

# U.S. Customs and Border Protection



## **PROPOSED REVOCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN ARTICLES OF FOOTWEAR**

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

**ACTION:** Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of certain articles of footwear.

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

**DATES:** Comments must be received on or before April 8, 2016.

**ADDRESSES:** Written comments are to be addressed to the U.S. Customs and Border Protection, Office of International Trade, Regulations & Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

**FOR FURTHER INFORMATION CONTACT:** Laurance W. Frierson, Tariff Classification and Marking Branch, at (202) 325–0371.

## 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) (“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 public 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 to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP is proposing to revoke one ruling letter concerning the tariff classification of certain articles of footwear under the Harmonized Tariff Schedule of the United States (HTSUS). Although in this notice, CBP is specifically referring to New York Ruling Letter (NY) N239002, dated March 29, 2013, (Attachment A), this notice covers any ruling on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (for example, a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise 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 proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer’s failure to advise CBP of substantially identical transactions or of

a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In ruling letter NY N239002, CBP determined that the Nike USA, Inc. (Nike) “Studio Wrap Pack,” which consists of several articles of footwear and related accessories for the practice of yoga and other exercise activities, was not classifiable pursuant to General Rule of Interpretation (GRI) 3(b), as “goods put up in sets for retail sale.” Accordingly, CBP ruled that the articles contained in the Studio Wrap Pack should be separately classified, by application of GRI 1, under their respective HTSUS headings. CBP has reconsidered ruling letter NY N239002, and it is now CBP’s position that the Studio Wrap Pack is properly classified, by application of GRI 3, in heading 6404, HTSUS, which provides for, “Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is therefore proposing to revoke ruling letter NY N239002, and to revoke any other ruling not specifically identified, to reflect the tariff classification of the Nike Studio Wrap Pack, according to the analysis contained in the proposed Headquarters Ruling Letter (HQ) H241428, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments time received.

Dated: December 15, 2015

GREG CONNOR  
*for*

JOANNE STUMP,  
*Acting Director*

*Commercial and Trade Facilitation Division*

Attachments

## [ATTACHMENT A]

N239002

March 29, 2013

CLA-2-64:RR:NC:N4:447

CATEGORY: Classification

TARIFF NO.: 6307.90.9889, 6402.99.3165,  
6404.19.3960, 6406.90.3060

MS. MELISSA POWELL  
NIKE USA INC.  
ONE BOWERMAN DRIVE, MS322-D  
BEAVERTON, OR 97005

RE: The tariff classification of a foot wrap “set” from Korea.

DEAR MS. POWELL:

In your letter dated February 25, 2013, you requested a tariff classification ruling for a footwear “set” identified as item 324734, “Nike Studio Pack.” You describe this item consisting of a foot wrap, a slip-on flat, a mesh laundry bag, a sock-liner and an accessory ankle strap. Although these items are marketed and sold at retail as a set, they do not qualify as a “set” for tariff classification purposes.

In order to qualify as a set for tariff purposes, the components of the set must meet all of the following criteria as defined in the Explanatory Note X (b) to GRI 3(b): For the purposes of this Rule, the term “goods put up in sets for retail sale” shall be taken to mean goods which: (a) consist of at least two articles which are, prima facie, classifiable in different headings... (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards). In this case, the second criterion is not met since the foot wrap, slip-on flat, mesh laundry bag, sock-liner and accessory ankle strap can be used for different activities. Therefore, the submitted sample identified as item 324734, “Nike Studio Pack” is not classifiable as a set for tariff purposes and each item will be classified separately. You suggest that the set be classified under subheading 4016.10.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for other articles of vulcanized rubber other than hard rubber: of cellular rubber. We disagree with this suggested classification based on General Rules of Interpretation (GRI) 1, which states in pertinent part; ‘For legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes.’

The submitted sample identified as an ankle strap, is approximately forty-two inches long and made of elasticized textile material. This strap, also referred to in marketing material as “The Ribbon,” is to be used with the foot wrap to provide “extra support and custom style.”

The submitted sample identified as a laundry bag for the foot wrap, is made of man-made textile mesh material and is used during the cleaning of the foot wrap. It is approximately 9 and one half inches long and six inches wide and has a drawstring closure at the top.

The applicable subheading for both the ankle strap and the laundry bag will be 6307.90.9889, HTSUS, which provides for other made up textile articles: other. The rate of duty will be 7% ad valorem.

The submitted sample identified as a women's foot wrap is slip-on footwear designed exclusively for use by exercisers in studio/gym classes (i.e. yoga and pilates) in lieu of traditional footwear. It has an elasticized neoprene rubber or plastics strap upper and outer sole. The outer sole features numerous rubber or plastics traction dots of different sizes on its surface. The forefoot portion of the shoe has two openings, one for the big toe and the other for the rest of the toes.

The applicable subheading for the foot wrap will be 6402.99.3165, HTSUS, which provides for footwear with outer soles and uppers of rubber or plastics: other footwear: other: other: having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements) is rubber or plastics; not having a foxing or a foxing-like band and not protective against water, oil, grease or chemicals or cold or inclement weather; other: other: other: for women: other. The rate of duty will be 6 percent ad valorem.

The submitted sample identified as a women's slip-on flat is a "ballet-type" shoe with a rubber or plastics outer sole and a predominately textile upper. You provided a laboratory report from Customs Laboratory Services, LLC, the results of which state that the outer sole overlaps the upper by the requisite  $\frac{1}{4}$  of an inch around 46.5% of the perimeter of the shoe. We find that this encirclement is not sufficient to constitute a foxing or a foxing-like band.

The applicable subheading for the slip-on flat will be 6404.19.3960, HTSUS, which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: footwear with outer soles of rubber or plastics: not sports footwear; footwear not designed to be a protection against cold or inclement weather and not having a foxing or a foxing-like band; footwear of the slip-on type; footwear that is not less than 10 percent by weight of rubber or plastics; other: other: for women. The rate of duty will be 37.5% ad valorem.

The submitted sample identified as a removable sock liner is the insole that fits inside the slip-on flat shoe. You describe the insole consisting of textile covered foam (rubber or plastics). Based on characteristics such as use (for shock absorption, cushioning, arch support, etc.), component weight/bulk and on the presumed greater cost of the rubber or plastics material, it is the rubber or plastics component that provides the essential character of this removable insole.

The applicable subheading for the removable insole will be 6406.90.3060, HTSUS, which provides for parts of footwear, removable insoles, heel cushions and similar articles; of rubber or plastics: other. The rate of duty will be 5.3% ad valorem.

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

The ankle strap, laundry bag and removable insole are not marked with the country of origin. Therefore, if imported as is, they will not meet the country of origin marking requirements of 19 U.S.C. 1304. Accordingly, the items would be considered not legally marked under the provisions of 19 C.F.R. 134.11 which states, "every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article."

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Stacey Kalkines at 646-733-3042.

*Sincerely,*

THOMAS J. RUSSO

*Director*

*National Commodity Specialist Division*

## [ATTACHMENT B]

HQ H241428  
CLA-2 OT:RR:CTF:TCM H241428 LWF  
CATEGORY: Classification  
TARIFF NO.: 6404.19.39

MR. LARS-ERIK A. HJELM  
AKIN GUMP STRAUSS HAUER & FELD LLP  
1333 NEW HAMPSHIRE AVENUE, N.W.  
WASHINGTON, DC 20036-1564

RE: Revocation of New York Ruling Letter N239002, dated March 29, 2013;  
tariff classification of the Nike Studio Wrap Pack

DEAR MR. HJELM:

This letter is to inform you that U.S. Customs and Border Protection (CBP) has reconsidered New York Ruling Letter (NY) N239002, issued to your client, Nike USA, Inc. (“Nike”) on March 29, 2013, concerning the tariff classification of a collection of footwear articles contained in Nike’s “Studio Wrap Pack” (Item #324734). In ruling letter NY N239002, CBP determined that the Studio Wrap Pack was not classifiable as “goods put up in sets for retail sale,” pursuant to General Rule of Interpretation (GRI) 3(b), and concluded that the component articles of the Studio Wrap Pack should be separately classified, pursuant to GRI 1, in their respective headings. Upon your request, dated April 30, 2013, CBP has reviewed NY N239002 and finds the ruling to be in error. Accordingly, for the reasons set forth below, CBP is revoking ruling letter NY N239002.

**FACTS:**

In ruling letter NY N239002, CBP described the Nike Studio Wrap Pack, Model No. 324734, as a collection of articles put up for sale together to provide a consumer with foot protection and traction during exercise activities. The Studio Wrap Pack is imported in a condition suitable for sale directly to users without repacking, and each Studio Wrap Pack consists of the following individual articles:

**1 Pair of Foot Wraps:** Each Foot Wrap is constructed of strips of knit textile that has been laminated with polyurethane cellular rubber. The strips are sewn together in a shape that wraps around the heel, lower ankle, and foot, while leaving the toes exposed. Synthetic traction dots are attached to the bottom of Foot Wrap, along slip soles that cover the heel and midfoot areas of the foot. The Foot Wraps account for 43.4% of the Studio Wrap Pack total cost.



*Nike Studio Wrap Pack, the "Foot Wrap"*

The Foot Wraps are designed to provide a near-barefoot experience during exercise activities such as yoga, pilates, and barre, while also delivering foot protection and traction on studio and gym floor surfaces. The Foot Wrap is also intended to be worn in combination with the Strap and is designed to fit inside the slip-on Flats, allowing a user to travel to and from the studio or gym while wearing the Foot Wrap. However, as the Foot Wrap does not possess an outer sole or toe coverings, it would be impractical to wear the Foot Wrap outside, without the combined use of the Flats.

Nike states in its February 25, 2013 tariff classification ruling request that it intends to sell the Foot Wrap as part of the Studio Wrap Pack, and in the future, separately with the Straps.

**2 Straps:** Each Strap consists of a cellular rubber ribbon that is designed to be wrapped over the Foot Wrap and around the ankle. The Strap provides additional support to the foot and ankle and accessorizes the Foot Wrap's fashion appearance. Use of the Straps with the Foot Wraps is optional.



*Nike Studio Wrap Pack, the Foot Wrap with a tied "Strap" around the foot and ankle*

**1 Pair of slip-on Flats:** The slip-on Flats consist of a textile-majority upper with a rubber/plastic outer sole. The Flats have no closure devices and are designed to be worn over the Foot Wraps or separately, without the Foot Wraps, in combination with the removable Insoles. Nike states that the Flats account for 32% of the Studio Wrap pack's total cost.



*Nike Studio Wrap Pack, the “Flat,” worn over a Foot Wrap with tied Strap*

**2 Insoles:** The removable Insoles are designed to be optionally inserted into the Flats and are constructed of textile-covered foam. A consumer, when not wearing the Foot Wraps, can insert the Insoles into the Flats for additional cushioning while walking.

**1 Mesh Bag:** The Mesh Bag is constructed of synthetic fibers and is large enough to hold the Foot Wraps and Straps. It is designed to provide the consumer with a protective bag in which to launder the Foot Wraps and Straps. The design of the Mesh Bag allows water and detergent to rinse and clean the Foot Wraps and Straps, while simultaneously protecting the items from damage during the washing cycle.

\* \* \* \* \*

#### **ISSUE:**

Whether the Nike Studio Wrap Pack is properly classified, pursuant to General Rule of Interpretation (GRI) 3(b), as goods put up in sets for retail sale, or whether the individual components of the Studio Wrap Pack should be separately classified, by application of GRI 1, in their respective headings.

#### **LAW AND ANALYSIS:**

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principals set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context with requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determine first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order.

The HTSUS provisions under consideration in this case are as follows:

6402	Other footwear with outer soles and uppers of rubber or plastics
6404	Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials

\* \* \* \* \*

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HS and are thus useful in ascertaining the proper classification of merchandise. It is CBP's practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUS. *See* T.D. 89-90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

As an initial matter, CBP observes that the Nike Studio Wrap Pack consists of a variety of individual articles (the Foot Wraps, Flats, Straps, Insoles, and Mesh Bag), packaged together for retail sale, that are, *prima facie*, classifiable in two or more headings. Specifically, there is no dispute that the Foot Wraps are described by heading 6402, HTSUS; the Flats are described by heading 6404, HTSUS; the Straps are described by heading 6307, HTSUS; the Insoles are described by heading 6406, HTSUS; and that the Mesh Bag is described by heading 6307, HTSUS.

Consequently, because the Nike Studio Wrap Pack is, *prima facie*, classifiable under two or more headings, classification shall be effected by application of GRI 3—specifically GRI 3(b), which directs 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.”<sup>1</sup>

For purposes of tariff classification under GRI 3(b), the term “sets for retail sale” carries a specific meaning that is defined in detail by EN (X) to GRI 3(b). Specifically, EN (X) to GRI 3(b) states:

- (X) For the purpose of this Rule, the term ‘goods put up in sets for retail sale’ shall be taken to mean goods which:
  - (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings . . . ;
  - (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
  - (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

\* \* \* \* \*

Upon consideration of whether the component articles of the Nike Studio Wrap Pack are properly classifiable as a “set” under GRI 3, there is no dispute

<sup>1</sup> GRI 3(b) states, in pertinent part, as follows:

3. When, 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 as follows:

[...]

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods 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.

that the merchandise is described by criteria (a) and (c), as set forth in EN (X) to GRI 3(b). Consistent with EN (X)(a) and (c) to GRI 3(b), the individual component articles of the Studio Wrap Pack are, *prima facie*, classifiable in different headings; likewise, the articles are packaged together in a retail box that is suitable for sale directly to users without repacking. Consequently, because the Nike Studio Wrap Pack satisfies criterion (a) and (c) of the EN (X) to GRI 3(b), the determination as to whether the Studio Wrap Pack is classifiable as “goods put up in sets for retail sale” turns on whether the merchandise is also described by EN(X)(b), which states that “sets” must consist of products or articles put up “to meet a particular need or carry out a specific activity.”

The courts have provided guidance on the meaning of “products or articles put up together to meet a particular need or carry out a specific activity” for purposes of classification pursuant to GRI 3(b). See *Estee Lauder, Inc. v. United States*, 815 F. Supp. 2d 1287, 1294 (Ct. Int’l Trade 2012). In *Estee Lauder*, the Court of International Trade (CIT) considered the classification of several cosmetic items put up together for retail sale, and concluded that because each item was specifically related to makeup and possessed an identifiable, individual function that was intended for use together or in conjunction with one another for the single activity of putting on makeup, the cosmetic items met the particular need of makeup application and were therefore, properly classified pursuant to GRI 3(b). *Id.* at 1295–96. Noting that each of the exemplars provided in the ENs consist of individual components that are used together or in conjunction with another for a single purpose or activity, the CIT agreed that “for goods put up together to meet the ‘particular need’ or ‘specific activity’ requirement and thereby be deemed a set, they must be so related as to be clearly intended for use together or in conjunction with one another for a single purpose or activity.” *Id.* (citing with approval CBP’s *Informed Compliance Publication*, “Classification of Sets”, 12 (2004)).<sup>2</sup>

Consistent with the courts’ interpretation of the terms “particular need” and “specific activity” in EN (X)(b) to GRI 3(b), CBP finds that the individual component articles of the Nike Studio Wrap Pack are put up together for use in a single purpose or activity. Specifically, they are designed for use in conjunction with one another to provide foot protection and floor traction during yoga, pilates, and barre exercise activities.

Moreover, CBP notes that the complementary design of the individual component articles makes it such that a consumer would not purchase the Studio Wrap Pack to use the Foot Wraps or Flats without the other. That the

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<sup>2</sup> Equally important, however, the CIT in *Estee Lauder* warned against conflating the GRI 3(b) requirements for composite goods (i.e., whether the items are “mutually complementary” or “adapted to one another”), with the requirements for the GRI 3(b) retail sets analysis (do the goods “meet a particular need” or “carry out a specific activity”), stating:

Requiring set goods to be mutually complementary or adapted to one another effectively joins the Explanatory Notes requirements for composite goods to the Explanatory Notes describing retail sets. This conflation of requirements is unsupported in the statute or the Explanatory Notes. *Estee Lauder*, 815 F. Supp. 2d 1287 at 1295–96 (citing ENs (IX) and (X) to GRI 3(b))

Flats may be used as conventional footwear, independent of the Foot Wraps, does not negate the fact that the Flats are put up with the other component articles for the particular activity of exercising. Consequently, upon consideration of the character and use of the Foot Wraps, Straps, Flats, Insoles, and Mesh Bag with one another, CBP concludes that the Studio Wrap Pack is fully described by EN(X)(b) to GRI 3, because the merchandise is put up together to provide foot protection and floor traction during yoga, pilates, and barre exercise activities.

With respect to the Mesh Bag included with the Studio Wrap Pack to transport, store, and wash the Foot Wraps and Straps, CBP notes that in *Estee Lauder*, the CIT repeatedly referred to cases and containers, suitable for general use and classifiable elsewhere in the Nomenclature, as non-functional set components contemplated under GRI 3(b). *Estee Lauder*, 815 F. Supp. 2d at 1299–1300 (citing EN (X) to GRI3(b)). In each example, the inclusion of a case or container with a set, although suitable for general use, did not negate the set's qualification under GRI 3(b). *Id.*

Pursuant to the text of GRI 3(b), goods put up in sets for retail sale must be classified as if they consisted of the material or component which “gives them their essential character.”<sup>3</sup> The phrase “essential character” carries specific meaning in the context of tariff classification, and the courts have defined “essential character” as, “that which is indispensable to the structure, core or condition of the article, i.e., what it is.” *Structural Industries v. United States*, 360 F. Supp. 2d 1330, 1336 (Ct. Int'l Trade 2005).

EN VIII to GRI 3(b) explains that “[t]he factor which determines essential character will vary as between different kinds of goods,” and may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of the constituent material in relation to the use of the goods. *See* EN VIII to GRI 3(b). However, among those factors identified in EN VIII to GRI 3(b), recent court decisions concerning “essential character” analysis under GRI 3(b) have primarily focused on the role of the constituent material in relation to the use of the goods. *See Estee Lauder*, 815 F. Supp. 2d at 1296; *see also Structural Industries*, 360 F. Supp. 2d 1330; *Conair Corp. v. United States*, 29 C.I.T. 888 (2005); *Home Depot USA, Inc. v. United States*, 427 F. Supp. 2d 1278 (Ct. Int'l Trade 2006), *aff'd* 491 F.3d 1334 (Fed. Cir. 2007).

Consistent with the guidance provided by the courts and the ENs to GRI 3, CBP evaluates the functional components of a set when determining what article or component imparts a set with its essential character. Relevant to the classification of the instant merchandise, CBP has previously found that the essential character of sets consisting of footwear sold in combination with a bag or pouch is often imparted by the functional article of footwear. *See* Headquarters ruling letter (“HQ”) H008845, October 3, 2008 (finding that a pair of bowling shoes imparted the essential character of a set consisting of bowling shoes, a plastic slip-on shoe cover for one of the shoes, a fabric shoe bag, and a smaller “sole and heel” bag containing four interchangeable soles

<sup>3</sup> EN VIII to GRI 3(b) explains that “[t]he factor which determines essential character will vary as between different kinds of goods,” and may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of the constituent material in relation to the use of the goods. *See* EN VIII to GRI 3(b).

and four interchangeable heels); NY N239273, dated April 2, 2013 (finding that the articles of footwear imparted the essential character of a set consisting of a pair of slip-on dance shoes and a polyester carrying pouch).

Here, the essential character of the Nike Studio Wrap Pack is imparted by the functional items used to provide foot protection and traction for exercise activities, namely the Foot Wraps and Flats. CBP finds that the Insoles, Straps, and Mesh Bag serve supporting roles in providing foot protection and traction for purchasers. The role of the Insoles is to provide additional cushioning for the foot when used in the Flats and is not essential to the use of the Studio Wrap Pack. Similarly, the relative low bulk and value of the Straps and Mesh Bag, combined with the fact that the components do not provide foot protection or traction when used independently of the Foot Wraps and Flats, are evidence of the components' supportive role in facilitating the use and care of the items that enable the Studio Wrap Pack to fulfill the specific activity that makes it a set. Accordingly, CBP finds that the Insoles, Straps, and Mesh Bag do not impart the Studio Wrap Pack with its essential character.

By contrast, it is apparent upon first impression that the Foot Wraps and Flats are functional items of the Studio Wrap Pack. The Foot Wraps and Flats provide foot protection and traction and are necessary for the particular activity of the set. Without either component, a purchaser could not protect his or her feet or gain additional traction as compared to barefoot exercise.

In determining whether the Foot Wraps or Flats impart the Studio Wrap Pack with its essential character, CBP observes that the Foot Wraps and Flats are designed to be used, separately or in combination with one another, to provide foot protection and traction for exercise activities. Accordingly, CBP finds that the articles share equal importance in fulfilling the particular need or specific activity associated with the Studio Wrap Pack. See EN(X), GRI 3(b). Similarly, the Foot Wraps and Flats share similar individual unit production costs; the Foot Wraps and Flats account for 43.4% and 32%, respectively, of the total production cost of the Studio Wrap Pack. Consequently, because the specific role, function, and unit production cost of the Foot Wraps and Flats do not distinguish either article as uniquely indispensable to the "structure, core, or condition" of the Studio Wrap Pack, CBP cannot determine whether the Foot Wraps or Flats impart the merchandise with its essential character. See *Structural Industries v. United States*, 360 F. Supp. 2d at 1336.

When goods cannot be classified by reference to GRI 3(a) or 3(b), GRI (c) instructs that they shall be classified "under the heading which occurs last in numerical order among those which equally merit consideration." Here, CBP has determined that the Foot Wraps and Flats are equally important to the essential character of the Studio Wrap Pack. The Foot Wraps are classifiable in heading 6402, HTSUS; and the Flats are classifiable in heading 6404, HTSUS. Accordingly, by application of GRI 3(c), CBP finds that the Nike Studio Wrap Pack is classifiable in heading 6404, HTSUS, which provides for, "Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials."

#### **HOLDING:**

By application of GRI 3(c), the Nike Studio Wrap Pack is classified in heading 6404, HTSUS, specifically subheading 6404.19.39, HTSUS, which

provides for “Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Other: Footwear with open toes or open heels; footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners, the foregoing except footwear of subheading 6404.19.20 and except footwear having a foxing or foxing-like band wholly or almost wholly of rubber or plastics applied or molded at the sole and overlapping the upper: Other: Other.” The column one, general rate of duty under this provision in 2013 is 37.5%, *ad valorem*.

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

**EFFECT ON OTHER RULINGS:**

In accordance with the above analysis, NY N239002, dated March 29, 2013, is hereby **REVOKED**.

*Sincerely,*

JOANNE STUMP,  
*Acting Director*

*Commercial and Trade Facilitation Division*



**GENERAL NOTICE**  
**19 CFR PART 177**

**PROPOSED MODIFICATION OF ONE RULING LETTER  
AND TREATMENT RELATING TO THE TARIFF  
CLASSIFICATION OF ANTENNA SHIELDS**

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

**ACTION:** Notice of proposed modification of a ruling letter and treatment concerning the tariff classification of antenna shields.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that CBP intends to modify one ruling letter pertaining to the tariff classification of the Impulse, arc VISION 312 and Ecoscope models of antenna shields. CBP also proposes to revoke any treatment previously accorded by it to substantially identical transactions. Comments are invited on the correctness of the proposed action.

**DATES:** Comments must be received on or before April 8, 2016.

**ADDRESSES:** Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K Street NE, 10th Floor, Washington, DC 20229–1177. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

**FOR FURTHER INFORMATION CONTACT:** Emily Beline, Tariff Classification and Marking Branch, Regulations and Rulings, Office of International Trade, (202) 325–7799.

### **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), (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 modify one ruling letter pertaining to the tariff classification of the Impulse, arc VISION 312, and Ecoscope models of antenna shields, imported by Schlumberger Technology Corporation. Although in this notice CBP is specifically referring to Headquarters Ruling Letter (HQ) H164415, dated June 1, 2015, (Attachment A), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the ones identified. No further rulings have been found. Any party who has received

an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during this notice period.

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

In the analysis section of HQ H164425, CBP classified all three models of antenna shields in heading 9015, HTSUS, which provides for "Surveying, (including photogrammetrical surveying), hydrographic, oceanographic, hydrological, meteorological or geophysical instruments and appliances, excluding compasses; rangefinders; parts and accessories thereof." This was correctly noted on the first page of the ruling. This analysis remains correct. However in the Holding section of HQ H164415, CBP erroneously stated that the goods were classified in subheading 9015.80.80, HTSUS. Pursuant to the analysis, they are correctly classified in subheading 9015.90.0060, HTSUSA (Annotated), as, "Surveying, (including photogrammetrical surveying), hydrographic, oceanographic, hydrological, meteorological or geophysical instruments and appliances, excluding compasses; rangefinders; parts and accessories thereof: Parts and accessories: Of other geophysical instruments and appliances," because the goods are parts of geophysical instruments, they are not geophysical instruments themselves.

Further, the column one rate of duty for goods classified under subheading 9015.90.0060, HTSUSA is "equal to the rate applicable to the article of which it is a part or accessory". In the instant case, that is as geophysical instruments and appliances, which are classified in subheading 9015.80.8040, HTSUSA, which is duty free.

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to modify HQ H164415 as regards the Holding, and any other ruling not specifically identified in order to reflect the proper classification of the merchan-

dise pursuant to the analysis set forth in Headquarters Ruling (HQ) H267349, (Attachment B). Additionally, pursuant to 19 U.S.C. 1625(c) (2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

Dated: December 28, 2015

LEVA K. O'ROURKE  
*for*

MYLES B. HARMON,  
*Director*

*Commercial and Trade Facilitation Division*

Attachments

## [ATTACHMENT A]

HQ H164415  
CLA-2 OT: RR: CTF: TCM H164415 ERB  
CATEGORY: Classification  
TARIFF NO.: 9015.80.8040

PORT DIRECTOR, PORT OF HOUSTON  
U.S. CUSTOMS AND BORDER PROTECTION  
2350 N. SAM HOUSTON PKWY E  
HOUSTON, TX 77032

Attn: Dawn Blake, Import Specialist

RE: Application for Further Review of Protest Number 5309–11–100212;  
Classification of antenna shields

DEAR PORT DIRECTOR:

The following is our decision regarding the Application for Further Review (AFR) of Protest Number 5309–11–100212, timely filed on March 22, 2011 by counsel on behalf of Schlumberger Technology Corporation (STC or Protestant). The AFR concerns the classification of antenna shields under the Harmonized Tariff Schedule of the United States (HTSUS). No samples were made available, however, additional product information was provided by STC in email communications dating December 23, 2014, and January 15, 2015.

**FACTS:**

This AFR relates to nine entries of the subject merchandise at the Port of Houston between June 23, 2010 and December 14, 2010.<sup>1</sup> STC entered the subject merchandise under subheading 8431.43.80, HTSUS which provides for parts suitable for use solely or principally with the machinery of headings 8425 to 8430.<sup>2</sup> On October 12, 2010 U.S. Customs and Border Protection (CBP) issued Requests for Information (CBP Form CF-28) to the Protestant seeking additional information regarding the subject antenna shields. On December 15, 2010, CBP issued a Notice of Action (CBP Form CF-29) notifying STC of the classification change and liquidated all the entries on February 11, 2011 under subheading 7326.90.85, HTSUS which provides for other articles of iron or steel. The Protestant's AFR requests classification of the antenna shields for the Impulse and arcVISION 312 models under subheading 8431.43.80, HTSUS, as parts of machinery, and for the Ecoscope model under 9015.90.00, HTSUS, which provides for geophysical instruments, parts and accessories thereof.

A drill string is a term loosely applied to the assembled collection of the drill pipe, drill collar, drill bit, and other bottom hole assemblies (BHA) used

<sup>1</sup> Information contained on STC's Entry Summary Form 7501 listed the subject merchandise as "Drill Pipe w/Tool JT 843041/49." This was later clarified as being the part at issue here, part number S-268919.

<sup>2</sup> Subheading 8430.41, HTSUS, provides for "Other moving, grading, leveling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snowplows and snowblowers: Other boring or sinking machinery: Self-propelled. Subheading 8430.49, HTSUS, provides for, "Other moving, grading, leveling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snowplows and snowblowers: Other."

to make the drill bit turn at the bottom of a wellbore. A drill collar is a heavy pipe above the drill bit in a drill string. It is “dumb” metal, in that it is a heavy piece of metal that provides weight on the bit to assist gravity in the drilling. The bit and the collar are integral parts of a drill string because the bit breaks the earth’s crust, and the collar allows the drilling mud to flow through it and not clog the bit.

BHA refers to other components of the lower portion of the drill string, such as the directional drilling and measuring platform, referred to as Logging-While-Drilling (LWD), and Measurement-While-Drilling (MWDs) tools. MWD tools evaluate the physical properties of the borehole in three-dimensional space.<sup>3</sup> MWDs that also measure formation parameters (resistivity, porosity, sonic velocity, acoustic waveform, hole direction, and weight on the bit) are referred to as LWD tools.<sup>4</sup> The antenna and antenna shields are part of the LWD and MWD measuring platform. Antenna shields provide physical protection for antenna components. Neither the antenna, nor the antenna shield are used to physically break the earth’s crust, but without it an operator would essentially be drilling blind. S/he would not know where to position the drill or whether or not to slow down.

The subject merchandise has dual functions, as it is a specially configured antenna shield which incorporates characteristics of the drill collar. First, it performs the function of a drill collar in that it serves as a weight which assists gravity by driving the bit downwards into the borehole, and allows the drilling mud to flow through specially configured slots. Second, it serves as an antenna shield by providing sufficient mechanical protection for the antenna, while at the same time being substantially transparent to both z-mode and x-mode electromagnetic waves. Put another way, given the harsh conditions in which the drill must operate, the antenna shields are constructed to physically protect the antenna without distorting or over-attenuating the transmitted and/or received electromagnetic waves which are responsible for communicating the data to the drill operator at the surface.<sup>5</sup>

#### **ISSUE:**

Whether the subject antenna shields are classified as an article of iron or steel under subheading 7326.90.85, HTSUS, or as a part of machinery under subheading 8431.43.40, HTSUS, or as a part of geophysical instruments under subheading 9015.90.00, HTSUS.

#### **LAW AND ANALYSIS:**

Initially, we note that this matter is protestable under 19 U.S.C. § 1514(a)(2) as a decision on classification. The protest was timely filed, within 180 days of liquidation for entries made on or after December 18, 2004.

<sup>3</sup> See <http://www.glossary.oilfield.slb.com/en/Terms.aspx?LookIn=term%20name&filter=BHA>

<sup>4</sup> Resistivity is a fundamental material property which represents how strongly a material opposes the flow of electric current and in this context, it characterizes the rock or sediment in a borehole by measuring its electrical resistivity. Along with formation porosity measurements, it is often used to indicate the presence of hydrocarbons in the formation. A high electrical resistivity often contains hydrocarbons such as crude oil, while porous formations having a low electrical resistivity are often water saturated.

<sup>5</sup> U.S. Patent No. 8,497,673 (Filed September 28, 2009).

(Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. 108–429 § 2103(2)(B)(ii), (iii) (codified as amended at 19 U.S.C. § 1514(c)(3)(2006)).

Further Review of Protest No. 5309–11–100212 is properly accorded to Protestant pursuant to 19 C.F.R. § 174.24(b) because it involves questions of law or fact which have not been ruled upon by the Commissioner of Customs or his designee or by the Customs Courts. Specifically, STC raises a legal question regarding the proper classification of the antenna shields under the HTSUS, and secondarily, STC raises a factual question regarding the nature, function and use of the antenna shields.

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 GRI may then be applied in order.

The HTSUS headings and subheadings under consideration are the following:

7326	Other articles of iron or steel:
* * *	
8431	Parts suitable for use solely or principally with the machinery of headings 8425 to 8430:
8431.43	Of machinery of heading 8426, 8429 or 8430: Parts for boring or sinking machinery of subheading 8430.41 or 8430.49:
8431.43.80	Other
* * *	
9015	Surveying (including photogrammetrical surveying), hydrographic, oceanographic, hydrological, meteorological or geophysical instruments and appliances, excluding compasses; rangefinders; parts and accessories thereof:
9015.90	Parts and Accessories:

Section XV (Base metals), which covers Chapter 73, Note 1(h) states the following:

This section does not cover:

\* \* \*

(h) Instruments or apparatus of Section XVIII, including clock or watch springs;

Section XVIII covers Chapter 90. Therefore, if the subject merchandise is classified in Chapter 90, it is excluded from classification in Chapter 73.

Section XVI, Note 1(m) states:

1. This section does not cover:

\* \* \*

(m) Articles of chapter 90;

Therefore, again, if the subject merchandise is classified in Chapter 90, it is excluded from classification in Section XVI, which includes Chapter 84.

Note 2(b) to Chapter 90 provides the following:

2. Subject to note 1 above, parts and accessories for machines, apparatus, instruments or articles of this chapter are to be classified according to the following rules:

(b) Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus ... are to be classified with the machines, instruments or apparatus of that kind.

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

The EN 84.30 provides, in relevant part, the following:

This heading covers machinery..., for “attacking” the earth’s crust (e.g. for cutting and breaking down rock, earth, coal, etc.; earth excavation, digging, drilling, etc.), or for preparing or compacting the terrain (e.g., scraping, levelling, grading, tamping or rolling).

This heading includes:

\* \* \*

### (III) EXTRACTING, CUTTING OR DRILLING MACHINERY

This is mainly used in mining, well-drilling, tunneling, quarrying, clay cutting, etc.

\*\* \*

(D) Well sinking or boring machines for the extraction of petroleum, natural gases, ...

\* \* \*

The EN 84.30 continues:

### PARTS

Subject to the general provisions regarding the classification of parts (see the General Explanatory Note to Section XVI), parts of the machines of this heading are classified in heading 84.31.

Given the above, the EN 84.31 provides, in relevant part:

This heading includes:

\* \* \*

(4) Rotary tables, swivels, kellys, kelly drive bushings, tool-joints, drill collars, ...

The EN 90.15 provides, in relevant part:

### (VI) GEOPHYSICAL INSTRUMENTS

(2) Magnetic or gravimetric geophysical instruments used in prospecting for ores, oil, etc. These highly sensitive instruments include magnetic balances, magnetometers, magnetic theodolites and gravimeters, torsion balances.

\* \* \*

(5) Apparatus for measuring the inclination of a borehole.

EN 90.15 continues:

#### PARTS AND ACCESSORIES

Subject to the provisions of Notes 1 and 2 to this Chapter (see the General Explanatory Note) this heading also covers parts and accessories of the goods of this heading. Such parts and accessories include: tripods specially designed for instruments used in geodesy, topography, etc.; supporting rods for optical squares; tripods for staves; arrows for land chains.

If the subject merchandise is classified in Chapter 90, then it is excluded from classification in Chapter 73, by operation of Note 1(h) to Section XV, and it is excluded from classification in Chapter 84, by operation of Note 1(m) to Section XVI. Thus, the first issue is whether or not the merchandise qualifies as a part of machinery of Section XVIII, which includes Chapter 90.

In *Bauerhin Technologies Limited v. United States*, 19 CIT 1441, 914 F. Supp. 554 (1995), aff'd 110 F.3d 774 (Fed. Cir. 1997), the Court pointed out that there are two distinct lines of cases defining the word "part" in the tariff. Starting with *U.S. v. Willoughby Camera Stores, Inc.* 21 CCPA 322, 324 (1933), T.D. 46075 (1933), cert. denied, 292 U.S. 640 (1934), this line of cases holds that a part of an article "is something necessary to the completion of that article without which the article to which it is to be joined, could not function as such article." Another line of cases evolved from *United States v. Pompeo*, 43 CCPA 9, C.D. 1669 (2955), which held that a device may be a part of an article even though its use is optional and the article will function without it, if the device is dedicated for use upon the article, and, once installed the article will not operate without it.

The definition of "parts" was also discussed more recently, in *Rollerblade, Inc. v. United States*, 116 F. Supp. 2d 1247 (CIT 2000), aff'd 282 F.3d 1349 (CAFC 2002). In that case, the United States Court of Appeals for the Federal Circuit defined parts as "an essential element or constituent; integral portion which can be separated, replaced, etc." *Id.* at 1353 (citing *Webster's New World Dictionary* 984 (3d College Ed. 1988)). The Court also noted that a "part" must also bear a direct relationship to the primary article.

Drill collars are classified as "parts of machinery of headings 8425 to 8430", in subheading 8431.43.40, HTSUS. See New York Ruling Letter (NY) N025539, dated April 4, 2008; NY R01962, dated June 3, 2005. If this merchandise were part of the drill collar, which is itself a part of the drill string, it would not be considered a part of boring or sinking machinery of heading 8431, HTSUS. See *Mitsubishi Elecs. Am. v. United States*, 19 C.I.T. 378, 383 n.3 (Ct. Int'l Trade 1995), "This is because a subpart of a particular part of an article is more specifically provided for as a part of that part than as a part of the whole." Citing *C.F. Liebert v. United States*, 60 Cust. Ct. 677, 686-87, 287 F. Supp. 1008, 1014 (1968) (holding that parts of clutches which are parts of winches are more specifically provided for as parts of clutches than as parts of winches). As such, in that it adds weight to the bit and allows mud to flow through its apertures, it is not a drill collar *per se*. Rather, its function is described by the text of heading 9015, HTSUS, as a geophysical instrument which is integral, necessary, and solely used with the LWD/MWD.

The subject antenna shields satisfy the Court's requirements as a "part" under heading 9015, HTSUS, because the shields are necessary for the geophysical measuring equipment to operate as it is intended. They are an essential component, one which is integral, though it can be separated and replaced as a component of the LWD/MWD platform of directional resistivity tools. Heading 9015, HTSUS, provides for "Geophysical instruments." The term "geophysical" is not defined in the HTSUS. In determining the proper meaning of a tariff provision, the Courts have held that where the HTSUS does not expressly define a term, "the correct meaning of the term is its common commercial meaning." *Arko Foods Int'l, Inc. v. United States*, 654 F.3d 1361, 1364 (Fed. Cir. 2011). To determine the common commercial meaning, the Courts have directed that CBP may rely upon its own understanding of terms, and may consult lexicographic and scientific authorities. *See Airflow Tech., Inc. v. United States*, 524 F.3d 1287, 1291 (Fed. Cir. 2008).

In HQ H024751, dated August 24, 2010, this office sought to define this same tariff term at issue here. There, in citing to Schlumberger's Oilfield Glossary, the term "geophysics" is defined as the, "[s]tudy of the physics of the earth, especially its electrical, gravitational and magnetic fields and propagation of elastic (seismic) waves within it."<sup>6</sup> The subject antenna shields are an integral part of the integrated LWD/MWD platform which provides continuous direction and inclination data while drilling. Insofar as this is a series of interconnected machines which work together to transmit all necessary data between the operator at the surface and the drill string, the subject antenna shields are parts of "geophysical" instruments. Pursuant to Note 2(b) to Chapter 90, parts suitable for use solely or principally with an instrument of that chapter is to be classified with that instrument. Our conclusion is also in keeping with the EN 90.15(IV) which indicates that "apparatus for measuring the inclination of a borehole" and "magnetic geophysical instruments used in prospecting for oil" are classified under heading 9015, HTSUS, as geophysical instruments. *See* EN 90.15(IV)(2), (5). *See also* HQ W968458, dated May 8, 2009 (sonic imaging tool used to examine the condition of subsurface geological formations for purposes of oil exploration classified under heading 9015, HTSUS, as a geophysical instrument).

Thus, as the subject merchandise is described by the tariff terms of Chapter 90, they are excluded from Chapter 73 by operation of Note 1(h) to Section XV, and excluded from Chapter 84, by operation of Note 1(m) to Section XVI. Pursuant to Note 2(b) to Chapter 90, the subject antenna shields are parts of geophysical instruments of heading 9015, HTSUS.

The merchandise in question may be subject to antidumping or countervailing duties (AD/CVD). Written decisions regarding the scope of AD/CVD orders are issued by the Enforcement and Compliance office in the International Trade Administration of the U.S. Department of Commerce, and are separate from tariff classification and original rulings issued by U.S. Customs and Border Protection. You can contact them at <http://trade.gov/enforcement> (click on "Contact Us"). For your information, you can view a list of current AD/CVD cases at the United States International Trade Commis-

<sup>6</sup> Schlumberger Oilfield Glossary. "1.n. geophysics," available at <http://glossary.oilfield.slb.com/en/Terms.aspx?LookIn=term%20name&filter=geophysics> Accessed 26 March 2015.

sion website at <http://www.usitc.gov> (click on “Antidumping and Countervailing Duty” under “Popular Topics” at the top of the screen), and you can search AD/CVD deposit and liquidation messages using CBP’s AD/CVD Search tool at <http://addcvd.cbp.gov>

**HOLDING:**

For the reasons set forth above, by application of GRI 1, the subject Impulse, arcVISION, and Ecoscope antenna shields are all classified under heading 9015, HTSUS. They are specifically provided for in subheading 9015.80.8040, HTSUSA (Annotated) as “Surveying (including photogrammetrical surveying), hydrographic, oceanographic, hydrological, meteorological or geophysical instruments and appliances, excluding compasses; rangefinders; parts and accessories thereof: Other instruments and appliances: Other: Geophysical instruments and appliances.” The general column one rate of duty is free.

Since reclassification of the subject merchandise as indicated above will result in a lower rate of duty, you are instructed to allow the protest in full, and re-liquidate entries of the antenna shields pursuant to the above analysis.

In accordance with the Protest/Petition Processing Handbook, you are to mail this decision, together with the Customs Form 19, to the Protestant no later than 60 days from the date of this letter. Any reliquidation of the entry in accordance with the decision must be accomplished prior to mailing of the decision. Sixty days from the date of the decision the Office of Regulations and Rulings will make the decision available to CBP personnel, and to the public on the CBP Home Page on the World Wide Web at [www.cbp.gov](http://www.cbp.gov), by means of the Freedom of Information Act, and other methods of public distribution.

*Sincerely,*

MYLES H. HARMON,  
*Acting Director*  
*Commercial Rulings Division*

## [ATTACHMENT B]

HQ H267349

CLA-2 OT: RR: CTF: TCM: H267349ERB

CATEGORY: Classification

TARIFF NO.: 9015.90.0060

MR. JAMES PRINCE

SENIOR LEGAL COUNSEL, TRADE AND CUSTOMS COMPLIANCE

SCHLUMBERGER

5599 SAN FELIPE STREET

HOUSTON, TX 77056

RE: Modification of HQ H164415; Tariff Classification of antenna shields

DEAR MR. PRINCE:

U.S. Customs and Border Protection (CBP) issued Schlumberger Technology Corporation (STC or Protestant) Headquarters Ruling Letter (HQ) H164415 on June 1, 2015. HQ H164415 pertains to the tariff classification under the Harmonized Tariff Schedule of the United States, (HTSUS) of three models of antenna shields, the Impulse, arcVISION 312, and Ecoscope. HQ H164415 is correct as regards the legal analysis, however there was an error in the Holding regarding the tariff classification at the six-digit sub-heading level. It is corrected herein.

As an initial matter we note that under *San Francisco Newspaper Printing Co. v. United States*, 620 F. Supp. 738 (Ct. Int'l Trade 1985), the decision on the merchandise which was the subject of Protest Number 5309-11-100212 was final on both the Protestant and CBP. Therefore, while we may review the law and analysis of HQ H164415, any decision taken herein would not impact the entries subject to that ruling.

**FACTS:**

A drill string is a term loosely applied to the assembled collection of the drill pipe, drill collar, drill bit, and other bottom hole assemblies (BHA) used to make the drill bit turn at the bottom of a wellbore. A drill collar is a heavy pipe above the drill bit in a drill string. It is “dumb” metal, in that it is a heavy piece of metal that provides weight on the bit to assist gravity in the drilling. The bit and the collar are integral parts of a drill string because the bit breaks the earth’s crust, and the collar allows the drilling mud to flow through it and not clog the bit.

BHA refers to other components of the lower portion of the drill string, such as the directional drilling and measuring platform, referred to as Logging-While-Drilling (LWD), and Measurement-While-Drilling (MWDs) tools. MWD tools evaluate the physical properties of the borehole in three-dimensional space.<sup>1</sup> MWDs that also measure formation parameters (resistivity, porosity, sonic velocity, acoustic waveform, hole direction, and weight on the bit) are referred to as LWD tools.<sup>2</sup> The antenna and antenna shields

<sup>1</sup> See <http://www.glossary.oilfield.slb.com/en/Terms.aspx?LookIn=term%20name&filter=BHA>

<sup>2</sup> Resistivity is a fundamental material property which represents how strongly a material opposes the flow of electric current and in this context, it characterizes the rock or sediment in a borehole by measuring its electrical resistivity. Along with formation porosity measurements, it is often used to indicate the presence of hydrocarbons in the formation. A high

are part of the LWD and MWD measuring platform. Antenna shields provide physical protection for antenna components. Neither the antenna, nor the antenna shield are used to physically break the earth's crust, but without it an operator would essentially be drilling blind. S/he would not know where to position the drill or whether or not to slow down.

The subject merchandise has dual functions, as it is a specially configured antenna shield which incorporates characteristics of the drill collar. First, it performs the function of a drill collar in that it serves as a weight which assists gravity by driving the bit downwards into the borehole, and allows the drilling mud to flow through specially configured slots. Second, it serves as an antenna shield by providing sufficient mechanical protection for the antenna, while at the same time being substantially transparent to both z-mode and x-mode electromagnetic waves. Put another way, given the harsh conditions in which the drill must operate, the antenna shields are constructed to physically protect the antenna without distorting or over-attenuating the transmitted and/or received electromagnetic waves which are responsible for communicating the data to the drill operator at the surface.<sup>3</sup>

#### **ISSUE:**

Whether the subject antenna shields are classified as an article of iron or steel under subheading 7326.90.85, HTSUS, or as a part of machinery under subheading 8431.43.40, HTSUS, or as a part of geophysical instruments under subheading 9015.90.00, HTSUS.

#### **LAW AND ANALYSIS:**

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 GRI may then be applied in order.

The HTSUS headings and subheadings under consideration are the following:

7326	Other articles of iron or steel:
* * *	
8431	Parts suitable for use solely or principally with the machinery of headings 8425 to 8430:
8431.43	Of machinery of heading 8426, 8429 or 8430: Parts for boring or sinking machinery of subheading 8430.41 or 8430.49:
8431.43.80	Other
* * *	
9015	Surveying (including photogrammetrical surveying), hydrographic, oceanographic, hydrological, meteorological or geophysical instruments and appliances, excluding compasses; rangefinders; parts and accessories thereof:

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electrical resistivity often contains hydrocarbons such as crude oil, while porous formations having a low electrical resistivity are often water saturated.

<sup>3</sup> U.S. Patent No. 8,497,673 (Filed September 28, 2009).

## 9015.90                      Parts and Accessories:

Section XV (Base metals), which covers Chapter 73, Note 1(h) states the following:

This section does not cover:

\* \* \*

(h) Instruments or apparatus of Section XVIII, including clock or watch springs;

Section XVIII covers Chapter 90. Therefore, if the subject merchandise is classified in Chapter 90, it is excluded from classification in Chapter 73.

Section XVI, Note 1(m) states:

3. This section does not cover:

\* \* \*

(m) Articles of chapter 90;

Therefore, again, if the subject merchandise is classified in Chapter 90, it is excluded from classification in Section XVI, which includes Chapter 84.

Note 2(b) to Chapter 90 provides the following:

4. Subject to note 1 above, parts and accessories for machines, apparatus, instruments or articles of this chapter are to be classified according to the following rules:

(b) Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus ... are to be classified with the machines, instruments or apparatus of that kind.

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

The EN 84.30 provides, in relevant part, the following:

This heading covers machinery..., for “attacking” the earth’s crust (e.g. for cutting and breaking down rock, earth, coal, etc.; earth excavation, digging, drilling, etc.), or for preparing or compacting the terrain (e.g., scraping, levelling, grading, tamping or rolling).

This heading includes:

\* \* \*

## (III) EXTRACTING, CUTTING OR DRILLING MACHINERY

This is mainly used in mining, well-drilling, tunneling, quarrying, clay cutting, etc.

\* \* \*

(D) Well sinking or boring machines for the extraction of petroleum, natural gases, ...

\* \* \*

The EN 84.30 continues:

PARTS

Subject to the general provisions regarding the classification of parts (see the General Explanatory Note to Section XVI), parts of the machines of this heading are classified in heading 84.31.

Given the above, the EN 84.31 provides, in relevant part:

This heading includes:

\* \* \*

(4) Rotary tables, swivels, kellies, kelly drive bushings, tool-joints, drill collars, ...

The EN 90.15 provides, in relevant part:

(VI) GEOPHYSICAL INSTRUMENTS

(2) Magnetic or gravimetric geophysical instruments used in prospecting for ores, oil, etc. These highly sensitive instruments include magnetic balances, magnetometers, magnetic theodolites and gravimeters, torsion balances.

\* \* \*

(5) Apparatus for measuring the inclination of a borehole.

EN 90.15 continues:

PARTS AND ACCESSORIES

Subject to the provisions of Notes 1 and 2 to this Chapter (see the General Explanatory Note) this heading also covers parts and accessories of the goods of this heading. Such parts and accessories include: tripods specially designed for instruments used in geodesy, topography, etc.; supporting rods for optical squares; tripods for staves; arrows for land chains.

If the subject merchandise is classified in Chapter 90, then it is excluded from classification in Chapter 73, by operation of Note 1(h) to Section XV, and it is excluded from classification in Chapter 84, by operation of Note 1(m) to Section XVI. Thus, the first issue is whether or not the merchandise qualifies as a part of machinery of Section XVIII, which includes Chapter 90.

In *Bauerhin Technologies Limited v. United States*, 19 CIT 1441, 914 F. Supp. 554 (1995), aff'd 110 F.3d 774 (Fed. Cir. 1997), the Court pointed out that there are two distinct lines of cases defining the word "part" in the tariff. Starting with *U.S. v. Willoughby Camera Stores, Inc.* 21 CCPA 322, 324 (1933), T.D. 46075 (1933), cert. denied, 292 U.S. 640 (1934), this line of cases holds that a part of an article "is something necessary to the completion of that article without which the article to which it is to be joined, could not function as such article." Another line of cases evolved from *United States v. Pompeo*, 43 CCPA 9, C.D. 1669 (2955), which held that a device may be a part of an article even though its use is optional and the article will function without it, if the device is dedicated for use upon the article, and, once installed the article will not operate without it.

The definition of "parts" was also discussed more recently, in *Rollerblade, Inc. v. United States*, 116 F. Supp. 2d 1247 (CIT 2000), aff'd 282 F.3d 1349 (CAFC 2002). In that case, the United States Court of Appeals for the Federal Circuit defined parts as "an essential element or constituent; integral portion

which can be separated, replaced, etc.” *Id* at 1353 (citing *Webster’s New World Dictionary* 984 (3d College Ed. 1988)). The Court also noted that a “part” must also bear a direct relationship to the primary article.

Drill collars are classified as “parts of machinery of headings 8425 to 8430”, in subheading 8431.43.40, HTSUS. See New York Ruling Letter (NY) N025539, dated April 4, 2008; NY R01962, dated June 3, 2005. If this merchandise were part of the drill collar, which is itself a part of the drill string, it would not be considered a part of boring or sinking machinery of heading 8431, HTSUS. See *Mitsubishi Elecs. Am. v. United States*, 19 C.I.T. 378, 383 n.3 (Ct. Int’l Trade 1995), “This is because a subpart of a particular part of an article is more specifically provided for as a part of that part than as a part of the whole.” Citing *C.F. Liebert v. United States*, 60 Cust. Ct. 677, 686–87, 287 F. Supp. 1008, 1014 (1968) (holding that parts of clutches which are parts of winches are more specifically provided for as parts of clutches than as parts of winches). As such, in that it adds weight to the bit and allows mud to flow through its apertures, it is not a drill collar *per se*. Rather, its function is described by the text of heading 9015, HTSUS, as a geophysical instrument which is integral, necessary, and solely used with the LWD/MWD.

The subject antenna shields satisfy the Court’s requirements as a “part” under heading 9015, HTSUS, because the shields are necessary for the geophysical measuring equipment to operate as it is intended. They are an essential component, one which is integral, though it can be separated and replaced as a component of the LWD/MWD platform of directional resistivity tools. Heading 9015, HTSUS, provides for “Geophysical instruments.” The term “geophysical” is not defined in the HTSUS. In determining the proper meaning of a tariff provision, the Courts have held that where the HTSUS does not expressly define a term, “the correct meaning of the term is its common commercial meaning.” *Arko Foods Int’l, Inc. v. United States*, 654 F.3d 1361, 1364 (Fed. Cir. 2011). To determine the common commercial meaning, the Courts have directed that CBP may rely upon its own understanding of terms, and may consult lexicographic and scientific authorities. See *Airflow Tech., Inc. v. United States*, 524 F.3d 1287, 1291 (Fed. Cir. 2008).

In HQ H024751, dated August 24, 2010, this office sought to define this same tariff term at issue here. There, in citing to Schlumberger’s Oilfield Glossary, the term “geophysics” is defined as the, “[s]tudy of the physics of the earth, especially its electrical, gravitational and magnetic fields and propagation of elastic (seismic) waves within it.”<sup>4</sup> The subject antenna shields are an integral part of the integrated LWD/MWD platform which provides continuous direction and inclination data while drilling. Insofar as this is a series of interconnected machines which work together to transmit all necessary data between the operator at the surface and the drill string, the subject antenna shields are parts of “geophysical” instruments. Pursuant to Note 2(b) to Chapter 90, parts suitable for use solely or principally with an instrument of that chapter is to be classified with that instrument. Our conclusion is also in keeping with the EN 90.15(IV) which indicates that “apparatus for measuring the inclination of a borehole” and “magnetic geophysical instruments used in prospecting for oil” are classified under heading

<sup>4</sup> Schlumberger Oilfield Glossary. “1.n. geophysics,” available at <http://glossary.oilfield.slb.com/en/Terms.aspx?LookIn=term%20name&filter=geophysics> Accessed 26 March 2015.

9015, HTSUS, as geophysical instruments. *See* EN 90.15(IV)(2), (5). *See also* HQ W968458, dated May 8, 2009 (sonic imaging tool used to examine the condition of subsurface geological formations for purposes of oil exploration classified under heading 9015, HTSUS, as a geophysical instrument).

Thus, as the subject merchandise is described by the tariff terms of Chapter 90, they are excluded from Chapter 73 by operation of Note 1(h) to Section XV, and excluded from Chapter 84, by operation of Note 1(m) to Section XVI. Pursuant to Note 2(b) to Chapter 90, the subject antenna shields are parts of geophysical instruments of heading 9015, HTSUS.

The merchandise in question may be subject to antidumping or countervailing duties (AD/CVD). Written decisions regarding the scope of AD/CVD orders are issued by the Enforcement and Compliance office in the International Trade Administration of the U.S. Department of Commerce, and are separate from tariff classification and original rulings issued by U.S. Customs and Border Protection. You can contact them at <http://trade.gov/enforcement> (click on “Contact Us”). For your information, you can view a list of current AD/CVD cases at the United States International Trade Commission website at <http://www.usitc.gov> (click on “Antidumping and Countervailing Duty” under “Popular Topics” at the top of the screen), and you can search AD/CVD deposit and liquidation messages using CBP’s AD/CVD Search tool at <http://adcvd.cbp.gov>

#### **HOLDING:**

For the reasons set forth above, by application of GRI 1, the subject Impulse, arcVISION, and Ecoscope antenna shields are all classified under heading 9015, HTSUS. They are specifically provided for in subheading 9015.90.0060, HTSUSA (Annotated) as “Surveying (including photogrammetrical surveying), hydrographic, oceanographic, hydrological, meteorological or geophysical instruments and appliances, excluding compasses; rangefinders; parts and accessories thereof: Parts and accessories: Of other geophysical instruments and appliances.” The column one rate of duty is applicable to the article of which it is a part or accessory. In this case, that is as a part of geophysical instruments and appliances, and the rate of duty there is *free*.

Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided at [www.usitc.gov](http://www.usitc.gov)

#### **EFFECT ON OTHER RULINGS:**

HQ H164415, dated June 1, 2015 is hereby MODIFIED, however, the liquidation of which was the subject of protest 5309–11–100212 was final on CBP and the Protestant.

MYLES B. HARMON,  
*Director*

*Commercial and Trade Facilitation Division*

**PROPOSED MODIFICATION OF A RULING LETTER  
RELATING TO THE TARIFF CLASSIFICATION OF  
CERTAIN WOVEN FABRIC**

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

**ACTION:** Notice of proposed modification of a ruling letter relating to the tariff classification of Sefar Tetex Mono V-17-2030-W 50 Rayl Woven Fabric (woven fabric).

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625 (c)), as amended by Section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this Notice advises interested parties that U.S. Customs and Border Protection (CBP) proposes to modify a ruling letter relating to the tariff classification of certain woven fabric under the Harmonized Tariff Schedule of the United States (HTSUS). Comments are invited on the correctness of the proposed action.

**DATES:** Comments must be received on or before April 8, 2016.

**ADDRESSES:** Written comments are to be addressed to U.S. Customs and Border Protection, Office of International Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K Street NE, 10th Floor, Washington, D.C. 20229-1177. Submitted comments may be inspected at the above address during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325-0118.

**FOR FURTHER INFORMATION CONTACT:** Beth Jenior, Tariff Classification and Marking Branch, Regulations and Rulings, Office of International Trade: (202) 325-0010.

**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 to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, this Notice advises interested parties that CBP intends to modify a ruling letter pertaining to the tariff classification of woven fabric. In this Notice, CBP is specifically referring to the modification of Headquarters Ruling Letter (HQ) H063618, dated March 27, 2015 (Attachment A).

On page six of HQ H063618, the ruling contained the following misstatement of the Explanatory Notes (EN) to heading 59.11 of the international Harmonized System: "Furthermore, the instant fabric is not a square shape." The ENs to heading 59.11 state that bolting cloths "are porous fabrics (for example, with a gauze, leno or plain weave), geometrically accurate as to size and shape (usually square) of the meshes." The ENs do not reference the shape of the cloth; rather, they reference the shape of the cloth's meshes. As such, the above reference to the cloth's shape is a misstatement of the ENs.

Pursuant to 19 U.S.C. §1625(c)(1), CBP proposes to modify HQ H063618, in order to correctly reflect EN 59.11. The modifications are reflected in proposed Headquarters Ruling Letter (HQ) H266215, set forth as Attachment B to this document.

Before taking this action, consideration will be given to any written comments timely received.

Dated: December 28, 2015

IEVA K. O'ROURKE  
*for*

MYLES B. HARMON,  
*Director*

*Commercial and Trade Facilitation Division*

Attachments

## [ATTACHMENT A]

HQ H063618

March 27, 2015

CLA-2 OT:RR:CTF:TCM H063618 EGJ

CATEGORY: Classification

TARIFF NO.: 5806.32.20

C.J. ERICKSON, Esq.  
COWAN, LIEBOWITZ & LATMAN, P.C.  
1133 AVENUE OF THE AMERICAS  
NEW YORK, NY 10036-6799

Reconsideration of NY N042709, dated November 25, 2008; Classification of Sefar Tetex Mono V-17-2030-W 50 Rayl Woven Fabric

DEAR MR. ERICKSON:

This is in reply to your letter dated April 13, 2009, in which you requested reconsideration of New York Ruling Letter (NY) N042709, dated November 25, 2008, which pertains to the tariff classification of Sefar Tetex Mono V-17-2030-W 50 Rayl woven fabric (the woven fabric) under the Harmonized Tariff Schedule of the United States (HTSUS). You submitted the reconsideration request on behalf of your client, Sefar Filtration, Inc. (Sefar). Although we responded to your request for a meeting by email on February 5, 2015, and on February 18, 2015, we did not receive any further comments from you on the matter. Therefore, our reconsideration of NY N042709 follows.

**FACTS:**

In NY N042709, CBP described the woven fabric as follows:

In various correspondences with this office concerning the classification of this product, you have described the item as follows; "...the slit bolting cloth consists of a polyetheretherketone (PEEK)...woven fabric in 3-300 meter lengths, and can be made in various widths. It is geometrically accurate as to size and shape of meshes...The slit bolting cloth is used in sound filtration applications. It is sold in the sound suppression/sound attenuation market"...The samples submitted were all approximately 5/8th inch wide. The samples have selvages on both sides which your letter indicated were formed when the fabric was cut with heated knives ... The use of this product, as stated in your October 13, 2008 request letter, was in the sound suppression/sound attenuation market. This particular product will be used as a component of a noise reduction panel in the inlet cowl of a jet engine. You indicated there was no other use for this material in the U.S.

While your ruling request stated that the woven fabric came in various widths, all of the submitted samples were 5/8th inch wide. As such, CBP only classified the submitted samples. Likewise, this ruling letter only addresses the 5/8th inch wide samples. We note that 5/8th inch is equivalent to approximately 1.5 centimeters.

Based upon the aforementioned facts, CBP classified the woven fabric in heading 5806, HTSUS, as a narrow woven fabric. However, you assert that it is properly classified in heading 5911, HTSUS, as a textile product for technical uses. For support, you state that the original requester did not list all the uses for the woven fabric. Your letter includes the following list of uses:

as a rectangular patch for space suits, as part of an automotive filter pump, as part of a gasket, as part of a panel used during the manufacture of fiberboard liner for industrial transformers, as part of a strainer bag that filters high temperature oil for re-use in food applications, as part of a panel used to produce cellulose triacetate and as part of a panel used to produce purified terephthalic acid.

**ISSUE:**

Is the woven fabric classified as a narrow woven fabric of subheading 5806.32, HTSUS, or as bolting cloth of subheading 5911.20, HTSUS?

**LAW AND ANALYSIS:**

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is made in accordance with the General Rules of Interpretation (GRI). 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 HTSUS provisions at issue provide, in pertinent part, as follows:

5806	Narrow woven fabrics, other than goods of heading 5807....
	Other woven fabrics:
5806.32	Of man-made fibers:
	*          *          *
5911	Textile products and articles, for technical uses, specified in note 7 to this chapter:
5911.20	Bolting cloth, whether or not made up:
	*          *          *

Note 5(a) to Chapter 58 provides as follows:

For the purposes of heading 5806, the expression “*narrow woven fabrics*” means:

- (a) Woven fabrics of a width not exceeding 30 cm, whether woven as such or cut from wider pieces, provided with selvages (woven, gummed or otherwise made) on both edges;
- \*          \*          \*

Note 7 to Chapter 59 provides as follows:

- (a) Textile products in the piece, cut to length or simply cut to rectangular (including square) shape (other than those having the character of the products of headings 5908 to 5910), the following only:
- (i) Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes;
  - (ii) Bolting cloth;
  - (iii) Straining cloth of a kind used in oil presses or the like, of textile material or of human hair;

- (iv) Flat woven textile fabric with multiple warp or weft, whether or not felted, impregnated or coated, of a kind used in machinery or for other technical purposes;
  - (v) Textile fabric reinforced with metal, of a kind used for technical purposes;
  - (vi) Cords, braids and the like, whether or not coated, impregnated or reinforced with metal, of a kind used in industry as packing or lubricating metals;
- (b) Textile articles (other than those of headings 5908 to 5910) of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).

\* \* \*

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

EN 58.06(A)(2) describes narrow woven fabric as follows:

Strips of a width not exceeding 30 cm, cut (or slit) from wider pieces of warp and weft fabric (whether cut (or slit) longitudinally or on the cross) and provided with false selvages on both edges, or a normal woven selvedge on one edge and a false selvedge on the other. False selvages are designed to prevent unravelling of a piece of cut (or slit) fabric and may, for example, consist of a row of gauze stitches woven into the wider fabric before cutting (or slitting), of a simple hem, or they may be produced by gumming the edges of strips, or by fusing the edges in the case of certain ribbons of man-made fibres. They may also be created when a fabric is treated before it is cut into strips in a manner that prevents the edges of those strips from unravelling. No demarcation between the narrow fabric and its false selvages need be evident in that case. Strips cut (or slit) from fabric but not provided with a selvedge, either real or false, on each edge, are **excluded** from this heading and classified with ordinary woven fabrics.

\* \* \*

EN 59.11(A)(2) describes bolting cloth as follows:

Bolting cloths. These are porous fabrics (for example, with a gauze, leno or plain weave), geometrically accurate as to size and shape (usually square) of the meshes, which must not be deformed by use. They are mainly used for sifting (e.g., flour, abrasive powders, powdered plastics, cattle food), filtering or for screen printing. Bolting cloths are generally made of hard twisted undischarged silk yarn or of synthetic filament yarn.

\* \* \*

Heading 5911, HTSUS, covers textile products and articles for technical uses which are specified in Note 7 to Chapter 59.<sup>1</sup> Only those textile products described in Note 7 are classifiable in Heading 5911, HTSUS. You assert that the instant woven fabric is bolting cloth, which is listed in Note 7(a)(2). For support, you cite to EN 59.11, which states that bolting cloth must be porous, geometrically accurate as to size and shape of the meshes, and that bolting cloth cannot be deformed by use. Further, you state that the instant woven fabric is uncoated and consists of synthetic filament yarn. You state that the instant woven fabric is physically identical to Sefar item 3B17-0850-158-00, which was classified in subheading 5911.20, HTSUS, in NY N025649, dated May 2, 2008. For all of these reasons, you assert that the instant woven fabric is classifiable as bolting cloth of subheading 5911.20, HTSUS.

In Headquarters Ruling Letter (HQ) HQ 950733, dated December 28, 1993, we set forth the following dictionary definitions of the terms “bolt” and “bolting cloth”<sup>2</sup>

*The Century Dictionary and Cyclopedia*, The Century Company (1911): bolt1 vt 1: To sift or pass through a sieve or bolter so as to separate the coarser from the finer particles, as bran from flour; sift out: as, to bolt meal; to bolt out the bran; bolt2 n. 1.: A sieve; a machine for sifting flour; bolting-cloth n.: A cloth for bolting or sifting; a linen, silk, or hair cloth, of which bolters are made for sifting meal, etc. The finest and most expensive silk fabric made is bolting-cloth, for the use of millers, woven almost altogether in Switzerland.

*Funk & Wagnals New Standard Dictionary of the English Language*, (1928): bolting, n. 1: The act or process of sifting, usually in a mill or machine; b. cloth 1: A fabric, usually of unsized silk, for separating the various products of a flouring mill.

*The Wellington Sears Handbook of Industrial Textiles*, Ernest R. Kaswell (1963): bolting cloth: Light weight, finely woven silk and nylon bolting cloths made in precise mesh sizes are extensively used industrially for sifting and screening purposes. These extremely uniform filament yarn constructions in leno weaves are manufactured principally in Switzerland on special looms, requiring a high degree of skill on the part of the operator to achieve weaving perfection.

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<sup>1</sup> We note that a recent court case discussed the tariff classification of textile articles for technical uses under heading 5911, HTSUS. *Airflow Technology, Inc. v. United States*, 524 F.3d 1287 (Fed. Cir. 2008)(*Airflow*). In *Airflow*, however, the Federal Circuit examined the definition of “straining cloth” of Note 7(a)(iii), and not “bolting cloth” of Note 7(a)(ii). As the instant ruling only pertains to bolting cloth, we will not apply the analysis therein to the instant merchandise.

<sup>2</sup> When, as in this case, a tariff term is not defined by the HTSUS or its legislative history, “the term’s correct meaning is its common meaning.” *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). The common meaning of a term used in commerce is presumed to be the same as its commercial meaning. *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989). To ascertain the common meaning of a term, a court may consult “dictionaries, scientific authorities, and other reliable information sources” and “lexicographic and other materials.” *C.J. Tower & Sons v. United States*, 673 F.2d 1268, 1271 (CCPA 1982); *Simod*, 872 F.2d at 1576.

Bolting cloths are designated by the number of interstices or openings per linear inch, in the same manner as fine wire screening. For example, a 200 mesh bolting cloth has 200 openings per inch in both the warp and filling directions. The size of the openings must also be specified, as yarns of different deniers provide different size interstices for a given mesh cloth...

Silk bolting cloths are generally used for dry sifting processes, with the filament nylon cloths preferred for wet screening operations such as those employed in starch and flour manufacturing. Both types of fabrics are also widely used by the textile industry in screen printing.

*Webster's Third New International Dictionary*, Merriam-Webster (1986): bolt 1: to sift (as meal or flour) usu. through fine-meshed cloth; also: to refine and purify (as meal or flour) through any process; bolting cloth: a firm fabric now usu. of silk woven in various mesh sizes for bolting (as flour) or for use in screen printing, needlework, or photographic enlargements.

*Fairchild's Dictionary of Textiles*: bolting cloth: A plain weave fabric originally of silk with a fine, uniform mesh; the fabric is woven in the gum and has a high number of threads per inch. The standard width is 40 inches. Fine mesh cotton muslin is also employed. For a time, filament yarn of Vinyon, a copolymer of vinyl acetate and vinyl chloride was used, but when production of this yarn ceased, other synthetic yarns were used. Uses: sifting flour in flour mills and screen printing. Sometimes called banderoles.

Hence, by definition, the bolting cloth of Note 7(a)(ii) to Chapter 59 is not just a porous material. It is an article that, although made only of textile fabric, is a size and shape that is used in certain limited ways. According to the ENs, bolting cloth is usually square. However, the instant fabric sample is a long, rectangular strip of fabric. Even if the instant woven fabric has some of the characteristics of bolting cloth, we note that it does not have the same uses as bolting cloth.

CBP has only issued four rulings which classify merchandise under sub-heading 5911.20, HTSUS, as bolting cloth. In all of those cases, the merchandise was used for sifting, sieving or screen-printing. See HQ 950733 (filtration medium for blood purification), NY 896117, dated April 7, 1994 (screen-printing), NY 815642, dated October 10, 1995 (screen-printing), and NY N025649, dated May 2, 2008 (sifting/filtering/screening). In NY N025649, the size and shape of the cloth is not stated, but unlike the fabric in NY N025649, your ruling request did not mention any use of the instant woven fabric for sifting, sieving or screen-printing. Furthermore, the instant fabric is not a square shape.

In HQ 961537, dated November 21, 2000, CBP examined mesh woven fabric used on test strips for a portable blood glucose monitoring system. That requester also asserted that its woven fabric was classifiable as bolting cloth because it shared many of the same physical characteristics of bolting cloth. Like bolting cloth, the mesh woven fabric was made up of synthetic filament yarn, it was porous, and it was designed to prevent deformation by use. However, as the mesh woven fabric was not used for sifting, sieving, or screen

printing, CBP determined that it could not be classified as bolting cloth. Similarly, the instant woven fabric is not used for sifting, sieving or screen-printing. As such, it cannot be classified as bolting cloth under heading 5911, HTSUS.

In NY N042709, CBP classified the instant woven fabric as narrow woven fabric of heading 5806, HTSUS. Note 5(a) to Chapter 58 states that narrow woven fabrics cover woven fabrics of a width not exceeding 30 cm, which have selvages (woven, gummed or otherwise made) on both edges. The instant woven fabric is less than 30 cm wide, and it has selvages formed by cutting with a hot knife to prevent it from unraveling. As it meets the definition of a narrow woven fabric, we find that the instant merchandise is properly classified under heading 5806, HTSUS.

**HOLDING:**

By application of GRIs 1 (Note 7(a)(ii) to Chapter 59 and Note 5(a) to Chapter 58) and 6, Sefar Tetex Mono V-17-2030-W 50 Rayl woven fabric, in a width not exceeding 30 cm and having selvages on both sides, is classified under subheading 5806.32.20, HTSUS, which provides, in pertinent part, for “Narrow woven fabrics, other than goods of heading 5807...: Other woven fabrics: Of man-made fibers: Other.” The 2015 column one, general rate of duty is 6.2 percent *ad valorem*.

Duty rates are provided for convenience only and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at [www.usitc.gov](http://www.usitc.gov).

**EFFECT ON OTHER RULINGS:**

NY N042709, dated November 25, 2008, is hereby affirmed.

*Sincerely,*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*

## [ATTACHMENT B]

HQ H266215  
CLA-2 OT:RR:CTF:TCM H266215 EGJ  
CATEGORY: Classification  
TARIFF NO.: 5806.32.20

C.J. ERICKSON, Esq.  
COWAN, LIEBOWITZ & LATMAN, P.C.  
1133 AVENUE OF THE AMERICAS  
NEW YORK, NY 10036-6799

RE: Modification of HQ H063618; Classification of Sefar Tetex Mono V-17-2030-W 50 Rayl Woven Fabric

DEAR MR. ERICKSON:

Headquarters Ruling Letter (HQ) H063618, dated March 27, 2015, was a reconsideration of New York Ruling Letter (NY) N042709, dated November 25, 2008. This modification reflects a corrected application of the Explanatory Notes for heading 59.11 of the international Harmonized System. The rest of the decision remains the same.

This is in reply to your letter dated April 13, 2009, in which you requested reconsideration of New York Ruling Letter (NY) N042709, dated November 25, 2008, which pertains to the tariff classification of Sefar Tetex Mono V-17-2030-W 50 Rayl woven fabric (the woven fabric) under the Harmonized Tariff Schedule of the United States (HTSUS). You submitted the reconsideration request on behalf of your client, Sefar Filtration, Inc. (Sefar). Although we responded to your request for a meeting by email on February 5, 2015, and on February 18, 2015, we did not receive any further comments from you on the matter. Therefore, our reconsideration of NY N042709 follows.

**FACTS:**

In NY N042709, CBP described the woven fabric as follows:

In various correspondences with this office concerning the classification of this product, you have described the item as follows; "...the slit bolting cloth consists of a polyetheretherketone (PEEK)...woven fabric in 3-300 meter lengths, and can be made in various widths. It is geometrically accurate as to size and shape of meshes...The slit bolting cloth is used in sound filtration applications. It is sold in the sound suppression/sound attenuation market"...The samples submitted were all approximately 5/8th inch wide. The samples have selvages on both sides which your letter indicated were formed when the fabric was cut with heated knives ... The use of this product, as stated in your October 13, 2008 request letter, was in the sound suppression/sound attenuation market. This particular product will be used as a component of a noise reduction panel in the inlet cowl of a jet engine. You indicated there was no other use for this material in the U.S.

While your ruling request stated that the woven fabric came in various widths, all of the submitted samples were 5/8th inch wide. As such, CBP only classified the submitted samples. Likewise, this ruling letter only addresses the 5/8th inch wide samples. We note that 5/8th inch is equivalent to approximately 1.5 centimeters.

Based upon the aforementioned facts, CBP classified the woven fabric in heading 5806, HTSUS, as a narrow woven fabric. However, you assert that it is properly classified in heading 5911, HTSUS, as a textile product for technical uses. For support, you state that the original requester did not list all the uses for the woven fabric. Your letter includes the following list of uses: as a rectangular patch for space suits, as part of an automotive filter pump, as part of a gasket, as part of a panel used during the manufacture of fiberboard liner for industrial transformers, as part of a strainer bag that filters high temperature oil for re-use in food applications, as part of a panel used to produce cellulose triacetate and as part of a panel used to produce purified terephthalic acid.

**ISSUE:**

Is the woven fabric classified as a narrow woven fabric of subheading 5806.32, HTSUS, or as bolting cloth of subheading 5911.20, HTSUS?

**LAW AND ANALYSIS:**

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is made in accordance with the General Rules of Interpretation (GRI). 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 HTSUS provisions at issue provide, in pertinent part, as follows:

5806	Narrow woven fabrics, other than goods of heading 5807...: Other woven fabrics:
5806.32	Of man-made fibers: * * *
5911	Textile products and articles, for technical uses, specified in note 7 to this chapter:
5911.20	Bolting cloth, whether or not made up: * * *

Note 5(a) to Chapter 58 provides as follows:

For the purposes of heading 5806, the expression “*narrow woven fabrics*” means:

- (a) Woven fabrics of a width not exceeding 30 cm, whether woven as such or cut from wider pieces, provided with selvages (woven, gummed or otherwise made) on both edges;  
\* \* \*

Note 7 to Chapter 59 provides as follows:

- (a) Textile products in the piece, cut to length or simply cut to rectangular (including square) shape (other than those having the character of the products of headings 5908 to 5910), the following only:

- (i) Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes;
- (ii) Bolting cloth;
- (iii) Straining cloth of a kind used in oil presses or the like, of textile material or of human hair;
- (iv) Flat woven textile fabric with multiple warp or weft, whether or not felted, impregnated or coated, of a kind used in machinery or for other technical purposes;
- (v) Textile fabric reinforced with metal, of a kind used for technical purposes;
- (vi) Cords, braids and the like, whether or not coated, impregnated or reinforced with metal, of a kind used in industry as packing or lubricating metals;

(b) Textile articles (other than those of headings 5908 to 5910) of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).

\* \* \*

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

EN 58.06(A)(2) describes narrow woven fabric as follows:

Strips of a width not exceeding 30 cm, cut (or slit) from wider pieces of warp and weft fabric (whether cut (or slit) longitudinally or on the cross) and provided with false selvages on both edges, or a normal woven selvedge on one edge and a false selvedge on the other. False selvages are designed to prevent unravelling of a piece of cut (or slit) fabric and may, for example, consist of a row of gauze stitches woven into the wider fabric before cutting (or slitting), of a simple hem, or they may be produced by gumming the edges of strips, or by fusing the edges in the case of certain ribbons of man-made fibres. They may also be created when a fabric is treated before it is cut into strips in a manner that prevents the edges of those strips from unravelling. No demarcation between the narrow fabric and its false selvages need be evident in that case. Strips cut (or slit) from fabric but not provided with a selvedge, either real or false, on each edge, are **excluded** from this heading and classified with ordinary woven fabrics.

\* \* \*

EN 59.11(A)(2) describes bolting cloth as follows:

Bolting cloths. These are porous fabrics (for example, with a gauze, leno or plain weave), geometrically accurate as to size and shape (usually square) of the meshes, which must not be deformed by use. They are

mainly used for sifting (e.g., flour, abrasive powders, powdered plastics, cattle food), filtering or for screen printing. Bolting cloths are generally made of hard twisted undischarged silk yarn or of synthetic filament yarn.

\* \* \*

Heading 5911, HTSUS, covers textile products and articles for technical uses which are specified in Note 7 to Chapter 59.<sup>1</sup> Only those textile products described in Note 7 are classifiable in Heading 5911, HTSUS. You assert that the instant woven fabric is bolting cloth, which is listed in Note 7(a)(2). For support, you cite to EN 59.11, which states that bolting cloth must be porous, geometrically accurate as to size and shape of the meshes, and that bolting cloth cannot be deformed by use. Further, you state that the instant woven fabric is uncoated and consists of synthetic filament yarn. You state that the instant woven fabric is physically identical to Sefar item 3B17-0850-158-00, which was classified in subheading 5911.20, HTSUS, in NY N025649, dated May 2, 2008. For all of these reasons, you assert that the instant woven fabric is classifiable as bolting cloth of subheading 5911.20, HTSUS.

In Headquarters Ruling Letter (HQ) HQ 950733, dated December 28, 1993, we set forth the following dictionary definitions of the terms “bolt” and “bolting cloth”<sup>2</sup>:

*The Century Dictionary and Cyclopedia*, The Century Company (1911): bolt1 vt 1: To sift or pass through a sieve or bolter so as to separate the coarser from the finer particles, as bran from flour; sift out: as, to bolt meal; to bolt out the bran; bolt2 n. 1.: A sieve; a machine for sifting flour; bolting-cloth n.: A cloth for bolting or sifting; a linen, silk, or hair cloth, of which bolters are made for sifting meal, etc. The finest and most expensive silk fabric made is bolting-cloth, for the use of millers, woven almost altogether in Switzerland.

*Funk & Wagnalls New Standard Dictionary of the English Language*, (1928): bolting, n. 1: The act or process of sifting, usually in a mill or machine; b. cloth 1: A fabric, usually of unsized silk, for separating the various products of a flouring mill.

*The Wellington Sears Handbook of Industrial Textiles*, Ernest R. Kaswell (1963): bolting cloth: Light weight, finely woven silk and nylon bolting

<sup>1</sup> We note that a recent court case discussed the tariff classification of textile articles for technical uses under heading 5911, HTSUS. *Airflow Technology, Inc. v. United States*, 524 F.3d 1287 (Fed. Cir. 2008)(*Airflow*). In *Airflow*, however, the Federal Circuit examined the definition of “straining cloth” of Note 7(a)(iii), and not “bolting cloth” of Note 7(a)(ii). As the instant ruling only pertains to bolting cloth, we will not apply the analysis therein to the instant merchandise.

<sup>2</sup> When, as in this case, a tariff term is not defined by the HTSUS or its legislative history, “the term’s correct meaning is its common meaning.” *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). The common meaning of a term used in commerce is presumed to be the same as its commercial meaning. *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989). To ascertain the common meaning of a term, a court may consult “dictionaries, scientific authorities, and other reliable information sources” and “lexicographic and other materials.” *C.J. Tower & Sons v. United States*, 673 F.2d 1268, 1271 (CCPA 1982); *Simod*, 872 F.2d at 1576.

cloths made in precise mesh sizes are extensively used industrially for sifting and screening purposes. These extremely uniform filament yarn constructions in leno weaves are manufactured principally in Switzerland on special looms, requiring a high degree of skill on the part of the operator to achieve weaving perfection.

Bolting cloths are designated by the number of interstices or openings per linear inch, in the same manner as fine wire screening. For example, a 200 mesh bolting cloth has 200 openings per inch in both the warp and filling directions. The size of the openings must also be specified, as yarns of different deniers provide different size interstices for a given mesh cloth...

Silk bolting cloths are generally used for dry sifting processes, with the filament nylon cloths preferred for wet screening operations such as those employed in starch and flour manufacturing. Both types of fabrics are also widely used by the textile industry in screen printing.

*Webster's Third New International Dictionary*, Merriam-Webster (1986): bolt 1: to sift (as meal or flour) usu. through fine-meshed cloth; also: to refine and purify (as meal or flour) through any process; bolting cloth: a firm fabric now usu. of silk woven in various mesh sizes for bolting (as flour) or for use in screen printing, needlework, or photographic enlargements.

*Fairchild's Dictionary of Textiles*: bolting cloth: A plain weave fabric originally of silk with a fine, uniform mesh; the fabric is woven in the gum and has a high number of threads per inch. The standard width is 40 inches. Fine mesh cotton muslin is also employed. For a time, filament yarn of Vinyon, a copolymer of vinyl acetate and vinyl chloride was used, but when production of this yarn ceased, other synthetic yarns were used. Uses: sifting flour in flour mills and screen printing. Sometimes called banderoles.

Hence, by definition, the bolting cloth of Note 7(a)(ii) to Chapter 59 is not just a porous material. It is an article that, although made only of textile fabric, has a mesh that is geometrically accurate as to size and shape, and is used in certain limited ways. According to the ENs, bolting cloth usually has a square mesh. Even if the instant woven fabric has some of the characteristics of bolting cloth, we note that it does not have the same uses as bolting cloth.

CBP has only issued four rulings which classify merchandise under sub-heading 5911.20, HTSUS, as bolting cloth. In all of those cases, the merchandise was used for sifting, sieving or screen-printing. See HQ 950733 (filtration medium for blood purification), NY 896117, dated April 7, 1994 (screen-printing), NY 815642, dated October 10, 1995 (screen-printing), and NY N025649, dated May 2, 2008 (sifting/filtering/screening). In NY N025649, the size and shape of the cloth is not stated, but unlike the fabric in NY N025649, your ruling request did not mention any use of the instant woven fabric for sifting, sieving or screen-printing.

In HQ 961537, dated November 21, 2000, CBP examined mesh woven fabric used on test strips for a portable blood glucose monitoring system. That

requester also asserted that its woven fabric was classifiable as bolting cloth because it shared many of the same physical characteristics of bolting cloth. Like bolting cloth, the mesh woven fabric was made up of synthetic filament yarn, it was porous, and it was designed to prevent deformation by use. However, as the mesh woven fabric was not used for sifting, sieving, or screen printing, CBP determined that it could not be classified as bolting cloth. Similarly, the instant woven fabric is not used for sifting, sieving or screen-printing. As such, it cannot be classified as bolting cloth under heading 5911, HTSUS.

In NY N042709, CBP classified the instant woven fabric as narrow woven fabric of heading 5806, HTSUS. Note 5(a) to Chapter 58 states that narrow woven fabrics cover woven fabrics of a width not exceeding 30 cm, which have selvages (woven, gummed or otherwise made) on both edges. The instant woven fabric is less than 30 cm wide, and it has selvages formed by cutting with a hot knife to prevent it from unraveling. As it meets the definition of a narrow woven fabric, we find that the instant merchandise is properly classified under heading 5806, HTSUS.

**HOLDING:**

By application of GRIs 1 (Note 7(a)(ii) to Chapter 59 and Note 5(a) to Chapter 58) and 6, Sefar Tetex Mono V-17-2030-W 50 Rayl woven fabric, in a width not exceeding 30 cm and having selvages on both sides, is classified under subheading 5806.32.20, HTSUS, which provides, in pertinent part, for “Narrow woven fabrics, other than goods of heading 5807...: Other woven fabrics: Of man-made fibers: Other.” The 2015 column one, general rate of duty is 6.2 percent *ad valorem*.

Duty rates are provided for convenience only and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at [www.usitc.gov](http://www.usitc.gov).

**EFFECT ON OTHER RULINGS:**

NY N042709, dated November 25, 2008, is hereby affirmed.

*Sincerely,*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*

**REVOCATION OF A RULING LETTER AND REVOCATION  
OF TREATMENT RELATING TO THE TARIFF  
CLASSIFICATION OF SAYTEX HP 7010, ALSO KNOWN AS  
BROMINATED POLYSTYRENE (CAS #88497-56-7)**

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

**ACTION:** Notice of revocation of a ruling letter and treatment relating to the tariff classification of Saytex HP 7010, also known as Brominated Polystyrene (CAS #88497-56-7).

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by Section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection (CBP) is revoking one ruling letter relating to the tariff classification of Saytex HP 7010, also known as Brominated Polystyrene (CAS #88497–56–7), under the Harmonized Tariff Schedule of the United States (HTSUS). CBP is also revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin and Decisions*, Vol. 49, No. 45, November 10, 2015. No comments were received in response to this notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after May 9, 2016.

**FOR FURTHER INFORMATION CONTACT:** George Aduhene, Tariff Classification and Marking Branch, Regulations and rulings, Office of International Trade: (202) 325–0184

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

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

Pursuant to section 625 (c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice proposing to revoke NY N074315 and any treatment accorded to substantially identical transactions was published in *Customs Bulletin and Decisions*, Vol. 49, No. 45, November 10, 2015. No comments were received in response to this notice.

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 this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY N074315, CBP classified Saytex HP 7010, also known as Brominated Polystyrene (CAS #88497–56–7) in subheading 3824.90, HTSUS, which provides for: "Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: Other." It is now CBP's position that Saytex HP 7010, also known as brominated polystyrene (CAS #88497–56–7) is classified in subheading 3903.90.50, HTSUS.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking NY N074315 and any other ruling not specifically identified, in order to reflect the proper classification of Saytex HP 7010, also known as Brominated Polystyrene (CAS #88497–56–7) according to the analysis contained in HQ H257795, 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 and Decisions*.

Dated: December 22, 2015

GREG CONNOR  
for

JOANNE STUMP,  
Acting Director

*Commercial and Trade Facilitation Division*

Attachment

HQ H257795

December 22, 2015

CLA-2 OT:RR:CTF:TCM H257795 GA

CATEGORY: Classification

TARIFF NO.: 3903.90.50

MR. J. MICHAEL TAYLOR  
KING & SPALDING  
1700 PENNSYLVANIA AVE., NW  
SUITE 200  
WASHINGTON, DC 20006

RE: Revocation of NY N074315; Classification of Saytex HP 7010, also known as brominated polystyrene (CAS #88497-56-7)

DEAR MR. TAYLOR:

This is in response to your request for reconsideration of New York Ruling Letter (NY) N074315, dated September 25, 2009, issued to your client, Albemarle Corporation (“Albemarle”), concerning the tariff classification of Saytex HP 7010, also known as brominated polystyrene (CAS #88497-56-7), under the Harmonized Tariff Schedule of the United States (HTSUS). In that ruling, U.S. Custom and Border Protection (CBP) classified the subject product in subheading 3824.90, HTSUS, which provides for: “Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: Other.”

On November 10, 2015, 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 of the proposed action was published in the *Customs Bulletin* Vol. 49, No. 45. No comments were received in response to this notice.

**FACTS:**

In NY N074315, CBP described the merchandise as follows:

Saytex HP 7010, also known as Brominated Polystyrene, is a mixture composed of 68% bromine and 32% polystyrene. The product is a flame retardant polymeric additive indicated for use in engineering plastic applications.

The specification data provided by Albemarle clarifies that the product is not a mixture of two unreacted components with a ratio of 68% bromine and 32% polystyrene. The product is in the form of the reacted product, that is, a chemically modified polymer. It contains by weight 68% of bromine.

**ISSUE:**

Is Saytex HP 7010, also known as brominated polystyrene (CAS #88497-56-7), properly classified in heading 3824, HTSUS, as a “chemical product or preparation. . . not elsewhere specified or included”, or in heading 3903, HTSUS, as “polymers of styrene, in primary forms”?

**LAW AND ANALYSIS:**

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is made in accordance with the General Rules of Interpretation (GRI). 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 HTSUS provisions at issue provide, in pertinent part, as follows:

- 3824            Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included.
- 3903            Polymers of styrene, in primary forms.

Heading 3824, HTSUS, provides, in relevant part, for chemical products and preparations which are “not elsewhere specified or included.” Therefore, if the merchandise is described by heading 3903, HTSUS, it is not classified in heading 3824, HTSUS.

Heading 3903, HTSUS, provides for polymers of styrene, in primary forms. The specification data submitted by Albemarle confirms that Saytex HP 7010, also known as brominated polystyrene (CAS #88497-56-7), is a chemically modified polymer. Chemically modified polymers are classified according to their constituent polymeric material – polystyrene. The merchandise is classified in heading 3903, HTSUS. As such, it cannot be classified in Heading 3824, HTSUS.

**HOLDING:**

Pursuant to GRIs 1 and 6, Saytex HP 7010, also known as brominated polystyrene (CAS #88497-56-7), is classified in heading 3903, HTSUS, and specifically in subheading 3903.90.50, which provides for “Polymers of styrene, in primary forms: Other: Other.” The column one, general rate of duty is 6.5 percent *ad valorem*.

Duty rates are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at <http://www.usitc.gov>.

This merchandise may be subject to the requirements of the Toxic Substances Control Act (TSCA) which is administered by the U.S. Environmental Protection Agency (EPA). Contact information for the EPA is as follows: 402 M Street, S.W., Washington, D.C. 20460, telephone number (202) 554-1404, or EPA Region II at (908) 321-6669.

**EFFECT ON OTHER RULINGS:**

NY N074315, dated September 25, 2009, is hereby REVOKED.

*Sincerely,*

GREG CONNOR

*for*

JOANNE STUMP,

*Acting Director*

*Commercial and Trade Facilitation Division*

**GENERAL NOTICE**  
**19 CFR PART 177**

**CORRECTED PROPOSED MODIFICATION AND  
REVOCATION OF RULING LETTERS AND PROPOSED  
REVOCATION OF TREATMENT RELATING TO THE  
TARIFF CLASSIFICATION OF CERTAIN PATIENT LIFTING  
DEVICES**

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

**ACTION:** Corrected notice of proposed modification of ruling letters and proposed revocation of treatment relating to the tariff classification of certain patient lifts.

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

Notice of CBP's intent to modify New York Ruling Letters (NY) 865148, NY 868691, NY 871935, NY B87708, NY C81648, and NY D83377, was first published on April 8, 2015. That notice contained typographical and typesetting errors in the names of the rulings and various dates. It also erroneously included NY 865148, and omitted NY N092699. We are issuing this correction to clarify the rulings involved. As such, this notice advises CBP's intention to modify or revoke the following rulings: NY 868691, NY 871935, NY B87708, NY C81648, NY D83377, and NY N092699. In addition, proposed ruling HQ H235507 is substantially revised from the previous notice. Finally, the comment date is 30 days from publication of this corrected notice.

**DATES:** Comments must be received on or before April 8, 2016.

**ADDRESSES:** Written comments are to be addressed to U.S. Customs and Border Protection, Office of International Trade, Regulations and Rulings, Attn: Trade and Commercial Regulations Branch, 90 K St. NE, Washington, D.C. 20229. Submitted

comments may be inspected during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325-0118.

**FOR FURTHER INFORMATION CONTACT:** Emily Beline, Tariff Classification and Marking Branch, Regulations and Rulings, Office of International Trade (202) 325-7799.

## **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) (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 to 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 modify five ruling letters, and revoke one ruling letter, pertaining to the tariff classification of certain patient lifts. Although in this notice, CBP is specifically referring to the modification of NY 868691, dated December 10, 1991 (Attachment A), NY 871935, dated March 25, 1992 (Attachment B), NY B87708, dated July 30, 1997 (Attachment C), NY C81648, dated November 24, 1997 (Attachment D), NY D83377, dated November 6, 1998 (Attachment E), and revocation of NY N092699, dated February 25, 2010 (Attachment F) this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable

efforts to search existing databases for rulings in addition to the ones identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during this notice period.

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

In NY 868691, CBP determined that the patient lifts at issue were classified under heading 9402, HTSUS, specifically under subheading 9402.90.00, HTSUS, which provides for, medical surgical, dental or veterinary furniture, and that they were eligible for secondary classification under subheading 9817.00.96, HTSUS, which provides for "Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles: Other". It is now CBP's position that the subject merchandise is properly classified under heading 8428, HTSUS, specifically under 8428.90.02, HTSUS, which provides for, lifting machinery, by application of GRI 1. However, it is CBP's position that the instant articles remain eligible for secondary classification under subheading 9817.00.96, HTSUS.

In NY 871935, CBP determined that the "Liko MasterLift System" was classified under heading 9402, HTSUS. It is now CBP's position that the subject merchandise is properly classified under heading 8428, HTSUS, by application of GRI 1. The remainder of the ruling which classified various other goods stays intact, and is not impacted by this modification.

In NY B87708, CBP determined that the Albatros and Ergotracc ceiling lift systems, the Ergolift floor lifts, and the extra Eroglift slings were classified under heading 9402, HTSUS, and that they were eligible for secondary classification under subheading 9817.00.96, HTSUS. It is now CBP's position that the subject merchandise is properly classified under heading 8428, HTSUS, by ap-

plication of GRI 1. The extra Ergolift slings are properly classified in subheading 8431.90.00, HTSUS, which provides for, "Parts suitable for use solely or principally with the machinery of headings 8425 to 8430: Of machinery of heading 8428: Other." However, it is CBP's position that the instant articles remain eligible for secondary classification under subheading 9817.00.96, HTSUS.

In NY C81648, CBP determined that the "Pro-Med Patient Lifting System" in multiple models, was classified under heading 9402, HTSUS, and that it was eligible for secondary classification under subheading 9817.00.96, HTSUS. It is now CBP's position that the subject merchandise is properly classified under heading 8428, HTSUS, by application of GRI 1. However, it is CBP's position that the instant articles remain eligible for secondary classification under subheading 9817.00.96, HTSUS.

In NY D83377, CBP determined that the bath lifts at issue were classified under heading 9402, HTSUS, and that they were eligible for secondary classification under subheading 9817.00.96, HTSUS. It is now CBP's position that the subject merchandise is properly classified under heading 8428, HTSUS, by application of GRI 1. However, it is CBP's position that the instant articles remain eligible for secondary classification under subheading 9817.00.96, HTSUS.

In NY N092699, CBP classified the Proxi-Motion patient lift, a mobile device designed to be used by caregivers to assist in moving a patient or disabled person from a bed or a chair in subheading 8428.90.0190, HTSUS. The classification of this subject merchandise is correct. However, this ruling was not issued pursuant to 19 U.S.C. § 1625 and Customs Regulations regarding modification or revocation of interpretive rulings, found in 19 CFR § 177.12. Therefore, CBP is proposing to revoke NY N092699.

Pursuant to 19 U.S.C. 1625(c) (1), CBP proposes to modify NY 868691, NY 871935, NY B87708, NY C81648, NY D83377, and revoke NY N092699, and to revoke or modify any other ruling not specifically identified, in order to reflect the proper classification of the patient lifts according to the analysis contained in proposed Headquarters Ruling Letter (HQ) H235507 (Attachment G). Additionally, pursuant to 19 U.S.C. 1625(c) (2), CBP intends to revoke or modify any treatment previously accorded by CBP to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: January 8, 2016

IEVA K. O'ROURKE  
*for*  
MYLES B. HARMON,  
*Director*  
*Commercial and Trade Facilitation Division*

Attachments

## [ATTACHMENT A]

NY 868691

December 10, 1991

CLA-2-94:S:N:N1:119 868691

CATEGORY: Classification

TARIFF NO.: 9402.90.0020; 9817.00.9600

MR. THOMAS F. HERCEG  
T.F. HERCEG, INC.  
98 RIDGE ROAD  
CHESTER, NY 10918

RE: The tariff classification of patient lifters from Belgium

DEAR MR. HERCEG:

In your letter dated November 4, 1991, you requested a tariff classification ruling.

Based on the literature furnished, three types of patient lifters are to be imported: a Hydraulic Mobile Machine, an Electric Mobile Machine and a Ceiling Mounted System. The Mobile Machines have a lifting mast mounted on a "U" shaped base on casters. The Ceiling Mounted System consists of a motor and steel rails. A total support lifting frame or special Polyester woven nylon slings can be used with all three mechanisms.

The patient lifters are designed to move people with motor disabilities from bed to wheelchair, and from wheelchair to toilet or bath. The lifting frame (Handi-Move frame) can hold the patient firmly in place without depending on the patient's muscles.

The applicable subheading for the patient lifters will be 9402.90.0020, Harmonized Tariff Schedule of the United States (HTS), which provides for medical, surgical, dental or veterinary furniture. The rate of duty will be 5.3 percent

Based on the information you have furnished, the patient lifters described above will be eligible for a free rate of duty as articles specially designed or adapted for the use or benefit of physically or mentally handicapped persons in subheading 9817.00.9600, HTS. All applicable entry requirements must be met including the filing of form ITA-362P. Please note that this free provision does not apply to parts.

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

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

*Sincerely,*

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

## [ATTACHMENT B]

NY 871935

MARCH 25, 1992

CLA-2-94:S:N:N1:233 871935

CATEGORY: Classification

TARIFF NO.: 9019.10.2000; 8419.20.0000 &  
9402.90.0020

MS. SANDRA L. MARSHANKE  
C. J. TOWER, INC., CUSTOMS BROKERS  
128 DEARBORN STREET  
BUFFALO, NEW YORK 14207-3198

RE: The tariff classification of medical equipment from Canada.

DEAR MS. MARSHANKE:

In your letter dated February 10, 1992, on behalf of Amada Medical, Inc., Mississauga, Ontario, Canada L4Z 1T5, you requested a tariff classification ruling.

The merchandise consists of four Models of medical equipment. The first, Model A-2000, is a Whirlpool Bathing System (Kramer Bathing Systems). It is a therapeutic bathing and whirlpool hydromassage for geriatric/disabled patients including a lift for transport in and out of the tub. The "Smart Tub" is adjustable and automatically fills with the push of a button then shuts off once the fill is completed. It has an electronically controlled hydromassage and easy to read digital display. Convenient hand held shower with adjustable spray controls and non-skid tub and grip bars. The lift base is fully interchangeable with the stretcher and/or chair and has a hydraulic foot pedal control. It is constructed of rust proof stainless steel with acid resistant metal parts.

The second, Model S-206, is a Getinge Flusher/Disinfector. It is designed for efficient cleaning and disinfection of the utensils mainly used in the management of patients' hygiene, such as bedpans, urinals, kidney basins and suction bottles. Its principal function is sterilizing based on the fact that the greatest part of the time cycle is consumed by that process. The disinfector has space for, e.g., one bedpan or three urine bottles at a time and is started with a button. The entire process only takes three minutes and comprises flushing, cleaning and disinfection. Disinfection is accomplished with steam at temperature of at least 85 degrees C (185 degrees F). The lid remains locked until disinfection is completed. It is at home in a medical department, obstetrical unit, intensive care unit, surgical department or quarantine unit. The dimensions vary according to models.

The third is a Liko MasterLift System. It consists of three different styles. The first is the Regular. It is a one-piece sling with individual leg supports and the maximum load is 170 kg (380 lbs.), which is used to transport a patient. Liko's patented "wrap-around" design means that MasterSling automatically adapts itself to any patient and is available in different sizes, including, Model #35320-1P, a "high-back" for added support. MasterSling uses no metal and comes in a variety of strong, pliable fabrics, i.e., nylon, cotton, polyester net, and plastic-coated fiberglass. Weight-bearing straps are made of strong, durable synthetic fiber. A MasterSling with reinforced leg

supports distributes pressure evenly and prevents the fabric from twisting or wrinkling. A MasterSling with synthetic sheepskin padding is available for pressure-sensitive patients.

The second is the Liko MasterLift System Overhead. It has two basic designs, a StraightRail and a TraverseRail. It has three installation alternatives which are ceiling mounted, wall mounted and an upright support, and includes a selection of options for lifting patient upright, reclined or from horizontal positions. It comes in a variety of different sizes. The lifting capacity is 170 kg (380 lbs.). The third style, the Golvo, is available with either a fixed or an adjustable chassis. An optional electronic scale mounts conveniently between the slingbar and the lifting strap. Any of the high-quality, easy- to-use MasterLift accessories may be used with Golvo. It is designed to stand on the floor. The fourth model is a Merivaara's Rose Geriatric Chair. It is a comfortable, versatile nursing aid and has been designed for use in the nursing of the elderly and for patients requiring long term care. It features a contoured seat which provides sturdy support and optimum seating comfort during extended use. The dining table provides a solid support during meals and conveniently doubles as a surface for such activities as craftwork, writing and reading. It is supplied either attached to the chair, so that it can be turned to the side, or as a separate item. In either case, the tray can be locked securely in place. The distance between the table and the user is also adjustable. The overall dimensions are width maximum 650 mm and the height maximum 1250 mm.

The applicable subheading for the therapeutic bathing and whirlpool hydromassage for the Kramer Bathing Systems will be 9019.10.2000, Harmonized Schedule of the United States, HTSUS, which provides for mechanotherapy appliance and massage apparatus. The duty rate will be 4.2 percent ad valorem. The applicable subheading for the lift for the Kramer Bathing Systems will be 9402.90.0020, HTSUS, which provides for medical, surgical, dental or veterinary furniture (for example, operating tables, examination tables, hospital beds with mechanical fittings, dentists' chairs); barbers' chairs and similar chairs, having rotating as well as both reclining and elevating movements; parts of the foregoing articles: other, other. The duty rate will be 5.3 per cent ad valorem. The applicable subheading for the Getinge Flusher Disinfecter will be 8419.20.0000, HTSUS, which provides for machinery, plant or laboratory equipment, for the treatment of materials by a process involving a change of temperature such as heating, .... sterilizing: Medical, surgical or laboratory sterilizers. The duty rate will be 4.2 percent ad valorem. The applicable subheading for the Liko Lifting System and Marivaara's Rose Geriatric Chair will be 9402.90.0020, HTSUS, which provides for medical, surgical, dental or veterinary furniture; parts of the foregoing articles The duty rate will be 5.3 percent ad valorem.

Goods classifiable under subheadings 9019.10.200; 8419.20.00020 and 9402.90.0020, HTSUS, which have originated in the territory of Canada, will be entitled to a 2.5 percent, a 0.8 percent ad valorem and a 1 percent ad valorem rate of duty, respectively, under the United States-Canada Free Trade Agreement (CFTA) upon compliance with all applicable regulations.

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

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

*Sincerely,*

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

[ATTACHMENT C]

NY B87708

July 30, 1997

CLA-2-94:RR:NC:SP:233 B87708

CATEGORY: Classification

TARIFF NO.: 9402.90.0020; 9817.00.9600

MR. DAN BEAUREGARD

A.N. DERINGER, INC.

P.O. Box 284

HIGHGATE SPRINGS, VT 05460

RE: The tariff classification of the Albatros and Ergotrac Ceiling Lift Systems, the Ergolift Floor Lift and Ergofit Slings from Canada.

DEAR MR. BEAUREGARD:

In your letter dated July 21, 1997, you requested a tariff classification ruling.

You have submitted descriptive literature for the following items:

1. The Albatros Ceiling Lift System is a patient-lifting system which operates on two motorized axes. It features an automatic return-to-charge function, a lifting capacity of 250 kgs (550 lbs), a battery supply unit, an emergency stop pull cord and an emergency lowering device.

2. The Ergotrac Ceiling Lift System is a patient-transfer system on a fixed rail with two axes, permitting easy manual lateral displacement. It is electrically powered and features a lifting capacity of 190 kgs (418 lbs), a padded universal carry bar which accepts all types of slings, an automatic back-up battery supply unit and emergency Up/Down buttons.

3. The Ergolift is an ergonomic floor lift. It features multi-positioned handles near the care giver, motorized opening of the legs, an easily accessible emergency stop button, patient rotation capability of 360 degrees, a directional blockage system, luminous dials for battery and charging function, and a padded swivel carry bar adaptable to all types of slings. The patient can be hoisted from the floor without lifting the shoulders. The standardized motorized opening of the legs of the Ergolift and the optimal distribution of the patient's weight, allows the care-giver to easily maneuver the unit without risk.

4. Ergolift Slings are a range of four slings to be used with the Ergolift. They are designed for use by patients with different needs. Each sling features 100% polyester soft mesh net, a lined seat made from polyester and foam, a lifting capacity of 250 kgs (550 lbs) and a nylon strap with choice of positioning. The slings are water-resistant and machine washable.

The applicable subheading for the Albatros and Ergotrac Ceiling Lift Systems, the Ergolift Floor Lift and Ergofit Slings will be 9402.90.0020, Harmonized Tariff Schedule of the United States (HTS), which provides for Medical, surgical, dental or veterinary furniture...parts of the foregoing articles: Other, other. The rate of duty will be 2.1% ad valorem.

The Albatros and Ergotrac Ceiling Lift Systems, the Ergolift Floor Lift and Ergofit Slings appear to be intended for the use of individuals with a chronic ailment which substantially limits their ability to care for themselves. The devices are therefore eligible for a free rate of duty as articles specially designed or adapted for the use or benefit of physically or mentally handicapped persons in subheading 9817.00.9600, HTS. All applicable entry requirements must be met including the filing of form ITA-362P.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at 212-466-5739.

*Sincerely,*

GWENN KLEIN KIRSCHNER

*Chief,*

*Special Products Branch National Commodity  
Specialist Division*

## [ATTACHMENT D]

NY C81648

November 24, 1997

CLA-2-94:RR:NC:SP:233 C81648

CATEGORY: Classification

TARIFF NO.: 9402.90.0020; 9817.00.9600

MS. LIZZIE McLEISH  
PRO-MED AUSTRALIA PTY LTD  
P.O. BOX 440  
MOORABBIN 3189  
VICTORIA AUSTRALIA

RE: The tariff classification of patient lifting devices from Australia.

DEAR MS. McLEISH:

In your letter dated November 5, 1997, you requested a tariff classification ruling.

You have submitted descriptive literature for the Pro-Med Patient Lifting System, a comprehensive range of patient lifting products for home or hospital. The system includes general purpose lifters, twin-boom high capacity lifters, a lifting frame, stand-up lifters, slings and supports. The lifters each feature an advanced electronic control and power system with two-speed raise and lower controls, a wall mount recharging station with removable battery pack, knee pad release, base width adjustment, kick-stop castors, pixel sling adjustment, sling size and type identification and a hydraulic pump option. The lifters are available in the Alpha 180, Delta, Elf, and Alpha 230 Alpha 180 Twin-Boom models.

The Pro-Med lifting frame is a development of an Australian emergency stretcher concept. The lifting frame can be assembled around an injured or immobilized patient who is then supported by a series of semi-rigid cross support straps individually inserted beneath the patient's limbs and body. The existing prone position is therefore not disturbed during manual or lifter transfer from ambulance to operating room to ward. For general ward use the frame and lifter combination allows simple, one carer changing of bed linen and pressure care. The lifting frame has easy-to-use plastic locking clips at each end for assembly around the patient.

The stand-up lifters are designed for lifting of the patient off a bed or chair and raised to a fully-standing position. They are available in the Elf Stand-Up, Pixel and Tempo models.

The applicable subheading for the patient lifting devices will be 9402.90.0020, Harmonized Tariff Schedule of the United States (HTS), which provides for medical, surgical, dental or veterinary furniture:...parts of the foregoing articles: other, other. The rate of duty will be 2.1% ad valorem.

Based on the information you have furnished, the Pro-Med patient lifting devices are designed for the use of individuals with severe muscular or similar disabilities that substantially limit their ability to stand, walk or move freely. These articles are therefore eligible for a free rate of duty as articles specially designed or adapted for the use or benefit of physically or mentally handicapped persons in subheading 9817.00.9600, HTS. All applicable entry requirements must be met including the filing of form ITA-362 P.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at 212-466-5739.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director,*

*National Commodity Specialist Division*

## [ATTACHMENT E]

NY D83377

November 6, 1998

CLA-2-94:RR:NC:SP:233 D83377

CATEGORY: Classification

TARIFF NO.: 9402.90.0020; 9817.00.96

MS. CONNIE FREEMAN  
THE A. W. FENTON COMPANY INC.  
P.O. BOX 81179  
CLEVELAND, OH 44181-0179

RE: The tariff classification of bath lifts from Taiwan.

DEAR MS. FREEMAN:

In your letter dated October 23, 1998, on behalf of Invacare Corporation, you requested a tariff classification ruling.

You have submitted a brochure which illustrates a battery operated bath lift. The bath lifts are designed to allow a patient to transfer from a wheelchair to the lift with minimal effort. The patient then uses the attached handset to lower the bath lift into the water. After bathing, the handset is again used to raise the patient back to the bath lift's highest position to allow the patient to transfer back onto the wheelchair safely. The lifts are battery powered, and are equipped with a removable battery behind the backrest.

The applicable subheading for the bath lifts will be 94102.90.0020, Harmonized Tariff Schedule of the United States (HTS), which provides for medical, surgical, dental or veterinary furniture...; parts of the foregoing articles: other: other. The rate of duty will be 1.1% ad valorem.

The bath lifts are eligible for a free rate of duty as articles specially designed or adapted for the use or benefit of physically or mentally handicapped persons in subheading 9817.00.96, HTS. All applicable entry requirements must be met including the filing of form ITA-362P.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at 212-466-5739.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director,*

*National Commodity Specialist Division*

## [ATTACHMENT F]

N092699

February 25, 2010

CLA-2-84:OT:RR:NC:N1:106

CATEGORY: Classification

TARIFF NO.: 8428.90.0190

MR. WILLIAM BURAK  
ERGO-ASYST TECHNOLOGY, LLC  
DBA TECHNIMOTION MEDICAL  
5810 TRADE CENTER DR.  
SUITE 300  
AUSTIN, TX 78744

RE: The tariff classification of a patient lift from China.

DEAR MR. BURAK:

In your letter dated January 27, 2009, you requested a tariff classification ruling. A description and literature with pictures were submitted with your request.

The submitted article is the Proxi-Motion patient lift. It is a mobile device that is designed to be used by caregivers to assist in moving a patient or disabled person from a bed or chair. The patient would be seated in a sling which is attached to the arm of the machine. The arm, when raised vertically, would lift the patient in the sling. When not in use, a table top can be attached to the arm for the patient's use.

The applicable subheading for the Proxi-Motion patient lift will be 8428.90.0190, Harmonized Tariff Schedule of the United States (HTSUS), which provides for other lifting...machinery: other machinery, other. The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Mark Palasek at (646) 733-3013.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director,*

*National Commodity Specialist Division*

## [ATTACHMENT G]

HQ H235507  
CLA-2 OT:RR:CTF:TCM H235507 ERB  
CATEGORY: Classification  
TARIFF NO.: 8428.90.0290; 9817.00.96

MR. DAN BEAUREGARD  
A.N. DERINGER, INC.  
P.O. Box 284  
HIGHGATE SPRINGS, VT 05460

RE: Modification of NY 868691, Modification of NY 871935, Modification of NY B87708, Modification of NY C81648, Modification of NY D83377, Revocation of NY N092699; Tariff Classification of various patient lifts

DEAR MR. BEAUREGARD:

This is in reference to the above referenced New York Ruling Letters, which each regard the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) of a product identified as a patient or person lifting device. The rulings were either issued to you, or issued to you on behalf of a client, by U.S. Customs and Border Protection (CBP).

In the above referenced rulings, CBP classified the subject patient lift under heading 9402, HTSUS, which provides for medical furniture. We have since reviewed these rulings and found them to be incorrect. For the reasons set forth below, we intend to modify the following rulings which classify substantially similar products under heading 9402, HTSUS: NY 868691, dated December 10, 1991 (three types of patient lifters, a hydraulic mobile machine, an electric mobile machine, and a ceiling mounted system); NY 871935, dated March 25, 1992 (three styles of the Liko MasterLift System<sup>1</sup>); NY B87708, dated July 30, 1997 (Albatros and Ergotrac ceiling lift systems, and Ergolift floor lift); NY C81648, dated November 24, 1997 (four models of the Pro-Med Patient Lifting System); and NY D83377, dated November 6, 1998 (the Invacare bath lift).

We also intend to revoke NY N092699, dated February 25, 2010, (classifying the Proxi-Motion patient lift). Pursuant to 19 U.S.C. § 1625(c) and 19 C.F.R. § 177.12(b), Customs is to follow a notice and comment procedure if conflicting or inconsistent rulings exist. We have reviewed NY N092699, and while the classification itself is correct, it was issued in conflict with the aforementioned rulings NY 868691, NY 871935, NY B87708, NY C81648, and NY D83377.

For ease, this ruling will only discuss the facts of NY B87708. However, as the goods of each of the aforementioned rulings are identical or substantially similar with regards to the patient lifts, the analysis contained herein will apply to all named rulings.

<sup>1</sup> NY 871935 also classified four models of the Whirlpool Bathing System (Kramer Bathing Systems) in subheading 9019.10.20, HTSUS, which provides for mechano-therapy appliance and massage apparatus; one model (S-206) of the Getinge Flusher/Disinfectant in subheading 8419.20.00, HTSUS, which provides for machinery, plant or laboratory equipment, for the treatment of materials by a process involving a change of temperature such as heating, ..., sterilizing: Medical, surgical or laboratory sterilizers; and one article called the Merivaara's Rose Geriatric Chair, in subheading 9401.90.00, HTSUS, which provides for medical furniture. These classifications remain intact and are not disrupted by the instant modification.

**FACTS:**

In NY B87708, CBP described the Albatros and Ergotrac Ceiling Lift Systems, and the Ergolift Floor Lift, in the following manner:

The Albatros Ceiling lift System is a patient-lifting system which operates on two motorized axes. It features an automatic return-to-charge function, a lifting capacity of 250 kgs (550 lbs.), a battery supply unit, an emergency stop pull cord and an emergency lowering device.

The Ergotrac Ceiling Lift System is a patient-transfer system on a fixed rail with two axes, permitting easy manual lateral displacement. It is electrically powered and features a lifting capacity of 190 kgs (418) lbs.), a padded universal carry bar which accepts all types of slings, an automatic back-up battery supply nit and emergency Up/Down buttons.

The Ergolift is an ergonomic floor lift. It features multi-positioned handles near the care giver, motorized opening of the legs, an easily accessible emergency stop button, patient rotation capability of 360 degrees, a directional blockage system, luminous dials for battery and charging function, and a padded swivel carry bar adaptable to all types of slings. The patient can be hoisted from the floor without lifting the shoulders. The standardized motorized opening of the legs of the Ergolift and the optimal distribution of the patient's weight, allows the caregiver to easily maneuver the unit without risk.

\* \* \*

The applicable subheading for the Albatros and Ergotrac Ceiling Lift Systems, the Ergo lift Floor Lift and Ergofit Slings will be 9402.90.0020, Harmonized Tariff Schedule of the United States (HTS), which provides for Medical, surgical, dental or veterinary furniture: ... parts of the foregoing articles: Other, other. The rate of duty will be 2.1% ad valorem.

The Albatros and Ergotrac Ceiling Lift Systems, the Ergolift Floor Lift ... appear to be intended for the use of individuals with a chronic ailment which substantially limits their ability to care for themselves. The devices are therefore eligible for a free rate of duty as articles specially designed or adapted for the use or benefit of physically or mentally handicapped persons in subheading 9817.00.9600, HTS.

**ISSUE:**

Whether the instant products are properly classified under heading 8428, HTSUS, which provides for "Other lifting ... machinery", or under heading 9402, HTSUS, which provides for "Medical ... furniture".

**LAW AND ANALYSIS:**

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification 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 GRI may then be applied.

The HTSUS provisions under consideration are:

- 8428 Other lifting, handling, loading or unloading machinery (for example, elevators, escalators, conveyors, teleferics):
- 9402 Medical, surgical, dental or veterinary furniture (for example, operating tables, examination tables, hospital beds with mechanical fittings, dentists' chairs); barbers' chairs and similar chairs, having rotating as well as both reclining and elevating movements; parts of the foregoing articles:

Note 2 to Chapter 94, HTSUS, states, in pertinent part:

The articles (other than parts) referred to in headings 9401 to 9403 are to be classified in those headings only if they are designed for placing on the floor or ground.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs), constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of the headings. *See* T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

EN 84.28 states, in pertinent part:

[T]his heading covers a wide range of machinery for the mechanical handling of materials, goods, etc. (lifting, conveying, loading, unloading, etc.). They remain here even if specialised for a particular industry, for agriculture, metallurgy, etc.

The heading covers lifting or handling machines usually based on pulley, winch or jacking systems, and often including large proportions of static structural steelwork, etc. These static structural elements (e.g., pylons specialised for teleferics, etc.) are classified in this heading when they are presented as parts of a more or less complete handling machine.

These more complex machines include:

### (III) OTHER SPECIAL LIFTING OR HANDLING MACHINERY

- (L) Patient lifts. These are devices with a supporting structure and a seat for the raising and lowering of seated persons, e.g., in a bathroom or onto a bed. The mobile seat is fixed to the supporting structure by means of ropes or chains.

The General EN to Chapter 94 states, in pertinent part:

For the purposes of this Chapter, the term "furniture" means:

- (A) Any "movable" articles (not included under other more specific headings of the Nomenclature), which have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafés, restaurants, laboratories, hospitals, dentists' surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport.

EN 94.02 states, in pertinent part:

- (A) MEDICAL, SURGICAL, DENTAL OR VETERINARY FURNITURE

It should be noted that this group is restricted to furniture of a type specially designed for medical, surgical, dental or veterinary use; furniture for general use not having such characteristics is therefore excluded.

Heading 9402, HTSUS, provides in pertinent part for medical furniture. To satisfy the heading text, however, the goods must be both specially designed for medical, surgical, dental or veterinary use, and they must be “furniture.” See EN to Chapter 94, and EN 94.02.

The General EN (A) to Chapter 94 defines furniture as: “[a]ny ‘movable’ articles ... which have the essential characteristic that they are constructed, in some cases, for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings and other places.” CBP has previously considered the meaning of the term “equip” as well as the phrase “to equip”. In HQ 964352, dated September 11, 2000 CBP cited *The Random House Dictionary of the English Language*, (1973), which defines the word “equip” as meaning: “To furnish or provide with whatever is needed for service or for any undertaking”. There, CBP ultimately determined that waste receptacles were not designed to equip a building, office, or room, but instead were temporary repositories of waste. See also HQ 964053, dated July 27, 2000; and HQ 962658, dated July 18, 2000. By including the words “not included under other more specific headings” in the definition of furniture, the drafters of the ENs intended that Chapter 94 would not cover all “moveable” articles constructed for placing on the floor. A more specific heading which better describes the article is preferable to the more general heading of furniture. While the instant lifts are constructed, in some cases, for placing on the ground, they are not used to equip private dwellings or other places. They do not have a utilitarian purpose of equipping a room. Rather, they are used to transfer a patient to and from a bath or bed. As such, the instant lifts are not “furniture,” and are not properly classified as such under chapter 94, specifically, heading 9402, HTSUS.

Heading 8428, HTSUS, provides, in pertinent part, for other lifting machinery. See NY N160936, dated May 2, 2011 (classifying a power lift gate assembly); NY N057959, dated April 27, 2009 (classifying a motorcycle lift). The heading covers specialized lifting machines based on pulley, winch or jacking systems, which often included large proportions of static structural elements. See EN 84.28.

In November 2003, Subsection (III)(L) was added to the EN 84.28, by corrigendum. See Annex D/1 to Doc. NC0796B2 (HSC/32/Nov. 2003), para. 100; Annex L/14 to Doc. NC0796B2. This addition provides specifically for “patient lifts,” described as supporting structure and a seat for the raising and lowering of seated persons, e.g., in a bathroom or onto a bed. See EN(III)(L) to 84.28.

The instant lifts are comprised of moveable metal structures that stand on the floor, or are ceiling or wall mounted. A fabric sling hangs down from the arm of the structure by ropes. The sling is designed such that a patient may be seated in it and transferred to and from a bed or a bath<sup>2</sup>. Therefore, as the

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<sup>2</sup> The term “seat” is not defined in the tariff or in the ENs. When a tariff term is not defined by the HTSUS or its legislative history, “the term’s correct meaning is its common meaning.” *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). The common

subject patient lifts meet the text of heading 8428, HTSUS, and are described by EN (III)(L) to 84.28, the lifts are classifiable under heading 8428, HTSUS. Specifically, the instant lifts are classified under subheading 8428.90.00, HTSUS, which provides for “Other lifting, handling, loading or unloading machinery (for example, elevators, escalators, conveyors, teleferics): Other machinery”<sup>3</sup>.

### Heading 9817

Section 1121 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. No. 100–418, 102 Stat. 1107) and Presidential Proclamation 5978 implemented the Nairobi Protocol by inserting permanent provisions—specifically, subheadings 9817.00.92, 9817.00.94, and 9817.00.96—into the HTSUS. These tariff provisions specifically provide that “[a]rticles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons” are eligible for duty-free treatment.

Notes in subchapter XVII of Chapter 98 of the HTSUS define the terms “blind or other physically or mentally handicapped persons” and limit the classification of certain products under subheadings 9817.00.92, 9817.00.94, and 9817.00.96. U.S. Note 4(a), subchapter XVII, Chapter 98, HTSUS, defines the term “blind or other physically or mentally handicapped persons” as “any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working.” U.S. Note 4(b), subchapter XVII, Chapter 98, HTSUS excludes four categories of goods from subheadings 9817.00.92, 9817.00.94, and 9817.00.96: (1) articles for acute or transient

meaning of a term used in commerce is presumed to be the same as its commercial meaning. *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989). To ascertain the common meaning of a term, CBP may consult “dictionaries, scientific authorities, and other reliable information sources” and “lexicographic and other materials.” *C.J. Tower & Sons v. United States*, 673 F.2d 1268, 1271 (C.C.P.A. 1982); *Simod*, 872 F.2d at 1576. The Oxford English Dictionary defines “seat” as “7.a. Something adapted or used for sitting upon, as a chair, stool, sofa, etc. ... b. In narrower sense: That part (of a chair, saddle, etc.) upon which its occupant sits.” See <www.oed.com> (last checked January 16, 2013). See also *Various Underwriters at Interest, Lloyd’s London v. Cascade Helicopters, Inc.*, 1993 U.S. Dist. LEXIS 13227, \*7 (N.D. IL 1993) (quoting *The American Heritage Dictionary* 1107 (2d ed. 1982)).

<sup>3</sup> NY B87708 also classifies the Ergolift slings alone, which are described as, “100% polyester soft mesh net, a lined seat made from polyester and foam, a lifting capacity of 250 kgs (550 lbs.) and a nylon strap with choice of positioning. The slings are water resistant and machine washable.” See NY B87708. At the time, since the slings were considered a part of medical furniture, they were classified alongside the lifts themselves in heading 9402, HTSUS, which provides for furniture and parts thereof. Here, however, so long as no other Chapter or Section exclusionary notes apply, parts of lifting devices of heading 8428, HTSUS, are classified in heading 8431, HTSUS, pursuant to Note 2 to Section XVI, which covers chapter 84. Specific information, including the Ergolift sling’s warp and weft, and any applicable surface treatments, is no longer available. Therefore, for purposes of this ruling and without the benefit of additional information, as the Ergolift slings were considered parts in NY B87708, these particular slings will still be considered a part, specifically a part of lifting machinery here, and will be classified in subheading 8431.39.00, HTSUS, which provides for, “Parts suitable for use solely or principally with the machinery of headings 8425 to 8430: Of machinery of heading 8428: Other.”

disability; (2) spectacles, dentures, and cosmetic articles for individuals not substantially disabled; (3) therapeutic and diagnostic articles; and (4) medicine or drugs.

CBP decides whether a product is “specially designed or adapted for the use or benefit” of the handicapped on a case-by-case basis, balancing five factors set forth in Headquarter Ruling Letter (“HQ”) HQ556449, dated May 5, 1992. Here, persons who are unable to lift or move themselves into or out of a bath or bed, specifically those with severe, chronic mobility issues qualify as “handicapped people” under U.S. Note 4 and the specific exclusions contained in U.S. Note 4(b) do not apply.

The physical properties of the subject patient lifting devices clearly distinguish them as those used in hospitals or clinics for patients unable to move themselves, or in some cases, are installed in a user’s home in circumstances where the user is unable to move themselves. Use of these patient lifts by the general public is improbable, and there is little evidence such use would be fugitive. The importers of the subject rulings here are recognized manufacturers or distributors of goods for the handicapped, specifically lifting and mobility devices, and the channels of commerce these goods are sold in is highly specialized to serve hospitals or clinics with handicapped patients. Finally, the condition of the articles at the time of importation indicate that these articles are for the handicapped. Therefore, pursuant to the factors stipulated in HQ 556449, the goods which qualified for duty-free treatment under subheading 9817.00.96, HTSUS, in its original ruling (e.g., NY 868691, NY B87708, NY C81648, and NY D83377) will maintain its qualification for duty-free treatment pursuant to the analysis herein. However, all applicable entry requirements must still be met.

#### **HOLDING:**

By application of GRI 1, the patient lifting devices described in NY 868691, NY 871935, NY B87708, NY C81648, NY D83377, and NY N092699 are classified under heading 8428, HTSUS, specifically under subheading 8428.90.0290, HTSUSA, which provides for “Other lifting, handling, loading or unloading machinery (for example, elevators, escalators, conveyors, teleferics): Other machinery”.

The column one, general rate of duty is free.

Duty rates are provided for convenience only and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at [www.usitc.gov](http://www.usitc.gov).

#### **EFFECT ON OTHER RULINGS:**

NY 868691, dated December 10, 1991; NY 871935, dated March 25, 1992; NY B87708, dated July 30, 1997; NY C81648, dated November 24, 1997; NY D83377, dated November 6, 1998 are hereby **MODIFIED** in accordance with the above analysis.

NY N092699, dated February 25, 2010 is hereby **REVOKED**.

*Sincerely,*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*

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**MODIFICATION OF TWO RULING LETTERS, REVOCATION  
OF ONE RULING LETTER, AND REVOCATION OF  
TREATMENT RELATING TO THE TARIFF  
CLASSIFICATION OF TIRES FOR USE ON DUMP TRUCKS**

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

**ACTION:** Notice of the modification of two ruling letters, revocation of one ruling letter, and the revocation of treatment relating to the classification of certain off-road tires for dump trucks.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying or revoking three ruling letters concerning the tariff classification of certain off-road tires for dump trucks under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP

is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 49, No. 39, on September 30, 2015. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after May 9, 2016.

**FOR FURTHER INFORMATION CONTACT:** Claudia Garver, Tariff Classification and Marking Branch, Regulations and Rulings, Office of International Trade at (202) 325-0024.

### **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) (“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 public 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 to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the *Customs Bulletin*, Vol. 49, No. 39, on September 30, 2015, proposing to modify two ruling letters and to revoke one ruling letter pertaining to the tariff classification of off road tires for use on dump trucks. As stated in the proposed notice, this action will cover Headquarters Ruling Letter (“HQ”) 958100, dated March 25, 1997, HQ 959730, dated May 29, 1997, and HQ 966360, dated June 13, 2003, as well as any rulings on this merchandise which may exist, but

have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the three identified. No further rulings have been found. 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 comment 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 comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In HQ 958100, HQ 959730, and HQ 966360, CBP classified various off-road tires for use on dump trucks in subheading 4011.20.10, HTSUS, which provides for tires of a kind used on buses or trucks. CBP has reviewed HQ 958100, HQ 959730, and HQ 966360 and has determined the ruling letters to be in error. It is now CBP's position that the subject tires are properly classified, by operation of GRI 1, in subheadings 4011.62.00 or 4011.63.00, as "other" tires having a herringbone or similar tread, or in subheadings 4011.93.40, 4011.93.80, 4011.94.40, or 4011.94.80, HTSUS, depending on the tread pattern and use of the tires.

Pursuant to 19 U.S.C. §1625(c)(1), CBP is modifying HQ 958100 and HQ 959730 and revoking HQ 966360. CBP is also revoking any other ruling not specifically identified to reflect the tariff classification of the subject merchandise according to the analysis contained in HQ H192148, set forth as an attachment to this notice. 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: January 12, 2015

JACINTO JUAREZ

*for*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*

Attachment

HQ H192148

January 12, 2016

CLA-2 OT:RR:CTF:TCM H192148 CkG

CATEGORY: Classification

TARIFF NO.: 4011.62.0000, 4011.63.0000,  
4011.93.4000, 4011.93.8000, 4011.94.4000,  
4011.94.8000

PORT DIRECTOR  
CUSTOMS AND BORDER PROTECTION  
PORT OF SEATTLE  
1000 SECOND AVE., SUITE 2100  
SEATTLE, WA 98104

Re: Modification of HQ 958100, HQ 959730 and Revocation of HQ 966360;  
classification of certain off-the-road tires for dump trucks

DEAR PORT DIRECTOR,

This is in reference to Headquarters Ruling Letter (HQ) 958100, issued to the Port Director in Seattle, Washington, on March 25, 1997, with regard to Protest # 3001-95-100575, concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of tires for dump trucks. The articles were classified in subheading 4011.20.10, HTSUS, 4011.91, or 4011.99, HTSUS, depending on the tread pattern and use of the tires. Since the issuance of that ruling, Customs and Border Protection (CBP) has reviewed the classification of these items and has determined that the cited ruling is in error.

HQ 958100 is a decision on a specific protest. A protest is designed to handle entries of merchandise which have entered the U.S. and been liquidated by CBP. A final determination of a protest, pursuant to Part 174, Customs Regulations (19 CFR 174), cannot be modified or revoked as it is applicable only to the merchandise which was the subject of the entry protested. Furthermore, CBP lost jurisdiction over the protested entries in HQ 958100 when notice of disposition of the protest was received by the protestant. See, *San Francisco Newspaper Printing Co. v. U.S.*, 9 CIT 517, 620 F.Supp. 738 (1935).

However, CBP can modify or revoke a protest review decision to change the legal principles set forth in the decision. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103-182, 107 Stat. 2057), 60 days after the date of issuance, CBP may propose a modification or revocation of a prior interpretive ruling or decision by publication and solicitation of comments in the CUSTOMS BULLETIN. This modification will not affect the entries which were the subject of Protest 3001-95-100575, but will be applicable to any entries of similar merchandise made 60 days after publication of the final notice of revocation in the CUSTOMS BULLETIN.

We are also revoking HQ 966360, dated June 13, 2003, and modifying HQ 959730, dated May 29, 1997, which classified similar tires for dump trucks in subheading 4011.20.10, HTSUS, as tires of a kind used on buses or trucks.

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 revoke HQ 966360 and to modify HQ 958100 and HQ 959730 was published on September 30, 2015, in Volume 49, Number 39, of the *Customs Bulletin*. No comments were received in response to this Notice.

### **FACTS:**

The articles under consideration are certain off-the-road tires for earth-mover equipment described as large dump trucks. These tires are classified in accordance with the Tire and Rim Association (TRA) coding system with a TRA code that begins with the letter “E”.

In HQ 958100, off-the-road tires suitable for dump trucks and bearing the TRA codes E-1/R-5, E-3/G-18, E-3/G-44, E-3/T-331, E-4/G-18ET, E-4/G-28ET, E-4/G-36ET, E-4/T-431, E-4/T-432, E-4/T-433, E-4/T451, and E-7/D-1 were classified in subheading 4011.20.10, HTSUS.<sup>1</sup> The importer claimed that the tread on these tires met the definition for “herring-bone” or similar tread tires.

In HQ 959730, Triangle brand off-the-road tires style TL-612 designed for use on earthmoving and loader equipment bearing the TRA code “E-3”, with or without another code, were classified in subheading 4011.20.10, HTSUS, if of radial construction, and in 4011.20.50, HTSUS, if of another construction.<sup>2</sup> The importer claimed that the tread on these tires met the definition for “herring-bone” or similar tread tires.

In HQ 966360, Michelin Earthmover tires (part numbers 248850 and 123475) with five tread patterns including a herringbone tread, for use principally in rigid dumpers and transport vehicles, were classified in subheading 4011.20.10, HTSUS.

### **ISSUE:**

Whether the instant tires are classified in subheading 4011.20, HTSUS, as tires “of a kind used on buses or trucks”; in subheading 4011.6, HTSUS, as “other, having a “herring-bone” or similar tread”; or in subheading 4011.9, HTSUS, as “other” tires.

### **LAW AND ANALYSIS:**

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is made in accordance with the General Rules of Interpretation (GRI). 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

<sup>1</sup> Tires bearing the TRA codes E-2/G-15, E-2/G-29, G-2/G-15, G-2/W-15, G-2/G-57, L-2/G-15, L-2/G-29, L-2/G-54 and L-2/W-15 were classified in subheading 4011.91 (tires having a herring-bone or similar tread) or 4011.99, HTSUS (other tires). These were described as off-the-road tires suitable for use on earthmoving equipment (motor scrapers and wheel cranes), loader and dozer equipment (loader and dozer, mobile cranes, and fork lifts), machine graders only, and industrial tires. These are not at issue. However, we note that subheading 4011.91.50 has been eliminated from the HTSUS and replaced with subheadings 4011.62, 4011.63 and 4011.69, HTSUS, which provide, respectively, for tires with a herring-bone tread, of a kind used on construction and industrial handling vehicles and machinery (4011.62.00 and 4011.63.00), or other vehicles and machinery (4011.69.00).

<sup>2</sup> CBP also classified said tires if bearing only a TRA “L-3” code, indicating suitability for loaders and dozers, in subheading 4011.99.40 or 4011.99.80, HTSUS, depending on the type of construction. These TRA code “L-3” tires are not at issue.

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 HTSUS provisions at issue provide, in pertinent part, as follows:

4011	New pneumatic tires, of rubber
4011.20	Of a kind used on buses or trucks
4011.20.10	Radial...
...	
	Other, having a “herring-bone” or similar tread:
4011.61.00	Of a kind used on agricultural or forestry vehicles and machines
4011.62.00	Of a kind used on construction or industrial handling vehicles and machines and having a rim size not exceeding 61 cm
4011.63.00	Of a kind used on construction or industrial handling vehicles and machines and having a rim size exceeding 61 cm
4011.69.00	Other
	Other:
4011.92.00	Of a kind used on agricultural or forestry vehicles and machines
4011.93	Of a kind used on construction or industrial handling vehicles and rim size not exceeding 61 cm
4011.93.40	Radial
4011.93.80	Other
4011.94	Of a kind used on construction or industrial handling vehicles and machines and having a rim size exceeding 61 cm
4011.94.40	Radial
4011.94.80	Other
4011.99	Other
	* * * *

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

EN 87.04 provides, in pertinent part, as follows:

This heading also covers:

(1) **Dumpers**, sturdily built vehicles with a tipping or bottom opening body, designed for the transport of excavated or other materials. These vehicles, which may have a rigid or articulated chassis, are generally fitted with off-the-road wheels and can work over soft ground. Both heavy and light dumpers are included in this group; the latter are sometimes characterised by a two-way seat, two seats facing in opposite directions or by two steering wheels, to enable the vehicles to be steered with the driver facing the body for unloading.

...

### **Subheading Explanatory Notes.**

#### **Subheading 8704.10**

These dumpers can generally be distinguished from other vehicles for the transport of goods (in particular, tipping lorries (trucks)) by the following characteristics..."

- the dumper body is made of very strong steel sheets; its front part is extended over the driver's cab to protect the cab; the whole or part of the floor slopes upwards towards the rear;
- in some cases the driver's cab is half-width only;
- lack of axle suspension;
- high braking capacity;
- limited speed and area of operation;
- special earth-moving tyres;
- because of their sturdy construction the tare weight/payload ratio does not exceed 1 : 1.6;
- the body may be heated by exhaust gases to prevent materials from sticking or freezing.

It should be noted, however, that certain dumpers are specially designed for working in mines or tunnels, for example, those with a bottom-opening body. These have some of the characteristics mentioned above, but do not have a cab or an extended protective front part of the body.

\* \* \* \*

Heading 40.11 provides for "New pneumatic tires, of rubber." There is no dispute that off-the-road tires for dump trucks are classified therein. The issue arises at the six-digit subheading level.

Subheading 4011.20 provides for "New pneumatic tires, of rubber: Of a kind used on buses or trucks." Subheadings 4011.61–4011.69 provide for "New pneumatic tires, of rubber: Other, having a "herring-bone" or similar tread," such as tires of a kind used on agricultural or forestry vehicles and machines (4011.61) or of a kind used on construction or industrial handling vehicles (4011.62–4011.63), and others (4011.69). Finally, subheadings 4011.92–4011.99 provides for "New pneumatic tires, of rubber: Other," (i.e., not having a herring-bone or similar tread), such as tires of a kind used on agricultural or forestry vehicles and machines (4011.92) or of a kind used on construction or industrial handling vehicles (4011.93–4011.94), and others (4011.99).

Trucks are motor vehicles for the transport of goods that are classifiable in Chapter 87. Both dumpers and lorries are trucks classifiable in heading 87.04, as motor vehicles for the transport of goods. However, we note that the EN to subheading 8704.10 draws a distinction between "dumpers" and "lorries" (trucks), stating that "These dumpers can generally be distinguished from other vehicles for the transport of goods (in particular, tipping lorries (trucks)) by the following characteristics", such as, i.e., "special earth-moving tires."

The CBP Informed Compliance Publication (ICP) on Classification of Tires further notes that "There are numerous machines identified as classifiable in

chapter 84 that move on tires but are not trucks. These would include excavating machines of heading 8429, construction machines and snow plows of heading 8430, agricultural machines of heading 8432 and harvesting machines of heading 8433. Although they all may be designed in some instances to roll on tires, they are not trucks, but machines, and their tires would be classifiable further on in heading 4011.”

Thus, dumpers or dump-body trucks are not trucks (lorries). As such, the off-the-road tires of dumpers or dump-body trucks are not tires “of a kind used on buses or trucks” within the scope of subheading 4011.20, and said tires are not classified therein.

The EN to heading 4011 clarifies, with respect to subheadings 4011.62, 4011.63, 4011.93 and 4011.94, that for the purposes of these subheadings, the expression “construction or industrial handling machines” includes vehicles and machines used for mining. The instant tires, per the TRA code and manufacturer information, are designed for use with dumpers and dump trucks, off-road applications such as construction and mining.

The TRA Yearbook provides the following description of earthmovers:

Earthmover: transportation usually occurs over unimproved surfaces at speeds up to 40 mph and short distances, up to 2.5 miles, one way. Equipment in this category is mainly haulage trucks and scrapers.

Thus, dumper truck tires bearing a TRA code “E”, are designed primarily for off-road use over unimproved surfaces, and for short distances only. They are used in construction and mining operations. They are not of a class or kind used on trucks designed primarily for on-road use. Dumper tires with characteristics for use other than normal on road use or mixed on-road off-road use should be classified in subheading 4011.6 or 4011.9, depending on whether or not the individual tires have a herring-bone or similar tread.

CBP has concluded in prior rulings that “herring-bone” refers to a tread pattern consisting of rows of short slanted parallel lines going in the opposite directions from the center of the tread with the slant alternating row by row. These short slanted rows would meet in the center of the tire tread to form a “V” shape. See HQ 958100, dated March 25, 1997. This is supported by the Explanatory Notes (ENs) heading 40.11, in which tires classified in subheadings 4011.61–4011.69 (having a herringbone or similar tread) are pictured. All the tire treads pictured therein, except for one, have rows of short slanted parallel lines going in opposite directions with the slant alternating row by row, which stop in the center of the tire and form a “V”-like pattern. The remaining tread pattern pictured in the ENs has short slanted parallel lines with the slant alternating row by row which do not meet in the center, but instead extend below the opposite slanted line. This is not a standard herring-bone tread, but an example of a “similar” tread. The tread lugs may be one solid line from sidewall to center, individual raised ridges aligned in a herring-bone pattern, or a combination of a strip of tread and ridges forming the angled line.

The tires at issue in HQ 958100 bearing the TRA codes E-1/R-5, E-3/G-18, E-3/G-44, E-3/T-331, E-4/G-18ET, E-4/G-28ET, E-4/G-36ET, E-4/T-431, E-4/T-432, E-4/T-433, E-4/T451, and E-7/D-1, do not have a herring-bone or similar tread. They do not feature slanted parallel lines with the slant alternating row by row. These tires are thus classified in subheading 4011.93, or 4011.94, HTSUS.

The Triangle brand off-the-road tires style TL-612 at issue in HQ 959730 and the Michelin Earthmover tires (part numbers 248850 and 123475) at issue in HQ 966360 feature tread patterns with slanted, parallel rows with the slant alternating line by line. They therefore have a herringbone tread and are classified in subheadings 4011.62, or 4011.63, HTSUS.

**HOLDING:**

Pursuant to GRIs 1 and 6, the off-the-road tires suitable for dump trucks and bearing the TRA codes E-1/R-5, E-3/G-18, E-3/G-44, E-3/T-331, E-4/G-18ET, E-4/G-28ET, E-4/G-36ET, E-4/T-431, E-4/T-432, E-4/T-433, E-4/T451 and E-7/D-1, are classified in heading 4011, HTSUS, and if of a kind used on construction or industrial handling vehicles and machines and having a rim size not exceeding 61 cm, are classified in subheadings 4011.93.4000, HTSUS, if of radial construction or 4011.93.8000, HTSUS, if of other construction; and if of a kind used on construction or industrial handling vehicles and machines and having a rim size exceeding 61 cm, are classified in subheadings 4011.94.4000, HTSUS, if of radial construction or 4011.94.8000, HTSUS, if of other construction. The 2015 column one, general rates of duty are 4% and 3.4% *ad valorem*, respectively.

Pursuant to GRIs 1 and 6, the Triangle brand off-the-road tires style TL-612 and the Michelin Earthmover tires (part numbers 248850 and 123475) are classified in heading 4011, HTSUS, and as other tires having a “herring-bone” or similar tread in subheading 4011.62.0000, HTSUS, if of a kind used on construction or industrial handling vehicles and machines and having a rim size not exceeding 61cm, or in subheading 4011.63.0000, HTSUS, if of a kind used on construction or industrial handling vehicles and machines hand having a rim size exceeding 61cm. The 2015 column one, general rate of duty is Free.

**EFFECT ON OTHER RULINGS:**

HQ 958100, dated March 25, 1997 is hereby modified with respect to those tires bearing the TRA codes E-1/R-5, E-3/G-18, E-3/G-44, E-3/T-331, E-4/G-18ET, E-4/G-28ET, E-4/G-36ET, E-4/T-431, E-4/T-432, E-4/T-433, E-4/T451; and E-7/D-1.

HQ 959730, dated May 29, 1997, is hereby modified with respect to the Triangle brand off-the-road tires style TL-612 designed for use on earthmoving and loader equipment bearing the TRA code “E-3”, with or without another code.

HQ 966360, dated June 13, 2003, is hereby revoked.

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

*Sincerely,*

JACINTO JUAREZ

*for*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*

cc:

Ms. Margaret V. Wilson  
Customs/Drawback Administrator  
Michelin North America, Inc.  
One Parkway South P.O. Box 19001  
Greenville, South Carolina 29602-9001

Port Director  
U.S. Customs and Border Protection  
300 South Ferry St.  
Terminal Island, CA 90731



**MODIFICATION OF SIX RULING LETTERS AND  
REVOCATION OF TREATMENT RELATING TO  
PREFERENTIAL TARIFF TREATMENT AND COUNTRY OF  
ORIGIN MARKING UNDER THE NAFTA FOR CERTAIN  
PREPARED NUTS**

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

**ACTION:** Notice of modification of six ruling letters and revocation of treatment relating to preferential tariff treatment and country of origin marking under the North American Free Trade Agreement (“NAFTA”) for certain prepared nuts.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection (CBP) is modifying six ruling letters relating to preferential tariff treatment and country of origin marking under the NAFTA for certain prepared nuts. Similarly, CBP is revoking any treatment previously accorded by it to substantially identical transactions. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, notice proposing to modify six ruling letters relating to preferential tariff treatment and country of origin marking under the NAFTA for certain prepared nuts was published on July 29, 2015, in Volume 49, Number 30 of the *Customs Bulletin*. One comment was received in response to this notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after May 9, 2016.

**FOR FURTHER INFORMATION CONTACT:** Antonio J. Rivera, Valuation and Special Programs Branch, Regulations and Rulings, Office of International Trade at (202) 325-0226.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

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

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, notice proposing to modify six ruling letters relating to preferential tariff treatment and country of origin marking under the NAFTA for certain prepared nuts was published on July 29, 2015, in Volume 49, Number 30 of the *Customs Bulletin*. One comment was received in response to this notice.

As stated in the proposed notice, although in this notice CBP is specifically referring to the modification of New York Ruling Letter (NY) E87234, dated October 1, 1999; NY F88926, dated January 13, 2000; NY H84143, dated August 6, 2001; NY H82352, dated August 10, 2001; NY R02589, dated September 23, 2005; and, NY N228118, dated August 8, 2012, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the ruling identified above. 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 have advised CBP during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during this 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 this final decision.

In NY E87234, CBP determined, in relevant part, that various raw nuts of unspecified origins imported into Canada, where they were roasted and blanched or salted, qualified for preferential tariff treatment under the NAFTA when imported into the United States. In NY F88926 and NY H84143, CBP determined, in relevant part, that raw macadamia nuts of Australian origin imported into Canada, where they were roasted and blanched or salted, qualified for preferential tariff treatment under the NAFTA, and were eligible to be marked as goods of Canada when imported into the United States. In NY H82352, CBP determined, in relevant part, that various raw nuts of U.S., Canadian, Indian and Brazilian origin imported into Canada, where they were roasted, salted and mixed with oil qualified for preferential tariff treatment under the NAFTA. In NY R02589, CBP determined, in relevant part, that raw cashew nuts from non-NAFTA countries imported into Canada, where they were roasted and salted and mixed with peanuts of U.S. origin, qualified for preferential tariff treatment under the NAFTA when the mixture was imported into the United States. Further, CBP determined that raw, non-originating cashews and raw, in-shell peanuts of U.S. origin, which were roasted and mixed together in Canada, were eligible to be marked as goods of Canada; while raw, non-originating cashews and raw, shelled peanuts of U.S. origin were eligible to be marked as products of the United States. In NY N228118, CBP determined, in relevant part, that raw cashew nuts from various non-NAFTA countries imported into Canada, where they were heated, polished, cleaned, roasted (with or without oil) and salted, qualified for preferential tariff treatment under the NAFTA.

Based on our recent review of NY E87234, NYF88926, NY H84143, NY H82352, NY R02589, and NY N228118, it is now CBP's position that the prepared nuts do not qualify for preferential tariff treatment

under the NAFTA and, in applicable cases, do not qualify to be marked as a good of a NAFTA country.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is modifying NY E87234, NYF88926, NY H84143, NY H82352, NY R02589, and NY N228118, and any other ruling not specifically identified that is contrary to the determination set forth in this notice to reflect the proper requirements for prepared nuts to qualify for preferential tariff treatment under the NAFTA and to be marked as a good of a NAFTA country, pursuant to the analysis set forth in Headquarters Ruling Letters (HQ) H243329 (Attachment A), HQ H256782 (Attachment B), HQ H256783 (Attachment C), HQ H256785 (Attachment D), HQ H256784 (Attachment E), and HQ H256781 (Attachment F). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. One comment was received in response to this notice, and it is addressed in each modified ruling letter (Attachments A – F).

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

Dated: December 28, 2015

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

Attachments

## [ATTACHMENT A]

HQ H243329

December 28, 2015

OT:RR:CTF:VS H243329 AJR

CATEGORY: NAFTA

Ms. CAROL HAGYARD  
A.N. DERINGER, INC.  
173 WEST SERVICE ROAD  
CHAMPLAIN, NY 12919

RE: Modification of NY E87234; NAFTA; GN 12, HTSUS; Mixture of Roasted and Salted Nuts from Canada

DEAR Ms. HAGYARD:

This is in reference to New York Ruling Letter (“NY”) E87234, dated October 1, 1999, issued to you on behalf of your client, John Vince Foods of Downsview, Ontario. At issue was the tariff classification of mixed nuts and their eligibility for preferential tariff treatment under the North American Free Trade Agreement (“NAFTA”). In NY E87234, U.S. Customs and Border Protection (“CBP”) determined, in relevant part, that various raw nuts of unspecified origins imported into Canada, where they were roasted and blanched or salted, qualified for preferential tariff treatment under the NAFTA when imported into the United States.<sup>1</sup> It is now our position that the nuts do not qualify for preferential tariff treatment under the NAFTA. For the reasons described in this ruling, we hereby modify NY E87234.

The tariff classification of the roasted and blanched or salted nut mixture under the Harmonized Tariff Schedule of the United States (“HTSUS”) when imported from Canada is unaffected.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), notice proposing to modify six ruling letters, including NY E87234, concerning the preferential tariff treatment of certain prepared nuts under the NAFTA was published on July 29, 2015, in Vol. 49, No. 30, of the Customs Bulletin. CBP received one comment in response to this notice.

**FACTS:**

NY E87234 stated, in relevant part:

The merchandise is a snack product that consists of a mixture of nuts packed in a can. The ingredients are blanched, extra large Virginia peanuts, unblanched, jumbo runner peanuts, fancy, whole cashews, almonds, Brazil nuts, blanched filberts, and pecans that have been roasted separately in peanut oil and/or partially hydrogenated soybean oil and lightly salted. Jumbo runner peanuts or medium Virginia peanuts may be used if extra large Virginia peanuts are not available.

In your correspondence you indicate that raw nuts will be imported into Canada and roasted, blanched, and/or salted at the John Vince Food plant.

CBP found that each of the non-originating nuts used to make the nut mixture, classified in subheading 2008.19.85, HTSUS, satisfied the changes in tariff classification required under General Note (“GN”) 12(t)/20.4, HT-

<sup>1</sup> NY E87234 failed to consider whether the nuts qualified to be marked as a product of Canada.

SUS, and that, upon compliance with all applicable laws, regulations, and agreements under the NAFTA, the nut mixture would be subject to a free tariff rate when imported into the United States.

**ISSUE:**

Whether the nut mixture described in NY E87234 qualifies for preferential tariff treatment under the NAFTA?

**LAW AND ANALYSIS:**

Pursuant to GN 12, HTSUS, for an article to be eligible for NAFTA preference, two requirements must be satisfied. First, the article in question must be “originating” under the terms of GN 12, HTSUS, and second, the article must qualify to be marked as a good of a NAFTA country under the NAFTA Marking Rules contained in 19 CFR § 102.20.

With regard to the first requirement, GN 12(b), HTSUS, provides, in pertinent part:

For the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as “*goods originating in the territory of a NAFTA party*” only if –

....

ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that--

(A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivision (r), (s) and (t) of this note or the rules set forth therein, or

(B) the goods otherwise satisfy the applicable requirements of subdivision (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note[.]

Raw nuts are classified under various headings of Chapter 8, HTSUS. In understanding the language of the HTSUS, the Explanatory Notes (“ENs”) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the Harmonized System at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989). The ENs to Chapter 8, HTSUS, explain that nuts prepared according to Chapter 20, HTSUS, are excluded from Chapter 8, HTSUS. Mixed nut preparations are classified under subheading 2008.19, HTSUS. The ENs to heading 2008, HTSUS, explain that this heading includes oil-roasted nuts whether or not containing or coated with salt. In this case, various types of raw nuts were imported from unspecified countries into Canada, where they were roasted and blanched and/or salted, and thus correctly classified under subheading 2008.19.85, HTSUS.

The applicable rule in subdivision (t) provides for “a change to subheadings 2008.19 through 2008.99 from any other chapter.” *See* GN 12(t)/20.4, HTSUS. However, GN 12(s), Exceptions to Change in Tariff Classification Rules, HTSUS, provides, in relevant part:

(ii) Fruit, nut and vegetable preparations of chapter 20 that have been prepared or preserved merely by freezing, by packing (including canning) in water, brine or natural juices, or by roasting, either dry or in oil (including processing incidental to freezing, packing, or roasting), shall be treated as an originating good only if the fresh good were wholly produced or obtained entirely in the territory of one or more NAFTA parties.

Accordingly, though the non-originating nuts appear to undergo the requisite tariff shift from Chapter 8, HTSUS, to subheading 2008.19.85, HTSUS, it remains to be determined whether they meet the additional test imposed by GN 12(s)(ii), HTSUS. Under this provision, when nut preparations are prepared “merely” by roasting or processing “incidental” to roasting, then the origin of the nuts in their “fresh” state determines the origin of the good. The “fresh” state refers to the state of the nuts before they are roasted or processed in a manner incidental to roasting. Thus, for such nut preparations to be originating, the “fresh” nuts used to make the good must be wholly obtained or produced entirely in the territory of one or more of NAFTA parties (Mexico, Canada, or the United States). That is, non-originating nuts that, while in a NAFTA territory, are merely roasted, or processed in a manner incidental to roasting, will not be treated as originating nuts.

The term “merely” is not specifically defined in GN 12, HTSUS, but per its dictionary definition means “only (what is referred to) and nothing more.”<sup>2</sup> Read in the context of GN 12, HTSUS, the term “merely” means that the processes listed in GN 12(s)(ii), HTSUS, by themselves, are insufficient to qualify non-originating nuts for preferential tariff treatment under the NAFTA, despite changing tariff classifications per GN 12(b)(ii), HTSUS, and GN 12(t)/20.4, HTSUS. Thus, we find that the effect of GN 12(s)(ii), HTSUS, is to ensure that goods undergo sufficient processing in a NAFTA country, beyond the listed processes, in order to be considered originating for purposes of GN 12(b)(ii), HTSUS.

The term “incidental” is also not specifically defined in GN 12, HTSUS, but per its dictionary definition means “occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part.”<sup>3</sup> Applying this definition to GN 12(s)(ii), HTSUS, the term “incidental” indicates a process that may happen with or as a result of freezing, packing, or roasting, but is secondary to, or of lesser importance than, these processes.

We find that “salting” is precisely the type of lesser process contemplated by the note as incidental. Salting often occurs in connection not only with roasting, as in this case, but also with canning or freezing. It is the roasting, canning, or freezing processes which are the means by which the products are principally prepared. By contrast, salting has far less consequences to the essential character of the product. Moreover, the addition of salt like other flavors, spices, or other ingredients is, comparatively, a relatively simple process.

Given that roasting by itself would not be sufficient to make a nut an originating good per GN 12(s)(ii), HTSUS, it would be inconsistent with that

<sup>2</sup> “Merely” defined by *Oxford English Dictionary* at <http://www.oed.com/view/Entry/116740?rskey=jcbGqY&result=2#eid>.

<sup>3</sup> “Incidental” defined by the *Oxford English Dictionary* at <http://www.oed.com/view/Entry/93467?redirectedFrom=incidental#eid>.

note to conclude that “salting” would provide otherwise. Furthermore, the ENs to Chapter 20, HTSUS, state, in relevant part:

This heading covers fruits, nuts and other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise than by any of the processes specified in other Chapters or in the preceding headings of this Chapter.

It includes, *inter alia*:

(1) Almonds, ground-nuts, areca (or betel) nuts and other nuts, dry-roasted, oil roasted or fat-roasted, **whether or not containing or coated with vegetable oil, salt, flavours, spices or other additives.** (Emphasis added).

...

(9) Fruit, nuts, fruit-peel and other edible parts of plants (other than vegetables), preserved by sugar and put in syrup (e.g. *marrons glacés* or giner), whatever the packing.

Moreover, while the ENs to Chapter 20, HTSUS, mention “salt,” the references to “dry-roasted, oil-roasted or fat-roasted” and “preserved by sugar and put in syrup” indicate the principal processes of preparation or preservation that would change the classification of nuts from Chapter 8, HTSUS, to Chapter 20, HTSUS. The fact that “salt” is mentioned with reference to the types of roasting, but is not specifically mentioned as a process of preparation or preservation, suggests that “salting” is something that may happen with or as a result of roasting nuts, but whether the nuts are salted, or not, is not essential to the preparation; what is essential to the preparation is the roasting. For all of the foregoing reasons, we find that for purposes of GN 12(s)(ii), HTSUS, the term “processing incidental to freezing, packing, or roasting,” includes the process of “salting.”

This interpretation of GN 12(s)(ii), HTSUS, is further supported by Headquarters Ruling Letter (“HQ”) H243328, dated August 19, 2013, which considered “salting” to be a process incidental to roasting with regard to a provision from the United States-Korea Free Trade Agreement (“UKFTA”) that is parallel to GN 12(s)(ii), HTSUS. HQ H243328 affirms the decision in HQ H240383, dated May 3, 2013, determining the origin of the nuts from their “fresh” state on the basis that “salting and roasting [...] qualify as ‘processing incidental’ to roasting.”<sup>4</sup>

CBP received one comment in response to the notice to modify six ruling letters addressing nuts. The commenter states that the rules and in particular, the note to Chapter 20, indicate a two-step process in deciding whether the goods are deemed originating and entitled to preferential treatment as follows: (1) determining whether the nuts have been prepared beyond mere roasting in oil including processes incidental to roasting; and (2) if the nuts were prepared beyond mere roasting, then determining whether the non-originating materials satisfy the tariff shift rule. The commenter defines “merely” as “just” or “only,” or “nothing more,” and defines “incidental” as “being likely to ensue as a chance or minor consequence” and “occurring merely by chance or without intention or calculation.” The commenter argues

<sup>4</sup> We find that the absence of “merely” from the UKFTA provision does not affect the interpretation of “incidental” in HQ H243328 and HQ H240383.

that the nuts considered in NY E87234 were prepared beyond mere roasting in oil because, after their importation to Canada, they underwent multiple processes, which are not incidental to roasting, including “salting, mixing with other ingredients, screening, aspiration, cooling, and packaging in usually small packaging.”<sup>5</sup> The commenter concludes, by applying the second step, that the non-originating materials satisfy the tariff shift rule. The commenter supports this conclusion by citing Canadian International Trade Tribunal Case no. AP-2003–003, and NY N228118, dated August 8, 2012.

In response, we note that GN 12(s)(ii), HTSUS, (or the note to Chapter 20, as described by the commenter) must be read within the context of the provision that initiates its application, GN 12(b)(ii), HTSUS, which together ensure that such goods undergo sufficient processing in a NAFTA country to be considered originating goods. Accepting the commenter’s interpretation would mean that the processes of “salting, mixing with other ingredients, screening, aspiration, cooling, and packaging in usually small packaging” are sufficient to qualify non-originating nuts for preferential treatment under NAFTA because such processes performed together are not considered incidental to roasting, freezing, or packing. This would accord differing treatments to the same non-originating nuts, both roasted in NAFTA territories, on the basis that some were treated with salt plus other additives, and quality checked, while others were not, despite the fact that the essential character of the treated and untreated roasted nuts is the same. We find the commenter’s interpretation inconsistent with the proper interpretation of GN 12(s)(ii), HTSUS, which should instead be interpreted to include “salting” as a process incidental to roasting for the reasons discussed above. The other processes listed by the importer should be interpreted similarly. “Mixing with other ingredients” should be treated the same way as “salting” because the ENs to Chapter 20, HTSUS, reference “flavours, spices or other additives” in the same manner as “salt.” Further, the mixture in NY E87234 concerns various nut varieties, which would mean that if we were to agree with the commenter, mixing various types of nuts would be accorded preferential treatment, whereas using only one type of nut would not. We do not agree that the use of more non-originating materials should accord preferential treatment. “Cooling” is incidental to roasting because after roasting, the nuts automatically will need to cool down below the temperature at which they were roasted. Likewise, “screening” and “aspiration” are incidental to roasting because they are performed to check the quality of the roasted nuts as a result of their roasting. Lastly, we note that we are not bound by cases from the Canadian International Trade Tribunal, and NY N228118 is being modified along with the NY ruling letter at issue, NY E87234.

Accordingly, we find that salting is a process incidental to roasting and does not render the product originating. Rather, the origin of the product as imported is determined by the origin of the nuts in the “fresh” state per GN 12(s)(ii), HTSUS. Given the foregoing, the roasted, blanched and/or salted mixed nuts may not be treated as originating because they do not meet the requirements of GN 12(s)(ii), HTSUS; that is, they were not wholly obtained or produced entirely in Mexico, Canada, or the United States as fresh nuts.

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<sup>5</sup> We note that aside from “salting”, the other operations noted by the commenter (mixing with other ingredients, screening, aspiration, cooling, and packaging in usually small packaging) were not discussed in the original fact pattern to NY E87234. However, we will discuss them in our response.

Therefore, the prepared mixed nuts imported from Canada do not qualify for preferential tariff treatment under the NAFTA.

**HOLDING:**

NY E87234 is modified to reflect that, by application of GN 12(s)(ii), HTSUS, the prepared nut mixture imported from Canada is not eligible for preferential tariff treatment under the NAFTA. The tariff classification of the prepared nut mixture, subheading 2008.19.85, HTSUS, is unchanged.

**EFFECT ON OTHER RULINGS:**

NY E87234, dated October 1, 1999, is hereby MODIFIED. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

*Sincerely,*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*

## [ATTACHMENT B]

HQ H256782

December 28, 2015

OT:RR:CTF:VS H256782 AJR

CATEGORY: NAFTA

MS. CECELIA CASTELLANOS  
WESTERN OVERSEAS CORPORATION  
10731 WALKER STREET  
CYPRESS, CA 90630-4757

RE: Modification of NY F88926; NAFTA; GN 12, HTSUS; 19 CFR § 102.20 - Country of Origin Marking; Macadamia Nuts Roasted and Salted in Canada

DEAR MS. CASTELLANOS:

This is in reference to New York Ruling Letter (“NY”) F88926, dated January 13, 2000, issued to you on behalf of your client, Macadamia Processing Company Limited of Lismore, Australia. At issue was the tariff classification of macadamia nuts, their eligibility for preferential tariff treatment under the North American Free Trade Agreement (“NAFTA”), and their country of origin marking. In NY F88926, U.S. Customs and Border Protection (“CBP”) determined, in relevant part, that raw macadamia nuts of Australian origin imported into Canada, where they were roasted and blanched or salted, qualified for preferential tariff treatment under the NAFTA when imported into the United States. In addition, CBP found that the prepared nuts qualified to be marked as goods of Canada. It is now our position that the nuts do not qualify for preferential tariff treatment under the NAFTA, and do not qualify to be marked as goods of Canada. For the reasons described in this ruling, we hereby modify NY F88926.

The tariff classification of the roasted and salted macadamia nuts under subheading 2008.19.9010 of the Harmonized Tariff Schedule of the United States (“HTSUS”) when imported from Canada is unaffected.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), notice proposing to modify six ruling letters, including NY F88926, concerning the preferential tariff treatment of certain prepared nuts under the NAFTA was published on July 29, 2015, in Vol. 49, No. 30, of the Customs Bulletin. CBP received one comment in response to this notice.

**FACTS:**

NY F88926 stated, in relevant part:

The merchandise is comprised of raw macadamia nut kernels of Australian origin that are exported in bulk from Australia to Canada for roasting and salting. The nuts will then be shipped to the United States in bulk vacuum packaging of 5 or 10 pound bags. The nuts will be sold commercially in the United States to institutions preparing food; they are not for retail sale as imported.

CBP found that the non-originating macadamia nuts satisfied the changes in tariff classification required under General Note (“GN”) 12(t)/20.4, HTSUS, and that, upon compliance with all applicable laws, regulations, and agreements under the NAFTA, the nuts would be subject to a free tariff rate when imported into the United States. CBP also found that the nuts qualified to be marked as goods of Canada under the NAFTA Marking Rules (19 CFR §§ 102.11(a)(3) and 102.20(d)).

**ISSUE:**

Whether the roasted and salted macadamia nuts described in NY F88926 qualify for preferential tariff treatment under the NAFTA, and whether they may be marked as goods of Canada?

**LAW AND ANALYSIS:**

Pursuant to GN 12, HTSUS, for an article to be eligible for NAFTA preference, two requirements must be satisfied. First, the article in question must be “originating” under the terms of GN 12, HTSUS, and second, the article must qualify to be marked as a good of a NAFTA country under the NAFTA Marking Rules contained in 19 CFR § 102.20.

With regard to the first requirement, GN 12(b), HTSUS, provides, in pertinent part:

For the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as “*goods originating in the territory of a NAFTA party*” only if –

....

ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that--

(A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivision (r), (s) and (t) of this note or the rules set forth therein, or

(B) the goods otherwise satisfy the applicable requirements of subdivision (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note[.]

Raw macadamia nuts are classified in subheading 0802.90, HTSUS. In understanding the language of the HTSUS, the Explanatory Notes (“ENs”) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the Harmonized System at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989). The ENs to Chapter 8, HTSUS, explain that nuts prepared according to Chapter 20, HTSUS, are excluded from Chapter 8, HTSUS. Roasted and salted macadamia nuts are classified under subheading 2008.19.9010, HTSUS. The ENs to heading 2008, HTSUS, explain that this heading includes oil-roasted nuts whether or not containing or coated with salt. In this case, raw macadamia nuts were imported from Australia into Canada, where they were roasted and salted, and thus correctly classified under subheading 2008.19.9010, HTSUS.

The applicable rule in subdivision (t) provides for “a change to subheadings 2008.19 through 2008.99 from any other chapter.” *See* GN 12(t)/20.4, HTSUS. However, GN 12(s), Exceptions to Change in Tariff Classification Rules, HTSUS, provides, in relevant part:

(ii) Fruit, nut and vegetable preparations of chapter 20 that have been prepared or preserved merely by freezing, by packing (including canning)

in water, brine or natural juices, or by roasting, either dry or in oil (including processing incidental to freezing, packing, or roasting), shall be treated as an originating good only if the fresh good were wholly produced or obtained entirely in the territory of one or more NAFTA parties.

Accordingly, though the non-originating nuts appear to undergo the requisite tariff shift from Chapter 8, HTSUS, to subheading 2008.19.9010, HTSUS, it remains to be determined whether they meet the additional test imposed by GN 12(s)(ii), HTSUS. Under this provision, when nut preparations are prepared “merely” by roasting or processing “incidental” to roasting, then the origin of the nuts in their “fresh” state determines the origin of the good. The “fresh” state refers to the state of the nuts before they were roasted or processed in a manner incidental to roasting. Thus, for such nut preparations to be originating, the “fresh” nuts used to make the good must be wholly obtained or produced entirely in the territory of one or more of NAFTA parties (Mexico, Canada, or the United States). That is, non-originating nuts that, while in a NAFTA territory, are merely roasted, or processed in a manner incidental to roasting, will not be treated as originating nuts.

The term “merely” is not specifically defined in GN 12, HTSUS, but per its dictionary definition means “only (what is referred to) and nothing more.”<sup>1</sup> Read in the context of GN 12, HTSUS, the term “merely” means that the processes listed in GN 12(s)(ii), HTSUS, by themselves, are insufficient to qualify non-originating nuts for preferential tariff treatment under the NAFTA, despite changing tariff classifications per GN 12(b)(ii), HTSUS, and GN 12(t)/20.4, HTSUS. Thus, we find that the effect of GN 12(s)(ii), HTSUS, is to ensure that goods undergo sufficient processing in a NAFTA country, beyond the listed processes, in order to be considered originating for purposes of GN 12(b)(ii), HTSUS.

The term “incidental” is also not specifically defined in GN 12, HTSUS, but per its dictionary definition means “occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part.”<sup>2</sup> Applying this definition to GN 12(s)(ii), HTSUS, the term “incidental” indicates a process that may happen with or as a result of roasting, but is secondary to, or of lesser importance than, the process of roasting.

We find that “salting” is precisely the type of lesser process contemplated by the note as incidental. Salting often occurs in connection not only with roasting, as in this case, but also with canning or freezing. It is the roasting, canning, or freezing processes which are the means by which the products are principally prepared. By contrast, salting has far less consequences to the essential character of the product. Moreover, the addition of salt like other flavors, spices, or other ingredients is a relatively simple process and does not require a prescribed amount to be added.

Given that roasting by itself would not be sufficient to make a nut an originating good per GN 12(s)(ii), HTSUS, it would be inconsistent with that note to conclude that “salting” would provide otherwise. Furthermore, the ENs to Chapter 20, HTSUS, state, in relevant part:

<sup>1</sup> “Merely” defined by *Oxford English Dictionary* at <http://www.oed.com/view/Entry/116740?rskey=jcbGqY&result=2#eid>.

<sup>2</sup> “Incidental” defined by the *Oxford English Dictionary* at <http://www.oed.com/view/Entry/93467?redirectedFrom=incidental#eid>.

This heading covers fruits, nuts and other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise than by any of the processes specified in other Chapters or in the preceding headings of this Chapter.

It includes, *inter alia*:

(1) Almonds, ground-nuts, areca (or betel) nuts and other nuts, dry-roasted, oil roasted or fat-roasted, **whether or not containing or coated with vegetable oil, salt, flavours, spices or other additives.** (Emphasis added).

...

(9) Fruit, nuts, fruit-peel and other edible parts of plants (other than vegetables), preserved by sugar and put in syrup (e.g. *marrons glacés* or giner), whatever the packing.

Moreover, while the ENs to Chapter 20, HTSUS, mention “salt,” the references to “dry-roasted, oil-roasted or fat-roasted” and “preserved by sugar and put in syrup” indicate the principal processes of preparation or preservation that would change the classification of nuts from Chapter 8, HTSUS, to Chapter 20, HTSUS. The fact that “salt” is mentioned with reference to the types of roasting, but is not specifically mentioned as a process of preparation or preservation, suggests that “salting” is something that may happen with or as a result of roasting nuts, but whether the nuts are salted, or not, is not essential to the preparation; what is essential to the preparation is the roasting. For all of the foregoing reasons, we find that for purposes of GN 12(s)(ii), HTSUS, the term “processing incidental to freezing, packing, or roasting,” includes the process of “salting.”

This interpretation of GN 12(s)(ii), HTSUS, is further supported by Headquarters Ruling Letter (“HQ”) H243328, dated August 19, 2013, which considered “salting” to be a process incidental to roasting with regard to a provision from the United States-Korea Free Trade Agreement (“UKFTA”) that is parallel to GN 12(s)(ii), HTSUS. HQ H243328 affirms the decision in HQ H240383, dated May 3, 2013, determining the origin of the nuts from their “fresh” state on the basis that “salting and roasting [...] qualify as ‘processing incidental’ to roasting.”<sup>3</sup>

CBP received one comment in response to the notice to modify six ruling letters addressing nuts.<sup>4</sup> The commenter states that the rules and in particular, the note to Chapter 20, indicate a two-step process in deciding whether the goods are deemed originating and entitled to preferential treatment as follows: (1) determining whether the nuts have been prepared beyond mere roasting in oil including processes incidental to roasting; and (2) if the nuts were prepared beyond mere roasting, then determining whether the non-originating materials satisfy the tariff shift rule. The commenter defines “merely” as “just” or “only,” or “nothing more,” and defines “incidental” as “being likely to ensue as a chance or minor consequence” and “occurring merely by chance or without intention or calculation.” The commenter

<sup>3</sup> We find that the absence of “merely” from the UKFTA provision does not affect the interpretation of “incidental” in HQ H243328 and HQ H240383.

<sup>4</sup> The comment addresses the facts from NY E87234, dated October 1, 1999, which is one of the six ruling letters being modified along with the NY ruling letter at issue, NY F88926.

argues that the nuts considered in NY E87234, were prepared beyond mere roasting in oil because, after their importation to Canada, they underwent multiple processes, which are not incidental to roasting, including “salting, mixing with other ingredients, screening, aspiration, cooling, and packaging in usually small packaging.”<sup>5</sup> The commenter concludes, by applying the second step, that the non-originating materials satisfy the tariff shift rule. The commenter supports this conclusion by citing Canadian International Trade Tribunal Case no. AP-2003–003, and NY N228118, dated August 8, 2012.

In response, we note that GN 12(s)(ii), HTSUS, (or the note to Chapter 20, as described by the commenter) must be read within the context of the provision that initiates its application, GN 12(b)(ii), HTSUS, which together ensure that such goods undergo sufficient processing in a NAFTA country to be considered originating goods. Accepting the commenter’s interpretation would mean that the processes of “salting, mixing with other ingredients, screening, aspiration, cooling, and packaging in usually small packaging” are sufficient to qualify non-originating nuts for preferential treatment under NAFTA because such processes performed together are not considered incidental to roasting, freezing, or packing. This would accord differing treatments to the same non-originating nuts, both roasted in NAFTA territories, on the basis that some were treated with salt plus other additives, and quality checked, while others were not, despite the fact that the essential character of the treated and untreated roasted nuts is the same. We find the commenter’s interpretation inconsistent with the proper interpretation of GN 12(s)(ii), HTSUS, which should instead be interpreted to include “salting” as a process incidental to roasting for the reasons discussed above. The other processes listed by the commenter should be interpreted similarly. “Mixing with other ingredients” should be treated the same way as “salting” because the ENs to Chapter 20, HTSUS, reference “flavours, spices or other additives” in the same manner as “salt.” Further, the mixture in NY E87234 concerns various nut varieties, which would mean that if we were to agree with the commenter, mixing various types of nuts would be accorded preferential treatment, whereas using only one type of nut would not. We do not agree that the use of more non-originating materials should accord preferential treatment. “Cooling” is incidental to roasting because after roasting, the nuts automatically will need to cool down below the temperature at which they were roasted. Likewise, “screening” and “aspiration” are incidental to roasting because they are performed to check the quality of the roasted nuts as a result of their roasting. Lastly, we note that we are not bound by cases from the Canadian International Trade Tribunal, and NY N228118 is being modified along with the NY ruling letter at issue, NY F88926.

Accordingly, we find that salting is a process incidental to roasting and does not render the product originating. Rather, the origin of the product as imported is determined by the origin of the nuts in the “fresh” state per GN 12(s)(ii), HTSUS. Given the foregoing, the roasted and salted macadamia nuts may not be treated as originating because they do not meet the requirements of GN 12(s)(ii), HTSUS; that is, they were not wholly obtained or produced entirely in Mexico, Canada, or the United States as fresh nuts.

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<sup>5</sup> We note that aside from “salting”, the other operations noted by the commenter (mixing with other ingredients, screening, aspiration, cooling, and packaging in usually small packaging) were not discussed in the original fact pattern to NY E87234. However, we will discuss them in our response.

Therefore, the prepared macadamia nuts imported from Canada do not qualify for preferential tariff treatment under the NAFTA.

### *Marking*

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. § 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the United States shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. § 1304 was “that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will.” *United States v. Friedlaender & Co.*, 27 CCPA 297, 302, C.A.D. 104 (1940). Part 134, CBP Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. § 1304.

Section 134.1(b), CBP Regulations (19 CFR § 134.1(b)), defines “country of origin” as:

[T]he country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the “country of origin” within the meaning of [the marking laws and regulations]; however, for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin.

Part 102, CBP Regulations (19 CFR Part 102), sets forth the NAFTA Rules of Origin for country of origin marking purposes. As the macadamia nuts were grown in Australia, Section 102.11(a)(1) and (2) do not apply. Section 102.11(a)(3) provides:

The country of origin of a good is the country in which ... each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in § 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

“Foreign material means a material whose country of origin as determined under these rules is not the same as the country in which the good is produced.” 19 CFR § 102.1(e).

Under the provisions of 19 CFR § 102.20, the tariff shift rule for subheading 2008.19, HTSUS, provides as follows:

A change to subheading 2008.19 through 2008.99 from any other chapter, provided that the change is not the result of mere blanching of nuts.

However, the note from Chapter 20, HTSUS, provides:

Notwithstanding the specific rules of this chapter, fruit, nut and vegetable preparations of Chapter 20 that have been prepared or preserved merely by freezing, by packing (including canning) in water, brine or natural

juices, or by roasting, either dry or in oil (including processing incidental to freezing, packing or roasting), shall be treated as a good of the country in which the fresh good was produced.

Based on the note from Chapter 20, HTSUS, the country of origin of the macadamia nuts is not determined by 19 CFR § 102.11(a) (incorporating 19 CFR § 102.20), and the next step in the country of origin marking determination is provided in 19 CFR § 102.11(b), which states:

Except for a good that is specifically described in the Harmonized System as a set, or is classified as a set pursuant to General Rule of Interpretation 3, where the country of origin cannot be determined under paragraph (a) of this section:

(1) The country of origin of the good is the country or countries of origin of the single material that imparts the essential character of the good...

“Material’ means a good that is incorporated into another good as a result of production with respect to that other good, and includes parts, ingredients, subassemblies, and components.” 19 CFR § 102.1(l).

“For purposes of identifying the material that imparts the essential character to a good under §102.11, the only materials that shall be taken into consideration are those domestic or foreign materials that are classified in a tariff provision from which a change in tariff classification is not allowed under the §102.20 specific rule or other requirements applicable to the good.” 19 CFR § 102.18(b)(1).

Pursuant to 19 CFR § 102.11(b) (incorporating 19 CFR § 102.18(b)(1)), we find that the single material that imparts the essential character of the finished good is the macadamia nuts. Therefore, the prepared macadamia nuts may not be marked as goods of Canada, but rather must be marked to indicate that they are products of Australia.

#### **HOLDING:**

NY F88926 is modified to reflect that, by application of GN 12(s)(ii), HTSUS, the prepared macadamia nuts imported from Canada are not eligible for preferential tariff treatment under the NAFTA. In addition, by application of the note from Chapter 20, HTSUS, 19 CFR § 102.11(a) and (b), 19 CFR § 102.18(b)(1), and 19 CFR § 102.20, the prepared macadamia nuts may not be marked as goods of Canada, but rather must be marked to indicate that they are products of Australia. The tariff classification of the prepared macadamia nuts is unchanged.

#### **EFFECT ON OTHER RULINGS:**

NY F88926, dated January 13, 2000, is hereby MODIFIED. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

*Sincerely,*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*

## [ATTACHMENT C]

HQ H256783

December 28, 2015

OT:RR:CTF:VS H256783 AJR

CATEGORY: NAFTA

MR. RODNEY RALSTON  
TRANS-BORDER CUSTOMS SERVICES, INC.  
ONE TRANS-BORDER DRIVE  
P.O. BOX 800  
CHAMPLAIN, NY 12919

RE: Modification of NY H84143; NAFTA; GN 12, HTSUS; 19 CFR § 102.20 - Country of Origin Marking; Macadamia Nuts Roasted and Salted in Canada

DEAR MR. RALSTON:

This is in reference to New York Ruling Letter (“NY”) H84143, dated August 6, 2001, issued to you on behalf of your client, Papco Foods, Inc., of St. Laurent, Quebec. At issue was the tariff classification of macadamia nuts, their eligibility for preferential tariff treatment under the North American Free Trade Agreement (“NAFTA”), and their country of origin marking. In NY H84143, U.S. Customs and Border Protection (“CBP”) determined, in relevant part, that raw macadamia nuts of Australian origin imported into Canada, where they were roasted and blanched or salted, qualified for preferential tariff treatment under the NAFTA when imported into the United States. In addition, CBP found that the prepared nuts qualified to be marked as goods of Canada. It is now our position that the nuts do not qualify for preferential tariff treatment under the NAFTA, and do not qualify to be marked as goods of Canada. For the reasons described in this ruling, we hereby modify NY H84143.

The tariff classification of the roasted and salted macadamia nuts under subheading 2008.19.9010 of the Harmonized Tariff Schedule of the United States (“HTSUS”), when imported from Canada, is unaffected.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), notice proposing to modify six ruling letters, including NY H84143, concerning the preferential tariff treatment of certain prepared nuts under the NAFTA was published on July 29, 2015, in Vol. 49, No. 30, of the Customs Bulletin. CBP received one comment in response to this notice.

**FACTS:**

NY H84143 stated, in relevant part:

The merchandise is comprised of raw macadamia nut kernels of Australian origin that are exported in bulk from Australia to Canada for roasting and salting. The nuts will then be shipped to the United States in bags of 1 or 2 pounds or in bulk bags of 5 or 10 pound bags.

CBP found that the non-originating macadamia nuts satisfied the changes in tariff classification required under General Note (“GN”) 12(t)/20.4, HTSUS, and that, upon compliance with all applicable laws, regulations, and agreements under the NAFTA, the nuts would be subject to a free tariff rate when imported into the United States. CBP also found that the nuts qualified to be marked as goods of Canada under the NAFTA Marking Rules (19 CFR §§ 102.11(a)(3) and 102.20(d)).

**ISSUE:**

Whether the roasted and salted macadamia nuts described in NY H84143 qualify for preferential tariff treatment under the NAFTA, and whether they may be marked as goods of Canada?

**LAW AND ANALYSIS:**

Pursuant to GN 12, HTSUS, for an article to be eligible for NAFTA preference, two requirements must be satisfied. First, the article in question must be “originating” under the terms of GN 12, HTSUS, and second, the article must qualify to be marked as a good of a NAFTA country under the NAFTA Marking Rules contained in 19 CFR § 102.20.

With regard to the first requirement, GN 12(b), HTSUS, provides, in pertinent part:

For the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as “*goods originating in the territory of a NAFTA party*” only if –

....

ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that--

(A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivision (r), (s) and (t) of this note or the rules set forth therein, or

(B) the goods otherwise satisfy the applicable requirements of subdivision (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note[.]

Raw macadamia nuts are classified in subheading 0802.90, HTSUS. In understanding the language of the HTSUS, the Explanatory Notes (“ENs”) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the Harmonized System at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989). The ENs to Chapter 8, HTSUS, explain that nuts prepared according to Chapter 20, HTSUS, are excluded from Chapter 8, HTSUS. Roasted and salted macadamia nuts are classified under subheading 2008.19.9010, HTSUS. The ENs to heading 2008, HTSUS, explain that this heading includes oil-roasted nuts whether or not containing or coated with salt. In this case, raw macadamia nuts were imported from Australia into Canada, where they were roasted and salted, and thus correctly classified under subheading 2008.19.9010, HTSUS.

The applicable rule in subdivision (t) provides for “a change to subheadings 2008.19 through 2008.99 from any other chapter.” *See* GN 12(t)/20.4, HTSUS. However, GN 12(s), Exceptions to Change in Tariff Classification Rules, HTSUS, provides, in relevant part:

(ii) Fruit, nut and vegetable preparations of chapter 20 that have been prepared or preserved merely by freezing, by packing (including canning)

in water, brine or natural juices, or by roasting, either dry or in oil (including processing incidental to freezing, packing, or roasting), shall be treated as an originating good only if the fresh good were wholly produced or obtained entirely in the territory of one or more NAFTA parties.

Accordingly, though the non-originating nuts appear to undergo the requisite tariff shift from Chapter 8, HTSUS, to subheading 2008.19.9010, HTSUS, it remains to be determined whether they meet the additional test imposed by GN 12(s)(ii), HTSUS. Under this provision, when nut preparations are prepared “merely” by roasting or processing “incidental” to roasting, then the origin of the nuts in their “fresh” state determines the origin of the good. The “fresh” state refers to the state of the nuts before they were roasted or processed in a manner incidental to roasting. Thus, for such nut preparations to be originating, the “fresh” nuts used to make the good must be wholly obtained or produced entirely in the territory of one or more of NAFTA parties (Mexico, Canada, or the United States). That is, non-originating nuts that, while in a NAFTA territory, are merely roasted, or processed in a manner incidental to roasting, will not be treated as originating nuts.

The term “merely” is not specifically defined in GN 12, HTSUS, but per its dictionary definition means “only (what is referred to) and nothing more.”<sup>1</sup> Read in the context of GN 12, HTSUS, the term “merely” means that the processes listed in GN 12(s)(ii), HTSUS, by themselves, are insufficient to qualify non-originating nuts for preferential tariff treatment under the NAFTA, despite changing tariff classifications per GN 12(b)(ii), HTSUS, and GN 12(t)/20.4, HTSUS. Thus, we find that the effect of GN 12(s)(ii), HTSUS, is to ensure that goods undergo sufficient processing in a NAFTA country, beyond the listed processes, in order to be considered originating for purposes of GN 12(b)(ii), HTSUS.

The term “incidental” is also not specifically defined in GN 12, HTSUS, but per its dictionary definition means “occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part.”<sup>2</sup> Applying this definition to GN 12(s)(ii), HTSUS, the term “incidental” indicates a process that may happen with or as a result of roasting, but is secondary to, or of lesser importance than, the process of roasting.

We find that “salting” is precisely the type of lesser process contemplated by the note as incidental. Salting often occurs in connection not only with roasting, as in this case, but also with canning or freezing. It is the roasting, canning, or freezing processes which are the means by which the products are principally prepared. By contrast, salting has far less consequences to the essential character of the product. Moreover, the addition of salt like other flavors, spices, or other ingredients is a relatively simple process and does not require a prescribed amount to be added.

Given that roasting by itself would not be sufficient to make a nut an originating good per GN 12(s)(ii), HTSUS, it would be inconsistent with that note to conclude that “salting” would provide otherwise. Furthermore, the ENs to Chapter 20, HTSUS, state, in relevant part:

<sup>1</sup> “Merely” defined by *Oxford English Dictionary* at <http://www.oed.com/view/Entry/116740?rskey=jcbGqY&result=2#eid>.

<sup>2</sup> “Incidental” defined by the *Oxford English Dictionary* at <http://www.oed.com/view/Entry/93467?redirectedFrom=incidental#eid>.

This heading covers fruits, nuts and other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise than by any of the processes specified in other Chapters or in the preceding headings of this Chapter.

It includes, *inter alia*:

(1) Almonds, ground-nuts, areca (or betel) nuts and other nuts, dry-roasted, oil roasted or fat-roasted, **whether or not containing or coated with vegetable oil, salt, flavours, spices or other additives.** (Emphasis added).

...

(9) Fruit, nuts, fruit-peel and other edible parts of plants (other than vegetables), preserved by sugar and put in syrup (e.g. *marrons glacés* or giner), whatever the packing.

Moreover, while the ENs to Chapter 20, HTSUS, mention “salt,” the references to “dry-roasted, oil-roasted or fat-roasted” and “preserved by sugar and put in syrup” indicate the principal processes of preparation or preservation that would change the classification of nuts from Chapter 8, HTSUS, to Chapter 20, HTSUS. The fact that “salt” is mentioned with reference to the types of roasting, but is not specifically mentioned as a process of preparation or preservation, suggests that “salting” is something that may happen with or as a result of roasting nuts, but whether the nuts are salted, or not, is not essential to the preparation; what is essential to the preparation is the roasting. For all of the foregoing reasons, we find that for purposes of GN 12(s)(ii), HTSUS, the term “processing incidental to freezing, packing, or roasting,” includes the process of “salting.”

This interpretation of GN 12(s)(ii), HTSUS, is further supported by Headquarters Ruling Letter (“HQ”) H243328, dated August 19, 2013, which considered “salting” to be a process incidental to roasting with regard to a provision from the United States-Korea Free Trade Agreement (“UKFTA”) that is parallel to GN 12(s)(ii), HTSUS. HQ H243328 affirms the decision in HQ H240383, dated May 3, 2013, determining the origin of the nuts from their “fresh” state on the basis that “salting and roasting [...] qualify as ‘processing incidental’ to roasting.”<sup>3</sup>

CBP received one comment in response to the notice to modify six ruling letters addressing nuts.<sup>4</sup> The commenter states that the rules and in particular, the note to Chapter 20, indicate a two-step process in deciding whether the goods are deemed originating and entitled to preferential treatment as follows: (1) determining whether the nuts have been prepared beyond mere roasting in oil including processes incidental to roasting; and (2) if the nuts were prepared beyond mere roasting, then determining whether the non-originating materials satisfy the tariff shift rule. The commenter defines “merely” as “just” or “only,” or “nothing more,” and defines “incidental” as “being likely to ensue as a chance or minor consequence” and “occurring merely by chance or without intention or calculation.” The commenter

<sup>3</sup> We find that the absence of “merely” from the UKFTA provision does not affect the interpretation of “incidental” in HQ H243328 and HQ H240383.

<sup>4</sup> The comment addresses the facts from NY E87234, dated October 1, 1999, which is one of the six ruling letters being modified along with the NY ruling letter at issue, NY H84143.

argues that the nuts considered in NY E87234, were prepared beyond mere roasting in oil because, after their importation to Canada, they underwent multiple processes, which are not incidental to roasting, including “salting, mixing with other ingredients, screening, aspiration, cooling, and packaging in usually small packaging.”<sup>5</sup> The commenter concludes, by applying the second step, that the non-originating materials satisfy the tariff shift rule. The commenter supports this conclusion by citing Canadian International Trade Tribunal Case no. AP-2003–003, and NY N228118, dated August 8, 2012.

In response, we note that GN 12(s)(ii), HTSUS, (or the note to Chapter 20, as described by the commenter) must be read within the context of the provision that initiates its application, GN 12(b)(ii), HTSUS, which together ensure that such goods undergo sufficient processing in a NAFTA country to be considered originating goods. Accepting the commenter’s interpretation would mean that the processes of “salting, mixing with other ingredients, screening, aspiration, cooling, and packaging in usually small packaging” are sufficient to qualify non-originating nuts for preferential treatment under NAFTA because such processes performed together are not considered incidental to roasting, freezing, or packing. This would accord differing treatments to the same non-originating nuts, both roasted in NAFTA territories, on the basis that some were treated with salt plus other additives, and quality checked, while others were not, despite the fact that the essential character of the treated and untreated roasted nuts is the same. We find the commenter’s interpretation inconsistent with the proper interpretation of GN 12(s)(ii), HTSUS, which should instead be interpreted to include “salting” as a process incidental to roasting for the reasons discussed above. The other processes listed by the commenter should be interpreted similarly. “Mixing with other ingredients” should be treated the same way as “salting” because the ENs to Chapter 20, HTSUS, reference “flavours, spices or other additives” in the same manner as “salt.” Further, the mixture in NY E87234 concerns various nut varieties, which would mean that if we were to agree with the commenter, mixing various types of nuts would be accorded preferential treatment, whereas using only one type of nut would not. We do not agree that the use of more non-originating materials should accord preferential treatment. “Cooling” is incidental to roasting because after roasting, the nuts automatically will need to cool down below the temperature at which they were roasted. Likewise, “screening” and “aspiration” are incidental to roasting because they are performed to check the quality of the roasted nuts as a result of their roasting. Lastly, we note that we are not bound by cases from the Canadian International Trade Tribunal, and NY N228118 is being modified along with the NY ruling letter at issue, NY H84143.

Accordingly, we find that salting is a process incidental to roasting and does not render the product originating. Rather, the origin of the product as imported is determined by the origin of the nuts in the “fresh” state per GN 12(s)(ii), HTSUS. Given the foregoing, the roasted and salted macadamia nuts may not be treated as originating because they do not meet the requirements of GN 12(s)(ii), HTSUS; that is, they were not wholly obtained or produced entirely in Mexico, Canada, or the United States as fresh nuts.

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<sup>5</sup> We note that aside from “salting”, the other operations noted by the commenter (mixing with other ingredients, screening, aspiration, cooling, and packaging in usually small packaging) were not discussed in the original fact pattern to NY E87234. However, we will discuss them in our response.

Therefore, the prepared macadamia nuts imported from Canada do not qualify for preferential tariff treatment under the NAFTA.

### *Marking*

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. § 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the United States shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. § 1304 was “that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will.” *United States v. Friedlaender & Co.*, 27 CCPA 297, 302, C.A.D. 104 (1940). Part 134, CBP Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. § 1304.

Section 134.1(b), CBP Regulations (19 CFR § 134.1(b)), defines “country of origin” as:

[T]he country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the “country of origin” within the meaning of [the marking laws and regulations]; however, for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin.

Part 102, CBP Regulations (19 CFR Part 102), sets forth the NAFTA Rules of Origin for country of origin marking purposes. As the macadamia nuts were grown in Australia, Section 102.11(a)(1) and (2) do not apply. Section 102.11(a)(3) provides:

The country of origin of a good is the country in which ... each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in § 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

“Foreign material means a material whose country of origin as determined under these rules is not the same as the country in which the good is produced.” 19 CFR § 102.1(e).

Under the provisions of 19 CFR § 102.20, the tariff shift rule for subheading 2008.19, HTSUS, provides as follows:

A change to subheading 2008.19 through 2008.99 from any other chapter, provided that the change is not the result of mere blanching of nuts.

However, the note from Chapter 20, HTSUS, provides:

Notwithstanding the specific rules of this chapter, fruit, nut and vegetable preparations of Chapter 20 that have been prepared or preserved merely by freezing, by packing (including canning) in water, brine or natural

juices, or by roasting, either dry or in oil (including processing incidental to freezing, packing or roasting), shall be treated as a good of the country in which the fresh good was produced.

Based on the note from Chapter 20, HTSUS, the country of origin of the macadamia nuts is not determined by 19 CFR § 102.11(a) (incorporating 19 CFR § 102.20), and the next step in the country of origin marking determination is provided in 19 CFR § 102.11(b), which states:

Except for a good that is specifically described in the Harmonized System as a set, or is classified as a set pursuant to General Rule of Interpretation 3, where the country of origin cannot be determined under paragraph (a) of this section:

(1) The country of origin of the good is the country or countries of origin of the single material that imparts the essential character of the good...

“Material’ means a good that is incorporated into another good as a result of production with respect to that other good, and includes parts, ingredients, subassemblies, and components.” 19 CFR § 102.1(l).

“For purposes of identifying the material that imparts the essential character to a good under §102.11, the only materials that shall be taken into consideration are those domestic or foreign materials that are classified in a tariff provision from which a change in tariff classification is not allowed under the §102.20 specific rule or other requirements applicable to the good.” 19 CFR § 102.18(b)(1).

Pursuant to 19 CFR § 102.11(b) (incorporating 19 CFR § 102.18(b)(1)), we find that the single material that imparts the essential character of the finished good is the macadamia nuts. Therefore, the prepared macadamia nuts may not be marked as goods of Canada, but rather must be marked to indicate that they are products of Australia.

#### **HOLDING:**

NY H84143 is modified to reflect that, by application of GN 12(s)(ii), HTSUS, the prepared macadamia nuts imported from Canada are not eligible for preferential tariff treatment under the NAFTA. In addition, by application of the note from Chapter 20, HTSUS, 19 CFR § 102.11(a) and (b), 19 CFR § 102.18(b)(1), and 19 CFR § 102.20, the prepared macadamia nuts may not be marked as goods of Canada, but rather must be marked to indicate that they are products of Australia. The tariff classification of the prepared macadamia nuts is unchanged.

#### **EFFECT ON OTHER RULINGS:**

NY H84143, dated August 6, 2001, is hereby MODIFIED. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

*Sincerely,*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*

## [ATTACHMENT D]

HQ H256785

December 28, 2015

OT:RR:CTF:VS H256785 AJR

CATEGORY: NAFTA

MR. STEVE DECASTRO  
ALL-WAYS FORWARDING INTERNATIONAL, INC.  
701 NEWARK AVENUE, SUITE 300  
ELIZABETH, NJ 07208

RE: Modification of NY H82352; NAFTA; GN 12, HTSUS - Duty Preference;  
Mixed Nuts Roasted and Salted in Canada

DEAR MR. DECASTRO:

This is in reference to New York Ruling Letter (“NY”) H82352, dated August 10, 2001, issued to you on behalf of your client, Star Snacks, of Jersey City, New Jersey. At issue was the tariff classification of mixed nuts and their eligibility for preferential tariff treatment under the North American Free Trade Agreement (“NAFTA”). In NY H82352, U.S. Customs and Border Protection (“CBP”) determined, in relevant part, that various raw nuts of U.S., Canadian, Indian, and Brazilian origin imported into Canada, where they were roasted, salted, and mixed with other nuts, qualified for preferential tariff treatment under the NAFTA when imported into the United States.<sup>1</sup> It is now our position that the roasted and salted mixed nuts do not qualify for preferential tariff treatment under the NAFTA. For the reasons described in this ruling, we hereby modify NY H82352.

This modification does not affect CBP’s decision in NY H82352 that various roasted nuts imported into Canada, where they undergo a process similar to the raw nuts, do not qualify for preferential tariff treatment under the NAFTA. The tariff classification of the roasted and salted nuts under sub-heading 2008.19.85 under the Harmonized Tariff Schedule of the United States (“HTSUS”) when imported from Canada is also unaffected.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), notice proposing to modify six ruling letters, including H82352, concerning the preferential tariff treatment of certain prepared nuts under the NAFTA was published on July 29, 2015, in Vol. 49, No. 30, of the Customs Bulletin. CBP received one comment in response to this notice.

**FACTS:**

NY H82352 stated, in relevant part:

The merchandise is described as 16 ounce, retail pack tins of “Mixed Nuts,” consisting of 26.4 percent by weight of peanuts and 21.55 percent red skin peanuts (country of origin, Canada or the U.S.A.), 16.46 percent cashews (origin, India), 13.21 percent Brazil nuts (origin, Brazil) and 11.97 percent unbleached almonds, 5.98 percent unbleached filberts and 4.49 percent pecans (origin, all U.S.A.).

In your correspondence you indicate that the country of exportation will be Canada. The condition of the nuts when they are imported into Canada is sometimes raw and at other times roasted. The nuts are brought into the

<sup>1</sup> NY H82352 failed to consider whether the nuts qualified to be marked as a product of Canada.

country of exportation both in bags and boxes. When the nuts enter Canada in a raw condition, they are roasted, salted, and mixed with other ingredients (salt, oil, and other nuts). When the nuts enter Canada in a roasted condition, Star Snacks will re-salt, re-oil and pack the product in its final export container.

CBP found that the non-originating nuts, when imported raw into Canada, satisfied the changes in tariff classification required under General Note (“GN”) 12(t)/20.4, HTSUS, and that, upon compliance with all applicable laws, regulations, and agreements under the NAFTA, the nut mixture would be subject to a free tariff rate when imported into the United States.

**ISSUE:**

Whether the roasted and salted mixed nuts described in NY H82352 qualifies for preferential tariff treatment under the NAFTA?

**LAW AND ANALYSIS:**

Pursuant to GN 12, HTSUS, for an article to be eligible for NAFTA preference, two requirements must be satisfied. First, the article in question must be “originating” under the terms of GN 12, HTSUS, and second, the article must qualify to be marked as a good of a NAFTA country under the NAFTA Marking Rules contained in 19 CFR § 102.20.

With regard to the first requirement, GN 12(b), HTSUS, provides, in pertinent part:

For the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as “*goods originating in the territory of a NAFTA party*” only if –

....

ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that--

(A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivision (r), (s) and (t) of this note or the rules set forth therein, or

(B) the goods otherwise satisfy the applicable requirements of subdivision (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note[.]

Raw nuts are classified under various headings of Chapter 8, HTSUS. In understanding the language of the HTSUS, the Explanatory Notes (“ENs”) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the Harmonized System at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989). The ENs to Chapter 8, HTSUS, explain that nuts prepared according to Chapter 20, HTSUS, are excluded from Chapter 8, HTSUS. Mixed nut preparations are classified under sub-heading 2008.19, HTSUS. The ENs to heading 2008, HTSUS, explain that this heading includes oil-roasted nuts whether or not containing or coated with salt. In this case, various raw nuts were imported from non-NAFTA

countries into Canada, where they were mixed with other nuts and oil, and roasted and salted, and thus correctly classified under subheading 2008.19.85, HTSUS.

The applicable rule in subdivision (t) provides for “a change to subheadings 2008.19 through 2008.99 from any other chapter.” See GN 12(t)/20.4, HTSUS. However, GN 12(s), Exceptions to Change in Tariff Classification Rules, HTSUS, provides, in relevant part:

- (ii) Fruit, nut and vegetable preparations of chapter 20 that have been prepared or preserved merely by freezing, by packing (including canning) in water, brine or natural juices, or by roasting, either dry or in oil (including processing incidental to freezing, packing, or roasting), shall be treated as an originating good only if the fresh good were wholly produced or obtained entirely in the territory of one or more NAFTA parties.

Accordingly, though the non-originating nuts appear to undergo the requisite tariff shift from Chapter 8, HTSUS, to subheading 2008.19.85, HTSUS, it remains to be determined whether they meet the additional test imposed by GN 12(s)(ii), HTSUS. Under this provision, when nut preparations are prepared “merely” by roasting or processing “incidental” to roasting, then the origin of the nuts in their “fresh” state determines the origin of the good. The “fresh” state refers to the state of the nuts before they were roasted or processed in a manner incidental to roasting. Thus, for such nut preparations to be originating, the “fresh” nuts used to make the good must be wholly obtained or produced entirely in the territory of one or more of NAFTA parties (Mexico, Canada, or the United States). That is, non-originating nuts that, while in a NAFTA territory, are merely roasted, or processed in a manner incidental to roasting, will not be treated as originating nuts.

The term “merely” is not specifically defined in GN 12, HTSUS, but per its dictionary definition means “only (what is referred to) and nothing more.”<sup>2</sup> Read in the context of GN 12, HTSUS, the term “merely” means that the processes listed in GN 12(s)(ii), HTSUS, by themselves, are insufficient to qualify non-originating nuts for preferential tariff treatment under the NAFTA, despite changing tariff classifications per GN 12(b)(ii), HTSUS, and GN 12(t)/20.4, HTSUS. Thus, we find that the effect of GN 12(s)(ii), HTSUS, is to ensure that goods undergo sufficient processing in a NAFTA country, beyond the listed processes, in order to be considered originating for purposes of GN 12(b)(ii), HTSUS.

The term “incidental” is also not specifically defined in GN 12, HTSUS, but per its dictionary definition means “occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part.”<sup>3</sup> Applying this definition to GN 12(s)(ii), HTSUS, the term “incidental” indicates a process that may happen with or as a result of roasting, but is secondary to, or of lesser importance than, the process of roasting.

We find that “salting” is precisely the type of lesser process contemplated by the note as incidental. Salting often occurs in connection not only with roasting, as in this case, but also with canning or freezing. It is the roasting,

<sup>2</sup> “Merely” defined by *Oxford English Dictionary* at <http://www.oed.com/view/Entry/116740?rskey=jcbGqY&result=2#eid>.

<sup>3</sup> “Incidental” defined by the *Oxford English Dictionary* at <http://www.oed.com/view/Entry/93467?redirectedFrom=incidental#eid>.

canning, or freezing processes which are the means by which the products are principally prepared. By contrast, salting has far less consequences to the essential character of the product. Moreover, the addition of salt like other flavors, spices, or other ingredients is a relatively simple process and does not require a prescribed amount to be added.

Given that roasting by itself would not be sufficient to make a nut an originating good per GN 12(s)(ii), HTSUS, it would be inconsistent with that note to conclude that “salting” would provide otherwise. Furthermore, the ENs to Chapter 20, HTSUS, state, in relevant part:

This heading covers fruits, nuts and other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise than by any of the processes specified in other Chapters or in the preceding headings of this Chapter.

It includes, *inter alia*:

(1) Almonds, ground-nuts, areca (or betel) nuts and other nuts, dry-roasted, oil roasted or fat-roasted, **whether or not containing or coated with vegetable oil, salt, flavours, spices or other additives.** (Emphasis added).

...

(9) Fruit, nuts, fruit-peel and other edible parts of plants (other than vegetables), preserved by sugar and put in syrup (e.g. *marrons glacés* or giner), whatever the packing.

Moreover, while the ENs to Chapter 20, HTSUS, mention “salt,” the references to “dry-roasted, oil-roasted or fat-roasted” and “preserved by sugar and put in syrup” indicate the principal processes of preparation or preservation that would change the classification of nuts from Chapter 8, HTSUS, to Chapter 20, HTSUS. The fact that “salt” is mentioned with reference to the types of roasting, but is not specifically mentioned as a process of preparation or preservation, suggests that “salting” is something that may happen with or as a result of roasting nuts, but whether the nuts are salted, or not, is not essential to the preparation; what is essential to the preparation is the roasting. For all of the foregoing reasons, we find that for purposes of GN 12(s)(ii), HTSUS, the term “processing incidental to freezing, packing, or roasting,” includes the process of “salting.”

This interpretation of GN 12(s)(ii), HTSUS, is further supported by Headquarters Ruling Letter (“HQ”) H243328, dated August 19, 2013, which considered “salting” to be a process incidental to roasting with regard to a provision from the United States-Korea Free Trade Agreement (“UKFTA”) that is parallel to GN 12(s)(ii), HTSUS. HQ H243328 affirms the decision in HQ H240383, dated May 3, 2013, determining the origin of the nuts from their “fresh” state on the basis that “salting and roasting [...] qualify as ‘processing incidental’ to roasting.”<sup>4</sup>

CBP received one comment in response to the notice to modify six ruling letters addressing nuts.<sup>5</sup> The commenter states that the rules and in par-

<sup>4</sup> We find that the absence of “merely” from the UKFTA provision does not affect the interpretation of “incidental” in HQ H243328 and HQ H240383.

<sup>5</sup> The comment addresses the facts from NY E87234, dated October 1, 1999, which is one of the six ruling letters being modified along with the NY ruling letter at issue, NY H82352.

ticular, the note to Chapter 20, indicate a two-step process in deciding whether the goods are deemed originating and entitled to preferential treatment as follows: (1) determining whether the nuts have been prepared beyond mere roasting in oil including processes incidental to roasting; and (2) if the nuts were prepared beyond mere roasting, then determining whether the non-originating materials satisfy the tariff shift rule. The commenter defines “merely” as “just” or “only,” or “nothing more,” and defines “incidental” as “being likely to ensue as a chance or minor consequence” and “occurring merely by chance or without intention or calculation.” The commenter argues that the nuts considered in NY E87234, were prepared beyond mere roasting in oil because, after their importation to Canada, they underwent multiple processes, which are not incidental to roasting, including “salting, mixing with other ingredients, screening, aspiration, cooling, and packaging in usually small packaging.”<sup>6</sup> The commenter concludes, by applying the second step, that the non-originating materials satisfy the tariff shift rule. The commenter supports this conclusion by citing Canadian International Trade Tribunal Case no. AP-2003-003, and NY N228118, dated August 8, 2012.

In response, we note that GN 12(s)(ii), HTSUS, (or the note to Chapter 20, as described by the commenter) must be read within the context of the provision that initiates its application, GN 12(b)(ii), HTSUS, which together ensure that such goods undergo sufficient processing in a NAFTA country to be considered originating goods. Accepting the commenter’s interpretation would mean that the processes of “salting, mixing with other ingredients, screening, aspiration, cooling, and packaging in usually small packaging” are sufficient to qualify non-originating nuts for preferential treatment under NAFTA because such processes performed together are not considered incidental to roasting, freezing, or packing. This would accord differing treatments to the same non-originating nuts, both roasted in NAFTA territories, on the basis that some were treated with salt plus other additives, and quality checked, while others were not, despite the fact that the essential character of the treated and untreated roasted nuts is the same. We find the commenter’s interpretation inconsistent with the proper interpretation of GN 12(s)(ii), HTSUS, which should instead be interpreted to include “salting” as a process incidental to roasting for the reasons discussed above. The other processes listed by the commenter should be interpreted similarly. “Mixing with other ingredients” should be treated the same way as “salting” because the ENs to Chapter 20, HTSUS, reference “flavours, spices or other additives” in the same manner as “salt.” Further, the mixture in NY E87234 concerns various nut varieties, which would mean that if we were to agree with the commenter, mixing various types of nuts would be accorded preferential treatment, whereas using only one type of nut would not. We do not agree that the use of more non-originating materials should accord preferential treatment. “Cooling” is incidental to roasting because after roasting, the nuts automatically will need to cool down below the temperature at which they were roasted. Likewise, “screening” and “aspiration” are incidental to roasting because they are performed to check the quality of the roasted nuts as a result of their roasting. Lastly, we note that we are not bound by cases from

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<sup>6</sup> We note that aside from “salting”, the other operations noted by the commenter (mixing with other ingredients, screening, aspiration, cooling, and packaging in usually small packaging) were not discussed in the original fact pattern to NY E87234. However, we will discuss them in our response.

the Canadian International Trade Tribunal, and NY N228118 is being modified along with the NY ruling letter at issue, NY H82352.

Accordingly, we find that salting is a process incidental to roasting and does not render the product originating. Rather, the origin of the product as imported is determined by the origin of the nuts in the “fresh” state per GN 12(s)(ii), HTSUS. Given the foregoing, the prepared mixed nuts may not be treated as originating because they do not meet the requirements of GN 12(s)(ii), HTSUS; that is, they were not wholly obtained or produced entirely in Mexico, Canada, or the United States as fresh nuts. Therefore, the prepared mixed nuts imported from Canada do not qualify for preferential tariff treatment under the NAFTA.

**HOLDING:**

NY H82352 is modified to reflect that, by application of GN 12(s)(ii), HTSUS, the prepared nut mixture imported from Canada is not eligible for preferential tariff treatment under the NAFTA. This modification does not change CBP’s decision in NY H82352 that various roasted nuts imported into Canada, where they undergo a process similar to the raw nuts, do not qualify for preferential tariff treatment under the NAFTA. The tariff classification of the prepared nut mixture, subheading 2008.19.85, HTSUS, is also unchanged.

**EFFECT ON OTHER RULINGS:**

NY H82352, dated August 10, 2001, is hereby MODIFIED. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

*Sincerely,*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*

## [ATTACHMENT E]

HQ H256784

December 28, 2015

OT:RR:CTF:VS H256784 AJR

CATEGORY: NAFTA

MS. SHERI G. LAWSON  
WILSON INTERNATIONAL, INC.  
160 WALES AVENUE, SUITE 100  
TONAWANDA, NY 14150

RE: Modification of NY R02589; NAFTA; GN 12, HTSUS; 19 CFR § 102.20 - Country of Origin Marking; Mixed Nuts Roasted and Salted in Canada

DEAR MS. LAWSON:

This is in reference to New York Ruling Letter (“NY”) R02589, dated September 23, 2005, issued to you on behalf of your client, John Vince Foods, Inc., of Ontario, Canada. At issue was the tariff classification of mixed nuts, their eligibility for preferential tariff treatment under the North American Free Trade Agreement (“NAFTA”), and their country of origin marking. In NY R02589, U.S. Customs and Border Protection (“CBP”) determined, in relevant part, that raw cashew nuts from various non-NAFTA countries imported into Canada, where they were roasted, salted, and then mixed with peanuts of U.S. origin, qualified for preferential tariff treatment under the NAFTA when imported into the United States. In addition, CBP found that the mixture of raw, non-originating cashews and raw, in-shell peanuts of U.S.-origin qualified to be marked as goods of Canada; while raw, non-originating cashews and raw, shelled peanuts of U.S.-origin qualified to be marked as goods of the United States. It is now our position that the mixed nuts do not qualify for preferential tariff treatment under the NAFTA, and do not qualify to be marked as goods of Canada or the United States. For the reasons described in this ruling, we hereby modify NY R02589.

The tariff classification of the roasted and salted mixed nuts under sub-heading 2008.19.85 of the Harmonized Tariff Schedule of the United States (“HTSUS”) when imported from Canada is unaffected.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), notice proposing to modify six ruling letters, including NY R02589, concerning the preferential tariff treatment of certain prepared nuts under the NAFTA was published on July 29, 2015, in Vol. 49, No. 30, of the Customs Bulletin. CBP received one comment in response to this notice.

**FACTS:**

NY R02589 stated, in relevant part:

The product in question, called “Classic Mix,” is said to consist of 50 percent by weight of roasted and salted cashews and 50 percent of roasted and salted peanuts. The cashews are imported into Canada as raw, shelled nuts, and are the product of Brazil, Indonesia or other offshore countries. The peanuts are of U.S. origin, and are imported into Canada either blanched and shelled under tariff heading 2008.11, HTS, or as raw, in-shell peanuts (heading 1202.10).

You state that, in Canada, the cashews and peanuts are oil roasted and salted individually. The roasted nuts are then layered onto a mixing table and, as the mixing table is emptied, the product is mixed as it drops into a

tote. The mixed product is then packaged into see-through plastic containers of 500 grams (17.64 ounces), net, which are then packed for export into the United States.

CBP found that the non-originating cashews satisfied the changes in tariff classification required under General Note (“GN”) 12(t)/20.4, HTSUS, and that, upon compliance with all applicable laws, regulations, and agreements under the NAFTA, the roasted and salted mixed nuts would be subject to a free tariff rate when imported into the United States. CBP also found that the prepared nuts qualified to be marked as goods of Canada under the NAFTA Marking Rules (19 CFR §§ 102.11(a)(3) and 102.20(d)).

#### **ISSUE:**

Whether the roasted and salted mixed nuts described in NY R02589 qualify for preferential tariff treatment under the NAFTA, and whether they may be marked as goods of Canada?

#### **LAW AND ANALYSIS:**

Pursuant to GN 12, HTSUS, for an article to be eligible for NAFTA preference, two requirements must be satisfied. First, the article in question must be “originating” under the terms of GN 12, HTSUS, and second, the article must qualify to be marked as a good of a NAFTA country under the NAFTA Marking Rules contained in 19 CFR § 102.20.

With regard to the first requirement, GN 12(b), HTSUS, provides, in pertinent part:

For the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as “*goods originating in the territory of a NAFTA party*” only if –

....

ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that--

(A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivision (r), (s) and (t) of this note or the rules set forth therein, or

(B) the goods otherwise satisfy the applicable requirements of subdivision (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note[.]

Raw cashew nuts are classified in subheading 0801.32, HTSUS. In understanding the language of the HTSUS, the Explanatory Notes (“ENs”) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the Harmonized System at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989). The ENs to Chapter 8, HTSUS, explain that nuts prepared according to Chapter 20, HTSUS, are excluded from Chapter 8, HTSUS. Roasted and salted mixed nuts are classified under subheading 2008.19, HTSUS. The ENs to heading 2008, HTSUS, explain that this heading includes oil-roasted nuts whether or not containing or

coated with salt. In this case, raw cashew nuts were imported from non-NAFTA countries into Canada, where they were roasted, salted, and then mixed with peanuts of U.S. origin, and thus correctly classified under subheading 2008.19.85, HTSUS.

The applicable rule in subdivision (t) provides for “a change to subheadings 2008.19 through 2008.99 from any other chapter.” See GN 12(t)/20.4, HTSUS. However, GN 12(s), Exceptions to Change in Tariff Classification Rules, HTSUS, provides, in relevant part:

- (ii) Fruit, nut and vegetable preparations of chapter 20 that have been prepared or preserved merely by freezing, by packing (including canning) in water, brine or natural juices, or by roasting, either dry or in oil (including processing incidental to freezing, packing, or roasting), shall be treated as an originating good only if the fresh good were wholly produced or obtained entirely in the territory of one or more NAFTA parties.

Accordingly, though the non-originating nuts appear to undergo the requisite tariff shift from Chapter 8, HTSUS, to subheading 2008.19.85, HTSUS, it remains to be determined whether they meet the additional test imposed by GN 12(s)(ii), HTSUS. Under this provision, when nut preparations are prepared “merely” by roasting or processing “incidental” to roasting, then the origin of the nuts in their “fresh” state determines the origin of the good. The “fresh” state refers to the state of the nuts before they were roasted or processed in a manner incidental to roasting. Thus, for such nut preparations to be originating, the “fresh” nuts used to make the good must be wholly obtained or produced entirely in the territory of one or more of NAFTA parties (Mexico, Canada, or the United States). That is, non-originating nuts that, while in a NAFTA territory, are merely roasted, or processed in a manner incidental to roasting, will not be treated as originating nuts.

The term “merely” is not specifically defined in GN 12, HTSUS, but per its dictionary definition means “only (what is referred to) and nothing more.”<sup>1</sup> Read in the context of GN 12, HTSUS, the term “merely” means that the processes listed in GN 12(s)(ii), HTSUS, by themselves, are insufficient to qualify non-originating nuts for preferential tariff treatment under the NAFTA, despite changing tariff classifications per GN 12(b)(ii), HTSUS, and GN 12(t)/20.4, HTSUS. Thus, we find that the effect of GN 12(s)(ii), HTSUS, is to ensure that goods undergo sufficient processing in a NAFTA country, beyond the listed processes, in order to be considered originating for purposes of GN 12(b)(ii), HTSUS.

The term “incidental” is also not specifically defined in GN 12, HTSUS, but per its dictionary definition means “occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part.”<sup>2</sup> Applying this definition to GN 12(s)(ii), HTSUS, the term “incidental” indicates a process that may happen with or as a result of roasting, but is secondary to, or of lesser importance than, the process of roasting.

We find that “salting” is precisely the type of lesser process contemplated by the note as incidental. Salting often occurs in connection not only with roasting, as in this case, but also with canning or freezing. It is the roasting,

<sup>1</sup> “Merely” defined by *Oxford English Dictionary* at <http://www.oed.com/view/Entry/116740?rskey=jcbGqY&result=2#eid>.

<sup>2</sup> “Incidental” defined by the *Oxford English Dictionary* at <http://www.oed.com/view/Entry/93467?redirectedFrom=incidental#eid>.

canning, or freezing processes which are the means by which the products are principally prepared. By contrast, salting has far less consequences to the essential character of the product. Moreover, the addition of salt like other flavors, spices, or other ingredients is a relatively simple process and does not require a prescribed amount to be added.

Given that roasting by itself would not be sufficient to make a nut an originating good per GN 12(s)(ii), HTSUS, it would be inconsistent with that note to conclude that “salting” would provide otherwise. Furthermore, the ENs to Chapter 20, HTSUS, state, in relevant part:

This heading covers fruits, nuts and other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise than by any of the processes specified in other Chapters or in the preceding headings of this Chapter.

It includes, *inter alia*:

(1) Almonds, ground-nuts, areca (or betel) nuts and other nuts, dry-roasted, oil roasted or fat-roasted, **whether or not containing or coated with vegetable oil, salt, flavours, spices or other additives.** (Emphasis added).

...

(9) Fruit, nuts, fruit-peel and other edible parts of plants (other than vegetables), preserved by sugar and put in syrup (e.g. *marrons glacés* or giner), whatever the packing.

Moreover, while the ENs to Chapter 20, HTSUS, mention “salt,” the references to “dry-roasted, oil-roasted or fat-roasted” and “preserved by sugar and put in syrup” indicate the principal processes of preparation or preservation that would change the classification of nuts from Chapter 8, HTSUS, to Chapter 20, HTSUS. The fact that “salt” is mentioned with reference to the types of roasting, but is not specifically mentioned as a process of preparation or preservation, suggests that “salting” is something that may happen with or as a result of roasting nuts, but whether the nuts are salted, or not, is not essential to the preparation; what is essential to the preparation is the roasting. For all of the foregoing reasons, we find that for purposes of GN 12(s)(ii), HTSUS, the term “processing incidental to freezing, packing, or roasting,” includes the process of “salting.”

This interpretation of GN 12(s)(ii), HTSUS, is further supported by Headquarters Ruling Letter (“HQ”) H243328, dated August 19, 2013, which considered “salting” to be a process incidental to roasting with regard to a provision from the United States-Korea Free Trade Agreement (“UKFTA”) that is parallel to GN 12(s)(ii), HTSUS. HQ H243328 affirms the decision in HQ H240383, dated May 3, 2013, determining the origin of the nuts from their “fresh” state on the basis that “salting and roasting [...] qualify as ‘processing incidental’ to roasting.”<sup>3</sup>

CBP received one comment in response to the notice to modify six ruling letters addressing nuts.<sup>4</sup> The commenter states that the rules and in par-

<sup>3</sup> We find that the absence of “merely” from the UKFTA provision does not affect the interpretation of “incidental” in HQ H243328 and HQ H240383.

<sup>4</sup> The comment addresses the facts from NY E87234, dated October 1, 1999, which is one of the six ruling letters being modified along with the NY ruling letter at issue, NY R02589.

ticular, the note to Chapter 20, indicate a two-step process in deciding whether the goods are deemed originating and entitled to preferential treatment as follows: (1) determining whether the nuts have been prepared beyond mere roasting in oil including processes incidental to roasting; and (2) if the nuts were prepared beyond mere roasting, then determining whether the non-originating materials satisfy the tariff shift rule. The commenter defines “merely” as “just” or “only,” or “nothing more,” and defines “incidental” as “being likely to ensue as a chance or minor consequence” and “occurring merely by chance or without intention or calculation.” The commenter argues that the nuts considered in NY E87234, were prepared beyond mere roasting in oil because, after their importation to Canada, they underwent multiple processes, which are not incidental to roasting, including “salting, mixing with other ingredients, screening, aspiration, cooling, and packaging in usually small packaging.”<sup>5</sup> The commenter concludes, by applying the second step, that the non-originating materials satisfy the tariff shift rule. The commenter supports this conclusion by citing Canadian International Trade Tribunal Case no. AP-2003-003, and NY N228118, dated August 8, 2012.

In response, we note that GN 12(s)(ii), HTSUS, (or the note to Chapter 20, as described by the commenter) must be read within the context of the provision that initiates its application, GN 12(b)(ii), HTSUS, which together ensure that such goods undergo sufficient processing in a NAFTA country to be considered originating goods. Accepting the commenter’s interpretation would mean that the processes of “salting, mixing with other ingredients, screening, aspiration, cooling, and packaging in usually small packaging” are sufficient to qualify non-originating nuts for preferential treatment under NAFTA because such processes performed together are not considered incidental to roasting, freezing, or packing. This would accord differing treatments to the same non-originating nuts, both roasted in NAFTA territories, on the basis that some were treated with salt plus other additives, and quality checked, while others were not, despite the fact that the essential character of the treated and untreated roasted nuts is the same. We find the commenter’s interpretation inconsistent with the proper interpretation of GN 12(s)(ii), HTSUS, which should instead be interpreted to include “salting” as a process incidental to roasting for the reasons discussed above. The other processes listed by the commenter should be interpreted similarly. “Mixing with other ingredients” should be treated the same way as “salting” because the ENs to Chapter 20, HTSUS, reference “flavours, spices or other additives” in the same manner as “salt.” Further, the mixture in NY E87234 concerns various nut varieties, which would mean that if we were to agree with the commenter, mixing various types of nuts would be accorded preferential treatment, whereas using only one type of nut would not. We do not agree that the use of more non-originating materials should accord preferential treatment. “Cooling” is incidental to roasting because after roasting, the nuts automatically will need to cool down below the temperature at which they were roasted. Likewise, “screening” and “aspiration” are incidental to roasting because they are performed to check the quality of the roasted nuts as a result of their roasting. Lastly, we note that we are not bound by cases from

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<sup>5</sup> We note that aside from “salting”, the other operations noted by the commenter (mixing with other ingredients, screening, aspiration, cooling, and packaging in usually small packaging) were not discussed in the original fact pattern to NY E87234. However, we will discuss them in our response.

the Canadian International Trade Tribunal, and NY N228118 is being modified along with the NY ruling letter at issue, NY R02589.

Accordingly, we find that salting is a process incidental to roasting and does not render the product originating. Rather, the origin of the product as imported is determined by the origin of the nuts in the “fresh” state per GN 12(s)(ii), HTSUS. Given the foregoing, the roasted and salted mixed nuts may not be treated as originating because they do not meet the requirements of GN 12(s)(ii), HTSUS; that is, they were not wholly obtained or produced entirely in Mexico, Canada, or the United States as fresh nuts. Therefore, the mixed nuts imported from Canada do not qualify for preferential tariff treatment under the NAFTA.

### *Marking*

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. § 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the United States shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. § 1304 was “that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will.” *United States v. Friedlaender & Co.*, 27 CCPA 297, 302, C.A.D. 104 (1940). Part 134, CBP Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. § 1304.

Section 134.1(b), CBP Regulations (19 CFR § 134.1(b)), defines “country of origin” as:

[T]he country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the “country of origin” within the meaning of [the marking laws and regulations]; however, for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin.

Part 102, CBP Regulations (19 CFR Part 102), sets forth the NAFTA Rules of Origin for country of origin marking purposes. As the cashew nuts were grown in non-NAFTA countries, Section 102.11(a)(1) and (2) do not apply. Section 102.11(a)(3) provides:

The country of origin of a good is the country in which ... each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in § 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

“Foreign material’ means a material whose country of origin as determined under these rules is not the same as the country in which the good is produced.” 19 CFR § 102.1(e).

Under the provisions of 19 CFR § 102.20, the tariff shift rule for subheading 2008.19, HTSUS, provides as follows:

A change to subheading 2008.19 through 2008.99 from any other chapter, provided that the change is not the result of mere blanching of nuts.

However, the note from Chapter 20, HTSUS, provides:

Notwithstanding the specific rules of this chapter, fruit, nut and vegetable preparations of Chapter 20 that have been prepared or preserved merely by freezing, by packing (including canning) in water, brine or natural juices, or by roasting, either dry or in oil (including processing incidental to freezing, packing or roasting), shall be treated as a good of the country in which the fresh good was produced.

Based on the note from Chapter 20, HTSUS, the country of origin of the mixed nuts is not determined by 19 CFR § 102.11(a) (incorporating 19 CFR § 102.20), and the next step in the country of origin marking determination is provided in 19 CFR § 102.11(b), followed by 19 CFR § 102.11(c).

Section 102.11(b) states:

Except for a good that is specifically described in the Harmonized System as a set, or is classified as a set pursuant to General Rule of Interpretation 3, where the country of origin cannot be determined under paragraph (a) of this section:

(1) The country of origin of the good is the country or countries of origin of the single material that imparts the essential character of the good...

Section 102.11(c) states:

Where the country of origin cannot be determined under paragraph (a) or (b) of this section and the good is specifically described in the Harmonized System as a set or mixture, or classified as a set, mixture or composite good pursuant to General Rule of Interpretation 3, the country of origin of the good is the country of countries of origin of all materials that merit equal consideration for determining the essential character of the good.

“Material’ means a good that is incorporated into another good as a result of production with respect to that other good, and includes parts, ingredients, subassemblies, and components.” 19 CFR § 102.1(l).

“For purposes of identifying the material that imparts the essential character to a good under §102.11, the only materials that shall be taken into consideration are those domestic or foreign materials that are classified in a tariff provision from which a change in tariff classification is not allowed under the §102.20 specific rule or other requirements applicable to the good.” 19 CFR § 102.18(b)(1).

In this case, the mixed nuts are classified under 2008.19.85, HTSUS, which describes the product as a mixture. Pursuant to 19 CFR § 102.11(c) (incorporating 19 CFR § 102.18(b)(1)), we find that the cashew nuts and peanuts both merit equal consideration for determining the essential character of the finished good. Therefore, the prepared nut mixture may not be marked as a product of Canada, but rather must be marked to indicate that it is a product of Brazil, Indonesia, the United States, and the other offshore countries where the cashew nuts and peanuts originate. However, to the extent it is marked as a “Product of the United States,” that is within the purview of the Federal Trade Commission.

**HOLDING:**

NY R02589 is modified to reflect that, by application of GN 12(s)(ii), HTSUS, the prepared nut mixture imported from Canada is not eligible for preferential tariff treatment under the NAFTA. In addition, by application of the note from Chapter 20, HTSUS, 19 CFR § 102.11(a) - (c), 19 CFR § 102.18(b)(1), and 19 CFR § 102.20, the prepared nut mixture may not be marked as a good of Canada, but rather must be marked to indicate that it is a product of Brazil, Indonesia, the United States, and the other offshore countries where the cashew nuts and peanuts originate. The tariff classification of the prepared nuts is unchanged.

**EFFECT ON OTHER RULINGS:**

NY R02589, dated September 23, 2005, is hereby MODIFIED. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

*Sincerely,*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*

## [ATTACHMENT F]

HQ H256781

December 28, 2015

OT:RR:CTF:VS H256781 AJR

CATEGORY: NAFTA

MR. KEVIN J. SULLIVAN  
BAKER & MCKENZIE, LLP  
815 CONNECTICUT AVENUE, NW  
WASHINGTON, DC 20006-4078

RE: Modification of NY N228118; NAFTA; GN 12, HTSUS; 19 CFR § 102.20 – Country of Origin Marking; Cashew Nuts Roasted and Salted in Canada

DEAR MR. SULLIVAN:

This is in reference to New York Ruling Letter (“NY”) N228118, dated August 8, 2012, issued to you on behalf of your client, Harvest Manor Farms, LLC, of Texas. At issue was the tariff classification of cashew nuts, their eligibility for preferential tariff treatment under the North American Free Trade Agreement (“NAFTA”), and their country of origin marking. In NY N228118, U.S. Customs and Border Protection (“CBP”) determined, in relevant part, that raw cashew nuts from various non-NAFTA countries imported into Canada, where they were heated, polished, cleaned, roasted (with or without oil) and salted, qualified for preferential tariff treatment under the NAFTA when imported into the United States. In addition, CBP found that the prepared nuts qualified to be marked as goods of Canada. It is now our position that the nuts do not qualify for preferential tariff treatment under the NAFTA, and do not qualify to be marked as goods of Canada. For the reasons described in this ruling, we hereby modify NY N228118.

The tariff classification of the roasted and salted nuts under subheading 2008.19.1040 of the Harmonized Tariff Schedule of the United States (“HTSUS”), when imported from Canada, is unaffected.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), notice proposing to modify six ruling letters, including NY N228118, concerning the preferential tariff treatment of certain prepared nuts under the NAFTA was published on July 29, 2015, in Vol. 49, No. 30, of the Customs Bulletin. CBP received one comment in response to this notice.

**FACTS:**

NY N228118 stated, in relevant part:

[R]aw, shelled cashews will initially be imported into Canada from various suppliers from non-NAFTA countries. In Canada, the nuts will first be inspected and subjected to a heat process intended to bring them to an ambient temperature to control breakage during subsequent processing. After heating, the cashews will be re-inspected and then polished and cleaned by being passed through a high-efficiency aspirator. The cashews will then be placed into either an oil or dry roaster. After roasting, the nuts will undergo a salting operation. After salting, the cashews will be inspected again and then packed, either whole or halved, in retail containers of various types and sizes. They will then be imported into the United States. You state that the ingredients of the finished, imported merchandise will be cashews, sea salt and peanut oil (from the roaster).

CBP found that the non-originating nuts satisfied the changes in tariff classification required under General Note (“GN”) 12(t)/20.4, HTSUS, and that, upon compliance with all applicable laws, regulations, and agreements under the NAFTA, the nuts would be subject to a free tariff rate when imported into the United States. In reaching its decision, CBP stated that “GN 12(s)(ii), which sets forth an exception for products that merely undergo roasting or other specified processing, is not triggered here because the nuts at issue additionally undergo a salting process after roasting.” CBP also found that the prepared nuts qualified to be marked as goods of Canada under the NAFTA Marking Rules (19 CFR §§ 102.11(a)(3) and 102.20(d)).

**ISSUE:**

Whether the roasted and salted cashew nuts described in NY N228118 qualify for preferential tariff treatment under the NAFTA, and whether they may be marked as goods of Canada?

**LAW AND ANALYSIS:**

Pursuant to GN 12, HTSUS, for an article to be eligible for NAFTA preference, two requirements must be satisfied. First, the article in question must be “originating” under the terms of GN 12, HTSUS, and second, the article must qualify to be marked as a good of a NAFTA country under the NAFTA Marking Rules contained in 19 CFR § 102.20.

With regard to the first requirement, GN 12(b), HTSUS, provides, in pertinent part:

For the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as “*goods originating in the territory of a NAFTA party*” only if –

....

ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that--

(A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivision (r), (s) and (t) of this note or the rules set forth therein, or

(B) the goods otherwise satisfy the applicable requirements of subdivision (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note[.]

Raw cashew nuts are classified in subheading 0801.32, HTSUS. In understanding the language of the HTSUS, the Explanatory Notes (“ENs”) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the Harmonized System at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989). The ENs to Chapter 8, HTSUS, explain that nuts prepared according to Chapter 20, HTSUS, are excluded from Chapter 8, HTSUS. Roasted and salted cashew nuts are classified under subheading 2008.19, HTSUS. The ENs to heading 2008, HTSUS, explain that this heading includes oil-roasted nuts whether or not containing or

coated with salt. In this case, raw cashew nuts were imported from non-NAFTA countries into Canada, where they were heated, polished, cleaned, roasted, and salted, and thus correctly classified under subheading 2008.19.1040, HTSUS.

The applicable rule in subdivision (t) provides for “a change to subheadings 2008.19 through 2008.99 from any other chapter.” See GN 12(t)/20.4, HTSUS. However, GN 12(s), Exceptions to Change in Tariff Classification Rules, HTSUS, provides, in relevant part:

- (ii) Fruit, nut and vegetable preparations of chapter 20 that have been prepared or preserved merely by freezing, by packing (including canning) in water, brine or natural juices, or by roasting, either dry or in oil (including processing incidental to freezing, packing, or roasting), shall be treated as an originating good only if the fresh good were wholly produced or obtained entirely in the territory of one or more NAFTA parties.

Accordingly, though the non-originating nuts appear to undergo the requisite tariff shift from Chapter 8, HTSUS, to subheading 2008.19.1040, HTSUS, it remains to be determined whether they meet the additional test imposed by GN 12(s)(ii), HTSUS. Under this provision, when nut preparations are prepared “merely” by roasting or processing “incidental” to roasting, then the origin of the nuts in their “fresh” state determines the origin of the good. The “fresh” state refers to the state of the nuts before they were roasted or processed in a manner incidental to roasting. Thus, for such nut preparations to be originating, the “fresh” nuts used to make the good must be wholly obtained or produced entirely in the territory of one or more of NAFTA parties (Mexico, Canada, or the United States). That is, non-originating nuts that, while in a NAFTA territory, are merely roasted, or processed in a manner incidental to roasting, will not be treated as originating nuts.

The term “merely” is not specifically defined in GN 12, HTSUS, but per its dictionary definition means “only (what is referred to) and nothing more.”<sup>1</sup> Read in the context of GN 12, HTSUS, the term “merely” means that the processes listed in GN 12(s)(ii), HTSUS, by themselves, are insufficient to qualify non-originating nuts for preferential tariff treatment under the NAFTA, despite changing tariff classifications per GN 12(b)(ii), HTSUS, and GN 12(t)/20.4, HTSUS. Thus, we find that the effect of GN 12(s)(ii), HTSUS, is to ensure that goods undergo sufficient processing in a NAFTA country, beyond the listed processes, in order to be considered originating for purposes of GN 12(b)(ii), HTSUS.

The term “incidental” is also not specifically defined in GN 12, HTSUS, but per its dictionary definition means “occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part.”<sup>2</sup> Applying this definition to GN 12(s)(ii), HTSUS, the term “incidental” indicates a process that may happen with or as a result of roasting, but is secondary to, or of lesser importance than, the process of roasting.

We find that “salting” is precisely the type of lesser process contemplated by the note as incidental. Salting often occurs in connection not only with

<sup>1</sup> “Merely” defined by *Oxford English Dictionary* at <http://www.oed.com/view/Entry/116740?rskey=jcbGqY&result=2#eid>.

<sup>2</sup> “Incidental” defined by the *Oxford English Dictionary* at <http://www.oed.com/view/Entry/93467?redirectedFrom=incidental#eid>.

roasting, as in this case, but also with canning or freezing. It is the roasting, canning, or freezing processes which are the means by which the products are principally prepared. By contrast, salting has far less consequences to the essential character of the product. Moreover, the addition of salt like other flavors, spices, or other ingredients is a relatively simple process and does not require a prescribed amount to be added.

Given that roasting by itself would not be sufficient to make a nut an originating good per GN 12(s)(ii), HTSUS, it would be inconsistent with that note to conclude that “salting” would provide otherwise. Furthermore, the ENs to Chapter 20, HTSUS, state, in relevant part:

This heading covers fruits, nuts and other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise than by any of the processes specified in other Chapters or in the preceding headings of this Chapter.

It includes, *inter alia*:

(1) Almonds, ground-nuts, areca (or betel) nuts and other nuts, dry-roasted, oil roasted or fat-roasted, **whether or not containing or coated with vegetable oil, salt, flavours, spices or other additives.** (Emphasis added).

...

(9) Fruit, nuts, fruit-peel and other edible parts of plants (other than vegetables), preserved by sugar and put in syrup (e.g. *marrons glacés* or giner), whatever the packing.

Moreover, while the ENs to Chapter 20, HTSUS, mention “salt,” the references to “dry-roasted, oil-roasted or fat-roasted” and “preserved by sugar and put in syrup” indicate the principal processes of preparation or preservation that would change the classification of nuts from Chapter 8, HTSUS, to Chapter 20, HTSUS. The fact that “salt” is mentioned with reference to the types of roasting, but is not specifically mentioned as a process of preparation or preservation, suggests that “salting” is something that may happen with or as a result of roasting nuts, but whether the nuts are salted, or not, is not essential to the preparation; what is essential to the preparation is the roasting. For all of the foregoing reasons, we find that for purposes of GN 12(s)(ii), HTSUS, the term “processing incidental to freezing, packing, or roasting,” includes the process of “salting.”

This interpretation of GN 12(s)(ii), HTSUS, is further supported by Headquarters Ruling Letter (“HQ”) H243328, dated August 19, 2013, which considered “salting” to be a process incidental to roasting with regard to a provision from the United States-Korea Free Trade Agreement (“UKFTA”) that is parallel to GN 12(s)(ii), HTSUS. HQ H243328 affirms the decision in HQ H240383, dated May 3, 2013, determining the origin of the nuts from their “fresh” state on the basis that “salting and roasting [...] qualify as ‘processing incidental’ to roasting.”<sup>3</sup>

<sup>3</sup> We find that the absence of “merely” from the UKFTA provision does not affect the interpretation of “incidental” in HQ H243328 and HQ H240383.

CBP received one comment in response to the notice to modify six ruling letters addressing nuts.<sup>4</sup> The commenter states that the rules and in particular, the note to Chapter 20, indicate a two-step process in deciding whether the goods are deemed originating and entitled to preferential treatment as follows: (1) determining whether the nuts have been prepared beyond mere roasting in oil including processes incidental to roasting; and (2) if the nuts were prepared beyond mere roasting, then determining whether the non-originating materials satisfy the tariff shift rule. The commenter defines “merely” as “just” or “only,” or “nothing more,” and defines “incidental” as “being likely to ensue as a chance or minor consequence” and “occurring merely by chance or without intention or calculation.” The commenter argues that the nuts considered in NY E87234, were prepared beyond mere roasting in oil because, after their importation to Canada, they underwent multiple processes, which are not incidental to roasting, including “salting, mixing with other ingredients, screening, aspiration, cooling, and packaging in usually small packaging.”<sup>5</sup> The commenter concludes, by applying the second step, that the non-originating materials satisfy the tariff shift rule. The commenter supports this conclusion by citing Canadian International Trade Tribunal Case no. AP-2003-003.

In response, we note that GN 12(s)(ii), HTSUS, (or the note to Chapter 20, as described by the commenter) must be read within the context of the provision that initiates its application, GN 12(b)(ii), HTSUS, which together ensure that such goods undergo sufficient processing in a NAFTA country to be considered originating goods. Accepting the commenter’s interpretation would mean that the processes of “salting, mixing with other ingredients, screening, aspiration, cooling, and packaging in usually small packaging” are sufficient to qualify non-originating nuts for preferential treatment under NAFTA because such processes performed together are not considered incidental to roasting, freezing, or packing. This would accord differing treatments to the same non-originating nuts, both roasted in NAFTA territories, on the basis that some were treated with salt plus other additives, and quality checked, while others were not, despite the fact that the essential character of the treated and untreated roasted nuts is the same. We find the commenter’s interpretation inconsistent with the proper interpretation of GN 12(s)(ii), HTSUS, which should instead be interpreted to include “salting” as a process incidental to roasting for the reasons discussed above. The other processes listed by the commenter should be interpreted similarly. “Mixing with other ingredients” should be treated the same way as “salting” because the ENs to Chapter 20, HTSUS, reference “flavours, spices or other additives” in the same manner as “salt.” Further, the mixture in NY E87234 concerns various nut varieties, which would mean that if we were to agree with the commenter, mixing various types of nuts would be accorded preferential treatment, whereas using only one type of nut would not. We do not agree that the use of more non-originating materials should accord preferential treatment. “Cooling” is incidental to roasting because after roasting, the nuts automatically will need to cool down below the temperature at which they

<sup>4</sup> The comment addresses the facts from NY E87234, dated October 1, 1999, which is one of the six ruling letters being modified along with the NY ruling letter at issue, NY N228118.

<sup>5</sup> We note that aside from “salting”, the other operations noted by the commenter (mixing with other ingredients, screening, aspiration, cooling, and packaging in usually small packaging) were not discussed in the original fact pattern to NY E87234. However, we will discuss them in our response.

were roasted. Likewise, “screening” and “aspiration” are incidental to roasting because they are performed to check the quality of the roasted nuts as a result of their roasting. Lastly, we note that we are not bound by cases from the Canadian International Trade Tribunal.

Accordingly, we find that salting is a process incidental to roasting and does not render the product originating. Rather, the origin of the product as imported is determined by the origin of the nuts in the “fresh” state per GN 12(s)(ii), HTSUS. Given the foregoing, the roasted and salted cashew nuts may not be treated as originating because they do not meet the requirements of GN 12(s)(ii), HTSUS; that is, they were not wholly obtained or produced entirely in Mexico, Canada, or the United States as fresh nuts. Therefore, the prepared cashew nuts imported from Canada do not qualify for preferential tariff treatment under the NAFTA.

### *Marking*

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. § 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the United States shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. § 1304 was “that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will.” *United States v. Friedlaender & Co.*, 27 CCPA 297, 302, C.A.D. 104 (1940). Part 134, CBP Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. § 1304.

Section 134.1(b), CBP Regulations (19 CFR § 134.1(b)), defines “country of origin” as:

[T]he country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the “country of origin” within the meaning of [the marking laws and regulations]; however, for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin.

Part 102, CBP Regulations (19 CFR Part 102), sets forth the NAFTA Rules of Origin for country of origin marking purposes. As the cashew nuts were grown in non-NAFTA countries, Section 102.11(a)(1) and (2) do not apply. Section 102.11(a)(3) provides:

The country of origin of a good is the country in which ... each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in § 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

“Foreign material’ means a material whose country of origin as determined under these rules is not the same as the country in which the good is produced.” 19 CFR § 102.1(e).

Under the provisions of 19 CFR § 102.20, the tariff shift rule for subheading 2008.19, HTSUS, provides as follows:

A change to subheading 2008.19 through 2008.99 from any other chapter, provided that the change is not the result of mere blanching of nuts.

However, the note from Chapter 20, HTSUS, provides:

Notwithstanding the specific rules of this chapter, fruit, nut and vegetable preparations of Chapter 20 that have been prepared or preserved merely by freezing, by packing (including canning) in water, brine or natural juices, or by roasting, either dry or in oil (including processing incidental to freezing, packing or roasting), shall be treated as a good of the country in which the fresh good was produced.

Based on the note from Chapter 20, HTSUS, the country of origin of the cashew nuts is not determined by 19 CFR § 102.11(a) (incorporating 19 CFR § 102.20), and the next step in the country of origin marking determination is provided in 19 CFR § 102.11(b), which states:

Except for a good that is specifically described in the Harmonized System as a set, or is classified as a set pursuant to General Rule of Interpretation 3, where the country of origin cannot be determined under paragraph (a) of this section:

(1) The country of origin of the good is the country or countries of origin of the single material that imparts the essential character of the good...

“Material’ means a good that is incorporated into another good as a result of production with respect to that other good, and includes parts, ingredients, subassemblies, and components.” 19 CFR § 102.1(l).

“For purposes of identifying the material that imparts the essential character to a good under §102.11, the only materials that shall be taken into consideration are those domestic or foreign materials that are classified in a tariff provision from which a change in tariff classification is not allowed under the §102.20 specific rule or other requirements applicable to the good.” 19 CFR § 102.18(b)(1).

Pursuant to 19 CFR § 102.11(b) (incorporating 19 CFR § 102.18(b)(1)), we find that the single material that imparts the essential character of the finished good is the cashew nuts. Therefore, the prepared nuts may not be marked as goods of Canada, but rather must be marked to indicate that they are products of the non-NAFTA countries from where they originate.

#### **HOLDING:**

NY N228118 is modified to reflect that, by application of GN 12(s)(ii), HTSUS, the roasted and salted cashew nuts imported from Canada are not eligible for preferential tariff treatment under the NAFTA. In addition, by application of the note from Chapter 20, HTSUS, 19 CFR § 102.11(a) and (b), 19 CFR § 102.18(b)(1), and 19 CFR § 102.20, the prepared cashew nuts may not be marked as goods of Canada, but rather must be marked to indicate that they are products of the non-NAFTA countries from where they originate. The tariff classification of the prepared cashew nuts is unchanged.

**EFFECT ON OTHER RULINGS:**

NY N228118, dated August 8, 2012, is hereby MODIFIED. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

*Sincerely,*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*

◆◆◆◆◆

**PROPOSED MODIFICATION OF ONE RULING LETTER  
AND REVOCATION OF TREATMENT RELATING TO THE  
TARIFF CLASSIFICATION OF CEREAL BARS**

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

**ACTION:** Notice of proposed modification of one ruling letter and revocation of treatment relating to the tariff classification of cereal bars.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to modify New York Ruling Letter (NY) N211715, concerning the tariff classification of cereal bars under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments are invited on the correctness of the proposed actions.

**DATES:** Comments must be received on or before April 8, 2016.

**ADDRESSES:** Written comments are to be addressed to the U.S. Customs and Border Protection, Office of International Trade, Regulations & Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118

**FOR FURTHER INFORMATION CONTACT:** Claudia Garver, Tariff Classification and Marking Branch, Regulations and Rulings, Office of International Trade at (202) 325–0024.

## 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) (“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 public 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 to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the tariff classification of cereal bars. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) N211715, dated April 27, 2012 (Attachment A), this notice covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. 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 advise 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 proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer’s failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of

reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N211715, CBP classified two cereal bars, the Kellogg's Frosted Flakes Bar and the Froot Loops Bar, in heading 1704, HTSUS, specifically in subheading 1704.90.35, HTSUS, which provides for "Sugar confectionery (including white chocolate), not containing cocoa." It is now CBP's position that the Frosted Flakes Bar is properly classified in heading 1806, HTSUS, specifically in subheading 1806.32.90, HTSUS, which provides for "Chocolate and other food preparations containing cocoa."

Pursuant to 19 U.S.C. §1625(c)(1), CBP is proposing to modify NY N211715 and to revoke any other ruling not specifically identified to reflect the tariff classification of the subject merchandise according to the analysis contained in proposed Headquarters Ruling Letter ("HQ") H269530, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated: January 19, 2016

*Sincerely,*

JACINTO JUAREZ

*for*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*

Attachments

## [ATTACHMENT A]

April 27, 2012

CLA-2-17:OT:RR:NC:232

CATEGORY: Classification

TARIFF NO.: 1704.90.3550

MS. PAMALA STURHAN  
KELLOGG COMPANY  
67 W. MICHIGAN AVENUE  
BATTLE CREEK, MI 49016

RE: The tariff classification of Kellogg's Froot Loop and Frosted Flake Bars from Mexico

DEAR MS. STURHAN:

In your letter dated March 29, 2012 you requested a classification ruling. Samples were submitted along with your request. They were examined and disposed of. The products, Froot Loops Bars and Frosted Flakes Bars are imported under the "Kellogg's" brand name. They are sold to consumers in multi-pack boxes and as individual bars through various retail outlets such as grocery stores and drug stores.

The Froot Loops Bars are a multi-colored cereal shaped in bar form with a vanilla flavored coating on the bottom portion of the bar. The cereal bar is packed in a foil wrapping, decorated with the Kellogg's Froot Loops logo and has a net weight of 18 grams. They are said to contain 20-30 percent froot loop cereal, 10-20 percent vanilla flavored coating, 6-12 percent glucose solids, 6-12 percent glucose, 6-12 percent high fructose corn syrup, 2-6 percent palm oil, 2-6 percent sugar, 2-6 percent dextrose and less than 2 percent of the following: invert sugar, sorbitol, tricalcium phosphate, glycerin, partially hydrogenated soybean and cottonseed oil, vitamin C (ascorbic acid), soy lecithin, natural flavors, maltodextrin, vitamin E (alpha tocopherol), Vitamin B6 (pyridoxine hydrochloride), vitamin B1 (thiamin mononitrate) and BHT.

The Frosted Flakes Bars are corn flakes shaped in bar form with a chocolate flavored coating on the bottom of the bar. The cereal bar is packaged in a foil wrapping, decorated with the Kellogg's Frosted Flakes logo and has a net weight of 21 grams. They are said to contain 35-75 percent corn flakes, 15-25 percent chocolate flavored coating (cocoa content is less than 6 percent), 3-9 percent glucose, 3-9 percent high fructose corn syrup, 2-6 percent glucose solids, 2-6 percent soybean and palm oil, 2-6 percent sugar, 2-6 percent dextrose and less than 2 percent of the following: invert sugar, natural flavor, nonfat milk, tricalcium phosphate, sorbitol, glycerin, color added, soy lecithin, vitamin C (ascorbic acid), maltodextrin, wheat starch, vitamin E (alpha tocopherol), vitamin B1 (thiamin mononitrate), vitamin B6 (pyridoxine hydrochloride) and BHT.

In your letter, you suggested that both bars should be classified in either heading 1904, Harmonized Tariff Schedule of the United States (HTSUS), as a prepared food or heading 2106, Harmonized Tariff Schedule of the United States (HTSUS), as other food preparations not elsewhere specified or included. Based on the information provided, we disagree with your proposal.

The bars will be classified in heading 1704 as confectionery, as they are excluded from classification as a sweetened food preparation of Chapter 19 as stated in the language of the HTSUS, the Explanatory Notes (ENs). CBP has

consistently taken the position that a confection is a product that, in its condition as imported, is ready for consumption at retail as a confectionery, is marketed as such and is not an ingredient of another food. In their condition as imported, the Froot Loops and Frosted Flakes Bars are ready for consumption without further preparation and they are not sold as an ingredient of another food.

In summary, because the Froot Loop and Frosted Flakes Bars are sweet-tasting articles eaten for their sweetness, composed mostly of sugar, are ready for consumption, are viewed by Kellogg as a confectionery, and are marketed and sold as snacks, the Bars belong to the class or kind of goods that are considered confectioneries. In addition, because the Bars are a cereal which is coated with sugar in a proportion that gives it the character of a sugar confectionery of heading 1704, HTSUS, pursuant to EN 19.04(a)

The applicable subheading for the Kellogg Froot Loop and Frosted Flake Bars will be 1704.90.3550, Harmonized Tariff Schedule of the United States (HTSUS), which provides for sugar confectionery (including white chocolate), not containing cocoa: other: confections or sweetmeats ready for consumption: other: other: put up for retail sale: other. The rate of duty will be 5.6 percent ad valorem.

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

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling FDA at 301-575-0156, or at the Web site [www.fda.gov/oc/bioterrorism/bioact.html](http://www.fda.gov/oc/bioterrorism/bioact.html).

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Frank Troise at 646-733-3031.

*Sincerely,*

THOMAS J. RUSSO  
*Director*

*National Commodity Specialist Division*

## [ATTACHMENT B]

HQ H269530  
CLA-2 OT:RR:CTF:TCM H269530 CkG  
CATEGORY: Classification  
TARIFF NO: 1806.32.90

Ms. PAMALA STURHAN  
U.S. FOREIGN TRADE COMPLIANCE MANAGER  
KELLOGG COMPANY  
67 W. MICHIGAN AVENUE  
BATTLE CREEK, MI 49016

Re: Modification of NY N211715; classification of Kellogg's cereal bars

DEAR Ms. STURHAN,

This is in response to your request of August 4, 2014, for the reconsideration of New York Ruling Letter (NY) N211715, dated April 27, 2012, contesting Customs and Border Protection's (CBP) classification of the Kellogg's Frosted Flakes Bar in heading 1704, HTSUS, as sugar confectionery. In NY N211715, two Kellogg's cereal bars, the Froot Loops Bar and the Frosted Flakes Bar, were classified in heading 1704, HTSUS. You claim that the Kellogg's Frosted Flakes Bar is classified in heading 1806, HTSUS, heading 1904, HTSUS, or alternatively in heading 2106, HTSUS. You do not contest the classification of the Froot Loops Bar. We have reviewed NY N211715 and have determined that it is incorrect with regard to the classification of the Frosted Flakes Bar.

**FACTS:**

In NY N211715, the Frosted Flakes Bars were described as follows:

The Frosted Flakes Bar consists of corn flakes shaped in bar form with a chocolate flavored coating on the bottom of the bar. The cereal bar is packaged in a foil wrapping, decorated with the Kellogg's Frosted Flakes logo and has a net weight of 21 grams. It is said to contain 35–75 percent corn flakes, 15–25 percent chocolate flavored coating (cocoa content is less than 6 percent), 3–9 percent glucose, 3–9 percent high fructose corn syrup, 2–6 percent glucose solids, 2–6 percent soybean and palm oil, 2–6 percent sugar, 2–6 percent dextrose and less than 2 percent of the following: invert sugar, natural flavor, nonfat milk, tricalcium phosphate, sorbitol, glycerin, color added, soy lecithin, vitamin C (ascorbic acid), maltodextrin, wheat starch, vitamin E (alpha tocopherol), vitamin B1 (thamin mononitrate), vitamin B6 (pyridoxine hydrochloride) and BHT.

Based on additional information provided by Kellogg, the total cocoa content of the Frosted Flakes Bar is approximately 1.5% by weight on a defatted basis, and it contains approximately 26% of added sugars and sweeteners in the form of ingredients such as glucose and high fructose corn syrup.

**ISSUE:**

Whether the Frosted Flakes Bar is classified in heading 1704, HTSUS, as sugar confectionery; in heading 1806, HTSUS, as a food preparation containing cocoa; in heading 1904, HTSUS, as a cereal product; or in heading 2106, HTSUS, as a food preparation not elsewhere specified or included.

**LAW AND ANALYSIS:**

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes, and, provided such headings or notes do not otherwise require, according to the remaining GRI's." In other words, classification is governed first by the terms of the headings of the tariff and any relative section or chapter notes.

The HTSUS provisions at issue are as follows:

- 1704: Sugar confectionery (including white chocolate), not containing cocoa
- 1704.90: Other:
  - Confections or sweetmeats ready for consumption:
  - Other:
  - 1704.90.35: Other....
    - \* \* \* \*
- 1806: Chocolate and other food preparations containing cocoa:
  - Other, in blocks, slabs or bars:
  - 1806.32: Not filled:
    - Other:
    - 1806.32.90: Other...
      - \* \* \* \*
- 1904: Prepared foods obtained by the swelling or roasting of cereals or cereal products (for example, cornflakes); cereals (other than corn (maize)) in grain form or in the form of flakes or other worked grains (except flour, groats and meal), pre-cooked or otherwise prepared, not elsewhere specified or included:
- 1904.10.00: Prepared foods obtained by the swelling or roasting of cereals or cereal products....
- 2106: Food preparations not elsewhere specified or included:
- 2106.90: Other...
  - \* \* \* \*

Note 1 to Chapter 17 provides as follows:

1. This Chapter does not cover:

(a) Sugar confectionery containing cocoa (heading 18.06);

The Legal Notes to Chapter 18 provide as follows:

1. This Chapter does not cover the preparations of heading 04.03, 19.01, 19.04, 19.05, 21.05, 22.02, 22.08, 30.03 or 30.04.
2. Heading 18.06 includes sugar confectionery containing cocoa and, subject to Note 1 to this Chapter, other food preparations containing cocoa.

Note 3 to Chapter 19 provides as follows:

3. Heading 1904 does not cover preparations containing more than 6 percent by weight of cocoa calculated on a totally defatted basis or completely coated with chocolate or other food preparations containing cocoa of heading 1806 (heading 1806).

\* \* \* \*

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

The General Explanatory Notes to Chapter 17 provide, in pertinent part, as follows:

The Chapter **does not include**:

- (a) Sugar confectionery containing cocoa or chocolate (**other than** white chocolate) in any proportion, and sweetened cocoa powders (**heading 18.06**).
- (b) Sweetened food preparations of **Chapter 19, 20, 21 or 22**.

The General EN to Chapter 18 provides, in pertinent part, as follows:

This Chapter covers cocoa (including cocoa beans) in all forms, cocoa butter, fat and oil and preparations containing cocoa (in any proportion), **except**:

...

- (c) Food preparations of flour, groats, meal, starch or malt extract, containing less than 40 % by weight of cocoa calculated on a totally defatted basis, and food preparations of goods of headings 04.01 to 04.04 containing less than 5 % by weight of cocoa calculated on a totally defatted basis, of **heading 19.01**.
- (d) Swelled or roasted cereals containing not more than 6 % by weight of cocoa calculated on a totally defatted basis (**heading 19.04**).
- (e) Pastry, cakes, biscuits and other bakers' wares, containing cocoa (**heading 19.05**).

...

EN 18.06 provides, in pertinent part, as follows:

The heading also includes all sugar confectionery containing cocoa in any proportion (including chocolate nougat), sweetened cocoa powder, chocolate powder, chocolate spreads, and, in general, all food preparations containing cocoa (other than those excluded in the General Explanatory Note to this Chapter).

The EN to heading 19.04 provides, in pertinent part, as follows:

- (A) Prepared foods obtained by the swelling or roasting of cereals or cereal products (for example, corn flakes).

This group covers a range of food preparations made from cereal grains (maize, wheat, rice, barley, etc.) which have been made crisp by swelling or roasting. They are mainly used, with or without milk, as breakfast foods. Salt, sugar, molasses, malt extract, fruit or cocoa (see Note 3 and the General Explanatory Note to this Chapter), etc., may have been added during or after their manufacture.

...

The heading also excludes:

- (a) Prepared cereals coated or otherwise containing sugar in a proportion which gives them the character of sugar confectionery (heading 17.04).
- (b) Preparations containing more than 6 % by weight of cocoa calculated on a totally defatted basis or completely coated with chocolate or other food preparations containing cocoa of heading 18.06 (heading 18.06).

\* \* \* \*

In NY N211715, dated April 27, 2012, CBP classified the Frosted Flakes Bar in heading 1704, HTSUS, as sugar confectionery. You argue that the Frosted Flakes Bar is not classified in heading 1704, HTSUS, because it contains cocoa and because the Explanatory Notes to Chapter 17 exclude “Sweetened food preparations of Chapter 19, 20, 21 or 22” from classification in Chapter 17. You argue that it is properly classified in either heading 1904, HTSUS, as “prepared foods obtained by the swelling or roasting of cereals or cereal products”, or, if CBP determines that it has the character of confectionery, in heading 1806, HTSUS, as “other food preparations containing cocoa.” Alternatively, you suggest classification in heading 2106, HTSUS, as a food preparation not elsewhere specified or included.

Heading 1704, HTSUS, provides for “Sugar confectionery (including white chocolate), *not containing cocoa*” (emphasis added). Note 1 to Chapter 17 reiterates that Chapter 17 does not include “sugar confectionery containing cocoa (heading 18.06)”, and the EN to heading 17.04 further elaborates that heading 1704, HTSUS, excludes “Sugar confectionery containing cocoa or chocolate (other than white chocolate) *in any proportion*, and sweetened cocoa powders (heading 18.06).” (emphasis added). The classification of sugar confectionery containing cocoa is directed to heading 1806, HTSUS. Thus, in order for the Frosted Flakes Bar to be classified in heading 1704, HTSUS, it must be “sugar confectionery” within the meaning of the heading, and it must not contain cocoa or chocolate.

The term “confectionery” is not defined in the HTSUS. However, CBP has adopted the meaning of the term given by the United States Customs Court (now the Court of International Trade) in *Leaf Brands, Inc. v. United States*, (“*Leaf Brands*”) 70 Cust. Ct. 66 (1973).<sup>1</sup> The Court defined “confectionery” as the “many kinds of sweet-tasting articles which are eaten as such for their taste and flavor without further preparation and which are usually sold in confectionery outlets.” *Id.* at 71. Further, the Court found that whether an article is confectionery is determined by its chief use as a confection, which may be evidenced by its character and design and the manner in which it is sold (i.e., through candy brokers, in confectionery outlets), rather than by its

<sup>1</sup> This case was decided under the Tariff Schedules of the United States (TSUS). Decisions by the courts interpreting the TSUS are not deemed dispositive under the HTSUS. However, on a case-by-case basis, prior decisions should be considered instructive in interpreting the HTSUS, particularly where the nomenclature previously interpreted in those decisions remains unchanged and no dissimilar interpretation is required by the text of the HTSUS. See House Conference Report No. 100–576, dated April 20, 1998, on the Omnibus Trade and Competitiveness Act of 1988 (P.L. 100–418). In this instance, we consider *Leaf Brands v. United States*, 70 Cust. Ct. 66 (1973), to be instructive because it involves the interpretation of the identical tariff term “confectionery”.

shape and texture.<sup>2</sup> *Id.* at 72. Following *Leaf Brands*, CBP has consistently taken the position that a confection is a product that, in its condition as imported, is ready for consumption at retail as a confectionery and is marketed as such; it is not an ingredient of another food product. *See, e.g.*, HQ 086101, dated February 27, 1990 (peanut flavored chips), HQ 085206, dated February 23, 1990 (white chocolate in 5 kg blocks), HQ 955580, dated July 30, 2002, and HQ 965211, dated August 1, 2002 (chocolate fish).

As the instant product is no longer in production, we cannot ascertain the manner in which it is sold or marketed. However, we can ascertain from the ingredients, specifically the high proportion of added sugars, that the Frosted Flakes Bar has the character of confectionery. The aforementioned ingredients collectively comprise more than 26% of the Frosted Flakes Bar, without counting the additional sugar present in the frosted flakes and chocolate coating (Frosted Flakes cereal is stated to contain 10 g of sugar per 29 grams of cereal, but the sugar in the chocolate coating is not broken down by amount). Thus, the Frosted Flakes Bar has the character of a sugar confectionery.

The Kellogg's Frosted Flakes Bar contains roughly 1.5% cocoa on a defatted basis. Although the total cocoa content of the bar is low, the heading text and ENs to heading 1704, HTSUS, are clear that any amount of cocoa is sufficient to exclude a product of sugar confectionery from this heading. Thus, although the Frosted Flakes Bar has the character of sugar confectionery, we agree that because it contains cocoa, it cannot be classified in heading 1704, HTSUS.

You suggest that the Frosted Flakes Bar is classified in either heading 1806, HTSUS, heading 1904, HTSUS, or heading 2106, HTSUS. Note 1 to Chapter 17 and Note 2 to Chapter 18 direct the classification of sugar confectionery containing cocoa to heading 1806, HTSUS. The Frosted Flakes Bar, as a sugar confectionery containing cocoa, is thus classified in heading 1806, HTSUS, and not heading 1904, HTSUS. Note 3 to Chapter 19 confirms that "heading 19.04 does not cover preparations containing more than 6% by weight of cocoa calculated on a totally defatted basis or completely coated with chocolate *or other food preparations containing cocoa of heading 18.06 (18.06)*" (emphasis added). Thus, because the Frosted Flakes Bar has the character of sugar confectionery, it is excluded from classification as a food preparation of Chapter 19 or heading 1904, HTSUS. *See also*, HQ H200575, dated April 16, 2012. Because the Frosted Flakes Bar is specifically provided for in heading 1806, HTSUS, it cannot be classified in heading 2106, HTSUS.

By comparison, CBP has consistently classified snack bars containing cocoa in heading 1806, HTSUS. *See, e.g.*, NY N041325, dated October 29, 2008 (Kashi Cherry Dark Chocolate granola bar); NY N028269, dated May 16, 2008 (Sesame & Peanuts with Chocolate Bar), NY M80106, dated February 8, 2006 (protein and energy bars); NY L89983, dated February 7, 2006 (Crispy Rice with Chocolate bar); and NY J83776, dated May 27, 2003 ("banana & muesli with chocolate" bar).

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<sup>2</sup> The concept of "chief use" which stemmed from the TSUS, has been superseded by the concept of "principal use" contained in Additional U.S. Rule of Interpretation 1(a), HTSUS.

**HOLDING:**

Pursuant to GRIs 1 and 6, the Kellogg's Frosted Flakes Bar is classified in heading 1806, HTSUS, specifically subheading 1806.32.90, HTSUS, which provides for "Chocolate and other food preparations containing cocoa: Other, in blocks, slabs or bars: Not filled: Other: Other." The 2016, column one, general rate of duty is 6% *ad valorem*.

**EFFECT ON OTHER RULINGS:**

NY N211715, dated April 27, 2012, is hereby modified.

*Sincerely,*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*



**PROPOSED MODIFICATION OF TWO RULING LETTERS  
AND PROPOSED REVOCATION OF TREATMENT  
RELATING TO THE APPLICABILITY OF SUBHEADING  
9801.00.20, HTSUS TO CERTAIN AUTOMOBILE PARTS**

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

**ACTION:** Notice of proposed modification of two ruling letters and the revocation of treatment relating to the applicability of subheading 9801.00.20, Harmonized Tariff Schedule of the United States (HTSUS) to certain automobile parts.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that CBP intends to modify two New York ruling letters pertaining to the applicability of subheading 9801.00.20, HTSUS to certain automobiles parts. Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments are invited on the correctness of the proposed action.

**DATES:** Comments must be received on or before April 8, 2016.

**ADDRESSES:** Written comments are to be addressed to the U.S. Customs and Border Protection, Office of International Trade, Regulations & Rulings, Attn: Trade and Commercial Regulations Branch, 10th Floor, 90 K St. NE, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above

during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325-0118.

**FOR FURTHER INFORMATION CONTACT:** Teresa M. Frazier, Valuation and Special Programs Branch, Regulations and Rulings, Office of International Trade (202) 325-0139.

## **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 amends many sections of the Tariff Act of 1930, as amended, and related laws. Two 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 to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that CBP is proposing to modify two ruling letters pertaining to the applicability of subheading 9801.00.20, HTSUS to certain automobile parts. Although in this notice, CBP is specifically referring to New York Ruling Letter (NY) N263924, dated May 5, 2015, (Attachment A), and N260230, dated December 30, 2014 (Attachment B), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the ones identified. No further rulings have been

found. Any party who has received an interpretive ruling or decision (i.e. a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise 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 proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in seeking duty-free treatment of substantially identical transactions under subheading 9801.00.20, HTSUS should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N263924, CBP found imported products consisting of brake pad hardware kits to be exempt from duties pursuant to subheading 9801.00.20, HTSUS. In NY N260230, CBP determined that certain automobile parts, such as tie rods, slip sleeves, oil seals, brake pad and hub assemblies, were exempt from duties under subheading 9801.00.20, HTSUS. It is now CBP's position that these two decisions are incorrect and that the goods in both decisions are not eligible for duty-free treatment under subheading 9801.00.20, HTSUS.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP intends to modify NY N263924 and NY N260230 (set forth in Attachments A and B to this document), and any other ruling not specifically identified in order to reflect the proper tariff treatment of the merchandise pursuant to the analysis in Headquarters Ruling (HQ) H270377, (set forth as Attachment C to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: January 21, 2016

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

## [ATTACHMENT A]

N263924

May 5, 2015

CLA-2-98:OT:RR:NC:N1:106

CATEGORY: Classification

TARIFF NO.: 9801.00.2000

LYNN MAYNE,  
NORTH AMERICAN TRADE COMPLIANCE MANAGER  
FEDERAL MOGUL MOTORPARTS CORPORATION  
27300 WEST ELEVEN MILE ROAD  
SOUTHFIELD, MI 48034-6147

RE: The applicability of subheading 9801.00.2000, HTSUS, to various automobile parts from China, Taiwan, South Korea, Denmark and Germany, re-packaged in Mexico

DEAR Ms. MAYNE:

In your letter dated April 17, 2015, you requested a ruling on whether various automobile parts were eligible for treatment under subheading 9801.00.20, Harmonized Tariff Schedule of the United States (HTSUS).

As per your telephone conversation with this office on Monday, April 27, 2015, you stated that this ruling request differs from NY N260230, dated December 30, 2014, due to the fact that even though the same process is being performed, it is done at a different facility in Mexico with a different product line.

The imported products consist of the components of brake pad hardware kits. The complete “bill of materials” list of these individual items was e-mailed to this office on Monday, April 27, 2015. In your request, you state that these items were manufactured in either China, Taiwan, South Korea, Denmark or Germany and are imported in bulk by Federal Mogul Motorparts Corporation (FMM). Either FMM pays customs duties on these articles or it purchases them from US distributors who have already paid the respective duties. Following importation or purchase, FMM will export the various components, in-bond, to a warehouse located in Juarez, Mexico where they will pack them into retail packaging.

Section 141.2 of the Customs Regulations (19 CFR 141.2) states that “Dutiable merchandise imported and afterwards exported even though duty thereon may have been paid on the first importation, is liable to duty on every subsequent importation into the Customs territory of the United States” unless specifically exempted therefrom under the Harmonized Tariff Schedule of the United States (HTSUS). Subheading 9801.00.2000, 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 of 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 same person who imported it into, and exported it from, the United States.”

Customs does not consider the mere packaging of 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). Also see Headquarters Ruling Letter (HRL) 555624, dated May 1, 1990, which ruled that perfumes packaged into sample pouches abroad were not advanced in value or improved in condition for purposes of subheading 9801.00.10, HTSUS, treatment.

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 district director that the article for which free entry is claimed was exported from the United States under a lease or similar use agreement. According to *Black's Law Dictionary 179* (5th ed. 1979), a bailment is "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 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." Headquarters ruled, in HRL 560511, dated November 18, 1997, that "bailment" is a "similar use agreement" for the purposes of subheading 9801.00.20, HTSUS.

You assert that your transaction meets all the requirements for consideration of duty free entry under subheading 9801.00.2000, HTSUS. Specifically, you indicate that the components of brake pad hardware kits, being previously imported and duty paid where applicable, would be subject solely to packaging operations while in Mexico. Further, the subject automotive parts would be exported under conditions that would constitute exportation pursuant to a lease or similar use agreement and FMM, would be the importer, exporter and reimporter of the merchandise.

Based on the information submitted, the components of the brake pad hardware kits that are manufactured in either China, Taiwan, South Korea, Denmark and Germany and are re-packaged in Mexico will be eligible for duty-free treatment under subheading 9801.00.2000, HTSUS, when returned to the United States, ***provided that the district director at the port of entry (El Paso, Texas)*** is satisfied that FMM previously imported the various automobile parts in bulk and paid duty thereon; FMM purchases them from US distributors that have already paid customs duties on the articles; they are reimported by or for the account of FMM; and the documentary requirements of section 10.108, Customs Regulations, are satisfied. This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177). A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, please contact National Import Specialist Matthew Sullivan at [matthew.sullivan@cbp.dhs.gov](mailto:matthew.sullivan@cbp.dhs.gov).

*Sincerely,*

GWENN KLEIN KIRSCHNER

*Director*

*National Commodity Specialist Division*

## [ATTACHMENT B]

N260230

December 30, 2014

CLA-2-98:OT:RR:NC:N1:106

CATEGORY: Classification

TARIFF NO.: 9801.00.2000

SYDNEY H. MINTZER, ATTORNEY  
MAYER BROWN, LLP  
1999 K STREET, NW  
WASHINGTON, DC 20006-1101

RE: The applicability of subheading 9801.00.2000, HTSUS, to various automobile parts from China and South Korea, re-packaged in Mexico

DEAR MR. MINTZER:

In your letter dated December 16, 2014, you requested a ruling on behalf of Federal-Mogul Motorparts (FMM) Corporation of Southfield, Michigan on whether various automobile parts were eligible for treatment under subheading 9801.00.20, Harmonized Tariff Schedule of the United States (HTSUS).

The imported products consist of automobile parts, such as tie rods, slip sleeves, oil seals, brake pads and hub assemblies. You state that these items were manufactured in China or South Korea and imported in bulk by FMM. Either FMM pays customs duties on these articles or it purchases them from US distributors who have already paid the respective duties. Following importation or purchase, FMM will export the various automobile parts to a contractor in Mexico who will pack them into retail packaging. FMM will retain ownership of all of the articles shipped to Mexico. They will then reimport the packaged various automobile parts back into the United States.

Section 141.2 of the Customs Regulations (19 CFR 141.2) states that “Dutiable merchandise imported and afterwards exported even though duty thereon may have been paid on the first importation, is liable to duty on every subsequent importation into the Customs territory of the United States” unless specifically exempted therefrom under the Harmonized Tariff Schedule of the United States (HTSUS). Subheading 9801.00.2000, 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 of 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 same person who imported it into, and exported it from, the United States.”

Customs does not consider the mere packaging of 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). Also see Headquarters Ruling Letter (HRL) 555624, dated May 1, 1990, which ruled that perfumes packaged into sample pouches abroad were not advanced in value or improved in condition for purposes of subheading 9801.00.10, HTSUS, treatment.

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 district director that the article for which free entry is claimed was exported from the United States under a lease or similar use agreement. According to *Black's Law Dictionary 179* (5th ed. 1979), a bailment is “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 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.” Headquarters ruled, in HRL 560511, dated November 18, 1997, that “bailment” is a “similar use agreement” for the purposes of subheading 9801.00.20, HTSUS.

You assert that your client's transaction meets all the requirements for consideration of duty free entry under subheading 9801.00.2000, HTSUS. Specifically, you indicate that the various automobile parts, being previously imported and duty paid where applicable, would be subject solely to packaging operations and would not be otherwise advanced in value or improved in condition by any process or manufacture while in Mexico. Further, the subject automotive parts would be exported under conditions that would constitute exportation pursuant to a lease or similar use agreement and your client, FMM, would be the importer, exporter and reimporter of the merchandise.

Based on the information submitted, the various automobile parts that are manufactured in either China or South Korea and re-packaged in Mexico will be eligible for duty-free treatment under subheading 9801.00.2000, HTSUS, when returned to the United States, provided that the district director at the port of entry is satisfied that FMM previously imported the various automobile parts in bulk and paid duty thereon; FMM purchases them from US distributors that have already paid customs duties on the articles; they are reimported by or for the account of FMM; FMM exported the bags from the U.S. under a lease or a similar use agreement; and the documentary requirements of section 10.108, Customs Regulations, are satisfied.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, please contact National Import Specialist Matthew Sullivan at [matthew.sullivan@cbp.dhs.gov](mailto:matthew.sullivan@cbp.dhs.gov).

*Sincerely,*

GWENN KLEIN KIRSCHNER

*Director*

*National Commodity Specialist Division*

## [ATTACHMENT C]

HQ H270377

CLA-2 OT:RR:CTF:VSP H270377 tmf

CATEGORY: Classification

TARIFF NO.: 9801.00.20

LYNN MAYNE,  
NORTH AMERICAN TRADE COMPLIANCE MANAGER  
FEDERAL MOGUL MOTORPARTS CORPORATION  
27300 WEST ELEVEN MILE ROAD  
SOUTHFIELD, MICHIGAN 48034-6147

RE: Proposed Modification of New York Ruling Letters (NY) N260230, dated December 30, 2014 and N263924, dated May 5, 2015; Applicability of sub-heading 9801.00.20, HTSUS, to foreign automobile parts re-packaged in Mexico

DEAR Ms. MAYNE:

This letter is to inform you that U.S. Customs and Border Protection (CBP) has reconsidered New York Ruling Letters (NY) N263924, dated May 5, 2015 and N260230, dated December 30, 2014. In both rulings, CBP determined that various automobile parts were eligible for duty-free treatment under subheading 9801.00.20, Harmonized Tariff Schedules of the United States (HTSUS). We reviewed NY N260230 and NY N263924 and found them to be incorrect with respect to the duty-free treatment of the automobile parts acquired by a U.S. distributor. For the reasons set forth below, we are proposing to modify these rulings.

**FACTS:**

In NY N260230, Federal Mogul Motorparts Corporation (FMM) purchased automobile parts, such as tire rods, slip sleeves, oil seals, brake pads and hub assemblies and paid duty thereon, or purchased them from U.S. distributors who had already paid the respective duties. FMM shipped the parts to Mexico, and then reimported the packaged various automobile parts back into the United States. In NY N263924, components of brake pad hardware manufactured in either China, Taiwan, South Korea, Denmark or Germany were imported in bulk by FMM. Similarly, the ruling states that “[e]ither FMM pays customs duties on these articles or it purchases them from U.S. distributors who have already paid the respective duties.” The ruling also states that “N263924 differs from NY N260230, due to the fact that even though the same process is being performed, following importation or purchase, FMM will export the various components, in-bond, to a warehouse in Juarez, Mexico where the goods will be packed into retail packaging for a different product line.”

In both rulings, CBP found the goods were previously imported, duty was paid where applicable, and there was no advancement in value or improvement in condition by any process or manufacture while in Mexico. In addition, both rulings noted that the requester stated that the goods would be exported from Mexico under conditions that would constitute exportation under a lease or similar use agreement, and FMM would be the importer, exporter and reimporter of the merchandise.

**ISSUE:**

Whether the merchandise described in NY N263924 and NY N260230 qualifies for duty-free treatment under subheading 9801.00.20, HTSUS.

**LAW AND ANALYSIS:**

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 (CBERA) or Title V of the Trade Act of 1974 (Generalized System of Preferences)(GSP), 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 [emphasis added].

Section 10.108 of the U.S. Customs and Border Protection (“CBP”) Regulations, 19 C.F.R. § 10.108, provides 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 without having been advanced in value or improved in condition by any process of manufacture or other means, was exported from the United States under a lease or similar use agreement, and is being reimported by or for the account of the person who previously imported it into, and exported it from the United States. It should be noted that CBP has denied subheading 9801.00.20, HTSUS, treatment in situations where such evidence was not provided. See, e.g., Headquarters Ruling Letters (“HQ”) H232917, dated June 27, 2013 (denying protest and finding insulated concrete mold was not entitled to duty-free entry under subheading 9801.00.20, HTSUS because no evidence was provided to establish the previous importation and subsequent importation were by or for the account of the same person).

Under the CBP Regulations, an “importer” is “the person primarily responsible for the payment of any duties on the merchandise, or an authorized agent acting on his behalf.” 19 CFR § 101.1. Every importer is required to have an importer identification number. See 19 CFR § 24.5. We reviewed NY N263924 and N260230 and conclude that both decisions are not in conformity with the requirements of 19 C.F.R. § 10.108. The facts in each ruling state that either FMM pays the customs duties on the articles, or FMM purchases the goods from U.S. distributors who have already paid the respective duties. The rulings do not indicate that a U.S. distributor acted as an agent “by or for the account of FMM.” Subheading 9801.00.20, HTSUS, clearly requires that the re-importation must be by or for the account of the person or entity that imported it into, and exported it from the U.S. Therefore, based on the facts in both rulings, the U.S. distributor is the party who imported the parts in the first instance, and this does not satisfy the requirement that the parts are reimported by, or for the account of FMM. See HQ H232917, (citing to HQ 560256, dated July 23, 1997, and HQ 561005, dated Aug. 5, 1998). In sum, since both rulings failed to provide evidence that the previous importation or

subsequent importation is “by or for the account of FMM”, we find the requirements of subheading 9801.00.20, HTSUS, and 19 C.F.R. § 10.108 are not met, to the extent that the parts are acquired by FMM from a U.S. distributor.

**HOLDING:**

The merchandise described in New York Ruling Letters (NY) N263924 and N260230 is not entitled to duty-free entry under subheading 9801.00.20, HTSUS, to the extent that the parts are acquired by FMM from a U.S. distributor.

**EFFECT ON OTHER RULINGS:**

New York Ruling Letters N263924, dated May 5, 2015 and N260230, dated December 30, 2014, are hereby MODIFIED. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

*Sincerely,*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*



**PROPOSED MODIFICATION OF RULING LETTER AND  
REVOCATION OF TREATMENT RELATING TO THE  
TARIFF CLASSIFICATION OF A CERTAIN CASE FOR BABY  
WIPE**

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

**ACTION:** Notice of proposed revocation of a ruling letter and revocation of treatment relating to tariff classification of a certain case for baby wipes.

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

**DATES:** Comments must be received on or before April 8, 2016.

**ADDRESSES:** Written comments are to be addressed to Customs and Border Protection, Office of International Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K Street NE., 10th Floor, Washington, D.C. 20229-1177. Submitted comments may be inspected at Customs and Border Protection, 90 K Street NE., 10th Floor during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325-0118.

**FOR FURTHER INFORMATION CONTACT:** George Aduhene, Tariff Classification and Marking Branch, Regulations and Rulings, Office of International Trade (202) 325-0184

### **SUPPLEMENTARY INFORMATION:**

#### **BACKGROUND**

On December 8, 1993 Title VI, (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations.

Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625 (c)(1), Tariff Act of 1930 (19 U.S.C. §1625 (c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP is proposing to revoke a ruling letter pertaining to the tariff classification of a certain refillable plastic case for baby wipes. Although in this notice, CBP is specifically referring to the revocation of New York Ruling Letter (NY) N247516, dated November 19, 2013 (Attachment A), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the 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.

Similarly, pursuant to section 625 (c)(2), Tariff Act of 1930, (19 U.S.C. §1625 (c)(2)), as amended by section 6323 of Title VI, CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY N247516, CBP classified a certain fillable plastic case for baby wipes in heading 4202, HTSUS, and specifically in subheading 4202.99.9000 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides, in pertinent part, for other bags and containers, other, other, other. CBP has reviewed NY N247516 and has determined the ruling letter to be in error. It is now CBP's position that the fillable case for baby wipes are properly classified, by operation of GRIs 1 and 6, in heading 4202, HTSUS, specifically in subheading 4202.92.9060, HTSUSA, which provides, in pertinent part, for other containers and cases, with outer surface of plastic sheeting or textiles materials, other, other, other.

Pursuant to 19 U.S.C. §1625(c)(1), CBP is proposing to revoke NY N247516 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in proposed Headquarters Ruling Letter H257222, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated: January 21, 2016

*Sincerely,*

GREG CONNOR

*for*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*

Attachments

## [ATTACHMENT A]

N247516

November 19, 2013

CLA-2-42:OT:RR:NC:N4:441

CATEGORY: Classification

TARIFF NO.: 4202.99.9000

DONALD S. STEIN  
GREENBERG TRAUERIG, LLP  
2101 L STREET, N.W., SUITE 1000  
WASHINGTON D.C. 20037

RE: The tariff classification of reusable case for baby wipes from China

DEAR MR. STEIN:

In your letter dated October 29, 2013, you requested a tariff classification ruling. You have submitted a sample, which we are returning to you.

Style G066 is a two-piece case for baby wipes. The first component is a molded plastic case that is specially shaped and fitted to contain a package of baby wipes. The case opens into halves that snap together on one side. The front of the case has a slide closure for dispensing the wipes. The second component is textile case that is shaped and fitted to contain the molded plastic case. The two components together form a composite good, General Rule of Interpretation 3(b) of the Harmonized Tariff Schedule of the United States (HTSUS) noted. The essential character is imparted by the molded plastic case.

In your ruling request, you suggest classification of the case under sub-heading 4202.92.9060, HTSUS, which provides for other containers and cases, with outer surface of plastic sheeting or of textile materials, other, other other, other. However, as stated above, the case is constructed of molded plastic rather than plastic sheeting.

The applicable subheading for the case will be 4202.99.9000, HTSUS, which provides, in part, for other bags and containers, other, other, other. The rate of duty will be 20 percent ad valorem.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Vikki Lazaro at (646) 733-3041.

*Sincerely,*

GWENN KLEIN KIRSCHNER

*Acting Director*

*National Commodity Specialist Division*

## [ATTACHMENT B]

HQ H257222  
CLA-2 OT:RR:CTF:TCM H257222 GA  
CATEGORY: Classification  
TARIFF NO.: 4202.92.9060 HTSUSA

MR. DONALD STEIN  
GREENBERG TRAURIG, LLP  
2101 L STREET, N.W., SUITE 1000  
WASHINGTON, D.C. 20037

RE: Tariff classification of certain case for baby wipes; reconsideration of NY N247516

DEAR MR. STEIN:

In New York Ruling Letter (NY) N247516, U.S. Customs and Border Protection (CBP), issued to your client, Kimberly-Clark Corporation, Inc. on November 19, 2013, a certain refillable plastic case for baby wipes was classified under subheading 4202.99.9000 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides, in pertinent part, for other bags and containers, other, other, other. We have since reviewed NY 247516 and find it to be in error with respect to the description of the subject merchandise and the classification of the case for baby wipes.

**FACTS:**

According to NY N247516, a sample of the instant merchandise was submitted to CBP for classification. The ruling described the subject merchandise as a style G066 two-piece case for baby wipes. The first component is a molded plastic case that is specially shaped and fitted to contain a package of baby wipes. The case opens into halves that snap together on one side. The front of the case has a slide closure for dispensing the wipes. The second component is textile case that is shaped and fitted to contain the molded plastic case. The two components together form a composite good, General Rule Interpretation 3(b) of the Harmonized Tariff Schedule of the United States (HTSUS) noted. The ruling indicated the essential character of the merchandise is imparted by the molded plastic case. This description of the subject merchandise was inaccurate description of the sample you submitted, thereby resulting in a misclassification of the subject merchandise.

In your reconsideration request, dated February 19, 2014, you pointed out the error in description and clarified that the subject merchandise is a case that is specially shaped and fitted to contain a package of by baby wipes. It is constructed of plastic sheeting material. The case features a wrist strap, an integral extruded closure, and a flip-top for dispensing the wipes. It is of a durable construction and suitable for repetitive use. Upon visual inspection of the sample you resubmitted, CBP confirms this description of the subject merchandise.

**ISSUE:**

What is the proper classification under the HTSUS for the subject merchandise?

**LAW AND ANALYSIS:**

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 2 through 6 may then be applied in order.

There is no dispute that the subject merchandise is provided for under heading 4202, HTSUS. Pursuant to GRI 6, each subheading within heading 4202, HTSUS, are considered in order to determine which best describes the merchandise in question.

The subheadings under consideration in this case are subheading 4202.92, HTSUS, which provides, in pertinent part, for other containers or cases, with outer surface of sheeting plastics and subheading 4202.99, HTSUS, which covers other containers and cases. There is no dispute that the sample description in ruling NY N247516 was inaccurate. The sample merchandise is not of molded plastic; it is of plastic sheeting. There is no textile in the sample submitted. Furthermore, the sample merchandise is a one-piece case, not a two-piece case. Therefore, the subject merchandise is properly classified under subheading 4202.92, HTSUS, and therefore cannot be classified under the residual subheading 4202.99, HTSUS.

**HOLDING:**

By application of GRIs 1 and 6, the case for baby wipes is classifiable under heading 4202, HTSUS, and specifically provided for in subheading 4202.92.9060, HTSUSA, which provides, in pertinent part for other containers or cases, with outer surface of sheeting of plastic. The column one, general rate of duty is 17.6 percent *ad valorem*.

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

**EFFECT ON OTHER RULINGS:**

NY N247516, dated November 19, 2013, is hereby REVOKED.

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

*Sincerely,*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*

**GENERAL NOTICE**  
**19 CFR PART 177**

**REVOCAION OF ONE RULING LETTER AND  
REVOCAION OF TREATMENT RELATING TO THE  
TARIFF CLASSIFICATION OF MEDICAL APPARATUS**

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

**ACTION:** Notice of revocation of one ruling letter and revocation of treatment relating to tariff classification of medical apparatus.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by Section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter relating to the tariff classification of medical apparatus, under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 49, No. 51, on December 23, 2015. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after May 9, 2016.

**FOR FURTHER INFORMATION CONTACT:** George Aduhene, Tariff Classification and Marking Branch, Regulations and Rulings, Office of International Trade, at (202) 325–0184.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

On December 8, 1993 Title VI, (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter “Title VI”), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are “**informed compliance**” and “**shared responsibility**.” These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations.

Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625 (c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(2), as amended by section 623 of Title VI, a notice was published in the *Customs Bulletin*, Vol. 49, No. 51, on December 23, 2015, proposing to revoke one ruling letter pertaining to the tariff classification of medical apparatus. As stated, in the proposed notice, this action will cover HQ 085366, dated December 4, 1989, as well as any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the 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 have advised CBP during the comment 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 comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In HQ 085366, CBP classified a tube string subassembly of the Vital Vue Irrigation, Suction, and Illumination System Disposable Surgical Instrument ("Vital Vue"), in heading 9018, HTSUS, specifically in subheading 9018.90.60, HTSUS, which provides for, "Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof: Other instruments and appliances and parts and accessories thereof: Other: Electro-medical instruments and appliances and parts and

accessories thereof: Electro-surgical instruments and appliances, other than extracorporeal shock wave lithotripters; all the foregoing and parts and accessories thereof.” CBP has reviewed HQ 085366 and has determined the ruling letter to be in error. It is now CBP’s position that medical apparatus is properly classified, by operation of GRI 1, in heading 9018, HTSUS, specifically in subheading 9018.90.75, HTSUS, which provides for, “Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof: Other Instruments and appliances and parts and accessories thereof: Other: Electro-medical instruments and appliances and parts and accessories thereof: Other: Other: Other.”

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking HQ 085366 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H152456, set forth as Attachment “B” to this notice. 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: February 10, 2016

GREG CONNOR

*for*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*

Attachment

HQ H152456

February 10, 2016

CLA-2 OT:RR:CTF:TCM H152456 GA

CATEGORY: Classification

TARIFF NO.: 9018.90.75

MS. ELAINE JACOBY  
MANAGER

MILES, HASTINGS & JOFFROY, INC.  
6403 AVENIDA COSTA NORTE  
SUITE 3000  
OTAY MESA, CA 92073

RE: Revocation of HQ 085366, dated December 4, 1989; tariff classification of medical apparatus.

DEAR MS. JACOBY:

This letter concerns Headquarters Ruling (HQ) 085366, dated December 4, 1989, issued to you on behalf of your client Davis & Geck. That ruling involved the tariff classification of a Vital Vue Irrigation, Suction, and Illumination System Disposable Surgical Instrument (“Vital Vue”). In that ruling, U.S. Customs and Border Protection (CBP) classified the Vital Vue in subheading 9018.90.60, HTSUS, which provides for, “Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof: Other Instruments and appliances and parts and accessories thereof: Other: Electro-medical instruments and appliances and parts and accessories thereof: Electro-surgical instruments and appliances, other than extracorporeal shock wave lithotripters; all the foregoing and parts and accessories thereof.”

We have reviewed HQ 085366 and find it to be in error. For the reasons set forth below, we hereby revoke HQ 085366.

On December 23, 2015, 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 of the proposed action was published in the *Customs Bulletin* Vol. 49, No. 51. No comments were received in response to this notice.

**FACTS:**

In HQ 085366, the merchandise was described as follows:

A a tube string subassembly of the Vital Vue Irrigation, Suction, and Illumination System Disposable Surgical Instrument (“Vital Vue”). The subassembly consists of three lengths of plastic tubing bonded together to form separate channels for irrigation, suction, and electrical wires for the light power source. In addition, it contains a threaded suction adapter, a spike connector with protective cap, and a small telephone type electrical connector. The subassembly is also equipped with a small light bulb, which contains a thermistor designed to shut off the bulb when it becomes too hot.

The above-described subassembly is part of a single instrument that is used by a doctor to irrigate and/or aspirate the surgical field during a procedure to remove debris or blood. Irrigation (washing out or flushing a wound or body opening with a stream of water or another liquid) and aspiration

(removal, by suction, of a gas, fluid, or tissue from a body cavity or organ) augment a variety of medical or dental applications by reducing infection and/or providing the practitioner with a better view of the subject of the given procedure. The electrical connector and light bulb (with thermistor) contribute to the lighting function of the instrument, which allows the doctor to visualize the field without increasing the number of hands/instruments in the field.

**ISSUE:**

Whether the medical apparatus are electro-surgical instruments within the meaning of subheading 9018.90.60, HTSUS.

**LAW AND ANALYSIS:**

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 2 through 6 may then be applied in order.

The HTSUS provisions under consideration in this case are as follows:

9018	Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof
9018.90	Other instruments and appliances and parts and accessories thereof
	Other
	Electro-medical instruments and appliances and parts and accessories thereof
9018.90.60	Electro-surgical instruments and appliances, other than extracorporeal shock wave lithotripters; all the foregoing and parts and accessories thereof
	Other
9018.90.75	Other
	* * * * *

There is no dispute that the products at issue are classified in heading 9018, HTSUS. Nor is there a question whether they are “electro-medical instruments or appliances of subheading 9018.90, HTSUS. The issue is whether the instant merchandise falls under the scope of the provision for “electro-surgical instruments and appliances” in subheading 9018.90.60, HTSUS.

In order to determine the proper classification at the subheading level, GRI 6 is applied. GRI 6 provides that for legal purposes, classification of goods in the subheading of a heading shall be determined according to the terms of those subheadings and any related subheading notes, and *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same

level are comparable. For the purposes of this rule, the relative section, chapter and subchapters notes also apply, unless the context otherwise requires.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs") constitute the official interpretation of the HTSUS. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–90, 54 Fed. Reg. 35127 (August 23, 1989).

Explanatory Note 90.18 provides, in relevant part, as follows:

(V) OTHER ELECTRO-MEDICAL APPARATUS

This heading also covers electro-medical apparatus for preventive, curative or diagnostic purposes, other than X-ray, etc., apparatus of heading 90.22. This group includes:

- (7) Electro-surgical apparatus. These utilise high-frequency electric currents, the needle, probe, etc., forming one of the electrodes. **They can be employed to cut tissues (electrocutting) with a lancet (electric lancet), or to coagulate the blood (electrocoagulation).** Certain combined instruments may, by the use of control pedals, be made to act interchangeably as electrocutters or electrocoagulators. (Emphasis added)

The above explanatory note is consistent with the definition of electro-surgical in the *Merriam-Webster Dictionary*, which defines the term as “surgery by means of diathermy.” (2011) available at [www.merriam-webster.com](http://www.merriam-webster.com). The *Merriam-Webster Dictionary* defines “diathermy” as “the generation of heat in tissue by electric currents for medical or surgical purposes.” *Id.*

Based upon these definitions, the term “electro-surgical” means that electric currents are utilized in the surgery, whether for cutting tissue, coagulating blood or for other surgical applications. However, as described above, despite the fact that the instant products differ in the construction and function, the Vital Vue, the Hummer and E1, and the CASPER do not use electric currents to cut tissue or coagulate blood.

We note that we have classified other products that do not employ electrocutting or electrocoagulation in the strictest sense in subheading 9018.90.60, HTSUS. However, the instant products are distinguishable from those rulings. For instance, NY N006383, dated March 6, 2007, and HQ 951871, dated August 18, 1992 covered products that operated by laser or other light or photon beam processes. In NY N006383, CBP classified the Karl Storz Calculase (article number: 27750120–1), a Ho:Yak desktop laser used in lithotripsy surgery in subheading 9018.90.60, HTSUS. The laser energy generated by the machine enables the optimum lithotripsy of small to medium sized calculi in the urinary system. Similarly, in HQ 951871, CBP classified the “Pulsolith” Laser Lithotripter (“laser”) in subheading 9018.90.60, HTSUS. Here, the laser is a pulsed dye laser used to fragment ureteral, gallstone and common bile duct stones using a photo acoustic effect. In both cases, access to a body cavity is gained through a body opening to perform a surgical procedure to destroy an internally-located calculus even though such surgery does not entail the cutting of tissue or coagulation of

blood.<sup>1</sup> In addition, the procedures are performed in an operating room by a surgeon on a patient who is under some form of anesthesia.

On the other hand, the apparatus subject to HQ 085366 does not serve to perform a surgical procedure by virtue of its electronic operation. Rather, the subject medical apparatus are properly classified under subheading 9018.90.75, HTSUS.

**HOLDING:**

By application of GRIs 1 and 6, the subject medical apparatus are classified in subheading 9018.90.75, HTSUS, which provides for, "Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof: Other Instruments and appliances and parts and accessories thereof: Other: Electro-medical instruments and appliances and parts and accessories thereof: Other: Other." The rate of duty is "Free."

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

**EFFECT ON OTHER RULINGS:**

In accordance with the above analysis, HQ 085366, dated December 4, is hereby REVOKED.

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

*Sincerely,*

GREG CONNOR

*for*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*



**GENERAL NOTICE  
19 CFR PART 177**

**REVOCATION OF THREE RULING LETTERS AND  
REVOCATION OF TREATMENT RELATING TO THE  
TARIFF CLASSIFICATION OF FLOCKED HEAT  
TRANSFERS AND TEXTILE/PVC MATERIAL DESIGNED  
FOR TRANSFERRING IMAGES TO FABRIC OR OTHER  
SURFACES**

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

<sup>1</sup> Moreover, the merchandise subject to HQ951871 and NY N006383 differ from extracorporeal shock wave lithotripters, which are expressly excluded from subheading 9018.90.60, HTSUS.

**ACTION:** Notice of revocation of three ruling letters and revocation of treatment relating to the tariff classification of flocked heat transfers and textile/PVC material designed for transferring images to fabric or other surfaces.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking three ruling letters concerning tariff classification of flocked heat transfers and textile/PVC material designed for transferring images to fabric or other surfaces under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 49, No. 51, on December 23, 2015. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after May 9, 2016.

**FOR FURTHER INFORMATION CONTACT:** Tatiana Salnik Matherne, Tariff Classification and Marking Branch, Regulations and Rulings, Office of International Trade, at (202) 325–0351.

#### **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) (“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 public 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 to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the *Customs Bulletin*, Vol. 49, No. 51, on December 23, 2015, proposing to revoke 3 ruling letters pertaining to the tariff classification of flocked heat transfers and textile/PVC material designed for transferring images to fabric or other surfaces. As stated in the proposed notice, this action will cover New York Ruling Letters (“NY”) J81335, dated February 21, 2003; NY J80560, dated February 13, 2003; NY E85712, dated August 19, 1999, as well as any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the three identified. No further rulings have been found. 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 comment 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 comment period. An importer’s failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In NY J81335 and NY J80560, CBP classified flocked heat transfers in heading 5601, HTSUS, specifically in subheading 5601.30.00, HTSUS, which provides for “Wadding of textile materials and articles thereof; textile fibers, not exceeding 5 mm in length (flock), textile dust and mill neps: Textile flock and mill neps.” In NY E85712, CBP classified textile/PVC material designed for transferring images to fabric or other surfaces in heading 5903, HTSUS, specifically in subheading 5903.10.25, HTSUS, which provides for “Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: With poly(vinyl chloride): Of man-made fibers: Other: Other.” CBP has reviewed NY J81335, NY J80560 and NY E85712, and has determined these ruling letters to be in error. It is now CBP’s position that flocked heat transfers and textile/PVC ma-

terial designed for transferring images to fabric or other surfaces are properly classified, by operation of GRI 1 and 6, in heading 4908, HTSUS, specifically in subheading 4908.90.00, HTSUS, which provides for “Transfers (decalcomanias): Other.”

Pursuant to 19 U.S.C. §1625(c)(1), CBP is revoking NY J81335, NY J80560 and NY E85712, and revoking any other ruling not specifically identified to reflect the tariff classification of the subject merchandise according to the analysis contained in Headquarters Ruling Letter (“HQ”) H265493, set forth as Attachment “A” to this notice. 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: February 11, 2016

JACINTO JUAREZ

*for*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*

Attachment

HQ H265493

February 11, 2016

CLA-2 OT:RR:CTF:TCM H265493 TSM

CATEGORY: Classification

TARIFF NO.: 4908.90.00

MR. KEN SKILLMAN  
VANITY FAIR INTIMATES, L.P.  
3025 WINDWARD PLAZA  
SUITE 600  
ALPHARETTA, GA 30005

RE: Revocation of NY J81335, NY J80560 and NY E85712; Classification of Textile/PVC material used to heat transfer images to fabric or other surfaces; Classification of flocked heat transfers.

DEAR MR. SKILLMAN:

This is in reference to New York Ruling Letter (NY) J81335, issued to Vanity Fair Intimates, L.P. on February 21, 2003, and NY J80560, issued to Vanity Fair Intimates on February 13, 2003. NY J81335 and NY J80560 both concerned tariff classification of flocked heat transfers, classified by U.S. Customs and Border Protection (“CBP”) in subheading 5601.30.00, HTSUS, which provides for “Wadding of textile materials and articles thereof; textile fibers, not exceeding 5 mm in length (flock), textile dust and mill neps: Textile flock and mill neps.”

This is also in reference to NY E85712, issued to Explan International Trade Inc. on August 19, 1999, which concerned tariff classification of textile/PVC material used to heat transfer images to fabric or other surfaces, classified by CBP in subheading 5903.10.25, HTSUS, which provides for “Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: With poly(vinyl chloride): Of man-made fibers: Other: Other.”

Upon additional review, we have found the above-referenced classifications to be incorrect. For the reasons set forth below we hereby revoke NY J81335, NY J80560 and NY E85712.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published in the *Customs Bulletin*, Volume 49, No. 51, on December 23, 2015, proposing to revoke NY J81335, NY J80560 and NY E85712, and any treatment accorded to substantially identical transactions. No comments were received in response to this notice.

**FACTS:**

NY J81335, issued to Vanity Fair Intimates, L.P. on February 21, 2003, describes the subject merchandise as follows:

[The subject merchandise features] heat transfers. They consist of rayon flocking on carrier paper, with an adhesive, in the design of a bow. The bow design will be heat-transferred to a mesh fabric on the side panel of a brassiere. [The subject merchandise also features] a piece of fabric with the bow on it. In the heat transferring, both the paper and the adhesive are consumed, leaving only the flocked bow.

NY J80560, issued to Vanity Fair Intimates on February 13, 2003, describes the subject merchandise as follows:

[The subject merchandise features] heat transfers. They consist of rayon flocking on carrier paper, with an adhesive, in the design of a bow. The bow design will be heat-transferred to a mesh fabric on the side panel of a brassiere. [The subject merchandise also features] a piece of fabric with the bow on it. In the heat transferring, both the paper and the adhesive are consumed, leaving only the flocked bow.

NY E85712, issued to Explan International Trade Inc. on August 19, 1999, describes the subject merchandise as follows:

The instant sample consists of a woven fabric composed of 100% polyester man-made fibers which has been coated/laminated on one side with a compact polyvinyl chloride plastics material. This material is designed to transfer an image to a dark colored "T" shirt or other dark colored surface such as a book cover or photo album, etc. [T]his material will be imported in cut sizes of 11" x 17" or, in the future of 8 1/2" x 11", 11 11/16" x 16 1/2" and 8 1/4" x 11". [The] weight specifications for this material [are the following]: Wt. Of Textile: 285 g/m2 (67.5%) Wt. Of PVC: 137 g/m2 (32.5%) Total Wt.: 422 g/m2 (100%).

#### ISSUE:

What is the correct classification of the subject flocked heat transfers and textile/PVC material?

#### LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the table of contents, alphabetical index, and titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

In addition, in interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See* T.D. 89-80, 54 Fed. Reg. 35127 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

4908	Transfers (decalcomanias):			
4908.90.00	Other	*	*	*
5601	Wadding of textile materials and articles thereof; textile fibers, not exceeding 5 mm in length (flock), textile dust and mill neps:			
5601.30.00	Textile flock and dust and mill neps	*	*	*

- 5903 Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902:
- 5903.10 With poly(vinyl chloride):
- Of man-made fibers:
- Other:
- 5903.10.25 Other

NY J81335 and NY J80560 classified the subject flocked heat transfers under heading 5601, HTSUS, which provides for “Wadding of textile materials and articles thereof; textile fibers, not exceeding 5 mm in length (flock), textile dust and mill neps.” NY E85712 classified the subject textile/PVC material used to heat transfer images to fabric or other surfaces under heading 5903, which provides for “Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902.”

We note that the subject heat transfers could only be classified as textile materials of Chapters 56 or 59 of Section XI, HTSUS, by application of GRI 3(b), which provides, in pertinent part, that composite goods consisting of different materials or made up of different components shall be classified as if they consisted of the material or component which gives them their essential character. However, before a product can be classified as a composite good, we must determine if it is covered by a single heading per GRI 1.

We emphasize that, as noted above, the first sentence of GRI 1 explains that the table of contents, alphabetical index, and titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. Accordingly, the statement in NY J80560 that the subject merchandise is not considered “printed matter” and could thus not fall under heading 4908 is not based on the legal text. Even if the subject merchandise does not have to be considered “printed matter” to be classified under heading 4908, HTSUS, we note that heat transfers of flocking intended to decorate apparel, like the instant merchandise, are manufactured using similar machinery to that used in printing with ink and are used in the same manner as heat transfers made from other media (i.e. ink). Therefore, we consider the subject merchandise to be “printed matter.” Moreover, in January of 2007, in an Informed Compliance Publication (ICP), CBP defined “decals” as “printed transfers,” stating, in pertinent part, that “decals are specifically provided for, as printed transfers, in heading 4908 of the HTSUS.” CBP further noted that “decals may be applied to a variety of objects (e.g., of metal, plastic, wood, paperboard, textile, fabric, etc.), which need not undergo any further processing after the image has been transferred” and that “aside from their carriers, [decals] are nothing more than printed images on extremely thin, nearly invisible coating-material substrates...”

General Explanatory Notes to Chapter 49, HTSUS, provide, in pertinent part, the following: “In addition to the more common forms of printed products (e.g., books, newspapers, pamphlets, pictures, advertising matter), this Chapter covers such articles as: printed transfers (decalcomanias)...” ENs to heading 4908, HTSUS, provide, in pertinent part, that “Transfers (decalcomanias) consist of pictures, designs or lettering in single or multiple colours, lithographed or otherwise printed on absorbent, lightweight paper (or sometimes thin transparent sheeting of plastics), coated with a preparation, such

as of starch and gum, to receive the imprint which is itself coated with an adhesive. This paper is often backed with a supporting paper of heavier quality.”

Based on the foregoing, upon review we find that the subject flocked heat transfers and textile/PVC material are specifically provided for in heading 4908, HTSUS, and are classified in subheading 4908.90.00, HTSUS, which provides for “Transfers (decalcomanias): Other.” See NY N246787, dated October 31, 2013; NY A86366, dated August 20, 1996; NY I88275, dated December 2, 2002; and NY 865307, dated September 5, 1991.

**HOLDING:**

By application of GRIs 1 and 6, we find that the subject merchandise is classified under heading 4908, HTSUS. Specifically, it is classified in subheading 4908.90.00, HTSUS, which provides for “Transfers (decalcomanias): Other.” The 2015 column one, general rate of duty is free.

**EFFECT ON OTHER RULINGS:**

NY J81335, NY J80560 and NY E85712, are hereby REVOKED.

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

*Sincerely,*

JACINTO JUAREZ

*for*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*

**GENERAL NOTICE**  
**19 CFR PART 177**

**REVOCATION OF ONE RULING LETTER AND  
REVOCATION OF TREATMENT RELATING TO THE  
TARIFF CLASSIFICATION OF CERTAIN PILLOWCASES**

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

**ACTION:** Notice of revocation of one ruling letter and revocation of treatment relating to the tariff classification of certain pillowcases.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of certain pillowcases under the Harmonized Tariff Schedule of the United

States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 49, No. 51, on December 23, 2015. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after May 9, 2016.

**FOR FURTHER INFORMATION CONTACT:** Tatiana Salnik Matherne, Tariff Classification and Marking Branch, Regulations and Rulings, Office of International Trade, at (202) 325-0351.

### **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) (“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 public 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 to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the *Customs Bulletin*, Vol. 49, No. 51, on December 23, 2015, proposing to revoke one ruling letter pertaining to the tariff classification of certain pillowcases. As stated in the proposed notice, this action will cover New York Ruling Letter (“NY”) N239270, dated March 26, 2013, as well as any rulings on this merchandise which may exist, but have not been specifically identified. CBP has under-

taken reasonable efforts to search existing databases 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., 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 comment 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 comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In NY N239270, CBP classified certain pillowcases in heading 6302, HTSUS, specifically in subheading 6302.31.90, HTSUS, which provides for "Bed linen, table linen, toilet linen and kitchen linen: Other bed linen: Of cotton: Other: Not napped." CBP has reviewed NY N239270 and has determined the ruling letter to be in error. It is now CBP's position that the pillowcases at issue are properly classified, by operation of GRIs 1 and 6, in heading 6302, HTSUS, specifically in subheading 6302.31.70, HTSUS, which provides for "Bed linen, table linen, toilet linen and kitchen linen: Other bed linen: Of cotton: Other: Napped."

Pursuant to 19 U.S.C. §1625(c)(1), CBP is revoking NY N239270 and revoking any other ruling not specifically identified to reflect the tariff classification of the subject merchandise according to the analysis contained in Headquarters Ruling Letter ("HQ") H242650, set forth as Attachment "A" to this notice. 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: February 11, 2016

JACINTO JUAREZ  
for

MYLES B. HARMON,  
Director

*Commercial and Trade Facilitation Division*

Attachment

HQ H242650

February 11, 2016

CLA-2 OT:RR:CTF:TCM H242650 TSM

CATEGORY: Classification

TARIFF NO.: 6302.31.70

MR. RALPH NATALE, CEO  
AMERICAN SHIPPING Co INC.  
250 MOONACHIE RD.  
MOONACHIE, NJ 07074

RE: Revocation of NY N239270; Classification of pillowcases from India.

DEAR MR. NATALE:

This is in response to your request for reconsideration of New York Ruling Letter (NY) N239270, issued to Welspun USA Inc. on March 26, 2013, concerning the tariff classification of pillowcases from India. In that ruling, U.S. Customs and Border Protection (“CBP”) classified the subject merchandise under subheading 6302.31.90, Harmonized Tariff Schedule of the United States (“HTSUS”), which provides for “Bed linen, table linen, toilet linen and kitchen linen: Other bed linen: Of cotton: Other: Not napped.” A sample of the subject merchandise was received and examined by this office and will be returned. We have reviewed NY N239270 and found it to be in error. For the reasons set forth below, we hereby revoke NY N239270.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published in the *Customs Bulletin*, Volume 49, No. 51, on December 23, 2015, proposing to revoke NY N239270, and any treatment accorded to substantially identical transactions. No comments were received in response to this notice.

**FACTS:**

NY N239270, issued to Welspun USA Inc. on March 26, 2013, describes the subject merchandise as follows:

The submitted samples, identified as Item# 890104519603, are two pillowcases. They are made from 100 percent cotton woven fabric. The fabric is not printed. The open end of the pillowcase is finished with a 4-inch wide self-hem. It has multiple folds of fabric sewn with a single needle stitch. The folds create an effect that has the appearance of a row of piping. The pillowcases are packaged in a small self-fabric bag.

In your letter dated April 16, 2013, you argued that the subject pillowcases should be classified in subheading 6302.31.70, HTSUS, which provides for “Bed linen, table linen, toilet linen and kitchen linen: Other bed linen: Of cotton: Other: Napped.” In support of this argument, you stated as follows: “The fabric is brushed to create extra softness. The brushing process is a mechanical process where a fine emery brush rubs the fabric to create fine fibers from the loosely spun yarns. The product is thus napped to achieve ultra-soft finish on the products. It gains its softness through the loosely

spun yarn in its woven form.” Additional information provided indicates that the fabric was processed on a Lafer machine.<sup>1</sup>

### ISSUE:

Whether the pillowcases should be classified under subheading 6302.31.70, HTSUS, as “Bed linen, table linen, toilet linen and kitchen linen: Other bed linen: Of cotton: Other: Napped,” or subheading 6302.31.90, HTSUS, as “Bed linen, table linen, toilet linen and kitchen linen: Other bed linen: Of cotton: Other: Not Napped.”

### LAW AND ANALYSIS:

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 2 through 6 may then be applied in order.

In addition, in interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the Harmonized System at the international level. HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

6302	Bed linen, table linen, toilet linen and kitchen linen: Other bed linen:
6302.31	Of Cotton: Other:
6302.31.70	Napped
6302.31.90	Not Napped

The determinative issue in this case is whether the subject pillowcases are considered napped or not napped for tariff classification purposes.

Statistical Note 1(k) to Chapter 52 of the HTSUS, which provides for cotton, states:

The term “napped” means fabrics with a fuzzy, fibrous surface produced by scratching or pricking the surface so that some of the fibers are raised from the body of the yarn. Napped fabrics are not to be confused with pile fabrics. Outing and canton flannel, moleskin, etc. are typical fabrics with a nap.

Napped fabrics are processed so that they have either a slight or a dramatic nap on the face or both sides of the fabric. The napping process is accomplished by weaving loosely twisted yarns into the textile, which are then sheared and brushed to create the soft napped surface. Napped fabrics differ from PILE fabrics in that they do not have extra threads incorporated in the textile. Napping is considered a finishing process and is used on many fibers,

<sup>1</sup> See Lafer SPA website @ [www.laferspa.com/a\\_11\\_EN\\_14\\_1.html](http://www.laferspa.com/a_11_EN_14_1.html).

including manufactured fibers, silk and wool, as well as specialty fibers such as camel hair and mohair. Occasionally the napped effect does not continuously cover the fabric but is executed in stripes or figures. See *Encyclopedia of Textiles*, Judith Jerde, 157 (1992).

“Napped fabrics” can be distinguished from “pile-fabrics.” In *Tilton Textile Corp. v. United States*, 424 F. Supp. 1053, 77 Cust. Ct. 27, C.D. 4670 (1976) aff’d, 565 F.2d 140 (1977), the court stated: “[W]hat is termed a ‘nap’ or ‘napped fabrics’ is produced by the raising of some of the fibers of the threads which compose the basic fabric, whereas the ‘pile’ on ‘pile fabrics’ must be the raising at intervals, in the form of loops, the entire thickness of extra threads introduced into, but not essential to the basic fabric, which thus form an ‘uncut pile.’” See *Tilton Textile Corp. v. United States*, 424 F. Supp. 1053, 1066 (1976).

The Customs Court acknowledged that only some of the fibers must be raised on the fabric to be considered “napped fabric.” Furthermore, Statistical Note 1(k) to Chapter 52, HTSUS, which defines “napping” does not require that a specified amount of fibers must be raised in order to qualify as a napped good. Rather, the Note requires that “some of the fibers” are raised. While examination of the subject merchandise sample revealed that only some fibers were raised from the surface of the fabric, the level of napping is still visible to the eye and has been accomplished through the brushing process which is necessary for the formation of all napping. Therefore, the subject merchandise is considered napped for tariff classification purposes. See Headquarters Ruling Letter (HQ) 964822, dated April 24, 2001.

Based on the foregoing, we conclude that the subject pillowcases are classified in subheading 6302.31.70, HTSUS, which provides for “Bed linen, table linen, toilet linen and kitchen linen: Other bed linen: Of cotton: Other: Napped.”

#### **HOLDING:**

By application of GRIs 1 and 6, the subject pillowcases are classified under subheading 6302.31.70, HTSUS, as “Bed linen, table linen, toilet linen and kitchen linen: Other bed linen: Of cotton: Other: Napped.” The general, column one rate of duty is 3.8 percent *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the Internet at [www.usitc.gov/tata/hts/](http://www.usitc.gov/tata/hts/).

#### **EFFECT ON OTHER RULINGS:**

NY N239270, dated March 26, 2013, is hereby REVOKED.

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

*Sincerely,*

JACINTO JUAREZ

*for*

MYLES B. HARMON,

*Director*

*Commercial and Trade Facilitation Division*

**ACCREDITATION AND APPROVAL OF AMSPEC SERVICES, LLC, AS A COMMERCIAL GAUGER AND LABORATORY**

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

**ACTION:** Notice of accreditation and approval of AmSpec Services, LLC, as a commercial gauger and laboratory.

**SUMMARY:** Notice is hereby given, pursuant to CBP regulations, that AmSpec Services, LLC, has been approved to gauge petroleum and certain petroleum products and accredited to test petroleum and certain petroleum products for customs purposes for the next three years as of July 13, 2015.

**DATES:** *Effective Dates:* The accreditation and approval of AmSpec Services, LLC, as commercial gauger and laboratory became effective on July 13, 2015. The next triennial inspection date will be scheduled for July 2018.

**FOR FURTHER INFORMATION CONTACT:** Approved Gauger and Accredited Laboratories Manager, Laboratories and Scientific Services Directorate, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Suite 1500N, Washington, DC 20229, tel. 202- 344-1060.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to 19 CFR 151.12 and 19 CFR 151.13, that AmSpec Services, LLC, 4117 Montgomery St., Savannah, GA 31405, has been approved to gauge petroleum and certain petroleum products and accredited to test petroleum and certain petroleum products for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. AmSpec Services, LLC is approved for the following gauging procedures for petroleum and certain petroleum products from the American Petroleum Institute (API):

API Chapters	Title
1 .....	Vocabulary.
3 .....	Tank Gauging.
7 .....	Temperature Determination.
8 .....	Sampling.
9 .....	Density Determinations.
11.....	Physical Properties.
12 .....	Calculations.
17 .....	Maritime Measurement.

AmSpec Services, LLC is accredited for the following laboratory analysis procedures and methods for petroleum and certain petroleum products set forth by the U.S. Customs and Border Protection Laboratory Methods (CBPL) and American Society for Testing and Materials (ASTM):

CBPL No.	ASTM	Title
27-01	D287	Standard Test Method for API Gravity of crude Petroleum and Petroleum Products.
27-02	D1298	Standard Practice for Density, Relative Density (Specific Gravity), or API Gravity of Crude Petroleum and Liquid Petroleum Products by Hydrometer Meter.
27-03	D4006	Standard Test Method for Water in Crude Oil by Distillation.
27-04	D95	Standard Test Method for Water in Petroleum Products and Bituminous Materials by Distillation.
27-05	D4928	Standard Test Method for Water in Crude Oils by Coulometric Karl Fischer Titration.
27-06	D473	Standard Test Method for Sediment in Crude Oils and Fuel Oils by the Extraction Method.
27-08	D86	Standard Test Method for Distillation of Petroleum Products.
27-11	D445	Standard Test Method for Kinematic Viscosity of Transparent and Opaque Liquids.
27-13	D4294	Standard Test Method for Sulfur in Petroleum and Petroleum Products by Energy-Dispersive X-ray Fluorescence Spectrometry.
27-20	D4057	Standard Practice for Manual Sampling of Petroleum and Petroleum Products.
27-48	D4052	Standard Test Method for Density and Relative Density of Liquids by Digital Density Meter.
27-50	D93	Standard Test Methods for Flash-Point by Pensky-Martens Closed Cup Tester.
27-53	D2709	Standard Test Method for Water and Sediment in Middle Distillate Fuels by Centrifuge.
27-54	D1796	Standard Test Method for Water and Sediment in Fuel Oils by the Centrifuge Method. 27-58 D5191 Standard Test Method For Vapor Pressure of Petroleum Products.
27-58	D5191	Standard Test Method For Vapor Pressure of Petroleum Products

Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S.

Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquiries regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344-1060. The inquiry may also be sent to [CBPGaugersLabs@cbp.dhs.gov](mailto:CBPGaugersLabs@cbp.dhs.gov). Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. <http://www.cbp.gov/about/labs-scientific/commercial-gaugers-and-laboratories>.

Dated: February 16, 2016.

IRA S. REESE,  
*Executive Director,  
Laboratories and Scientific  
Services Directorate.*

[Published in the Federal Register, February 22, 2016 (81 FR 8735)]



### **ACCREDITATION AND APPROVAL OF AMSPEC SERVICES, LLC, AS A COMMERCIAL GAUGER AND LABORATORY**

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

**ACTION:** Notice of accreditation and approval of AmSpec Services, LLC, as a commercial gauger and laboratory.

**SUMMARY:** Notice is hereby given, pursuant to CBP regulations, that AmSpec Services, LLC, has been approved to gauge petroleum and certain petroleum products and accredited to test petroleum and certain petroleum products for customs purposes for the next three years as of September 23, 2015.

**DATES:** *Effective Dates:* The accreditation and approval of AmSpec Services, LLC, as commercial gauger and laboratory became effective on September 23, 2015. The next triennial inspection date will be scheduled for September 2018.

**FOR FURTHER INFORMATION CONTACT:** Approved Gauger and Accredited Laboratories Manager, Laboratories and Scientific Services Directorate, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Suite 1500N, Washington, DC 20229, tel. 202- 344-1060.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to 19 CFR 151.12 and 19 CFR 151.13, that AmSpec Services, LLC, 2800-B Loop 197 South, Texas City, TX 77590, has

been approved to gauge petroleum and certain petroleum products and accredited to test petroleum and certain petroleum products for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. AmSpec Services, LLC is approved for the following gauging procedures for petroleum and certain petroleum products from the American Petroleum Institute (API):

API Chapters	Title
3 .....	Tank Gauging.
7 .....	Temperature Determination.
8 .....	Sampling.
11.....	Physical Properties.
12 .....	Calculations.
17 .....	Maritime Measurement.

AmSpec Services, LLC is accredited for the following laboratory analysis procedures and methods for petroleum and certain petroleum products set forth by the U.S. Customs and Border Protection Laboratory Methods (CBPL) and American Society for Testing and Materials (ASTM):

CBPL No.	ASTM	Title
27-03	D4006	Standard Test Method for Water in Crude Oil by Distillation.
27-04	D95	Standard Test Method for Water in Petroleum Products and Bituminous Materials by Distillation.
27-05	D4928	Standard Test Method for Water in Crude Oils by Coulometric Karl Fischer Titration.
27-06	D473	Standard Test Method for Sediment in Crude Oils and Fuel Oils by the Extraction Method.
27-08	D86	Standard Test Method for Distillation of Petroleum Products.
27-11	D445	Standard Test Method for Kinematic Viscosity of Transparent and Opaque Liquids.
27-13	D4294	Standard Test Method for Sulfur in Petroleum and Petroleum Products by Energy-Dispersive X-ray Fluorescence Spectrometry.
27-14	D2622	Standard Test Method for Sulfur in Petroleum Products.
27-46	D5002	Density of Crude Oils by Digital Density Meter.

CBPL No.	ASTM	Title
27-48	D4052	Standard Test Method for Density and Relative Density of Liquids by Digital Density Meter.
27-50	D93	Standard Test Methods for Flash-Point by Pensky-Martens Closed Cup Tester.
27-53	D2709	Standard Test Method for Water and Sediment in Middle Distillate Fuels by Centrifuge.
27-54	D1796	Standard Test Method for Water and Sediment in Fuel Oils by the Centrifuge Method.
27-58	D5191	Standard Test Method For Vapor Pressure of Petroleum Products.

Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquiries regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344-1060. The inquiry may also be sent to *CBPGaugersLabs@cbp.dhs.gov*. Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. <http://www.cbp.gov/about/labs-scientific/commercial-gaugers-and-laboratories>.

Dated: February 16, 2016.

IRA S. REESE,  
*Executive Director,  
 Laboratories and Scientific  
 Services Directorate.*

[Published in the Federal Register, February 22, 2016 (81 FR 8732)]

**NOTICE OF ISSUANCE OF FINAL DETERMINATION  
 CONCERNING CERTAIN DATA PROTECTION SOFTWARE  
 PRODUCTS**

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

**ACTION:** Notice of final determination.

**SUMMARY:** This document provides notice that U.S. Customs and Border Protection (“CBP”) has issued a final determination concerning the country of origin of certain data protection software products.

Based upon the facts presented, CBP has concluded that the country of origin of the software products is the United States for purposes of U.S. Government procurement.

**DATES:** The final determination was issued on February 12, 2016. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination no later than March 23, 2016.

**FOR FURTHER INFORMATION CONTACT:** Ross Cunningham, Valuation and Special Programs Branch, Regulations and Rulings, Office of International Trade (202) 325-0034.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that on February 12, 2016, pursuant to subpart B of Part 177, U.S. Customs and Border Protection Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of certain data protection software products known as WebALARM, WebALARM [Embedded], TheGRID Basic, and TheGrid Beacon, which may be offered to the U.S. Government under an undesignated government procurement contract. This final determination, HQ H268858, was issued under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511-18). In the final determination, CBP concluded that the processing in the United States results in a substantial transformation. Therefore, the country of origin of the software products is the United States for purposes of U.S. Government procurement.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that a notice of final determination shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: February 12, 2016.

JOANNE ROMAN STUMP,  
*Acting Executive Director,  
Regulations and Rulings,  
Office of International Trade.*

Attachment

HQ H268858

February 12, 2016

OT:RR:CTF:VS H268858 RMC

CATEGORY: Country of Origin

DAN MINUTILLO  
MINUTILLO: A LAW CORPORATION  
841 BLOSSOM HILL ROAD  
SECOND FLOOR  
P.O. BOX 20698  
SAN JOSE, CA 95160

Re: U.S. Government Procurement; Country of Origin of Data Protection Software; Substantial Transformation

DEAR MR. MINUTILLO:

This is in response to your letter dated August 18, 2015, requesting a final determination on behalf of e-Lock Corporation (“e-Lock”) pursuant to Subpart B of Part 177 of the U.S. Customs and Border Protection (“CBP”) Regulations (19 C.F.R. part 177). Under these regulations, which implement Title III of the Trade Agreements Act of 1979 (“TAA”), as amended (19 U.S.C. § 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain “Buy American” restrictions in U.S. law or for products offered for sale to the U.S. Government. This final determination concerns the country of origin of four data-protection software products. As a U.S. importer, e-Lock is a party-at-interest within the meaning of 19 C.F.R. § 177.22(d)(1) and is entitled to request this final determination.

**FACTS:**

E-Lock is a Malaysia based developer of cyber-security software that helps to prevent identity theft and threats to data integrity. This request concerns four software products that e-Lock wishes to offer for sale to the federal government:

(1) WebALARM; (2) WebALARM [Embedded]; (3) TheGRID Basic; and (4) TheGRID Beacon. The WebALARM products are designed to protect files and data from unauthorized changes. The two products are similar except that WebALARM [Embedded] is embedded to become part of an integrated security package. TheGRID products provide user-identification and authentication functionality and are designed to protect against online theft by providing two-factor authentication and optional mutual authentication. The two products are similar except that TheGRID Beacon is designed for mobile applications.

All four software products are produced using the same three-step process that essentially involves: (1) Writing the source code in Malaysia; (2) compiling the source code into usable object code in the United States; and (3) installing the finished software on U.S.-origin discs in the United States.

In a submission dated October 15, 2015, e-Lock provided additional information on the processes involved in creating source code and compiling it into object code in steps (1) and (2).

1. Writing e-Lock Source Code

a. Creating new source code project in e-Lock's source code repository server;

b. Using tools like Microsoft Visual Studio, Android Studio, Eclipse, Xcode, and Text Editors, e-Lock's software programmer starts writing computer code in C++, Java, and Objective-C languages;

c. Designing graphical layout using Visual Studio, Android Studio, or Xcode; and

d. (b) and (c) above are prepared and checked into source code repository server.

2. Compiling e-Lock Source Code into Object Code

a. The software builder signs into the continuous integration ("CI") server and performs a "build" action;

b. The CI server immediately checks out the latest version of source code from the repository server and performs compilation process;

c. Source code is then compiled into machine code for each relevant platform on Windows, Linux, Android, and iOS;

d. Incompatibilities or errors during compilation are handed; and

e. Source code is verified or rectified as needed.

After e-Lock's engineers compile the source code into object code in the United States, the continuous integration server automatically constructs installation packages for testing and executable files for various platforms. Finally, a plan for testing is developed and engineers perform software testing, unit and/or integration testing, regressions and/or performance testing, and acceptance testing. If the code passes the tests described above, the software-development phase is complete.

E-Lock also provided information on the costs and time associated with writing the source code in Malaysia and compiling the object code in the United States. E-Lock also noted that U.S.-based subcontracts and personnel install, distribute, and provide technical support for the finished products after sale.

E-Lock argues that the Malaysian source code is substantially transformed when it is compiled into usable object code in the United States and that the country of origin for government-procurement purposes is thus the United States.

**ISSUE:**

Whether the four software products are products of the United States for government-procurement purposes.

**LAW & ANALYSIS:**

Pursuant to Subpart B of Part 177, 19 C.F.R. § 177.21 *et seq.*, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government. Under the rule of origin set forth under 19 U.S.C. § 2518(4)(B):

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii)

in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 C.F.R. § 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of Part 177 consistent with the Federal Procurement Regulations. See 19 C.F.R. § 177.21. In this regard, CBP recognizes that the Federal Procurement Regulations restrict the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. The Federal Procurement Regulations define "U.S.-made end product" as:

[A]n article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

See 48 C.F.R. § 25.403(c)(1).

The issue in this case is whether e-Lock's Malaysian-developed source code is substantially transformed in the United States when engineers compile it into object code and load it onto U.S.-origin disks. E-Lock argues that the source code is "substantially different in nature, function, name and character than the final product after code compilation." Thus, according to e-Lock, the finished software is substantially transformed in the United States and the country of origin for government-procurement purposes is the United States.

The "source code" written in Malaysia and the "object code" compiled in the United States differ in several important ways. Source code is a "computer program written in a high level human readable language." See, e.g., Daniel S. Lin, Matthew Sag, and Ronald S. Laurie, *Source Code versus Object Code: Patent Implications for the Open Source Community*, 18 Santa Clara High Tech. L.J. 235, 238 (2001). While it is easier for humans to read and write programs in "high level human readable languages," computers cannot execute these programs. See Note, *Copyright Protection of Computer Program Object Code*, 96 Harv. L. Rev. 1723, 1724 (1983). Computers can execute only "object code," which is a program consisting of clusters of "0" and "1" symbols. *Id.* Programmers create object code from source code by feeding it into a program known as a "compiler." *Id.* Thus, step (1), the writing of source code in Malaysia, involves the creation of computer instructions in a high level human readable language, whereas step (2), which is performed in the United States, involves the compilation of those instructions into a format that computers can execute.

CBP has consistently held that conducting a "software build"—i.e., compiling source code into object code—results in a substantial transformation. See, e.g., Headquarters Ruling ("HQ") H192146, dated June 8, 2012 (holding that "software is substantially transformed into a new article with a new name, character and use in the country where the software build is performed"). For example, e-Lock cites HQ H243606, dated Dec. 4, 2013, in which an importer developed DocAve Software, a comprehensive suite of applications for Microsoft SharePoint, in both the United States and China. While most of the

source code was programmed in China, the source code was compiled into object code (i.e., “built”) in the United States. CBP held that “the software build performed in the U.S. substantially transforms the software modules developed in China and the U.S. into a new article with a new name, character and use . . .”. The country of origin of DocAve Software was thus the United States for purposes of U.S. Government procurement.

As in H192146 and H243606, e-Lock also conducts a software build in the United States. This process is sufficient to create a new article with a new name, character and use: the name of the product changes from source code to object code, the character changes from computer code to finished software, and the use changes from instructions to an executable program.

**HOLDING:**

The country of origin of the finished software products is the United States for purposes of government procurement.

Notice of this final determination will be given in the Federal Register, as required by 19 C.F.R. § 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 C.F.R. § 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 C.F.R. § 177.30, any party-at-interest may, within 30 days of publication of the Federal Register Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

*Sincerely,*

JOANNE ROMAN STUMP  
*Acting Executive Director Regulations & Rulings  
Office of International Trade*

[Published in the Federal Register, February 22, 2016 (81 FR 8733)]

**AGENCY INFORMATION COLLECTION ACTIVITIES:**

**Declaration for Free Entry of Returned American Products**

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

**ACTION:** 30-Day notice and request for comments; extension of an existing collection of information.

**SUMMARY:** U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Declaration for Free Entry of Returned American Products (CBP Form 3311). This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the

burden hours or to the information collected. This document is published to obtain comments from the public and affected agencies.

**DATES:** Written comments should be received on or before March 23, 2016 to be assured of consideration.

**ADDRESSES:** Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira\_submission@omb.eop.gov* or faxed to (202) 395-5806.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229-1177, at 202-325-0265.

**SUPPLEMENTARY INFORMATION:** This proposed information collection was previously published in the **Federal Register** (80 FR 68327) on November 4, 2015, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10. CBP invites the general public and other Federal agencies to comment on proposed and/ or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104-13; 44 U.S.C. 3507). The comments should address:

(a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden, including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs to respondents or record keepers from the collection of information (total capital/ startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for OMB approval. All comments will become a matter of public record. In this document, CBP is soliciting comments concerning the following information collection:

**Title:** Declaration of Free Entry of Returned American Products.  
**OMB Number:** 1651-0011.

**Form Number:** CBP Form 3311.

**Abstract:** CBP Form 3311, *Declaration for Free Entry of Returned American Products*, is used by importers and their agents when duty-free entry is claimed for a shipment of returned American products under the Harmonized Tariff Schedules of the United States. This form serves as a declaration that the goods are American made and that they have not been advanced in value or improved in condition while abroad; were not previously entered under a temporary importation under bond provision; and that drawback was never claimed and/or paid. CBP Form 3311 is authorized by 19 CFR 10.1, 10.66, 10.67, 12.41, 123.4, and 143.23 and is accessible at: <http://www.cbp.gov/newsroom/publications/forms?title=3311&=Apply>.

**Current Actions:** CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected on Form 3311.

**Type of Review:** Extension (with no change).

**Affected Public:** Businesses.

**Estimated Number of Respondents:** 12,000.

**Estimated Number of Responses per Respondent:** 35.

**Estimated Number of Total Annual Responses:** 420,000.

**Estimated Time per Response:** 6 minutes.

**Estimated Total Annual Burden Hours:** 42,000.

Dated: February 17, 2016.

TRACEY DENNING,  
*Agency Clearance Officer,*  
*U.S. Customs and Border Protection.*

[Published in the Federal Register, February 22, 2016 (81 FR 8731)]

## AGENCY INFORMATION COLLECTION ACTIVITIES:

### Petroleum Refineries in Foreign Trade Sub-Zones

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

**ACTION:** 30-Day notice and request for comments; extension of an existing collection of information.

**SUMMARY:** U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Bud-

get (OMB) for review and approval in accordance with the Paperwork Reduction Act: Petroleum Refineries in Foreign Trade Sub-zones. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours or to the information collected. This document is published to obtain comments from the public and affected agencies.

**DATES:** Written comments should be received on or before March 23, 2016 to be assured of consideration.

**ADDRESSES:** Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov) or faxed to (202) 395-5806.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229-1177, at 202-325-0265.

**SUPPLEMENTARY INFORMATION:** This proposed information collection was previously published in the **Federal Register** (80 FR 63239) on October 19, 2015, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10. CBP invites the general public and other Federal agencies to comment on proposed and/ or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104-13; 44 U.S.C. 3507). The comments should address:

(a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden, including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs to respondents or record keepers from the collection of information (total capital/ startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for OMB

approval. All comments will become a matter of public record. In this document, CBP is soliciting comments concerning the following information collection:

**Title:** Petroleum Refineries in Foreign Trade Sub-Zones.

**OMB Number:** 1651-0063.

**Abstract:** The Foreign Trade Zones Act, 19 U.S.C. 81c(d) contains specific provisions for petroleum refinery sub-zones. It permits refiners and CBP to assess the relative value of such products at the end of the manufacturing period during which these products were produced when the actual quantities of these products resulting from the refining process can be measured with certainty.

19 CFR 146.4(d) provides that the operator of the refinery sub-zone is required to retain all records relating to the above mentioned activities for five years after the merchandise is removed from the sub-zone. Further, the records shall be readily available for CBP review at the sub-zone.

Instructions on compliance with these record keeping provisions are available in the Foreign Trade Zone Manual which is accessible at: <http://www.cbp.gov/document/guides/foreign-trade-zones-manual>.

**Current Actions:** CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

**Type of Review:** Extension (without change).

**Affected Public:** Businesses.

**Estimated Number of Respondents:** 81.

**Estimated Number of Total Annual Responses:** 81.

**Estimated Time per Response:** 1000 hours.

**Estimated Total Annual Burden Hours:** 81,000.

Dated: February 17, 2016.

TRACEY DENNING,  
*Agency Clearance Officer,*  
*U.S. Customs and Border Protection.*

[Published in the Federal Register, February 22, 2016 (81 FR 8731)]

