

U.S. Customs and Border Protection



PROPOSED REVOCATION OF TWO RULING LETTERS AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF FLEA DROPS

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

ACTION: Notice of proposed revocation of two ruling letters, and proposed revocation of treatment relating to the tariff classification of flea drops.

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 two ruling letters concerning tariff classification of flea 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 January 28, 2022.

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: Marina Mekheil, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325-0974.

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 2 ruling letters pertaining to the tariff classification of flea drops. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") F86615, dated May 24, 2000 (Attachment A), and NY A84405, dated June 17, 1996 (Attachment B), 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 two 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 F86615 and NY A84405, CBP classified flea drops in heading 3004, HTSUS, specifically in subheading 3004.90.9003, HTSUS,

which provides for “[M]edicaments ... consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale: Other: Other: For veterinary use.”¹ CBP has reviewed NY F86615 and NY A84405 and has determined the ruling letters to be in error. It is now CBP’s position that flea drops are properly classified, in heading 3808, HTSUS, specifically in subheading 3808.91.50, HTSUS, which provides for “Insecticides, rodenticides, fungicides ...put up in forms or packings for retail sale or as preparations ...: Other: Insecticides: Other: Other...”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY F86615 and NY A84405 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H232357, set forth as Attachment C 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:

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

¹ Classified in subheading 3004.90.9203, HTSUS in the 2021 edition of the HTSUS.

NY F86615

May 24, 2000

CLA-2-30:RR:NC:2:238 F86615

CATEGORY: Classification

TARIFF NO.: 3004.90.9003

MS. DODY TROMBLEY
NORMAN G. JENSEN, INC.
P.O. BOX 2457
CHAMPLAIN, NY 12919

RE: The tariff classification of Gentle Touch™ Flea Drops from Canada

DEAR MS. TROMBLEY:

In your letter dated April 24, 2000, on behalf of Confab Laboratories Inc., you requested a tariff classification ruling.

The submitted sample, Gentle Touch™ Flea Drops, consists of six, snap-open, plastic tubes put up for retail sale in a paperboard container. Each tube contains a formulated insecticide indicated for topical application on dogs and cats to kill fleas.

Although the paperboard container indicates that the flea drops contain “[N]o Pesticides,” we note that the two active ingredients contained in the formulation, namely, Sodium lauryl sulfate (7.00%) and Citric acid (5.00%) are, in fact, considered pesticides - albeit minimal-risk pesticide substances - by the U.S. Environmental Protection Agency (EPA), notwithstanding their exemption from the requirements of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Federal Register / Vol. 61, No. 45 / Wednesday, March 6, 1996 / Rules and Regulations. We further note that the inert ingredients contained in the formulation, namely, Hydrogenated vegetable oil, Soybean oil, and Glycerin, all appear on the list of inert ingredients identified as minimum risk inerts (list 4A inerts). Federal Register / Vol. 59, No. 187 / Wednesday, September 28, 1994 / Notices. Accordingly, in light of the present wording appearing on the paperboard container, i.e., “No Pesticides,” we strongly advise you to contact the U.S. Environmental Protection Agency, Office of Pesticide Programs, 401 M Street, S.W., Washington, DC, 20460, telephone: 703-305-7092, for a resolution of this matter. Finally, although the active ingredients are characterized as pesticide substances by the EPA, it is our determination that the subject product has the essential character of a veterinary medicament. Explanatory Note 38.08 (exclusion (c)), HTS.

The applicable subheading for the subject product will be 3004.90.9003, Harmonized Tariff Schedule of the United States (HTS), which provides for “[M]edicaments ... consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale: Other: Other: For veterinary use.” The general rate of duty will be free.

In addition to possible regulation by the EPA, this merchandise may also be subject to the requirements of the Federal Food, Drug, and Cosmetic Act, which is administered by the U.S. Food and Drug Administration. You may contact them at 5600 Fishers Lane, Rockville, Maryland 20857, telephone number 301-443-1544.

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 Harvey Kuperstein at 212-637-7068.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity
Specialist Division

NY A84405

June 17, 1996

CLA-2-30:RR:NC:FC:238 A84405

CATEGORY: Classification

TARIFF NO.: 3004.90.9003

KENNETH G. WEIGEL, Esq.

NANCY KAO, Esq.

KIRKLAND & ELLIS

655 FIFTEENTH STREET, N.W.

WASHINGTON, D.C. 20005

RE: The tariff classification of advantage Flea Adulticide from Germany

DEAR MR. WEIGEL & MS. KAO:

In your letter dated June 4, 1996, on behalf of your client, Bayer Corporation, you requested a tariff classification ruling.

This letter will be given confidential treatment based on the facts you supplied to support your claim for exemption from disclosure.

According to the submitted samples and descriptive literature, the subject product, advantage, is a once-a-month topical flea treatment, used for the prevention and treatment of flea infestations in dogs and cats. The product contains Imidacloprid (CAS-138261-41-3), as the active ingredient, and is available only through licensed practicing veterinarians. It is put up in small tubes of various sizes, the size and number of tubes used depending on the weight and type of animal on which it will be applied (e.g., "cats over 9 lbs.", "dogs over 20 lbs."). The tubes, in turn, are blister-packed and put up in retail packaging. In our opinion, although the active ingredient, Imidacloprid, is characterized in the Farm Chemicals Handbook '96 and the Merck Index (Twelfth Edition) as an insecticide, the subject product has the essential character of a veterinary medicament.

The applicable subheading for the subject product will be 3004.90.9003, Harmonized Tariff Schedule of the United States (HTS), which provides for: "Medicaments ... consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale: Other: Other: For veterinary use." The rate of duty will be free.

This merchandise may be subject to the regulations of the Food and Drug Administration and/or the Environmental Protection Agency, Office of Pesticides and Toxic Substances. You may contact the FDA at 5600 Fishers Lane, Rockville, Maryland 20857, telephone number (301) 443-6553. You may contact the Environmental Protection Agency, Office of Pesticides and Toxic Substances at 402 M Street, S.W., Washington, D.C. 20460, telephone number (202) 554-1404, or EPA Region II at (908) 321-6669.

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 Cornelius Reilly at 212-466-5770.

Sincerely,

ROGER J. SILVESTRI

*Director,**National Commodity
Specialist Division*

HQ H232357
OT:RR:CTF:TCM H232357 MMM
CATEGORY: Classification
TARIFF NO.: 3808.91.2501

MS. DODY TROMBLEY
NORMAN G. JENSEN, INC.
P.O. BOX 2457
CHAMPLAIN, NY 12919

RE: Revocation of NY F86615 and NY A84405: Classification of Flea Drops

DEAR MS. TROMBLEY:

This is in reference to New York Ruling Letter (NY) F86615, dated May 24, 2000, issued to you for your client, Confab Laboratories, Inc., concerning the tariff classification of a flea treatment for dogs and cats under the Harmonized Tariff Schedule of the United States (HTSUS). In that ruling, U.S. Customs and Border Protection (CBP) classified the subject merchandise in subheading 3004.90.9003, HTSUS, which provided for veterinary medications.¹ We have reviewed NY F86615 and find it to be in error. For the reasons set forth below, we hereby revoke NY F86615 and one other ruling with substantially similar merchandise: NY A84405, dated June 17, 1996, which was issued to Bayer Corporation.²

FACTS:

The subject merchandise, Gentle Touch™ Flea Drops, consists of six, snap-open, plastic tubes put up for retail sale in a paperboard container. Each tube contains a formulated insecticide indicated for topical application on dogs and cats to kill fleas. The two active ingredients contained in the formulation are sodium lauryl sulfate (seven percent) and citric acid (five percent). Both of these active ingredients are considered pesticides by the U.S. Environmental Protection Agency (EPA).³ The inert ingredients are hydrogenated vegetable oil, soybean oil and glycerin.

ISSUE:

Are the subject flea drops classified in subheading 3004.90.9203, HTSUS, which provides for, in pertinent part, “Medicaments ... put up in measured doses or in forms or packings for retail sale: Other: Other: For veterinary use...”, or in subheading 3808.91.2501, HTSUS, which provides for: “Insecti-

¹ Prior to the 2002 HTSUS, this subheading was 3004.90.90 03. The 2021 HTSUS subheading is 3004.90.92 03.

² In NY A84405, the subject merchandise is a topical flea treatment, with the product name Advantage. The product contains Imidacloprid (CAS-138261-41-3) as the active ingredient, which is considered to be an insecticide by EPA.² Advantage is available only through licensed practicing veterinarians. It is put up in small tubes of various sizes, the size and number of tubes used depending on the weight and type of animal on which it will be applied (e.g., “cats over 9 lbs.”, “dogs over 20 lbs.”). The tubes, in turn, are blister-packed and put up in retail packaging.

³ See “Lauryl Sulfate Salts Final Work Plan & Proposed Registration Review Final Decisions Case 4016 June 2010” 5-6 (EPA Docket No. EPA-HQ-OPP-2009-0727) and “Citric Acid Final Work Plan and Proposed Registration Review Final Decision, Registration Review Case 4024 June 2009” 5-6 (EPA Docket No. EPA-HQ-OPP-2008-0855), both available at www.regulations.gov.

cides, rodenticides, fungicides ...put up in forms or packings for retail sale or as preparations ...: Other: Other: Other...”?

LAW AND ANALYSIS:

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

The 2021 HTSUS provisions under consideration are as follows:

3004	Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale:
3004.90	Other:
3004.90.92	Other:
3004.90.9203	For veterinary use ...
3808	Insecticides, rodenticides, fungicides, herbicides, antisprouting products and plant-growth regulators, disinfectants and similar products, put up in forms or packing for retail sale or as preparations or articles (for example, sulfur-treated bands, wicks and candles, and flypapers):
	Other:
3808.91	Insecticides:
	Other:
	Containing any aromatic or modified aromatic insecticide:
3808.91.2501	Other...

Note 1(d) to Chapter 38 provides as follows:

This chapter does not cover:

* * *

(d) Medicaments (heading 3003 or 3004) ...

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the official interpretation of the Harmonized System. While not legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System at the international level and are generally indicative of the proper interpretation of these headings. *See* Treas. Dec. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

EN 30.03 states that:⁴

This heading covers medicinal preparations for use in the internal or external treatment or prevention of human or animal ailments. These preparations are obtained by mixing together two or more substances.

⁴ Heading 3003, HTSUS, provides in pertinent part for “Medicaments ... not put up in measured doses or in forms or packings for retail sale ...”

However, if put up in measured doses or in forms or packings for retail sale, they fall in **heading 30.04**.

EN 30.04(e) states that:

The heading also excludes:

(e) Insecticides, disinfectants, etc., of **heading 38.08**, not put up for internal or external use as medicines ...

EN 38.08(I) states that:

The products of heading 38.08 can be divided into the following groups:

(I) **Insecticides**

Insecticides include not only products for killing insects, but also those having a repellent or attractant effect. The products may be in a variety of forms such as sprays or blocks (against moths), oils or sticks (against mosquitoes), powder (against ants), strips (against flies), cyanogen gas absorbed in diatomite or paperboard (against fleas and lice).

Many insecticides are characterized by their mode of action or method of use. Among these are:

- insect growth regulators: chemicals which interfere with biochemical and physiological processes in insects.
- fumigants: chemicals which are distributed in the air as gases.
- chemosterilants: chemicals used to sterilize segments of an insect population.
- repellents: substances which prevent insect attack by making their food or living conditions unattractive or offensive.
- attractants: used to attract insects to traps or poisoned baits ...

EN 38.08(c) states that:

This heading excludes:

(c) Disinfectants, insecticides, etc., having the essential character of medicaments, including veterinary medicaments (**heading 30.03 or 30.04**)

...

* * *

Heading 3004, HTSUS, provides for medicaments for therapeutic or prophylactic uses. Note 1(d) to Chapter 38 excludes medicaments of heading 3004, HTSUS, from classification in Chapter 38. Therefore, if the flea treatments are classifiable as medicaments, they cannot be classified as insecticides of heading 3808, HTSUS. In *Inabata Specialty Chemicals v. United States*, 29 C.I.T. 419, 423 (2005), the U.S. Court of International Trade ("CIT") defined "therapeutic" as follows:

In determining the common meaning of the term "therapeutic" for purposes of classifying an article under HTSUS Heading 3004, the court in *Warner-Lambert Co. v. United States*, 341 F. Supp. 2d 1272, 1277, 28 Ct. Int'l Trade 939 (Ct. Int'l Trade 2004), referred to Stedman's Medical Dictionary, which provides that "therapeutic" is "relating to . . . the treatment, *remediating*, or curing of a disorder or disease." STEDMAN'S MEDICAL DICTIONARY 1821 (27th ed. 2000) (emphasis added). The term "therapeutic" has been defined for tariff purposes as embracing "the alleviative or palliative, as well as the curative or healing qualities." *J.E. Bernard & Co., Inc. v. United States*, 58 Cust. Ct. 23, 28, 262 F. Supp. 434,

438, C.D. 2872 (1967); *see also id.* at 29 (finding that hearing aids which ease the affection of deafness without curing it are therapeutic devices); *United States v. Alltransport, Inc.*, 44 C.C.P.A. 149, 152 (1957) (a product is a medicinal if it is “of use, or believed by the prescriber or user fairly and honestly to be of use, in curing or alleviating, or palliating or preventing, some disease or affliction of the human frame”).

A medicament is therapeutic if it treats, remediates, or cures a disease or affliction of a human or animal body. Similarly, a medicament is prophylactic if it prevents a disease or affliction of a human or animal body. To be classified under heading 3004, HTSUS, a medicament must either be therapeutic or prophylactic.

The instant flea drops are not a treatment for a disease or an affliction because the flea drops do not have an effect on the pet’s body. Rather, the flea drops kill fleas and ticks. While some of the chemicals may be absorbed into the pet’s skin, the intent is not to have an effect on the pet.⁵ The flea drops attract and interfere with the life cycles of the infesting pests. As the flea drops kill fleas and ticks but do not prevent or treat any disease or affliction of the pet’s body, they cannot be classified as medicaments of heading 3004, HTSUS. Accordingly, Note 1(d) to Chapter 38 does not exclude the flea drops from classification in Chapter 38.

Heading 3808, HTSUS, provides for insecticides packaged for retail sale. EN 38.08(I) states that the heading includes products in a variety of forms, such as oils and sprays. The instant merchandise consists of liquid drops to be used as a topical application on dogs and cats. The drops include two active pesticide ingredients, sodium lauryl sulfate and citric acid. The drops are formulated to kill fleas. At importation, the subject merchandise is packaged for retail sale. As such, the subject merchandise is classified as an insecticide of heading 3808, HTSUS. This outcome is consistent with prior rulings issued by CBP on similar products.⁶

HOLDING:

By application of GRI 1, the subject flea treatments are classified in sub-heading 3808.91.2501, HTSUS, which provides for: “Insecticides, rodenticides, fungicides ...put up in forms or packings for retail sale or as preparations ...: Other: Insecticides: Other: Other...” The 2021 column one, general rate of duty is 6.5 percent *ad valorem*.

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

EFFECT ON OTHER RULINGS:

NY F86615, dated May 24, 2000, and NY A84405, dated June 17, 1996, are hereby revoked.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

⁵ See Headquarters Ruling H310592, dated October 7, 2020 (classified hand sanitizer in heading 3808).

⁶ See NY M86008, dated September 7, 2006, and NY I83323, dated June 20, 2002.

**PROPOSED REVOCATION OF TWO RULING LETTERS
AND PROPOSED REVOCATION OF TREATMENT
RELATING TO THE TARIFF CLASSIFICATION OF
T-SECTIONS**

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

ACTION: Notice of proposed revocation of two ruling letters, and proposed revocation of treatment relating to the tariff classification of T-sections.

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 two ruling letters concerning the tariff classification of T-sections 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 January 28, 2022.

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: Marina Mekheil, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0974.

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 two ruling letters pertaining to the tariff classification of T-sections. Although in this notice, CBP is specifically referring to Headquarters Ruling Letter ("HQ") 965520, dated July 9, 2002 (Attachment A) and New York Ruling Letter ("NY") 898929, dated July 6, 1994 (Attachment B), 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 two rulings 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 HQ 965520 and NY 898929, CBP classified the T-sections in heading 8431 HTSUS, specifically in subheading 8431.31.00, HTSUS, which provides for "Parts suitable for use solely or principally with the machinery of headings 8425 to 8430: Of machinery of heading 8428: Of passenger or freight elevators other than continuous action,

skip hoists or escalators.” CBP has reviewed HQ 965520 and NY 898929, and has determined the ruling letters to be in error. It is now CBP’s position that the T-sections are properly classified in heading 7216, HTSUS, specifically in subheading 7216.50.00, HTSUS, which provides for “Angles, shapes and sections of iron or nonalloy steel: Other angles, shapes and sections, not further worked than hot-rolled, hot-drawn or extruded,” and that the subject articles are subject to Section 232 duties.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke HQ 965520 and NY 898929, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H304529, set forth as Attachment C 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: November 29, 2021

for
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

HQ 965520

July 9, 2002

CLA-2 RR:CR:GC 965520 GOB

CATEGORY: Classification

TARIFF NO.: 8431.31.00

JOHN B. PELLEGRINI

ROSS & HARDIES

65 EAST 55TH STREET

NEW YORK, NY 10022-3219

RE: Elevator Guide Rails

DEAR MR. PELLEGRINI:

This is in reply to your letter of February 1, 2002, to the Director, National Commodity Specialist Division, New York, on behalf of Yamato Kogyo (USA) Corporation, requesting a ruling, under the Harmonized Tariff Schedule of the United States (“HTSUS”), with respect to certain elevator guide rails. Your letter was referred to this office for preparation of a response.

FACTS:

You describe the elevator guide rails as follows:

The merchandise which is the subject of this request is six types of elevator guide rails: EG 8K, EG 13K, EG 18K, EG 24K, EG 30K and EG 50K. The merchandise consists of T-shaped sections of hot-rolled, non-alloy steel. The guide rails will be imported in various dimensions (height and width) but in a single standard length of 16,437 feet . . .

. . .

The merchandise is used to guide elevator cars as they travel up and down the elevator shaft. The merchandise will be sold in its condition as imported with minor modifications.

. . .

As imported, the articles are cut to length and essentially have the same shape as the finished article. The imported articles have no practical use other than as elevator rail guides.

You state that the post-importation modifications will consist of the following: creating a notch in one side of the guide; creating a groove along the opposite side; boring eight bolt holes in the bottom; chamfering the bolt holes; machining the top to adjust the dimensions; and machining to smooth the sides of the vertical runner.

ISSUE:

What is the classification under the HTSUS of the elevator guide rails?

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (“GRI’s”). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and

legal notes do not otherwise require, the remaining GRI's may then be applied. GRI 2(a) provides in pertinent part that “[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article.”

The Harmonized Commodity Description and Coding System Explanatory Notes (“EN’s”) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the EN’s provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80.

The HTSUS headings under consideration are as follows:

7216 Angles, shapes and sections of iron or nonalloy steel:

* * * * *

8431 Parts suitable for use solely or principally with the machinery of headings 8425 to 8430:

Heading 7216, HTSUS, does not appear to describe the subject goods as they are not merely angles, shapes, or sections of iron or steel. The goods are cut to specific lengths, heights, and widths (top and bottom width). You state that the goods “have no practical use other than as elevator rail guides” and that they have the essential character of finished guide rails.

Heading 8428, HTSUS, provides for: “Other lifting, handling, loading or unloading machinery (for example, elevators, escalators, conveyors, teleferics).”

EN 84.28 provides in pertinent part as follows:

. . . this heading covers a wide range of machinery for the mechanical handling of materials, goods, etc (lifting, conveying, loading, unloading, etc.)

. . .

When presented separately, [static structural elements] are classified in **heading 84.31 provided** they are fitted or designed to be fitted with the mechanical features essential for the operation of the moving parts of the complete installation ... [Emphasis in original.]

In NY 898929 dated July 6, 1994, Customs classified certain finished elevator guide rails in subheading 8531.31.00, HTSUS.

We find that the subject goods are unfinished or incomplete elevator guide rails, which have the essential character of complete or finished elevator guide rails. We further find that the elevator guide rails are parts suitable for use solely or principally with elevators. Elevators are classified in heading 8428, HTSUS. Accordingly, at GRI 2(a), the subject elevator guide rails are described in heading 8431, HTSUS, and are classified in subheading 8431.31.00, HTSUS, as: “Parts suitable for use solely or principally with the machinery of headings 8425 to 8430: . . . Of machinery of heading 8428: . . . Of passenger or freight elevators other than continuous action, skip hoists or escalators.”

HOLDING:

At GRI 2(a), the subject elevator guide rails are classified in subheading 8431.31.00, HTSUS, as: “Parts suitable for use solely or principally with the machinery of headings 8425 to 8430: . . . Of machinery of heading 8428: . . . Of passenger or freight elevators other than continuous action, skip hoists or escalators.”

Sincerely,

MYLES B. HARMON,

Acting Director

Commercial Rulings Division

NY 898929

July 6, 1994

CLA-2-84:S:N:N1:103 898929

CATEGORY: Classification

TARIFF NO.: 8431.31.0060

MR. TOM CLEVELAND
TRICOASTAL INDUSTRIES, INC.
535 CONNECTICUT AVENUE
NORWALK, CONNECTICUT 06854

RE: The tariff classification of elevator guide rails from Brazil, China, Germany, Italy, Korea or Taiwan

DEAR MR. CLEVELAND:

In your letter dated June 1, 1994, you requested a tariff classification ruling.

Elevator guide rails are T-shaped rails used to guide elevator cars as they travel up and down the elevator shaftway. The merchandise in question will be imported in two conditions - unfinished and finished.

In the finished condition, a hot rolled "T" section of ordinary low carbon structural steel has undergone processing prior to importation to produce an article to be solely used as an elevator guide rail. Processing includes machining operations such as straightening, planing, and milling and painting to prevent rust. The rails weigh from 8 to 30 pounds per foot. Lengths vary from 10 to 20 feet depending upon customer specifications but are generally 16 feet for most applications.

The applicable subheading for the finished elevator guide rails will be 8431.31.0060, Harmonized Tariff Schedule of the United States (HTS), which provides for parts suitable for use solely or principally with passenger or freight elevators, other than continuous action elevators. The duty rate will be 2 percent ad valorem.

Articles classifiable under subheading 8431.31.0060, HTS, which are products of Brazil are entitled to duty free treatment under the Generalized System of Preferences (GSP) upon compliance with all applicable regulations.

Your inquiry does not provide enough information for us to give a classification ruling on the unfinished sections. Your request for a classification ruling should include a step-by-step description of the manufacturing operations performed in Brazil and in the United States. Submit detailed data on man hours expended, labor costs and additional component (if any) costs incurred.

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

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

Sincerely,

JEAN F. MAGUIRE
Area Director
New York Seaport

HQ H304529
 OT:RR:CTF:CPMMA H304529 MMM
 CATEGORY: Classification
 TARIFF NO.: 7216.50.0000

JOHN B. PELLEGRINI, ESQ.
 MCGUIRE WOODS
 1345 AVENUE OF THE AMERICAS
 NEW YORK, NY 10105

RE: Revocation of HQ 965520 and NY 898929; Tariff classification of T-sections

DEAR MR. PELLEGRINI:

This is to inform you that U.S. Customs and Border Protection (“CBP”) has reconsidered Headquarters’ Ruling Letter (“HQ”) 965520, dated July 9, 2002 (issued to Yamato Kogyo (USA) Corporation) and New York Ruling Letter (“NY”) 898929, dated July 6, 1994 (issued to Tricoastal Industries, Inc.), regarding the classification, under the Harmonized Tariff Schedule of the United States (“HTSUS”), of T-sections.¹ In HQ 965520 and NY 898929, CBP classified the T-sections in heading 8431, HTSUS, specifically in subheading 8431.31.00, HTSUS, which provides for “parts suitable for use solely or principally with the machinery of headings 8425 to 8430: Of machinery of heading 8428: Of passenger or freight elevators other than continuous action, skip hoists or escalators.” We have determined that the two CBP rulings are in error and that the correct tariff classification should be under heading 7216, HTSUS, specifically under subheading 7216.50.00, HTSUS, which provides for “Angles, shapes and sections of iron or nonalloy steel: Other angles, shapes and sections, not further worked than hot-rolled, hot-drawn or extruded.” Accordingly, for the reasons set forth below, we hereby revoke HQ 965520 and NY 898929.

FACTS:

HQ 965520 describes the subject T-sections as follows:

The merchandise ... is six types of elevator guide rails: EG 8K, EG 13K, EG 18K, EG 24K, EG 30K and EG 50K. The merchandise consists of T-shaped sections of hot-rolled, non-alloy steel. The guide rails will be imported in various dimensions (height and width) but in a single standard length of 16,437 feet (sic) ... The merchandise is used to guide elevator cars as they travel up and down the elevator shaft. The merchandise will be sold in its condition as imported with minor modifications ... As imported, the articles are cut to length and essentially have the same shape as the finished article. The imported articles have no practical use other than as elevator rail guides.

You state that the post-importation modifications will consist of the following: creating a notch in one side of the guide; creating a groove along the opposite side; boring eight bolt holes in the bottom; chamfering the bolt holes; machining the top to adjust the dimensions; and machining to smooth the sides of the vertical runner.

¹ We have also considered classification of the bar ties in NY I81164, dated May 21, 2002, and of the frame in NY A82738, dated May 13, 1996. We decline to revoke those rulings at this time due to insufficient information..

NY 898929 describes the T-sections as follows:

Elevator guide rails are T-shaped rails used to guide elevator cars as they travel up and down the elevator shaftway. The merchandise in question will be imported in two conditions - unfinished and finished. In the finished condition, a hot rolled “T” section of ordinary low carbon structural steel has undergone processing prior to importation to produce an article to be solely used as an elevator guide rail. Processing includes machining operations such as straightening, planing, and milling and painting to prevent rust. The rails weigh from 8 to 30 pounds per foot. Lengths vary from 10 to 20 feet depending upon customer specifications but are generally 16 feet for most applications.

ISSUE:

Whether the T-sections in HQ 965520 and NY 898929 are classifiable under heading 7216, HTSUS, as angles, shapes and sections of nonalloy steel or under heading 8431, HTSUS, as parts suitable for use solely or principally with elevators.

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (“GRIs”). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order. Pursuant to GRI 6, classification at the subheading level uses the same rules, *mutatis mutandis*, as classification at the heading level.

GRI 2(a) states:

Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

The 2021 HTSUS provisions under consideration are as follows:

7216	Angles, shapes and sections of iron or nonalloy steel:
7216.50.00	Other angles, shapes and sections, not further worked than hot-rolled, hot-drawn or extruded
8428	Other lifting, handling, loading or unloading machinery (for example, elevators, escalators, conveyors, teleferics):
8431	Parts suitable for use solely or principally with the machinery of headings 8425 to 8430:
	Of machinery of heading 8428:
8431.31.00	Of passenger or freight elevators other than continuous action, skip hoists or escalators

Note 1(f) to section XV, HTSUS, states that, “This section does not cover: ... Articles of section XVI (machinery, mechanical appliances and electrical goods).”

Note 2(b) to section XVI, HTSUS, states that parts that are “suitable for use solely or principally with a particular kind of machine ... are to be classified with the machines of that kind or in heading ... 8431 ...”

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of the headings. It is CBP’s practice to consult, whenever possible, the terms of the ENs when interpreting the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The ENs to GRI 2(a) provide, in relevant part:

(I) The first part of Rule 2 (a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished, **provided** that, as presented, it has the essential character of the complete or finished article.

(II) The provisions of this Rule also apply to **blanks** unless these are specified in a particular heading. The term “**blank**” means an article, not ready for direct use, having the approximate shape or outline of the finished article or part, and which can only be used, other than in exceptional cases, for completion into the finished article or part (e.g., bottle preforms of plastics being intermediate products having tubular shape, with one closed end and one open end threaded to secure a screw type closure, the portion below the threaded end being intended to be expanded to a desired size and shape).

Semi-manufactures not yet having the essential shape of the finished articles (such as is generally the case with bars, discs, tubes, etc.) are not regarded as “blanks”

The General ENs to chapter 72, note 1(n) describe angles, shapes, and sections of chapter 72 as “[p]roducts having a uniform solid cross-section along their whole length which do not conform to any of the definitions at (ij), (k), (l) or (m) above or to the definition of wire.”

EN 72.16 states, in pertinent part, the following:

Angles, shapes and sections are defined in Note 1 (n) to this Chapter.

The sections most commonly falling in this heading are H, I, T, capital omega, Z and U (including channels), obtuse, acute and right (L) angles. The corners may be square or rounded, the limbs equal or unequal, and the edges may or may not be “bulbed” (bulb angles or shipbuilding beams).

Angles, shapes and sections are usually produced by hot-rolling, hot-drawing, hot-extrusion or hot-forging or forging blooms or billets

The products of this heading may have been subjected to working such as drilling, punching or twisting or to surface treatment such as coating, plating or cladding - see Part IV (C) of the General Explanatory Note to this Chapter, **provided** they do not thereby assume the character of articles or of products falling in other headings.

The heavier angles, shapes and sections (e.g., girders, beams, pillars and joists) are used in the construction of bridges, buildings, ships, etc.;

lighter products are used in the manufacture of agricultural implements, machinery, automobiles, fences, furniture, sliding door or curtain tracks, umbrella ribs and numerous other articles.

* * *

In *Bauerhin Techs. Ltd. P'ship. v. United States*, 110 F.3d 774 (Fed. Cir. 1997), the court identified two distinct lines of cases defining the word “part.” Consistent with *United States v. Willoughby Camera Stores, Inc.*, 21 C.C.P.A. 322, 324 (1933) (citations omitted), one line of cases holds that a part of an article “is something necessary to the completion of that article. . . . [W]ithout which the article to which it is to be joined, could not function as such article.” The other line of cases evolved from *United States v. Pompeo*, 43 C.C.P.A. 9, 14 (1955), which held that a device may be a part of an article even though its use is optional and the article will function without it, if the device is dedicated for use upon the article, and, once installed, the article will not operate without it. The definition of “parts” was also discussed in *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1353 (Fed. Cir. 2002), wherein the United States Court of Appeals for the Federal Circuit (“CAFC”) defined parts as “an essential element or constituent; integral portion which can be separated, replaced, etc.”² This line of reasoning has been applied in previous CBP rulings.³

However, before examining whether the goods in question satisfy one or both of the aforementioned tests, we note that they only qualify to be “parts” of the good (an elevator) if they bear a “direct relationship” to the good, such that the good is the “primary article” of which the item is a component.⁴ Otherwise, as the Court of International Trade (“CIT”) and its predecessor, the Customs Court, have held, the item will be considered merely a “part” of whatever intermediate part constitutes the primary article.⁵

CBP has consistently adhered to this principle by excluding parts of “primary articles” from HTSUS “parts provisions” where the primary articles themselves are parts classifiable in such provisions. For example, in HQ H169057, dated September 4, 2014, CBP ruled that a front frame designed to reinforce a wind engine, which in turn constituted one of two components of a wind generator, could not be classified as part of the wind generator itself. Similarly, HQ H005091, dated January 24, 2007, excluded from heading 8708, which provides for motor vehicle parts, a trunk assembly that constituted one of several component parts of an automobile trunk lock.⁶ In sum, it is not enough that an item will eventually form a portion of another article. Rather the item must be processed to the point where it is no longer recognizable as a profile but instead has the character of a finished part.

² *Id.* at 1353 (citing Webster’s New World Dictionary 984 (3d College Ed. 1988)).

³ See *e.g.*, HQ H255093, dated January 14, 2015; HQ H238494, dated June 26, 2014; and HQ H027028, dated August 19, 2008.

⁴ See HQ H255855, dated May 27, 2015.

⁵ See *Mitsubishi Elecs. Am. v. United States*, 19 CIT 378, 383 n.3, 882 F. Supp. 171, 175 n.3 (1995) (“[A] subpart of a particular part of an article is more specifically provided for as a part of the part than as a part of the whole.”); *Liebert v. United States*, 60 Cust. Ct. 677, 686–87, 287 F. Supp. 1008, 1014, Cust. Dec. 3499 (1968) (holding that parts of clutches, which clutches are in turn parts of winches, are more specifically provided for as parts of clutches than as parts of winches).

⁶ See also HQ H020958, dated November 28, 2008; HQ 963325, dated September 15, 2000.

As imported, the subject merchandise in HQ 965520 and NY 898929 will need to undergo a total fabrication before it will be ready for assembly in the elevator shaft and recognizable as a finished part. The subject merchandise in HQ 965520 was imported as T-shaped sections in a single standard length of 16.437 feet or 5 meters. The subject merchandise in NY 898929 was imported as T-shaped sections in lengths varying from 10 to 20 feet (generally 16 feet).

Post-importation, the subject merchandise in HQ 965520 will be subject to the following operations: creating a notch in one side of the guide, creating a groove along the opposite side, boring eight bolt holes in the bottom, chamfering the bolt holes, machining the top to adjust the dimensions, and machining to smooth the sides of the vertical runner. Once these operations are completed, the subject merchandise would then be assembled in the elevator shaft.

CBP has determined that the subject merchandise in HQ 965520 and NY 898929, at importation, are T shaped sections and not parts of elevators. Even after machining operations such as straightening, planing, milling, and painting to prevent rust, the merchandise remains a T shaped section. It has not been combined with any other section or the fishplates, brackets, braces control elements, roller clamps or other materials that make the section dedicated to use as a guide rail. Machining operations such as straightening, planing, and milling and painting to prevent rust do not make the sections suitable for use solely with lifting equipment and do not cause the subject merchandise to assume the character of articles of heading 8431.⁷

The instant merchandise, which is imported in the form of T-shaped sections of hot-rolled, non-alloy steel in various dimensions, is described by the term “angles, shapes, and sections” set forth in note 1(n) to chapter 72. Heading 7216 includes T shapes as well as “other” shapes, such as special profiles of non-standard cross-section including those used in the manufacture of machinery and automobiles.⁸ T shapes that have been drilled, punched, twisted, or subjected to surface treatment such as coating, plating or cladding are classifiable in heading 7216.⁹

For similar reasons, the T sections are not unfinished guiderails under GRI 2(a). The imported T-shaped sections must be fabricated and installed on the hoist way wall with significant other components before becoming guiderails for use with an elevator. As such, the T-shaped sections cannot be considered a blank of a guide rail.¹⁰

⁷ The ENs to GRI 2(a), *supra*, exclude semi-manufactures not yet having the shape of finished article (here the elevator guide rails) from classification as unfinished articles under GRI 2(a). The rails in their condition as imported are just T-sections. They do not have the shape of the finished elevator guide rail module. The merchandise is imported as T-shaped sections, which are subjected to significant processing to become elevator guide rails forming a module. The T-sections must be fabricated, installed on the hoistway wall; and must be fixed and connected between guide rail bracket and rail support on the hoistway wall. As such, the T-sections cannot be considered a blank.

⁸ See EN 72.16.

⁹ See EN 72.16.

¹⁰ See https://www.elevatorworld.com/pdf/ed_book_chapters/ed_focus/Chapter_7.pdf A guiderail is the long installed rail in the shaft that needs the fishplated joints, brackets, braces, guides, etc. to be a complete guiderail. If these things were imported together, they might be an unassembled guiderail. But the T-sections in standard lengths are nowhere close to a finished guiderail.

Lastly, CBP has previously classified incomplete nonalloy steel profiles in subheading 7216.50.00, HTSUS. In NY N295858, dated May 3, 2018 and NY N295670, dated April 27, 2018, nonalloy steel profiles, which were further machined, assembled into a frame, and painted after importation, were classified under subheading 7216.50.00. In NY I85271, dated September 13, 2002, steel beams used in construction that did not have the essential character of the finished parts were classified in heading 7216, HTSUS. In NY 884276, dated April 21, 1993, carbon steel ribbed profile sheeting cut in length ready to be used in roofing and siding applications was classified in heading 7216, HTSUS. Accordingly, the subject merchandise in both HQ 965520 and NY 898929 are classifiable in heading 7216, HTSUS.

Therefore, by application of GRIs 1 and 6, the subject merchandise in HQ 965520 and NY 898929 are steel special profile shapes of heading 7216, HTSUS, classified specifically under subheading 7216.50.00, which provides for angles, shapes and sections of iron or nonalloy steel, other angles shapes and sections not further worked than hot-rolled, hot-drawn or extruded.

HOLDING:

By application of GRIs 1 and 6, the T-sections at issue in HQ 965520 and NY 898929 are classified in heading 7216, HTSUS, specifically in subheading 7216.50.00, HTSUS, as “Angles, shapes and sections of iron or nonalloy steel: Other angles, shapes and sections, not further worked than hot-rolled, hot-drawn or extruded” for the reasons explained above. The 2021 column one, duty rate is 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 at <https://hts.usitc.gov/current>.

Section 232 remedies are based on the country of origin. At the time of importation, the importer must report the chapter 99 subheading applicable to the product classification in addition to the chapter 72 subheading listed above. The relevant Proclamations are subject to periodic amendment of the exclusions, so the importer should exercise reasonable care in monitoring the status of goods covered by the Proclamations and the applicable chapter 99 subheadings.

EFFECT ON OTHER RULINGS:

HQ 965520, dated July 9, 2002, and NY 898929, dated July 6, 1994, are hereby REVOKED.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

Cc: Mr. Tom Cleveland
Tricoastal Industries, Inc.
535 Connecticut Avenue
Norwalk, Connecticut 06854

**PROPOSED REVOCATION OF ONE RULING LETTER AND
PROPOSED REVOCATION OF TREATMENT RELATING TO
THE TARIFF CLASSIFICATION OF PET BOWLS**

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

ACTION: Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of pet bowls.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning the tariff classification of certain pet bowls 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 January 28, 2022.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

FOR FURTHER INFORMATION CONTACT: Karen S. Greene, Chemicals, Petroleum, Metals & Miscellaneous Branch, Regulations and Rulings, Office of Trade, at Karen.S.Greene@cbp.dhs.gov.

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 one ruling letter pertaining to the tariff classification of certain pet bowls. Although in this notice, CBP is specifically referring to New York Ruling Letter (NY) N305668, dated xx (Attachment A), 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 one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the 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 after the effective date of the final decision on this notice.

In NY N305668, CBP classified pet bowls composed predominantly of bamboo fiber powder in heading 4421, HTSUS, as other articles of wood. CBP has reviewed NY JN305668 and has determined the ruling letter is in error.

It is now CBP's position that a pet bowl composed predominantly of bamboo fiber powder is classified in subheading 3924, HTSUS, specifically in subheading 3924.90.56, HTSUS, which provides for "Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N305668 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H306852, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

N305668

August 14, 2019

CLA-2-44:OT:RR:NC:N4:434

CATEGORY: Classification

TARIFF NO.: 4421.91.9780

MR. MICHAEL BROWN
BROWNSTONE INTERNATIONAL
18712 NE PORTAL WAY
PORTLAND, OR 97230

RE: The tariff classification of pet bowls from China

DEAR MR. BROWN:

In your letter, dated August 6, 2019, you requested a tariff classification ruling on behalf of your client, Van Ness Plastic Molding Co. Inc. A product description and photos were submitted for our review.

The “pet watering and feeding bowls” are made from a composite material that is, per your submission, 57% bamboo, 20% corn starch, 11% organic biobased glue, 10% melamine, and 2% dry powder colorant. One photo depicts a round, shallow bowl with a drawing of a cat face at the bottom. The other photo depicts connected side-by-side food and water dishes with a gold fish motif at the bottom of each.

You propose classification in subheading 4419.19.9000, Harmonized Tariff Schedule of the United States (HTSUS), Tableware and kitchenware, of wood. However, the tableware and kitchenware of heading 4419 are for use by humans rather than animals.

The applicable subheading for the pet bowls, which are primarily wood, will be 4421.91.9780, HTSUS, which provides for “Other articles of wood: Of bamboo: Other: Other: Other: Other.” The rate of duty will be 3.3 percent ad valorem.

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

Effective July 6, 2018, the Office of the United States Trade Representative (USTR) imposed an additional tariff on certain products of China classified in the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(b), HTSUS. The USTR imposed additional tariffs, effective August 23, 2018, on products classified under the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(d), HTSUS. Subsequently, the USTR imposed further tariffs, effective September 24, 2018, on products classified under the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(f) and U.S. Note 20(g), HTSUS.

For additional information, please see the relevant Federal Register notices dated June 20, 2018 (83 F.R. 28710), August 16, 2018 (83 F.R. 40823), and September 21, 2018 (83 F.R. 47974).

Products of China that are provided for in subheading 9903.88.01, 9903.88.02, 9903.88.03, or 9903.88.04 and classified in one of the subheadings enumerated in U.S. Note 20(b), U.S. Note 20(d), U.S. Note 20(f) or U.S. Note 20(g) to subchapter III shall continue to be subject to antidumping, countervailing, or other duties, fees and charges that apply to such products, as well as to those imposed by the aforementioned Chapter 99 subheadings.

Products of China classified under subheading, 4421.91.9780, HTSUS, unless specifically excluded, are subject to the additional 25 percent ad

valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.03, in addition to subheading 4421.91.9780, HTSUS, listed above.

The tariff is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Notice cited above and the applicable Chapter 99 subheading.

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 Charlene Miller at charlene.s.miller@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

HQ H306852
OT:RR:CTF:CPMM H306852 KSG
CATEGORY: Classification
TARIFF NO.: 3924.90.56

JENNIFER M. SMITH
THE BRISTOL GROUP
1707 L STREET NW
SUITE 570
WASHINGTON, DC 20036

RE: Proposed revocation of NY N305668; tariff classification of pet bowls made of bamboo fiber powder

DEAR Ms. SMITH:

This letter is in reference to New York Ruling Letter (NY) N305668, dated August 14, 2019, regarding the tariff classification of certain pet bowls made of bamboo fiber powder under the Harmonized Tariff Schedule of the United States (HTSUS).

In NY N305668, pet bowls made of 57% bamboo fiber powder and 10% melamine were classified in subheading 4421.91.97, HTSUS.

We have reviewed NY N305668 and determined that the reasoning is in error. Accordingly, for the reasons set forth below, CBP is proposing to revoke NY N305668.

FACTS:

The pet bowls are made of a composite material consisting of 57% bamboo fiber powder, 10% melamine, 20% corn starch, 2% dry powder colorant and 11% glue. The production of the pet bowls include: the addition of specific bamboo fiber powder into the mold of the thermal molding machine; the horizontal mold is closed with high pressure and a high temperature; and the polishing of the edges of the product. The product is then inspected, cleaned and packaged. The name of the thermal molding machine is a “High Temperature Hydraulic Forming Machine.

ISSUE:

Whether the pet bowls described above are properly classified in heading 4421, HTSUS, or as a plastic in heading 3924, HTSUS.

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. If 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 6 provides that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply unless the context otherwise requires.

The HTSUS headings under consideration are the following:

4421 Other articles of wood

3924 Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics.

Chapter Note 1 of Chapter 39, HTSUS, provides that “Throughout the tariff schedule the expression “plastics” means those materials of headings 3901 to 3914 which are or have been capable, either at the moment of polymerization or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticizer) by molding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence. Throughout the tariff schedule, any reference to “*plastics*” also includes vulcanized fiber.”

The term “plastic” encompasses any organic materials subjected to a polymerization process which creates a malleable product that can be cast, pressed or extruded into a variety of shapes during manufacture. *See, e.g., <http://www.nobelprize.org/educational/chemistry/plastics/readmore.html>*. Bioplastics are formed by subjecting a fibrous material such as cellulose fibers or wood pulp, mixed with a resin or glue, to heat and pressure. This process polymerizes the fibrous filler material, transforming it into a plastic.

In NY N201536, CBP classified a cutting board made of bamboo fiber powder in heading 3924, HTSUS, as tableware or kitchenware of plastic. In that ruling, CBP stated that “Plastic may consist of unplasticised materials which become plastic in the molding and curing process, or of materials to which plasticisers have been added. These materials may incorporate fillers that are made of wood flour, cellulose, textile fibers, mineral substances, starch, etc.” We believe that the conclusion reached in NY N201536 is correct and is directly relevant to the instant case. The pet bowls are made predominantly of bamboo fiber powder that become plastic in the molding. Therefore, the pet bowls, made as described above, are properly classified in heading 3924, HTSUS, specifically in subheading 3924.90.56, HTSUS. Accordingly, we propose the revocation of NY N306852.

HOLDING:

By application of GRI’s 1 and 6, the pet bowls described above are classified in subheading 3924.90.56, HTSUS as household articles of plastics. The column one, general rate of duty is 3.4 percent ad valorem.

Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided for at www.usitc.gov.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

cc: NIS Charlene Miller, NCSD

U.S. Court of Appeals for the Federal Circuit

HYUNDAI STEEL COMPANY, SEAH STEEL CORP., NEXTEEL Co., LTD.,
Plaintiffs-Appellees HUSTEEL Co., LTD., Plaintiff v. UNITED STATES,
CALIFORNIA STEEL INDUSTRIES, IPSCO TUBULARS INC., MAVERICK TUBE
CORPORATION, Defendants WELSPUN TUBULAR LLC USA, Defendant-
Appellant

Appeal No. 2021–1748

Appeal from the United States Court of International Trade in Nos. 1:18-cv-00169-CRK, 1:18-cv-00173-CRK, 1:18-cv-00177-CRK, 1:18-cv-00178-CRK, Judge Claire R. Kelly.

Decided: December 10, 2021

HENRY DAVID ALMOND, Arnold & Porter Kaye Scholer LLP, Washington, DC, argued for plaintiff-appellee Hyundai Steel Company, Hyundai Steel Company and NEXTEEL Co., Ltd. also represented by LESLIE BAILEY, KANG WOO LEE, JAE-HONG DAVID PARK, DANIEL WILSON.

JEFFREY M. WINTON, Winton & Chapman PLLC, Washington, DC, argued for plaintiff-appellee SeAH Steel Corp. Also represented by MICHAEL JOHN CHAPMAN, JOOYOUN JEONG, VI MAI.

ELIZABETH DRAKE, Schagrin Associates, Washington, DC, argued for defendant-appellant. Also represented by BENJAMIN JACOB BAY, NICHOLAS J. BIRCH, CHRISTOPHER CLOUTIER, GEERT M. DE PREST, WILLIAM ALFRED FENNELL, LUKE A. MEISNER, KELSEY RULE, ROGER BRIAN SCHAGRIN.

Before O'MALLEY, BRYSON, and HUGHES, *Circuit Judges*.

BRYSON, *Circuit Judge*.

Appellant Welspun Tubular LLC USA appeals from a decision of the Court of International Trade (“the Trade Court”) regarding an administrative review of an antidumping duty order on welded line pipe from the Republic of Korea. In that review, the Department of Commerce found that a “particular market situation” (“PMS”) existed in the Korean market for welded line pipe. Based on that finding, Commerce made an upward adjustment in its calculation of the costs of production of the subject welded line pipe for the two selected respondents, Hyundai Steel Company and SeAH Steel Corporation, which resulted in enhanced antidumping duties.¹

The Trade Court overturned Commerce’s determination on the ground that Commerce was not statutorily authorized to adjust the exporters’ costs of production to account for the existence of a PMS.

¹ In addition to Hyundai and SeAH, Commerce’s review also covered 22 respondents who were not specifically examined.

The court also found that Commerce’s determination that a PMS existed in Korea was unsupported by substantial evidence. We agree with the Trade Court that the 2015 amendments to the antidumping statute do not authorize Commerce to use the existence of a PMS as a basis for adjusting a respondent’s costs of production to determine whether a respondent has made home market sales below cost. In light of our decision on the statutory construction issue, it is unnecessary for us to decide whether Commerce’s finding of a PMS was supported by substantial evidence.

I

A

The administrative review at issue in this case focused on sales of welded line pipe made by Hyundai and SeAH between May 22, 2015, and November 30, 2016. After its investigation, Commerce issued a preliminary determination finding that sales of welded line pipe in the United States had been made below “normal value.” Welded Line Pipe from Korea: Preliminary Results of Antidumping Duty Administrative Review; 2015–2016, 83 Fed. Reg. 1,023 (Jan. 9, 2018). In determining normal value, Commerce found that a PMS existed in Korea during the review period. Based on that finding, Commerce made an upward adjustment to the costs of production for both Hyundai and SeAH. *See id.*; Decision Memorandum for the Preliminary Results of the 2015–2016 Administrative Review of the Antidumping Duty Order on Welded Line Pipe from Korea (Dep’t Commerce Jan. 9, 2018) (“Preliminary Memo”), <https://enforcement.trade.gov/frn/summary/korea-south/2018-00183-1.pdf>. When Commerce issued its final determination on July 18, 2018, it continued to apply that upward adjustment.² *See* Welded Line Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2015–2016, 83 Fed. Reg. 33,919 (Dep’t Commerce July 18, 2018); Issues and Decision Memorandum for the Final Results of the 2015–2016 Administrative Review of the Antidumping Duty Order on Welded Line Pipe, at 23 (Dep’t Commerce July 18, 2018) (“Final Memo”), <https://enforcement.trade.gov/frn/summary/korea-south/2018-15327-1.pdf>. Based in part on that upward adjustment, Commerce found that Hyundai and SeAH were selling welded line pipe for less than fair value in the United States and therefore assessed antidumping duties against them.

² Commerce subsequently amended its final determination to correct for a ministerial error. *See* Welded Line Pipe from the Republic of Korea: Amended Final Results of Antidumping Duty Administrative Review; 2015–2016, 83 Fed. Reg. 39,682 (Aug. 10, 2018). That amendment is not relevant to this appeal.

B

In general, when Commerce determines whether a product is being sold for less than fair value, it must make “a fair comparison . . . between the export price or constructed export price and normal value.” 19 U.S.C. § 1677b(a).³ The normal value of merchandise is ordinarily determined by the price at which comparable goods were sold in the exporter’s home market during the period of review. In determining normal value, Commerce looks first at home market sales of comparable goods; it may also use third-country market sales of comparable goods as the basis for normal value if certain conditions are met. *See id.* § 1677b(a)(1)(C). In either case, Commerce is directed to exclude sales made below the exporter’s cost of production. *Id.* § 1677b(b)(1). That inquiry is referred to as the “sales-below-cost test.” If all market sales in the ordinary course of trade⁴ fail the sales-below-cost test (i.e., those sales are all below the exporter’s cost of production), then Commerce may base normal value on the constructed value of the goods.⁵ *Id.* However, if there are market sales in the ordinary course of trade that pass the sales-below-cost test, Commerce must use those sales in determining normal value unless it makes one of a few specified findings, such as that a PMS “prevents a proper comparison with the export price or constructed export price.” *Id.* § 1677b(a)(1)(B)(ii)(III); *see also id.* § 1677b(a)(1)(C)(iii).⁶

Here, Commerce based Hyundai’s normal value on home market sales and SeAH’s normal value on third-country sales. Preliminary Memo at 15 (discussing Hyundai); J.A. 27 (discussing SeAH). Accordingly, Commerce applied the sales-below-cost test to determine which of those sales should be included in the normal value calculation. *See* Preliminary Memo at 21. With respect to both respondents, Com-

³ The export price and constructed export price generally refer to the price at which the exporter sells the subject merchandise to an unaffiliated purchaser in the United States, subject to various adjustments. *Id.* § 1677a(a)–(b).

⁴ The antidumping statute defines “ordinary course of trade” to mean “the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind.” 19 U.S.C. § 1677(15). It then provides that the following sales and transactions, “among others,” are outside the ordinary course of trade: “[s]ales disregarded under section 1677b(b)(1)”; “[t]ransactions disregarded under section 1677b(f)(2)”; and “[s]ituations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or constructed export price.” *Id.*

⁵ “Constructed value” seeks to approximate the normal value by summing the exporter’s cost of production, any selling or administrative expenses incurred by the exporter, profit realized by the exporter on the sale of the goods, and any expenses associated with packing the merchandise for shipment to the United States. 19 U.S.C. § 1677b(e).

⁶ In the principal opinion below, Judge Kelly reviewed in some detail the complex statutory scheme governing Commerce’s determination whether merchandise is sold at less than fair value. *Husteel Co. v. United States*, 426 F. Supp. 3d 1376, 1383–87 (Ct. Int’l Trade 2020). In light of her discussion, we have provided only a brief summary of that scheme.

merce calculated normal value using the respondents' market sales above the cost of production, as provided in section 1677b(b). To determine the dumping margins that are now before the court, Commerce did not calculate either respondent's normal value using the constructed value provision, section 1677b(e).⁷

Section 1677b(b)(3) sets forth a specific methodology for calculating the cost of production for a particular product for purposes of the sales-below-cost test:

For purposes of this part, the cost of production shall be an amount equal to the sum of—

(A) the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business;

(B) an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question; and

(C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the foreign like product in condition packed ready for shipment.

19 U.S.C. § 1677b(b)(3). Section 1677b(e) contains a similar methodology for calculating the constructed value of a product, although constructed value also includes an amount for profits. *Id.* § 1677b(e).

In 2015, Congress enacted the Trade Preferences Extension Act (“TPEA”), which amended the constructed value calculation statute, section 1677b(e), to include the following proviso:

[I]f a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this part or any other calculation methodology.

Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, § 504, 129 Stat. 362, 385 (2015); *see also* 19 U.S.C. § 1677b(e). Thus, the TPEA enabled Commerce to adjust the calculation methodology for determining constructed value when it finds that a PMS exists.

⁷ In its first final determination, Commerce calculated SeAH's normal value using constructed value. Final Memo at 46. Commerce subsequently altered its calculation of SeAH's normal value to use SeAH's third country sales, and those sales form the basis for the dumping margins at issue in this appeal. J.A. 27.

In its final determination, Commerce found that a particular market situation existed with respect to hot-rolled coil (“HRC”) and electricity, key inputs in the production of welded line pipe. Final Memo at 13–14. Specifically, Commerce identified four factors that collectively impacted the cost of production of welded line pipe: (1) Korean government subsidies of Korean steel producers, including HRC producers; (2) overcapacity in Chinese steel production, which put downward pressure on Korean domestic HRC prices, (3) “strategic alliances” among companies in the Korean steel industry that resulted in favorable HRC prices to some domestic Korean producers; and (4) “government involvement in the Korean electricity market.” *Id.* Commerce was able to quantify only the first factor, the Korean HRC subsidies. Commerce used that factor to adjust Hyundai’s and SeAH’s costs of production when conducting the sales-below-cost test. *Id.* at 23–24.

In support of its adjustment to the respondents’ costs of production for purposes of the sales-below-cost test, Commerce relied on the amendment to section 1677b(e), which allows for an adjustment to constructed value, to justify its use of an adjustment to Hyundai’s and SeAH’s costs of production. Commerce explained:

Section 504 of the TPEA added the concept of “particular market situation” in the definition of the term “ordinary course of trade,” for purposes of [constructed value] under section 773(e) of the Tariff Act of 1930, as amended (the Act), and through these provisions for purposes of the [costs of production] under section 773(b)(3) of the Act.

Id. at 12.

C

Four Korean respondents, including Hyundai and SeAH, filed an action in the Trade Court challenging Commerce’s final determination. Their challenge focused mainly on Commerce’s determination that a PMS existed and Commerce’s consequent adjustment to the respondents’ costs of production. After briefing and argument, the Trade Court held that the antidumping statute did not permit Commerce to use PMS as a basis for making an adjustment to the respondents’ costs of production and remanded the matter to Commerce. *Husteel*, 426 F. Supp. 3d 1376, 1389 (Ct. Int’l Trade 2020).

After explaining in detail the various ways in which the antidumping statute authorizes Commerce to calculate normal value and to conduct a comparison between normal value and export price (or constructed export price), the Trade Court held that, in this case,

“Commerce chose a path not permitted by the statutory scheme.” *Id.* at 1387. In particular, the court explained, “Commerce misappropriated the language of 19 U.S.C. § 1677b(e), which provides that when using constructed value, Commerce may use any reasonable calculation method if it finds a PMS affected the [cost of production].” *Id.*

The Trade Court focused on Commerce’s statement that the TPEA had added the concept of “particular market situation” in the definition of “ordinary course of trade” for purposes of constructed value under section 1677b(e), and “through these provisions” for purposes of the cost of production and the sales-below-cost test under section 1677(b). The court rejected Commerce’s position and concluded that “there is nothing in the statutory scheme which can be read to grant Commerce the authority to modify the [sales-below-cost] test to account for a PMS.” *Id.* The court therefore remanded the matter to Commerce for further proceedings consistent with the court’s ruling.

On remand, Commerce acquiesced in the court’s ruling on the PMS issue under protest. A second proceeding before the Trade Court and a second remand followed, addressing issues not relevant to this appeal. *Husteel Co. v. United States*, 463 F. Supp. 3d 1334 (Ct. Int’l Trade 2020). Following that remand, the Trade Court entered judgment on Commerce’s determination of antidumping duties, as revised in accordance with the court’s remand orders. *Husteel Co. v. United States*, 494 F. Supp. 3d 1287 (Ct. Int’l Trade 2021).⁸

II

In this appeal, Welspun argues that Commerce reasonably interpreted the antidumping statute and was therefore justified in adjusting Hyundai’s and SeAH’s costs of production to account for a PMS.

A

We have held that when Commerce interprets statutes in the course of antidumping proceedings, those interpretations are entitled to deference under the *Chevron* doctrine. *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001) (“[S]tatutory interpretations articulated by Commerce during its antidumping

⁸ Like Judge Kelly in this case, the other judges of the Trade Court who have addressed the PMS issue have all held that, for purposes of the sales-below-cost test, Commerce is not authorized to make adjustments to a respondent’s costs of production to account for a PMS. See, e.g., *Saha Thai Steel Pipe Pub. Co. v. United States*, 422 F. Supp. 3d 1363, 1369–70 (Ct. Int’l Trade 2019) (Choe-Groves, J.); *Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States*, 426 F. Supp. 3d 1395, 1411–12 (Ct. Int’l Trade 2020) (Restani, J.); *Dong-A Steel Co. v. United States*, 475 F. Supp. 3d 1317, 1337–41 (Ct. Int’l Trade 2020) (Katzmann, J.).

proceedings are entitled to judicial deference under *Chevron.*”); see generally *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

When evaluating an agency’s interpretation of a statute under *Chevron*, we must first determine “whether Congress has directly spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842. If the statute is unambiguous, courts “must give effect to the unambiguously expressed intent of Congress.” *Id.* at 843. However, “[i]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.*

Step one of the *Chevron* analysis requires us to determine whether Congress has expressed an unambiguous intent “using the traditional tools of statutory construction.” *Atilano v. McDonough*, 12 F.4th 1375, 1380 (Fed. Cir. 2021); *Timex, V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998); see *Chevron*, 467 U.S. at 843 n.9. Commerce has interpreted the 2015 amendment to section 1677b(e) to permit an adjustment to a respondent’s costs of production. In view of the text and structure of the antidumping statute, as amended by the TPEA, we disagree with Commerce’s interpretation of the statute, and for the reasons set forth below, we hold that Commerce’s interpretation fails at *Chevron* step one.

B

The structure of section 1677b, as amended by the TPEA, clearly indicates that Congress intended to limit PMS adjustments to calculations pursuant to the “constructed value” subsection, 19 U.S.C. § 1677b(e), and not to authorize Commerce to make such adjustments pursuant to the “cost of production” subsection, *id.* § 1677b(b).

To begin with, the provisions governing the calculation of “cost of production” and “constructed value” contain similar language but are delineated separately. See 19 U.S.C. § 1677b(b)(3) (cost of production); *id.* § 1677b(e) (constructed value). Yet the TPEA amendment that allowed the use of a different calculation methodology if a PMS exists “such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade,” TPEA § 504(c), was made to the constructed value subsection, not to the cost of production subsection. If Congress had intended to allow a PMS adjustment to be made when calculating the cost of production for purposes of applying the sales-below-cost test, it presumably would have amended the cost of production subsection as well as the constructed value subsection. But it did not.

The Supreme Court has observed that, where “Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted); see also *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020); *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1350–51 (Fed. Cir. 2015); *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 13 F.3d 398, 401–02 (Fed. Cir. 1994). Because Congress amended section 1677b(e) to allow for a PMS adjustment, but did not amend section 1677b(b), it is reasonable to infer that Congress intended for the PMS adjustment to be available for calculations of constructed value, but not for calculations of the cost of production.⁹

That inference is reinforced by the limiting language of Congress’s amendment to section 1677b(e). The proviso that allows for an adjustment to constructed value to account for a PMS is explicitly limited to being used “[f]or purposes of paragraph (1)” of section 1677b(e). 19 U.S.C. § 1677b(e). Section 1677b(e)(1) instructs Commerce to include in its calculation of constructed value “the cost of materials and fabrication or other processing of any kind employed in producing the merchandise.” Thus, the proviso allowing for a PMS adjustment to constructed value is explicitly limited to one portion of the constructed value calculation. The limiting phrase “[f]or purposes of paragraph (1)” strongly suggests that Congress intended for the adjustment to be limited not only to section 1677b(e), but also specifically to a single paragraph within that section.

Other amendments made to section 1677b by the TPEA provide further support for the Trade Court’s construction of the antidumping statute. The TPEA amended the definition of “ordinary course of trade” to include “[s]ituations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or constructed export price.” 19 U.S.C. § 1677(15). At the same time, the TPEA changed the language of the last clause of section 1677b(e)(1), which describes the cost-of-materials component of the constructed value calculation. Before the TPEA, that clause referred to the cost of materials that would ordi-

⁹ Welspun objects to this line of reasoning as an improper application of the canon of statutory construction referred to as *expressio unius est exclusio alterius*. Welspun notes that courts have been hesitant to rely on that canon in the administrative law context. See, e.g., *Cheney R. Co. v. Interstate Com. Comm’n*, 902 F.2d 66, 68–69 (D.C. Cir. 1990). Our analysis, however, does not rest solely, or even primarily, on the *expressio unius* canon. To the extent that canon is applicable, it merely reinforces the natural conclusions that can be drawn from the text and structure of the antidumping statute and the TPEA amendments.

narily permit the production of the merchandise “in the ordinary course of business.” The TPEA amended that clause to refer to the cost of materials that would ordinarily permit the production of the merchandise “in the ordinary course of trade.”

That change provided a clear link between section 1677b(e) and section 1677(15). Yet the TPEA made no such change to the last clause of section 1677b(b)(3), the parallel provision of the cost of production subsection. That clause continues to refer to the cost of materials that would ordinarily permit the production of the merchandise “in the ordinary course of business.” Thus, while the TPEA amendment to section 1677(15) linked the constructed value subsection with “situations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or the constructed export price,” *id.* § 1677(15), the amendment established no such link with the cost of production subsection.

Welspun argues that the antidumping statute must be regarded as ambiguous with regard to the issue before the court because it is silent as to whether, for purposes of the sales-below-cost test, Commerce may adjust costs of production to account for a PMS. We disagree. It is true that the antidumping statute does not explicitly prohibit adjusting the costs of production because of a PMS. But Congress’s failure to expressly forbid the use of cost-of-production adjustments based on a PMS does not authorize Commerce to make such adjustments. To the contrary, “the absence of a statutory prohibition cannot be the source of agency authority.” *FAG Italia S.P.A. v. United States*, 291 F.3d 806, 816 (Fed. Cir. 2002); *see also Ry. Lab. Executives’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 659 (D.C. Cir.) (en banc) (refusing to “presume a delegation of power from Congress absent an express withholding of such power” (emphasis omitted)), *amended*, 38 F.3d 1224 (D.C. Cir. 1994).

For a statute to be considered silent under *Chevron* step one, there must be a “gap left, implicitly or explicitly, by Congress” that Commerce is entitled to fill. *Chevron*, 467 U.S. at 815; *see also Carciari v. Salazar*, 555 U.S. 379, 391 (2009) (refusing to give *Chevron* deference to an agency interpretation of a statute where Congress “left no gap in [the statute] for the agency to fill”). In enacting the TPEA, Congress did not leave a gap for Commerce to fill with regard to adjusting the costs of production. Rather, Congress simply and unambiguously allowed for a PMS adjustment to constructed value but not to the costs of production for purposes of the sales-below-cost test. Because Congress left no statutory gap for Commerce to fill, Commerce may not apply a PMS adjustment to the calculation of costs of production

under the sales-below-cost test, but “must give effect to the unambiguously expressed intent of Congress” not to allow such an adjustment. *See Chevron*, 467 U.S. at 843.

Welspun also argues that the legislative history of the TPEA indicates that the statute is at least ambiguous. For support, Welspun cites three statements from the legislative history: First, the Senate Report on the TPEA noted that the amendments to section 1677b were designed to give Commerce “flexibility in calculating a duty that is not based on distorted pricing or costs.” S. Rep. No. 114–45 at 37 (2015). Second, during the House debate on the TPEA, Representative Patrick Meehan noted that the bill “gives Commerce the kind of discretion to be able to look at the facts and to take recalcitrant countries and hold them accountable by creating what is accurate.” 161 Cong. Rec. H4655, H4690 (daily ed. June 25, 2015). Third, Senator Sherrod Brown noted that his proposed Level the Playing Field Act, which served as the basis for some of the TPEA’s provisions, was designed in part to address distorted production costs in the Korean pipe industry. *See* 161 Cong. Rec. S2897, S2900 (daily ed. May 14, 2015).

Those statements are all very general in scope, and none specifically addresses adjusting either constructed value or the costs of production to account for a PMS. As a result, we are unpersuaded that the legislative history indicates any intent on the part of Congress to leave a gap regarding the use of a PMS adjustment in the calculation of an exporter’s costs of production for purposes of the sales-below-cost test.

Finally, Welspun argues that limiting the use of a PMS adjustment to calculations of constructed value would lead to “absurd” results. Specifically, Welspun argues that, “[i]f Commerce were not to make a PMS adjustment, certain sales that would have otherwise been disregarded under the sales-below-cost test would remain in the normal value based on the unadjusted effect of PMS-distorted transactions or costs.” Appellant’s Reply Br. 21. The problem, Welspun argues, is that “[t]he inclusion of such sales in normal value would contravene the general mandate that normal value must be calculated so as to permit a fair or proper comparison with the export price or constructed export price.” *Id.* We disagree that the statute necessarily leads to that result.

When Commerce determines normal value, it may depart from using home-market sales if it finds that a “particular market situation in the exporting country does not permit a proper comparison with the export price or constructed export price.” 19 U.S.C. §

1677b(a)(1)(C)(iii); *see also id.* § 1677b(a)(1)(B)(ii)(III) (providing a similar mechanism for excluding third-country sales). Although Commerce must make a slightly different finding from that described in section 1677b(e) to trigger those provisions,¹⁰ it is not the case that under the Trade Court’s construction of the statute Commerce is powerless to address home-market sales that are affected by a PMS yet still pass the sales-below-cost test. To the contrary, section 1677b(a)(1) specifically gives Commerce the tools to ensure “a proper comparison with the export price.”¹¹ 19 U.S.C. § 1677b(a)(1)(C)(iii). In short, neither the text of the TPEA amendments nor the legislative history of the statute supports Welspun’s proposed construction of the statute, and the construction adopted by the Trade Court does not have the perverse consequences that Welspun claims.

III

Apart from its reliance on the 2015 TPEA amendments to support Commerce’s interpretation of section 1677b(e), Welspun points to subsection (f)(1)(A) of section 1677b as a separate basis to support the application of a PMS adjustment to the respondents’ costs of production. In Welspun’s view, that provision is “the key mechanism by which any departure from a respondent’s normal records and any adjustment[s] to [cost of production] are made.” Appellant’s Reply Br. 22–23.

Section 1677b(f)(1)(A) states that costs “shall normally be calculated based on the records of the exporter . . . if such records are kept in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the merchandise.” 19 U.S.C. § 1677b(f)(1)(A). That language authorizes Commerce to make adjustments to reported costs when accounting practices or other circumstances do not accurately reflect the actual costs incurred by the exporter. Welspun

¹⁰ The PMS provisions in section 1677b(a)(1) require a finding that a PMS exists such that there cannot be “a proper comparison with the export price or constructed export price.” 19 U.S.C. § 1677b(a)(1)(C)(iii). By contrast, under section 1677b(e), Commerce may adjust constructed value when a PMS exists “such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade.” *Id.* § 1677b(e). These are different standards, so in order to trigger the provisions in 1677b(a)(1), Commerce would need to find that the PMS prevents a proper comparison to the export price, not just that the exporter’s actual costs do not accurately reflect the costs of production.

¹¹ The Trade Court added that its construction of the TPEA amendments is not illogical. The court explained that “[a] PMS that affects costs of production would presumably affect prices for domestic sales and export sales so there would be no reason to adjust only the home market prices.” *Husteel*, 426 F. Supp. 3d at 1388. By contrast, “[i]f the PMS was of a kind that only affected domestic sales, then it would be one which prevented ‘a proper comparison with the export price or constructed export price’ and Commerce would move to either third country sales or constructed value.” *Id.* at 1388–89.

suggests that section 1677b(f)(1)(A) extends Commerce's authority to adjust an exporter's costs to cases in which a reported cost accurately reflects what the exporter has paid, but in which the cost was suppressed by a PMS or other factor.

Commerce did not rely on section 1677b(f)(1)(A) in its final determination; it instead relied solely on the TPEA amendments for its authority to adjust the respondents' costs of production due to a PMS when conducting the sales-below-cost test. Nor did Welspun (or any other defendant before the Trade Court) rely on that section in support of Commerce's adjustments in its final determination. And the Trade Court did not address the section 1677b(f)(1)(A) argument that Welspun has now raised. Welspun has therefore not preserved that argument for appellate review. See *Corus Staal BV v. United States*, 502 F.3d 1370, 1378 n.4 (Fed. Cir. 2007); *Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002). Moreover, under well-settled principles of administrative law, Commerce's failure to base its ruling in whole or in part on section 1677b(f)(1)(A) means that section 1677b(f) is not available as an alternative ground for upholding Commerce's final determination. See *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1379 (Fed. Cir. 2012); *Thai I-Mei Frozen Foods Co. v. United States*, 616 F.3d 1300, 1307 (Fed. Cir. 2010) (“[W]e review only the bases on which Commerce made its determination.”). We therefore do not address Welspun's section 1677b(f)(1)(A) argument in this case.

IV

Welspun also appeals the Trade Court's holding that Commerce's finding that a PMS existed was unsupported by substantial evidence. Because it was impermissible for Commerce to adjust Hyundai's and SeAH's costs of production to account for a PMS, we need not reach the question whether Commerce's PMS finding was supported by substantial evidence. Accordingly, we uphold the judgment of the Trade Court with respect to both Hyundai and SeAH.

AFFIRMED

U.S. Court of International Trade

Slip Op. 21–167

DONGKUK S&C Co., LTD., Plaintiff, v. UNITED STATES, Defendant, and
WIND TOWER TRADE COALITION, Defendant-Intervenor.

Before: Leo M. Gordon, Judge
Court No. 20–03686

[*Final Determination* remanded in part.]

Dated: December 13, 2021

Robert G. Gosselink and *Jarrod M. Goldfeder*, Trade Pacific PLLC, of Washington, D.C., argued for Plaintiff Dongkuk S&C Co., Ltd. With them on the brief was *MacKensie R. Sugama*.

Ashley Akers, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, Washington, D.C., argued for Defendant United States. Of counsel on the argument was *Kirrin Hough*, Attorney, Office of the Assistant Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C. With Ms. Akers on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Jesus N. Saenz*, Attorney, Office of the Assistant Chief Counsel for Trade Enforcement and Compliance.

Derick G. Holt, Wiley Rein LLP, of Washington, D.C., argued for Defendant-Intervenor Wind Tower Trade Coalition. On the brief were *Alan H. Price*, *Daniel B. Pickard*, *Robert E. DeFrancesco*, *Laura El-Sabaawi*, and *Stephanie M. Bell*.

OPINION and ORDER

Gordon, Judge:

This action involves the U.S. Department of Commerce’s (“Commerce”) final affirmative determination in the antidumping duty investigation of utility scale wind towers (“subject merchandise”) from the Republic of Korea. *See Utility Scale Wind Towers from the Republic of Korea*, 85 Fed. Reg. 40,243 (Dep’t of Commerce July 6, 2020) (“*Final Determination*”), and the accompanying Issues and Decision Memorandum, A-580–902 (Dep’t of Commerce June 29, 2020), <https://enforcement.trade.gov/frn/summary/korea-south/2020–14438–1.pdf> (last visited this date) (“*Decision Memorandum*”).

Before the court is the USCIT Rule 56.2 motion for judgment on the agency record filed by Plaintiff Dongkuk S&C Co., Ltd. (“DKSC”). *See* Mem. In Supp. of Mot. for J. upon the Agency R. of Pl. Dongkuk S&C

Co. Ltd., ECF No. 22¹ (“Pl.’s Br.”); *see also* Def.’s Resp. to Pl.’s Rule 56.2 Mot. for J. upon the Agency R., ECF No. 27 (“Def.’s Resp.”); Def.-Intervenor Wind Tower Trade Coal.’s Resp. Br., ECF No. 31 (“Def.-Intervenor’s Resp.”); Pl. Dongkuk S&C Co. Ltd.’s Reply to Def.’s and Def.-Intervenor’s Resps. to DKSC’s Mot. for J. upon the Agency R., ECF No. 35. The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2018),² and 28 U.S.C. § 1581(c) (2018). For the reasons set forth below, the court remands in part and sustains in part the *Final Determination*.

I. Standard of Review

The court sustains Commerce’s “determinations, findings, or conclusions” unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”). Substantial evidence has been described as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as “something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966). Fundamentally, though, “substantial evidence” is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr. & Richard Murphy, *Administrative Law and Practice* § 9.24[1] (3d ed. 2021). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action “was reasonable given the circumstances presented by the whole record.” 8A *West’s Fed. Forms*, National Courts § 3.6 (5th ed. 2021).

¹ All citations to the parties’ briefs and the agency record are to their confidential versions unless otherwise noted.

² 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.

II. Discussion

A. Steel Plate Cost Adjustment

Utility scale wind towers are produced for use in utility scale wind turbine electrical power generating systems. Pl.’s Br. at 3. Wind towers are large structures designed to support the nacelle and rotor blades of a wind turbine, and can vary in height and weight, among other physical characteristics. *Id.* They typically consist of three to five cylindrical or conical sections, with each section consisting of multiple steel plates—the main material input—that are rolled and welded together to form a steel shell. *Id.* The wind tower sections are usually produced and then shipped to a project site for assembly into a completed wind tower. *Id.*

At the beginning of the underlying investigation, Commerce identified 11 physical characteristics³ that are most significant in differentiating the costs between products. *Decision Memorandum* at 21 (citing “Product Characteristics for the Antidumping Duty Investigation of Utility Scale Wind Towers from the Republic of Korea,” at Att. I, PD⁴ 94 (Dep’t of Commerce Sept. 17, 2019)). These physical char-

³ Those characteristics are:

Physical Characteristic	Description
1. Type	Whether the product is a complete tower or section
2. Weight	Weight of tower/section
3. Height	Height of tower/section
4. Tower Sections	Number of tower sections for the particular sale
5. Type of Paint	The top paint coat for the tower/section
6. Metalizing	The degree of metalizing of the tower/section
7. Elec. Conduit-Bus Bars	Whether the tower/section contains bus bars
8. Elec. Conduit-Power	Whether the tower/section contains power cables
9. Lift	Whether an elevator is attached to the tower/section
10. Platform	The number of platforms in the tower/section
11. Internal Components	Whether there were other internal components

Pl.’s Br. at 13 (citing “Product Characteristics for the Antidumping Duty Investigation of Utility Scale Wind Towers from the Republic of Korea,” at Att. I, PD 94 (Dep’t of Commerce Sept. 17, 2019)).

⁴ “PD ___” refers to a document contained in the public administrative record, which is found in ECF No. 15–3 unless otherwise noted. “CD ___” refers to a document contained in the confidential administrative record, which is found in ECF No. 15–2 unless otherwise noted.

acteristics define the unique products, *i.e.*, CONNUMs,⁵ for sales comparison purposes and the level of detail within each physical characteristic (*e.g.*, thickness, width, or height, etc.) that reflect the importance that Commerce places on comparing the most similar products in price-to-price comparisons. *Id.* A wind tower’s height and weight were two of the most significant physical characteristics. *See id.* However, neither the dimensions, nor the grade, nor any other characteristic of the steel plate used to create the subject merchandise were listed as one of the physical characteristics of the wind towers. *Id.*

In certain circumstances in an antidumping duty investigation, Commerce is to determine whether sales of the foreign like product were made at less than the cost of production of that product. Commerce is to normally calculate costs “based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country ... and reasonably reflect the costs associated with the production and sale of the merchandise.” 19 U.S.C. § 1677b(f)(1)(A). A respondent’s reported costs “reasonably reflect the costs associated with the production and sale of the merchandise” if they reflect meaningful cost differences attributable to the finished product’s different physical characteristics. *See Thai Plastic Bags Indus. Co. v. United States*, 746 F.3d 1358, 1368 (Fed. Cir. 2014) (explaining that “physical differences in products ‘generally account’ for major differences in costs” and “[r]eliance on physical characteristics, because of its ability to promote consistency, is a predictable methodology that is administrable across all investigations and administrative reviews”).

In reporting the costs incurred in producing the subject wind towers, DKSC included the specific steel plate input costs for each individual wind tower project during the period of investigation (“POI”). Pl.’s Br. at 5. Commerce found, however, that DKSC’s reported steel plate costs “were significantly different between [CONNUMs] sold in the Japanese comparison market⁶ and those sold in the U.S. market.”

⁵ A “CONNUM” is a contraction of the term “control number,” and is Commerce jargon for a unique product (defined in terms of a hierarchy of specified physical characteristics determined in each antidumping proceeding). All products whose product hierarchy characteristics are identical are deemed to be part of the same CONNUM and are regarded as “identical” merchandise for purposes of price comparison. The hierarchy of product characteristics defining a unique CONNUM varies from case to case depending on the nature of the subject merchandise.

⁶ Upon determining that DKSC’s “sales in the home market [were] under the five percent viability threshold,” Commerce instructed DKSC to report its sales to Japan as the basis for normal value. *Decision Memorandum* at 9; *see also* 19 U.S.C. §§ 1677b(a)(1)(B)(ii), 1677b(a)(1)(C) (normal value may be based on third country sales if “[Commerce] determines that the aggregate quantity (or, if quantity is not appropriate, value) of [home market

Decision Memorandum at 19. To determine the reason for the cost differences in steel plate in the various wind tower projects, Commerce purportedly analyzed the reported costs “[u]sing the physical characteristics as [its] guidepost” and by “grouping CONNUMs by the related height and weight physical characteristics, and the steel plate cost difference between steel grades and dimensions (*i.e.*, thickness, width, or height) within the same time period.” *Id.* at 22. As a result, Commerce found that “the overwhelming factor that caused the differences in the steel plate costs was the timing of the steel plate purchases, rather than the physical characteristics of the [wind towers].” *Id.*; *see also* 19 U.S.C. § 1677b(f)(1)(A). In accordance with its normal practice, Commerce then decided to adjust (“smooth”) “costs to address distortions when such cost differences are attributable to factors beyond the physical characteristics.” *Decision Memorandum* at 21. Here, because of the impact of the timing of the steel plate purchases, Commerce adjusted costs by weight-averaging “the reported steel plate costs for all reported CONNUMs.” *Id.*

DKSC challenges Commerce’s determination that DKSC’s normal books and records did not reflect the cost to produce the subject merchandise based on the physical characteristics, and Commerce’s subsequent decision to adjust those costs by weight-averaging. In particular, DKSC argues that the record fails to demonstrate that Commerce “analyzed the steel plate costs by grouping CONNUMs by the related height and weight physical characteristics.” Pl.’s Br. at 14. DKSC also maintains that “Commerce does not appear to have ever compared DKSC’s CONNUM costs using any of the eleven enumerated physical characteristics as its guidepost, as it stated it did.” *Id.* Lastly, DKSC contends that because Commerce did not identify steel plate as one of the CONNUM physical characteristics “[a]ny analysis by Commerce of DKSC’s steel plate material input prices ... was not relevant to a determination of whether the costs ... reasonably reflected differences in the physical characteristics of the completed wind towers.” *Id.* at 13–14.

To the contrary, Defendant argues that Commerce’s analysis (or at least a summary thereof) is contained in the record in the Final Cost Calculation Memorandum. *See* Def.’s Resp. at 10, 14; *see also* Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Dongkuk S&C Co., Ltd. at 1–2, PD 327, CD 230 (Dep’t of Commerce June 29, 2020) (“Final Cost Calculation Memorandum”). Defendant maintains that Commerce’s analysis sales] is insufficient to permit a proper comparison with the sales of the subject merchandise to the United States;” and aggregate quantity (or value) is normally insufficient if “such quantity (or value) is less than [five] percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States”).

identified purchases of steel plate that were incorporated into two CONNUMs with different reported ranges for both the height and weight characteristics. Def.'s Resp. at 10. Defendant also contends that Commerce explained the relevance of its steel plate analysis in regard to its determination that steel plate cost fluctuations were unrelated to the physical characteristics of the subject merchandise. *Id.* (citing Final Cost Calculation Memorandum at 1–2).

The court disagrees. The only analysis in the Final Cost Calculation Memorandum focused on a cost comparison of “Japanese and U.S. steel plate purchases made in the same month” and found that “the per-unit steel plate prices did not significantly vary due to the thickness, weight, or height, *i.e.*, the physical characteristics of the steel plate.” Final Cost Calculation Memorandum at 1–2. There is nothing in that Memorandum that supports a conclusion that Commerce did in fact group CONNUMs by any of the 11 physical characteristics or otherwise use those characteristics as a “guidepost.” *Cf. Decision Memorandum* at 22. As DKSC points out, Commerce’s analysis may not constitute a reasonable application of 19 U.S.C. § 1677b(f)(1)(A). *See* Pl.’s Br. at 12.

Lastly, Defendant argues that the analysis nonetheless supports Commerce’s determination because “Commerce applies its practice of adjusting unreasonable cost reporting both to finished products CONNUMs *and* to individual inputs for such products.” Def.’s Resp. at 11 (emphasis in original) (citing *Pipe & Tube from Turkey*, 82 Fed. Reg. 49,179, and *Pasta from Italy*, 83 Fed. Reg. 63,627). The court must reject this argument as it is a *post hoc* rationalization by agency counsel and does not reflect Commerce’s rationale as set forth in the *Decision Memorandum*. *See Motor Vehicle Mfrs. Ass’n v. State Farm Ins.*, 463 U.S. 29, 50 (1983) (“courts may not accept appellate counsel’s *post hoc* rationalization for agency action” (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))). Commerce made no reference to its “practice” of adjusting costs based solely on an analysis of individual inputs, nor did Commerce rely on *Pasta from Italy* in reaching its determination on this issue. *See Decision Memorandum* at 21–22 (making no reference to *Pasta from Italy*, and citing only, without any discussion, *Pipe & Tube from Turkey*).

Here, the record fails to demonstrate how Commerce’s analysis could lead a reasonable mind to conclude that DKSC’s reported costs did not reflect the cost to produce and sell the subject merchandise. Accordingly, this issue is remanded to Commerce for further consideration.⁷

⁷ DKSC argues in the alternative that, even if Commerce’s steel plate analysis were relevant, the analysis does not support Commerce’s finding that “the significant cost

B. CV Profit and Selling Expenses

Plaintiff also challenges Commerce’s selection of surrogate data for the calculation of constructed value. *See* Pl.’s Br. at 19–25. Plaintiff noted at oral argument that it is undisputed that “Commerce compared US prices to CV after finding that all reported Japanese market sales failed the sales below cost test;” and “that occurred only because of Commerce’s unsupportable cost smoothing methodology” *See* Oral Argument at 25:20–25:50, ECF No. 44 (Dec. 1, 2021). Given that the court is remanding Commerce’s steel plate cost smoothing determination, *see* Section A *supra*, and that Commerce’s reconsideration of that issue may impact Commerce’s calculation of constructed value, the court will hold in abeyance consideration of Plaintiff’s challenge to Commerce’s selection of surrogate data used to calculate constructed value pending the filing of remand results.

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that Commerce’s determination as to an adjustment for steel plate costs is remanded to Commerce for further explanation, and if appropriate, reconsideration of its cost analysis under 19 U.S.C. § 1677b(f)(1)(A); it is further

ORDERED that Commerce shall file its remand results on or before March 15, 2022; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Commerce files its remand results with the court.

Dated: December 13, 2021

New York, New York

/s/ Leo M. Gordon

JUDGE LEO M. GORDON

fluctuations found in the steel plate consumption costs for different CONNUMs was not due to differences in physical characteristics, but rather due to timing of the steel plate purchases.” Pl.’s Br. at 16 (citing Final Cost Calculation Memorandum at 1). Because the issue is remanded to Commerce and the agency may address this argument on remand, the court does not need to reach this argument.

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