

U.S. Customs and Border Protection



RECEIPT OF DOMESTIC INTERESTED PARTY PETITION CONCERNING THE TARIFF CLASSIFICATION OF STEEL TABLE PANS

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

ACTION: Notice of receipt of domestic interested party petition; solicitation of comments.

SUMMARY: U.S. Customs and Border Protection (CBP) has received a petition submitted on behalf of a domestic interested party requesting the reclassification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain steel table pans. CBP currently classifies the subject steel table pans under subheading 7323.93.00, HTSUS, as table, kitchen or other household articles and parts thereof of iron or steel, other, other, of stainless steel. Petitioner contends that the proper classification for the subject steel table pans is under subheading 8419.90.95, HTSUS, as parts of steam tables, which are machinery for the treatment of materials by a process involving a change of temperature such as . . . steaming, other than machinery of a kind used for domestic purposes. This document invites comments with regard to the correctness of the current classification.

DATE: Comments must be received on or before October 12, 2021.

ADDRESSES: You may submit comments, identified by docket number, by the first method listed below:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP-2021-0029.

- *Mail:* Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

Instructions: All submissions received must include the agency name and docket number for this notice of domestic interested party petition concerning the tariff classification of steel table pans. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents, exhibits, or comments received, go to <http://www.regulations.gov>. Due to the relevant COVID-19-related restrictions, CBP has temporarily suspended on-site public inspection of public comments.

FOR FURTHER INFORMATION CONTACT: Anthony L. Shurn, Electronics, Machinery, Automotive, and International Nomenclature Branch, Regulations and Rulings, Office of Trade, Customs and Border Protection, at (202) 325-0218, or by email at anthony.l.shurn@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

Background

A petition has been filed under section 516 of the Tariff Act of 1930, as amended (19 U.S.C. 1516), on behalf of The Vollrath Company, LLC (Vollrath or Petitioner), which is a commercial and consumer food service equipment manufacturer and supplier based in Sheboygan, Wisconsin. Vollrath meets all of the requirements of a domestic interested party set forth in 19 U.S.C. 1516(a)(2) and section 175.3(a) in title 19 of the Code of Federal Regulations (CFR) (19 CFR 175.3(a)).

In New York Ruling (NY) C87748 (May 27, 1998), CBP's predecessor, the U.S. Customs Service (Customs), stated that "steam table pans and chafers of stainless steel" are "items [that] come in various sizes. They are intended to be placed in a steam table or in a food warmer to keep food hot. They can not [sic] be used on top of a stove." CBP classified the "steam table pans and chafers of stainless steel" under subheading 7323.93.00, HTSUS, which provides for "Table, kitchen or other household articles and parts thereof, of iron or steel; iron or steel wool; pot scourers and scouring or polishing pads, gloves and the like, of iron or steel: Other: Of stainless steel." Petitioner contends that the proper classification for the steel table pans is under subheading 8419.90.95, HTSUS, which provides for "Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, non-electric; parts thereof: Parts: Other".

Applicable Legal Principles

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation (GRIs) and, in the absence of

special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation (ARIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings 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, GRIs 2 through 6 may be applied in order.

The Explanatory Notes (ENs) 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* Treasury Decision (T.D.) 89–80, 54 FR 35127, 35128 (August 23, 1989). The EN for heading 73.23, states, in pertinent part, that this group comprises a wide range of iron or steel articles, not more specifically covered by other headings of the Nomenclature, used for table, kitchen or other household purposes; it includes the same goods for use in hotels, restaurants, boarding-houses, hospitals, canteens, barracks, etc. The EN further states, in pertinent part, that the group includes articles for kitchen use such as steamers and preserving pans and that the group also includes iron or steel parts of the article listed above such as separating compartments for pressure cookers.

Elaboration of Petitioner’s Views

Petitioner contends that the proper classification for the subject steel table pans is subheading 8419.90.95, HTSUS, which provides for “Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, nonelectric; parts thereof.” Petitioner contends that between the classifications that merit consideration, heading 8419, HTSUS, is the most appropriate because steel table pans are not table, kitchen or other household articles of heading 7323, HTSUS. Petitioner further states that classification of the steel table pans as a part of steam tables and commercial chafers within heading 8419, HTSUS, is supported by the tariff headings, the EN to heading 8419, HTSUS, and court decisions that establish the definition of a “part.”

Petitioner contends that steam tables are classified under subheading 8419.81.90, HTSUS, in reliance upon Customs' ruling in NY N836798 (February 22, 1989), which classified a food warmer used to transport food to various areas located within commercial establishments, and the EN to heading 84.19. Subheading 8419.81.90, HTSUS, provides for "Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes: Other machinery, plant and equipment: For making hot drinks or for cooking or heating food: Other."

According to the Petitioner, steam tables, which are gas or electric powered machines used in commercial food service operations to heat and hold prepared food, are a type of steam-heated cooker, and that steam tables are appropriately classified under heading 8419, HTSUS, in reliance upon Part I (17) to EN 84.19, which includes specialized heating or cooking apparatus which are not normally used in the household (*e.g.*, steam-heated cookers, hot-plates, warming cupboards, drying cabinets, etc.). Petitioner asserts that the subject steel table pans are parts of steam tables in reliance upon the notes to Section XVI, HTSUS, which provide, in pertinent part, that parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading are to be classified with the machines, instruments, or apparatus of that kind. Petitioner advises that the subject steel table pans are specifically designed to fit within the standard size well of a steam table, transfer heat from the steam to the food, and withstand extended exposure to steam, and therefore, that the steel table pans are principally used with steam tables.

Petitioner advises that CBP's rulings are inconsistent. Petitioner references NY C87748 (May 27, 1998) in which Customs classified steam table pans and chafers of stainless steel under subheading 7323.93.00, HTSUS; NY N199500 (January 24, 2012), in which CBP rejected classification of chafing dishes heated by sterno candles under subheading 8419.81.90, HTSUS, because the unit was not mechanical; and, NY C88591 (July 1, 1998), in which Customs classified a similar chafer set with water pan, food pan, and cover under subheading 8419.81.90, HTSUS. According to Petitioner, unlike the products of NY N199500, the steel table pans at issue here are not

excluded from heading 8419 because they are specifically designed to be used with electric or gas-powered steam tables. Petitioner notes that the subject steel table pans should be classified in accordance with NY C88591 under heading 8419, HTSUS.

Analysis Used by CBP in Prior Rulings

Note 1(f) to Section XV, HTSUS, provides in pertinent part that this section does not cover articles of section XVI (machinery, mechanical appliances and electrical goods). Subheading 7323.93.00, HTSUS, provides, in pertinent part, for “Table, kitchen or other household articles and parts thereof, of iron or steel; iron or steel wool; pot scourers and scouring or polishing pads, gloves and the like, of iron or steel: Other: Of stainless steel.” CBP has classified stainless steel cookware, including chafing dishes and steam pans, under heading 7323, HTSUS, where the merchandise is not mechanical or electric. *See* NY C87748 and NY N199500. As noted above, however, in NY C88591, CBP’s predecessor classified a chafer set with water pan, food pan, and cover in subheading 8419.81.90, HTSUS.

Comments

Pursuant to section 175.21 of the CBP Regulations (19 CFR 175.21), before making a determination on this matter, CBP invites written comments on the petition from interested parties.

The domestic interested party petition concerning the tariff classification of certain steel table pans, as well as all comments received in response to this notice, will be available for public inspection on the docket at *www.regulations.gov*.

Authority

This notice is published in accordance with 19 U.S.C. 1516 and section 175.21 of the CBP Regulations (19 CFR 175.21).

Troy A. Miller, the Acting Commissioner, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

Dated: August 6, 2021.

ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division,
Regulations & Rulings, Office of Trade,
U.S. Customs and Border Protection.

[Published in the Federal Register, August 11, 2021 (85 FR 44031)]

RECEIPT OF DOMESTIC INTERESTED PARTY PETITION CONCERNING THE TARIFF CLASSIFICATION OF MIXTURES OF DRIED GARLIC AND DRIED ONION

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

ACTION: Notice of receipt of domestic interested party petition; solicitation of comments.

SUMMARY: U.S. Customs and Border Protection (CBP) has received a petition submitted on behalf of a domestic interested party requesting the reclassification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain dried garlic and dried onion mixtures. CBP currently classifies the subject dried garlic and dried onion mixtures under subheading 0712.90.85, HTSUS, as mixtures of dried vegetables. Petitioner contends that the proper classification for the subject dried garlic and dried onion mixtures is under subheading 0712.90.40, HTSUS, as dried garlic. This document invites comments with regard to the correctness of the current classification.

DATES: Comments must be received on or before October 12, 2021.

ADDRESSES: You may submit comments, identified by docket number, by the first method listed below:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP–2020–0023.

- *Mail:* Due to COVID–19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

Instructions: All submissions received must include the agency name and docket number for this notice of domestic interested party petition concerning the tariff classification of dried garlic and dried onion mixtures. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents, exhibits, or comments received, go to <http://www.regulations.gov>. Due to the relevant COVID–19-related restrictions, CBP has temporarily suspended on-site public inspection of public comments.

FOR FURTHER INFORMATION CONTACT: Tanya Secor, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, at (202) 325–0062, or by email at tanya.j.secor@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

Background

A petition has been filed under section 516 of the Tariff Act of 1930, as amended (19 U.S.C. 1516), on behalf of Olam West Coast Inc. (Petitioner or Olam), which is an agri-business and supplier of food, ingredients, and raw materials, based in Fresno, California. Olam manages a wide range of production, processing, and supply of agricultural products in twelve states, with a majority of its operations in California. Olam's largest onion and garlic plant is in Gilroy, California. Olam meets all of the requirements of a domestic interested party set forth in 19 U.S.C. 1516(a)(2) and section 175.3(a) in title 19 of the Code of Federal Regulations (19 CFR 175.3(a)).

In New York Ruling Letter (NY) N276018 (November 23, 2016), NY N276015 (November 23, 2016), NY N267292 (August 27, 2015), NY N259557 (November 28, 2014), and NY N256957 (September 23, 2014), CBP classified various mixtures of dried (also referred to as dehydrated) garlic and dried onions as mixtures of dried vegetables in subheading 0712.90.85 of the Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Dried vegetables, whole, cut, sliced, broken or in powder, but not further prepared: Other vegetables; mixtures of vegetables: Other vegetables; mixtures of vegetables." Petitioner contends that the proper classification for the dried garlic and dried onion mixtures is dried garlic in subheading 0712.90.40, HTSUS, which provides for "Dried vegetables, whole, cut, sliced, broken or in powder, but not further prepared: Other vegetables; mixtures of vegetables: Garlic."

Applicable Legal Principles

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation (GRIs) and, in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation (ARIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings 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, GRIs 2 through 6 may be applied in order.

The Explanatory Notes (ENs) 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* Treasury Decision (T.D.) 89–80, 54 FR 35127, 35128 (August 23, 1989). The EN for heading 07.12, states, in pertinent part, that the heading also covers dried vegetables, broken or powdered, such as asparagus, cauliflower, parsley, chervil, onion, garlic, celery, generally used either as flavouring materials or in the preparation of soups.

Elaboration of the Petitioner’s Views

Petitioner contends that the proper classification for the subject dried garlic and dried onion mixtures is subheading 0712.90.40, HTSUS, which provides for “Dried vegetables, whole, cut, sliced, broken or in powder, but not further prepared: Other vegetables; mixtures of vegetables: Garlic.” Petitioner contends that the subject dried garlic and dried onion mixtures are not “mixtures of vegetables” because they are “overwhelmingly composed of dried garlic” and therefore are “appropriately classified as dried garlic under” subheading 0712.90.40, HTSUS, pursuant to GRI 3(b).

Petitioner argues that whether a given product is to be considered a “mixture of vegetables” depends on the specific vegetables included in the mixture, the relative quantities of such vegetables, and the impact that the non-predominant vegetables have on the product’s essential character. Petitioner also urges CBP to consider how a given product is marketed to determine whether industry standards and/or consumers consider the product in question to be a “mixture of vegetables.” Based on these factors, Petitioner urges CBP to find that the subject dried garlic and dried onion mixtures are not “mixtures of vegetables,” but rather dried garlic products. It is Petitioner’s view that dried garlic imparts the essential character. In support of its argument, Petitioner relies on a ruling where dried garlic mixed with chemical substances is classified as “dried garlic” in subheading 0712.90.40, HTSUS. *See, e.g.*, NY N270709 (December 15, 2015) (dried garlic mixed with calcium stearate and dried garlic mixed with silicon dioxide).

Analysis Used by CBP in Prior Rulings

Subheading 0712.90.85, HTSUS, provides for “Dried vegetables, whole, cut, sliced, broken or in powder, but not further prepared: Other vegetables; mixtures of vegetables: Other vegetables; mixtures of vegetables.” There are no specifications or requirements to qualify as a mixture in the section notes, chapter notes, or ENs. The EN for heading 07.12 provides guidance that both garlic and onion are vegetables. “Mixture” is not defined in the HTSUS.

In the rulings at issue, the mixtures of dried vegetables are comprised of varying combinations of the components dried garlic and

dried onion. Specifically, NY N256957 classifies a mixture of 50 percent dried garlic and 50 percent dried onion; NY N259557 also classifies a 50–50 percent dried garlic and dried onion mixture; NY N267292 classifies three dried garlic and dried onion mixtures covering 90 percent dried garlic and 10 percent dried onion, 95 percent dried garlic and 5 percent dried onion, 99 percent dried garlic and 1 percent dried onion; NY N276015 also classifies three vegetable mixtures, one of 64 percent dried garlic and 36 percent dried onion, one of 87 percent dried garlic and 13 percent dried tomatoes, one of 80 percent dried onion and 20 percent dried celery; NY N276018 classifies two dried garlic and dried onion mixtures, one of 99 percent dried garlic and 1 percent dried onion and the other of 1 percent dried garlic and the 99 percent dried onion. All of these various dried vegetable mixtures are classified in subheading 0712.90.85, HTSUS, as mixtures of dried vegetables, notwithstanding the amount of the component dried garlic. These rulings classified the mixtures of dried garlic and dried onion under GRIs 1 and 6, because the subject merchandise are all mixtures of dried vegetables and there are no requisite amounts to qualify as a mixture.

Comments

Pursuant to section 175.21 of the CBP Regulations (19 CFR 175.21), before making a determination on this matter, CBP invites written comments on the petition from interested parties.

The domestic interested party petition concerning the tariff classification of certain dried garlic and dried onion mixtures, as well as all comments received in response to this notice, will be available for public inspection on the docket at *www.regulations.gov*.

Authority: This notice is published in accordance with 19 U.S.C. 1516 and section 175.21 of the CBP Regulations (19 CFR 175.21).

Troy A. Miller, the Acting Commissioner, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

Dated: August 6, 2021.

ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division,
Regulations & Rulings, Office of Trade,
U.S. Customs and Border Protection.

RECEIPT OF DOMESTIC INTERESTED PARTY PETITION CONCERNING THE TARIFF CLASSIFICATION OF DRIED ONION PRODUCTS

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

ACTION: Notice of receipt of domestic interested party petition; solicitation of comments.

SUMMARY: U.S. Customs and Border Protection (CBP) has received a petition submitted on behalf of a domestic interested party requesting the reclassification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain dried onion products. CBP currently classifies the subject dried onion products under subheading 2005.99.20, HTSUS, as onions prepared or preserved otherwise than by vinegar or acetic acid. Petitioner contends that the proper classification for the subject dried onion products is under subheading 0712.20.20, HTSUS, as dried onion powder not further prepared. This document invites comments with regard to the correctness of the current classification.

DATES: Comments must be received on or before October 12, 2021.

ADDRESSES: You may submit comments, identified by docket number, by the first method listed below:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP-2021-0028.

- *Mail:* Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

Instructions: All submissions received must include the agency name and docket number for this notice of domestic interested party petition concerning the tariff classification of dried onion products. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents, exhibits, or comments received, go to <http://www.regulations.gov>. Due to the relevant COVID-19-related restrictions, CBP has temporarily suspended on-site public inspection of public comments.

FOR FURTHER INFORMATION CONTACT: Tanya Secor, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, at (202) 325-0062 or by email at tanya.j.secor@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

Background

A petition has been filed under section 516 of the Tariff Act of 1930, as amended (19 U.S.C. 1516), on behalf of Olam West Coast Inc. (Petitioner or Olam), which is an agri-business and supplier of food, ingredients, and raw materials, based in Fresno, California. Olam manages a wide range of production, processing, and supply of agricultural products in twelve states, with a majority of its operations in California. Olam's largest onion and garlic plant is in Gilroy, California. Olam meets all of the requirements of a domestic interested party set forth in 19 U.S.C. 1516(a)(2) and section 175.3(a) in title 19 of the Code of Federal Regulations (19 CFR 175.3(a)).

In New York Ruling Letter (NY) N265994 (July 9, 2015), NY N261449 (February 20, 2015), NY N257752 (October 24, 2014), and NY M86441 (October 13, 2006), CBP classified various mixtures of onion powder and salt or other ingredients as prepared or preserved onions in subheading 2005.99.20 of the Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, not frozen, other than products of heading 2006: Other vegetables and mixtures of vegetables: Other: Onions." Petitioner contends that the proper classification for the onion powder mixtures is dried onion powder in subheading 0712.20.20, HTSUS, which provides for "Dried vegetables, whole, cut, sliced, broken or in powder, but not further prepared: Onions: Powder or flour."

Applicable Legal Principles

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation (GRIs) and, in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation (ARIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings 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, GRIs 2 through 6 may be applied in order. GRI 3(b) applies to mixtures, which are *prima facie*, classifiable under two or more headings and which cannot be classified by reference to GRI 3(a). Pursuant to GRI 3(b), mixtures shall be classified as if they consisted of the material or component which gives them their essential character.

Note 3 to Chapter 7, HTSUS, provides that heading 0712 covers all dried vegetables of the kinds falling in headings 0701 to 0711, excluding certain vegetables but including onions. Note 1(a) to Chapter 20,

HTSUS, provides that this chapter does not cover vegetables, fruit or nuts, prepared or preserved by the processes specified in Chapter 7, 8, or 11. Conversely, Note 3 to Chapter 20, HTSUS, provides in pertinent part that heading 2005 covers, as the case may be, only those products of Chapter 7, which have been prepared or preserved by processes other than those referred to in Note 1(a).

The Explanatory Notes (ENs) 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* Treasury Decision (T.D.) 89–80, 54 FR 35127, 35128 (August 23, 1989).

The General EN to Chapter 7, HTSUS, provides, in pertinent part, that this Chapter covers vegetables, including the products listed in Note 2 to the Chapter, whether fresh, chilled, frozen (uncooked or cooked by steaming or boiling in water), provisionally preserved or dried (including dehydrated, evaporated or freeze-dried), and that some of these products when dried and powdered are sometimes used as flavoring materials but nevertheless remain classified in heading 07.12. The EN further states that vegetables prepared or preserved by any process not provided for in Chapter 7 fall in Chapter 20. The EN for heading 07.12 states, in pertinent part, that the heading covers vegetables of headings 07.01 to 07.11 which have been dried (including dehydrated, evaporated or freeze-dried) *i.e.*, with their natural water content removed by various processes. The EN further provides that heading 0712, HTSUS, covers dried vegetables, broken or powdered, such as asparagus, cauliflower, parsley, chervil, onion, garlic, celery, generally used either as flavouring materials or in the preparation of soups. The EN for heading 20.05 states, in pertinent part, that the heading covers products (other than vegetables prepared or preserved by vinegar or acetic acid of heading 20.01, frozen vegetables of heading 20.04 and vegetables preserved by sugar of heading 20.06) that have been prepared or preserved by processes not provided for in Chapter 7 or 11.

Elaboration of the Petitioner's Views

Petitioner contends that the proper classification for the subject dried onion products is subheading 0712.20.20, HTSUS, which provides for “Dried vegetables, whole, cut, sliced, broken or in powder, but not further prepared: Onions: Powder or flour.” Petitioner contends that the subject onion products are (1) preserved by drying and, therefore, excluded from Chapter 20, HTSUS; (2) neither “preserved”

nor “prepared” in a manner covered by Chapter 20, HTSUS; and (3) not “prepared” or “preserved” under the “common and commercial meaning” of those terms. Specifically, Petitioner argues that the subject dried onion products are neither prepared nor preserved because the small quantities of salt or preservatives do not create a permanent change to the onion powder. In support of its argument, Petitioner relies on Headquarters Ruling Letter (HQ) H243645 (September 30, 2015) wherein CBP classified dried sliced and diced potatoes with added sodium bisulfate under subheading 0712.90.30, HTSUS, as dried potatoes not further prepared. In HQ H243645, CBP determined that sodium bisulfite simply preserved the potatoes’ freshness, color and flavor, and did not further prepare the product.

Petitioner asserts that to the extent the products are mixtures of multiple ingredients, the essential character of these products remains onion powder and therefore they should be classified under 0712.20.20, HTSUS, pursuant to GRI 3(b). Petitioner also argues that classifying such products as “prepared” or “preserved” is contrary to the intention to protect domestic production of dried onion as indicated by the high tariff rate applicable to dried onion and dried onion powder.

Analysis Used by CBP in Prior Rulings

Subheading 2005.99.20, HTSUS, provides for “Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, not frozen, other than products of heading 2006: Other vegetables and mixtures of vegetables: Other: Onions.” The EN for heading 0712 provides guidance that the heading covers dried vegetables in powder form, including onion, not otherwise prepared. If a dried vegetable product is prepared beyond the scope of heading 0712, HTSUS, it will be precluded from classification in that heading and classifiable in heading 2005, HTSUS.

In the rulings at issue, the dried onion products are comprised of dried onion powder and varying additional ingredients. Specifically, NY N265994 classified agglomerated onion powder consisting of 94.5% dried onion powder, 5% water, and 0.5% of maltodextrin, silicon dioxide, and potassium sorbate combined. NY N261449 classified onion and salt powders blended in five different formulations: 91% onion powder and 9% salt; 93% onion powder and 7% salt; 95% onion powder and 5% salt; 97% onion powder and 3% salt; and 99% onion powder and 1% salt. NY N257752 classified five products, two of which were comprised of onion powder and salt. The first consisted of 80% onion powder and 20% salt and the second consisted of 90% onion powder and 10% salt. Finally, NY M86441 classified agglomerated

onion powder consisting of 88.5% dehydrated onion powder, 5% water, 4% corn starch, 1% Arabic gum, 1% silicon dioxide, and 0.5% citric acid. CBP determined that the addition of salt and other ingredients, regardless of the proportions, further prepared the onion powder beyond the scope of heading 0712, HTSUS. Thus, these dried onion products were classified pursuant to GRI 1 in subheading 2005.99.20, HTSUS, as onions prepared or preserved otherwise than by vinegar or acetic acid.

Comments

Pursuant to section 175.21, CBP Regulations (19 CFR 175.21), before making a determination on this matter, CBP invites written comments on the petition from interested parties.

The domestic interested party petition concerning the tariff classification of certain dried onion products, as well as all comments received in response to this notice, will be available for public inspection on the docket at *www.regulations.gov*.

Authority

This notice is published in accordance with 19 U.S.C. 1516 and section 175.21 of the CBP Regulations (19 CFR 175.21).

Troy A. Miller, the Acting Commissioner, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

Dated: August 6, 2021.

ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division,
Regulations & Rulings, Office of Trade,
U.S. Customs and Border Protection.

[Published in the Federal Register, August 11, 2021 (85 FR 44030)]

**PROPOSED REVOCATION OF EIGHT RULING LETTERS,
PROPOSED MODIFICATION OF FOUR RULING LETTERS,
AND PROPOSED REVOCATION OF TREATMENT
RELATING TO THE TARIFF CLASSIFICATION OF
FLOCKED PAPER SETS**

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

ACTION: Notice of proposed revocation of eight ruling letters, proposed modification of four ruling letters, and proposed revocation of treatment relating to the tariff classification of flocked paper sets.

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 eight ruling letters and modify four ruling letters concerning tariff classification of flocked paper sets 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 on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before September 24, 2021.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

FOR FURTHER INFORMATION CONTACT: Ms. Arim J. Kim, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0266.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with 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 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke eight ruling letters and modify four ruling letters pertaining to the tariff classification of flocked paper sets. Although in this notice, CBP is specifically referring to NY K83080, dated February 26, 2004 (Attachment A), NY K83204, dated February 26, 2004 (Attachment B), NY K86534, dated June 10, 2004 (Attachment C), and NY L83248, dated March 18, 2005 (Attachment D), NY I83703, dated June 28, 2002 (Attachment E), NY J80696, dated February 7, 2003 (Attachment F), NY L81409, dated December 20, 2004 (Attachment G), NY N099452, dated April 28, 2010 (Attachment H), HQ 950774, dated January 28, 1992 (Attachment I), NY G82351, dated September 22, 2000 (Attachment J), NY N038315, dated October 14, 2008 (Attachment K), and NY N217077, dated June 5, 2012 (Attachment L), this notice also 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 twelve 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 comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), 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 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 the final decision on this notice.

In NY K83080, NY K83204, NY K86534, NY L83248, NY I83703, NY J80696, NY L81409, NY N038315, and NY N217077, CBP classified flocked paper sets in heading 4823, HTSUS, specifically in subheading 4823.90.67, HTSUS, which provides for “Other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers: Other: Other: Other: Of coated paper or paperboard: Other”. In NY N099452, CBP classified the subject merchandise in subheading 4823.90.86, HTSUS, which provides for “Other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers: Other: Other: Other: Other: Other”. In NY G82351, CBP classified the subject merchandise in subheading 4911.91.40, HTSUS, which provides for “Other printed matter, including printed pictures and photographs: Other: Pictures, designs and photographs: Other: Other”. Lastly, in HQ 950774, CBP classified the subject merchandise in subheading 9608.20.00, HTSUS, which provides for “Ball point pens; felt tipped and other porous-tipped pens and markers; fountain pens, stylograph pens and other pens; duplicating styli; propelling or sliding pencils (for example, mechanical pencils); pen-holders, pencil-holders and similar holders; parts (including caps and clips) of the foregoing articles, other than those of heading 9609: Felt tipped and other porous-tipped pens and markers”. CBP has reviewed the aforementioned rulings and has determined the ruling letters to be in error. It is now CBP’s position that flocked paper sets are properly classified, in heading 4811, HTSUS, specifically in subheading 4811.90.90, HTSUS, which provides for “Paper, paperboard, cellulose wadding and webs of cellulose fibers, coated, impregnated, covered, surface-colored, surface-decorated or printed, in rolls or rectangular (including square) sheets, of any size, other than goods of the kind described in heading 4803, 4809 or 4810: Other paper, paperboard, cellulose wadding and webs of cellulose fibers: Other”.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY K83080, NY K83204, NY K86534, NY L83248, NY I83703, NY J80696, NY L81409 and NY N099452, to modify HQ 950774, NY G82351, NY N038315 and NY N217077, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H303761, set forth as Attachment M 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: July 21, 2021

ALLYSON MATTANAH

for

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

Attachments

NY K83080

February 26, 2004

CLA-2-48:RR:NC:SP:234 K83080

CATEGORY: Classification

TARIFF NO.: 4823.90.6600

MR. KEVIN MAHER
C-AIR CUSTOMHOUSE BROKERS
181 So. FRANKLIN AVE.
VALLEY STREAM, NY 11581

RE: The tariff classification of a “fuzzy poster” coloring set from China.

DEAR MR. MAHER:

In your letter dated February 5, 2004, you requested a tariff classification ruling on behalf of Rose Art Industries, Inc.

A sample identified as a #4616 “Funtime Fuzzy Poster Value Set” was submitted for our examination and is being returned to you as requested. It consists of the following items put up together for retail sale in a printed paperboard display box:

- 5 “fuzzy posters,” which are sheets of white paper, partially coated with black flock so as to form pictures and designs. The white, unflocked areas are meant to be colored in by the user. The “posters” range in size from 6” x 9” to 16” x 20”.
- A “fuzzy portfolio,” which is a paperboard pocket folder measuring 9½” x 11½” in the closed position. Its face has a flocked design suitable for coloring.
- 8 washable markers in assorted colors.
- A packet of sequins.
- A small tube of white glue.
- A wooden “design stick” to assist in the application of the sequins.

The above-described items, all of which relate to a coloring/decorating activity, will be regarded as “goods put up in sets for retail sale” whose essential character is imparted by the flocked “posters.”

The applicable subheading for the complete #4616 set will be 4823.90.6600, Harmonized Tariff Schedule of the United States (HTS), which provides for other (non-enumerated) articles of coated paper or paperboard. The rate of duty will be Free.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Carl Abramowitz at 646-733-3037.

Sincerely,

ROBERT B. SWIERUPSKI

Director,

National Commodity Specialist Division

NY K83204
February 26, 2004
CLA-2-48:RR:NC:SP:234 K83204
CATEGORY: Classification
TARIFF NO.: 4823.90.6600

MR. KEVIN MAHER
C-AIR CUSTOMHOUSE BROKERS
181 So. FRANKLIN AVE.
VALLEY STREAM, NY 11581

RE: The tariff classification of a “fuzzy poster” coloring set from China.

DEAR MR. MAHER:

In your letter dated February 5, 2004, you requested a tariff classification ruling on behalf of Rose Art Industries, Inc.

A sample identified as a #4618 “Funtime Fuzzy Value Set” was submitted for our examination and is being returned to you as requested. It consists of the following items put up together for retail sale in a printed paperboard display box:

- 4 “fuzzy posters,” which are sheets of white paper, partially coated with black flock so as to form pictures and designs. The white, unflocked areas are meant to be colored in by the user. The “posters” range in size from 8” x 20” to 16” x 20”.
- 8 washable markers in assorted colors.
- A small tube of glitter glue.

The above-described items, all of which relate to a coloring/decorating activity, will be regarded as “goods put up in sets for retail sale” whose essential character is imparted by the flocked “posters.”

The applicable subheading for the complete #4618 set will be 4823.90.6600, Harmonized Tariff Schedule of the United States (HTS), which provides for other (non-enumerated) articles of coated paper or paperboard. The rate of duty will be Free.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Carl Abramowitz at 646-733-3037.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity Specialist Division

NY K86534

June 10, 2004

CLA-2-48:RR:NC:SP:234 K86534

CATEGORY: Classification

TARIFF NO.: 4823.90.6600

MR. KEVIN MAHER
C-AIR CUSTOMHOUSE BROKERS
181 SOUTH FRANKLIN AVENUE
VALLEY STREAM, NY 11581

RE: The tariff classification of a child's activity kit consisting of flocked-paper pictures, a plastic "coloring desk," markers and glitter glue, from China.

DEAR MR. MAHER:

In your letter dated May 26, 2004, you requested a tariff classification ruling on behalf of Rose Art Industries, Inc.

A sample identified as a #5236 "Fuzzy Poster Activity Desk" was submitted for our examination and is being returned to you as requested. It consists of the following items put up together for retail sale in a printed paperboard box:

- A roll of white paper, approximately 10 inches wide by 5 feet long, portions of which are coated with black flock so as to form a series of pictures. The white (unflocked) areas are meant to be colored/decorated by the user. The individual pictures may be cut off the roll and framed and/or displayed as desired.
- 6 felt-tipped markers in assorted colors.
- A tube of silver "glitter glue."
- A 12" x 15" x 1½" molded plastic "desk" that incorporates a holder for the flocked paper roll and slots through which the paper can be unrolled. The "desk" acts as a work surface upon which the paper can be unrolled for coloring purposes. Although the work surface is molded with recesses that may act as temporary holders for the markers and glitter glue, it does not incorporate any compartments in which the accessories may be stored. Additional rolls of poster paper are not available for purchase without the purchase of another set with another work surface. The work surface does not have any practical application as a desk after the roll of paper is used up.

For tariff classification purposes, this kit will be regarded as "goods put up in sets for retail sale" whose essential character is imparted by the flocked paper. According to the cost breakdown provided with your request, the flocked paper is the costliest component, with a value more than twice that of the plastic work surface.

Accordingly, the applicable subheading for the complete #5236 "Fuzzy Poster Activity Desk" kit will be 4823.90.6600, Harmonized Tariff Schedule of the United States (HTS), which provides for other (non-enumerated) articles of coated paper. The rate of duty will be Free.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is

imported. If you have any questions regarding the ruling, contact National Import Specialist Carl Abramowitz at 646-733-3037.

Sincerely,

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

NY L83248

March 18, 2005

CLA-2-48:RR:NC:SP:234 L83248

CATEGORY: Classification

TARIFF NO.: 4823.90.6600

MR. KEVIN MAHER
C-AIR CUSTOMHOUSE BROKERS
181 SO. FRANKLIN AVE.
VALLEY STREAM, NY 11581

RE: The tariff classification of a “fuzzy poster” coloring set from China.

DEAR MR. MAHER:

In your letter dated February 25, 2005, you requested a tariff classification ruling on behalf of Rose Art Industries, Inc.

A sample identified as a #4633 “Fuzzy Value Set” was submitted for our examination and is being returned to you as requested. It consists of the following items put up together for retail sale in a printed paperboard display box:

- 4 “fuzzy posters,” which are sheets of white paper, partially coated with purple flock so as to form pictures and designs. The white, unflocked areas are meant to be colored in by the user. The “posters” range in size from 8” x 20” to 16” x 20”.
- 8 felt-tipped markers in assorted colors.
- 2 small tubes of glitter glue.

The above-described items, all of which relate to a coloring/decorating activity, will be regarded as “goods put up in sets for retail sale” whose essential character is imparted by the flocked “posters.”

The applicable subheading for the complete #4633 set will be 4823.90.6600, Harmonized Tariff Schedule of the United States (HTS), which provides for other (non-enumerated) articles of coated paper or paperboard. The rate of duty will be Free.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Carl Abramowitz at 646-733-3037.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity
Specialist Division

NY I83703

June 28, 2002

CLA-2-48:RR:NC:SP:234 I83703

CATEGORY: Classification

TARIFF NO.: 4823.90.6600

Ms. LORIANNE ALDINGER
RITE AID CORPORATION
P.O. Box 3165
HARRISBURG, PA 17105

RE: The tariff classification of “velvet art” sets (flocked pictures with pens) from China.

DEAR Ms. ALDINGER:

In your letter dated June 7, 2002, you requested a tariff classification ruling.

A sample identified as a “velvet art assortment” (item #998245) was submitted for our examination. It is a paperboard retail display box containing four “velvet art designs” (pictures) and six plastic, felt-tipped pens of assorted colors. Each velvet picture is an 8”x10” sheet of white paperboard bearing a design or scene whose outlines have been formed by black flock affixed to selected portions of the surface. The white, unflocked areas are to be colored by the consumer using the pens provided.

You state that “the composition of this item is 80% velvet paper card and 20% plastic.” It is assumed that this breakdown is by value.

For tariff classification purposes, the product will be considered “goods put up in sets for retail sale” whose essential character is imparted by the flocked paperboard items.

Accordingly, the applicable subheading for the complete “velvet art assortment” (#998245) will be 4823.90.6600, Harmonized Tariff Schedule of the United States (HTS), which provides for other (non-enumerated) articles of coated paper or paperboard. The rate of duty will be 1.1%.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Carl Abramowitz at 646-733-3037.

Sincerely,

ROBERT B. SWIERUPSKI

Director,

National Commodity Specialist Division

NY J80696

February 7, 2003

CLA-2-48:RR:NC:SP:234 J80696

CATEGORY: Classification

TARIFF NO.: 4823.90.6600

MR. JOSEPH STINSON
LISS GLOBAL, INC.
7746 DUNGAN ROAD
PHILADELPHIA, PA 19111

RE: The tariff classification of flocked picture cards with pens, from China.

DEAR MR. STINSON:

In your letter dated January 30, 2003, you requested a tariff classification ruling.

A sample identified as “HTP Velvet Picture Treats” (item #932021) was submitted and is being returned to you as requested. It is a retail bag containing 16 “Velvet Treat” packets intended to be given out to children on Halloween. Each packet contains a 2¾” x 3¾” flocked paper “picture card” together with a small (3”) felt-tipped marker pen. The cards bear assorted designs or scenes (involving jack-o-lanterns, bats, tombstones, etc.) formed by black flock affixed to selected portions of the surface. The white, unflocked areas are to be colored using the pen provided.

You propose classifying this product in subheading 9505.90.6000, Harmonized Tariff Schedule of the United States (HTS), which provides for other (than certain enumerated) festive, carnival or other entertainment articles. We find, however, that because the product is not used either to decorate the home or to entertain in the home on Halloween, it is not classified within heading 9505, HTS.

For tariff purposes, the merchandise will be regarded as “goods put up in sets for retail sale” whose essential character is imparted by the flocked paper cards.

The applicable subheading for the “HTP Velvet Picture Treats” will be 4823.90.6600, Harmonized Tariff Schedule of the United States (HTS), which provides for other (non-enumerated) articles of coated paper or paperboard. The rate of duty will be 0.6%.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Carl Abramowitz at 646-733-3037.

Sincerely,

ROBERT B. SWIERUPSKI
Director,

National Commodity Specialist Division

NY L81409

December 20, 2004

CLA-2-48:RR:NC:SP:234 L81409

CATEGORY: Classification

TARIFF NO.: 4823.90.6600

MR. DANIEL SHAPIRO
TOMPKINS & DAVIDSON, LLP
ONE ASTOR PLAZA
1515 BROADWAY
NEW YORK, NY 10036-8901

RE: The tariff classification of children's flocked paperboard "posters," with markers for coloring, from China.

DEAR MR. SHAPIRO:

In your letter dated December 6, 2004, you requested a tariff classification ruling on behalf of Tara Toy Corporation. Three samples were submitted for our examination and are being returned to you as requested.

The "Barbie Very Velvet Poster Set" (Item #33021) is a shrink-wrapped retail package containing a 6" x 9" sheet of white paperboard, partially coated with flock so as to form a picture or "scene," together with 5 "mini markers" (felt-tipped pens) in assorted colors. The user is encouraged to employ the markers to color the unflocked areas of the paperboard.

The "Hot Wheels Very Velvet Poster Set" (Item #52422) is the same type of kit described above, except that the flocked paperboard sheet measures 11" x 15" and exhibits a racing-car motif. Five markers are again included.

The "Girlie Girl Very Velvet Spring-Action Poster Set" (Item #52455) is a shrink-wrapped kit containing another 11" x 15" flocked paperboard "poster" accompanied by 5 markers. However, in this instance the poster incorporates an additional feature: a die-cut, flocked paperboard shape attached to its face by means of a spring. This is meant to enhance the picture by imparting 3-D and kinetic effects.

For tariff classification purposes, the above-described kits will be regarded as "goods put up in sets for retail sale" whose essential character is imparted by the flocked paperboard components.

Accordingly, the applicable subheading for all of the above-described kits will be 4823.90.6600, HTS, which provides for other (non-enumerated) articles of coated paper or paperboard. The rate of duty will be Free.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Carl Abramowitz at 646-733-3037.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity
Specialist Division

N099452

April 28, 2010

CLA-2-48:OT:RR:NC:2:234

CATEGORY: Classification

TARIFF NO.: 4823.90.8600

Ms. KRISTA B. RUFFONI
FAMILY DOLLAR SERVICES, INC.
10401 MONROE ROAD
MATTHEWS, NC 28105

RE: The tariff classification of velvet art from China

DEAR Ms. RUFFONI:

In your letter dated March 19, 2010 you requested a tariff classification ruling.

The ruling was requested on Style number 65612, a velvet art poster with six felt tipped markers of assorted colors. You submitted a sample for our examination which will be returned as you requested. The “velvet” art picture is an 8” x 10” sheet of white paperboard that depicts the Disney Pixar Toy Story character Woody with the words Western Hero and Woody Roundup. The Toy Story character is designed with an outline formed by black flock affixed to the white background. The white, unflocked areas are to be colored by the consumer using the markers provided.

For tariff classification purposes, the product will be considered “goods put up in sets for retail sale” whose essential character is imparted by the flocked paperboard item.

The applicable subheading for the velvet art poster will be 4820.90.8600, Harmonized Tariff Schedule of the United States (HTSUS), which provides for other (non-enumerated) articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers. 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 Patricia Wilson at (646) 733-3037.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

HQ 950774

January 28, 1992

CLA-2 CO:R:C:T 950774 JS

CATEGORY: Classification

TARIFF NO.: 4823.90.6500; 9608.20.0000

THERESA BUELL
WESTERN GRAPHICS CORP.
P.O. BOX 22310
EUGENE, OR 97402-0417

RE: Poster product; flocked paper; pens

DEAR Ms. BUELL:

This is in reference to your letter of November 1, 1991, requesting classification of a poster product under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

FACTS:

The merchandise at issue, a sample of which was provided, is a "Fuzzy Poster." It is an 11 x 14 inch poster of a dragon produced on paper or paperboard, which has been flocked with a black rayon fiber on a white background. Six felt-tipped markers of varying colors are provided with the poster so that the user may color in the white spaces. The poster and pens are shrink-wrapped together with a piece of cardboard for stiffness.

You request classification for the sample as an "entirety" as well as for the pens and poster individually imported.

ISSUE:

What is the classification of the merchandise at issue.

LAW AND ANALYSIS:

Classification of merchandise under the HTSUSA is in accordance with the General Rules of Interpretation (GRI), taken in order. GRI 1 requires that classification be determined according to the terms of the headings and any relative section or chapter notes, taken in order.

Heading 4823 encompasses articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibres, not covered by any of the previous headings of this Chapter nor excluded by Note 1 to this Chapter. The other headings of Chapter 48 and Note 1 do not provide for articles such as the item before us. Since the fuzzy poster is paper or paperboard article flocked with textile fiber, classification within heading 4823 is appropriate (see also, NYRL 870187, January 6, 1992, "Popcorn Art" made of flocked paperboard to form pictures classified under subheading 4823.90.6500, HTSUSA).

Heading 4911, which provides for other printed matter, including printed pictures and photographs, is not applicable since the process of creating a design by flocking is not considered printing.

Heading 9608, provides for, inter alia, felt tipped and other porous-tipped pens and markers. The pens at issue squarely fit this description and are thus included within this heading.

Where the two items above are imported shrink-wrapped as a set, we determine classification based on a GRI 3 analysis. GRI 3(c) states that when goods cannot be classified by reference to 3(a), i.e., the heading which pro-

vides the most specific description, or 3(b), the component which imparts the essential character, they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration. Since the pens are intended for coloring the white spaces of the poster and the poster depicts a figure which is to be colored in, both components of the set are equally significant. The preceding GRI do not therefore provide a basis for classifying the goods, and heading 9608 prevails in accordance with the rule above.

HOLDING:

The poster alone is classified under subheading 4823.90.6500, HTSUSA, which provides for other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers: other: other: other: of coated paper or paperboard: other, dutiable at the rate of 5.6 ad valorem.

The markers are classified under subheading 9608.20.0000, which provides for felt tipped and other porous-tipped pens and markers, dutiable at the rate of 8 percent ad valorem.

The shrink-wrapped set is classified under subheading 9608.20.0000, HTSUSA, on the basis of GRI 3(c) as described above.

With reference to your use of the above classification numbers on the Shipper's Export Declaration (SED), please be advised that the statistical reporting numbers for articles classified in Chapters 1 through 97 of the Harmonized Tariff Schedule may be used in place of comparable Schedule B numbers on the SED.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact the local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

Sincerely,

JOHN DURANT,

Director

Commercial Rulings Division

NY G82351

September 22, 2000

CLA-2-49:RR:NC:SP:234 G82351

CATEGORY: Classification

TARIFF NO.: 4911.91.4040; 4819.10.0040;

9608.20.0000

MR. MICHAEL J. MERCER
CORBETT INTERNATIONAL, INC.
CARGO SERVICE BUILDING 80
J.F.K. INTERNATIONAL AIRPORT
JAMAICA, N.Y. 11430

RE: The tariff classification of “velvet art sets” (flocked pictures with pens) from the United Kingdom.

DEAR MR. MERCER:

In your letter dated August 16, 2000, together with a supplementary submission received here on September 19, you requested a tariff classification ruling on behalf of P & M Products USA, Inc. (Lionville, PA).

A sample identified as a #70031 “Velvet Art Set” accompanied your inquiry and will be retained for reference. It is a corrugated paperboard retail display box containing 3 “velvet pictures” and 6 felt-tipped pens of assorted colors. Each “velvet picture” is an 8” x 10” sheet of sturdy white paperboard bearing a cartoon scene whose outlines have been formed by black flock affixed to selected portions of the surface. The white, unflocked areas are to be colored by the consumer using the pens provided.

The “velvet pictures,” even before being colored, appear to be of good quality and suitable for long-term retention and/or decorative display by the consumer. According to a breakdown you provided, the value of the three pictures is more than twice that of the six pens.

For tariff purposes, the product will be considered “goods put up in sets for retail sale” whose essential character is imparted by the pictures.

Accordingly, the applicable subheading for the complete #70031 “Velvet Art Set” will be 4911.91.4040, Harmonized Tariff Schedule of the United States (HTS), which provides for other (than certain enumerated) printed pictures, designs and photographs. The rate of duty will be 1.2%.

You also requested that we provide classifications for the individual components, “as they could be imported separately to accommodate shortages.” You noted that the pens will be manufactured in the Czech Republic, while the other items will be made in Great Britain.

The applicable subheading for the paperboard/flock “velvet pictures,” imported separately, will be 4911.91.4040, HTS, as described above. The rate of duty will be 1.2%.

The applicable subheading for the retail display boxes (including paperboard insert/spacer), imported separately, will be 4819.10.0040, HTS, which provides for other (than certain enumerated) cartons, boxes and cases, of corrugated paper or paperboard. The rate of duty will be 1.1%.

The applicable subheading for the pens, imported separately, will be 9608.20.0000, HTS, which provides for felt tipped and other porous-tipped pens and markers. The rate of duty will be 4%.

Articles classifiable under subheading 9608.20.0000, HTS, which are products of (and imported directly from) the Czech Republic are currently entitled to duty-free treatment under the Generalized System of Preferences (GSP)

upon compliance with all applicable regulations. The GSP, however, is subject to modification and periodic suspension, which may affect the status of your transaction at the time of entry for consumption or withdrawal from warehouse. To obtain current information on GSP, check the Customs Web site at www.customs.gov. At the Web site, click on “CEBB” and then search for the term “GSP”.

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

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

Sincerely,

ROBERT B. SWIERUPSKI

Director,

National Commodity Specialist Division

N038315

October 14, 2008

CLA-2-48:OT:RR:NC:2:234

CATEGORY: Classification

TARIFF NO.: 4811.41.3000; 2505.10.1000;
3213.10.0000; 3213.90.0000;
3924.90.2000; 3926.90.3500;
3926.90.4000; 4823.90.6700;
4911.91.4040; 9603.30.2000;
9608.20.0000

Ms. LORIANNE ALDINGER
RITE AID CORPORATION
P. O. BOX 3165
HARRISBURG, PA 17105

RE: The tariff classification of activity kit from China

DEAR Ms. ALDINGER:

In your letter dated August 20, 2008, you requested a tariff classification ruling.

You submitted a sample designated as the “3 Kits in 1 Triple the Fun” art activity set which will be returned to you as requested. The set contains three craft kits and is designed for ages over 3. It combines “Sand by Number”, “Velvet Art Fun” and “Paint by Number”. The activity of each kit is to create pictures, posters and paintings by using designs by numbers that require sand, markers and paint. The following components are included for each set: “Sand by Number” has six bags of colored sand, one paperboard color chart, two 5¼” x 7¼” paper pre-glued pictures, two plastic photo frames and one plastic paint brush; “Velvet by Number” has six fine tip markers, one glitter glue stick, two 6” x 8½” velvet posters, two 4½” x 6” velvet greeting cards, one sheet of plastic stick-on jewels, and one bag of sequins; “Paint by Number” has six fine tip markers, four 5” x 7” printed paint-by-number paperboard cards, two 8½” x 11” printed paint-by-number paperboard cards, six poster paint pots, and one plastic paint brush. In response to our inquiry, you advised our office that the sand is natural sand with colorant. You also stated that the velvet paper is made of plant fiber.

The applicable subheading for the pre-glued paper designs will be 4811.41.3000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Paper, coated, impregnated, covered, surface-colored, surface-decorated or printed, in rolls or rectangular (including square) sheets...gummed or adhesive paper and paperboard: self-adhesive: other (than certain enumerated kinds).” The rate of duty will be Free.

The applicable subheading for the sand will be 2505.10.1000, (HTSUS), which provides for “Natural sands of all kinds, whether or not colored, other than metal-bearing sands of chapter 26: silica sands and quartz sands: Sand containing by weight 95 percent or more of silica and not more than 0.6 percent of oxide of iron.” The rate of duty will be Free.

The applicable subheading for the paint pots will be 3213.10.0000 (HTSUS), which provides for “Artists’, students’ or signboard painters’ colors, modifying tints, amusement colors and the like, in tablets, tubes, jars, bottles, pans or in similar forms or packings: Colors in sets.” The rate of duty will be 6.5 percent ad valorem on the entire set.

The applicable subheading for the glitter glue will be 3213.90.0000, (HTSUS), which provides for “Artists’, students’ or signboard painters’ colors, modifying tints, amusement colors and the like, in tablets, tubes, jars, bottles, pans or in similar forms or packings: other.” The rate of duty will be 3.4 percent ad valorem.

The applicable subheading for the plastic picture frames will be 3924.90.2000, (HTSUS), which provides for “Tableware, kitchenware, other household articles...of plastics: other: picture frames.” The rate of duty will be 3.4 percent ad valorem.

The applicable subheading for the sequins will be 3926.90.3500, (HTSUS), which provides for “Other articles of plastics...Beads, bugles and spangles ...articles thereof, not elsewhere specified or included, other.” The rate of duty will be 6.5 percent ad valorem.

The applicable subheading for the plastic stick-on jewels will be 3926.90.4000, (HTSUS), which provides for “Other articles of plastics: Imitation Gemstones.” The rate of duty will be 2.8 percent ad valorem.

The applicable subheading for the velvet design paper will be 4823.90.6700, (HTSUS), which provides for “Other (non-enumerated) articles of coated paper or paperboard.” The rate of duty will be Free.

The applicable subheading for the printed paperboard cards will be 4911.91.4040, (HTSUS), which provides for “Other (than certain enumerated) printed pictures, designs and photographs.” The rate of duty will be Free.

The applicable subheading for the paint brush will be 9603.30.2000, (HTSUS), which provides for “Artists’ brushes, writing brushes and similar brushes for the application of cosmetics: valued not over 5 cents each.” The rate of duty will be 2.6 percent ad valorem.

The applicable subheading for the fine tip markers will be 9608.20.0000, (HTSUS), which provides for “Felt tipped and other porous-tipped pens and markers.” The rate of duty will be 4 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 Patricia Wilson at (646) 733-3037.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

N217077

June 5, 2012

CLA-2-95:OT:RR:NC:N4:424

CATEGORY: Classification

TARIFF NO.: 9503.00.0073, 4823.90.6700

MS. LORIANNE ALDINGER
RITE AID CORPORATION
P.O. Box 3165
HARRISBURG, PA 17105

RE: The tariff classification of various craft kits from China

DEAR MS. ALDINGER:

In your letter dated April 25, 2012 you requested a tariff classification ruling.

The samples of three children's craft kits, assortment item #9015935, were received with your inquiry. The first item is the paper doll kit. It consists of two cardboard doll cutouts, two stands, stick-on clothing, adornments and three markers in a paperboard retail display box. It is principally designed for the amusement of children six years of age and older. Children will derive amusement by designing and selecting various wardrobes and accessories and dressing up the paper dolls.

The second item is the velvet brite set. It is a paperboard retail display box containing nine velvet art designs and six plastic, felt-tipped markers of assorted colors. Each velvet art design is a sheet of white paperboard bearing a picture or scene whose outlines have been formed by black flock affixed to selected portions of the surface. The white, unflocked areas are to be colored by the consumer using the markers provided. The velvet pictures come in the dimensions of 5" x 7", 6" x 9" and 8" x 10". For tariff classification purposes, the product will be considered "goods put up in sets for retail sale" whose essential character is imparted by the flocked paperboard items.

The last item is the color surprise art set. It is a paperboard retail display box containing ten color surprise sheets, one wooden drawing tool and one paper stencil with die-cut shapes and objects. The color surprise sheets are coated, multi-color paperboard with five printed black/grey coatings and five solid black coatings. The sheets measure approximately 4" x 6" and 4¼" x 5 ½", respectively. The die-cut stencil is used in conjunction with the coated paperboard sheets to create the pictures. When the coated paper is scratched off with the wooden drawing tool the designs reveal the multi-colored backgrounds. For tariff classification purposes, the item will be considered "goods put up in sets for retail sale" whose essential character is imparted by the color sheets and coloring activity.

The applicable subheading for the paper doll kit will be 9503.00.0073, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Tricycles, scooters, pedal cars and similar wheeled toys...dolls, other toys...puzzles of all kinds; parts and accessories thereof.. 'Children's products' as defined in 15 U.S.C. § 2052: Other: Labeled or determined by importer as intended for use by persons: 3 to 12 years of age." The rate of duty will be free.

The applicable subheading for the velvet brite set and the color surprise art set will be 4823.90.6700, HTSUS, which provides for other (non-enumerated) articles of coated paper or paperboard. 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 James Forkan at (646) 733-3025.

Sincerely,

THOMAS J. RUSSO

Director

National Commodity Specialist Division

HQ H303761
OT:RR:CTF:CPMMA H303761 AJK
CATEGORY: Classification
TARIFF NO: 4811.90.20; 4811.90.90

MR. KEVIN MAHER
C-AIR CUSTOMHOUSE BROKERS
181 So. FRANKLIN AVE.
VALLEY STREAM, NY 11581

RE: Revocation of NY K83080, NY K83204, NY K86534, NY L83248, NY I83703, NY J80696, NY L81409, and NY N099452; Modification of HQ 950774, NY G82351, NY N038315, and NY N217077; Modification by Operation of Law; Classification of Flocked Paper Sets

DEAR MR. MAHER:

This letter is in reference to your New York Ruling Letters (NY) K83080, dated February 26, 2004, NY K83204, dated February 26, 2004, NY K86534, dated June 10, 2004, and NY L83248, dated March 18, 2005, concerning the tariff classification of flocked paper sets. In the aforementioned rulings, U.S. Customs and Broder Protection (CBP) classified the merchandise in heading 4823, Harmonized Tariff Schedule of the United States (HTSUS), as other paper. We have reviewed the rulings and have determined that the classification of flocked paper sets in heading 4823, HTSUS, was incorrect.

We have also reviewed Headquarter Ruling Letter (HQ) 950774, dated January 28, 1992, NY I83703, dated June 28, 2002, NY J80696, dated February 7, 2003, NY L81409, dated December 20, 2004, NY N099452, dated April 28, 2010, NY G82351, dated September 22, 2000, NY N038315, dated October 14, 2008, and NY N217077, dated June 5, 2012, concerning the tariff classification of flocked paper sets, and have determined that the aforementioned rulings were incorrect. For the reasons set forth below, we revoke eight ruling letters and modify four ruling letters.

In addition to the modification of the classification of flocked paper set, HQ 950774 is also modified by operation of law with respect to the classification of flocked paper only. The modification by operation of law is precipitated by the change to Note 7(A) to Chapter 48, which previously stated that heading 4811, HTSUS, included paper in the form of rectangular sheet that exceeded 36 cm (14.17 inches) by 15 cm (5.9 inches) only. In 2002, however, Note 7(A) to Chapter 48 was replaced with Note 8(b) and the general size limitation on goods of heading 4811, HTSUS, was removed. Accordingly, the classification of flocked paper in the form of 11 inches (27.94 cm) by 14 inches (35.56 cm) rectangular sheet in HQ 950774 is modified by operation of law.

FACTS:

In all twelve rulings, the flocked paper sets contained flocked paper and an assortment of items to decorate flocked paper. Although all of the flocked paper sets are substantially similar as they consist of flocked paper, each set varies by component and size of flocked paper. In addition, some sets were contained in a paperboard retail display boxes while others were merely packaged together as sets. The subject merchandise was described in NY K83080 as follows:

“Funtime Fuzzy Poster Value Set” ... consists of the following items put up together for retail sale in a printed paperboard display box:

- 5 “fuzzy posters,” which are sheets of white paper, partially coated with black flock so as to form pictures and designs. The white, unflocked areas are meant to be colored in by the user. The “posters” range in size from 6” [15.24 cm] x 9” [22.86 cm] to 16” [40.64 cm] x 20” [50.8 cm].
- A “fuzzy portfolio,” which is a paperboard pocket folder measuring 9½” x 11½” in the closed position. Its face has a flocked design suitable for coloring.
- 8 washable markers in assorted colors.
- A packet of sequins.
- A small tube of white glue.
- A wooden “design stick” to assist in the application of the sequins.

ISSUE:

Whether the flocked paper sets are classified in heading 4811, HTSUS, as covered or surface decorated rectangular sheets of paper, or in heading 4823, HTSUS, as other paper, or in heading 4911, HTSUS, as other printed matter, or in heading 9608, HTSUS, as ball point pens.

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 GRIs 2 through 6 may then be applied in order.

GRI 3(b) states, in pertinent part:

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.

* * * * *

The HTSUS provisions at issue are as follows:

- 4811: Paper, paperboard, cellulose wadding and webs of cellulose fibers, coated, impregnated, covered, surface-colored, surface-decorated or printed, in rolls or rectangular (including square) sheets, of any size, other than goods of the kind described in heading 4803, 4809 or 4810:
- 4811.90: Other paper, paperboard, cellulose wadding and webs of cellulose fibers:
- In strips or rolls of a width exceeding 15 cm or in rectangular (including square) sheets with one side exceeding 36 cm and the other side exceeding 15 cm in the unfolded state:

Other:

- 4811.90.20: Wholly or partly covered with flock, gelatin, metal or metal solutions
- 4811.90.90: Other
- * * *
- 4823: Other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers:
- 4823.90: Other:
 - Other:
 - Of coated paper or paperboard:
- 4823.90.67: Other
- Other:
- 4823.90.86: Other
- * * *
- 4911: Other printed matter, including printed pictures and photographs:
 - Other:
 - 4911.91: Pictures, designs and photographs:
 - Printed not over 20 years at time of importation:
 - Other:
- 4911.91.40: Other
- * * *
- 9608: Ball point pens; felt tipped and other porous-tipped pens and markers; fountain pens, stylograph pens and other pens; duplicating styli; propelling or sliding pencils (for example, mechanical pencils); pen-holders, pencil-holders and similar holders; parts (including caps and clips) of the foregoing articles, other than those of heading 9609:
- 9608.20.00: Felt tipped and other porous-tipped pens and markers

Note 2 to Chapter 49 provides, in pertinent, as follows:

2. For the purposes of chapter 49 the term “printed” also means reproduced by means of a duplicating machine, produced under the control of an automatic data processing machine, embossed, photographed, photocopied, thermocopied or typewritten.

* * * * *

The Harmonized Commodity Description and Coding System (HS) Explanatory Notes (ENs) constitute the official interpretation of the HS. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HS at the international level, and are generally indicative of the proper interpretation of these headings. See T.D. 89-80, 54 Fed. Reg. 35127 (August 23, 1989).

EN to GRI 3(b) provides, in pertinent part:

(X) 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 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 end users without repacking (e.g., in boxes or cases or on boards).

The term “goods put up in sets for retail sale” therefore only covers sets consisting of goods which are intended to be sold to the end user where the individual goods are intended to be used together.

EN to Chapter 49 provides, in pertinent part:

For the purposes of this Chapter, the term “printed” includes not only reproduction by the several methods of ordinary hand printing (e.g., prints from engravings or woodcuts, other than originals) or mechanical printing (letterpress, offset printing, lithography, photogravure, etc.), but also reproduction by duplicating machines, production under the control of an automatic data processing machine, embossing, photography, photocopying, thermocopying or typewriting (see Note 2 to this Chapter), irrespective of the form of the characters in which the printing is executed (e.g., letters of any alphabet, figures, shorthand signs, Morse or other code symbols, Braille characters, musical notations, pictures, diagrams). The term does not, however, include coloration or decorative or repetitive-design printing.

EN 48.11 provides, in pertinent part, as follows:

Paper and paperboard are classified in this heading only if they are in strips or rolls or in rectangular (including square) sheets, of any size. If they have been cut to any other shape, they fall in later headings of this Chapter (for example, 48.23). Subject to these conditions and the exceptions mentioned in the heading and those referred to at the end of this Explanatory Note, this heading applies to the following in rolls or sheets:

- (A) Paper, paperboard, cellulose wadding and webs of cellulose fibres, to which superficial coatings of materials *other than* (emphasis added) kaolin or other inorganic substances have been applied over the whole or part of one or both surfaces (e.g., thermosensitive paper used, for example, in telefax machines).

EN 48.23 provides, in pertinent part, as follows:

This heading includes:

- (A) Paper and paperboard, cellulose wadding and webs of cellulose fibres, not covered by any of the previous headings of this Chapter :
 - in strips or rolls of a width not exceeding 36 cm;
 - in rectangular (including square) sheets of which no side exceeds 36 cm in the unfolded state;
 - cut to shape other than rectangular (including square)

EN 49.11 provides, in pertinent part:

This heading covers all printed matter (including photographs and printed pictures) of this Chapter (see the General Explanatory Note above) but not more particularly covered by any of the preceding headings of the Chapter.

* * * * *

As a preliminary matter, we note that each flocked paper set in the aforementioned rulings varies in component, packaging material, and form and size of the flocked paper parts. Each set consists of a variety of item (e.g., flocked paper, pen[s] or marker[s], glue stick, glitter, etc.) that comprises the flocked paper set and is packaged together for retail sale. Among the rulings, some flocked paper sets are packaged in paperboard retail display boxes. Moreover, the size and form of the flocked paper parts in these sets vary as some are imported in rolls of flocked paper while others are in the form of rectangular sheets in various sizes. As explained below, however, the difference in each flocked paper set does not affect our analysis.

The classification of flock paper sets is determined by the application of GRI 3(b), which applies to “[g]oods put up in sets for retail sale”. The General EN to GRI 3(b) defines “sets for retail sale” as “goods which are intended to be sold to the end user where the individual goods are intended to be used together.” In the instant case, the flocked paper sets constitute “sets for retail sale” because the merchandise consists of multiple items with distinctly classifiable headings while no specific provision encompasses the set as a whole. Moreover, the components of the sets are put up together for the final consumers to decorate flocked paper and the sets are packaged together for sale without repackaging after importation. *See* EN to GRI 3(b). In NY N038315, however, CBP analyzed a flocked paper set, which contained markers, a glue stick, flocked paper, plastic stick-on jewels and sequins, and incorrectly classified each component of the flocked paper set in its corresponding heading. It is now CBP’s position that the flocked paper set in NY N038315 constitutes a set for retail sale under GRI 3(b). Pursuant to GRI 3(b), therefore, the flocked paper sets are “sets for retail sale” for classification purposes and thus, they are classified as a whole, not by the individual component of the set.

To classify under GRI 3(b), CBP must identify the component of the subject merchandise that imparts the merchandise with its essential character. “The ‘essential character’ of an article is ‘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). Accordingly, the flocked paper sets are classified in the heading in which the component that imparts the essential character of the subject merchandise is classified. In the instant case, the flocked paper sets are commonly marketed as velvet or fuzzy art sets and they are sold by showcasing the flocked paper parts. Moreover, the flocked paper sets are comprised of items that are necessary for the activity of crafting flocked paper. For example, the pens or markers are utilized to color the unflocked spaces of flocked paper while the glue and glitters are similarly used to decorate flocked paper. In HQ 950774, CBP found that the pens and flocked paper in flocked paper sets were equally significant and thus, classified the merchandise in heading 9608, HTSUS, as pens, under GRI 3(c). As explained above, however, the pens contained in these sets do not impart the essential character of the merchandise because they are merely auxiliary components that support the user’s utility of flocked paper—to color, craft, and decorate flocked paper. Under GRI 3(b), the essential character of the flocked paper sets is imparted by the flocked paper parts and thus, the classification of the merchandise in the heading of other components—such as heading 9608, HTSUS—is precluded.

Heading 4911, HTSUS, provides for other printed matter. EN to Chapter 49 defines “printed” as “reproduction by the several methods of ordinary hand printing (e.g., prints from engravings or woodcuts, other than originals) or mechanical printing (letterpress, offset printing, lithography, photogravure, etc.), but also reproduction by duplicating machines, production under the control of an automatic data processing machine, embossing, photography, photocopying thermocopying or typewriting”. See also Note 2 to Chapter 49. Moreover, Merriam-Webster Dictionary defines “print” as “to make a copy of by impressing paper against an inked printing surface”. *Print*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/print> (last visited May 7, 2021). Accordingly, flocked papers do not qualify as “printed” matter within HTSUS due to the distinct process of flocking paperboard. Unlike the process of printing, which is a reproduction process by impressing paper against an inked printing surface either via hand or machine, flocked paper is created by partially covering paper with flock; it does not undergo a reproduction or printing process as prescribed in EN to Chapter 49. In NY G82351, however, CBP incorrectly classified a flocked paper set and flocked paper in heading 4911, HTSUS, as printed matters. Because flocked paper—which is a paper covered with flock—is not a reproduced or printed product, it is not classifiable in heading 4911, HTSUS, as other printed matter.

EN 48.11 states that heading 4811, HTSUS, includes covered paper that contains “superficial coatings of materials *other than* (emphasis added) kaolin or other inorganic substances”. To be classified in this heading, however, the paper must be “in strips or rolls or in rectangular (including square) sheets” See EN 48.11. As such, paper that has been cut to any shape other than rectangular or square sheets are classified in heading 4823, HTSUS, as other paper. See *id.*; see also EN 48.23. Accordingly, the subject flocked paper in all twelve rulings is classified in heading 4811, HTSUS, because the papers, which are in the form of strips and rectangular sheets, are partially covered in flock, thereby creating a decoration, and flock is the type of material that is included in heading 4811, HTSUS. Thus, flocked paper is classified in heading 4811, HTSUS, as covered paper.

Specifically, subheading 4811.90.20, HTSUS, is an *eo nomine* provision for paper covered with flock. This subheading, however, encompasses flocked paper that are “in strips or rolls of a width exceeding 15 cm [5.9 inches] or in rectangular (including square) sheets with one side exceeding 36 cm [14.17 inches] and the other side exceeding 15 cm [5.9 inches] in the unfolded state” only. Thus, the flocked paper sets in NY K83204, NY K86534, NY L83248, NY L81409 in part, and HQ 950774 in part are classified in subheading 4811.90.20, HTSUS, as paper covered with flock, because they fall within the specified measurements. However, the flocked paper sets in NY I83703, NY J80696, NY L81409 in part, NY N099452, NY G82351, NY N038315, and NY N217077 are classified in subheading 4811.90.90, HTSUS, as other covered paper, because they do not meet the specified measurements for subheading 4811.90.20, HTSUS, and thus, excluded therein.

Pursuant to GRI 3(b), flocked paper sets are classified in heading 4811, HTSUS, as other covered paper.

HOLDING:

By application of GRI 3(b), the subject flocked paper sets are classified in heading 4811, HTSUS. The flocked paper sets with flocked paper that are in strips or rolls of a width exceeding 15cm (5.9 inches) or in rectangular or

square sheets with one side exceeding 36 cm (14.17 inches) and the other side exceeding 15 cm (5.9 inches) are classified in subheading 4811.90.20, HTSUS, which provides for “[p]aper, paperboard, cellulose wadding and webs of cellulose fibers, coated, impregnated, covered, surface-colored, surface-decorated or printed, in rolls or rectangular (including square) sheets, of any size, other than goods of the kind described in heading 4803, 4809 or 4810: [o]ther paper, paperboard, cellulose wadding and webs of cellulose fibers: [i]n strips or rolls of a width exceeding 15 cm or in rectangular (including square) sheets with one side exceeding 36 cm and the other side exceeding 15 cm in the unfolded state: [o]ther: [w]holly or partly covered with flock, gelatin, metal or metal solutions”. The 2021 column one, general rate of duty is free.

Alternatively, the flocked paper sets with flocked paper that are smaller than the measurements outlined above are classified in subheading 4811.90.90, HTSUS, which provides for “[p]aper, paperboard, cellulose wadding and webs of cellulose fibers, coated, impregnated, covered, surface-colored, surface-decorated or printed, in rolls or rectangular (including square) sheets, of any size, other than goods of the kind described in heading 4803, 4809 or 4810: [o]ther paper, paperboard, cellulose wadding and webs of cellulose fibers: [o]ther”. The 2021 column one, general rate of duty is free.

In accordance with the change of Note to Chapter 48 in 2002, the flocked paper in HQ 950774 that was classified in heading 4823, HTSUS, is now classified in heading 4811, HTSUS, specifically subheading 4811.90.90, HTSUS, which provides for “[p]aper, paperboard, cellulose wadding and webs of cellulose fibers, coated, impregnated, covered, surface-colored, surface-decorated or printed, in rolls or rectangular (including square) sheets, of any size, other than goods of the kind described in heading 4803, 4809 or 4810: [o]ther paper, paperboard, cellulose wadding and webs of cellulose fibers: [o]ther”. The 2021 column one, general rate of duty 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.

EFFECT ON OTHER RULINGS:

NY K83080, dated February 26, 2004, NY K86534, dated June 10, 2004, NY L83248, dated March 18, 2005, NY I83703, dated June 28, 2002, NY J80696, dated February 7, 2003, NY L81409, dated December 20, 2004, and NY N099452, dated April 28, 2010, are hereby revoked.

HQ 950774, dated January 28, 1992, NY G82351, dated September 22, 2000, NY N038315, dated October 14, 2008, and NY N217077, dated June 5, 2012 are modified. In addition, HQ 950774 is modified in part by operation of law with respect to the classification of the flocked paper only.

Sincerely,

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

CC: Ms. Lorianne Aldinger
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U.S. Court of International Trade

Slip Op. 21–93

PRO-TEAM COIL NAIL ENTERPRISE, INC. AND PT ENTERPRISE INC.,
Plaintiffs, UNICATCH INDUSTRIAL CO., LTD., et al., Consolidated
Plaintiffs, and S.T.O. INDUSTRIES, INC., Plaintiff-Intervenor, v.
UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE, INC.,
Defendant-Intervenor.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 18–00027

PUBLIC VERSION

[Remanding the U.S. Department of Commerce’s second remand results for the first administrative review of the antidumping duty order on certain steel nails from Taiwan.]

Dated: July 30, 2021

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OPINION AND ORDER

Barnett, Chief Judge:

This action is before the court on the U.S. Department of Commerce’s (“Commerce” or “the agency”) second remand results in the first administrative review of the antidumping duty order on certain steel nails from Taiwan. *See* Confidential Final Results of [Second] Redetermination Pursuant to Court Remand (“Second Remand Results”), ECF No. 99–1; *see generally* *Certain Steel Nails From Taiwan*, 83 Fed. Reg. 6,163 (Dep’t Commerce Feb. 13, 2018) (final results of antidumping duty admin. review and partial rescission of admin. review; 2015–2016) (“*Final Results*”), ECF No. 20–2, and accompanying Issues and Decision Mem, A-583–854 (Feb. 6, 2018) (“I&D Mem.”),

ECF No. 20–3.¹ The court has issued two opinions resolving substantive issues in this case; familiarity with those opinions is presumed. *See Pro-Team Coil Nail Enter. v. United States* (“Pro-Team II”), 44 CIT ___, 483 F. Supp. 3d 1242 (2020); *Pro-Team Coil Nail Enter. v. United States* (“Pro-Team I”), 43 CIT ___, 419 F. Supp. 3d 1319 (2019).

For the *Final Results*, Commerce determined all the mandatory respondents’ rates using total adverse facts available (or “total AFA”) and selected the highest dumping margin alleged in the petition, 78.17 percent, as AFA. *See Pro-Team I*, 419 F. Supp. 3d at 1325. In *Pro-Team I*, the court addressed five sets of plaintiffs’ challenges to the *Final Results*.² The court remanded the *Final Results* with respect to Commerce’s reliance on total facts available (neutral or adverse) for Pro-Team. *See id.* at 1334. The court sustained Commerce’s reliance on total facts otherwise available for Unicatch but remanded the agency’s use of an adverse inference. *See id.* at 1340.

In the first remand redetermination, Commerce calculated a company-specific dumping margin of zero percent for Pro-Team. *See Final Results of [First] Redetermination Pursuant to Court Remand* (“First Remand Results”) at 6–8, 32, ECF No. 71–1. Commerce continued to rely on total AFA to determine Unicatch’s margin and provided additional explanation supporting that decision. *See id.* at 8–15, 20–28. Commerce established a rate of 39.09 percent for the non-individually examined respondents (e.g., Hor Liang) using a simple average of Pro-Team’s zero percent margin and Unicatch’s 78.17 percent margin. *Id.* at 15–16, 29–32.

In *Pro-Team II*, the court sustained Commerce’s calculation of Pro-Team’s rate and the agency’s reliance on total AFA for Unicatch. 483

¹ The administrative record associated with the *Final Results* is divided into a Public Administrative Record (“PR”), ECF No. 20–4, and a Confidential Administrative Record (“CR”), ECF No. 20–5. The administrative record associated with the Second Remand Results is divided into a Public Remand Record (“2RPR”), ECF No. 101–2, and a Confidential Remand Record (“2RCR”), ECF No. 101–3. Parties submitted joint appendices containing record documents cited in their comments on the Second Remand Results. *See* Public Remand J.A., ECF No. 118; Confidential Remand J.A. (“2RCJA”), ECF No. 117. Commerce’s calculations used to corroborate the petition margin were filed separately by Plaintiffs. Confidential Pls.’ Resp. to Court Request for Additional Docs., Attach. 1, Attach. 2 (“SAS Worksheet”), ECF No. 120; *see also* [Public] Pls.’ Resp. to Court Request for Additional Docs., ECF No. 121. The court references the confidential version of the relevant record documents, unless otherwise specified.

² The five sets of plaintiffs consist of lead Plaintiffs Pro-Team Coil Nail Enterprise, Inc. and PT Enterprise Inc. (together, “Pro-Team”); Consolidated Plaintiffs Unicatch Industrial Co., Ltd. and TC International, Inc. (together, “Unicatch”); Consolidated Plaintiff PrimeSource Building Products, Inc.; Consolidated Plaintiffs Hor Liang Industrial Corp. and Romp Coil Nails Industries (referred to simply as “Hor Liang”); and Plaintiff-Intervenor S.T.O. Industries, Inc (“STO”). “Respondents” refers to the respondents that participated in the administrative proceedings associated with the Second Remand Results: Unicatch and Hor Liang. *See* Cmts. in Resp to Draft Results of Redetermination Pursuant to Court Remand (Jan. 28, 2021) (“Respondents’ 2R Case Br.”) at 1, 2RCR 2–3, 2RPR 2, 2RCJA Tab 11.

F. Supp. 3d at 1245. The court, however, remanded Commerce’s reliance on the petition rate as AFA because Commerce did not adequately corroborate the rate. *See id.* at 1251.

In the Second Remand Results, Commerce corroborated the petition rate using certain of Pro-Team’s transaction-specific margins in this review and what Commerce referred to as a “component approach.” Second Remand Results at 7–9. Commerce established a rate of 52.11 percent for Hor Liang by taking a simple average of the three³ mandatory respondents’ rates. *See id.* at 12–13.

Unicatch submitted comments contending that Commerce did not adequately corroborate the petition rate and failed to consider the totality of the circumstances in selecting the petition rate as AFA. *See Confidential Consol. Pls., [Unicatch] Cmts. on Redetermination (“Unicatch’s Cmts.”) at 8–14, ECF No. 107.* Hor Liang submitted comments contending that Commerce’s calculation of the rate for non-individually examined respondents was not reasonably reflective of Hor Liang’s potential dumping margin and was otherwise unsupported by substantial evidence or not in accordance with the law. *See Confidential Consol. Pls. [Hor Liang] Cmts. on Redetermination (“Hor Liang’s Cmts.”) at 4–14, ECF No. 105.*⁴ Defendant United States (“the Government”) and Defendant-Intervenor Mid Continent Steel & Wire, Inc. (“Mid Continent”) each submitted comments urging the court to sustain Commerce’s Second Remand Results in their entirety. *See Confidential Def.’s Resp. to the Parties’ Cmts. on the Dep’t of Commerce’s Final Results of Redetermination (“Gov’t’s Cmts.”), ECF No. 115; Confidential Def.-Int. [Mid Continent’s] Cmts. in Supp. of Final Remand Results (“Mid Continent’s Cmts.”), ECF No. 113.*

For the following reasons, the court sustains Commerce’s selection of the petition rate as AFA for Unicatch and remands Commerce’s use of a simple average of the mandatory respondents’ rates to establish the rate for non-individually examined respondents for further explanation or reconsideration.

³ Commerce had initially selected Pro-Team and Bonuts Hardware Logistics Co., LLC (“Bonuts”) as mandatory respondents. *See Pro-Team I*, 419 F. Supp. 3d at 1325. After Bonuts indicated that it would not participate in the review Commerce added Unicatch as a mandatory respondent. *Id.*

⁴ STO’s comments incorporated by reference the arguments presented in Unicatch’s comments and Hor Liang’s comments. *See Pl.-Int.’s Cmts. to Redetermination on Remand*, ECF No. 109.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),⁵ and 28 U.S.C. § 1581(c).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). “The results of a redetermination pursuant to court remand are also reviewed for compliance with the court’s remand order.” *SolarWorld Ams., Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (quoting *Xinjiaimei Furniture (Zhangzhou) Co. v. United States*, 38 CIT ___, ___, 968 F. Supp. 2d 1255, 1259 (2014)).

DISCUSSION

I. Commerce’s Selection and Corroboration of the Petition Rate for Unicatch

A. Background

For the *Final Results*, the agency relied on total AFA for Unicatch and, for that purpose, selected the petition rate of 78.17 percent. *See Pro-Team I*, 419 F. Supp. 3d at 1325, 1335–36. In *Pro-Team I*, the court sustained Commerce’s reliance on total facts otherwise available for Unicatch but remanded Commerce’s use of an adverse inference. *Id.* at 1340. Commerce continued to rely on total AFA for Unicatch and to use the petition rate as AFA. *See First Remand Results* at 15. Commerce relied on “information provided in the petition and corresponding discussion in the notice [of initiation of the administrative review]” to corroborate the petition rate. *Pro-Team II*, 482 F. Supp. 3d at 1250 (citing I&D Mem. at 21–22 & nn.86–87).

In *Pro-Team II*, while the court sustained Commerce’s use of an adverse inference, the court remanded Commerce’s reliance on the petition rate for reconsideration or further explanation. *See id.* at 1249–1251. The court explained that “Commerce’s determination that the petition rate is reliable and relevant for purposes of this administrative review, based on nothing more than its pre-initiation review of the data, is unsupported by substantial evidence and reasoned explanation.” *Id.* at 1251.

⁵ All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition, unless stated otherwise.

For the Second Remand Results, Commerce continued to rely on the petition rate as AFA. *See* Second Remand Results at 10. To corroborate the margin, Commerce compared the rate to certain of Pro-Team’s transaction-specific dumping margins calculated in this review. *See id.* at 8. Commerce found that a sufficient number of transaction-specific margins exceeded the petition rate for purposes of corroboration. *Id.*; *see also* SAS Worksheet, ECF p. 145 (identifying the transaction specific margins); Respondents’ 2R Case Br. at 7 (same).

Commerce rejected Respondents’ contention that Commerce relied on too few transaction-specific dumping margins to corroborate the petition rate and that the transactions relied on accounted for too small a portion of Pro-Team’s transactions. *See* Second Remand Results at 16–17. Commerce also rejected Respondents’ assertion that the transaction-specific margins were aberrational and, thus, unreliable for purposes of corroboration. *See id.* at 17–18. Commerce found that “nothing on the record indicates that the[corroborating] transactions were unique in some way or were conducted outside of the ordinary course of business.” *Id.* at 18.

Commerce determined that the 78.17 percent petition rate was not punitive considering Unicatch’s non-cooperative conduct and was necessary to deter such conduct in the future. *See id.* at 10, 19. Citing the *Final Results*, “Commerce explained why it could not use a gap-filling alternative adjustment because this would only raise more questions regarding the proper inclusion or exclusion of costs.” *Id.* at 10 & n.35 (citation omitted). Commerce further reasoned that Unicatch’s conduct had delayed the proceedings, thereby allowing Unicatch to attempt to manipulate the amount of time Commerce and interested parties had to address issues raised by the response. *See id.* at 18–19.

B. Legal Framework

When using an adverse inference to select from among the facts otherwise available, Commerce may rely “on information derived from-- (A) the petition, (B) a final determination in the investigation . . . , (C) any previous [administrative] review . . . , or (D) any other information placed on the record.” 19 U.S.C. § 1677e(b)(2). “When Commerce ‘relies on secondary information rather than on information obtained in the course of an investigation or review,’ it ‘shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal.’” *Deacero S.A.P.I. de C.V. v. United States*, 996 F.3d 1283, 1299 (Fed. Cir. 2021) (alteration in original) (quoting 19 U.S.C. § 1677e(c)(1)).

Corroboration does not require Commerce to estimate what Unicatch's dumping margin would have been if it had cooperated or "demonstrate that the . . . dumping margin used by the [agency] reflects an alleged commercial reality of [Unicatch]." 19 U.S.C. § 1677e(d)(3). Instead, "corroborating information means determining that [the information] 'has probative value.'" *Papierfabrik Aug. Koehler SE v. United States*, 843 F.3d 1373, 1380 (Fed. Cir. 2016) (citing Statement of Administrative Action ("SAA")⁶ accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol. 1, at 870 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199; 19 C.F.R. § 351.308).

C. Parties' Contentions

Unicatch⁷ contends that the underlying transactions used to corroborate the petition rate represent too small a portion of Pro-Team's total transactions, quantity sold, and total sales value. *See* Unicatch's Cmts. at 2-3. Further, according to Unicatch, the transaction-specific margins are unreliable because they are substantially higher than the rest of Pro-Team's transaction-specific margins. *See id.* at 3. Unicatch also avers that Commerce "did not examine the totality of the circumstances" or "attempt to balance the seriousness of Unicatch's conduct against the need to apply a 78.17 [percent] rate to ensure deterrence." *Id.* at 10.

The Government counters that there is no minimum number of transactions necessary for corroboration when Commerce relies on the transaction-specific margin methodology. *See* Gov't's Cmts. at 7-8. The Government further contends that Commerce explained that the transactions were not "aberrational in terms of individual quantity or unusual [in] terms of sale." *Id.* at 8 (citing Second Remand Results at 16); *see also* Mid Continent's Cmts. at 4-5. The Government and Mid Continent contend that the 78.17 percent rate is not punitive because Commerce explained that the rate was necessary to incentivize Unicatch to cooperate in the future. Gov't's Cmts. at 11-12; Mid Continent's Cmts. at 8-9.

⁶ The SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements Act." 19 U.S.C. § 3512(d).

⁷ Hor Liang agrees with Unicatch's arguments that Commerce failed to corroborate the petition rate and that Commerce's application of the petition rate failed to consider the totality of the circumstances in selecting the petition rate as AFA. *See* Hor Liang's Cmts. at 2-4.

D. Analysis

1. Commerce's Use of Transaction-Specific Margins to Corroborate the Petition Rate is Supported by Substantial Evidence and in Accordance with the Law

Transaction-specific margins may have probative value when the rate selected as AFA falls within a range of those transaction-specific margins. *See Deacero*, 996 F.3d at 1300 (sustaining Commerce's determination that the highest rate alleged in the petition was relevant when it was in the range of transaction-specific margins calculated in the immediately preceding administrative review); *Papierfabrik*, 843 F.3d at 1381 (sustaining Commerce's determination that the selected rate "fell within the range of transaction-specific margins calculated in [the second administrative review]") (alteration in original) (citation omitted). Here, Commerce explained that the petition margin was within the range of certain transaction-specific margins calculated for Pro-Team in this review. *See* Second Remand Results at 8, 16. In fact, the petition rate fell well below the transaction-specific margins relied upon by Commerce, thus, based on the further discussion below, the court finds that Commerce sufficiently corroborated the petition rate using data reasonably at its disposal. *See id.* at 16; *Deacero*, 996 F.3d at 1300.

Unicatch advances two challenges to Commerce's transaction-specific margin methodology: (1) the underlying sales do not account for a sufficient portion of Pro-Team's sales to be considered reliable; and (2) the margins are aberrationally high. *See* Unicatch's Cmts. at 2–6. Unicatch's arguments are not persuasive.

Depending on the particular facts, a single sale may suffice for purposes of corroboration. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330 (Fed. Cir. 2002) (a 30.95 percent margin was supported by a single sale under the specific facts of the case.). Here, Commerce explained that Respondents failed to demonstrate that the number of transactions was so insufficient as to call into question the data underlying the transaction-specific margins. *See* Second Remand Results at 17. "Neither the statute nor Commerce's practice includes a requirement that the corroborating transactions represent a minimum number or certain percentage of total sales," and Respondents did not cite authority to support their position. *Id.* The court finds no error in Commerce's corroboration analysis, which fulfills the statutory requirement for corroboration, is based on substantial evidence, and is otherwise consistent with applicable judicial

precedent. See *PAM, S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009) (“There must be at least enough evidence to allow reasonable minds to differ.”).

Next, Unicatch contends that the transaction-specific margins themselves are aberrational because they are significantly higher than Pro-Team’s other transaction-specific margins in this review. See Unicatch’s Cmts. at 3. Commerce rejected this argument because “nothing on the record indicates that the[] . . . [corroborating] transactions were unique in some way or were conducted outside the ordinary course of business.” Second Remand Results at 17–18. Moreover, “the mere fact that a margin is unusually high does not mean that it lacks probative value and hence cannot be used for corroboration.” *Papierfabrik*, 843 F.3d at 1381.⁸

Before the court, Unicatch repeats the arguments that Commerce rejected. See Unicatch’s Cmts. at 2–4. However, Unicatch does not identify any evidence that Commerce failed to consider or authority contrary to the agency’s conclusions. As noted above, the petition rate that Commerce corroborated, rather than being within the range of the transaction-specific margins in question, was well below those transaction-specific margins. In the absence of any arguments from Unicatch beyond simply objecting to the rate as too high, the court finds that Commerce adequately corroborated the petition rate.⁹

⁸ Unicatch relies on several cases in which the court discussed aberrational data in the context of Commerce’s surrogate country or surrogate value selection. See Unicatch’s Cmts. at 5 (collecting cases). Commerce applies different standards when it evaluates the reliability of surrogate data to value factors of production in a non-market economy case than when it corroborates information to use as AFA. Compare *Papierfabrik*, 843 F.3d at 1380 (explaining that corroborating information means the information has probative value), with *Jacobi Carbons AB v. United States*, 42 CIT ___, ___, 313 F. Supp. 3d 1308, 1314–15 (2018) (discussing the “best information available” standard in selecting a primary surrogate country pursuant to 19 U.S.C. § 1677b(c)(1)). Unicatch’s reliance on cases discussing surrogate data is misplaced.

⁹ Commerce also asserts that it corroborated the petition rate using a component approach. Commerce examined a range of transaction-specific normal values and net U.S. prices reported by Pro-Team and compared them to the normal value and net U.S. price upon which the petition rate is based. See Second Remand Results at 8–9, 18. Commerce found that the normal value and net U.S. price used for the petition rate were each well within the range of many normal value and U.S. transactions reported by Pro-Team. *Id.* at 9, 18. Unicatch objects that this approach fails to account for product comparisons and is irrelevant in determining the reliability of the selected margin. See Unicatch’s Cmts. at 6–7. Because the court finds that Commerce adequately corroborated the petition rate using the transaction-specific margin methodology, the court need not address Unicatch’s objections to the component approach.

2. Substantial Evidence Supports Commerce’s Conclusion that the Petition Rate was not Punitive and was Appropriate to Incentivize Compliance in the Future

“It is well established both that the purpose of AFA is to incentivize cooperation, not to impose punitive, aberrational, or uncorroborated margins, and that Commerce’s AFA determinations must be reasonable on the record.” *Deacero*, 996 F.3d at 1300–01 (citations omitted). The U.S. Court of Appeals for the Federal Circuit (“the Federal Circuit”) has indicated further that “Commerce should consider the overall facts and circumstances of each case, including the level of culpability of the non-cooperating party in an AFA analysis.” *BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1301 (Fed. Cir. 2019).

Here, Commerce adequately considered the totality of the circumstances in selecting the petition rate. Commerce found that “Unicatch failed to cooperate to the best of its ability by repeatedly failing to submit a cost reconciliation, despite multiple requests from Commerce” and, in so doing, its behavior delayed the proceedings, “[limiting] the time that Commerce and other interested parties [had] to analyze such information.” Second Remand Results at 9. By submitting still incomplete responses closer to the deadline for the preliminary results, Unicatch limited the ability of Commerce or interested parties to pose follow-up questions and further address deficiencies. *Id.* at 9–10.

Commerce explained that Respondents’ alternative methodology for selecting an AFA rate would not deter future non-cooperative conduct. *See id.* at 19. Respondents simply provided a list of Pro-Team’s “transaction-specific margins and argue[d] . . . that each one [was] too high, until [they] arriv[ed] at a margin that [they] . . . deemed appropriate.” *Id.* As Commerce found, however, such an approach would permit a respondent to cherry pick both the information it provided and the consequences for failing to provide a complete response to the agency. *Id.*

Unicatch complains to the court that the agency failed to consider the “totality of the circumstances” or the seriousness of Unicatch’s conduct in selecting the AFA rate. *See* Unicatch’s Cmts. at 10, 13–14. However, as set forth above, Commerce explained why, in light of Unicatch’s conduct, the agency selected the 78.17 percent rate as AFA and corroborated that rate using record information from the

administrative review.¹⁰ Commerce also discussed its rationale that the selected rate would provide a reasonable deterrent against future non-cooperative behavior. Commerce thus adhered to the court's admonition to avoid relying on "the same rationale [the agency] supplied for its use of AFA." *Pro-Team II*, 483 F. Supp. 3d at 1252.

3. Conclusion

Substantial evidence supports Commerce's use of the transaction-specific margin methodology for purposes of corroboration and the agency's consideration of Unicatch's conduct in selecting the AFA rate.

II. Commerce's Determination of the Rate for Non-Individually Examined Respondents

A. Background

In the *Final Results*, Commerce established a rate of 78.17 percent for non-individually examined respondents such as Hor Liang by averaging the mandatory respondents' rates (Pro-Team, Bonuts, and Unicatch), all of which were based on total AFA. 83 Fed. Reg. at 6,164; *see also* I&D Mem. at 5. In its amended complaint, Hor Liang alleged that Commerce's "application of a rate based on total AFA to [Hor Liang] . . . under [19 U.S.C. § 1673d(c)(5)(B)] . . . [was] not supported by substantial evidence." Compl. ¶ 28, *Hor Liang Indus. Corp. v. United States*, Court No. 18-cv-00029 (CIT Mar. 6, 2018) ("Hor Liang's Am. Compl.").

The Government moved to dismiss the amended complaint and the court granted the motion in part and denied it in part. *See Hor Liang Indus. v. United States*, 42 CIT ___, 337 F. Supp. 3d 1310 (2018). Relevant to this discussion, the court dismissed count one of the amended complaint. *See id.* at 1324–28. Hor Liang was allowed to proceed with count two in which it requested that, in the event Commerce calculated a company-specific rate for any of the mandatory respondents, Commerce should calculate Hor Liang's margin using such calculated rate(s). *See id.* at 1325 n.24.

In the Second Remand Results, Commerce established a rate of 52.11 percent for Hor Liang. Second Remand Results at 12. Commerce took a simple average of the mandatory respondents' rates—

¹⁰ In that vein, the court is not persuaded that the petition rate is punitive. *See Unicatch's Cmts.* at 13–14. It is well settled that "[a]s long as a rate is properly corroborated according to the statute, Commerce has acted within its discretion and the rate is not punitive." *Deacero*, 996 F.3d at 1300 (quoting *Papierfabrik*, 843 F.3d at 1382). As explained above, Commerce properly corroborated the petition rate.

including Bonuts.¹¹ *See id.* at 12–13. Commerce asserted that it relied on the “expected method” to calculate the rate. *See, e.g., id.* at 23 & nn.72, 75 (citations omitted). Despite its assertion, Commerce later acknowledged that it departed from the expected method reportedly because it lacked volume data for Bonuts. *Id.* at 26–27. Without further explanation, Commerce indicated that the missing or unusable “volume data” were Bonuts’ sales values. *Id.* at 25–26. Commerce also rejected Respondents’ contention that the 52.11 percent rate was not reasonably reflective of Hor Liang’s potential dumping margin. *Id.* at 24 & n.77 (citation omitted).

B. Legal Framework

Section 1673d(c)(5) governs the method for establishing the all-others rate for non-individually examined companies in an investigation. While that statutory provision applies to investigations, Commerce uses that same methodology to determine the rate for non-individually examined companies in administrative reviews. *See Albemarle Corp. v. United States*, 821 F.3d 1345, 1352–53 (Fed. Cir. 2016). When, as here, the rates for the mandatory respondents are all zero, *de minimis*, or determined entirely on the basis of facts otherwise available, Commerce “may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.” 19 U.S.C. § 1673d(c)(5)(B).

The SAA explains that

[t]he expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined on the basis of the facts available, provided that volume data is available. If that method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods.

SAA at 873, 1994 U.S.C.C.A.N. at 4201. The SAA’s reference to “other reasonable methods” may include taking a simple average of the mandatory respondents’ zero, *de minimis*, and AFA rates. *See Solianus, Inc. v. United States*, 43 CIT ___, ___, 391 F. Supp. 3d 1331, 1338 (2019) (addressing the Federal Circuit’s discussion of Com-

¹¹ In the First Remand Results, Commerce calculated a rate of zero percent for Pro-Team and continued to base Unicatch’s rate on total AFA. First Remand Results at 25, 32. For non-individually examined respondents, Commerce determined a rate of 39.09 percent using a simple average of Pro-Team’s rate and Unicatch’s rate, inadvertently omitting Bonuts’ rate from the calculation. *See id.* at 29–32; Second Remand Results at 27–28.

merce's use of a simple average in *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370 (Fed. Cir. 2013)).

C. Parties' Contentions

Hor Liang contends that Commerce blindly relied on the "expected method" without considering evidence that doing so would result in a rate not reasonably reflective of Hor Liang's potential dumping margin. *See* Hor Liang's Cmts. at 4–10. Next, Hor Liang contends that it was unreasonable for Commerce to calculate the rate for non-individually examined respondents using a simple average as opposed to a weighted-average. *See id.* at 11–14.

The Government avers that the court should not consider Hor Liang's challenges to its rate from the Second Remand Results because the court previously dismissed the count that encompass these challenges. *See* Gov't's Cmts. at 16–17 n.5. In the alternative, the Government contends that Hor Liang's rate is representative of its potential dumping margin because the statute assumes the mandatory respondents' margins are representative of non-examined respondents' margins, and Hor Liang has not provided evidence rebutting that assumption. *Id.* at 16–21 (citing, *inter alia*, *Albemarle*, 821 F.3d at 1355). Finally, the Government and Mid Continent contend that Commerce was permitted to depart from the expected method and calculate a simple average under the circumstances. *See id.* at 22–23; Mid Continent's Cmts. at 14, 21–22.

D. Analysis

1. Hor Liang's Challenges to the Second Remand Results are Properly Before the Court

In *Hor Liang*, the court found that the plaintiff (Hor Liang) had not exhausted its administrative remedies in contesting Commerce's assignment of a margin based entirely on AFA to a cooperating non-examined respondent and no exception to the exhaustion doctrine applied. 337 F. Supp. 3d at 1325–28. Accordingly, the court dismissed that count of Hor Liang's amended complaint. *See id.* at 1328. In count two, however, Hor Liang requested "a recalculated rate in the event [Pro-Team] or Unicatch succeed in obtaining a calculated rate in their companion actions." *Id.* at 1325 n.24. The court allowed this challenge to proceed because it "relate[d] to matters that postdate the *Final Results*, and thus, [was] not subject to the exhaustion doctrine." *Id.*

Hor Liang now argues that Commerce did not consider evidence that the rate it established for Hor Liang, which was based in part on Pro-Team’s calculated margin, was not reasonably reflective of Hor Liang’s potential dumping margin. *See* Hor Liang’s Cmts. at 4–10. This is a different argument based on a different rate than was considered in *Hor Liang*. This argument falls within the scope of count two of the amended complaint because it requests relief based on Commerce calculating a company-specific rate for Pro-Team. *See* Hor Liang’s Am. Compl. ¶ 31. Moreover, this argument was not subject to the exhaustion doctrine and could not be because it “post-date[s] the *Final Results*.” *Hor Liang*, 337 F. Supp. 3d at 1325 n.24. Thus, the court rejects the Government’s contention that Hor Liang’s challenges to the Second Remand Results are not properly before the court. *See* Gov’t’s Cmts. at 16–17 n.5.

2. Commerce’s Departure from the Expected Method is Remanded for Further Explanation or Reconsideration

As an initial matter, at various times each of the parties and Commerce incorrectly state that Commerce calculated the rate for non-individually examined respondents using the expected method. *See, e.g.*, Second Remand Results at 23; Hor Liang’s Cmts. at 8; Gov’t’s Cmts. at 3. While weight-averaging the rates of the mandatory respondents is the expected method, *see* SAA at 873, 1994 U.S.C.C.A.N. at 4201, that is not the method that Commerce employed. Rather, Commerce calculated a *simple* average of the mandatory respondents’ rates. *See, e.g.*, Second Remand Results at 25–26.

The SAA provides that Commerce may depart from the expected method when “volume data is [not] available.” SAA at 873, 1994 U.S.C.C.A.N. at 4201. Here, Commerce stated that it departed from the expected method because “the volume data for Bonuts [were] incomplete, and therefore, unusable for purposes of calculating a weighted-average.” Second Remand Results at 26–27.

Commerce, however, had placed on the record U.S. import volume data from U.S. Customs and Border Protection (“Customs”), which was broken down by producer/exporter, and which Commerce relied on to select the mandatory respondents. *See* Selection of Respondents for the 2015–2016 Admin. Review (Nov. 29, 2016) (“Respondent Selection Mem.”) at 9, Attach., CR 6, PR 38, 2RCJA Tab 2); Selection of Additional Mandatory Respondent (Feb. 9, 2017) at 3, PR 76, 2RCJA Tab 7. U.S. import volumes for Bonuts were included in this data. *See* Respondent Selection Mem., Attach. When Commerce asserted that the volume data were incomplete, it did not explain why the Customs data, which were reliable for purposes of respondent selection, were

not also reliable for purposes of using the “expected method” for determining the rate for non-individually investigated companies. Because Commerce failed to address record evidence regarding the volume of Bonuts’ U.S. shipments and otherwise failed to justify its departure from the expected methodology, that departure is unsupported by substantial evidence.¹² See *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) (“[T]he path of Commerce’s decision must be reasonably discernable to a reviewing court.”).¹³ Because the court finds that substantial evidence does not support Commerce’s departure from the expected method, the court does not reach Hor Liang’s contention that the 52.11 percent margin was not reasonably reflective of Hor Liang’s potential dumping margin. Hor Liang’s Cmts. at 4–10. Nevertheless, any arguments that Hor Liang wishes to preserve should be raised on remand so that Commerce has an opportunity to address them on the record.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce’s Second Remand Results are sustained with respect to Commerce’s selection and corroboration of the petition rate as AFA for Unicatch; it is further

ORDERED that Commerce’s Second Remand Results are remanded for reconsideration or further explanation of Commerce’s departure from the expected method in determining the rate for non-individually examined respondents; it is further

ORDERED that Commerce shall file its remand redetermination on or before October 13, 2021; it is further

ORDERED that subsequent proceedings shall be governed by USCIT Rule 56.2(h); and it is further

ORDERED that any comments or responsive comments must not exceed 3,000 words.

¹² The court is not persuaded by Commerce’s assertion that it lacked “sales values” for Bonuts. Second Remand Results at 26. Commerce uses *quantity/volume* data, not *sales values*, to weight-average respondent rates. See, e.g., *Certain Activated Carbon from the People’s Republic of China: Issues and Decision Mem. for the Final Results of the Fourth Antidumping Duty Admin. Review*, A-570–904 (Nov. 2, 2012) at 28–30, available at <https://enforcement.trade.gov/frn/summary/prc/2012-27423-1.pdf> (last visited July 30, 2021). Commerce did not explain the relevance of the missing sales values to weight-averaging the mandatory respondents’ rates.

¹³ Hor Liang also contends that Commerce should have excluded Bonuts when determining the rate for non-individually examined respondents. Hor Liang’s Cmts. at 11. In the First Remand Results, Commerce inadvertently omitted Bonuts from that weighted-average. See Second Remand Results at 27. Commerce generally has authority to correct ministerial errors on remand, particularly when they relate to issues under litigation.

Dated: July 30, 2021
New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT, CHIEF JUDGE

Slip Op. 21–98

CHANGZHOU TRINA SOLAR ENERGY CO., LTD. et al., Plaintiffs and Consolidated Plaintiffs, and JA SOLAR TECHNOLOGY YANGZHOU CO., LTD. et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SOLARWORLD AMERICAS, INC. et al., Defendant-Intervenor and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 18–00176

[Sustaining the U.S. Department of Commerce’s second remand redetermination in the fourth administrative review of the antidumping duty order covering crystalline silicon photovoltaic cells, whether or not assembled into modules.]

Dated: August 10, 2021

Robert G. Gosselink and *Jonathan M. Freed*, Trade Pacific, PLLC, of Washington, DC, for plaintiffs.

Jeffrey S. Grimson, *Sarah M. Wyss*, and *Bryan P. Cenko*, Mowry & Grimson, PLLC, of Washington, DC, for consolidated plaintiffs and plaintiff-intervenors JA Solar Technology Yangzhou Co., Ltd., Shanghai JA Solar Technology Co., Ltd. and JingAo Solar Co., Ltd.

Tara K. Hogan, Assistant Director, and *Joshua E. Kurland*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. Also on the brief was *Brian M. Boynton*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of Counsel on the brief was *Leslie M. Lewis*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce’s (“Commerce”) remand redetermination filed pursuant to the court’s order in *Changzhou Trina Solar Energy Co. v. United States*, 45 CIT __, __, 492 F. Supp. 3d 1322 (Jan. 4, 2021) (“*Changzhou II*”). See Final Results of Remand Redetermination Pursuant to Court Remand, Apr. 5, 2021, ECF No. 105–1 (“*Second Remand Results*”). In *Changzhou II*, the court remanded Commerce’s decision to value Trina’s¹ international freight expenses using Maersk Line (“Maersk”) rate quotes. *Chanzhou II*, 45 CIT at __, 492 F. Supp. 3d at 1332; see also *Changzhou Trina Solar Energy Co. v. United States*, 44 CIT __, __, 450 F. Supp. 3d 1301, 1312–13 (May 13, 2020) (“*Changzhou I*”).

¹ Changzhou Trina Solar Energy Co., Ltd., Trina Solar (Changzhou) Science & Technology Co., Ltd., Yancheng Trina Solar Energy Technology Co., Ltd., Changzhou Trina Solar Yabang Energy Co., Ltd., Turpan Trina Solar Energy Co., Ltd., Hubei Trina Solar Energy Co., Ltd., and Trina Solar (Hefei) Science & Technology Co., Ltd are referred to, collectively, as “Trina.”

On remand, Commerce abandons its reliance on Maersk data to value Trina's international freight expenses, and instead uses data from Xenata XS ("Xenata"). See *Second Remand Results* at 6. Both Trina and consolidated plaintiffs and plaintiff-intervenors JA Solar Technology Yangzhou Co., Ltd., Shanghai JA Solar Technology Co., Ltd., and JingAo Solar Co., Ltd. (collectively, "JA Solar") (Trina and JA Solar are collectively referred to as "Plaintiff") submit comments agreeing with the *Second Remand Results*. See Plt. Trina's Cmts. on Final Results of Remand Redetermination, May 5, 2021, ECF No. 108 ("Trina Br."); Cmts. On Final Results of Remand Redetermination of [JA Solar], May 5, 2021, ECF No. 107 ("JA Solar Br."). Defendant United States requests that the court sustain the *Second Remand Results*. See Def.'s Request to Sustain Remand Redetermination, June 3, 2021, ECF No. 110 ("Def. Br."). For the following reasons, the court sustains Commerce's *Second Remand Results*.

BACKGROUND

The court presumes familiarity with the facts of this case as set out in its previous opinions ordering remand to Commerce, and recounts only those facts relevant to the court's review of the *Second Remand Results*. See *Changzhou II*, 45 CIT at ___, 492 F. Supp. 3d at 1325–32; see also *Changzhou I*, 44 CIT at ___, 450 F. Supp. 3d at 1304–07, 1312–13.

On July 27, 2018, Commerce published its final determination in the fourth administrative review of the antidumping duty ("ADD") order covering crystalline silicon photovoltaic cells, whether or not assembled into modules ("solar cells" or "solar panels"), from the People's Republic of China ("China"). See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From [China]*, 83 Fed. Reg. 35,616 (Dep't Commerce July 27, 2018) (final results of [ADD] admin. review and final determination of no shipments; 2015–2016) ("*Final Results*") and accompanying Issues and Decisions Memo., A-570–979, (July 11, 2018), ECF No. 36 5 ("Final Decision Memo"). In *Changzhou I*, the court held that Commerce's decision to use Maersk data in calculating Trina's international freight expenses was unsupported by substantial evidence because record evidence contradicted Commerce's finding that handling charges could be removed from the Maersk data but not the Xeneta data and remanded for Commerce to further explain or reconsider its determination that the Maersk data is more specific than the Xeneta data.² *Changzhou I*,

² Commerce initially determined the Maersk data was better than the Xeneta data because Maersk data was adjustable to exclude brokerage and handling charges. Final Decision Memo at 30. Commerce found that the Xeneta data was not adjustable and, if used, would lead to double counting for these charges. *Id.*

44 CIT at ___, 450 F. Supp. 3d at 1313. On remand, Commerce continued to use Maersk data to calculate Trina's international freight expenses. See Final Results of Remand Redetermination, p. 4–8, Aug. 7, 2020, ECF No. 91–1 (“*First Remand Results*”). Commerce explained that it continued to use Maersk data because although both the Maersk and Xeneta data properly excluded brokerage and handling charges, Maersk specifically offered containers for shipping electronics, while Xeneta's rates did not distinguish “between regular shipments, hazardous shipments, and shipments that require refrigeration.” *Id.* at 5–6.

In *Changzhou II*, the court again held that Commerce's decision to calculate Trina's international freight expense using Maersk data was unsupported by substantial evidence because the record lacked evidence to support the assumption that electronic goods are shipped in different types of containers than any other nonhazardous and non-refrigerated goods. *Changzhou II*, 45 CIT at ___, 492 F. Supp. 3d at 1328. The court further held that Commerce's conclusion that the Maersk data, but not the Xeneta data, excluded hazardous and refrigerated goods from the price was unsupported by record evidence. *Id.* at 1329. The court remanded to Commerce for further explanation, specifically identifying several factors that detracted from Commerce's determination that the Maersk data was the best available information to calculate Trina's international freight costs. *Id.* at 1329–32. The court noted that Commerce did not include route specificity in its analysis even though the record indicated that the cost of freight depended not only on the type of container but also the route. *Id.* at 1329–30. The court also remanded for further explanation of the comparative representativeness of the Maersk and Xeneta data sets, observing that the Maersk data was comprised of only 32 price quotes from a few days during the period of review (“POR”), with nearly half of those quotes on one day, while the Xeneta data covered the entire POR and was based on several hundred thousand rates per month. *Id.* at 1330. Finally, the court remanded to Commerce for further explanation of its assumption that Xeneta's rates included prices for hazardous and refrigerated goods while Maersk's rates did not, as one would expect such shipments to be more expensive and Xeneta's prices were far lower than Maersk's. *Id.* at 1331–32.

On remand, Commerce determines that Xeneta's data is the best available information to value Trina's international freight costs. *Second Remand Results* at 6–8. All parties request that the court sustain Commerce's findings. See *Trina Br.* at 2; *JA Solar Br.* at 1–3; *Def. Br.* at 1–2.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018)³ and 28 U.S.C. § 1581(c) (2018), which grant the Court authority to review actions contesting the final determination in an administrative review of an ADD order. The court will uphold Commerce’s determination unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]” 19 U.S.C. § 1516a(b)(1)(B)(i). “The results of a redetermination pursuant to court remand are also reviewed ‘for compliance with the court’s remand order.’” *Xinjiaimei Furniture (Zhangzhou) Co. v. United States*, 38 CIT ___, ___, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

All parties ask the court to sustain Commerce’s *Second Remand Results*. See Trina Br. at 2; JA Solar Br. at 1–3; Def. Br. at 1–2. For the following reasons, the court sustains the *Second Remand Results* as supported by substantial evidence and otherwise in accordance with the law.

When subject merchandise is exported from a nonmarket economy (“NME”) country, Commerce calculates normal value of entries by using data from a surrogate, market economy country (“surrogate country”) at a comparable level of economic development to value the factors utilized to produce the subject merchandise (“FOPs”). 19 U.S.C. § 1677b(c)(1). Commerce uses “the best available information” to value the FOPs, *id.*, and has discretion to determine what constitutes the best available information. *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011). Commerce generally selects surrogate values that are publicly available, product specific, reflect a broad market average, and are contemporaneous with the POR. *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014); see also Import Admin., U.S. Dep’t Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), available at <https://enforcement.trade.gov/policy/bull04-1.html> (last visited Aug. 4, 2021). Because China has an NME, when calculating Trina’s dumping margin, Commerce determined the normal value of Trina’s entries of subject merchandise by using data from a surrogate country to value Trina’s FOPs, including international freight costs. See Final Decision Memo at 27–32.

³ Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

In the *Second Remand Results*, Commerce notes that the record does not contain any documentation supporting the conclusion that rates for shipping electronic goods and other nonhazardous and non-refrigerated goods differ. *Second Remand Results* at 6. Commerce further states that it has no additional evidence to support the conclusion that the Maersk data exclude rates for shipping hazardous and refrigerated goods while the Xeneta data do not. *Id.* Commerce concludes that “the Maersk and Xeneta datasets equally satisfy Commerce’s criteria of tax exclusivity, contemporaneity, and public availability.” *Id.* However, Commerce finds that the Xeneta data is more specific to the shipping routes used by Trina and represents a broader market average than the Maersk data. *Id.* In support of these findings, Commerce notes that the Xeneta rates cover all the freight routes used by Trina, while the Maersk rates only cover approximately 30% of the routes. *Id.* Commerce further states that the Xeneta data “includes thousands of actual shipments covering every day of the POR while the Maersk data comprise 32 price quotes, with 15 of the quotes from only one day of the POR.” *Id.* Therefore, Commerce concludes that the Xeneta data is the best available information with which to value Trina’s international freight costs. *Id.* at 6–7.

Commerce’s analysis and decision to use the Xeneta data are reasonable, supported by substantial evidence, and in accordance with law. The record supports Commerce’s findings that the Xeneta data is more representative than the Maersk data and covered all of Trina’s routes. *See also Changzhou II*, 45 CIT at ___, 492 F. Supp. 3d at 1329–31. Likewise, Commerce’s decision to stop relying on any purported differences in the rates for shipping electronic goods and other nonhazardous and nonrefrigerated goods is reasonable because there is no record evidence that shows any such differences in prices.

All parties agree with Commerce’s determinations in the *Second Remand Results* and request that the *Second Remand Results* be sustained. *See* Trina Br. at 2; JA Solar Br. at 1–3; Def. Br. at 1–2. Commerce’s *Second Remand Results* are supported by substantial evidence and in accordance with law and are sustained.

CONCLUSION

For the foregoing reasons, Commerce’s *Second Remand Results* are supported by substantial evidence and comply with the court’s order in *Changzhou II* and are therefore sustained. Judgment will enter accordingly.

Dated: August 10, 2021
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE

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