the importer argued that the sale between the related parties should be used for determining the transaction value of the imported merchandise because the parties allegedly dealt with each other at arm's length as though they were unrelated. In support of this position, the importer stated that a 1986 sales agreement between the parties was negotiated at a time when the parties were not related and that the pricing of the merchandise remained in effect subsequent to 1989 even after the parties became related. In determining that this evidence was insufficient to justify that the related deal with each other as if unrelated, HRL 545272 stated:

Based on the above, it appears when that the joint venture was formed, the corporate relationship between [the related parties] may not have immediately effected the price of the existing products. However, for a transaction to be truly arm's length, a pricing scheme cannot stay in effect indefinitely because market conditions can change over time. The original sales contract was negotiated in 1986 and 1987, but the actual sales of the [imported products] occurred several years later, such as in the sample entry provided by the Office of Regulatory Audit, where the transaction occurred in 1991. To ensure that prices of the products are kept current, the parties may have to review the prices and make adjustments. At some point, the parties may even have to renegotiate with each other. In other words, we believe that even though the prices for some the [imported products] were initially set when they were unrelated, it does not necessarily establish that the relationship between [the related parties] did not influence the price of the [imported product] over an indefinite period of time. The fact that the prices remained unchanged over a period over several years is some indication that the relationship may have influenced the price. In order for Customs to accept the transfer price, additional evidence of its validity is needed.

It is our opinion that HRL 545272 is applicable to this situation. The mere fact that the prices remain unchanged before and after Zenith and Lucky Goldstar became related is not prima facie evidence that the parties relations did not influence the price. This fact must be examined along with other evidence regarding the circumstances of sale to determine whether transaction value is an acceptable method of appraisalment between the related parties. As no other evidence or positions were presented by your office or Zenith, we have not formulated an opinion on this issue.

-Sale for export and Mexican packing costs:

In this situation, we first need to examine whether a sale for exportation to the U.S. occurred between Zenith and the foreign vendors. For Customs purposes, the word "sale" generally is defined as a transfer of ownership in property from one party to another for a consideration. *J.L. Wood v. United States*, 62 CCPA 25, 33 C.A.D. 1139 (1974). While *J.L. Wood* was decided under the prior appraisal statute, Customs adheres to this definition under the TAA. The primary factors to consider in determining whether there has been a transfer of property or ownership are whether the alleged buyer has assumed the risk of loss, and whether the buyer has acquired title to the imported merchandise. See, Headquarters Ruling Letter (HRL) 544775 dated April 3, 1992, and HRL 543633 dated July 7, 1987. Also relevant is whether, in general, the roles of the parties and circumstance of the transaction indicate that the parties are functioning as buyer and seller. See, HRL 545474 dated August 25, 1995.

A similar factual situation was addressed in HRL 544230 dated December 22, 1988, in which the imported merchandise was entered into the U.S. from El Salvador under a Transportation and Exportation Bond and then shipped to Mexico for a retail packaging operation. After the packaging operation, the merchandise was imported into the U.S. for retail sale. In that ruling, Customs determined that the sale for exportation occurred between the El Salvador seller and the U.S. importer and that the packing operation in Mexico did not alter that conclusion. HRL 544230 determined that the Mexican packaging operation fell within the statutory definition of packing costs set forth in §402(h)(3) of the TAA, which states:

the cost of all containers and coverings of whatever nature and of packing, whether for labor or materials, used in placing the merchandise in condition, packed ready for shipment to the United States.

The imported merchandise was not packed ready for shipment to the United States until it was packaged in Mexico. Thus, the transaction value was based on the price paid to the seller with an addition for the packing operation performed in Mexico pursuant to §402(b)(1)(A) of the TAA.

Additionally, in HRL 545254 dated November 22, 1994, Customs held that a sale between a foreign company and a United States company which included an intermediate shipment through a Canadian bonded warehouse operation was a sale for exportation to the United States, and transaction value was determined to be the proper method of appraisal. Thus, the fact that the goods in the subject transactions were first shipped to Canada and placed in a bonded warehouse, did not preclude the use of transaction value. HRL 545254 stated that no contingency of diversion existed with regard to an alternative disposition of the goods in Canada. Namely, the merchandise which did not meet the quality standards was not sold in Canada but was removed from the bonded warehouse and returned to the exporter.

However, Customs found transaction value inapplicable as a means of appraisal in HRL 546069 dated August 1, 1996, where cheese, intended for the United States market, was shipped through Holland and placed in a bonded warehouse for inspection to ensure the cheese met contract specifications before its final shipment to the United States. If the cheese did not meet specifications, it could be sold in the European market. Given those facts Customs found that the evidence submitted did not establish that the cheese was destined for the United States market.

Based on the above-cited precedent, it is our opinion that the Products are sold for exportation and destined for the United States at the time Zenith purchased them from the Asian sellers. Zenith has submitted purchase orders, invoices, packing lists, Customs Forms and bills of lading as evidence that the Products are sold for exportation and destined for the United States at the time Zenith purchased the Products from the Asian sellers. Both the purchase orders and invoices indicate that the terms of sale or shipping terms are FOB Asian shipping port through Los Angeles to McAllen, Texas. Thus, the Products are destined to the U.S. at the time of purchase. Additionally, the bills of lading show shipment from Asia to the United States and Zenith as the consignee, who is responsible for paying the shipping costs. Title to the Products is transferred from the foreign vendors to Zenith at the time the Products are loaded onto the vessels bound for the U.S. The foreign vendors receive payment for the Products shortly after the Products are loaded aboard a vessel bound to the United States through letters of credit. Zenith has also submitted copies of Customs Form 7512, Transportation Entry and Manifest of Goods Subject to Customs Inspection and Permit for Transportation and Exportation class of entry, as evidence that they are importer of record when making entry into the U.S.

Additionally, in HRL 545368 dated July 6, 1995, Customs examined a number of factors to ascertain whether imported hair dryers were clearly destined for the United States in determining whether a sale for exportation took place between the foreign manufacturer and the middleman. In this case the imported products exclusively used English on their packaging and on the care manual; they contained UL safety label on the packaging; they used 110-volt electrical current, which is not used outside of North America; they incorporated a circuit interruption device, which is required only in the U.S.; they used U.S. trademarks on the product and product packaging and statements on the shipping documents showed that the merchandise was to be delivered to the importer in the U.S. Thus, Customs held that the products were clearly destined for the United States. As the manufacturer and middleman were unrelated and it was presumed that they negotiated at arm's length, Customs determined that the transaction value was based upon the price actually paid or payable by the middleman to the manufacturer.

With regard to the Products being destined for the United States, we find that the Products are similarly situated to the hair dryers in HRL 545368. Zenith submitted a sample of an imported accessory, "SpaceSound," as evidence that its Products are destined to the United States at the time of purchase. The Product and its packaging comply with U.S. Customs country of origin marking requirements in that it carries the statement, in English, that the Product is "Made in China." Zenith's trademark for the Product, its copyrighted logo, and Zenith's name appear, in English, on the Product, its packaging, and user's manual. Zenith states that, when mandated by U.S. law, the Products possess safety features, such as circuit interrupter devices, which are required in the United States but are not required in other countries, including Mexico. Counsel notes that the sample accessory carries a UL safety label and a Federal Communications Commission product identification number. Thus, an examination of the Product and its packaging indicates that it is destined to the United States. Counsel states that all of its Products are treated in a manner similar to the submitted sample.

Based on the evidence submitted, the Products which are imported in-bond through the U.S. and then re-packaged in Mexico for importation in the U.S. are clearly destined for the United States at the time Zenith purchased them from the Asian vendors. Similar to HRL 544230, we find that the imported merchandise is not packed ready for shipment to the United States until it has been packaged in Mexico. It is our opinion that the costs incurred in Mexico, temporary storage and handling, are integral to this packing operation and, therefore, meet the statutory definition of packing costs in §402(h)(3) of the TAA. The packing costs are a statutory addition to the price actually paid or payable pursuant to §402(b)(1)(A) of the TAA. The Products are appraised pursuant to transaction value under §402(b) of the TAA based on the price actually paid or payable between Zenith and the foreign vendors with an addition for the packing costs incurred by Zenith in Mexico.

-Buying Agent:

We note that in acquiring the Products from the foreign vendors, Zenith on occasion uses Buying Agents. Counsel states that Zenith provides these agents with product specifications and requirements and the terms which Zenith will accept. Thus, the agents act on behalf of Zenith in seeking and securing vendors. As a general matter, bona fide buying commissions are not added to the price actually paid or payable. *Pier 1 Imports, Inc. v. United States*, 708 F. Supp. 351, 13 CIT 161, 164 (1989). The existence of a bona fide buying commission depends upon the relevant factors of the individual case. *J.C. Penney Purchasing Corp. v. United States*, 451 F. Supp. 973 (Cust. Ct. 1978). In this regard the importer has the burden of proving the existence of a bona fide agency relationship and that payments to the agent constitute bona fide buying commissions. *Rosenthal-Netter, Inc. v. United States*, 679 F. Supp. 21, 23, 12 CIT 77, 78 (1988). Since the buying agency issue was not raised in this request and no evidence was submitted, we have not formulated a position as to whether it is dutiable.

3. Subheading 9801.00.20

We previously found in §1 of this ruling that pursuant to the representative protest, the protests may not be amended to include the duty-free claim under subheading 9801.00.20, HTSUS. However, if you find that a protest timely and properly raises the subheading 9801.00.20, HTSUS, issue, the analysis below should be used in your disposition of the protest.

Subheading 9801.00.20, HTSUS, provides for the duty-free treatment of:

[a]rticles, previously imported, with respect to which the duty was paid upon such previous importation . . . if (1) reimported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad, after having been exported under lease or similar use agreements, and (2) reimported by or for the account of the person who imported it into, and exported it from, the United States.

The predecessor of subheading 9801.00.20, HTSUS, was item 801.00 of the Tariff Schedules of the United States (TSUS). That particular provision was amended in 1984 to provide for, inter alia, articles that had been exported under “similar use agreements” and leases to entities other than foreign manufacturers. Trade and Tariff Act of 1984, Pub. L. No. 98–573, 118,

98 Stat. 4922 (1984). Before the amendment, duty-free treatment applied only to merchandise that had been exported under lease to foreign manufacturers.

In this case Zenith claims that the Products qualify for duty-free treatment under subheading 9801.00.20, HTSUS, as a “similar use agreement.” Based upon the information presented, the Products imported from Mexico were being reimported by or for the account of the person who imported them into, and exported them from, the United States, namely Zenith. Furthermore, while in Mexico, the Products were stored and repackaged for return to the U.S. and Partes was compensated for the storage service in lump sum payments from Zenith. Thus, while in Mexico the Products were not advanced in value or improved in condition by any process of manufacture or other means.

In regard to whether the parts and accessories were exported under a lease or similar use agreement, it is our opinion that the agreement between Zenith and Partes is not a lease as Zenith did not grant Partes with the right to use the parts and accessories in exchange for periodic payments. Rather, Zenith is the party that is paying Partes for its services. See *Werner & Pfleiderer Corp. v United States*, 17 CIT 916, 918 (1993), citing to *Black’s Law Dictionary* 889 (6th ed. 1990) defining a “lease” as, “a contract by which one owning . . . property grants to another the right to possess, use and enjoy it for specified period of time in exchange for periodic payment.”

However, it is our opinion that the relationship between Zenith and Partes is a bailment agreement for Partes to hold and repackage the goods until they are needed by Zenith’s customers. See HRL 222863 dated July 1, 1991. The term “bailment” is defined as:

[a] delivery of goods of personal property, by one person to another, in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust. *Black’s Law Dictionary* 129 (5th ed. 1979).

Therefore, in the spirit of the liberal interpretation of subheading 9801.00.20, HTSUS, we find that this bailment arrangement is a “similar use agreement” within the meaning of subheading 9801.00.20, HTSUS, and that the Products are eligible for duty-free treatment under subheading 9801.00.20, HTSUS, provided you are satisfied that the Products for which free entry are claimed were duty-paid on a previous importation. See 19 CFR § 10.108.

HOLDING:

Based on the representative protest submitted, Zenith may not amend its protest by adding its additional ground that the Products previously entered into the U.S., which were warehoused in Chicago, and then moved to Partes, are entitled to duty-free treatment under subheading 9801.00.20, HTSUS, pursuant to 19 CFR § 174.28.

Based on the evidence presented, the Products are clearly sold for exportation to the U.S. from the foreign vendors. Thus, assuming transaction value is acceptable, the Products are appraised under § 402(b) of the TAA based on the price actually paid or payables between Zenith and the foreign ven-

dors. The packing costs incurred by Zenith and paid to the Mexican related party are to be added to the price actually paid or payable in determining transaction value.

If a protest timely and properly raises the subheading 9801.00.20, HTSUS, claims, it is our opinion that the Products are eligible for duty-free treatment under subheading 9801.00.20, HTSUS. In order to receive duty-free treatment under this tariff provision, no specific documents are required; rather, the importer must establish to your satisfaction that the statutory requirements have been met.

This decision should be mailed by your office to the internal advice requester no later than 60 days from the date of this letter. On that date the Office of Regulations and Rulings will take steps to make the decision available to Customs personnel via the Customs Rulings Module in ACS and the public via the Diskette Subscription Service, Freedom of Informational Act and other public access channels.

ACTING DIRECTOR,
Director,
International Trade Compliance Division.

[ATTACHMENT D]

DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
HQ 560511
November 18, 1997
CLA-2 RR:TC:SM 560511 JML
CATEGORY: Classification
TARIFF NO: 9801.00.20

MR. KNOX WHITE, ESQ.
HAYNSWORTH, MARION, MCKAY & GUERARD, L.L.P.
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Greenville, SC 29602

RE: Eligibility of Chinese-origin bibs packaged in the Dominican Republic for duty-free treatment under subheading 9801.00.20, HTSUS; GRI 3(b); similar use agreement.

DEAR MR. WHITE:

This is in response to your letter of May 23, 1997 on behalf of Gerber Childrenswear, Inc. ("Gerber"), in which you requested a binding ruling on the eligibility of Chinese-origin bibs for duty-free treatment under subheading 9801.00.20, Harmonized Tariff Schedule of the United States ("HTSUS"). Through additional correspondence received by our office on November 4, 1997, you provided a sample of the bib for our review.

FACTS:

The information provided indicates that Gerber intends to engage in certain business transactions wherein it will import Chinese-origin bibs into the United States ("U.S.") and pay duty on the same. Gerber will export the bibs to the Dominican Republic for retail packaging with assembled infant

underwear as a promotional item. The underwear are assembled in the Dominican Republic as one piece infant underwear called “onesies.” Gerber will then reimport the bibs (in the packaging with the underwear) into the U.S.

According to your submission, Gerber’s relationship with the Dominican plant, Costura Dominicana, is one of bailor to bailee as it pertains to the delivery and return of the bibs. You claim that Gerber maintains ownership of the bibs throughout the entire process, while Costura Dominicana is responsible for the goods’ safe return.

ISSUE:

Whether the Chinese-origin bibs, packaged together for retail sale with the underwear in the Dominican Republic, are eligible for duty-free treatment under subheading 9801.00.20, HTSUS, upon their reimportation into the U.S.

LAW AND ANALYSIS:

CLASSIFICATION

The first issue to be addressed is whether the packaged bib and underwear are classifiable together under one tariff provision, or whether they are each classifiable separately under different provisions.

Classification under the HTSUS is made 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 may then be applied. The Explanatory Notes (“EN”) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRIs.

In pertinent part, GRI 2(b) states that “[t]he classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.” GRI 3 states, “[w]hen, by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected” according to the terms of GRI 3. GRI 3(a) directs that the headings are regarded as equally specific when each heading refers to part only of the items in a set put up for retail sale. Therefore, to determine whether the article might be classified under one provision, we look to GRI 3(b), which states in pertinent part that:

[g]oods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The EN for GRI 3(b) define “goods put up for sets in retail sale” as goods which consist of at least two different articles which are classifiable in different headings; consist of products or articles put up together to meet a particular need or carry out a specific activity; and are put up in a manner suitable for sale directly to users without repacking.

Applying this definition to the instant case, Customs is of the opinion that the bib and underwear are not “goods put up in sets for retail sale.” The bib and the underwear are products used for entirely different purposes. The

products do not, together, meet a particular need or carry out a specific activity. As they do not qualify as a set under GRI 3(b), the bib and underwear packaged together are to be each classified separately in accordance with the principles of GRI 1.

9801.00.20

Subheading 9801.00.20, HTSUS, provides duty-free treatment for:

[a]rticles, previously imported, with respect to which the duty was paid upon such previous importation or which were previously free of duty pursuant to the Caribbean Basin Economic Recovery Act or Title V of the Trade Act of 1974, if (1) reimported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad, after having been exported under lease or similar use agreements, and (2) reimported by or for the account of the person who imported it into, and exported it from, the United States.

Section 10.108, Customs Regulations (19 CFR 10.108), provides, in relevant part, that free entry shall be accorded under subheading 9801.00.20, HTSUS, whenever it is established to the satisfaction of the port director that the article for which free entry is claimed was duty paid on a previous importation, is being reimported by or for the account of the person who previously imported it into, and exported it from the U.S., and was exported from the U.S. under lease or similar use agreement.

In this case, to the extent the transaction at issue is prospective in nature, we assume that Gerber is the original importer of the bibs and paid duty on them. Copies of sample entries provided supports these facts. It also appears that Gerber will be the party reimporting the bibs since they are to be retailed as a Gerber product in its packaging. Moreover, Customs does not consider merely packaging a good for retail sale as an advancement in value or improvement in condition. See *John v. Carr & Sons, Inc.*, 69 Cust.Ct. 78, C.D. 4377 (1972), *aff'd*, 61 CCPA 52, C.A.D. 1118 (1974); Headquarters Ruling Letter (“HRL”) 555624, dated May 1, 1990 (perfumes packaged into sample pouches abroad not advanced in value or improved in condition for purposes of subheading 9801.00.10 treatment).

Thus, the question turns on whether the bibs will be exported abroad under a “lease or similar use agreement” as required under subheading 9801.00.20, HTSUS. The predecessor of subheading 9801.00.20, HTSUS, was item 801.00 of the Tariff Schedules of the United States (TSUS). That particular provision was amended in 1984 to provide for articles that had been exported under “similar use agreements” and leases to entities other than foreign manufacturers. Trade and Tariff Act of 1984, Pub. L. No. 98–573, 118, 98 Stat. 4922 (1984) Before the amendment, duty-free treatment applied only to merchandise that had been exported under lease to foreign manufacturers. In *Werner & Pfleiderer Corporation. V. United States*, 17 C.I.T. 916 (1993), a recent case interpreting the amended language of item 801.00, Tariff Schedules of the United States (“TSUS”) (the precursor provision to subheading 9801.00.20, HTSUS), the Court of International Trade stated that “the provision concerning goods exported under lease, in particular, is not the sort of exemption from duties which must be narrowly construed.” At issue was whether or not a loan arrangement was the type of “similar use agreement” contemplated by item 801.00, TSUS. In holding that a loan was a “similar use agreement,” the court opined that if the drafters of that provision intended the provision to encompass nothing broader

than a lease, then the language “similar use agreement” would not have been added to the provision. See also Headquarter’s Ruling Letter (“HRL”) 559937, dated July 25, 1997

You contend that the situation under which Gerber will export the bibs to the Dominican Republic is one of bailment. You claim that a bailment arrangement is a qualified “similar use agreement” for purposes of subheading 9801.00.20, HTSUS. In this regard we note the definition of bailment as stated in Blacks’s Law Dictionary:

A delivery of goods of personal property, by one person (bailor) to another (bailee), in trust for the execution of a special object upon or in relation to such goods, beneficial to either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust. (emphasis added). Black’s Law Dictionary (6th ed. 1990)

You state that Gerber delivers materials and parts for packaging operations in the Dominican Republic but that Gerber maintains ownership of the materials throughout the process. In accordance with the above-stated findings of the courts and Customs rulings, we find that such a relationship qualifies as a “similar use agreement” for purposes of subheading 9801.00.20, HTSUS. Thus, assuming Gerber provides evidence to the port director’s satisfaction in accordance with the documentary requirements of section 10.108, Customs Regulations, the bibs will be eligible for duty-free treatment under subheading 9801.00.20, HTSUS, upon their reimportation into the U.S.

HOLDING:

Based on the information submitted, we find that the bibs packaged in the Dominican Republic will be eligible for duty-free treatment under subheading 9801.00.20, HTSUS, when returned to the U.S., provided Gerber previously imported the bibs and paid duty thereon; they are reimported by or for the account of Gerber; and the documentary requirements of section 10.108, Customs Regulations, are satisfied.

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

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT E]

DEPARTMENT OF HOMELAND SECURITY,
U.S. CUSTOMS AND BORDER PROTECTION,
HQ H019446
OT:RR:CTF:VS H019446 GOB
CATEGORY: Classification
TARIFF NO.: 9801.00.20

MR. MICHAEL J. SPAIN, ESQ.
SONNENBERG, ANDERSON, O'DONNELL & RODRIGUEZ
200 West Adams Street, Suite 2625
Chicago, Illinois 60606

RE: Subheading 9801.00.20, HTSUS; Modification of HQ 222863

DEAR MR. SPAIN:

In HQ 222863, dated July 1, 1991, we responded to your ruling request on behalf of Imperial World, Inc. We have reexamined HQ 222863 and have determined that it needs to be modified. Our modification follows.

FACTS:

You state that your client, Imperial World, Inc. ("Imperial World"), imports precious jewelry samples under heading 7113 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Included in these samples are gold rings, bracelets, necklaces, and pendants. Some of the articles are gem-set with precious or semiprecious stones, such as diamonds, sapphires, rubies, emeralds, topaz, and amethyst.

Some of these articles are occasionally sent back to the factory where they were made so that they may be exhibited to customers visiting the manufacturing plant. You state that the merchandise sent back is used only for exhibition purposes; no further processing or manufacturing is done to these articles. You also state that Imperial World does this because it finds establishing inventories at both the manufacturing plant and in the United States to be too expensive.

After the merchandise has been exhibited at the manufacturing plant, Imperial World reimports it into U.S. customs territory. Imperial World wishes to have the reimported merchandise classified under subheading 9801.00.20, HTSUS, which would entitle it to duty-free status.

ISSUE:

Whether the articles are entitled to treatment under subheading 9801, HTSUS?

LAW AND ANALYSIS:

Subheading 9801.00.20, HTSUS, provides for duty-free treatment for:

Articles, previously imported, with respect to which the duty was paid upon such previous importation or which were previously free of duty pursuant to the Caribbean Basin Economic Recovery Act or Title V of the Trade Act of 1974, if (1) reimported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad, after having been exported under lease or similar use agreements, and (2) reimported by or for the account of the person who imported it into, and exported it from, the United States.

The predecessor provision of subheading 9801.00.20 was item 801.00 of the Tariff Schedules of the United States (“TSUS”). That provision was amended in 1984 to provide for, *inter alia*, articles that had been exported under similar use agreements and leases to entities other than foreign manufacturers. Trade and Tariff Act of 1984, Pub. L. No. 98–573, 118, 98 Stat. 4922 (1984). Before the amendment, duty-free treatment under this provision applied only to merchandise that had been exported under lease to foreign manufacturers.

In the present case, Imperial World makes no mention of a lease agreement between the manufacturer and itself. Rather, Imperial World claims that it qualifies for subheading 9801.00.20, HTSUS under the similar use provision. The particular use in this case would be the exhibition of the articles at the manufacturing plant. Imperial World further states that the manufacturer does not pay for the use of the samples and that both parties benefit through customers’ orders as a result of the exhibition. Upon reimportation, Imperial World is also the importer of record.

While there exists no court case precedent interpreting “similar use agreement” under 9801, and the legislative history of the provision does not provide a clear definition, we find “similar use agreement” to mean an agreement similar to that of a lease. We believe the provision was added to cover transactions that do not involve formal lease agreements but are very much like leases in most respects. In fact, in the legislative history of the House bill that introduced this particular amendment, it is stated that “[t]he intent of this legislation is to extend coverage of [801.00] to the reimportation of goods which were exported under lease to someone other than a foreign manufacturer . . .” H.R. Rep. No. 34, 98th Cong., 2d Sess. 157 (July 25, 1984). We must now decide whether the agreement between Imperial World and the manufacturer is similar to a lease agreement.

Imperial World contends that the agreement between it and the manufacturer constitutes a “bailment” situation and further states that this is a type of similar use agreement referred to under subheading 9801.00.20, HTSUS. It claims that the distinction between a bailment situation and a formal lease is the absence of a payment.

Subsequent to the issuance of HQ 222863, in a case pertaining to 801.00, TSUS, *Werner & Pfleiderer Corp., v. United States*, 17 C.I.T. 916 (1993), the Court of International Trade considered a situation where the plaintiff exported a machine to Ogilvie Mills in Canada, indicating on the shipping invoice that it was the property of Werner and was on loan for testing purposes. The Court of International Trade referred to the definition of a lease, namely, that it is “a contract by which one owning . . . property grants to another the right to possess, use and enjoy the property for a specified period of time in exchange for periodic payment.” The court noted that consideration is a necessary element of a valid lease and that the general definitions of loan and lease were identical except for the requirement of consideration. The court found that the agreement between Werner and Ogilvie constituted either a lease or a loan for temporary use, and was clearly a similar use agreement. The court acknowledged the absence of a payment, but did not make reference to a bailment.

In this case, the jewelry is being exported for exhibition. This is similar to a loan for testing, as was approved by the court in *Werner & Pfleiderer*. Accordingly, we find that the subject goods are eligible for treatment under subheading 9801.00.20, HTSUS.

As such, we do not need to address whether the language “similar use agreement” encompasses a “bailment,” as that term is not part of the statutory language of subheading 9801.00.20, HTSUS.

HOLDING:

The reimportation of articles of jewelry is eligible for subheading 9801.00.20, HTSUS, based upon the facts that duty had been previously paid on the merchandise, the articles were not advanced in value or improved in condition while abroad, and the articles were reimported by the party who exported them from the United States under a similar use agreement for exhibition purposes.

EFFECT ON OTHER RULINGS:

HQ 222863 is modified. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

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

[ATTACHMENT F]

DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
HQ H019799
MAR-05 OT:RR:CTF:VS H019799 GOB
CATEGORY: Classification

TERRIE A. GLEASON, ESQ.
BAKER & MCKENZIE
815 Connecticut Avenue, NW,
Washington, DC 20006-4078

RE: Modification of HQ 562343; Inventory Management; FIFO; NAFTA Eligibility; U.S. General Note 20

DEAR MS. GLEASON:

In HQ 562343, dated August 27, 2002, we responded to your ruling request on behalf of R.G. Barry Corporation (“RG Barry”). We have reexamined HQ 562343. We have determined that HQ 562343 needs to be modified to make clear that it did not address the applicability of subheading 9801.00.20, HTSUS to the facts therein. Our modification follows.

FACTS:

Your ruling request concerns the appropriate attribution of origin to goods of different countries of origin that are packaged for importation into the U.S. at a foreign distribution center.

A manufacturer and distributor of house slippers, RG Barry, is opening a distribution center in Nuevo Laredo, Mexico. The slippers exported to the U.S. from this distribution center fall into several categories with respect to country of origin and treatment by Customs and Border Protection (“CBP”).

A large proportion of this merchandise is of Mexican origin, eligible to be entered free of duty and fees under the NAFTA. A small proportion of the merchandise is manufactured in China. The Chinese-origin merchandise en-

ters the distribution center after having been imported, duty paid, into the U.S. Also, certain Mexican-origin merchandise enters the Mexican distribution center after having been imported into the U.S. free of duty and fees under the NAFTA. The activity of importing into the U.S., re-exporting to the Nuevo Laredo distribution facility, and finally packing and shipping bulk containers for importation into the U.S. is conducted by RG Barry for its own account; no sales are involved.

The issue of attribution raised in the ruling request arises because a small portion of the Chinese-origin and Mexican-origin merchandise have the same style numbers. The ruling request seeks approval to identify the country of origin of such merchandise according to a first-in-first-out (“FIFO”) accounting method when preparing the merchandise for shipment to the U.S. It is understood that such identification, or constructive segregation, would be used in place of physical segregation according country of origin of the merchandise having the same style numbers.

It is submitted that identification of Chinese as opposed to Mexican merchandise on the basis of a FIFO accounting method should be acceptable because the accuracy of the respective quantities to be entered can be verified using invoices and style summary sheets. It is argued that by reason of such records, the quantity of each class of goods can be ascertained by CBP, such that the goods should not be treated as commingled within the meaning General Note 20, HTSUS (prior to 2002, General Note 19). It is suggested that physical segregation of the Chinese and Mexican merchandise having the same style numbers is not necessary because the quantities may be determined by reference to packing lists and other documents filed at the time of entry.

RG Barry also argues that General Note 20 has no application under the circumstances because the rate of duty applicable to the merchandise under both the NAFTA and subheading 9801.00.20, HTSUS, is the same – zero.

You advise that with respect to the Mexican-origin, previously imported merchandise, the CBP Port Director at Laredo, Texas, has approved re-importation under subheading 9801.00.20, HTSUS. However, you state that the previously-entered, Mexican-origin goods will be re-entered into the U.S. under the applicable HTSUS provision for the slippers, free of duty and merchandise processing fees (“MPF”) under NAFTA, rather than subheading 9801.00.20, HTSUS. This Mexican-origin merchandise, having been imported into the U.S. by RG Barry, is delivered by RG Barry on a consignment basis to its Nuevo Laredo distribution center, and then re-imported by RG Barry for its own account.

Subheading 9801.00.20, HTSUS, provides for the duty-free treatment of goods that have been previously imported duty paid if: 1) the article is re-imported without having been advanced in value or improved in condition; 2) the article was exported under a lease or similar use agreement; and 3) the article is re-imported by or for the account of the person who imported it into, and exported it from, the United States.

In your letter requesting this ruling, you claim that the Chinese-origin merchandise, we presume previously imported into the U.S. duty paid, consigned to the Mexican warehouse, and re-imported, would be eligible for treatment under subheading 9801.00.20, HTSUS.

ISSUE:

May the importer employ a FIFO accounting and inventory management method to constructively segregate Chinese-origin goods claimed to be eli-

gible for treatment under subheading 9801.00.20, HTSUS, from Mexican-origin goods eligible for duty-free and MPF-free treatment under the NAFTA?

LAW & ANALYSIS:

Acceptable techniques to identify goods that are subject to differing treatment at entry are indicated in several sections of the Customs laws and Regulations. In this case, both General Note 20, HTSUS, and the inventory management methods permitted under the NAFTA (see, 19 CFR § 181 App., Schedule X) are applicable to the circumstances set forth.

General Note (GN) 20 prescribes the tariff treatment to be afforded to goods that are commingled. It provides, in relevant part, that:

(a) Whenever goods subject to different rates of duty are so packed together or mingled that the quantity or value of each class of goods cannot be readily ascertained by customs officers (without physical segregation of the shipment or the contents of any entire package thereof), by one or more of the following means:

- (i) sampling,
- (ii) verification of packing lists or other documents filed at the time of entry, or
- (iii) evidence showing performance of commercial settlement tests generally accepted in the trade and filed in such time and manner as may be prescribed by regulations of the Secretary of the Treasury,

the commingled goods shall be subject to the highest rate of duty applicable to any part thereof. (An additional provision concerns segregation under CBP supervision following notification by Customs to the importer that goods are commingled. It does not appear that this is the procedure contemplated by RG Barry for the operations at issue.)

The Regulations for the administration of NAFTA eligibility and marking provide various possibilities for the treatment of commingled goods. In particular, commingled goods that are fungible may be accounted for by the use of specified inventory management methods. Section 102.12 of the NAFTA marking regulations (19 CFR §102.12) provides that:

When fungible goods of different countries of origin are commingled the country of origin of the goods: (a) Is the countries of origin of those commingled goods; or (b) If the good is fungible, has been commingled, and direct physical identification of the origin of the commingled good is not practical, the country or countries of origin may be determined on the basis of an inventory management method provided under the appendix to part 181 of the Customs Regulations.

For the purpose of identifying goods manufactured in Mexico that are to be imported under claims of eligibility as NAFTA originating goods, 19 CFR §181 App., Section 7(16)(b) provides:

where originating goods and non-originating goods that are fungible goods are physically combined or mixed in inventory and prior to exportation do not undergo production or any other operation in the territory of the NAFTA country in which they were physically combined or mixed in inventory, other than unloading, reloading or any other operation necessary to preserve the goods in good condition or to transport the goods for exportation to the territory of another NAFTA country, the determination of whether the good is an originating good may, at the

choice of the exporter of the good or the person from whom the exporter acquired the good, may be made on the basis of any of the applicable inventory management methods set out in Schedule X.

Part I, Section 11 of Schedule X (19 CFR §181 App.), prescribes the FIFO method of inventory management as one of the four methods of inventory management acceptable for determining whether fungible goods are originating goods.

On the basis of the facts presented and these provisions of the CBP Regulations concerning claims of NAFTA eligibility, this office concludes that:

- The merchandise originating in China and the merchandise originating in Mexico that have the same style numbers are fungible goods for the purposes of inventory management;
- RG Barry's FIFO accounting as described is one of the inventory management methods acceptable for the purposes of determining and claiming NAFTA eligibility from among fungible goods physically combined in inventory; and
- Provided that the operations performed on the fungible goods the Nuevo Laredo distribution center are limited to those authorized in 19 CFR §181 App., Section 7(16)(b), RG Barry may elect to employ its FIFO method for the attribution of Mexican origin and NAFTA eligibility to the goods.

With regard to Chinese-origin fungible merchandise to be entered under subheading 9801.00.20, HTSUS, you advise that in support of its claim under this subheading, RG Barry will maintain all copies of CF 7501 relating to the style at issue. It is understood that these would be available, pursuant to 19 CFR 10.108, to establish to the port director's satisfaction that duty was paid on previous importations of the goods into the U.S.

Your submission indicates that the port director already has approved entry under subheading 9801.00.20, HTSUS, for certain Mexican-origin goods on the same basis. This ruling does not address the applicability of subheading 9801.00.20, HTSUS, to goods which were previously imported into the U.S., exported to the distribution center, and re-imported into the U.S. This ruling only addresses the applicability of the use of the FIFO method for purposes of entering the slippers under NAFTA.

With regard to the method of segregation, RG Barry submits that in most cases it will segregate the Chinese and Mexican merchandise according to packing lists or other documents filed at the time of entry as specified at U.S. General Note 20(a)(ii). In those cases where a single style number has two countries of origin, the FIFO inventory management method would be used.

Under these circumstances RG Barry's FIFO method would enable CBP officials to ascertain properly the quantity and value of the respective classes of goods. Once the requisite number of slippers have been entered under NAFTA per the FIFO inventory method, any subsequent slippers would need to qualify for entry under subheading 9801.00.20, HTSUS.

As indicated above, this ruling does not address whether the requirements for use of subheading 9801.00.20, HTSUS have been satisfied.

HOLDING:

Upon consideration of the FIFO approach proposed by RG Barry to accomplish the necessary attribution of country of origin in connection with its

Mexican distribution operations, we find that FIFO inventory management is consistent with the applicable NAFTA and HTSUS General Notes provisions, and is approved for attribution of origin as described herein.

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

EFFECT ON OTHER RULINGS:

HQ 562343 is modified. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

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

[ATTACHMENT G]

DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
HQ H019800
OT:RR:CTF:VS H019800 GOB
CATEGORY: Valuation

PORT DIRECTOR
U.S. CUSTOMS SERVICE
P.O. Box 3130
Laredo, Texas 78044-3130

RE: Modification of HQ 546561 with respect to subheading 9801.00.20,
HTSUS

DEAR PORT DIRECTOR:

In HQ 546561, dated March 16, 1998, we responded to your request for internal advice with respect to certain issues. We have reexamined HQ 546561 and have determined that it needs to be modified with respect to the subheading 9801.00.20, Harmonized Tariff Schedule of the United States ("HTSUS") issue. Our modification follows.

This is in regard to a memorandum from the Supervisor Import Specialist, Duty Assessment Branch II, dated November 7, 1996, forwarding a request for Internal Advice dated October 10, 1996, submitted by Baker & McKenzie on behalf of Zenith Electronics Corporation. The issues raised are whether the protestant can amend its Protests, whether the imported products are entitled to duty-free treatment pursuant to subheading 9801.00.20, Harmonized Tariff Schedule of the United States ("HTSUS"), and whether the products imported from Mexico are appraised under transaction value pursuant to § 402(b) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 ("TAA"), codified at 19 U.S.C. §1401a, based on the purchase price between Zenith and the Asian vendors. Information obtained in a telephone conversation between Zenith's counsel and a member of my staff on March 20, 1997, obtained at the July 15, 1997 meeting and contained in an additional submission dated September 8, 1997 was taken into consideration in reaching this decision.

FACTS:

The products at issue are various foreign origin replacement parts and accessories for Zenith's main products, televisions and numerous electronic products. Zenith imports the products from unrelated vendors in various Asian countries, with the exception of Lucky Goldstar Electronics, Inc. ("Lucky Goldstar"), to whom Zenith is related. As of November 1995, Lucky Goldstar owned a fifty-seven percent (57%) interest in Zenith. Zenith states that it imports only a few articles from Lucky Goldstar and it is the parties' long-standing policy to sell products to each other at an arm's length price. As evidence of this practice, Zenith provided two sets of invoices for two different products. The invoices show that Zenith paid Lucky Goldstar the same price for each product before and after the parties became related. Thus, Zenith states the relationship with Lucky Goldstar had no effect on the prices charged by Lucky Goldstar to Zenith for the parts and accessories. Counsel states that Zenith employs two buying agents in Asia, Zenith Taiwan, a wholly-owned subsidiary of Zenith, and HMO, Inc. a subsidiary of GC Thorsen, Inc., who act on behalf of Zenith in seeking and securing vendors. Counsel states that Zenith provides these agents with product specifications and requirements and the terms which Zenith will accept.

Prior to July 1994, Zenith entered the products into the Long Beach port for consumption under transaction value pursuant to §402(b) of the TAA based on the price Zenith paid the foreign vendors. The products then entered Zenith's Chicago warehouse until they were resold to U.S. customers.

In July 1994, Zenith moved its warehouse operations to Partes de Television de Reynosa, S.A. de C.V. ("Partes"), a wholly owned Mexican subsidiary of Zenith, to save on freight, labor and real estate costs. The previously imported duty-paid products contained in the Chicago warehouse were moved to Partes. Now, Zenith imports its products through the Long Beach port to McAllen, Texas via a Transportation and Exportation Bond. Zenith submitted samples of Customs Form 7512, Transportation Entry and Manifest of Goods Subject to Customs Inspection and Permit for Transportation and Exportation class of entry. The products are then exported from the U.S. and proceed to the Partes warehouse.

At the Partes warehouse, the products are unloaded and stored for a temporary period of time. When Zenith requires products to fulfill U.S. customers orders, Partes simply repackages the products for resale and ships them to the U.S. per Zenith's instructions. Zenith re-imports the products and the U.S. customers either take title to the goods at entry or at customer specified locations. The U.S. customers pay Zenith for the goods. Partes does not receive money from the U.S. customers. Partes is paid by Zenith for its packing operation, including temporary storage and handling, through occasional lump-sum payments. Zenith has submitted samples of its invoices to the U.S. customers which make no mention of Partes or Mexico. Counsel states that the products enter Mexico under bond and free of duty pursuant to Mexico's Maquiladora Program and, thus, they never enter Mexico's commerce. Zenith submitted copies of Zenith's Mexican Ministry of Commerce and Industrial Development Permits and Mexico's entry documents documenting the in-bond importation of various products into Mexico. Counsel states that Zenith never planned to divert the products into the Mexican commerce upon the occurrence of any particular contingency and Zenith does not transfer title to the products to Partes or any other party. Counsel

states that Zenith merely consigns the products to Partes for temporary storage.

The terms of sale between Zenith and all the foreign vendors are "FOB Foreign Port." Counsel states that title and risk of loss to the products pass from the foreign vendor to Zenith when the products are laden aboard vessels bound for the U.S. in the foreign port specified by the parties in sales contracts. With regard to its buying agents, Zenith notes that title passes from the foreign vendors to the buying agents and then simultaneously to Zenith at the foreign port. Zenith has submitted representative samples of its purchase orders, packing lists, and commercial invoices as evidence that Zenith takes title in the foreign country and that the U.S. is the final destination of the Products. Additionally, Zenith has submitted bills of lading from shipping companies as evidence that the U.S. is the final destination of the products and that Zenith is responsible for paying freight and related charges from Asia to the U.S.

Counsel states all of Zenith's foreign vendors are aware that the products are being manufactured pursuant to Zenith's specifications for importation into the U.S. Zenith's specifications for the products include the requirement that the products meet all U.S. technical and safety standards and carry all required U.S. technical and safety labels. Zenith also requires that the products be marked in accordance with U.S. Customs country of origin marking requirements. Moreover, Zenith's accessories require that Zenith's name and the Zenith product name be displayed in English on the product and product packing. Counsel stated in the March 20, 1997, telephone conversation that Zenith orders the products from the foreign vendors for their own inventory. Counsel noted that Zenith orders its parts, *i.e.*, transistors, and accessories (remote controls), based on their tracking information which analyzes the demand for their televisions. Thus, based on the number of televisions Zenith is making, Zenith can estimate the amount of parts and accessories they need to procure. Counsel maintains that all of the imported products are specifically produced for Zenith, a U.S. company, for resale in the U.S. market.

With regard to Zenith's importation from Partes, Zenith made entry under transaction value pursuant to §402(b) of the TAA and based the value of each product on the full resale price paid to Zenith by its U.S. customer. Zenith now submits that the proper appraisement of products imported from Partes is transaction value pursuant to §402(b) of the TAA based on the price Zenith paid the foreign vendor. Additionally, in letters dated October 7 and 8, 1996, to the Supervisory Import Specialist, Counsel has requested to amend all Zenith's protests by adding an additional ground. Zenith submits that the products previously entered into the U.S. duty-paid, which were warehoused in Chicago, and then moved to Partes, are entitled to duty-free treatment under subheading 9801.00.20, HTSUS. Counsel stated in the March 20, 1997, telephone conversation that Zenith has not claimed drawback on any of the Products eligible for subheading 9801.00.20, HTSUS, duty-free treatment.

ISSUES:

1. Whether the protestant can amend its Protests.
2. Whether the products imported from Mexico should be appraised pursuant to transaction value of §402(b) of the TAA based on the purchase price

between Zenith and the Asian vendors. If so, are the packing costs incurred in Mexico a statutory addition to the price actually paid or payable pursuant to §402(b)(1)(B) of the TAA.

3. Whether the imported products are entitled to duty-free treatment pursuant to subheading 9801.00.20, HTSUS.

LAW AND ANALYSIS:

1. Amendment to Protest

With regard to whether Zenith may amend its protests, §174.14(a), Customs and Border Protection (“CBP”) Regulations (19 CFR 174.14(a)), provides that:

A protest may be amended at any time prior to the expiration of the 90-day period within which such protest may be filed determined in accordance with §174.12(e). The amendment may assert additional claims pertaining to the administrative decision which is the subject of the protest, or may challenge an additional administrative decision relating to the same category of merchandise which is the subject of the protest. For the presentation of additional grounds or arguments in support of a valid protest after the 90-day period has expired see §174.28.

Section 174.28, Customs Regulations (19 CFR §174.28), provides:

In determining whether to allow or deny a protest filed within the time allowed, a reviewing officer may consider alternative claims and additional grounds or arguments submitted in writing by the protesting party with respect to any decision which is the subject of a valid protest at any time prior to disposition of the protest

Zenith submits that the products previously entered into the U.S. duty-paid, which were warehoused in Chicago, and then moved to Partes, are entitled to duty-free treatment under subheading 9801.00.20, HTSUS. Zenith has submitted its additional ground in writing in its letters dated October 7 and 8, 1996, to the Supervisory Import Specialist. For most of the entries under Protest, the October 7 and 8, 1996 additional ground was submitted to Customs well after the 90-day period set forth in 19 CFR §174.14(a). Thus, Customs may consider Zenith’s additional ground, as set forth in the October 7 and 8, 1996 letters, only if it is an additional ground asserted against a valid claim set forth in its protests.

The representative protest submitted to this office asserts that the appraised value of all the imported merchandise was incorrect. Additionally, Zenith stated that “. . . in other cases, there was no ‘importation’ of the merchandise so that no duties would be owed.” We do not find any language in the protest which raises the duty-free claim of subheading 9801.00.20, HTSUS. Thus, the protest does not “cryptic[ly], inartistic[ly], or poorly drawn,” raise as a protested administrative decision the duty-free claim. See, *Mattel, Inc. v. United States*, 72 Cust. Ct. 257, C.D. 4547, 37 F. Supp. 955 (1974) and HQ 224447 dated September 26, 1996. Pursuant to the representative protest submitted, Zenith’s letters claiming duty-free treatment pursuant to subheading 9801.00.20, HTSUS, were not timely submitted. Therefore, you may not consider this additional ground pursuant to 19 CFR §174.28.

2. Valuation

The preferred method of appraising merchandise imported into the U.S. is transaction value pursuant to §402(b) of the TAA. §402(b)(1) of the TAA provides, in pertinent part, that transaction value of imported merchandise is the “price actually paid or payable for the merchandise when sold for exportation to the United States,” plus enumerated statutory additions including packing costs incurred by the buyer. §402(b)(1)(A) of the TAA.

Related Parties

Imported merchandise is appraised under transaction value only if the buyer and seller are not related, or if related, the transaction value is deemed to be acceptable. In this situation, one of Zenith’s foreign vendors, Lucky Goldstar, is a related party pursuant to §402(g)(1) of the TAA. §402(b)(2)(B) of the TAA provides that transaction value between related parties is acceptable only if an examination of the circumstances of the sale indicates that the relationship between the parties does not influence the price actually paid or payable, or the transaction value of imported merchandise closely approximates the transaction value of identical or similar merchandise in sales to unrelated buyers in the U.S. or the deductive or computed value for identical or similar merchandise. Although you did not specifically seek advice regarding whether the relationship between Zenith and Lucky Goldstar affects the price of the imported merchandise, we feel a brief discussion of this issue is warranted.

Under the circumstances of sales approach, if the parties buy and sell from one another as if they were unrelated, transaction value will be considered acceptable. Thus, if the price is determined in a manner consistent with normal industry pricing practice, or with the way the seller deals with unrelated buyers, the price actually paid or payable will be deemed not to have been influenced by the relationship. Furthermore, the price will not be influenced if it is shown that the price is adequate to ensure recovery of all costs plus a profit that is equivalent to the firm’s overall profit realized over a representative period of time in sales of merchandise of the same class or kind. Statement of Administrative Action, reprinted in *Customs Valuation under the Trade Agreements Act of 1979*, Department of the Treasury, U.S. Customs Service (October 1981) at 54; §152.103(j)(2), Customs Regulations (19 CFR 152.103(j)(2)).

Counsel states that Zenith and Lucky Goldstar buy and sell from one another as if they were unrelated. As evidence of this practice, Zenith provided two sets of invoice for two different products. The invoices show that Zenith paid Lucky Goldstar the same price for each product before (invoice dated September 6, 1995, for part number 597–106A; and invoice dated September 22, 1995, for part number 521–250S) and after the parties became related (invoice dated January 24, 1996, for part number 597–106A; and invoice dated January 1, 1996, for part number 521–250S). Thus, counsel contends that transaction value is acceptable between Zenith and its related foreign vendor, Lucky Goldstar.

A similar argument was raised in HQ 545272 dated August 17, 1995, in which the importer argued that the sale between the related parties should be used for determining the transaction value of the imported merchandise because the parties allegedly dealt with each other at arm’s length as though they were unrelated. In support of this position, the importer stated that a 1986 sales agreement between the parties was negotiated at a time when the parties were not related and that the pricing of the merchandise

remained in effect subsequent to 1989 even after the parties became related. In determining that this evidence was insufficient to justify that the related dealt with each other as if unrelated, HQ 545272 stated:

Based on the above, it appears when that the joint venture was formed, the corporate relationship between [the related parties] may not have immediately effected the price of the existing products. However, for a transaction to be truly arm's length, a pricing scheme cannot stay in effect indefinitely because market conditions can change over time. The original sales contract was negotiated in 1986 and 1987, but the actual sales of the [imported products] occurred several years later, such as in the sample entry provided by the Office of Regulatory Audit, where the transaction occurred in 1991. To ensure that prices of the products are kept current, the parties may have to review the prices and make adjustments. At some point, the parties may even have to renegotiate with each other. In other words, we believe that even though the prices for some the [imported products] were initially set when they were unrelated, it does not necessarily establish that the relationship between [the related parties] did not influence the price of the [imported product] over an indefinite period of time. The fact that the prices remained unchanged over a period over several years is some indication that the relationship may have influenced the price. In order for Customs to accept the transfer price, additional evidence of its validity is needed.

It is our opinion that HQ 545272 is applicable to this situation. The mere fact that the prices remain unchanged before and after Zenith and Lucky Goldstar became related is not prima facie evidence that the parties relations did not influence the price. This fact must be examined along with other evidence regarding the circumstances of sale to determine whether transaction value is an acceptable method of appraisement between the related parties. As no other evidence or positions were presented by your office or Zenith, we have not formulated an opinion on this issue.

Sale for export and Mexican packing costs

In this situation, we first need to examine whether a sale for exportation to the U.S. occurred between Zenith and the foreign vendors. For Customs purposes, the word "sale" generally is defined as a transfer of ownership in property from one party to another for a consideration. *J.L. Wood v. United States*, 62 CCPA 25, 33 C.A.D. 1139 (1974). While *J.L. Wood* was decided under the prior appraisement statute, CBP adheres to this definition under the TAA. The primary factors to consider in determining whether there has been a transfer of property or ownership are whether the alleged buyer has assumed the risk of loss and whether the buyer has acquired title to the imported merchandise. See HQ 544775 dated April 3, 1992, and HQ 543633 dated July 7, 1987. Also relevant is whether, in general, the roles of the parties and circumstance of the transaction indicate that the parties are functioning as buyer and seller. See HQ 545474 dated August 25, 1995.

A similar factual situation was addressed in HQ 544230, dated December 22, 1988, in which the imported merchandise was entered into the U.S. from El Salvador under a Transportation and Exportation Bond and then shipped to Mexico for a retail packaging operation. After the packaging operation, the merchandise was imported into the U.S. for retail sale. In that ruling, CBP determined that the sale for exportation occurred between the El Salvador seller and the U.S. importer and that the packing operation in Mexico

did not alter that conclusion. HQ 544230 determined that the Mexican packing operation fell within the statutory definition of packing costs set forth in §402(h)(3) of the TAA, which states:

the cost of all containers and coverings of whatever nature and of packing, whether for labor or materials, used in placing the merchandise in condition, packed ready for shipment to the United States.

The imported merchandise was not packed ready for shipment to the United States until it was packaged in Mexico. Thus, the transaction value was based on the price paid to the seller with an addition for the packing operation performed in Mexico pursuant to §402(b)(1)(A) of the TAA.

Additionally, in HQ 545254, dated November 22, 1994, CBP held that a sale between a foreign company and a United States company which included an intermediate shipment through a Canadian bonded warehouse operation was a sale for exportation to the United States, and transaction value was determined to be the proper method of appraisement. Thus, the fact that the goods in the subject transactions were first shipped to Canada and placed in a bonded warehouse did not preclude the use of transaction value. HQ 545254 stated that no contingency of diversion existed with regard to an alternative disposition of the goods in Canada. Namely, the merchandise which did not meet the quality standards was not sold in Canada but was removed from the bonded warehouse and returned to the exporter.

However, CBP found transaction value inapplicable as a means of appraisement in HQ 546069, dated August 1, 1996, where cheese, intended for the United States market, was shipped through Holland and placed in a bonded warehouse for inspection to ensure the cheese met contract specifications before its final shipment to the United States. If the cheese did not meet specifications, it could be sold in the European market. Given those facts CBP found that the evidence submitted did not establish that the cheese was destined for the United States market.

Based on the above-cited precedent, it is our opinion that the products are sold for exportation and destined for the United States at the time Zenith purchased them from the Asian sellers. Zenith has submitted purchase orders, invoices, packing lists, Customs Forms and bills of lading as evidence that the products are sold for exportation and destined for the United States at the time Zenith purchased the products from the Asian sellers. Both the purchase orders and invoices indicate that the terms of sale or shipping terms are FOB Asian shipping port through Los Angeles to McAllen, Texas. Thus, the products are destined to the U.S. at the time of purchase. Additionally, the bills of lading show shipment from Asia to the United States and Zenith as the consignee, who is responsible for paying the shipping costs. Title to the products is transferred from the foreign vendors to Zenith at the time the products are loaded onto the vessels bound for the U.S. The foreign vendors receive payment for the products shortly after the products are loaded aboard a vessel bound to the United States through letters of credit. Zenith has also submitted copies of Customs Form 7512, Transportation Entry and Manifest of Goods Subject to Customs Inspection and Permit for Transportation and Exportation class of entry, as evidence that they are importer of record when making entry into the U.S.

Additionally, in HQ 545368, dated July 6, 1995, CBP examined a number of factors to ascertain whether imported hair dryers were clearly destined for the United States in determining whether a sale for exportation took

place between the foreign manufacturer and the middleman. In this case the imported products exclusively used English on their packaging and on the care manual; they contained UL safety label on the packaging; they used 110-volt electrical current, which is not used outside of North America; they incorporated a circuit interruption device, which is required only in the U.S.; they used U.S. trademarks on the product and product packaging and statements on the shipping documents showed that the merchandise was to be delivered to the importer in the U.S. Thus, CBP held that the products were clearly destined for the United States. As the manufacturer and middleman were unrelated and it was presumed that they negotiated at arm's length, CBP determined that the transaction value was based upon the price actually paid or payable by the middleman to the manufacturer.

With regard to the products being destined for the United States, we find that the products are similarly situated to the hair dryers in HRL 545368. Zenith submitted a sample of an imported accessory, "SpaceSound," as evidence that its products are destined to the United States at the time of purchase. The product and its packaging comply with U.S. Customs country of origin marking requirements in that it carries the statement, in English, that the product is "Made in China." Zenith's trademark for the product, its copyrighted logo, and Zenith's name appear, in English, on the product, its packaging, and user's manual. Zenith states that, when mandated by U.S. law, the products possess safety features, such as circuit interrupter devices, which are required in the United States but are not required in other countries, including Mexico. Counsel notes that the sample accessory carries a UL safety label and a Federal Communications Commission product identification number. Thus, an examination of the product and its packaging indicates that it is destined to the United States. Counsel states that all of its products are treated in a manner similar to the submitted sample.

Based on the evidence submitted, the products which are imported in-bond through the U.S. and then re-packaged in Mexico for importation in the U.S. are clearly destined for the United States at the time Zenith purchased them from the Asian vendors. Similar to HQ 544230, we find that the imported merchandise is not packed ready for shipment to the United States until it has been packaged in Mexico. It is our opinion that the costs incurred in Mexico, temporary storage and handling, are integral to this packing operation and, therefore, meet the statutory definition of packing costs in §402(h)(3) of the TAA. The packing costs are a statutory addition to the price actually paid or payable pursuant to §402(b)(1)(A) of the TAA. The products are appraised pursuant to transaction value under §402(b) of the TAA based on the price actually paid or payable between Zenith and the foreign vendors with an addition for the packing costs incurred by Zenith in Mexico.

Buying Agent

We note that in acquiring the products from the foreign vendors, Zenith on occasion uses Buying Agents. Counsel states that Zenith provides these agents with product specifications and requirements and the terms which Zenith will accept. Thus, the agents act on behalf of Zenith in seeking and securing vendors. As a general matter, *bona fide* buying commissions are not added to the price actually paid or payable. *Pier 1 Imports, Inc. v. United States*, 708 F. Supp. 351, 13 CIT 161, 164 (1989). The existence of a bona fide buying commission depends upon the relevant factors of the individual case. *J.C. Penney Purchasing Corp. v. United States*, 451 F. Supp. 973 (Cust. Ct.

1978). In this regard the importer has the burden of proving the existence of a bona fide agency relationship and that payments to the agent constitute bona fide buying commissions. *Rosenthal-Netter, Inc. v. United States*, 679 F. Supp. 21, 23, 12 CIT 77, 78 (1988). Since the buying agency issue was not raised in this request and no evidence was submitted, we have not formulated a position as to whether it is dutiable.

3. Subheading 9801.00.20

We previously found in section one of this ruling that pursuant to the representative protest, the protests may not be amended to include the duty-free claim under subheading 9801.00.20, HTSUS. However, if you find that a protest timely and properly raises the subheading 9801.00.20 issue, the analysis below should be used in your disposition of the protest.

Subheading 9801.00.20, HTSUS, provides for the duty-free treatment of:

[a]rticles, previously imported, with respect to which the duty was paid upon such previous importation . . . if (1) reimported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad, after having been exported under lease or similar use agreements, and (2) reimported by or for the account of the person who imported it into, and exported it from, the United States.

The predecessor of subheading 9801.00.20, HTSUS, was item 801.00 of the Tariff Schedules of the United States (“TSUS”). That provision was amended in 1984 to provide for, *inter alia*, articles that had been exported under “similar use agreements” and leases to entities other than foreign manufacturers. Trade and Tariff Act of 1984, Pub. L. No. 98–573, 118, 98 Stat. 4922 (1984). Before the amendment, duty-free treatment applied only to merchandise that had been exported under lease to foreign manufacturers.

In this case Zenith claims that the products qualify for duty-free treatment under subheading 9801.00.20, HTSUS, as a “similar use agreement.” Based upon the information presented, the products imported from Mexico were being reimported by or for the account of the person who imported them into, and exported them from, the United States, namely Zenith. Furthermore, while in Mexico, the products were stored and repackaged for return to the U.S. and Partes was compensated for the storage service in lump sum payments from Zenith. Thus, while in Mexico the products were not advanced in value or improved in condition by any process of manufacture or other means.

In regard to whether the parts and accessories were exported under a lease or similar use agreement, it is our opinion that the agreement between Zenith and Partes is not a lease as Zenith did not grant Partes with the right to use the parts and accessories in exchange for periodic payments. Rather, Zenith is the party that is paying Partes for its services. See *Werner & Pfleiderer Corp. v. United States*, 17 CIT 916, 918 (1993), citing to *Black’s Law Dictionary* 889 (6th ed. 1990), defining a “lease” as, *inter alia*, “a contract by which one owning . . . property grants to another the right to possess, use and enjoy it for specified period of time in exchange for periodic payment.”

The question here is whether the goods were exported under a similar use agreement. In HQ 222863, an argument was made that a bailment is a type of similar use agreement. In HQ 222863, CBP noted that there was no court

precedent interpreting “similar use agreement” and that there was a particular use, *i.e.*, exhibition. Subsequent to the issuance of HQ 222863, the Court of International Trade considered item 801.00, TSUS (now subheading 9801.00.20, HTSUS) in the *Werner* case, where no payment was made for the use of the exported goods. In *Werner*, the court found that a notation on the shipping invoice to a loan for testing purposes was an agreement that constituted a similar use agreement and did not make reference to a bailment.

We have reexamined HQ 222863 in light of the guidance provided in the *Werner* case. We have determined that the key considerations in *Werner* were that there be an agreement under which the merchandise was exported and that the agreement provide for the merchandise to be used (testing purposes), not merely held for resale. Thus, while we continue to agree, as suggested in HQ 222863, that payment is not a requirement for eligibility under subheading 9801.00.20, HTSUS, an agreement providing for use of the merchandise is a requirement. We do not believe that we need to address whether a bailment is a similar use agreement for purposes of answering the question raised in that case as to whether jewelry exported for exhibition qualified for subheading 9801.00.20, HTSUS, treatment. Rulings subsequent to HQ 222863 have referred to the bailment definition in HQ 222863 when no payment was made, but they did not focus on the requirement of use. Therefore, upon further consideration of this matter, we find that merely warehousing, packaging, or a combination of the two does not amount to a similar use within the meaning of subheading 9801.00.20, HTSUS, because such operations do not amount to a use of the goods. To the extent that our rulings held or suggested otherwise, we are taking action to modify them accordingly. We believe our previous interpretation on this issue was overly expansive and allowed treatment under subheading 9801.00.20, HTSUS, which is well beyond the scope of the subheading.

Accordingly, we find that the subject goods are not eligible for treatment under subheading 9801.00.20, HTSUS.

HOLDINGS:

Based on the representative protest submitted, Zenith may not amend its protest by adding its additional ground that the products previously entered into the U.S., which were warehoused in Chicago, and then moved to Partes, are entitled to duty-free treatment under subheading 9801.00.20, HTSUS, pursuant to 19 CFR § 174.28.

Based on the evidence presented, the products are clearly sold for exportation to the U.S. from the foreign vendors. Thus, assuming transaction value is acceptable, the products are appraised under §402(b) of the TAA based on the price actually paid or payable between Zenith and the foreign vendors. The packing costs incurred by Zenith and paid to the Mexican related party are to be added to the price actually paid or payable in determining transaction value.

If a protest timely and properly raises the subheading 9801.00.20, HTSUS, claim, the products are not eligible for duty-free treatment under subheading 9801.00.20, HTSUS, because there is no lease or similar use agreement. HQ 546561 is modified in this respect.

This decision should be mailed by your office to the internal advice requester no later than 60 days from the date of this letter. On that date the office of Regulations and Rulings will take steps to make the decision avail-

able to CBP personnel and to the public on the CBP Home Page at www.cbp.gov, by means of the Freedom of Information Act, and other methods of public distribution.

EFFECT ON OTHER RULINGS:

HQ 546561 is modified. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

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

[ATTACHMENT H]

DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
HQ H019801
CLA-2 OT:RR:CTF:VS H019801 GOB
CATEGORY: Classification
TARIFF NO: 9801.00.20

MR. KNOX WHITE, ESQ.
HAYNSWORTH, MARION, MCKAY & GUERARD, L.L.P.
75 Beattie Place
Two Insignia Financial Plaza - Eleventh Floor
Post Office Box 2048
Greenville, SC 29602

RE: Modification of HQ 560511; Subheading 9801.00.20, HTSUS

DEAR MR. WHITE:

In HQ 560511, dated November 18, 1997, we responded to your ruling request of May 23, 1997 on behalf of Gerber Childrenswear, Inc. ("Gerber"). We have reexamined HQ 560511 and have determined that it needs to be modified with respect to the subheading 9801.00.20, Harmonized Tariff Schedule of the United States ("HTSUS") issue. Our modification follows.

In your letter of May 23, 1997 you requested a ruling on the eligibility of Chinese-origin bibs for duty-free treatment under subheading 9801.00.20, Harmonized Tariff Schedule of the United States ("HTSUS"). Through additional correspondence received by our office on November 4, 1997, you provided a sample of the bib for our review.

FACTS:

The information provided indicates that Gerber intends to engage in certain business transactions wherein it will import Chinese-origin bibs into the United States and pay duty on the same. Gerber will export the bibs to the Dominican Republic for retail packaging with assembled infant underwear as a promotional item. The underwear are assembled in the Dominican Republic as one piece infant underwear called "onesies." Gerber will then reimport the bibs (in the packaging with the underwear) into the U.S.

According to your submission, Gerber's relationship with the Dominican plant, Costura Dominicana, is one of bailor to bailee as it pertains to the de-

livery and return of the bibs. You claim that Gerber maintains ownership of the bibs throughout the entire process, while Costura Dominicana is responsible for the goods' safe return.

ISSUE:

Whether the Chinese-origin bibs, packaged together for retail sale with the underwear in the Dominican Republic, are eligible for duty-free treatment under subheading 9801.00.20, HTSUS, upon their reimportation into the U.S.

LAW AND ANALYSIS:

Classification

The first issue to be addressed is whether the packaged bib and underwear are classifiable together under one tariff provision, or whether they are each classifiable separately under different provisions.

Classification under the HTSUS is made 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 may then be applied. The Explanatory Notes ("EN") to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRIs.

In pertinent part, GRI 2(b) states that "[t]he classification of goods consisting of more than one material or substance shall be according to the principles of rule 3." GRI 3 states, "[w]hen, by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected" according to the terms of GRI 3. GRI 3(a) directs that the headings are regarded as equally specific when each heading refers to part only of the items in a set put up for retail sale. Therefore, to determine whether the article might be classified under one provision, we look to GRI 3(b), which states in pertinent part that:

[g]oods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The EN for GRI 3(b) defines "goods put up for sets in retail sale" as goods which consist of at least two different articles which are classifiable in different headings; consist of products or articles put up together to meet a particular need or carry out a specific activity; and are put up in a manner suitable for sale directly to users without repacking.

Applying this definition to the instant case, we find that the bib and underwear are not "goods put up in sets for retail sale." The bib and the underwear are products used for entirely different purposes. The products do not, together, meet a particular need or carry out a specific activity. As they do not qualify as a set under GRI 3(b), the bib and underwear packaged together are to be each classified separately in accordance with the principles of GRI 1.

Subheading 9801.00.20

Subheading 9801.00.20, HTSUS, provides duty-free treatment for:

[a]rticles, previously imported, with respect to which the duty was paid upon such previous importation or which were previously free of duty pursuant to the Caribbean Basin Economic Recovery Act or Title V of the Trade Act of 1974, if (1) reimported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad, after having been exported under lease or similar use agreements, and (2) reimported by or for the account of the person who imported it into, and exported it from, the United States.

Section 10.108, Customs and Border Protection (“CBP”) Regulations (19 CFR 10.108), provides, in relevant part, that free entry shall be accorded under subheading 9801.00.20, HTSUS, whenever it is established to the satisfaction of the port director that the article for which free entry is claimed was duty-paid on a previous importation, is being reimported by or for the account of the person who previously imported it into, and exported it from the U.S., and was exported from the U.S. under lease or similar use agreement.

The predecessor of subheading 9801.00.20, HTSUS, was item 801.00 of the Tariff Schedules of the United States (“TSUS”). That provision was amended in 1984 to provide for, *inter alia*, articles that had been exported under “similar use agreements” and leases to entities other than foreign manufacturers. Trade and Tariff Act of 1984, Pub. L. No. 98-573, 118, 98 Stat. 4922 (1984). Before the amendment, duty-free treatment applied only to merchandise that had been exported under lease to foreign manufacturers.

In this case, to the extent the transaction at issue is prospective in nature, we assume that Gerber is the original importer of the bibs and paid duty on them. Copies of sample entries provided supports these facts. It also appears that Gerber will be the party reimporting the bibs since they are to be retailed as a Gerber product in its packaging. Moreover, Customs does not consider merely packaging a good for retail sale as an advancement in value or improvement in condition. *See John v. Carr & Son, Inc. v. United States*, 69 Cust. Ct. 78, C.D. 4377 (1972), *aff’d*, 61 CCPA 52, C.A.D. 1118 (1974); HQ 555624, dated May 1, 1990 (perfumes packaged into sample pouches abroad not advanced in value or improved in condition for purposes of subheading 9801.00.10 treatment).

Gerber claims that the goods qualify for duty-free treatment under subheading 9801.00.20, HTSUS, as a “similar use agreement” based upon the bailment of the goods. As indicated above, one of the requirements for subheading 9801.00.20, HTSUS, is that the goods must have been exported under “lease or similar use agreements.” In *Werner & Pfleiderer Corp. v. United States*, 17 CIT 916 (1993), the court held that a loan for temporary use (testing) was a similar use agreement. The court in *Werner* cited to the following definition of “lease” in Black’s Law Dictionary (1990): “a contract by which one owning . . . property grants to another the right to possess, use and enjoy it for specified period of time in exchange for periodic payment.”

The question here is whether the goods were exported under a similar use agreement. In HQ 222863, an argument was made that a bailment is a type of similar use agreement. In HQ 222863, CBP noted that there was no court precedent interpreting “similar use agreement” and that there was a par-

ticular use, *i.e.*, exhibition. Subsequent to the issuance of HQ 222863, the Court of International Trade considered item 801.00, TSUS (now subheading 9801.00.20, HTSUS) in the *Werner* case, where no payment was made for the use of the exported goods. In *Werner*, the court found that a notation on the shipping invoice to a loan for testing purposes was an agreement that constituted a similar use agreement and did not make reference to a bailment.

We have reexamined HQ 222863 in light of the guidance provided in the *Werner* case. We have determined that the key considerations in *Werner* were that there be an agreement under which the merchandise was exported and that the agreement provide for the merchandise to be used (testing purposes), not merely held for resale. Thus, while we continue to agree, as suggested in HQ 222863, that payment is not a requirement for eligibility under subheading 9801.00.20, HTSUS, an agreement providing for use of the merchandise is a requirement. We do not believe that we need to address whether a bailment is a similar use agreement for purposes of answering the question raised in that case as to whether jewelry exported for exhibition qualified for subheading 9801.00.20, HTSUS, treatment. Rulings subsequent to HQ 222863 have referred to the bailment definition in HQ 222863 when no payment was made, but they did not focus on the requirement of use. Therefore, upon further consideration of this matter, we find that merely warehousing, packaging, or a combination of the two does not amount to a similar use within the meaning of subheading 9801.00.20, HTSUS, because such operations do not amount to a use of the goods. To the extent that our rulings held or suggested otherwise, we are taking action to modify them accordingly. We believe our previous interpretation on this issue was overly expansive and allowed treatment under subheading 9801.00.20, HTSUS, which is well beyond the scope of the subheading.

Accordingly, we find that the subject goods are not eligible for treatment under subheading 9801.00.20, HTSUS.

HOLDING:

The subject goods are not eligible for treatment under subheading 9801.00.20, HTSUS, as they are not exported under a lease or similar use agreement.

A copy of this ruling letter should be attached to the entry documents filed at the time the goods are entered. If the documents have been filed without a copy of this ruling, it should be brought to the attention of the CBP officer handling the transaction.

EFFECT ON OTHER RULINGS:

HQ 560511 is modified. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

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

**MODIFICATION OF A RULING LETTER AND REVOCATION
OF TREATMENT RELATING TO THE ADMISSIBILITY OF
CERTAIN UTILITY KNIVES**

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

ACTION: Modification of a classification ruling letter and revocation of treatment relating to the admissibility of certain utility knives.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying a ruling letter relating to the admissibility of certain utility knives. CBP is also modifying or revoking any treatment previously accorded by it to substantially identical merchandise. Notice of the proposed action was published on November 21, 2007, in Volume 41, Number 48, of the CUSTOMS BULLETIN. CBP received one comment in response to the notice, which was favorable.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after March 9, 2008.

FOR FURTHER INFORMATION CONTACT: W. Richmond Beevers, Intellectual Property Rights and Restricted Merchandise Branch: (202) 572-8723.

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 in-

formation 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, notice proposing to modify Headquarters Ruling Letter HQ W479898, dated June 29, 2007, was published on November 21, 2007, in Volume 41, Number 48, of the CUSTOMS BULLETIN. CBP received one comment in response to the notice, which was favorable.

As stated in the proposed notice, this modification will cover any rulings on this merchandise that may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., a 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.

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 is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in the 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 HQ W479898, CBP ruled, in part, that a utility knife with a retractable blade that extended into the open and locked position when pressure was applied to an elongated activator, under tension of a spring which resisted extension of the blade, being stretched as the activator lever was depressed, and assisted in the retraction of the blade, was prohibited from entry into the United States pursuant to the Switchblade Knife Act (15 U.S.C. §§ 1241–1245). Since the issuance of that ruling, CBP has reviewed the admissibility of the utility knives and has determined that the cited ruling is in error as it pertains to the "Squeeze Knife"TM utility knives.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is modifying HQ W479898 and is revoking or modifying any other ruling not specifically identified, to reflect the admissibility of the "Squeeze Knife"TM utility knives according to the analysis contained in proposed Headquarters Ruling Letter (HQ) H017909, set forth as an attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

DATED: December 26, 2007

JEREMY N. BASKIN,
Acting Director,
Border Security and Trade Compliance Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY,
U.S. CUSTOMS AND BORDER PROTECTION,
HQ H017909
December 26, 2007
ENF-4-02-OT:RR:BSTC:IPR H017909 WRB
CATEGORY: Restricted Merchandise

GEORGE S. MCCUE, ESQ.
STEPTOE & JOHNSON, L.L.P.
1330 Connecticut Ave., N.W.
Washington, DC 20036-1795

RE: Request for Reconsideration of Ruling HQ W479898 Regarding
“Squeeze Knife;” Admissibility; Switchblade Knife Act, 15 U.S.C.
§ 1241, *et seq.*

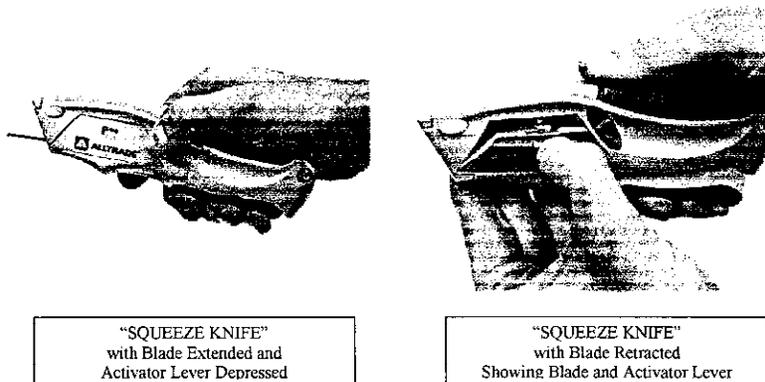
DEAR MR. MCCUE,

This is in response to your request dated September 25, 2007, on behalf of Alltrade Tools, LLC, for a reconsideration of a binding ruling regarding admissibility of “Squeeze Knife” knives vis-à-vis the Switchblade Knife Act, 15 U.S.C. § 1241, *et seq.*, as implemented by the Customs and Border Protection (CBP) Regulations at 19 CFR §§ 12.95 – 12.103. A sample was provided for our examination. Based upon the additional information and new evidence submitted, we have agreed to reconsider our prior ruling HQ W479898.

FACTS:

The “Squeeze Knife”TM has the appearance of a single utility knife and is approximately 6 and ½ inches in length. The “blade” of the article, which appears to be a standard utility/dry wall/“razor knife” blade, is approximately 1 inch long when fully extended. The “blade” extends into the open and locked position when pressure is applied to an elongated activator that comprises part of the handle. Inside the knife, a spring is attached to the mechanism which holds the blade. This spring is stretched when the activator lever is depressed, actively resisting the extension of the blade and the depression of the lever. If the lever is depressed only slightly, the blade is extended part-way, without locking in position. If the user ceases applying pressure at any time before the blade is fully extended and locked, the blade automatically retracts into the handle under spring tension. If depressed fully, the elongated activator locks the blade in position and forms part of the grip of the knife. A separate button on the side of the knife is depressed to release the spring, automatically retracting the blade back into the body

of the knife. The spring resists extension of the blade, being stretched as the activator lever is depressed, and assists in the retraction of the blade. There is also a blade-shaped storage compartment for replacement blades built into the body of the knife. Images of the subject knives are shown below:



ISSUES:

Whether the utility knives are admissible into the United States?

LAW and ANALYSIS:

Admissibility

The admissibility of knives into the commerce of the United States is determined according to the Switchblade Knife Act, 15 U.S.C. § 1241, *et seq.*, as implemented by the CBP Regulations at 19 CFR §§ 12.95 – 12.103. The CBP Regulations restate the provisions of 15 U.S.C. § 1241 verbatim. As we have stated many times, most recently in Headquarters Ruling Letter (HQ) 116315, dated March 1, 2005:

Pursuant to the Act of August 12, 1958 (Pub. L. 85–623, codified at 15 U.S.C. §§ 1241–1245, otherwise known as the “Switchblade Knife Act”), whoever knowingly introduces, or manufactures for introduction, into interstate commerce, or transports or distributes in interstate commerce, any switchblade knife, shall be fined or imprisoned, or both. The Customs and Border Protection (“CBP”) Regulations promulgated pursuant to the Switchblade Knife Act are set forth in 19 CFR §§ 12.95–12.103. In this regard we note the following definitions:

§ 12.95 Definitions.

Terms as used in §§12.96 through 12.103 of this part are defined as follows:

(a) Switchblade knife. . . . any imported knife, . . . including “Balisong”, “butterfly” . . . knives, which has one or more of the following characteristics or identities:

- (1) A blade which opens automatically by hand pressure applied to a button or device in the handle of the knife, or any knife with a

blade which opens automatically by operation of inertia, gravity, or both;

(2) Knives which, by insignificant preliminary preparation, as described in paragraph (b) of this section, can be altered or converted so as to open automatically by hand pressure applied to a button or device in the handle of the knife or by operation of inertia, gravity, or both;

(3) Unassembled knife kits or knife handles without blades which, when fully assembled with added blades, springs, or other parts, are knives which open automatically by hand pressure applied to a button or device in the handle of the knife or by operation of inertia, gravity, or both; or

(4) Knives with a detachable blade that is propelled by a spring-operated mechanism, and components thereof.

b) Insignificant preliminary preparation. "Insignificant preliminary preparation" means preparation with the use of ordinarily available tools, instruments, devices, and materials by one having no special manual training or skill for the purpose of modifying blade heels, relieving binding parts, altering spring restraints, or making similar minor alterations which can be accomplished in a relatively short period of time.

(c) Utilitarian use. "Utilitarian use" includes but is not necessarily limited to use:

- (1) For a customary household purpose;
- (2) For usual personal convenience, including grooming;
- (3) In the practice of a profession, trade, or commercial or employment activity;
- (4) In the performance of a craft or hobby;
- (5) In the course of such outdoor pursuits as hunting and fishing; and
- (6) In scouting activities.

Other pertinent regulations are as follows:

§ 12.96 Imports unrestricted under the Act.

(a) Common and special purpose knives. Imported knives with a blade style designed for a primary utilitarian use, as defined in § 12.95(c), shall be admitted to unrestricted entry provided that in condition as entered the imported knife is not a switchblade knife as defined in §12.95(a)(1). Among admissible common and special purpose knives are jackknives and similar standard pocketknives, special purpose knives, scout knives, and other knives equipped with one or more blades of such single edge nonweapon styles as clip, skinner, pruner, sheep foot, spey, coping, razor, pen, and cuticle.

(b) Weapons with fixed blades. Importations of certain articles having a fixed unexposed or exposed blade are not within the prohibition of 15 U.S.C. 1241 through 1245. However, upon release by Customs, possession of these admissible articles which include such weapons as

sword canes, camel whips, swords, sheath knives, machetes and similar devices that may be capable of use as weapons may be in violation of State or municipal laws.

§ 12.97 Importations contrary to law.

Importations of switchblade knives, except as permitted by 15 U.S.C. 1244, are importations contrary to law and are subject to forfeiture under 19 U.S.C. 1595a(c).

The plain language of the statute and relevant CBP regulations prohibit the importation of knives which are for use solely as weapons while explicitly permitting the importation of “common and special purpose” knives (see 15 U.S.C. §§ 12.95(c) (“Utilitarian Use” and 12.96(a) (“unrestricted imports”). Several courts have addressed the breadth of the prohibition set forth in the statute (see, e.g., *Precise Imports Corp. v. Kelly*, 378 F.2d 1014, 1017 (2d Cir. 1967), (“We hold, therefore, that a knife may be found to be a switchblade knife within the meaning of the Switchblade Knife Act if it is found that it can be made to open automatically by hand pressure, inertia, or gravity after insignificant alterations, and that one of its primary purposes is for use as a weapon.”) (*Taylor v. United States*, 848 F.2d 715, 717 (6th Cir. 1988)(“describing a Balisong: “while the exotic knife has some utilitarian use, it is most often associated with the martial arts and with combat . . . [and is] potentially dangerous, lethal . . .” Citing another district court decision involving the same issue, *Precise Imports Corp. v. Kelly*, 378 F.2d 1014 (2d Cir.), *cert. denied*, 389 U.S. 973, 19 L. Ed. 2d 465, 88 S. Ct. 472 (1967) (upholding a seizure of certain knives with no legitimate purpose), the district court described it as of “minimal value” and distinguished another “seminal case interpreting the Act”, *United States v. 1,044 Balisong Knives*, No. 70–110 (D. Ore. Sept. 28, 1970) (refusing to support seizure). The district court concluded that “congress intended to prohibit knives that opened automatically, ready for instant use . . . [and] was not concerned with whether the knife’s blade would merely be exposed by gravity”, . . . [it] intended ‘open’ to mean ‘ready for use.’” *Taylor v. United States*, 848 F.2d 715, 717 (6th Cir. 1988).

In *Precise Imports Corp. v. Kelly*, 378 F.2d 1014, 1017 (2d Cir. 1967), the court observed that:

The report of the Senate Committee on Interstate and Foreign Commerce which recommended passage of the Switchblade Knife Act stated that the enforcement of state laws banning switchblade knives would be extremely difficult as long as such knives could be freely obtained in interstate commerce, and added:

“In supporting enactment of this measure, however, your committee considers that the purpose to be achieved goes beyond merely aiding States in local law enforcement. The switchblade knife is, by design and use, almost exclusively the weapon of the thug and the delinquent. Such knives are not particularly adapted to the requirements of the hunter or fisherman, and sportsmen generally do not employ them. It was testified that, practically speaking, there is no legitimate use for the switchblade to which a conventional sheath or jackknife is not better suited. This being the case, your committee believes that it is in the national interest that these articles be banned from interstate commerce.”

S.Rep. No. 1980, 85th Cong., 2d Sess., reprinted in 2 U.S. Code Cong. & Ad. News 1958, at 3435–37.

In *Fall v. Esso Standard Oil Co.*, 297 F.2d 411, 414 (5th Cir. 1961), a wrongful death suit brought by the widow of a sailor who was stabbed with a switchblade, the court, through *dicta*, observed that because of their requisite characteristics, the type of and apparent intended use knives must be considered vis-à-vis the Switchblade Knife Act:

A useful tool may be a dangerous weapon. Lizzie Borden took an axe. A weapon may be a useful tool. The trial judge cleaned fish with his switchblade knife. But an axe belongs in a tool shed; a seaman cannot bring one aboard ship . . . Because of the dual nature of certain instruments as tools and weapons, the determination of the character of the instrument for purposes of the litigation is usually one for the jury.

Thus the court stated the essential question that must be answered here: if what appears to be a drywall or utility knife has characteristics of, *i.e.*, opens automatically like a prohibited switchblade knife, does the utilitarian or commercial purpose exception in 19 CFR § 12.95(c) override the general prohibition?

The knives at issue appear to be drywall or utility knives, equipped with utility knife blades. We have conducted extensive research regarding the switchblade knife act and the types of knives that are proscribed thereby. No authority appears to exist which addresses the exceptions to the act for “utilitarian” knives set forth at 19 CFR 12.95(c).

It is axiomatic in regard to the interpretation of statutory language that “when . . . the terms of a statute [are] unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances.” *United States v. James*, 478 U.S. 597, 606, 92 L. Ed. 2d 483, 106 S. Ct. 3116 (1986) (quoting *Rubin v. United States*, 449 U.S. 424, 430, 66 L. Ed. 2d 633, 101 S. Ct. 698 (1981) (internal quotation marks omitted)). Moreover, absent a “clearly expressed legislative intention to the contrary,” a statute’s plain meaning “must ordinarily be regarded as conclusive.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980). *Glaxo Operations UK, Ltd. v. Quigg*, 894 F.2d 392, 395 (Fed. Cir. 1990).

We conclude that while *all* knives can potentially be used as weapons, given that 19 CFR 12.95(c) lists six enumerated utilitarian uses (set forth above), only those knives that are specifically designed as (or insignificant preliminary preparation can be made into) switchblade knives or weapons are proscribed under the relevant statute and regulations.

The “Squeeze Knife”TM is opened by the application of pressure on the handle that extends the utility blade into the extended and locked position against spring pressure. This spring is stretched when the activator lever is depressed, actively resisting the extension of the blade and the depression of the lever. If the user ceases applying pressure at any time before the blade is fully extended and locked, the blade automatically retracts into the handle under spring tension. The spring resists extension of the blade, being stretched as the activator lever is depressed, and assists in the retraction of the blade. Because of these characteristics, the “Squeeze Knife”TM does not meet the definition of a switchblade knife as provided in § 12.95(a)(1) (*i.e.*, a blade which opens automatically by operation of inertia, gravity or both). Rather, the spring action of this knife is the opposite of that covered by the Switchblade Knife Act, in that it automatically retracts or “closes” the knife.

This model is not a prototypical switchblade or stiletto; rather, it is a spring activated utility knife which is designed for single-handed use by tradesmen. Given the explicit language of the Switchblade Knife Act and the implementing regulations, we conclude that the Squeeze Knife does not violate the proscriptions of the Switchblade Act and is admissible into the United States.

HOLDING:

The “Squeeze Knife”TM does not have the proscribed characteristics of a switchblade or gravity knife and is admissible into the United States. To the extent that our prior decision in HQ W479898 is incompatible with this determination, HQ W479898 is revoked.

Charles Stewart for GEORGE FREDERICK MCCRAY, ESQ.,
Chief,
Intellectual Property Rights Branch.

