

U.S. Customs and Border Protection



QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS ON CUSTOMS DUTIES

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

ACTION: General notice.

SUMMARY: This notice advises the public that the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties will remain the same from the previous quarter. For the calendar quarter beginning January 1, 2022, the interest rates for overpayments will be 2 percent for corporations and 3 percent for non-corporations, and the interest rate for underpayments will be 3 percent for both corporations and non-corporations. This notice is published for the convenience of the importing public and U.S. Customs and Border Protection personnel.

DATES: The rates announced in this notice are applicable as of January 1, 2022.

FOR FURTHER INFORMATION CONTACT: Bruce Ingalls, Revenue Division, Collection Refunds & Analysis Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 298-1107.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85-93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 provides different interest rates applicable to overpayments: One for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the

Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2021–24, the IRS determined the rates of interest for the calendar quarter beginning January 1, 2022, and ending on March 31, 2022. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (0%) plus three percentage points (3%) for a total of three percent (3%) for both corporations and non-corporations. For corporate overpayments, the rate is the Federal short-term rate (0%) plus two percentage points (2%) for a total of two percent (2%). For overpayments made by non-corporations, the rate is the Federal short-term rate (0%) plus three percentage points (3%) for a total of three percent (3%). These interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties remain the same from the previous quarter. These interest rates are subject to change for the calendar quarter beginning April 1, 2022, and ending on June 30, 2022.

For the convenience of the importing public and U.S. Customs and Border Protection personnel, the following list of IRS interest rates used, covering the period from July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Underpayments (percent)	Overpayments (percent)	Corporate overpayments (Eff. 1–1–99) (percent)
070174.....	063075	6	6	.....
070175.....	013176	9	9	.....
020176.....	013178	7	7	.....
020178.....	013180	6	6	.....
020180.....	013182	12	12	.....
020182.....	123182	20	20	.....
010183.....	063083	16	16	.....
070183.....	123184	11	11	.....
010185.....	063085	13	13	.....
070185.....	123185	11	11	.....
010186.....	063086	10	10	.....
070186.....	123186	9	9	.....
010187.....	093087	9	8	.....
100187.....	123187	10	9	.....
010188.....	033188	11	10	.....

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (Eff. 1-1-99) (percent)
040188.....	093088	10	9	.....
100188.....	033189	11	10	.....
040189.....	093089	12	11	.....
100189.....	033191	11	10	.....
040191.....	123191	10	9	.....
010192.....	033192	9	8	.....
040192.....	093092	8	7	.....
100192.....	063094	7	6	.....
070194.....	093094	8	7	.....
100194.....	033195	9	8	.....
040195.....	063095	10	9	.....
070195.....	033196	9	8	.....
040196.....	063096	8	7	.....
070196.....	033198	9	8	.....
040198.....	123198	8	7	.....
010199.....	033199	7	7	6
040199.....	033100	8	8	7
040100.....	033101	9	9	8
040101.....	063001	8	8	7
070101.....	123101	7	7	6
010102.....	123102	6	6	5
010103.....	093003	5	5	4
100103.....	033104	4	4	3
040104.....	063004	5	5	4
070104.....	093004	4	4	3
100104.....	033105	5	5	4
040105.....	093005	6	6	5
100105.....	063006	7	7	6
070106.....	123107	8	8	7
010108.....	033108	7	7	6
040108.....	063008	6	6	5
070108.....	093008	5	5	4
100108.....	123108	6	6	5
010109.....	033109	5	5	4
040109.....	123110.....	4	4	3
010111.....	033111.....	3	3	2
040111.....	093011.....	4	4	3
100111.....	033116.....	3	3	2
040116.....	033118.....	4	4	3

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (Eff. 1-1-99) (percent)
040118.....	123118.....	5	5	4
010119.....	063019.....	6	6	5
070119.....	063020.....	5	5	4
070120.....	033122.....	3	3	2

Dated: December 27, 2021.

CRINLEY S. HOOVER,
Acting Chief Financial Officer,
U.S. Customs and Border Protection.

[Published in the Federal Register, January 4, 2022 (85 FR 00233)]

**PROPOSED REVOCATION OF ONE RULING LETTERS AND
PROPOSED REVOCATION OF TREATMENT RELATING TO
THE TARIFF CLASSIFICATION OF A SOLAR MODULE
FROM AN UNDISCLOSED COUNTRY OF ORIGIN**

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 a solar module from an undisclosed country of origin.

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 tariff classification of a solar module 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 February 18, 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: Dwayne Rawlings, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–0092.

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 solar modules. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) NY N255298, dated July 31, 2014 (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 subsequent to the effective date of the final decision on this notice.

In NY N255298, CBP classified a solar module in heading 8501, HTSUS, specifically in subheading 8501.31.80, HTSUS, which provides for "Electric motors and generators (excluding generating sets): Other DC motors; DC generators: Of an output not exceeding 750 W: Generators." CBP has reviewed NY N255298 and has determined the ruling letter to be in error. It is now CBP's position that the solar module is properly classified, in heading 8541, HTSUS, specifically in subheading 8541.40.60, HTSUS, which provides for "Diodes, transistors and similar semiconductor devices; photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels; light-emitting diodes (LED); mounted piezoelectric crystals; parts thereof: Photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels; light-emitting diodes (LED): Other diodes."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N255298 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H258440, 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:

GREGORY CONNOR
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N255298

July 31, 2014

CLA-2-85:OT:RR:NC:N1:112

CATEGORY: Classification

TARIFF NO.: 8501.31.8000

JANET TAKUSHI
SENIOR CONSULTANT
LIVINGSTON INTERNATIONAL, INC.
670 YOUNG STREET
TONAWANDA, NY 14150

RE: The tariff classification of solar module from an undisclosed country of origin

DEAR Ms. TAKUSHI:

In your letter dated July 14, 2014, you requested a tariff classification ruling on behalf of your client, Solarmass Energy Group, Ltd.

The merchandise in question is described as a Solar Surface, which is the solar generating component of the Ergosun™ Solar Roof Tile. This device consists of an ultra-thin solar cell membrane attached to a connector board and insulating poly-vinyl fluoride (Tedlar®) backing. The attached connector board contains a diode that prevents back feed and overheating, and male and female connector plugs which are used to connect multiple solar panels together to generate DC electricity. Solarmass Energy Group will import the assembled solar cells which will be applied to roof tiles in the United States and sold to consumers and businesses.

You suggested subheading 8541.40.6020, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels; light-emitting diodes: Other diodes: Other: Solar cells: Assembled into modules or made up into panels. However, the diode that is mounted only to the female socket to prevent back feed is a blocking diode. Explanatory Note (EN) 85.41 (B) (i) states that heading 8541 does not cover panels or modules equipped with elements, however simple, i.e. diodes to control the direction of the current. As such, since the Solar Surface solar module does contain diodes, classification under subheading HTSUS 8541.40.6020 is inapplicable.

The applicable subheading for the Solar Surface will be 8501.31.8000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Electric motors and generators (excluding generating sets): other DC motors; DC generators: of an output not exceeding 750 W: generators..." The general rate of duty is 2.5% ad valorem.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Karl Moosbrugger at karl.moosbrugger@cbp.dhs.gov.

Sincerely,
GWENN KLEIN KIRSCHNER
Director
National Commodity Specialist Division

ATTACHMENT B

HQ H258440
OT:RR:CTF:EMAIN H258440 DSR
CATEGORY: Classification
TARIFF NO.: 8451.40.60

JANET TAKUSHI
SENIOR CONSULTANT
LIVINGSTON INTERNATIONAL PROFESSIONAL SERVICES
670 YOUNG STREET
TONAWANDA, NY 14150

RE: Revocation of NY N255298 (July 31, 2014); Tariff classification of a solar module from an undisclosed country of origin

DEAR Ms. TAKUSHI:

This letter is in response to a request for reconsideration submitted by you on behalf of your client, Solarmass Energy Group, Ltd., concerning New York Ruling Letter (NY) N255298, dated July 31, 2014. That ruling concerned the classification of a solar module under the 2014 Harmonized Tariff Schedule of the United States (HTSUS). The ruling classified the article under subheading 8501.31.80, HTSUS, which provides for “Electric motors and generators (excluding generating sets): Other DC motors; DC generators: Of an output not exceeding 750 W: Generators.” We have reviewed the tariff classification of the article taking into consideration the additional information you provided in your reconsideration request and have determined that the cited ruling is in error. Therefore, NY N255298 is revoked for the reasons set forth in this ruling.

FACTS:

In NY N255298, the device is described, in relevant part, as follows:

The merchandise in question is described as a Solar Surface, which is the solar generating component of the Ergosun™ Solar Roof Tile. This device consists of an ultra-thin solar cell membrane attached to a connector board and insulating poly-vinyl fluoride (Tedlar®) backing. The attached connector board contains a diode that prevents back feed and overheating, and male and female connector plugs which are used to connect multiple solar panels together to generate DC electricity.

Additional information submitted with the reconsideration request characterizes the diode as a “bypass diode” that “regulates the direct current (‘DC’) which is connected to a third-party inverter located in the home where the DC energy is converted to alternating current (‘AC’).” That AC energy is ultimately fed from the inverter to a meter and, from there, to the home’s electrical panel...” The imported solar module will be applied to roof tiles in the United States and sold to consumers and businesses.

ISSUE:

Is the module described above classifiable under heading 8501, HTSUS, which provides for electric generators, or under heading 8541, HTSUS, which provides for photosensitive semiconductor devices?

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 based on GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's 2 through 6 may then be applied in order.

In addition, in interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. See T.D. 89 80, 54 Fed. Reg. 35127 (August 23, 1989).

The following HTSUS provisions are under consideration:

8501	Electric motors and generators (excluding generating sets): Other DC motors: DC generators:
8501.31	Of an output not exceeding 750 W:
8501.31.80	Generators. * * *
8541	Diodes, transistors and similar semiconductor devices; photo-sensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels; light-emitting diodes (LED); mounted piezoelectric crystals; parts thereof:
8541.40	Photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels; light-emitting diodes (LED):
8541.40.60	Other diodes.

Explanatory Note ("EN") 85.01(II) describes two categories of items that are specifically included in heading 8501. HTSUS. To wit, the EN states:

(II) ELECTRIC GENERATORS

Machines that produce electrical power from various energy sources (mechanical, solar, etc.) are classified here, provided they are not more specifically covered by any other heading of the Nomenclature.

...

The heading also covers photovoltaic generators consisting of panels of photocells combined with other apparatus, e.g., storage batteries and electronic controls (voltage regulator, inverter, etc.) and panels or modules equipped with elements, however simple (for example, diodes to control the direction of the current), which supply the power directly to, for example, a motor, an electrolyser.

In these devices, electricity is produced by means of solar cells which convert solar energy directly into electricity (photovoltaic conversion).

...

EN 85.41 provides, in pertinent part:

(B) PHOTSENSITIVE SEMICONDUCTOR DEVICES

This group comprises photosensitive semiconductor devices in which the action of visible rays, infra-red rays or ultra-violet rays causes variations in resistivity or generates and electromotive force, by the internal photo-electric effect.

*** The main types of photosensitive semiconductor devices are:

*** (2) Photovoltaic cells, which convert light directly into electrical energy without the need for an external source of current. [...]

Special categories of photovoltaic cells are:

(i) Solar cells, silicon photovoltaic cells which convert sunlight directly into electric energy. They are usually used in groups such as source of electric power, e.g., in rockets or satellites employed in space research, for mountain rescue transmitters.

The heading also covers solar cells, whether or not assembled in modules or made into panels. However, the heading does not cover panels or modules equipped with elements, however simple, (for example, diodes to control the direction of current), which supply the power directly to, for example, a motor, an electrolyser (heading 85.01).

Thus, per the ENs, panels or modules with elements that can supply the power directly to an external load, are precluded from classification in heading 8541, HTSUS, and are classified in heading 8501, HTSUS.

In Headquarters Rulings Letter (HQ) H084604, dated May 3, 2010, CBP noted that “a solar module is not precluded from classification under heading 8541, HTSUS, simply because it contains “elements,” e.g., diodes which control the direction of the current). Those elements must also “supply power directly” to an external load, such as a motor or an electrolyser. *See* EN 85.01(II), *supra*. CBP then classified the device as a photosensitive semiconductor device in subheading 8541.40.60, HTSUS, because the device lacked pertinent indicators of being a generator of heading 8501, HTSUS, e.g., blocking diodes and inverters to convert DC power produced by the solar panels into AC power usable by items intended devices. In sum, the solar panels provided for in HQ H084604 were not generators.

The determination of whether a given solar panel is classified as a solar generator of heading 8501, HTSUS, or as a panel of photovoltaic cells of heading 8541, HTSUS, is based on whether the subject device is equipped with elements that allow it to supply power directly to another article (i.e., an external load) that consumes such power. Here, the instant panel is not equipped with elements that allow it to supply power directly to another article. While the solar module of NY N255298 produces electrical power (i.e., direct current) from its solar cells, that current is intended to pass through to multiple connected solar modules and eventually to an external inverter located in a home. In this particular scenario, the inverter, which converts the current to AC, is the element that enables the subject panel to supply power directly to an external load. The solar module essentially functions in a manner that is comparable to the solar module considered in HQ H250768 (December 2, 2016) (a solar module that could only connect to other solar modules and could not supply power to any external loads classified in heading 8541, HTSUS).

For the reasons explained above, NY N255298 is revoked and the subject solar module is now classified in subheading 8541.40.60, HTSUS, which provides for “Diodes, transistors and similar semiconductor devices; photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels; light-emitting diodes (LED); mounted piezoelectric crystals; parts thereof: Photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels; light-emitting diodes (LED): Other diodes.”

HOLDING:

By application of GRI 1, the solar module is classifiable under heading 8541, HTSUS. Specifically, by application of GRI 6, it is classifiable subheading 8541.40.60, HTSUS, which provides for “Diodes, transistors and similar semiconductor devices; photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels; light-emitting diodes (LED); mounted piezoelectric crystals; parts thereof: Photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels; light-emitting diodes (LED): Other diodes.”

The column one, general rate of duty is “Free.” Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided at www.usitc.gov.

On January 23, 2018, Presidential Proclamation 9693 imposed safeguard measures on imports of crystalline silicon photovoltaic (CSPV) cells and certain products incorporating CSPV cells in the form of additional tariffs or tariff rate quotas for a period of three years. Such products classified under subheading 8541.40.60, HTSUS, unless specifically excluded, are subject to the additional duties. See Note 18 to Chapter 99 and subheadings 9903.45.21 through 9903.45.25, HTSUS.

EFFECT ON OTHER RULINGS:

NY N255298 (July 31, 2014) is hereby revoked.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

19 CFR PART 177

MODIFICATION OF TWO RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO COUNTRY OF ORIGIN MARKING OF CERTAIN MIC PERCUTANEOUS PLACEMENT AND MEDICAL KITS

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

ACTION: Notice of modification of two ruling letters, and of revocation of treatment relating to the country of origin marking of certain MIC Percutaneous Placement and Medical Kits.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying two ruling letters concerning the country of origin marking of certain MIC Percutaneous Placement and Medical Kits. Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 40, on October 13, 2021. Two comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after March 20, 2022.

FOR FURTHER INFORMATION CONTACT: Tatiana Salnik Matherne, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0351.

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), a notice was published in the *Customs Bulletin*, Vol. 55, No. 40, on October 13, 2021, proposing to modify two ruling letters pertaining to the country of origin marking of certain MIC Percutaneous Placement and Medical Kits. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In HQ H016800, dated December 10, 2007, and HQ H190655, dated July 14, 2014, CBP determined that the outer containers of the MIC Percutaneous Placement and Medical Kits must be marked with a list of countries of origin of all components contained within those containers, without reference to the country of origin of each individual component. CBP has reviewed HQ H016800 and HQ H190655 and has determined the ruling letters to be in error. It is now CBP's position that the MIC Percutaneous Placement and Medical Kits must be marked to specify the country of origin of each component.

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

Dated:

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

Attachment

HQ H265715
January 5, 2022
OT:RR:CTF:FTM H265715 TSM
CATEGORY: Marking

DONALD S. STEIN, ESQ.
GREENBERG TRAUIG, LLP
800 CONNECTICUT AVENUE N.W.
SUITE 500
WASHINGTON, DC 20006

RE: Modification of HQ H016800 and HQ H190655; Country of origin marking of a certain MIC Percutaneous Placement Kit and Medical Kits.

DEAR MR. STEIN:

This is in reference to Headquarters Ruling Letter (“HQ”) H016800, issued to your client, Avent Inc., on December 10, 2007, concerning the country of origin marking of a certain MIC Percutaneous Placement Kit (“PKK.”) In that ruling, U.S. Customs and Border Protection (“CBP”) determined that all components of the PKK kit and their country of origin need not be listed on the PKK kit packaging. Rather, the PKK kit packaging may be marked “Product of USA, Ireland and Mexico” or other words of similar meaning.¹ This is also in reference to HQ H190655, dated July 14, 2014, concerning the country of origin marking of certain medical kits. In that ruling, CBP determined that the containers of the imported medical kits must be marked with an accurate list of countries of origin of all the articles.² Upon additional review, we have found these determinations to be incorrect. For the reasons set forth below we hereby modify HQ H016800 and HQ H190655.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published in the *Customs Bulletin*, Volume 55, No. 40, on October 13, 2021, proposing to modify HQ H016800 and HQ H190655, and to revoke any treatment accorded to substantially identical transactions. Two comments generally supporting the proposed action were received on or before November 12, 2021.

FACTS:

HQ H016800, describes the subject merchandise as follows:

The merchandise at issue is identified as the “MIC Percutaneous Placement Kit.” The PPK is a medical device to initially place balloon-retained enteral feeding catheters for gastrostomy feeding. The PPK will be marketed to and used in hospitals and clinics by healthcare professionals. The PPK consists of a stoma measuring device, two syringes, 24fr dilator, a gastroplexy assembly (package containing four devices), scalpel, introducer needle, hemostat, guidewire and catheter. The stoma measuring

¹ HQ H016800 also determined the country of origin of the MIC Percutaneous Placement Kit, which is not at issue here.

² HQ H190655 also determined the country of origin of the medical kit and the sufficiency of marking of the outer container in lieu of marking the individual articles contained within the container. Those issues are not addressed here.

device, 24fr dilator and catheter are from Mexico. The guidewire is from Ireland. The hemostat is from Pakistan. The syringes, gatroplexy assembly, scalpel and introducer needle are from the United States. The PPK is assembled in Mexico. The individual components of the PPK are not marked. The kit will be placed in a sealed package and sterilized. The sealed kit is then placed in individual shipping boxes.

In HQ H016800, CBP found that all components of the PPK and their country of origin need not be listed on the packaging. Rather, the packaging may be marked “Product of USA, Ireland and Mexico,” “Components (or parts) produced in U.S., Ireland and Mexico” or other words of similar meaning.

HQ H190655, describes the subject merchandise as follows:

The instant merchandise consists of various medical kits, imported into the U.S. from Mexico. The kits contain numerous components, which are organized and packaged into sub-kits. The components include items such as needles, scissors, towels, catheters, sponges, scalpels, plastic bowls, forceps, gauzes, etc. The sub-kits group various components together into a single container—for example, a box with scissors of different sizes or a sealed bag with a catheter, needles, and blades. The components are sourced from various countries, including the U.S., Canada, Mexico, China, the Dominican Republic, South Korea, Thailand and Vietnam, are assembled into sub-kits by outside suppliers, and are packaged into a single container—the final medical kit—in Mexico. The components in the sub-kits may have different countries of origin. Upon importation into the U.S., some kits are sold directly to hospitals, and some are repacked, with additional components inserted into the finished kit.

The imported kits are marked on the outside container with the names of countries from which the subject merchandise may originate, for example “Products of the U.S., Mexico, China, Taiwan.” The individual components are not marked.

In HQ H190655, CBP found that the outer containers of the imported medical kits must be marked with an accurate list of the countries of origin of all the articles.

ISSUE:

Whether the containers for the PPK and medical kits at issue are marked in accordance with the requirements of Treasury Decision (“T.D.”) 91–7.

LAW AND ANALYSIS:

The marking statute, section 304 of the Tariff Act of 1930, as amended (19 U.S.C. § 1304) provides that, unless excepted, every article of foreign origin imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. § 1304 was “that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident

purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will.” *United States v. Friedlaender & Co. Inc.*, 27 C.C.P.A. 297, 302, C.A.D. 104 (1940).

The country of origin marking requirements and the exceptions of 19 U.S.C. § 1304 are set forth in Part 134, Customs Regulations (19 C.F.R. Part 134), which implements the country of origin marking requirements and exceptions of 19 U.S.C. § 1304. Section 134.41(b), Customs Regulations (19 C.F.R. § 134.41(b)), mandates that the ultimate purchaser in the United States must be able to find the marking easily and read it without strain. 19 C.F.R. § 134.1(d), defines the ultimate purchaser as generally the last person in the United States who will receive the article in the form in which it was imported. 19 C.F.R. § 134.32(d) provides that articles for which the marking of the containers will reasonably indicate the origin of the articles are exempted from marking requirements.

The principles governing the country of origin marking of sets, mixtures, and composite goods, were addressed by CBP in Treasury Decision (“T.D.”) 91–7, 25 Cust. B. & Dec. 7 (January 8, 1991). In that decision, CBP determined in relevant part that for purposes of 19 U.S.C. § 1304, the relevant inquiry is whether the materials or components have been substantially transformed as a result of their inclusion in a set, mixture, or composite good. If the materials or components have not been substantially transformed, each component must be individually marked to indicate its own country of origin.

In HQ H016800 and HQ H190655, CBP determined that the components of the PKK and medical kits, such as stoma measuring devices, syringes, dilators, gastroplexy assemblies, scalpels, needles, hemostats, guidewires, catheters, scissors, towels, sponges, plastic bowls, forceps, gauzes, etc., retained their different countries of origin. CBP further determined that the outer containers of the imported kits must be marked with an accurate list of the countries of origin of all the articles, for example “Product of USA, Ireland and Mexico,” “Products of the U.S., Mexico, China, Taiwan,” or other words of similar meaning.

Upon review, we find that marking of the outer containers with a list of countries of origin of all articles contained within those containers, without reference to the country of origin of each individual article, is not consistent with T.D. 91–7. As discussed above, T.D. 91–7 requires each item, if not substantially transformed as a result of its inclusion in a set, to be individually marked to indicate its own country of origin. In HQ H016800 and HQ H190655, CBP determined that the components of the PKK and medical kits retained their individual countries of origin. Accordingly, consistent with the requirements of T.D. 91–7, the PKK and medical kits must be marked to specify the country of origin of each component, for example “Catheters made in Mexico, Hemostats made in Pakistan, etc.,” or its equivalent. See HQ H009368, dated September 27, 2007, and HQ 954260, dated May 4, 1994 (finding that the Bondex Surface Preparation Kit and Child’s Fishing Kit must be marked with the countries of origin of the individual components). To the extent such foreign materials/components are insignificant, or would have no influence on the purchasing decision, CBP applies a “common sense” approach to determine whether marking is required. See HQ H050245, dated February 9, 2009.

As noted above, we received two comments generally supporting the proposed modification of HQ H016800 and HQ H190655. However, both com-

menters requested an extension beyond the 60-day period following the publication in the Customs Bulletin, as required by 19 U.S.C. § 1625(c), for this ruling to become effective. The commenters argued that additional time would be necessary to comply with the T.D. 91-7 requirement that the PKK and medical kits must be marked to specify the country of origin of each component. In addition, one of the commenters stated that CBP's proposed decision provided little guidance regarding the formatting that CBP will require when reviewing a country of origin marking dealing with dozens to potentially over one hundred individual components. The commenter requested additional guidance as to the range of marking styles that will be deemed acceptable for country of origin marking purposes and provided certain examples of potentially accepted markings.

With regard to the request for an extension beyond the 60-day period following the publication in the Customs Bulletin for this ruling to become effective, we have no statutory authority to delay the effective date of the ruling. Accordingly, this ruling will become effective 60 days after its publication in the Customs Bulletin, in accordance with 19 U.S.C. § 1625 (c). With regard to the request for additional guidance concerning specific variations and acceptable marking styles for a country of origin marking addressing medical kits with dozens of individual components, we note that a separate request for a ruling concerning country of origin marking of medical kits containing numerous components may be filed in accordance with the requirements of 19 C.F.R § 177. However, as an example of acceptable marking, we note that the following country of origin marking of the Open Heart CDS-4 procedure kit, which contains around 70 items (it is one of the products in HQ H190655), as proposed by one commenter, is in compliance with T.D. 91-7: "Gauze, plastic bags, other packaging, tape, trays, cups, lids, pitcher, basins, bowls, other containers, stockinet, light handle cover, mayo stand, needle counter, suture boot, stop flag, gowns, mop head, certain drapes, certain table covers, OR towels laparotomy sponges, bulb syringes, Yankauer bulb tips, suction tubing, anesthesia mask, cautery pen, certain surgical blades, and decanter bag made in China; tubing made in the Dominican Republic; electrodes made in Korea; sutures, pouch, breathing bag, Foly tray, anesthesia circuit, oxygen sensor, ligature clip applier, ligature clips, and skin stapler made in Mexico; CSR wrap gowns, table cover, protective sheet, certain drapes, surgical blade made in Thailand."

HOLDING:

In accordance with T.D. 91-7, the PKK and medical kits at issue in HQ H016800 and HQ H190655, must be marked with the country of origin of each component contained within those kits.

EFFECT ON OTHER RULINGS:

HQ H016800, dated December 10, 2007, is hereby MODIFIED with regard to the country of origin marking of the MIC Percutaneous Placement Kit.

HQ H190655, dated July 16, 2014, is hereby MODIFIED with regard to the country of origin marking of the medical kits.

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

*Sincerely,
For*

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division



**PROPOSED REVOCATION OF TWO RULING LETTERS,
PROPOSED MODIFICATION OF ONE RULING LETTER,
AND PROPOSED REVOCATION OF TREATMENT
RELATING TO THE TARIFF CLASSIFICATION OF
BANDAGE SCISSORS**

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

ACTION: Notice of proposed revocation of two ruling letters, proposed modification of one ruling letter, and proposed revocation of treatment relating to the tariff classification of bandage scissors.

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 and modify one ruling letter concerning tariff classification of bandage scissors 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 February 18, 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: Nataline Viray-Fung, Electronics Machinery Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at nataline.viray-fung@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 two ruling letters and modify one ruling letter pertaining to the tariff classification of bandage scissors. Although in this notice, CBP is specifically referring to Headquarters Ruling Letter ("HQ") 957534 (August 7, 1995) (Attachment A), New York Ruling Letter ("NY") N014017 (July 25, 2007) (Attachment B), and NY 810138 (May 15, 1995) (Attachment C), 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 three 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 957534, NY N014017, and NY 810138 CBP classified bandage scissors in heading 9018, HTSUS, specifically in subheading 9018.90.80, HTSUS, which provides for “Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof: Other instruments and appliances and parts and accessories thereof: Other: Other.” CBP has reviewed these rulings and has determined them to be in error. It is now CBP’s position that bandage scissors are properly classified, in heading 8213, HTSUS, specifically in subheading 8213.00.90, HTSUS, which provides for “Scissors, tailors’ shears and similar shears, and blades and other base metal parts thereof: Valued over \$1.75/dozen: Other (including parts).”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke HQ 957534, NY N014017 and modify NY 810138 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H318631, set forth as Attachment D 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:

GREGORY CONNOR
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachments

HQ 957534

August 7, 1995

CLA-2 R:C:M 957534 LTO

CATEGORY: Classification

TARIFF NO.: 9018.90.80

REGIONAL COMMISSIONER OF CUSTOMS
C/O PROTEST AND CONTROL SECTION
6 WORLD TRADE CENTER
ROOM 761
NEW YORK, NEW YORK 10048-0945

RE: Protest 1001-94-106187; Medicut Shears; scissors; Section XVIII, note 1(h); Additional Rule of Interpretation 1(a); HQ 088876, NY 810138; heading 8213; EN 90.18

DEAR REGIONAL COMMISSIONER:

The following is our decision regarding Protest 1001-94-106187, which concerns the classification of "Medicut Shears" under the Harmonized Tariff Schedule of the United States (HTSUS). The subject merchandise was entered on December 20, 1993, and the entry was liquidated on August 12, 1994. The protest was timely filed on September 6, 1994.

FACTS:

The articles in question are referred to as "Medicut Shears," which are medical utility scissors. The Medicut Shears are 7 « inch scissors with offset stainless steel blades and plastic handles. One blade edge is serrated, the other sharpened. They feature a safety bandage tip on the longer blade, which the protestant states is designed to facilitate safe blade access between a bandage and the patient's skin. The plastic handle has one large ring to accommodate the third, fourth and fifth finger, and a smaller thumb ring.

The protestant states that the Medicut Shears are used by health care professionals in a variety of non-surgical applications, such as, cutting gauze and other bandage material, including casts. They can be used to cut wire or metal in instances where those materials are used, such as, in rigid splints. They are designed to withstand repeated autoclaving at temperatures of up to 290 degrees Fahrenheit for use in sterile environments.

The protestant states that the Medicut Shears are made from 420 surgical grade stainless steel (high chromium content). They have a blade rivet that is machine-affixed and is designed to withstand a pull force of 88kg. They have a Rockwell hardness of C58 and a sandblasted finish, which sets them apart from shears sold to consumer markets. The protestant further states that 99 percent of their products, including the Medicut Shears, are marketed to the health care industry.

The Medicut Shears were entered under subheading 9018.90.80, HTSUS, which provides for other instruments and appliances used in medical, surgical, dental or veterinary sciences. They were classified upon liquidation under subheading 8213.00.90, HTSUS, which provides for other scissors, tailors' shears and similar shears, valued over \$1.75/dozen.

ISSUE:

Whether the Medicut Shears are classifiable as scissors, tailors' shears and similar shears, under heading 8213, HTSUS, or as instruments and appliances used in medical, surgical, dental or veterinary sciences, under heading 9018, HTSUS.

LAW AND ANALYSIS:

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states in pertinent part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes"

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System, and are generally indicative of the proper interpretation of these headings. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The headings under consideration are as follows:

- 8213 Scissors, tailors' shears and similar shears
- 9018 Instruments and appliances used in medical, surgical, dental or veterinary sciences

Note 1(h) to section XV, HTSUS, states that the section, which includes chapter 82, does not cover the "[i]nstruments or apparatus of section XVIII." Thus, if the Medicut Shears are classifiable under heading 9018, HTSUS, a section XVIII heading, they cannot be classified as scissors under heading 8213, HTSUS.

EN 90.18, pg. 1487, states that heading 9018, HTSUS, "covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives), either to make a diagnosis, to prevent or treat an illness or to operate, etc." The note, pg. 1488, further points out that "a number of the instruments used in medicine or surgery (human or veterinary) are, in effect, tools (e.g., hammers, mallets, saws, chisels, gouges, forceps, pliers, spatulae, etc.), or articles of cutlery (scissors, knives, shears, etc.)." According to EN 90.18, articles like the Medicut Shears can only be classified under heading 9018, HTSUS, if "they are clearly identifiable as being for medical or surgical use by reason of their special shape, the ease with which they are dismantled for sterilisation, their better quality manufacture, the nature of the constituent metals or by their get-up"

The Medicut Shears are used by health care professionals in a variety of non-surgical applications, including cutting gauze and other bandage material, as well as, casts. While they are similar in shape to many consumer scissors, the Medicut Shears are in fact quite different. They have a safety bandage tip on the longer blade, which is designed to facilitate safe blade access between a bandage and the patient's skin (consumer scissors sometimes have safety tips). They are made from 420 surgical grade stainless steel (high chromium content), which has a higher heat-treated hardness, strength and wear resistance (consumer scissors are generally made from 410 stainless steel—much lower chromium content). They have a Rockwell hardness of C58 and a sandblasted finish, common to high-grade surgical instruments (consumer scissors are generally hardened to C45 and are not sandblasted).

They are designed to withstand repeated autoclaving at temperatures of up to 290 degrees Fahrenheit so that they can be used in sterile environments (consumer scissors are generally not autoclavable). Further, they have a blade rivet that is machine-affixed and designed to withstand a pull force of 88kg (consumer scissors generally have a rivet strength of 50kg). All of these factors make the Medicut Shears approximately twice the price of the similarly-shaped consumer scissors. Moreover, the protestant states that 99 percent of their products, including the Medicut Shears, are marketed to the health care industry.

In HQ 088876, dated February 3, 1992, Customs classified iris dissecting scissors and “Spencer” stitch scissors under subheading 9018.90.80, HTSUS. The scissors were specially shaped and made of 420 surgical grade stainless steel, and were marketed for medical or surgical use. Citing Additional U.S. Rule of Interpretation 1(a), HTSUS, we held that the scissors were “goods which belong to the class of medical or surgical instruments.”

It is our opinion that, based on the above-listed factors, the Medicut Shears belong to the broad “class of medical instruments” designed to “treat an illness . . . , etc.” See EN 90.18; NY 810138, dated May 15, 1995 (wherein other bandage cutting scissors—“Lister Bandage Scissors”—were held to be classifiable under subheading 9018.90.80, HTSUS). They are therefore classifiable under heading 9018, HTSUS, specifically under subheading 9018.90.80, HTSUS.

HOLDING:

The Medicut Shears are classifiable under subheading 9018.90.80, HTSUS.

The protest should be GRANTED. In accordance with section 3A(11)(b) of Customs Directive 099 3550-065, dated August 4, 1993, Subject: Revised Protest Directive, this decision, together with the Customs Form 19, should be mailed by your office to the protestant no later than 60 days from the date of this letter. Any reliquidation of the entry in accordance with the decision must be accomplished prior to the mailing of the decision. Sixty days from the date of the decision the Office of Regulations and Rulings will take steps to make the decision available to Customs personnel via the Customs Rulings Module in ACS and the public via the Diskette Subscription Service, Freedom of Information Act and other public access channels.

Sincerely,

JOHN DURANT,

Director

Commercial Rulings Division

N014017

July 25, 2007

CLA-2-90:RR:NC:N1:105

CATEGORY: Classification

TARIFF NO.: 9018.90.8000

MR. JOSE MUNOZ
DBA JOSE MUNOZ & ASSOCIATES
1717 S. 50TH STREET
TAMPA, FL 33619-7507

RE: The tariff classification of medical bandage scissors from Pakistan

DEAR MR. MUNOZ:

In your letter dated July 6, 2007, for Gripsors LLC, you requested a tariff classification ruling. Samples of the 3.5 and 5.5 inch versions were provided.

You state: "The subject merchandise are stainless steel scissors to be used by personnel in the nursing care profession specifically designed for removing and applying medical bandages with the additional feature of having grooves in the handles that can grip IV and G tubing, vials, etc. to safely facilitate opening..."

The retail packaging for each states that the fine grooves between the handles are used to grip IV and other tubing and refers to them as Gripsors. From the sample, both are angled at about 45 degrees and have a bulbous ending on the longer cutting blade.

The Harmonized System Explanatory Note to its 90.18 states:

It should also be noted that a number of the instruments used in medicine or surgery (human or veterinary) are, in effect, tools (e.g., hammers, mallets, saws, chisels, gouges, forceps, pliers, spatulae, etc.), or articles of cutlery (scissors, knives, shears, etc.). Such articles are classified in this heading **only** when they are clearly identifiable as being for medical or surgical use by reason of their special shape, the ease with which they are dismantled for sterilisation, their better quality manufacture, the nature of the constituent metals or by their get-up (frequently packed in cases or boxes containing a set of instruments for a particular treatment : child-birth, autopsies, gynaecology, eye or ear surgery, veterinary cases for parturition, etc.).

The applicable subheading for the Gripsors will be 9018.90.8000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "other" instruments and appliances used in the medical, surgical or veterinary sciences. The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist J. Sheridan at 646-733-3012.

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

NY 810138

May 15, 1995

CLA-2-90:S:N:N3:119 810138

CATEGORY: Classification

TARIFF NO.: 9018.90.8000

Ms. PAMELA PINTER
BIG APPLE CUSTOMS BROKERS INC.
151-02 132ND AVENUE
JAMAICA, NY 11434

RE: The tariff classification of surgical scissors from Pakistan

DEAR Ms. PINTER:

In your letter dated March 6, 1995, received May 2, 1995 by this office, you requested a tariff classification ruling on behalf of U.S. Surgical Supplies, Jersey City, NJ 07306.

The articles to be imported are the following:

7 1/2 inch Lister Bandage Scissors
5 1/2 inch " " "
4 1/2 inch " " "
3 1/2 inch " " "
5 1/2 inch Operating Scissors

The stainless steel instruments are all marked "Stainless" on one side and "Pakistan" on the other.

The applicable subheading for the surgical scissors will be 9018.90.8000, Harmonized Tariff Schedule of the United States (HTS), which provides for instruments and appliances used in medical, surgical, dental or veterinary sciences... other. The duty rate will be 6.3 percent.

Articles classifiable under subheading 9018.90.8000, HTS, which are products of Pakistan are entitled to duty free treatment under the Generalized System of Preferences (GSP) upon compliance with all applicable regulations.

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

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

Sincerely,

JEAN F. MAGUIRE
Area Director
New York Seaport

HQ H318631
CLA-2 OT:RR:CTF:EMAIN H318631 NVF
CATEGORY: Classification
TARIFF NO.: 8213.00.90

PORT DIRECTOR,
PORT OF NEW YORK
70 HAMILTON AVE
BROOKLYN, NY 11231

MS. PAMELA PINTER
BIG APPLE CUSTOMS BROKERS INC.
151-02 132ND AVE
JAMAICA, NY 11434

MR JOSE MUNOZ
JOSE MUNOZ & ASSOCIATES
1717 S. 50TH STREET
TAMPA, FL 33619-7507

RE: Revocation of HQ 957534 and NY N014017; Modification of NY 810138;
Medicut Shears; Lister Bandage Scissors; Gripsors Bandage Scissors

DEAR PORT DIRECTOR, MS. PINTER AND MR. MUNOZ:

This letter is in reference to Headquarters Ruling Letter (“HQ”) 957534 (August 7, 1995), New York Ruling Letter (“NY”) 81038 (May 15, 1995), and NY N014017 (July 25, 2007), regarding the classification of various bandage and fabric scissors under the Harmonized Tariff Schedule of the United States (HTSUS). In these rulings, U.S. Customs and Border Protection (“CBP”) classified Medicut shears, Gripsors bandage scissors, and Lister bandage scissors in subheading 9018.90.80, HTSUS, which provides for, “Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof: Other instruments and appliances and parts and accessories thereof: Other: Other.” Upon reconsideration, CBP has determined that HQ 957534 and NY N014017 are in error and is revoking these rulings in accordance with the reasoning below. CBP has also determined that NY 810138 is in error as pertains to Lister bandage scissors and is therefore modifying the ruling accordingly.

FACTS:

In HQ 957534 the subject merchandise is described as Medicut brand shears, which are 7” scissors with offset stainless steel blades and plastic handles. One blade edge is serrated, the other sharpened. They feature a safety bandage tip on the longer blade, which is designed to facilitate safe blade access between a bandage and the patient’s skin. The plastic handle has one large ring to accommodate the third, fourth and fifth finger, and a smaller thumb ring. Medicut Shears are used by health care professionals in a variety of non-surgical applications, such as, cutting gauze and other bandage material, including casts. They can be used to cut wire or metal in instances where those materials are used, such as, in rigid splints. They are designed to withstand repeated autoclaving at temperatures of up to 290 degrees Fahrenheit for use in sterile environments. The Medicut shears are made from 420 surgical grade stainless steel (high chromium content). They

have a blade rivet that is machine-affixed and is designed to withstand a pull force of 88kg. They have a Rockwell hardness of C58 and a sandblasted finish.

In NY N014017, the subject merchandise consists of various models of Gripsors brand scissors. They are stainless steel scissors to be used by personnel in the nursing care profession specifically designed for removing and applying medical bandages with the additional feature of having grooves in the handles that can grip IV and G tubing, vials, etc. They are angled at about 45 degrees and have a bulbous ending on the longer cutting blade.

In NY 81038, the subject merchandise is described as Lister bandage scissors in lengths of 3.5", 4.5", 5.5" and 7.5". They are made of stainless steel.

ISSUE:

Whether scissors used for removing bandages are classified as instruments used in in medical, surgical, dental or veterinary sciences of heading 9018, HTSUS, or as scissors of heading 8213, HTSUS.

LAW AND ANALYSIS:

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

The HTSUS subheadings under consideration are as follows:

- 8213 Scissors, tailors' shears and similar shears, and blades and other base metal parts thereof.
- 9018 Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof

Note 1(h) to Section XV, HTSUS states that Section XV, which includes Chapter 82, does not cover the "[i]nstruments or apparatus of section XVIII." Thus, if the subject scissors are classifiable under heading 9018, HTSUS, a Section XVIII heading, they cannot be classified as scissors under heading 8213, HTSUS.

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

EN 90.18 states that heading 9018 "covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives), either to make a diagnosis, to prevent or treat an illness or to operate, etc." The EN further states that "a number of the instruments used in medicine or surgery (human or veterinary) are, in effect, tools (e.g., hammers, mallets, saws, chisels, gouges, forceps, pliers, spatulae, etc.), or articles of cutlery (scissors, knives, shears, etc.)." According to EN 90.18, articles can only be classified under heading 9018, HTSUS, if "they are

clearly identifiable as being for medical or surgical use by reason of their special shape, the ease with which they are dismantled for sterilisation, their better quality manufacture, the nature of the constituent metals or by their get-up”

In this case, we have various scissors that are used to remove bandages and other fabric. We observe that these scissors are very similar to scissors used by EMTs and first responders to cut off patients’ clothing. Some of the scissors have offset blades and/or blunted safety tips. The scissors are used to remove bandages after a medical procedure has been completed. Thus, the scissors at issue are not used to diagnose or treat an illness, nor in a surgical setting, but rather after a medical procedure is performed when healing is underway or completed.

We are further convinced that these scissors are not medical or surgical instruments because they are used on fabric that is outside the human body and not actively used by a medical professional to diagnose or treat an illness, or perform surgery. Indeed, a search of the Unified Medical Language System, a database maintained by the National Institute for Health, yielded a long list of exemplars that more clearly fall under surgical or medical use, such as: Aebli corneal scissors, Craig brain scissors, hysterectomy scissors, microsurgery scissors, and Ragnell undermining scissors. These exemplars suggest the existence of a wide variety of specialized medical instruments that are used by doctors or surgeons during a medical procedure, and generally used to cut human tissue rather than fabric bandages after the procedure is completed. Indeed, Customs (now CBP) has previously classified iris dissecting scissors in heading 9018 because they are specially designed and manufactured for eye surgery. HQ 088876 (Feb. 3, 1992); *see also* NY D83744 (Nov. 9, 1998) (classifying surgical scissors in heading 9018, HTSUS). By contrast, Customs has also previously recognized that various tactical shears designed to cut clothing or seat belts in an emergency setting do not rise to the level of medical or surgical instruments. NY N271492 (Jan. 7, 2016).

Finally, we observe that the subject scissors are not sufficiently specialized to be considered instruments used in medical or surgical sciences. While they have offset blades and blunted safety tips, we observe that many consumer fabric scissors have offset blades and that all child safety scissors have blunted safety tips. The serration in the Medicut shears and the grooved edges of the Gripsors are features that are not integral to the function of the scissors, and thus do not render these ordinary scissors into specialized medical instruments. Although the Medicut shears are said to withstand heat of autoclaving, the same could be said of virtually all scissors made from stainless steel; there is no indication that the Medicut shears can be dismantled for sterilization.

In light of the foregoing, we find that the subject scissors used to cut bandages are classified under heading 8213 as scissors.

HOLDING:

By application of GRIs 1 and 6, bandage scissors are classified in heading 8213, specifically subheading 8213.00.90, HTSUS which provides for “Scissors, tailors’ shears and similar shears, and blades and other base metal parts thereof: Valued over \$1.75/dozen: Other (including parts).” The column one, general rate of duty is 3¢ each + 3% *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/tata/hts/.

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

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

U.S. Court of International Trade

Slip Op. 21–176

PORSCHE MOTORSPORT NORTH AMERICA, INC., Plaintiff, v. UNITED STATES,
Defendant.

Before: Stephen Alexander Vaden, Judge
Court No. 16–00182

[Granting Defendant’s Cross Motion for Summary Judgment and denying Plaintiff’s Motion for Summary Judgment.]

Dated: December 30, 2021

George R. Tuttle, III, Law Offices of George R. Tuttle of San Rafael, CA, for Plaintiff.
Beverly A. Farrell, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch; *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office; and *Valerie A. Sorensen-Clark*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection.

OPINION

Vaden, Judge:

As the curtain rises on Act III of Georges Bizet’s masterpiece *Carmen*, Don José has joined with his lover and a band of smugglers as they seek to secrete goods across the frontier without paying the applicable duties. Nearly 150 years later, another European seeks to achieve that same goal — this time legally — by bringing a series of novel interpretations of American customs law before the Court. With recourse to a duty-free provision, the protagonist here, like the eponymous operatic character, has repeatedly tried to reshuffle the deck dealt to it to avoid an outcome foretold. As with *Carmen*’s final denouement, however, it cannot escape fate.

BACKGROUND

Following the submission of an Amended Joint Statement of Uncontested Material Facts (AJSUMF), Plaintiff and Defendant submitted a second set of cross-motions for summary judgment regarding the repeated exportation and return of a trailer stocked with automotive parts. The three entries at issue pertain to approximately 10,000 articles brought by Plaintiff Porsche Motorsport North America, Inc. (PMNA) across the border to Canada and re-imported to the United States in 2014. Plaintiff contends the articles should be

classified under subheading 9801.00.85.00 of the Harmonized Tariff Schedule of the United States (HTSUS), which provides for duty-free treatment of “[p]rofessional books, implements, instruments, and tools of trade, occupation, or employment, when returned to the United States after having been exported for use temporarily abroad, if imported by or for the account of the person who exported such items.” Finding this provision inapplicable, U.S. Customs and Border Protection (CBP) instead classified the articles under multiple dutiable tariff provisions of the HTSUS. Compl. ¶ 15, ECF No. 6. At oral argument, PMNA dropped Count Two of its Amended Complaint regarding non-receipt of notices of extension for liquidation sent by CBP. The present briefings dispose of the remainder of the case. For the reasons set forth below, the Court finds that CBP’s determinations regarding classification of PMNA’s “inventory” items were correct, and the Court **GRANTS** Defendant’s Cross Motion for Summary Judgment on that issue and **DENIES** Plaintiff’s Motion.

I. Facts

PMNA claims its exportation and return of a trailer containing parts and tools allowed it to “promote the Porsche brand” through the provision of “emergency” support at racing events in Canada. AJSUMF ¶ 6, Ex. 5 ¶ 5, ECF No. 81. Plaintiff further attests that providing trackside access to parts and tools constituted a form of assistance for teams at 2014 Porsche GT3 Cup Challenge races that took place in Canada. Access to these articles allowed the competitors to repair their Porsche automobiles in the event of accidents or unexpected breakdowns. *See, e.g.*, Pl.’s Resp. at 10, ECF No. 85; Pl.’s Mot. Summ. J. (Pl.’s Br.) at Ex. 17 (Declaration of Robert Resetar), ¶¶ 11–14, ECF No. 83–2. The 2014 races addressed in this Complaint were the (1) 2014 Porsche GT3 Cup Challenge Race at Canadian Tire Motorsport Park in Bowmanville, Ontario (Entry KB5–5376882–5 dated 05/30/2014); (2) 2014 Porsche GT3 Cup at Calabogie Motorsports Park in Calabogie, Ontario (Entry KB5–5378599–3 dated 06/23/2014); and (3) 2014 Porsche GT3 Cup Challenge Canada, in Bowmanville, Ontario (Entry KB5 5381385–2 dated 09/01/2014). While providing access to purchasable parts at these GT3 Cup races, the trailer was open for business solely with racing teams. PMNA did not sell parts to the general public during the races. Parts sold to the racing teams were not returned to PMNA. AJSUMF ¶ 15, ECF No. 81.

PMNA’s trailer functioned as a roving emporium. Representatives from Porsche racing teams visited the trailer to obtain parts. PMNA’s employees kept track of parts purchased through a system of order sheets for each racing team. AJSUMF ¶¶ 26–27, ECF No. 81. After

the race, when the trailer had reentered the United States, the record of transactions from these sheets was transmitted to PMNA's accounting system. PMNA's office in Carson, California, then sent invoices to race teams for the car parts they had purchased. AJSUMF ¶ 29, ECF No. 81.

For each exportation to Canada and entry into the United States, PMNA filed "Certificates of Registration" (CBP Form 4455) with CBP. On each submission, PMNA indicated its intention to provide support for a particular GT3 race. *See, e.g.*, Pl.'s Br. at 32, ECF No. 83. It further provided manifests listing quantities, descriptions, and values of each of the various automotive and non-automotive parts in the trailer. The forms also listed the total respective values and quantities exported for each race, and they were later appended as declarations of the automotive parts re-entered into the United States. *See* KB5-5376882-5 dated 05/22/2014, KB5-5378599-3 dated 06/23/2014, and KB5-5381385-2 dated 09/01/2014.

At each entry, PMNA's broker classified the tools and automotive repair parts under subheading 9801.00.85 of the HTSUS. Under this provision, they would be duty-free. In its filings to CBP, PMNA did not make any adjustments to the quantities it returned to the United States. Compl., Entry Papers in Court File, Exs. 1, 2, and 3, ECF No. 6. For 2014's first race, the Porsche GT3 Cup Challenge Race at the Canadian Tire Motorsport Park in Bowmanville, the trailer's inventory report at the time of export identified 1,562 unique items in its inventory, a total parts count of 9,921 with a total value of \$1,442,775. AJSUMF ¶ 37, ECF No. 81. Seventy-one other items with an approximated value of \$13,140 were classified as "[n]on-inventory items PMNA support truck" on the submitted Form 4455 and the export manifest of parts. AJSUMF ¶ 38, Ex. 19, ECF No. 81. Although these items were included in the trailer in the subsequent two exports and entries, they were not reported on the relevant forms by PMNA. AJSUMF ¶¶ 60, 70, ECF No. 81. For the second race that year, the Porsche GT3 Cup at Calabogie Motorsports Park, the inventory report at the time of export for trailer 4HH42354 identified 1,576 unique items in inventory, a quantity parts count of 10,322 with a total value of \$1,483,795.32. AJSUMF ¶ 51, ECF No. 81. For the third and final race, the Porsche GT3 Cup Challenge Canada in Bowmanville, the inventory report at the time of export for trailer 4HH42354 identified 1,605 unique items in inventory and a quantity parts count of 10,426 with a total value of \$1,518,553.74. AJSUMF ¶ 64, ECF No. 81.

The sale of parts at the three races resulted in differences between the total number of automotive repair parts exported to Canada in

the trailer and the total returned to the United States on each trip. Following the first and second races in 2014, PNMA also replenished the inventory while in Canada, resulting in further changes to the inventory of reimported parts. At the first race, teams purchased 146 parts, netting PMNA \$34,009.61. While still in Canada, PMNA acquired additional inventory of 537 parts, valued at \$11,507.09. AJSUMF ¶ 41, ECF No. 81. Less than half of the total number of replenished parts, 207 individual items, were exported from the United States. The other 330 originated in Germany. AJSUMF ¶ 41, ECF No. 81. At re-entry, PMNA's customs broker failed to declare any changes in the export manifest, attesting that the total remained identical to the inventory initially exported to Canada. AJSUMF ¶ 44, ECF No. 81. The replenished parts received from Germany while the trailer was in Canada were declared and entered into the United States under a separate customs entry. AJSUMF ¶ 45, ECF No. 81. The additional replenished parts from the United States acquired while the trailer was in Canada were separately reported to CBP via a Prior Disclosure. AJSUMF ¶ 46, ECF No. 81.

At the second race (Entry KB5-5378599-3), PMNA sold 106 parts with a total sales price of \$31,850.37. AJSUMF ¶ 52, ECF No. 81. PMNA then replenished the trailer's inventory in Canada with 148 parts with a value of \$14,853.18. AJSUMF ¶ 53, ECF No. 81. Sixty-five of these parts were exported to Canada from Germany, and the other eighty-three were exported from the United States. AJSUMF ¶ 54, ECF No. 81. As in the first re-entry, the replenished parts from Germany were declared and entered under a separate customs entry, and the replenished parts from the United States were separately reported to CBP via a Prior Disclosure. AJSUMF ¶ 58, ECF No. 81.

For the third race (Entry KB5-5381385-2), Porsche race car teams purchased 206 parts with a sales value of \$69,069.93. AJSUMF ¶ 65, ECF No. 81. The trailer's stock was not replenished while the trailer was in Canada for the third race. AJSUMF ¶ 66, ECF No. 81.

After classifying the merchandise under various HTSUS provisions, CBP assessed duties, fees, and interest. For the first entry, PMNA faced a total duty of \$36,930.40, plus interest and fees of \$2,592.65, for a total payment of \$39,523.05. For the second entry, PMNA faced a total duty of \$40,488.92, plus interest and fees of \$2,629.78, for a total payment of \$43,118.70. For the third and final entry in question, PMNA faced a total duty of \$38,675.28, plus interest and fees of \$1,288.09, for a total payment of \$39,963.37. Altogether, the claimed liquidated duties, fees, and interest amounted to \$122,605.12. PMNA filed two protests regarding the three entries. CBP denied the protests; and PMNA paid CBP the assessed and the

claimed liquidated duties, fees, and interest. Am. Compl. ¶ 6; Am. Answer ¶ 4; Pl.’s Mot. Summ. J. Ex. 6 (Dep. of Def.’s Rule 30(b)(6) Witness, Mr. Christopher Kinner) at 41–42, ECF No. 23.

II. Procedural History

The parties have previously submitted cross-motions for summary judgment. Pl.’s Mot. Summ. J. at 2, ECF No. 23; Def.’s Mot. Summ. J. at 2, ECF No. 26. The Court¹ has already considered whether the imported merchandise qualifies for duty free treatment by operation of classification under subheading 9801.00.85. *See Porsche Motorsport N. Am., Inc.*, Slip Op. 18–105, 2018 WL 4029172 (CIT Aug. 22, 2018). However, after considering the parties’ cross-motions, the Court did not determine whether the subject entries qualify for duty-free treatment under subheading 9801.00.85 of the HTSUS. *Id.* at *5. The Court requested further information from both parties about the nature of the parts in question and the applicability of the discussed provision. *Id.* at *10. The Court did, in part, address CBP’s notices for extension of liquidation. *Id.* at *5. Following the submission of the AJSUMF, the Court has received new cross-motions for summary judgment. Pl.’s Mot. Summ. J. at 2, ECF No. 83; Def.’s Mot. Summ. J. (Def.’s Br.) at 2, ECF No. 84.

JURISDICTION AND STANDARDS OF REVIEW

The parties have not disputed PMNA’s fulfillment of the prerequisites for initiating this action. *See* 28 U.S.C. § 2637(a). Because Plaintiff contests the denial of its protests by CBP against the tariff classification of its returning automotive repair parts, jurisdiction is proper pursuant to 28 U.S.C. § 1581(a) (“The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part”).

The Court reviews CBP’s denial of Plaintiff’s protests *de novo*. *See Rheem Metalurgica S/A v. United States*, 951 F.Supp. 241, 246 (CIT 1996), *aff’d*, 160 F.3d 1357 (Fed. Cir. 1998). Although the decision of CBP is presumed correct and “[t]he burden of proving otherwise shall rest upon the party challenging such decision,” the Court’s “duty is to find the *correct* result.” 28 U.S.C. § 2639(a)(1); *see also Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) (Wisdom, J.).

¹ This case was originally assigned to The Honorable R. Kenton Musgrave on February 7, 2017, Order, ECF No. 15, who ruled on the original Motions for Summary Judgment. Following Judge Musgrave’s retirement, the case was reassigned to then-Chief Judge Timothy C. Stanceu on February 7, 2019. *See* Order, ECF No. 38. On January 8, 2021, the case was reassigned once again from then-Chief Judge Stanceu to Judge Vaden. Order, ECF No. 74. Shortly thereafter, the Court held a teleconference with the parties that launched the present round of dispositive briefing.

Rule 56 of the United States Court of International Trade (USCIT) provides that summary judgment may be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” USCIT Rule 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (interpreting the analogous provision of the Federal Rules of Civil Procedure). To reach this determination, the Court must decide “whether there are any factual disputes that are material to the resolution of the action.” *Texas Apparel Co. v. United States*, 698 F.Supp. 932, 934 (CIT 1988), *aff’d*, 883 F.2d 66 (Fed. Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). In ascertaining whether a genuine, material issue of fact exists, a Court reviews evidence submitted, in this case primarily from the AJSUMF, drawing all inferences against the moving party. *See Matsushita Elecs. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The movant bears the burden of demonstrating that there exists no genuine issue of material fact that would warrant a trial. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). At summary judgment, “the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson*, 477 U.S. at 249; *see also Ford Motor Co. v. United States*, 157 F.3d 849, 854 (Fed. Cir. 1998).

DISCUSSION

By this action, PMNA seeks a refund of the total amount cited above, \$122,605.12. PMNA now only disputes the customs duty classifications of its automobile parts and accessories that PMNA exported to Canada and returned to the United States in 2014. Though PMNA initially had also disputed receipt of notices for extension of liquidation deadlines, at oral argument on November 10, 2021, PMNA’s counsel Mr. George R. Tuttle, III, accompanied by Ms. Paula Kelly, PMNA’s Deputy General Counsel, informed the Court that PMNA had decided to “drop” its claims regarding non-receipt of notices for extension of liquidation deadlines.² For that reason, the Court **DISMISSES** Count Two of PMNA’s Amended Complaint despite its being further briefed by both parties in their latest Motions.

² Mr. Tuttle stated, “I spoke with my client and we agreed to abandon that claim [regarding non-receipt of notices of extension of liquidation] in the case.” Oral Arg. Tr. 8:17, ECF No. 94.

I. Classification under Subheading 9801.00.85.00

A. Legal Framework

In its Motion for Summary Judgment, Plaintiff maintains that the parts it exported to Canada and returned to the United States on three separate occasions should be properly classified under subheading 9801.00.85.00. Loosely paraphrasing this provision, the Court noted agreement among the parties in 2018 that:

[T]he parties agree that for articles to be classifiable under subheading 9801.00.85.00 they must be (1) professional implements, instruments, or tools of a (2) trade, occupation, or employment (3) returned to the United States after having been exported for use temporarily abroad and (4) imported by or for the account of the person who exported such items.

Porsche Motorsport N. Am., Inc., 2018 WL 4029172, at *5.

The Court notes there remains a dearth of prior caselaw addressing subheading 9801.00.85.00, yet it finds reason to dispute the construction previously promulgated by the parties. The text of the provision reads in full:

Professional books, implements, instruments, and tools of trade, occupation, or employment, when returned to the United States after having been exported for use temporarily abroad, if imported by or for the account of the person who exported such items.

In its 2018 opinion, the Court inserted “or” rather than “and” between “instruments” and “tools.” It also inserted “a” between “of” and “trade, occupation, or employment.” See *Porsche Motorsport N. Am., Inc.*, 2018 WL 4029172, at *5. This articulation of the elements of the provision suggests that “tools,” “books, implements, instruments” may be “of [a] trade, occupation, or employment.” Instead, the appropriate construction, given the bare “and” following the first two nouns in the series, would be to read “tools of trade, occupation, or employment” as the final component of the series. Under this construction, “books, implements, [and] instruments” are not tethered, grammatically, to “trade, occupation, or employment.” This simplifies the analysis to three elements, rather than four: (1) “[p]rofessional books, implements, instruments, and tools of trade, occupation, or employment,” (2) “when returned to the United States after having been exported for use temporarily abroad,” (3) “imported by or for the account of the person who exported such items.”

In addition, it is important to raise another grammatical feature of subheading 9801.00.85.00, previously implied by Defendant, that

should be made explicit. Subheading 9801.00.85.00 requires that all elements, numbered above, be met. The use of a disjunction — in the phrase “trade, occupation, or employment” — does not alter the meaning of the commas placed after “employment” and “abroad.” This punctuation makes all three elements a conjunctive series, indicating that each of the three elements must be fulfilled in order for merchandise to be classified under the subheading. This interpretation coheres with U.S. Note 1 of HTSUS Chapter 98, which states:

The provisions of this chapter are not subject to the rule of relative specificity in general rule of interpretation 3(a). Any article described in any provision in this chapter is classifiable in said provision if the conditions and requirements thereof and any regulations are met.

The straightforward meaning of the phrases constituting subheading 9801.00.85.00 is to provide duty free treatment to articles that meet all three elements articulated in the provision. If a re-importer can prove that its merchandise meets only two of the three elements, it still fails to meet the subheading’s requirements; and the items will be dutiable.

The brief discussions of the legislative history of the subheading by both parties provides little aid in deciphering which merchandise qualifies for duty free treatment. Pl.’s Resp. at 9–10, ECF No. 85; Def. Resp. at 11–12, ECF No. 89. Instead, it simply chronicles the evolution of the phrasing of the provision and how corporations became eligible to apply the subheading to their merchandise in appropriate circumstances.³

³ In full, the relevant subsection of the Senate Report reads:

Current law

Under HTS heading 9804.00.10, tools of trade, occupation, or employment that have been taken abroad by a person returning to the United States from a foreign country are considered a personal exemption and enter the United States duty free.

Explanation of provision

This section amends Chapter 98, subchapter I of the HTS by adding a new heading to permit the duty-free entry of “tools of the trade” by corporations as well as individuals.

Reason for change

Under the Customs Service’s interpretation of current law, goods used by technicians and engineers to provide repair services abroad may be brought in duty-free under the personal-allowance exemption, but only if the same individual that took the goods abroad accompanies them on their return. By allowing for duty-free re-entry for such goods, the provision would simplify the customs procedures for U.S. companies that provide such services and are unable to avail themselves of the personal-allowance exemption.

S. Rep. 104–393, Sec. 44 (*Articles Used to Provide Repair and Maintenance Services*) at 24–25. This recapitulation of the simple statutory alteration undertaken by Congress does not resolve the issue raised by PMNA’s conduct: Whether a trailer full of parts intended for sale should or should not be considered dutiable under the provision.

B. Analysis

i. Summary

In denying the parties' previous cross-motions for summary judgment, the Court noted that their briefings "reveal fundamental disagreement over not only the proper delineation of the ambit of subheading 9801.00.85.00, but also over the 'nature' of the article(s) claimed for classification in that tariff provision, *i.e.*, the ultimate question of fact." *Porsche Motorsport N. Am., Inc.*, 2018 WL 4029172, at *5. Having assembled an AJSUMF, the parties have provided sufficient additional undisputed facts for the Court to render judgment in favor of the Government on the issue of classification.

After consulting authoritative definitions of key terms, the Court finds the trailer full of automobile parts that PMNA exported to Canada and re-entered into the United States fails to meet at least one, if not two, of the three elements within subheading 9801.00.85.00. As a special, duty-free provision, it should be strictly construed. *See Atlas Copco, Inc. v. United States*, 651 F. Supp. 1446, 1448 (CIT 1986). The "inventory" items were not "[p]rofessional books, implements, instruments, and tools of trade, occupation, or employment." There is considerable evidence against the proposition that the "inventory" items were "returned to the United States after having been exported for use temporarily abroad." However, the Court, at this time, refrains from entering into the legal morass in this case surrounding the second element. CBP's repeated reinterpretation of that subsection of the provision and its relationship to key facts has introduced uncertainty that this opinion need not resolve. As noted above, failure to meet any one of the three elements is fatal to Plaintiff's claim. For that reason, a sequential analysis of the elements need not advance once a single element — here, the first — is found not to be met. It is undisputed that PMNA's inventory was "imported by or for the account of the person who exported such items," thereby satisfying the third element. Pl. Br. at 15, ECF No. 83.

Before performing the analysis, it is appropriate to note that, regarding the value of a small proportion of the items on PMNA's trailer, namely its "non-inventory" and "Workshop Tool Inventory" items, CBP applied no duty. In the first entry, PMNA cited seventy-one items under this heading on the submitted Form 4455 and the export manifest of parts. These items had an approximated value of \$13,140. They included everything from "trashcans" to a limited number of hand tools. AJSUMF ¶ 38, Ex. 19, ECF No. 81. As noted in the "Background" section of this opinion, these items were not declared in

the second and third entries. In Defendant's Additional Statement of Material Facts, it notes with regard to these items:

... PMNA also exported various hand tools from the United States to Canada. Def. Ex. 2 at ¶¶ 1.A, 1.B. ... The[se] hand tools ... were not made available for sale, but race teams were permitted to borrow them. Def. Ex. 1 at 29:08–29:12 ... Any race team that borrowed one of the[se] hand tools ... was required to return it to PMNA. Def. Ex. 4 (Pl. Resp. to First Set of Interrogatories) at ¶ 6 ... After a race, PMNA would reimport the[se] hand tools ... to the United States but did not individually declare any of them on its entry forms. Def. Ex. 2 at ¶ 1.B; Def. Ex. 1 at 48:04–48:07 ... PMNA did not declare the[se] hand tools ... because it considered them to be part of its truck. Def. Ex. 2 at ¶ 1.B; Def. Ex. 1 at 48:08–48:10 ... Because PMNA did not individually report the[se] ... on its entry forms, CBP did not classify the items or assess duties on them.

Def. Additional Statement of Material Facts (DASMF) ¶¶ 7–12, ECF No. 84.

In its written Response to these facts, Plaintiff attempted to deny the validity of CBP's elaboration of the record, which indicates that the non-inventory items were not dutied. Relying on its inconsistent delineation of exported and reimported goods on later entries, Plaintiff asserted that "the non-inventory items would not be included ... on CBP Form 7501." Resp. to Def.'s Rule 56.3 Statement of Additional Uncontested Material Facts ¶ 7, ECF No. 87. Plaintiff then reiterated the following statement that appears in the AJSUMF: "The total quantity and value reported on the CBP form 4455, Certificate of Registration is a quantity of 9,992 and \$1,455,915.89, which is the combined quantity and value of the parts inventory, *plus the 'Non-inventory items.'*" *Id.* (emphasis added).

The parties definitively resolved this issue at oral argument. Both acknowledged, on the record, that PMNA did not dispute that CBP treated all "Workshop Tool Inventory" and "non-inventory" items as nondutiable in its calculations. Oral Arg. Tr. 6:16, ECF No. 94; *see also* Oral Arg. Tr. 6:22. The process of assembling the AJSUMF thereby disposed of the dispute over what had and had *not* been assessed duties. The parties' statements on the record narrowed the dispute solely to "inventory items." Confusion over whether non-inventory items had been dutied, in part, prevented the Court's determination about the propriety of CBP's classification in its 2018 opinion. *Porsche Motorsport N. Am., Inc.*, 2018 WL 4029172, at *11, n.5.

In a larger sense, resolution of this relatively minor dispute provides an important factual backdrop. Through their actions in the series of instant entries, both PMNA and CBP treated certain articles on the trailer, which fell under subheading 9801.00.85.00, as duty free. In the wake of PMNA's subsequent non-declarations of the seventy-one non-inventory items in its second and third entries, CBP did not attempt to apply a duty based on their value. These facts provide context and a point of contrast for the much larger quantity of "inventory" items that PMNA provided for purchase at the Canadian rates for which it also seeks duty free treatment.

ii. PMNA's "Inventory" Under the First Element of Subheading 9801.00.85.00

The inventory included in PMNA's three entries, which it has variously described as "automotive replacement and repair tools," "parts," and "accessories," did not include books. *See* AJSUMF Exs. 12, 13, and 14, ECF No. 81. By putting forward capacious definitions for other terms in the opening clauses of subheading 9801.00.85.00, PMNA claims its inventory fulfills the first element of the provision. These claims are unavailing.

Although the parties have largely ignored the first word in the subheading, "professional," its placement in the statute's text is consequential. PMNA's counsel suggested at oral argument that the word applied only to "books" but provided no textual basis for this interpretation. Oral Arg. Tr. 14:25, ECF No. 94. In fact, the phrasing of the first element of the subheading cuts against any such limiting of the term's application: Subsequent nouns — for example, "implements" and "instruments" — lack preceding, modifying adjectives of their own. The adjective that precedes the entire series therefore most likely applies to all of the nouns listed, including "tools." *Lockhart v. United States*, 577 U.S. 347, 364 (2016) (Kagan & Breyer, JJ., dissenting) (The "interpretive practice of applying [a] modifier to the whole list boasts a fancy name—the 'series-qualifier canon,' see Black's Law Dictionary 1574 (10th ed. 2014)—but ... it reflects the completely ordinary way that people speak and listen, write and read."); *see also Thomas v. Bryant*, 938 F.3d 134, 146 (5th Cir. 2019) ("A modifier ordinarily applies to an entire series of parallel terms."). "When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." ANTONIN SCALIA & BRYAN A. GARNER, *Reading Law: The Interpretation of Legal Texts* 147 (2012).

Authoritative definitions of "professional" elucidate an underlying distinction made by the provision in question. Under the heading "4.

[of, belonging to, or proper to a profession,” the definition reads: “a. [r]elating to, connected with, or befitting a (particular) profession or calling; preliminary or necessary to the practice of a profession.” *Professional*, *Oxford English Dictionary* (2nd ed. 1989); see also *Professional*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/professional> (last visited December 30, 2021)) (“1: b: engaged in one of the learned professions[;] c: (1): characterized by or conforming to the technical or ethical standards of a profession”); *Professional*, *Collins English Dictionary* (10th ed. 2010) (“[p]rofessional means relating to a person’s work, especially work that requires special training”). The *Oxford English Dictionary* defines “profession,” under the subheading “II. [s]enses relating to professional occupation,” as “7. a. [a]n occupation in which a professed knowledge of some subject, field, or science is applied; a vocation or career, especially one that involves prolonged training and a formal qualification” *Profession*, *Oxford English Dictionary* (2nd ed. 1989); see also *Profession*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/profession> (last visited December 30, 2021)) (“4: a: a calling requiring specialized knowledge and often long and intensive academic preparation”; “4: b: a principal calling, vocation, or employment”); *Profession*, *Collins English Dictionary* (10th ed. 2010) (“A profession is a type of job that requires advanced education or training.”).

Applicable definitions of the first two nouns in subheading 9801.00.85.00 similarly clarify the provision’s meaning. The *Oxford English Dictionary* defines “implements” as “2. a. [i]n plural[,] [t]he apparatus, set of utensils, instruments, etc., employed in any trade, or in executing any piece of work.” *Implements*, *Oxford English Dictionary* (2nd ed. 1989); see also *Implement*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/implement> (last visited December 30, 2021) (“a device used in the performance of a task”; “serves as an instrument or tool.”); *Implement*, *Collins English Dictionary* (10th ed. 2010) (“An implement is a tool or other piece of equipment.”). “Instrument” has a similar definition: “1. b. [a] tool, implement, or utensil used to execute a piece of work; (now) esp. one used in delicate, precise, or skilled work, or for artistic, medical, or scientific purposes,” noting “6. [w]ith singular or plural agreement. Tools, weapons, or other devices collectively; equipment, gear.” *Instruments*, *Oxford English Dictionary* (2nd ed. 1989); see also *Instrument*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/instrument> (last visited December 30, 2021) (“used by another as a means or aid”; “instrument especially: one designed for

precision work.”); *Instrument*, *Collins English Dictionary* (10th ed. 2010) (“a tool or device that is used to do a particular task, especially a scientific task”; “a device that is used for making measurements of something such as speed, height, or sound, for example, on a ship or plane or in a car”; [s]omething ... for achieving a particular aim [that] is used by people to achieve that aim.”). Although the similarity in the meaning of these latter two words is evident in their appearance in each other’s definitions, “instruments” and “implements” bear slightly different connotations. One clear commonality, however, is that the objects entailed by their definitions are fashioned for a specific purpose for which they are used.

PMNA’s declared inventory items do not fall within these common, authoritative definitions. The parties submitted as undisputed fact that “Porsche Cars NA is in the business of importing and selling high-performance sports cars, SUVs, sedans, and parts and accessories for these vehicles to Porsche dealers throughout the United States and Canada, and to promote the Porsche brand.” AJSUMF ¶ 6, ECF No. 81. They further concur that “PMNA is in the business of importing and selling high-performance race cars, parts, and tools for use therewith, and to promote the Porsche brand.” AJSUMF ¶ 6, ECF No. 81. Selling cars and their parts is not a “professional” pursuit within the meaning of subheading 9801.00.85.00. It does not require “professed knowledge of some subject” or “prolonged training and a formal qualification.” Because the items were brought to the race-tracks merely for the purpose of sales, they are indistinguishable, under subheading 9801.00.85.00, from other goods related to racing that may be desired by drivers and mechanics but have nothing to do with professional services.

PMNA brought its inventory items, in this case parts, to Canada and sold them under the auspices of a business operation. PMNA knew these items would have a market among the enthusiasts who had purchased its cars. Plaintiff claims that “it is not the intention of PMNA to send the support trailers ... to Canada to ‘make money’ or to ‘sell parts’ like a mobile Kiosk or food truck.” Pl.’s Br. at 6, ECF No. 83. However, an international venture’s unprofitability does not render the re-entry of unsold merchandise duty-free. Moreover, PMNA derived commercial benefits from the trackside sales beyond their immediate value, ensuring that the purchase of high-priced cars would remain “attractive.” Pl.’s Br. at 6, ECF No. 83; AJSUMF ¶¶ 11, 20, ECF No. 81. Throughout years of litigation, Plaintiff has repeatedly failed to show that it did anything other than “sell parts,” despite its protracted disavowal of Defendant’s analogies applied to the trailer.

Even a cursory review of the supplies, parts, and accessories that made up PMNA's inventory suggests they were neither "implements" nor "instruments." The overwhelming majority of unique products were consumables to be purchased in the event of wear and tear suffered by cars on the racetrack. *See* AJSUMF Exs. 12, 13, 14, ECF No. 81. For example, oil, brake fluid, washers, hoses, radiator supports, head lamp trays, grommets, nuts, bolts, O-rings, screws, clamps, mirror glass, mirror housings, transmission brackets, and engine mounts had no specific purpose for PMNA if they are not sold to and used by others. *See* AJSUMF Exs. 12, 13, 14, ECF No. 81. Before purchase, these products had no use; there was no task to which PMNA was putting them. They were placed in the trailer for PMNA to garner sales resulting from the occasional need of race teams — not PMNA — to maintain their cars. Parts that did find a specific use were permanently — not temporarily — used. *Cf.* HTSUS, 9801.00.85.00 (" ... when returned to the United States after having been exported for use temporarily abroad ... "). They remained in Canada with the racing teams. AJSUMF ¶ 30, Ex. 6 ¶¶ 8, 13, 18, ECF No. 81. The dutiable "inventory" returned to the United States had never been put to a specific use, as evidenced by the fact that it was not sold.

PMNA's inventory items are also not "tools of trade, occupation, or employment." From the outset, it is appropriate to address the possibility that "tools of trade," "tools of occupation," or "tools of employment" might together or separately be terms of art, which have a specialized meaning that is well accepted in a particular subfield, in this case administrative or international trade law. Absent previous judicial decisions invoking this phrase in the context of subheading 9801.00.85.00, the Court notes Defendant's statement that "CBP has defined 'tools of trade' generally to include those items necessary for the exercise of the trade or profession of the individual." Def.'s Br. at 14, ECF No. 84; *see also* Def. Ex. 7 (HQ H013537). Beyond this brief summary, there appears to be little in the record to support the conclusion that "tools of trade" (or other iterations of that phrase implied by the statutory text) is a term of art with an established meaning. Plaintiff's provision of *The Free Dictionary's* definition of "tools of trade" — "the things that are needed in order to do a job" — is both imprecise and does little to clarify the term's meaning in this context. *Tools of Trade, The Free Dictionary* (2021). Pl.'s Br. at 18, ECF No. 83.

Uses of the phrase "tools of trade" in learned treatises and other bodies of law suggest that, as a term of art in other contexts, it

specifically excludes goods that are meant for sale. For example, the American Bar Association’s discussion of “temporary importation under bond” (TIB) notes:

TIB allows merchandise to be entered into the United States for certain specific purposes temporarily free of duty by posting a bond ... *Merchandise imported under a TIB may not be imported for sale or for sale on approval.* Specific purposes for which merchandise may be imported under a TIB include repair, alteration, or processing (including manufacture), testing or use for experimental purposes, use by nonresidents as *tools of trade*, as well as other more limited purposes.

BARTON LEGUM ET AL., INTERNATIONAL PRACTITIONER’S DESKBOOK SERIES: U.S. CUSTOMS: A PRACTITIONER’S GUIDE TO PRINCIPLES, PROCESS, AND PROCEDURES, Ch. 6 *Duty Savings Opportunities: Introduction to Trade Agreements, Unilateral Preference Programs, & Other Duty Savings Mechanisms* (ABA Section of International Law, 2nd ed. 2011) (emphasis added). In its footnotes, this discussion by the ABA’s International Law Section cites HTSUS subheadings 9813.00.05 through 9813.00.75. *Id.* This analysis suggests that “tools of trade” are not typically considered to include items for sale, either when they are inbound to or outbound from the United States. Suggesting that “tools of trade” can be saleable merchandise in one context, to the benefit of American-based importers, and not saleable merchandise in another context, when the term is applied to goods brought by foreign exporters to the United States, would be anomalous.

A treatise on bankruptcy provides further support from a body of federal law to distinguish “tools of [the] trade” from items that may be sold as merchandise. The Bankruptcy Code provides an exemption for “[t]he debtor’s aggregate interest, not to exceed \$2,525 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.” 11 U.S.C. § 522(d)(6). Recent surveys of this provision’s application indicate a majority interpretation has emerged that clarifies the meaning of “tools of [the] trade”:

Several courts have considered whether automobiles constitute tools of the trade ... and have reached different conclusions. The majority view is that automobiles may constitute tools of the trade under certain circumstances. Courts adopting the majority view have generally held that an automobile can be considered a tool of the trade if the vehicle *‘is necessary to, and is used by, the debtor to carry on his or her trade.’* This conclusion is consistent with the Code’s goal of providing the debtor with his

or her fresh start by allowing the debtor to continue to make a living pursuing his or her prepetition occupation.

BLOOMBERG LAW BANKRUPTCY TREATISE, Part II: Creditors, the Debtor and the Estate, Chapter 62: Bankruptcy Code § 522 – Exemptions (Charles J. Tabb ed., 2018). Here again, courts have noted the particular attributes of “tools of trade.” In bankruptcy, these items are used to support the performance of a livelihood. They are not typically understood as merchandise to be sold freely by a debtor, even if the debtor’s livelihood is the sale of those goods. The Bankruptcy Code’s careful attention to avoiding unnecessary exemptions that prevent the satisfaction of debts has led this term to be more clearly defined in relation “to carry[ing]” on an occupation. *See id.*

Similarly, in state law governing civil litigation, “tools of trade” are often excluded from sale or liquidation to satisfy judgements or debts owed to creditors. For example, New York’s Civil Practice Law & Rules describe the term as follows:

7. tools of trade, necessary working tools and implements, including those of a mechanic, farm machinery, team, professional instruments, furniture and library, not exceeding three thousand dollars in value, together with the necessary food for the team for one hundred twenty days, provided, however, that the articles specified in this paragraph are necessary to the carrying on of the judgment debtor’s profession or calling;

New York Consolidated Laws, N.Y. CPLR § 5205, Personal property exempt from application to the satisfaction of money judgments. Where most saleable goods that are not put to a specific employment-related use by their owner may be liquidated to satisfy judgements, items needed to sustain their possessor’s occupation may not. The underlying principle at play relates to the special status of goods that are necessary for an individual to be a productive service-provider. Goods that do not meet this threshold of immediate or essential utility may be liquidated to satisfy judgments because doing so would not prevent their possessor from earning a living.

Credible definitions of the constituent words of “tools of trade, occupation, or employment” bolster the propositions proffered by these scholarly and juridical sources. Individually and collectively, relevant dictionary entries indicate PMNA’s inventory does not fall under the phrase’s ambit. The *Oxford English Dictionary* provides a useful definition of “tool”:

1. a. ‘Any instrument of manual operation’ (Johnson); a mechanical implement for working upon something, as by cutting, striking, rubbing, or other process, in any manual art or industry; usually, one held in and operated directly by the hand (or

fixed in position, as in a lathe), but also including certain simple machines, as the lathe; sometimes extended to simple instruments of other kinds[.]

Tool, *Oxford English Dictionary* (2nd ed. 1989); see also *Tool*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/tool> (last visited December 30, 2021) (“a handheld device that aids in accomplishing a task”; “something (such as an instrument or apparatus) used in performing an operation or necessary in the practice of a vocation or profession”); *Tool*, *Collins English Dictionary* (10th ed. 2010) (“any instrument or simple piece of equipment that you hold in your hands and use to do a particular kind of work”; “[y]ou can refer to anything that you use for a particular purpose as a particular type of tool.”).

“Trade” bears a similarly helpful definition in the *Oxford English Dictionary*, falling below the first heading, “II. [a]n occupation or profession, and related senses”:

6. a. In early use: any regular occupation, profession, or business, esp. when undertaken as a means of making one’s living or earning money. In later use usually: an occupation involving manual [labor] or the buying and selling of goods, e.g. that of a craftsman or shopkeeper, as distinct from a learned profession; *spec.* a skilled manual occupation, esp. one requiring an apprenticeship or other training, as that of a builder, plumber, electrician, etc.

Trade, *Oxford English Dictionary* (2nd ed. 1989). Although this definition mentions “the buying and selling of goods ... as distinct from a learned profession,” the interpretive canon *noscitur a sociis* elucidates that this general, as opposed to specific, meaning of “trade” is inapplicable. The canon holds that “words grouped in a list should be given related meanings.” *Third Nat’l Bank in Nashville v. Impac Ltd.*, 432 U.S. 312, 322 (1977). Because “professional” appears as the first word in subheading 9801.00.85.00, and “profession” is used in the heading just above the cited definition, the “*spec[ific]*” definition which concludes the overall entry for “trade” has the most relevance. “Trade” is therefore most clearly defined in subheading 9801.00.85.00 as a “skilled manual occupation, esp. one requiring an apprenticeship or other training.” Related definitions confirm the validity of this interpretation. See *Trade*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/trade> (last visited December 30, 2021) (“an occupation requiring manual or mechanical skill”); *Trade*, *Collins English Dictionary* (10th ed. 2010) (“[s]omeone’s trade is the kind of work that they do, especially when they have been trained to do it over a period of time.”).

Noscitur is also instructive for definitions of the final two nouns in subheading 9801.00.85.00's second nested series. A credible definition of "occupation" indicates it is: "4. b. A particular action or course of action in which a person is engaged, esp. habitually; a particular job or profession; a particular pursuit or activity." *Occupation*, *Oxford English Dictionary* (2nd ed. 1989). See *Occupation*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/occupation> (last visited December 30, 2021) ("an activity in which one engages"; "the principal business of one's life: vocation"); see also *Occupation*, *Collins English Dictionary* (10th ed. 2010) ("[y]our occupation is your job or profession"). "Employment," under the *Oxford English Dictionary's* heading "5. That which a person is employed to do," has a related definition: "5. d. A person's regular occupation; a trade, a profession." *Employment*, *Oxford English Dictionary* (2nd ed. 1989). See also *Employment*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/employment> (last visited December 30, 2021) ("activity in which one engages or is employed"); *Employment*, *Collins English Dictionary* (10th ed. 2010) "[e]mployment is the fact of having a paid job").

PMNA's admitted "trade," "occupation," and "employment" do not allow for its inventory to be considered "tools" related to those pursuits. In its opening rendition of uncontested facts, PMNA tellingly notes:

The team or crew of people that prepare, maintain and repair the vehicle[s] [for automobile racing] have many years of experience and training to acquire the skills and knowledge necessary to maintain a race car in its proper condition, ready to race, and maintain that vehicle in racing condition during the race. The people that work to prepare, maintain, and repair the race vehicle apply their experience, training, skill, and knowledge to keep the vehicles on the track competing. *They are often employed by the team owner of the vehicle(s) to do so* and consider the work and service they provide to the team and the car to be their full or part time vocation, occupation, or career.

Pl. Br. at 13–14. (emphasis added) (citations omitted). In this passage, Plaintiff asserts that the individuals it describes as involved in a trade are not employees of PMNA. These individuals — who evidently do not sell parts — are hired by the race teams who purchase supplies from PMNA. Echoing these declarations, Plaintiff acknowledged at oral argument that its avowed "trade," "occupation," and "employment" pertain to selling cars. See, e.g., Oral Arg. Tr. 18:9, ECF No. 94 (describing sales as "the only job they [PMNA's track employees] know"). At the 2014 Canadian races, PMNA was not repairing

race cars. It made no effort to do so through contracts.⁴ As Mr. Blocker noted: “Part of the cost to the driver for participating in the series comes from covering salaries and travel (flight, hotel, rental cars, and meals) for the team of support mechanics and race engineers at each event.” Third Suppl. Dec. Brian Blocker, ECF No. 80, Ex. 1.

“Tools” that assist PMNA in selling goods are the only “tools” of PMNA’s “trade,” “occupation,” and “employment.” These include its undutied trailer, onboard computers, invoice paperwork, and the limited number of hand tools that it loaned to race teams. These items assist PMNA in its sales. Where “non-inventory” items were nondutiable, “inventory” items, as merchandise, were rightly subject to duties.

To the extent that PMNA may rely on customs ruling letters to support its position, CBP Ruling H013537 undermines its claimed classification of its inventory. The party to whom a ruling letter is directed is the only party who may rely on it. 19 C.F.R. § 177.9(b). Parties litigating other transactions may only rely on the ruling if their merchandise is “identical to the description set forth in the ruling letter.” 19 C.F.R. § 177.9(b); *see, e.g., United States v. Millennium Lumber Distrib. Co. Ltd.*, 887 F.Supp.2d 1369, 1378 (CIT 2013). Customs rulings are not “binding on the Court.” *Skaraborg Invest USA, Inc. v. United States*, 9 F.Supp.2d 706, 709 (CIT 1998); *see also S.C. Johnson & Son, Inc. v. United States*, 415 F. Supp. 3d 1373, 1385 (CIT 2019).

In CBP Ruling H013537, the party in interest, Texas Aero Engine Services Limited (TAESL), undertook a fundamentally different activity than PMNA. Unlike PMNA, TAESL’s mechanics travelled abroad to overhaul aircraft turbine engines, not to sell the parts to do so. The ruling’s opening recitation of facts notes “[TAESL mechanics] bring [the] goods needed to accomplish their work.” CBP Ruling HQ H013537 (July 2, 2007). TAESL mechanics did not arrive with a trailer full of parts that they offered to clients for sale, declining to fix the aircraft engines. TAESL’s trade and its use of the confined number of parts its mechanics brought overseas are not analogous to PMNA’s conduct as a re-importer of its inventory.

In sum, appropriate definitions indicate the first element of sub-heading 9801.00.85.00 yields a clear meaning that precludes applicability to PMNA’s “inventory.” The items in question were not “[p]rofessional books, implements, instruments, and tools of trade, occupation, or employment.” PMNA did not bring these items across

⁴ Citing Plaintiff’s own documents, Defendant’s additional statement of facts points out: “PMNA was under no contractual obligation with the race teams or any other party to make the inventory items available for sale in Canada.” Def. Ex.3 (Pl. Resp. to Req. for Prod. of Docs. ¶ 2), ECF No. 84.

the Canadian border for a professional purpose; instead, it aimed to generate sales among clients who raced cars that year. Nor did these goods relate to “learned” or “highly skilled” activities undertaken by PMNA, like actually repairing cars. In fact, Plaintiff had no specific application in mind for any of the goods it exported and re-imported beyond their purchase by third parties who might use them to remedy breakdowns of cars entered into races in Canada in 2014. The items at issue are not “tools” for reuse; they are instead merchandise for one-time sale.

II. General Principles Regarding the Application of Subheading 9801.00.85.00

The Court finds that HTSUS subheading 9801.00.85.00 has been significantly misunderstood and misapplied by both Plaintiff and Defendant. This duty-free subsection, which facilitates the cross-border provision of services by both individuals and corporations, should not be misconstrued to allow for importers and exporters to engage solely in sales of merchandise abroad. To determine subheading 9801.00.85.00’s applicability in the future, CBP should undertake the three-part analysis flowing naturally from the provision’s three elements.

Under the first element, CBP should first assess whether professed “books, implements, instruments, and tools of trade, occupation, or employment” are for “professional,” *i.e.* non-sales, purposes. The intended use for these items should correspond to the provision of a form a skilled labor by trained members of a trade. PMNA’s consumable products should serve as a salient point of contrast for goods claimed as duty free under this provision. Selling, by the definitions provided above, does not fall within the ambit of tradesmen’s skilled labor.

Regarding the second element, CBP should determine whether the items were actually used temporarily by the claimant while abroad, not merely made available for purchase by others who might employ them in a professional capacity. Here again, PMNA’s activities involving its trailer full of goods is instructive. Analysis of the first element has briefly touched on the reality that reimportation of reusable “implements, instruments, and tools” was not the company’s objective. Instead, it sought solely to re-import unsold, and therefore unused, goods. Consumable products remained in Canada when they were purchased; they faced no chance of being returned after “temporary use.”

Under the subheading’s third element, if the goods are also transported “by or for the account of the person who exported such items,” they are nondutiable. This is the most straightforward of the three

elements. It requires only a comparison of the names and items listed on the paperwork for exportation and reentry.

All three elements must be fulfilled. PMNA has failed to meet the requirements of the first element. It therefore cannot claim the duty-free status that the subheading confers for its inventory items.

CONCLUSION

In consideration of the foregoing, the Court finds in favor of Government on the matter of classification of PMNA's inventory items. The auto parts, accessories, and supplies therein entailed do not meet the requirements of subheading 9801.00.85.00.

ORDERED that Government's Motion for Summary Judgment is **GRANTED** on Count One of the Amended Complaint;

ORDERED that Plaintiff's Motion for Summary Judgment is **DE-NIED**; and

ORDERED that Count Two of Plaintiff's Amended Complaint is **DISMISSED** as abandoned.

Dated: December 30, 2021

New York, New York

/s/ Stephen Alexander Vaden
STEPHEN ALEXANDER VADEN, JUDGE



Slip Op. 22-01

HUSTEEL Co., LTD., Plaintiff, and NEXTEEL Co., LTD. et al., Consolidated Plaintiffs, v. UNITED STATES Defendant, and MAVERICK TUBE CORPORATION et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 19-00112

[Sustaining the U.S. Department of Commerce's second remand redetermination in the 2016-17 administrative review of the antidumping duty order on welded line pipe from the Republic of Korea.]

Dated: January 3, 2022

J. David Park, Henry D. Almond, Daniel R. Wilson, Leslie C. Bailey, Kang Woo Lee, Arnold & Porter Kaye Scholer LLP, of Washington, D.C., for consolidated plaintiff NEXTEEL Co., Ltd.

L. Misha Preheim, Assistant Director, and Robert R. Kiepura, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. Also on the brief were Brian M. Boynton, Acting Assistant Attorney General, and Jeanne E. Davidson, Director. Of Counsel on the brief was Reza Karamloo, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Gregory J. Spak, Frank J. Schweitzer, Kristina Zissis, and Matthew W. Solomon, White & Case LLP, of Washington, D.C., for defendant-intervenors Maverick Tube Corporation and IPSCO Tubulars Inc.

OPINION

Kelly, Judge:

Before the court is the U.S. Department of Commerce’s (“Commerce”) second remand redetermination in the 2016–17 administrative review of the antidumping duty (“ADD”) order on welded line pipe (“WLP”) from the Republic of Korea (“Korea”) filed pursuant to the court’s order in *Husteel Co. v. United States*, 45 CIT __, 520 F. Supp. 3d 1296 (2021) (“*Husteel II*”). See Final Results of Redetermination Pursuant to Ct. Remand, Sept. 2, 2021, ECF No. 113 (“*Second Remand Results*”). In *Husteel II*, the court remanded for a second time Commerce’s determination to calculate consolidated plaintiff NEXTEEL Co., Ltd.’s (“NEXTEEL”) “costs of non-prime products based on their resale value and [then] reallocate[] the difference between the resale value and the actual costs of producing non-prime products to the costs of prime products” in calculating NEXTEEL’s constructed value. *Husteel II*, 45 CIT at __, 520 F. Supp. 3d at 1309; see also *Husteel Co. v. United States*, 44 CIT __, __, 471 F. Supp. 3d 1349, 1366–67 (2020) (“*Husteel I*”); [WLP] from [Korea], 84 Fed. Reg. 27,762 (Dep’t Commerce June 14, 2019) (final results of [ADD] admin. review and final determination of no shipments; 2016–17) (“*Final Results*”) as amended by 84 Fed. Reg. 35,371 (Dep’t Commerce July 23, 2019) (amended final results of [ADD] admin. review; 2016–17) (“*Amended Final Results*”) and accompanying Issues and Decision Memo., A-580–876, (June 7, 2019), ECF No. 36–5 (“*Final Decision Memo*”); Final Results of Redetermination Pursuant to Ct. Remand, Jan. 8, 2021, ECF No. 84 (“*First Remand Results*”), as amended by, Corrected Final Results of Redetermination Pursuant to Ct. Remand, Jan. 22, 2021, ECF No. 88 (“*Amended First Remand Results*”).¹

In its *Second Remand Results*, Commerce uses the actual costs for NEXTEEL’s non-prime products as reflected in NEXTEEL’s accounting to calculate NEXTEEL’s constructed value. *Second Remand Results* at 2. Defendant-intervenors Maverick Tube Corporation and IPSCO Tubulars Inc. (collectively, “Tenaris USA”) oppose the *Second Remand Results*, arguing that Commerce should have continued to adjust NEXTEEL’s reported costs for non-prime products based on

¹ In the *Amended First Remand Results*, Commerce corrected an error in its calculation of NEXTEEL’s constructed value profit margin and selling expenses; however, the *Amended First Remand Results* did not change the analysis or methodology set forth in the *First Remand Results*. *Amended First Remand Results*.

their resale value, and that Commerce failed to explain or justify its reliance on NEXTEEL's reported costs. Cmts. of Def.-Intrnvrs [Tenaris USA] on Commerce's [*Second Remand Results*], 3–4, Oct. 4, 2021, ECF No. 116 (“Tenaris Br.”). Defendant United States and NEXTEEL filed briefs in support of the *Second Remand Results*. See Def.'s Resp. to Cmts. on [*Second Remand Results*], 4–6, Nov. 3, 2021, ECF No. 120 (“Def. Br.”); [NEXTEEL's] Cmts. on [*Second Remand Results*], 1, Nov. 3, 2021, ECF 121 (“Pl. Br.”). No other party submitted comments on the *Second Remand Results*. For the following reasons, the court sustains Commerce's *Second Remand Results*.

BACKGROUND

The court presumes familiarity with the facts of this case as set out in its previous opinions ordering remands to Commerce, and now recounts only those facts relevant to the court's review of the *Second Remand Results*. See *Husteel I*, 44 CIT at __, 471 F. Supp. 3d at 1356–59; *Husteel II*, 45 CIT at __, 520 F. Supp. 3d at 1300–04.

On June 14, 2019, Commerce issued its *Final Results*² in which it, inter alia, adjusted NEXTEEL's costs for non-prime products based on the non-prime products' estimated sale price because NEXTEEL reported that it was unable to sell non-prime products for use in the same applications or for the same prices as prime products. See Final Decision Memo at 42–43. In *Husteel I*, the court remanded Commerce's determination to adjust NEXTEEL's non-prime costs for further explanation of Commerce's practice and how the adjustment of NEXTEEL's costs accorded with that practice. *Husteel I*, 44 CIT at __, 471 F. Supp. 3d at 1367. Specifically, the court determined that Commerce failed to sufficiently explain whether NEXTEEL's non-prime product was still in scope and that Commerce failed to consider how costs incurred for the production and sale of non-prime products were reported in NEXTEEL's books and records. *Id.* In its *First Remand Results*, Commerce continued to adjust NEXTEEL's non-prime costs based on the non-prime products' sale value and apply the difference to NEXTEEL's prime products. *First Remand Results* at 9–13, 33–36.

In *Husteel II*, the court remanded Commerce's decision in the *First Remand Results* to continue adjusting NEXTEEL's non-prime costs based on the non-prime products' sale value and to apply the difference to the cost of NEXTEEL's prime products. *Husteel II*, 45 CIT at __, 520 F. Supp. 3d at 1308–09. The court held that although Com-

² In the *Amended Final Results*, Commerce corrected two ministerial errors in the *Final Results* that are not relevant to this decision. See *Amended Final Results*, 84 Fed. Reg. at 35,371.

merce had sufficiently explained how its methodology was applied to NEXTEEL's non-prime costs, Commerce failed to explain how that methodology comported with the U.S. Court of Appeals for the Federal Circuit's ("Court of Appeals") decision in *Dillinger France S.A. v. United States*, 981 F.3d 1318 (Fed. Cir. 2020). *Id.* Specifically, in *Husteel II*, the court characterized *Dillinger* as requiring "that Commerce must calculate constructed value based on the actual costs incurred in the production of prime and non-prime products." *Id.* at 1309; *see also Dillinger*, 981 F.3d at 1321–24. Thus, Commerce needed to explain how adjusting non-prime costs based on the estimated sale value reasonably reflected NEXTEEL's actual costs.

On remand from *Husteel II*, Commerce now revises its calculation of NEXTEEL's constructed value to use NEXTEEL's actual costs for non-prime product as reflected in NEXTEEL's books and records. *Second Remand Results* at 5. Tenaris USA is the only party that objects to the *Second Remand Results*. *See* Tenaris Br.; Pl. Br.; Def. Br. Tenaris USA argues that Commerce's methodology as set forth in the *First Remand Results* fully comported with *Dillinger* and, on remand, Commerce only needed to provide an explanation of how the methodology complied with the statutory requirements as interpreted by the Court of Appeals. Tenaris Br. at 5–8. Tenaris USA further argues that Commerce's determination in the *Second Remand Results* to rely on NEXTEEL's actual costs for non-prime products as reflected in NEXTEEL's books and records was inconsistent with *Dillinger* because NEXTEEL's reported costs allegedly "d[o] not 'reasonably reflect' the costs of production and sale of the merchandise," and *Dillinger* does not require Commerce to "automatically" use a respondent's reported costs in such circumstances. *Id.* at 9. Finally, Tenaris USA asserts that Commerce's decision is not supported by record evidence. *Id.* at 10. NEXTEEL contends that Commerce's *Second Remand Results* comply with *Husteel II* and *Dillinger* in that Commerce uses NEXTEEL's actual costs of production for non-prime products, which *Dillinger* requires. Pl. Br. at 1–2. NEXTEEL further argues that Tenaris USA misinterprets the import of *Dillinger*, which NEXTEEL asserts held that Commerce must use actual costs for non-prime products. *Id.* at 2–3. NEXTEEL also argues that Tenaris USA improperly seeks a further review of the *Final Results* and the *First Remand Results* as opposed to a review of the *Second Remand Results*. *Id.* at 3–4. Defendant asserts that Commerce's *Second Remand Results* are consistent with *Husteel II* and *Dillinger* and should be sustained because Commerce used NEXTEEL's actual costs for non-prime products, as it was required to. Def. Br. at 4–6. For the

following reasons, the court sustains Commerce's *Second Remand Results*.

JURISDICTION AND STANDARD OF REVIEW

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

DISCUSSION

Commerce's decision to rely on NEXTEEL's actual costs for non-prime product as reflected in NEXTEEL's books and records is supported by substantial evidence and in accordance with law. As set forth in *Husteel II*, the Court of Appeals interpreted 19 U.S.C. § 1677b(f)(1)(A) to require Commerce to use actual costs for non-prime products when calculating constructed value. *Husteel II*, 45 CIT at __, 520 F. Supp. 3d at 1308–09; *see also Dillinger*, 981 F.3d at 1321–24. If Commerce decides not to rely on the costs reported in a respondent's books and records, Commerce must explain why those reported costs do not reasonably reflect the respondent's actual costs. *See Dillinger*, 981 F.3d at 1324. On remand, Commerce found that NEXTEEL's books and records reflected NEXTEEL's actual costs for non-prime products. *Second Remand Results* at 5. In reaching this conclusion, Commerce notes that "NEXTEEL does not separately classify prime and non-prime products, nor does it value these products differently for inventory purposes, but rather assigns them full cost." *Id.* (footnotes omitted). Therefore, Commerce's decision to use those costs in its calculation of NEXTEEL's constructed value comports with *Dillinger*. *See Dillinger*, 981 F.3d at 1324.

Section 1677b of Title 19 of the U.S. Code provides the framework that Commerce must follow when calculating constructed value in an antidumping investigation or review. 19 U.S.C. § 1677b(e)–(f). The statute provides that constructed value shall be calculated by adding three categories of costs and expenses: (i) the cost of materials and fabrication or other processing; (ii) selling, general, and administra-

tive expenses and profits; and (iii) the cost of containers, coverings, and other expenses incurred to prepare the merchandise for shipment. *Id.* § 1677b(e). The statute further provides that

Costs shall normally be calculated 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 [“GAAP”] of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.

Id. § 1677b(f)(1)(A). The Court of Appeals stated that “Section 1677b(f)(1)(A) thus requires that reported costs must normally be used only if (1) they are based on the records . . . kept in accordance with the GAAP and (2) reasonably reflect the costs of producing and selling the merchandise.” *Dillinger*, 981 F.3d at 1321 (quoting *Thai Plastic Bags Indus. Co. v. United States*, 746 F.3d 1358, 1365 (Fed. Cir. 2014)) (internal quotation marks and bracketing omitted) (emphasis in original).

In *Dillinger*, the Court of Appeals held that Commerce’s calculation must reasonably reflect a respondent’s actual costs, whether or not the respondent’s books and records reasonably reflect such costs. 981 F.3d at 1321–23. Specifically, the *Dillinger* court held that Commerce was not permitted to use a respondent’s costs as reflected in its books and records because those reported costs did not reasonably reflect the respondent’s actual costs, even though the respondent kept its books and records in accordance with GAAP. *Id.* at 1324. The producer in *Dillinger* reported its costs for non-prime products based on their sales value; however, the parties did not dispute that the cost to bring non-prime products to market was the same as the cost to bring prime products to market, despite the lesser sales value for non-prime products. *Id.* at 1321. Therefore, the Court of Appeals held that Commerce was not permitted to rely on those books and records. *Id.* at 1324.

The Court of Appeals’ explanation of Commerce’s obligations when calculating costs to be used in constructed value applies here. Although the respondent in *Dillinger* reported in its books and records adjusted costs of non-prime products based on their likely sale value, while NEXTEEL reported the actual costs of non-prime products in its books and records, the principle that Commerce must rely on actual costs remains the same. *See Dillinger*, 981 F.3d at 1321; *Second Remand Results* at 5. In the *Final Results* and the *First Remand Results*, Commerce adjusted NEXTEEL’s reported costs for non-prime products based on the estimated sale value of such products, which is the same type of adjustment to actual costs that the Court of

Appeals found to be unlawful in *Dillinger*. Final Decision Memo at 42–43; *First Remand Results* at 9–13, 33–36; *Dillinger*, 981 F.3d at 1324.

As the Court of Appeals stated in *Dillinger* and *Thai Plastic Bags*, Commerce will “normally” use a respondent’s books and records only if two conditions are met: First, the books and records are kept in accordance with GAAP in the exporting or producing country; and second, that the books and records reasonably reflect the actual costs of producing and selling the merchandise. *Dillinger*, 981 F.3d at 1321; *Thai Plastic Bags*, 746 F.3d at 1365. In *Dillinger*, the Court of Appeals held that the respondent’s books and records failed to meet the second condition as they did not reasonably reflect the actual costs of producing and selling non-prime products. *Dillinger*, 981 F.3d at 1321. Here, on the other hand, Commerce concludes that NEXTEEL’s books and records meet both conditions, as they are kept in accordance with GAAP in Korea,³ and they reasonably reflect NEXTEEL’s actual costs of producing and selling non-prime products. *Second Remand Results* at 5. Therefore, Commerce’s decision to rely on NEXTEEL’s reported costs in its books and records in the *Second Remand Results* is in accordance with law.⁴

Moreover, Commerce’s determination to rely on the costs reported in NEXTEEL’s books and records is supported by substantial evidence. As discussed, Commerce normally relies on a respondent’s books and records on the conditions that (i) the books and records are kept in accordance with GAAP in the exporting or producing country; and (ii) the books and records reasonably reflect the respondent’s actual costs in producing and selling the merchandise. *See* 19 U.S.C. § 1677b(f)(1)(A); *Dillinger*. 981 F.3d at 1321–24. Commerce’s determinations that the costs reported in NEXTEEL’s books and records meet those conditions are supported by substantial evidence.

First, Commerce’s determination that NEXTEEL’s books and records were kept in accordance with GAAP in Korea is supported by

³ It is reasonably discernible from Commerce’s discussion of NEXTEEL’s accounting practices that Commerce determined that NEXTEEL’s books and records were kept in accordance with GAAP in Korea, and no party contends that NEXTEEL’s books and records are not kept in accordance with GAAP in Korea. *See Second Remand Results* at 5; Pl. Br.; Def. Br.; Tenaris Br.; *see also First Remand Results* at 8–10.

⁴ Tenaris USA argues that in the *Final Results* and the *First Remand Results* Commerce correctly adjusted the costs reported in NEXTEEL’s books and records to reflect the sale value of non-prime product. Tenaris Br. at 9. However, Commerce is required to use actual costs, regardless of the price at which the merchandise ultimately sells. *See* 19 U.S.C. § 1677b(f)(1)(A); *Dillinger*. 981 F.3d at 1321–24. Tenaris USA fails to explain how the sales price better reflects NEXTEEL’s actual costs in producing and selling non-prime products than the reported costs in NEXTEEL’s books and records, or, more importantly, why it is unreasonable for Commerce to rely on NEXTEEL’s reported costs.

substantial evidence because NEXTEEL reported that it maintains its books and records in accordance with GAAP in Korea and provided documentation in support of that claim. *See* Verification of the Cost Response of [NEXTEEL] in the [ADD] Admin. Review of [WLP] from [Korea], 4 and CVE-3 at 1–4, Dec. 11, 2018, PD 260, CD 316, Bar Codes 3782740–01, 3782739 01 (“Cost Verification Memo”).⁵ Tenaris USA does not argue or point to any evidence that NEXTEEL’s books and records are not kept in accordance with GAAP in Korea. Therefore, Commerce reasonably concluded based on record evidence that NEXTEEL’s books and records are kept in accordance with GAAP in Korea. *See Second Remand Results* at 5; Cost Verification Memo at 4, CVE-3 at 1–4.

Second, Commerce’s conclusion that NEXTEEL’s books and records reasonably reflect NEXTEEL’s actual costs is supported by substantial evidence. Commerce determined that “NEXTEEL does not separately classify prime and non-prime products, nor does it value these products differently for inventory purposes, but rather assigns them full cost.” *Second Remand Results* at 5 (citing NEXTEEL’s First Supplemental Section D Questionnaire Resp., 6, July 3, 2018, PD 119, CD 114, Bar Codes 3726679–01, 3726646–01 (“Supp. Section D Resp.”), and Cost Verification Memo at 2). Commerce concluded that “NEXTEEL’s reported costs reflect the actual costs of producing its non-prime products.” *Id.*

Tenaris USA argues that Commerce does not rely on any record evidence in support of its determination that NEXTEEL’s books and records reasonably reflect its actual costs, *see* Tenaris Br. at 10; however, that argument is incorrect. Commerce relies on NEXTEEL’s Supplemental Section D Response and the Cost Verification Memo, each of which include exhibits with NEXTEEL’s accounting of its costs for both non-prime and prime products. *See Second Remand Results* at 5; Supp. Section D Resp. at 6, Ex. SD-11-A; Cost Verification Memo at 2, 4, and CVE-3 at 1–4. Commerce analyzes the record evidence that demonstrates that NEXTEEL assigns prime and non-prime products “full cost,” and concludes that by assigning non-prime products their full cost, NEXTEEL’s books and records reasonably reflect its actual costs in producing and selling non-prime products. *Second Remand Results* at 5. Other than incorrectly arguing that Commerce does not rely on any record evidence in support of its

⁵ On August 22, 2019, Defendant filed indices to the public and confidential administrative records underlying Commerce’s *Final Results*, on the docket, at ECF Nos. 36–1–2. Citations to administrative record documents in this opinion are to the numbers Commerce assigned to such documents in the indices. All references in this opinion to documents from the administrative record are preceded by “PD” or “CD” to denote public or confidential documents.

conclusion, Tenaris USA does not make any other argument or point to any record evidence to demonstrate that the “full cost” reported in NEXTEEL’s books and records does not reasonably reflect “actual cost” as required by the statute.

Indeed, Tenaris USA contends that Commerce should have stood by Commerce’s original determination that “assigning full costs to [non-prime] products does not reasonably reflect the costs associated with the production and sale of the merchandise.” Tenaris Br. at 7 (quoting Final Decision Memo at 43). Tenaris USA relies on Commerce’s explanation in the *Final Results* and the *First Remand Results* that NEXTEEL could not sell non-prime products for a price high enough to recover the cost of producing and selling the products. *Id.* at 6 (citing Final Decision Memo at 42 and *First Remand Results* at 10). Nonetheless, neither Commerce in its Final Decision Memo or *First Remand Results* nor Tenaris USA explain the relevance of the sales price to Commerce’s obligation to use the actual costs of production and sales. *See* Final Decision Memo at 42–43; *First Remand Results* at 9–13; Tenaris Br. at 6–7; *see also* 19 U.S.C. § 1677b(f)(1)(A). Moreover, even if Commerce had offered some explanation for using the sales value to reduce NEXTEEL’s actual costs, the issue before the court is whether Commerce’s determination in the *Second Remand Results* to use NEXTEEL’s reported costs, not Commerce’s prior determination, is in accordance with law and supported by substantial evidence. Tenaris USA’s arguments regarding the reasonableness of Commerce’s prior determinations are not relevant, and, in any event, insufficient. Commerce’s determination that NEXTEEL’s full costs of production and sale of non-prime products as reflected in NEXTEEL’s books and records is supported by substantial evidence.

CONCLUSION

For the foregoing reasons, Commerce’s *Second Remand Results* are sustained. Judgment for Defendant will enter accordingly.

Dated: January 3, 2022

New York, New York

/s/ Claire R. Kelly

CLAIRE R. KELLY, JUDGE

Slip Op. 22–02

COMMUNICATIONS WORKERS OF AMERICA LOCAL 4123, on behalf of FORMER EMPLOYEES OF AT&T SERVICES, INC., Plaintiff, v. U.S. SECRETARY OF LABOR, Defendant.

Before: M. Miller Baker, Judge
Court No. 20-00075

[Remanding to the Department of Labor due to noncompliance with the initial remand order.]

Dated: January 5, 2022

Bernd G. Janzen, Devin S. Sikes, and Tebsy Paul, Akin Gump Strauss Hauer & Feld LLP of Washington, DC, on the brief for Plaintiff.

Brian M. Boynton, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director; and *Ashley Akers*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, on the brief for Defendant. Of counsel on the brief was *Tecla A. Murphy*, Attorney Advisor, Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor of Washington, DC.

OPINION

Baker, Judge:

This matter has returned to the court following a remand necessitated by the Department of Labor’s twin failures to address certain evidence submitted by the union and to explain why it relied on noncertified evidence from the union members’ former employer, AT&T. *See generally Comm’cns Workers of Am. Local 4123 ex rel. Former Emps. of AT&T Servs., Inc. v. U.S. Sec’y of Labor*, Ct. No. 20–00075, Slip Op. 21–53 (CIT May 4, 2021). Regrettably, the court must remand a second time because Labor again fails to explain why it has a reasonable basis to rely on noncertified information from AT&T.

Background

The genesis of this case is explained in Slip Opinion 21–53, *above*. In brief, a union challenged the Labor Department’s denial of trade adjustment assistance benefits to former AT&T call center workers, alleging that AT&T laid off the workers to send their jobs to call centers located abroad. The court agreed with the union “that Labor’s summary denial of benefits [was] not supported by substantial evidence, and remand[ed] for further proceedings . . .” *Id.* at 2.

The court found that Labor had failed to acknowledge, or even discuss, the evidence the union submitted in support of its petition, and further failed to explain why the certifying officer credited

AT&T's explanations over the union's evidence. *Id.* at 19. The court explained that the union's evidence, "fairly read, at least allows for an inference that the closure of the call centers in question will result in the offshoring of job functions previously performed in those facilities." *Id.* at 21. That inference, in turn, could detract from Labor's conclusion, so the court remanded, with the intention that the Department would address the union's evidence and weigh it against AT&T's evidence, in order to determine whether the relevant job losses were caused by a shift in services to, or an acquisition of those services from, foreign countries—as described in 19 U.S.C. § 2272(a)(2). ECF 31, at 1.

Additionally, in its prior decision, the court faulted Labor for failing to identify which evidence produced by AT&T persuaded the certifying officer that AT&T had it right. Labor's initial ruling simply stated, "AT&T officials have confirmed the work remained in the United States." *Id.* at 18 (quoting AR160).¹ The court explained why such a general finding was problematic:

While the Court can reasonably discern that [the certifying officer] found AT&T's evidence convincing, that fact alone is not enough because portions of AT&T's evidence (its questionnaire responses) were certified pursuant to 19 U.S.C. § 2272(d)(3)(A)(i) while other portions (the e-mail exchanges between AT&T's in-house counsel and Labor's investigator) were not. . . . [T]he upshot is that the Court is unable to determine whether, or to what extent, the certifying officer relied upon AT&T's noncertified evidence. The Court must remand so that Labor can do so

Id. at 18–19.² Accordingly, the court directed the Department to explain—insofar as it relied on noncertified evidence—why it "has a reasonable basis for determining that such information is accurate and complete without being certified," 19 U.S.C. § 2272(d)(3)(A)(ii), or else require AT&T to certify its evidence. ECF 31, at 1–2.

Finally, the court directed Labor—if it found the union's evidence to be convincing—to "address whether the shift to, or acquisition from, foreign countries 'contributed importantly' " to the job losses, as described in 19 U.S.C. § 2272(a)(2)(B)(ii), ECF 31, at 2.

¹ Citations to "AR" refer to the public version of the administrative record, ECF 15.

² After issuing its initial determination, Labor granted reconsideration, and then reached the same result in its "reconsideration determination." The court found that determination flawed for the same reasons as the Department's original determination. *Id.* at 28.

Labor's Remand Determination

Labor's remand determination (ECF 37) states that in response to the court's remand order, the Department reviewed the union's jobs report provided during the original investigation, "additional allegations provided by the petitioner during the reconsideration investigation," and other information provided by AT&T officials. *Id.* at 13 (citing AR114 as to the quoted material).

Labor's decision explains that the jobs report refers to nationwide job losses suffered by AT&T employees, "presents a general assertion that AT&T work has been and continues to be moved to non-U.S. locations," and "implies that the firm[s] decisions to route calls to third-party call centers outside the U.S. may lead to reduced call volume for U.S. call centers." *Id.* at 13–14 (emphasis added). As to the "additional allegations," the decision notes that they implied that workers in Jamaica "were performing the same type of call center work as workers at AT&T's Appleton, Wisconsin, office." *Id.* at 14 (citing AR114).

The reconsideration determination finds that "[t]he general allegations in the AT&T 2018 Jobs Report submitted by petitioner were countered by specific information supplied by AT&T that did not reveal a basis for finding the job report allegations applied to any of the five center investigations." *Id.* (emphasis added) (citing AR121–28, AR295–97, AR336–37). Likewise, AT&T explained that the workers in Jamaica were not performing the same sort of work as the Wisconsin call center workers "and provided additional information addressing the differences in types of calls handled by the call centers." *Id.* (citing AR122–24, AR336–37).

The remand determination therefore concludes:

The general allegations in the jobs report submitted by petitioner did not include specific evidence or make specific claims that the work of the locations in question moved to or was acquired from a foreign country, and were countered by the specific responses of AT&T's representatives, which did not support a basis for finding a shift of the work of any of the five call centers to another country or the acquisition of such services from another country.

Id. at 14–15 (emphasis added).

Turning to the second issue the court directed it to address, Labor's decision states that the Department found the information provided by AT&T "to be accurate and complete" for two reasons: (1) AT&T was "in the best position to provide accurate, complete, and current information regarding its own operations and business decisions," *id.* at 15; and (2) "the responding officials each had access to the firm's

records and to other officials with direct knowledge of the firm's operations and business decisions, including information about the circumstances of worker separations that the petitioner does not have." *Id.*

Labor then addresses whether AT&T's responses needed to be certified:

[A]t the onset of the investigation process, the firm's responding official is formally notified of the statutory requirement to submit all information requested by the Department for official purposes and in submitting the [questionnaire] has affirmed, under penalty of law, knowledge of the statutory requirement and the veracity of the [questionnaire] responses provided to the Department. *The statutory requirement to provide complete and accurate information subject to penalty of law applies to all responses to the Department's investigations.*

Id. at 16 (emphasis added) (citing, after the final sentence, AR11–13, AR26–27, AR49–50, AR59–60, and AR90).

Labor also states that AT&T's officials were "aware of the role they played" because at the beginning of the process, the Department's communications stated that "only knowledgeable as well as appropriate individuals should address the request for information" and that the officials should notify the Department promptly if someone else were a more appropriate contact person. *Id.* (citing AR12–13, AR26–27, AR39–40, AR49–50, AR59–60, and AR83–84). Therefore, "[t]he letter notification, the completion of the Affirmation of Information section within the Business Data Request forms, and concurrent and subsequent email correspondences with AT&T's representatives confirmed the accuracy and credibility of the information provided by the employer (AT&T)." *Id.* at 16–17.

The remand determination then affirms Labor's prior finding that the union's members were not eligible for trade adjustment assistance and therefore concludes that it was unnecessary to address whether off-shoring of jobs "contributed importantly" to their separation. *Id.* at 17–18.

After Labor filed the remand determination (ECF 39), the union (ECF 40) and the government (ECF 41) filed comments.

Standard of Review

The standard of review remains the same as it was in the previous proceeding before this court and is prescribed by 19 U.S.C. § 2395(b), which provides that "[t]he findings of fact by the Secretary of Labor, . . . if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to such Secretary

to take further evidence, and such Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings.”

“Substantial evidence is more than a scintilla[] and must do more than create a suspicion of the existence of the fact to be established. A reviewing court must consider the record as a whole, including that which fairly detracts from its weight, to determine whether there exists such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (cleaned up).

Labor’s decision is also subject to the default standard of the Administrative Procedure Act, which allows a reviewing court to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); see also *Former Emps. of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1362 (Fed. Cir. 2003) (stating, in trade adjustment case, that “[t]he Court of International Trade also has the authority under the Administrative Procedure Act to set aside the decision as contrary to law or arbitrary and capricious”).

Discussion

Labor’s remand determination addresses the union’s evidence but fails to adequately address the question of why AT&T’s evidence was satisfactory without statutory certification. As a result, the court remands again regarding this second issue.

I.

In finding that Labor’s original determinations³ did not address the union’s evidence, the court explained that while it could reasonably be discerned that the certifying officer found AT&T’s evidence convincing, the problem was that “Labor’s negative determination simply did not acknowledge, much less discuss, the union’s evidence, which . . . consisted of a job report and certain anecdotal examples of offshoring of work,” nor did Labor’s determinations explain the reason “why the certifying officer chose AT&T’s explanation over the union’s evidence.” Slip Op. 21–53, at 19.

Labor’s remand determination remedies this deficiency. It explains that the certifying officer reviewed the union’s jobs report and anecdotal examples of off-shoring and the material provided by AT&T. ECF 37, at 13. The remand determination characterizes the jobs

³ The term “Labor’s original determinations” refers collectively to the Department’s initial denial of benefits for the union’s members, AR154 *et seq.*, and subsequent reaffirmation of that determination on reconsideration, AR382 *et seq.*

report as presenting “general assertions” about offshoring of work and states that the report “implies” that offshoring “may lead to reduced call volume” for domestic call centers. *Id.* at 13–14. It also notes, “The general allegations in the jobs report submitted by petitioner did not include specific evidence or make specific claims that the work of the locations in question moved to or was acquired from a foreign country” *Id.* at 14–15 (emphasis added).

The remand determination also explains that AT&T provided “specific information” in response to the union’s submission, that the company’s information “did not reveal a basis for finding the job report allegations applied to any of the five center investigations,” and that the workers in Jamaica discussed in the anecdotal evidence were not performing the same sort of tasks as the workers in Wisconsin. *Id.* at 14–15.

For these reasons, Labor’s remand determination complies with the court’s remand order because it addresses the jobs report and explains why the certifying officer concluded that its implications, which were based on very general allegations, were rebutted by more specific evidence provided by AT&T. The court therefore concludes that Labor’s determination is now sufficiently supported by substantial evidence.

II.

The second issue on which the court remanded was Labor’s reliance on unverified statements from AT&T officials. The statute provides:

The Secretary shall require a firm or customer to certify—

(i) all information obtained under paragraph (1) from the firm or customer (as the case may be) through questionnaires; and

(ii) all other information obtained under paragraph (1) from the firm or customer (as the case may be) on which the Secretary relies in making a determination under section 2273 of this title, *unless the Secretary has a reasonable basis for determining that such information is accurate and complete without being certified.*

19 U.S.C. § 2272(d)(3)(A) (emphasis added).⁴

⁴ The references to “paragraph (1)” refer to 19 U.S.C. § 2272(d)(1), which reads, “The Secretary shall, in determining whether to certify a group of workers under section 2273 of this title, obtain from the workers’ firm, or a customer of the workers’ firm, information the Secretary determines to be necessary to make the certification, through questionnaires and in such other manner as the Secretary deems appropriate.”

The court explained that this provision requires Labor to mandate certification of all questionnaire responses and that, as to other information “obtained . . . from the firm” on which it “relies,” “the Department must require certification *unless* Labor has ‘a reasonable basis for determining that such information is accurate and complete without being certified.’ ” Slip Op. 21–53, at 24–25 (emphasis in original) (quoting 19 U.S.C. § 2272(d)(3)(A)(ii)). “The Court interprets this [second obligation] as requiring Labor—when it relies upon non-certified information—to expressly find that it has a reasonable basis for determining the accuracy and completeness of such information and to explain the basis for that finding.” *Id.* at 26–27.

The court further explained that Labor did not address what portion(s) of AT&T’s evidence the certifying officer found convincing, so the court was “unable to determine whether she relied on the certified questionnaire responses, the noncertified e-mail correspondence with AT&T’s in-house counsel, or some combination of both,” *id.* at 27, and, insofar as the decision relied on any noncertified information, it did not address “whether she had a reasonable basis for determining that the information was accurate and complete without being certified,” *id.*

A.

Labor’s remand determination still does not state whether the certifying officer relied on the questionnaire responses, the noncertified e-mail communications, or both. The decision does cite various administrative record pages. *See* ECF 37, at 14 (citing AR121–28); at 15 (citing AR121–28, AR295–97, AR336–37 (twice), and AR122–24); at 17 (citing AR53, AR63, AR73, AR92, AR106, AR250–61, AR266–67, AR272–73, AR295–97, AR300–03, AR307–11, AR325, AR341–42, AR349–50, AR54, AR64, AR72, AR94, AR108, and AR372). The court has reviewed these administrative record materials. AT&T’s questionnaire responses, all of which were certified as required by the statute, appear at pages AR51–57, AR61–67, AR70–76, AR90–98, and AR104–112. The other citations all refer to non-certified e-mail communications.

Page 17 of the remand determination contains string citations that include both questionnaire responses and noncertified e-mail communications. The court therefore concludes that the certifying officer relied on both types of material. But as with the original and reconsideration determinations, Labor’s remand determination does not reveal to what extent the certifying officer relied on the certified questionnaire responses or the noncertified e-mail communications. Thus, the court still cannot discern whether the certifying officer

believed the questionnaire responses alone would have been enough and the noncertified e-mail communications simply provided additional corroborating evidence—or whether, instead, the certifying officer regarded the e-mail communications as essential to her analysis. The court therefore must remand again, unless the remand determination complies with 19 U.S.C. § 2272(d)(3)(A)(ii)’s requirement that Labor—to the extent that it relies on uncertified information—provide a “reasonable basis for determining that such information is accurate and complete without being certified.”

B.

The remand determination does not show that Labor required AT&T to certify the e-mail communications as part of the remand proceedings, and the government did not file a supplemental administrative record with the court reflecting any such certification. The remand determination does, however, discuss why the certifying officer considered AT&T’s submissions accurate and complete, so the question for the court is whether that discussion complies with the statute.

1.

The remand determination observes as follows:

The written statements provided to the Department by AT&T’s Assistant Vice President, Senior Legal Counsels in the course of the reconsideration investigation about AT&T’s own business operations were determined by the Department to be accurate and complete based upon the following: the firm is in the best position to provide accurate, complete, and current information regarding its own operations and business decisions, and the responding officials each had access to the firm’s records and to other officials with direct knowledge of the firm’s operations and business decisions, including information about the circumstances of worker separations that the petitioner does not have.

ECF 37, at 15.

The problem with this finding is that, while it does constitute a finding that the information was “accurate and complete,” it does not provide a reasonable basis for reaching that conclusion. Of course AT&T’s personnel are in the best position to know about their company’s operations and business decisions and have the best access to records. But mere knowledge is not itself a reason to presume that the

response is truthful, which is presumably why Congress chose to impose the certification requirement in the first place.⁵

The remand determination further states that “[t]he statutory requirement to provide complete and accurate information subject to penalty of law applies to all responses to the Department’s investigations.” *Id.* (citing AR11–13, AR26–27, AR49–50, AR59–60, and AR90). The decision cites no statute or regulation in support of this proposition, however, and the cited record pages do not support the assertion.⁶

2.

The government’s comments in support of the remand determination invoke 19 U.S.C. § 2316(2). The government contends that the union’s argument that “the terms of the certifications on the [questionnaire] refer specifically to [‘]the information . . . on this form,’” ECF 41, at 17 (citing ECF 40, at 13–14), fails because

Plaintiffs misconstrue both the remand results and the legal penalty. The legal penalty applies to “Any person who . . . makes a false statement of a material fact knowing it to be false, or knowingly fails to disclose a material fact, when providing information . . . during an investigation of a [TAA petition].” The penalty for false statements applies regardless of whether the information is provided with or without a certification.

ECF 41, at 17–18 (citation omitted; alterations in original) (quoting 19 U.S.C. § 2316(2)).⁷

The court finds three problems with this argument. To begin with, Labor’s remand results do not cite that statute anywhere. Labor

⁵ The remand determination also notes that the questionnaires must be certified “under penalty of law.” *Id.* at 16. That statement is irrelevant for purposes of the reliability of noncertified e-mail communications.

⁶ The first four citations all refer to the same boilerplate letter Labor sends to firms as part of the initiation of trade adjustment assistance investigations, and the letter says nothing about the obligation to “provide complete and accurate information subject to penalty of law,” much less any ongoing obligation throughout the investigation. Rather, the letter explains the importance of the questionnaires, asks the recipient to “preview” the questionnaire form on the Department’s website, advises that Labor personnel will contact the recipient and will forward the actual form, and emphasizes the need for a timely response to avoid the need for a subpoena. *See, e.g.*, AR12–13. The final cited page, AR90, advises the recipient how to respond. Like the initiation letter, that page also says nothing about an obligation to “provide complete and accurate information subject to penalty of law,” nor does it say anything at all about any such ongoing obligation—indeed, it is completely silent about later phases of the investigation.

⁷ The statute the government cites provides that “[a]ny person who— . . . (2) makes a false statement of a material fact knowing it to be false, or knowingly fails to disclose a material fact when providing information to the Secretary during an investigation of a petition under section 2271 of this title, shall be imprisoned for not more than one year, or fined under title 18, or both.” 19 U.S.C. § 2316(2).

simply states, *ipse dixit*, that “[t]he statutory requirement to provide complete and accurate information subject to penalty of law applies to all responses to the Department’s investigations” and then cites ten pages of the administrative record, rather than a statute. ECF 37, at 16 (citing AR11–13, 26–27, 49–50, 59–60, 90). Thus, the government’s invocation of 19 U.S.C. § 2316(2) is an after-the-fact explanation.

Second, if the court were to accept the government’s theory about § 2316(2)’s significance, it would effectively read § 2272(d)(3)(A) out of the statute. If it were sufficient for Labor simply to point to § 2316(2), then neither part of § 2272(d)(3)(A) would serve any purpose because (i) there would be no reason to require certification of the questionnaire responses because they would be presumptively reliable under § 2316(2) and (ii) for that same reason, there would never be any reason for the Department to require certification of any other information.

“If it is possible to give effect to both statutes, we must do so.” *PDS Consultants, Inc. v. United States*, 907 F.3d 1345, 1357 (Fed. Cir. 2018) (citing *Watt v. Alaska*, 451 U.S. 259, 267 (1981)). “If any interpretation of the statutory provisions at issue allows both statutes to remain operative, the court must adopt that interpretation absent a clear congressional directive to the contrary.” *Id.* Moreover, “[a] basic tenet of statutory construction is that a specific statute takes precedence over a more general one.” *Id.* at 1358 (quoting *Arzio v. Shinseki*, 602 F.3d 1343, 1347 (Fed. Cir. 2010)). These principles mean that § 2316(2) does not excuse Labor’s failure to comply with the certification requirement in § 2272.

Finally, the mere existence of a statutory obligation under § 2316(2) to give truthful responses is not enough of a reason, without more, to conclude that the respondent is aware of that obligation and the consequences for noncompliance. In contrast, Labor’s questionnaires contain an express admonition that knowingly providing false information violates two federal statutes (18 U.S.C. § 1001 and 19 U.S.C. § 2316), followed by a notice that by signing the form, the respondent agrees to a statement that he is certifying the information’s truth, accuracy, and completeness under “penalty of law.” *See, e.g.*, AR35 (blank questionnaire).

Thus, the court concludes that the remand determination’s unsupported assertion that “all responses to the Department’s investigations” must consist of “complete and accurate information subject to penalty of law” is insufficient as a matter of law to satisfy Labor’s obligation under § 2272(d)(3)(A)(ii).

3.

The remand determination concludes that the certification of the questionnaire responses “and concurrent and subsequent email correspondences with AT&T’s representatives confirmed the accuracy and credibility of the information provided by the employer (AT&T).” *Id.* at 16–17.

That conclusion is a non sequitur. Certification of questionnaire responses does not apply to noncertified information, as the statute imposes a separate obligation for such information. Finally, “concurrent and subsequent email correspondences with AT&T’s representatives” cannot “confirm[] the accuracy and credibility” of that same e-mail correspondence. Such a rationale is circular.⁸

* * *

The court therefore remands because Labor has disregarded 19 U.S.C. § 2272(d)(3)(A)(ii) and the court’s remand order. While Labor’s remand determination concludes that the information AT&T submitted was “accura[te] and credib[le],” ECF 37, at 17, the findings on which the Department bases that conclusion are not supported by substantial evidence in the administrative record and do not fairly meet the statute’s requirement.

On remand, if Labor relies on noncertified evidence, it must reasonably explain why it finds that noncertified evidence accurate and complete. To the extent that it relies on noncertified evidence but cannot state a reasonable basis for finding it accurate and complete, the Department must direct AT&T to certify the relevant evidence as described in 19 U.S.C. § 2272(d)(3)(A)(ii).

Conclusion

For the reasons provided above, the court remands this matter to Labor for further proceedings consistent with this opinion. A separate remand order will issue.

Dated: January 5, 2022

New York, NY

/s/ M. Miller Baker

M. MILLER BAKER, JUDGE

⁸ Labor also points to its notification letter to AT&T. But the portion of the “letter notification” the decision cites relates only to determining whom the Department should contact for matters relating to the investigation—it has nothing to do with certification of the accuracy of responses provided during the investigation.

Index

Customs Bulletin and Decisions
Vol. 56, No. 2, January 19, 2022

U.S. Customs and Border Protection

General Notices

	<i>Page</i>
Quarterly IRS Interest Rates Used in Calculating Interest on Overdue Accounts and Refunds on Customs Duties	1
Proposed Revocation of One Ruling Letters and Proposed Revocation of Treatment Relating to the Tariff Classification of a Solar Module from an Undisclosed Country of Origin	4
Modification of Two Ruling Letters and Revocation of Treatment Relating to Country of Origin Marking of Certain MIC Percutaneous Placement and Medical Kits	13
Proposed Revocation of Two Ruling Letters, Proposed Modification of One Ruling Letter, and Proposed Revocation of Treatment Relating to the Tariff Classification of Bandage Scissors	19

U.S. Court of International Trade

Slip Opinions

	<i>Slip Op. No.</i>	<i>Page</i>
Porsche Motorsport North America, Inc., Plaintiff, v. United States, Defendant.	21-176	35
Husteel Co., Ltd., Plaintiff, and NEXTEEL Co., Ltd. et al., Consolidated Plaintiffs, v. United States Defendant, and Maverick Tube Corporation et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.	22-01	55
Communications Workers of America Local 4123, on behalf of Former Employees of AT&T Services, Inc., Plaintiff, v. U.S. Secretary of Labor, Defendant.	22-02	64