

# U.S. Customs and Border Protection



## RECEIPT OF APPLICATION FOR “LEVER-RULE” PROTECTION

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

**ACTION:** Notice of receipt of application for “Lever-Rule” protection.

**SUMMARY:** Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from the Monster Energy Company seeking “Lever-Rule” protection for the federally registered and recorded “MONSTER ENERGY”, “M & DESIGN”, and “M DESIGN” trademarks.

**FOR FURTHER INFORMATION CONTACT:** Ann Segura, Intellectual Property Rights Branch, Regulations & Rulings, (202) 325-0031.

### SUPPLEMENTARY INFORMATION:

#### BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from the Monster Energy Company seeking “Lever-Rule” protection. Protection is sought against importations of Monster Energy 500ML beverages made in South Africa, intended for sale outside the United States, that bear the “MONSTER ENERGY” (U.S. Trademark Registration No. 3,044,315/CBP Recordation No. TMK 15-01223), “M & DESIGN” (U.S. Trademark Registration No. 3,434,822/CBP Recordation No. TMK 10-00656; and U.S. Trademark Registration No. 3,434,821/CBP Recordation No. TMK 15-01224) and “M DESIGN” (U.S. Trademark Registration No. 5,580,962/CBP Recordation No. TMK 19-00076) trademarks. In the event that CBP determines that these South African Monster Energy beverages under consideration are physically and materially different from the Monster Energy beverages intended for sale in the United States, CBP will publish a notice in the Customs Bulletin, pursuant 19 CFR 133.2 (f), indicating that the above-referenced trademarks are entitled to “Lever-Rule” protection with respect to those physically and materially different beverages.

Dated: August 25, 2021

ALAINA VAN HORN  
*Chief,*  
*Intellectual Property Enforcement Branch*  
*Regulations and Rulings,*  
*Office of International Trade*



**URUGUAY BEEF IMPORTS APPROVED FOR THE  
ELECTRONIC CERTIFICATION SYSTEM (eCERT)**

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

**ACTION:** General notice.

**SUMMARY:** This document announces that the export certification requirement for certain imports of beef from the Oriental Republic of Uruguay (Uruguay) subject to a tariff-rate quota will be accomplished through the Electronic Certification System (eCERT). All imports of beef from Uruguay that are subject to the tariff-rate quota must have a valid export certificate with a corresponding eCERT transmission at the time of entry, or withdrawal from warehouse, for consumption. The United States Government (USG) has approved the request from Uruguay to transition, from the way the USG currently receives export certificates from Uruguay, to eCERT as the method of transmission. The transition to eCERT will not change the tariff-rate quota filing process or requirements. Importers will continue to provide the export certificate numbers from Uruguay in the same manner as when currently filing entry summaries with U.S. Customs and Border Protection. The format of the export certificate numbers will remain the same for the corresponding eCERT transmissions.

**DATES:** The use of the eCERT process for certain Uruguayan beef importations subject to a tariff-rate quota will be effective for beef entered, or withdrawn from a warehouse, for consumption on or after August 30, 2021.

**FOR FURTHER INFORMATION CONTACT:** Julia Peterson, Chief, Quota and Agriculture Branch, Trade Policy and Programs, Office of Trade, (202) 384-8905, or [HQQUOTA@cbp.dhs.gov](mailto:HQQUOTA@cbp.dhs.gov).

**SUPPLEMENTARY INFORMATION:****Background**

There is an existing tariff-rate quota on certain beef from the Oriental Republic of Uruguay (Uruguay) pursuant to Additional U.S. Note 3 of Chapter 2 of the Harmonized Tariff Schedule of the United States (HTSUS). The tariff-rate quota for beef from Uruguay was established by section 6 of the Presidential Proclamation No. 6763 (December 23, 1994), as a result of the Uruguay Round Agreements, approved by Congress in section 101 of the Uruguay Round Agreements Act (19 U.S.C. 3511(a), Pub. L. 103-465, 108 Stat. 4814). Tariff-rate quotas permit a specified quantity of merchandise to be entered or withdrawn for consumption at a reduced duty rate during a specified period. Furthermore, section 2012.3 of title 15 of the Code of Federal Regulations (CFR) states that beef may only be entered as a product of an eligible country for a tariff-rate quota if the importer makes a declaration to U.S. Customs and Border Protection (CBP) that a valid export certificate is in effect with respect to the beef. In addition, the CBP regulations, at 19 CFR 132.15, set forth provisions relating to the requirement that an importer must possess a valid export certificate at the time of entry, or withdrawal from warehouse, for consumption, to claim the in-quota tariff rate of duty on entries of beef subject to the tariff-rate quota.

The Electronic Certification System (eCERT) is a system developed by CBP that uses electronic data transmissions of information normally associated with a required export document, such as a license or certificate, to facilitate the administration of quotas and ensure that the proper restraint levels are charged without being exceeded. Uruguay currently submits export certificates to CBP via email, and in the administration of the quota, CBP validates these certificates with the certificate numbers provided by importers on their entry summaries. Uruguay requested to participate in the eCERT process to comply with the United States' tariff-rate quota for beef exported from Uruguay for importation into the United States. CBP has coordinated with Uruguay to implement the eCERT process, and now Uruguay is ready to participate in this process by transmitting its export certificates to CBP via eCERT.

Foreign countries participating in eCERT transmit information via a global network service provider, which allows connectivity to CBP's automated electronic system for commercial trade processing, the Automated Commercial Environment (ACE). Specific data elements are transmitted to CBP by the importer of record (or an authorized customs broker) when filing an entry summary with CBP, and those

data elements must match eCERT data from the foreign country before an importer may claim any applicable in-quota tariff rate of duty. An importer may claim an in-quota tariff rate when merchandise is entered, or withdrawn from warehouse, for consumption, only if the information transmitted by the importer matches the information transmitted by the foreign government. If there is no transmission by the foreign government upon entry, an importer must claim the higher over-quota tariff rate.<sup>1</sup> An importer may subsequently claim the in-quota tariff rate under certain limited conditions.<sup>2</sup>

This document announces that Uruguay will be implementing the eCERT process for transmitting export certificates for beef entries subject to the tariff-rate quota. Imported merchandise that is entered, or withdrawn from warehouse, for consumption on or after August 30, 2021, must match the eCERT transmission of an export certificate from Uruguay in order for an importer to claim the in-tariff quota rate. The transition to eCERT will not change the tariff-rate quota filing process or requirements. Importers will continue to provide the export certificate numbers from Uruguay in the same manner as when currently filing entry summaries with CBP. The format of the export certificate numbers will not change as a result of the transition to eCERT. CBP will reject entry summaries that claim an in-quota tariff rate when filed without a valid export certificate in eCERT.

Dated: August 16, 2021.

ANNMARIE R. HIGHSMITH,  
*Executive Assistant Commissioner,  
Office of Trade.*

[Published in the Federal Register, August 23, 2021 (85 FR 47127)]

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<sup>1</sup> If there is no associated foreign government eCERT transmission available upon entry of the merchandise, an importer may enter the merchandise for consumption subject to the over-quota tariff rate or opt not to enter the merchandise for consumption at that time (*e.g.*, transfer the merchandise to a Customs bonded warehouse or foreign trade zone or export or destroy the merchandise).

<sup>2</sup> If an importer enters the merchandise for consumption subject to the over-quota tariff rate and the associated foreign government eCERT transmission becomes available afterwards, an importer may claim the in-quota rate of duty by filing a post summary correction (before liquidation) or a protest under 19 CFR part 174 (after liquidation). In either event, the in-quota rate of duty is allowable only if there are still quota amounts available within the original quota period.

## 19 CFR CHAPTER I

### **NOTIFICATION OF TEMPORARY TRAVEL RESTRICTIONS APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES SERVICE BETWEEN THE UNITED STATES AND CANADA**

**AGENCY:** Office of the Secretary, U.S. Department of Homeland Security; U.S. Customs and Border Protection, U.S. Department of Homeland Security.

**ACTION:** Notification of continuation of temporary travel restrictions.

**SUMMARY:** This document announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border. Such travel will be limited to “essential travel,” as further defined in this document.

**DATES:** These restrictions go into effect at 12 a.m. Eastern Daylight Time (EDT) on August 22, 2021, and will remain in effect until 11:59 p.m. EDT on September 21, 2021, unless amended or rescinded prior to that time.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Watson, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202–325–0840.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

On March 24, 2020, DHS published notice of its decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel,” as further defined in that document.<sup>1</sup> The document described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID–19 within the United States and globally, DHS had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Canada posed a “specific threat to human life or national interests.” DHS later

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<sup>1</sup> 85 FR 16548 (Mar. 24, 2020). That same day, DHS also published notice of its decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel,” as further defined in that document. 85 FR 16547 (Mar. 24, 2020).

published a series of notifications continuing such limitations on travel until 11:59 p.m. EDT on August 21, 2021.<sup>2</sup>

DHS continues to monitor and respond to the COVID–19 pandemic. As of the week of August 5, 2021, there have been over 200 million confirmed cases globally, with over 4 million confirmed deaths.<sup>3</sup> There have been over 36.1 million confirmed and probable cases within the United States,<sup>4</sup> over 1.4 million confirmed cases in Canada,<sup>5</sup> and over 2.9 million confirmed cases in Mexico.<sup>6</sup>

DHS also notes that the Delta variant is driving an increase in cases, hospitalizations, and deaths in the United States.<sup>7</sup> Canada and Mexico are also seeing increased case counts and deaths.<sup>8</sup>

### Notice of Action

Given the outbreak and continued transmission and spread of COVID–19 within the United States and globally, the Secretary has determined that the risk of continued transmission and spread of the

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<sup>2</sup> See 86 FR 38556 (July 22, 2021); 86 FR 32764 (June 23, 2021); 86 FR 27802 (May 24, 2021); 86 FR 21188 (Apr. 22, 2021); 86 FR 14812 (Mar. 19, 2021); 86 FR 10815 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83432 (Dec. 22, 2020); 85 FR 74603 (Nov. 23, 2020); 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020). DHS also published parallel notifications of its decisions to continue temporarily limiting the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel.” See 86 FR 38554 (July 22, 2021); 86 FR 32766 (June 23, 2021); 86 FR 27800 (May 24, 2021); 86 FR 21189 (Apr. 22, 2021); 86 FR 14813 (Mar. 19, 2021); 86 FR 10816 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83433 (Dec. 22, 2020); 85 FR 74604 (Nov. 23, 2020); 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020).

<sup>3</sup> WHO, Coronavirus disease 2019 (COVID–19) Weekly Epidemiological Update (June 8, 2021), available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports> (accessed Aug. 11, 2021).

<sup>4</sup> CDC, COVID Data Tracker: United States COVID–19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction, [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100klast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days) (accessed Aug. 11, 2021).

<sup>5</sup> WHO, Situation by Region, Country, Territory & Area, available at <https://covid19.who.int/table> (accessed Aug. 11, 2021).

<sup>6</sup> *Id.*

<sup>7</sup> See CDC, Delta Variant: What We Know About the Science, <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html> (accessed Aug. 16, 2021).

<sup>8</sup> See Government of Canada, Coronavirus Disease (COVID–19) For Health Professionals, <https://health-infobase.canada.ca/covid-19/epidemiological-summary-covid-19-cases.html#VOC> (accessed Aug., 16, 2021). See Government of Mexico, Ministry of Health, COVID–19 National General Information, <https://datos.covid-19.conacyt.mx/#DOView> (accessed Aug. 16, 2021); Mexican Consortium of Genomic Surveillance (CoViGen-Mex), Reportes, <http://mexcov2.ibt.unam.mx:8080/COVID-TRACKER/> (accessed Aug. 16, 2021).

virus associated with COVID–19 between the United States and Canada poses an ongoing “specific threat to human life or national interests.”

In March 2020, U.S. and Canadian officials mutually determined that non-essential travel between the United States and Canada posed additional risk of transmission and spread of the virus associated with COVID–19 and placed the populace of both nations at increased risk of contracting the virus associated with COVID–19. Given the sustained human-to-human transmission of the virus, coupled with risks posed by new variants, non-essential travel to the United States places the personnel staffing land ports of entry between the United States and Canada, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID–19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),<sup>9</sup> I have determined that land ports of entry along the U.S.-Canada border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Canada border shall be limited to “essential travel,” which includes, but is not limited to—

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<sup>9</sup> 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,” is authorized to “[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. *See* 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities “related to Customs revenue functions” were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. *See* Treas. Dep’t Order No. 100–16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that “[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.” Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (*e.g.*, to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (*e.g.*, individuals working in the farming or agriculture industry who must travel between the United States and Canada in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (*e.g.*, government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID-19 or other emergencies);
- Individuals engaged in lawful cross-border trade (*e.g.*, truck drivers supporting the movement of cargo between the United States and Canada);
- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of “essential travel” for purposes of this Notification—

- Individuals traveling for tourism purposes (*e.g.*, sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Canada, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Canada. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EDT on September 21, 2021. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat. In coordination with public health and medical experts, DHS continues working closely with its partners across the United States and internationally to determine how to safely and sustainably resume normal travel.

The Commissioner of U.S. Customs and Border Protection (CBP) is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute “essential travel” under



this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

ALEJANDRO N. MAYORKAS,  
*Secretary,*  
*U.S. Department of Homeland Security.*

[Published in the Federal Register, August 23, 2021 (85 FR 46964)]



## 19 CFR CHAPTER I

### **NOTIFICATION OF TEMPORARY TRAVEL RESTRICTIONS APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES SERVICE BETWEEN THE UNITED STATES AND MEXICO**

**AGENCY:** Office of the Secretary, U.S. Department of Homeland Security; U.S. Customs and Border Protection, U.S. Department of Homeland Security.

**ACTION:** Notification of continuation of temporary travel restrictions.

**SUMMARY:** This document announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border. Such travel will be limited to “essential travel,” as further defined in this document.

**DATES:** These restrictions go into effect at 12 a.m. Eastern Daylight Time (EDT) on August 22, 2021, and will remain in effect until 11:59 p.m. EDT on September 21, 2021, unless amended or rescinded prior to that time.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Watson, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202–325–0840.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

On March 24, 2020, DHS published notice of its decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to

“essential travel,” as further defined in that document.<sup>1</sup> The document described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID–19 within the United States and globally, DHS had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico posed a “specific threat to human life or national interests.” DHS later published a series of notifications continuing such limitations on travel until 11:59 p.m. EDT on August 21, 2021.<sup>2</sup>

DHS continues to monitor and respond to the COVID–19 pandemic. As of the week of August 5, 2021, there have been over 200 million confirmed cases globally, with over 4 million confirmed deaths.<sup>3</sup> There have been over 36.1 million confirmed and probable cases within the United States,<sup>4</sup> over 1.4 million confirmed cases in Canada,<sup>5</sup> and over 2.9 million confirmed cases in Mexico.<sup>6</sup>

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<sup>1</sup> 85 FR 16547 (Mar. 24, 2020). That same day, DHS also published notice of its decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel,” as further defined in that document. 85 FR 16548 (Mar. 24, 2020).

<sup>2</sup> See 86 FR 38554 (July 22, 2021); 86 FR 32766 (June 23, 2021); 86 FR 27800 (May 24, 2021); 86 FR 21189 (Apr. 22, 2021); 86 FR 14813 (Mar. 19, 2021); 86 FR 10816 (Feb. 23, 2021); 86 FR 4967 (Jan. 19, 2021); 85 FR 83433 (Dec. 22, 2020); 85 FR 74604 (Nov. 23, 2020); 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020). DHS also published parallel notifications of its decisions to continue temporarily limiting the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel.” See 86 FR 38556 (July 22, 2021); 86 FR 32764 (June 23, 2021); 86 FR 27802 (May 24, 2021); 86 FR 21188 (Apr. 22, 2021); 86 FR 14812 (Mar. 19, 2021); 86 FR 10815 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83432 (Dec. 22, 2020); 85 FR 74603 (Nov. 23, 2020); 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020).

<sup>3</sup> WHO, Coronavirus disease 2019 (COVID–19) Weekly Epidemiological Update (June 8, 2021), available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports> (accessed Aug. 11, 2021).

<sup>4</sup> CDC, COVID Data Tracker: United States COVID–19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction, [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100klast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days) (accessed Aug. 11, 2021).

<sup>5</sup> WHO, Situation by Region, Country, Territory & Area, available at <https://covid19.who.int/table> (accessed Aug. 11, 2021).

<sup>6</sup> *Id.*

DHS also notes that the Delta variant is driving an increase in cases, hospitalizations, and deaths in the United States.<sup>7</sup> Canada and Mexico are also seeing increased case counts and deaths.<sup>8</sup>

### Notice of Action

Given the outbreak and continued transmission and spread of COVID–19 within the United States and globally, the Secretary has determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico poses an ongoing “specific threat to human life or national interests.”

In March 2020, U.S. and Mexican officials mutually determined that non-essential travel between the United States and Mexico posed additional risk of transmission and spread of the virus associated with COVID–19 and placed the populace of both nations at increased risk of contracting the virus associated with COVID–19. Given the sustained human-to-human transmission of the virus, coupled with risks posed by new variants, non-essential travel to the United States places the personnel staffing land ports of entry between the United States and Mexico, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID–19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),<sup>9</sup> I

<sup>7</sup> See CDC, Delta Variant: What We Know About the Science, <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html> (accessed Aug. 16, 2021).

<sup>8</sup> See Government of Canada, Coronavirus Disease (COVID–19) For Health Professionals, <https://health-infobase.canada.ca/covid-19/epidemiological-summary-covid-19-cases.html#VOC> (accessed Aug., 16, 2021). See Government of Mexico, Ministry of Health, COVID–19 National General Information, <https://datos.covid-19.conacyt.mx/#DOView> (accessed Aug. 16, 2021); Mexican Consortium of Genomic Surveillance (CoViGen-Mex), Reportes, <http://mexcov2.ibt.unam.mx:8080/COVID-TRACKER/> (accessed Aug. 16, 2021).

<sup>9</sup> 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,” is authorized to “[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. See 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities “related to Customs revenue functions” were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. See Treas. Dep’t Order No. 100–16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that “[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.” Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

have determined that land ports of entry along the U.S.-Mexico border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Mexico border shall be limited to “essential travel,” which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (*e.g.*, to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (*e.g.*, individuals working in the farming or agriculture industry who must travel between the United States and Mexico in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (*e.g.*, government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID-19 or other emergencies);
- Individuals engaged in lawful cross-border trade (*e.g.*, truck drivers supporting the movement of cargo between the United States and Mexico);
- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of “essential travel” for purposes of this Notification—

- Individuals traveling for tourism purposes (*e.g.*, sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Mexico, but does apply to

passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Mexico. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EDT on September 21, 2021. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat. In coordination with public health and medical experts, DHS continues working closely with its partners across the United States and internationally to determine how to safely and sustainably resume normal travel.

The Commissioner of U.S. Customs and Border Protection (CBP) is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

ALEJANDRO N. MAYORKAS,  
*Secretary,*  
*U.S. Department of Homeland Security.*

[Published in the Federal Register, August 23, 2021 (85 FR 46963)]



## 19 CFR PART 177

### **MODIFICATION OF THIRTEEN RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF PLASTIC LEG COVERINGS**

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

**ACTION:** Notice of modification of thirteen ruling letters and of revocation of treatment relating to the tariff classification of plastic leg coverings.

**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 thirteen ruling letters concerning tariff classification of plastic leg coverings under the Harmonized Tariff Schedule of the

United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 25, on June 30, 2021. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 7, 2021.

**FOR FURTHER INFORMATION CONTACT:** Parisa J. Ghazi, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325-0272.

### **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. 25, on June 30, 2021, proposing to modify thirteen ruling letters pertaining to the tariff classification of plastic leg coverings. 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 New York Ruling Letter (“NY”) N096096, dated March 23, 2010, NY N025677, dated May 2, 2008, NY N014873, dated August 13, 2007, NY N012283, dated June 21, 2007, NY N006635, dated February 28, 2007, NY M83717, dated October 11, 2006, NY M85722, dated August 14, 2006, NY M80474, dated March 17, 2006, NY L87172, dated September 12, 2005, NY L81757, dated January 26, 2005, NY K84618, dated April 14, 2004, NY J86180, dated June 24, 2003, and NY J84426, dated June 2, 2003, CBP classified plastic leg coverings in heading 9505, HTSUS, specifically in subheading 9505.90.60, HTSUS, which provides for “Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other.” CBP has reviewed NY N096096, NY N025677, NY N014873, NY N012283, NY N006635, NY M83717, NY M85722, NY M80474, NY L87172, NY L81757, NY K84618, NY J86180, and NY J84426 and has determined the ruling letters to be in error. It is now CBP’s position that the plastic leg coverings are properly classified, in heading 6406, HTSUS, specifically in subheading 6406.90.30, HTSUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of rubber or plastics.” With regard to NY N012283, CBP is proposing to modify the ruling to remove the reference to and classification of the leg coverings because the leg coverings were not part of the costume classified in that ruling.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N096096, NY N025677, NY N014873, NY N012283, NY N006635, NY M83717, NY M85722, NY M80474, NY L87172, NY L81757, NY K84618, NY J86180, and NY J84426 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H249079, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

*For*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

*Attachment*

HQ H249079

August 25, 2021

OT:RR:CTF:FTM H249079 PJG

CATEGORY: Classification

TARIFF NO.: 6406.90.30

MR. ROBERT A. PONTIER, CHB

AIR CARGO SALES, INC.

429 MOON CLINTON ROAD

CORAOPOLIS, PENNSYLVANIA 15108

RE: Modification of NY N096096, NY N025677, NY N014873, NY N012283, NY N006635, NY M83717, NY M85722, NY M80474, NY L87172, NY L81757, NY K84618, NY J86180, and NY J84426; Classification of Plastic Leg Coverings

DEAR MR. PONTIER:

This is in reference to New York Ruling Letter (“NY”) NY N014873, dated August 13, 2007, issued to you concerning the tariff classification of the Santa Claus costume (item 959638) under the Harmonized Tariff Schedule of the United States (“HTSUS”). The costume consists of a top/shirt, pants, hat, beard, wig, leg coverings (referred to as “boot covers”), belt and gloves. This decision concerns only the leg coverings, which are made of cellular plastic material.

In NY N014873, U.S. Customs and Border Protection (“CBP”) classified the leg coverings in subheading 9505.90.6000, HTSUSA, which provides for “Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other.” We have reviewed NY N014873 and find it to be in error regarding the tariff classification of the leg coverings. For the reasons set forth below, we hereby modify NY N014873 and eleven other rulings with substantially similar plastic leg coverings: NY N096096, dated March 23, 2010, NY N025677, dated May 2, 2008, NY N006635, dated February 28, 2007, NY M83717, dated October 11, 2006, NY M85722, dated August 14, 2006, NY M80474, dated March 17, 2006, NY L87172, dated September 12, 2005, NY L81757, dated January 26, 2005, NY K84618, dated April 14, 2004, NY J86180, dated June 24, 2003, and NY J84426, dated June 2, 2003.

We have also reviewed the original ruling request for NY N012283, dated June 21, 2007, and determined that the leg coverings, therein referred to as “boot covers,” were not part of the Buccaneer Beauty adult costume (style 521). Therefore, we are modifying that ruling to remove the reference to and classification of the leg coverings.

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. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on June 30, 2021, in Volume 55, Number 25, of the *Customs Bulletin*. No comments were received in response to this notice.

**FACTS:**

In NY N014873, CBP classified a well-made Santa Claus costume (item 959638), which consists of a top/shirt, pants, hat, beard, wig, leg coverings (referred to as “boot covers”), belt and gloves. This decision concerns only the



leg coverings, which are made of cellular plastic material. The cellular plastic leg coverings were classified in subheading 9505.90.6000, HTSUSA, which provides for “Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other.”

**ISSUE:**

Whether the leg coverings are classified as gaiters, leggings and similar articles under heading 6406, HTSUS, or as festive articles under heading 9505, HTSUS.

**LAW AND ANALYSIS:**

Classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) is made in accordance with the General Rules of Interpretation (“GRI”). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The 2021 HTSUS provisions under consideration are as follows:

<b>6406</b>	Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: * * *
<b>6406.90</b>	Other: * * *
	Of other materials: * * *
<b>6406.90.30</b>	Of rubber or plastics * * *
<b>9505</b>	Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: * * *
<b>9505.90</b>	Other: * * *
<b>9505.90.60</b>	Other

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the “official interpretation of the Harmonized System” at the international level. *See* 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989). While neither legally binding nor dispositive, the ENs “provide a commentary on the scope of each heading” of the HTSUS and are “generally indicative of [the] proper interpretation” of these headings. *See id.*

The EN to 64.06(II) provides as follows:

**(II) GAITERS, LEGGINGS, AND SIMILAR ARTICLES, AND PARTS THEREOF**

These articles are designed to cover the whole or part of the leg and in some cases part of the foot (e.g., the ankle and instep). They differ from socks and stockings, however, in that they do not cover the entire foot. They may be made of any material (leather, canvas, felt, knitted or crocheted fabrics, etc.) **except** asbestos. They include gaiters, leggings, spats, puttees, “mountain stockings” without feet, leg warmers and similar articles. Certain of these articles may have a retaining strap or elastic band which fits under the arch of the foot. The heading also covers identifiable parts of the above articles.

The EN to 95.05(A)(3) provides as follows:

This heading covers:

- (A) **Festive, carnival or other entertainment articles**, which in view of their intended use are generally made of non-durable material. They include:

\* \* \*

- (3) Articles of fancy dress, e.g., masks, false ears and noses, wigs, false beards and moustaches (**not being** articles of postiche – **heading 67.04**), and paper hats. However, the heading **excludes** fancy dress of textile materials, of **Chapter 61** or **62**.

Heading 6406, HTSUS, provides for gaiters and leggings. The terms “gaiters” and “leggings” are not defined in the HTSUS.<sup>1</sup> Headquarters Ruling Letter (“HQ”) 088454, dated October 11, 1991, defines a gaiter as “1. A leather or heavy cloth covering for the legs extending from the instep to the ankle or knee. 2. An ankle-high shoe with elastic sides. 3. An overshoe with a cloth top.” *Id.* (citing *The American Heritage Dictionary*, (2nd College Ed. 1982)). HQ 088454 provides two definitions for “legging”: 1) “[a] leg covering of material such as canvas or leather” and 2) “[c]overing for leg and ankle extending to knee or sometimes secured by stirrup strap under arch of foot. Worn in 19th c. by armed services and by civilian men. *See* PUTTEE and GAITER. Worn by women in suede, patent, and fabric in late 1960s.” *Id.* (citing *The American Heritage Dictionary*, (2nd College Ed. 1982) and *Fairchild’s Dictionary of Fashion*, (2nd Ed. 1988)). *See also* HQ 089582, dated November 6, 1991 and NY L81551, dated January 4, 2005.

In addition to gaiters and leggings, heading 6406, HTSUS, provides for “similar articles.” To “determine the scope of [a] general . . . phrase”, the United States Court of International Trade has used the rule of *ejusdem generis*. *See A.D. Sutton & Sons v. United States*, 32 C.I.T. 804, 808 (Ct. Int’l Trade 2008) (citing *Aves. in Leather, Inc. v. United States*, 178 F.3d 1241, 1244 (Fed. Cir. 1999)). Under the rule of *ejusdem generis*, “the general word or phrase is held to refer to things of the same kind as those specified.” *Id.* (citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994)). Therefore, “to fall within the scope of the general term, the imported good ‘must possess the same essential characteristics of purposes that unite

<sup>1</sup> “When...a tariff term is not defined in either the HTSUS or its legislative history”, its correct meaning is its common or commercial meaning. *See Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1356 (Fed. Cir. 2001). “To ascertain the common meaning of a term, a court may consult ‘dictionaries, scientific authorities, and other reliable information sources’ and ‘lexicographic and other materials.’” *Id.* at 1356–1357 (quoting *C.J. Tower & Sons v. United States*, 69 C.C.P.A. 128, 673 F.2d 1268, 1271 (CCPA 1982); *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)).

the listed examples preceding the general term or phrase.” *Id.* (citing *Aves. in Leather, Inc.*, 178 F.3d at 1244).

Applying the rule of *ejusdem generis*, we note that the definitions of gaiters and leggings provided in HQ 088454 indicate that the articles are both leg coverings. Similarly, EN 64.06(II) describes gaiters, leggings and similar articles as “designed to cover the whole or part of the leg and in some cases part of the foot....Certain of these articles may have a retaining strap or elastic band which fits under the arch of the foot.” The EN further states that these articles are different from socks because they do not cover the entire foot.

We find that the leg coverings included with the Santa Claus costume (item 959638) share the same characteristics as leggings and gaiters of heading 6406, HTSUS. The subject leg coverings provide leg coverage like leggings and gaiters, which provide leg coverage extending to the ankle or to the knee. Accordingly, the subject polyester leg coverings are classifiable under heading 6406, HTSUS, as articles similar to leggings and gaiters, and are specifically classified in subheading 6406.90.30, HTSUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of rubber or plastics.”

In NY N014873, CBP classified the leg coverings in heading 9505, HTSUS. Heading 9505, HTSUS, provides, in relevant part, for festive articles and “parts and accessories” of festive articles. EN 95.05(A)(3) states that the heading covers costume accessories such as masks, false ears, noses, wigs, false beards, mustaches and paper hats. *See Rubie’s Costume Co. v. United States*, 337 F.3d 1350, 1359 (Fed. Cir. 2003) (stating that the Explanatory Notes do not narrow the scope of heading 9505, HTSUS, to only accessories to costumes). CBP has classified similar costume accessories under heading 9505, HTSUS. *See, e.g.*, NY N245614, dated August 29, 2013 (stretchable sleeves covered in fake tattoos are classifiable in heading 9505, HTSUS) and NY N162276 (butterfly wings and wand are classifiable in heading 9505, HTSUS). Similar to the articles described in the exemplars provided in EN 95.05(A)(3) and the cited rulings, the subject merchandise are costume accessories.

When goods are *prima facie* classifiable under two or more headings, we must proceed to GRI 3. According to GRI 3(a), “[t]he heading which provides the most specific description shall be preferred to headings providing a more general description.” In *Russ Berrie & Co. v. United States*, 381 F.3d 1334 (Fed. Cir. 2004), the U.S. Court of Appeals for the Federal Circuit (“CAFC”) determined that Christmas and Halloween-themed lapel pins and earrings were *prima facie* classifiable as both imitation jewelry of heading 7117, HTSUS, and as festive articles of heading 9505, HTSUS. Applying GRI 3(a), the CAFC reasoned that:

We have recognized that festive articles include such disparate items as ‘placemats, table napkins, table runners, and woven rugs’ depicting ‘Christmas trees, Halloween jack-o-lanterns, [and Easter] bunnies,’ (citation omitted) ‘cast iron stocking hangers[;] ... Christmas water globes; ... [and] Easter water globes,’ (citation omitted) and jack-o-lantern mugs and pitchers (citation omitted).

Because heading 9505 covers a far broader range of items than heading 7117, the latter is more specific than the former. It is also more specific because it describes the item by name ('imitation jewelry') rather than by class ('festive articles'). It therefore follows that the imported merchandise is classifiable under heading 7117 rather than under heading 9505.

*Id.* at 1338.

In the instant case, the "gaiters, leggings and similar articles" heading is more specific than the "festive articles" heading because "it covers a narrower set of items." *See id.* The relevant portion of heading 6406, HTSUS, pertains to leg coverings, whereas the relevant portion of heading 9505, HTSUS, specifically "'festive articles'... need only to be closely associated with and used or displayed during a festive occasion." *Id.* Accordingly, heading 6406, HTSUS, is more specific than heading 9505, HTSUS, and by application of GRI 3(a), the subject leg coverings are properly classified under heading 6406, HTSUS, and specifically in subheading 6406.90.15, HTSUS, which provides for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials."

#### **HOLDING:**

By application of GRI 3(a), the Santa Claus costume (item 959638) leg coverings are classified under heading 6406, HTSUS, and specifically, in subheading 6406.90.30, HTSUS, which provides for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of rubber or plastics." The 2021 column one, general rate of duty is 5.3 percent *ad valorem*.

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

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

NY N096096, dated March 23, 2010, is MODIFIED with regard to the tariff classification of the Adult Santa Suit (style 4291) "boot tops."

NY N025677, dated May 2, 2008, is MODIFIED with regard to the tariff classification of the "boot covers" for the child's unisex Santa Claus costume (Item # CL 182) and the "boot covers" for the adult unisex Santa Claus costume (item # CL 181).

NY N014873, dated August 13, 2007, is MODIFIED with regard to the tariff classification of the Santa Claus (item 959638) "boot covers."

NY N012283, dated June 21, 2007, is MODIFIED to remove the reference to and tariff classification of the Buccaneer Beauty Adult Costume (style 521) "boot covers."

NY N006635, dated February 28, 2007, is MODIFIED with regard to the tariff classification of the Midnight Carnival Deluxe Leo the Lion Tamer Costume (style 5148050-051) "boot covers."

NY M83717, dated October 11, 2006, is MODIFIED with regard to the tariff classification of the Deluxe Knight costume (style 350476) "boot covers."

NY M85722, dated August 14, 2006, is MODIFIED with regard to the tariff classification of the Deluxe Santa Suit Set (style 300755) “boot covers.”

NY M80474, dated March 17, 2006, is MODIFIED with regard to the tariff classification of the Santa Claus Suit “boot covers.”

NY L87172, dated September 12, 2005, is MODIFIED with regard to the tariff classification of the Santa Claus Suit Plus (style CA-0001) “boot covers.”

NY L81757, dated January 26, 2005, is MODIFIED with regard to the tariff classification of the Royal King Costume (M-0800-00) “boot covers.”

NY K84618, dated April 14, 2004, is MODIFIED with regard to the tariff classification of the Santa Claus Costume (styles 7500 and 7510) “boot covers” or “boot tops.”

NY J86180, dated June 24, 2003, is MODIFIED with regard to the tariff classification of the Ranger Boot Covers (style IM962) “boot covers.”

NY J84426, dated June 2, 2003, is MODIFIED with regard to the tariff classification of the Santa Costume (style 4315-0040) “boot covers.”

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*



## 19 CFR PART 177

### **MODIFICATION OF SIXTEEN RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF TEXTILE LEG COVERINGS**

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

**ACTION:** Notice of modification of sixteen ruling letters and of revocation of treatment relating to the tariff classification of textile leg coverings.

**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 sixteen ruling letters concerning tariff classification of textile leg coverings under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the

proposed action was published in the *Customs Bulletin*, Vol. 55, No. 25, on June 30, 2021. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 7, 2021.

**FOR FURTHER INFORMATION CONTACT:** Parisa J. Ghazi, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325-0272.

## **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. 25, on June 30, 2021, proposing to modify sixteen ruling letters pertaining to the tariff classification of textile leg coverings. 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 New York Ruling Letter ("NY") N196588, dated January 5, 2012, NY N152983, dated April 4, 2011, NY N141478, dated February 2, 2011, NY N141467, dated February 2, 2011, NY N104375, dated June

3, 2010, NY N045816, dated December 15, 2008, NY N043382, dated December 2, 2008, NY N041398, dated November 5, 2008, NY N005706, dated February 9, 2007, NY M84821, dated July 31, 2006, NY M81135, dated March 27, 2006, NY L85036, dated June 17, 2005, NY L82557, dated March 11, 2005, NY E82340, dated June 3, 1999, NY E80263, dated May 5, 1999, and NY B86150, dated August 8, 1997, CBP classified the textile leg coverings in heading 9505, HTSUS, specifically in subheading 9505.90.60, HTSUS, which provides for “Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other.” CBP has reviewed NY N196588, NY N152983, NY N141478, NY N141467, NY N104375, NY N045816, NY N043382, NY N041398, NY N005706, NY M84821, NY M81135, NY L85036, NY L82557, NY E82340, NY E80263 and NY B86150 and has determined the ruling letters to be in error. It is now CBP’s position that the textile leg coverings are properly classified, in heading 6406, HTSUS, specifically in subheading 6406.90.15, HTSUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N196588, NY N152983, NY N141478, NY N141467, NY N104375, NY N045816, NY N043382, NY N041398, NY N005706, NY M84821, NY M81135, NY L85036, NY L82557, NY E82340, NY E80263 and NY B86150 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H239479, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

*For*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

*Attachment*

HQ H239479

August 24, 2021

OT:RR:CTF:FTM H239479 PJG

CATEGORY: Classification

TARIFF NO.: 6406.90.15

Ms. PAULINA DONG

SEASONAL VISIONS INTERNATIONAL INC.

1368 PARK AVENUE

EMERYVILLE, CA 94608

RE: Modification of NY N196588, NY N152983, NY N141478, NY N141467, NY N104375, NY N045816, NY N043382, NY N041398, NY N005706, NY M84821, NY M81135, NY L85036, NY L82557, NY E82340, NY E80263 and NY B86150; Classification of Textile Leg Coverings

DEAR Ms. DONG:

This is in reference to New York Ruling Letter (“NY”) N196588, dated January 5, 2012, issued to you concerning the tariff classification of three different adult costumes under the Harmonized Tariff Schedule of the United States (“HTSUS”). Specifically, NY N196588 classified the following costumes: Adult Pink Ninja Costume (item numbers: 5147316, 5147317, and 5147318); Adult Classic Witch Costume (item numbers: 5147322, 5147323, and 5147324); and Adult Viking Costume (item numbers: 5147319, 5147320, 5147321, 5147193, 5147194 and 5147195). This decision concerns only the Adult Viking Costume, and in particular, the polyester leg coverings, which are referred to as “boot covers,” designed to resemble boots when worn over the consumer’s shoes.

In NY N196588, U.S. Customs and Border Protection (“CBP”) classified the leg coverings in subheading 9505.90.60, HTSUS, which provides for “Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other.” We have reviewed NY N196588 and find it to be in error regarding the tariff classification of the leg coverings. For the reasons set forth below, we hereby modify NY N196588 and fifteen other rulings with substantially similar textile leg coverings: NY N152983, dated April 4, 2011, NY N141478, dated February 2, 2011, NY N141467, dated February 2, 2011, NY N104375, dated June 3, 2010, NY N045816, dated December 15, 2008, NY N043382, dated December 2, 2008, NY N041398, dated November 5, 2008, NY N005706, dated February 9, 2007, NY M84821, dated July 31, 2006, NY M81135, dated March 27, 2006, NY L85036, dated June 17, 2005, NY L82557, dated March 11, 2005, NY E82340, dated June 3, 1999, NY E80263, dated May 5, 1999, and NY B86150, dated August 8, 1997.

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. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on June 30, 2021, in Volume 55, Number 25, of the Customs Bulletin. No comments were received in response to this notice.



**FACTS:**

In your original request, dated December 12, 2011, you requested a tariff classification ruling for a Ninja costume, a Classic Witch costume, and a Viking costume. You included pictures of the Viking costume with your request and indicated that the costume is 100 percent knit polyester.

In NY N196588, the textile leg coverings are described as follows: “[t]he boot covers have a faux fur cuff and elastic attached to the bottom for securing around the shoe.” In the picture of the Viking Costume, the leg coverings are secured under the female model’s footwear with a strap. The leg coverings cover part of the boots and extend to just below the model’s knees, giving the appearance that she is wearing tall boots with fur cuffs.

**ISSUE:**

Whether the leg coverings are classified as gaiters, leggings and similar articles under heading 6406, HTSUS, or as festive articles under heading 9505, HTSUS.

**LAW AND ANALYSIS:**

Classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) is made in accordance with the General Rules of Interpretation (“GRI”). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The 2021 HTSUS provisions under consideration are as follows:

<b>6406</b>	Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: * * *
<b>6406.90</b>	Other: * * *
	Of other materials:
<b>6406.90.15</b>	Of textile materials * * *
<b>9505</b>	Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: * * *
<b>9505.90</b>	Other: * * *
<b>9505.90.60</b>	Other

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

[the] proper interpretation” of these headings. *See id.*

The EN to 64.06(II) provides as follows:

**(II) GAITERS, LEGGINGS, AND SIMILAR ARTICLES, AND PARTS THEREOF**

These articles are designed to cover the whole or part of the leg and in some cases part of the foot (e.g., the ankle and instep). They differ from socks and stockings, however, in that they do not cover the entire foot. They may be made of any material (leather, canvas, felt, knitted or crocheted fabrics, etc.) **except** asbestos. They include gaiters, leggings, spats, puttees, “mountain stockings” without feet, leg warmers and similar articles. Certain of these articles may have a retaining strap or elastic band which fits under the arch of the foot. The heading also covers identifiable parts of the above articles.

The EN to 95.05(A)(3) provides as follows:

This heading covers:

- (A) **Festive, carnival or other entertainment articles**, which in view of their intended use are generally made of non-durable material. They include:

\* \* \*

- (3) Articles of fancy dress, e.g., masks, false ears and noses, wigs, false beards and moustaches (**not being** articles of postiche – **heading 67.04**), and paper hats. However, the heading **excludes** fancy dress of textile materials, of **Chapter 61** or **62**.

Heading 6406, HTSUS, provides for gaiters and leggings. The terms “gaiters” and “leggings” are not defined in the HTSUS.<sup>1</sup> Headquarters Ruling Letter (“HQ”) 088454, dated October 11, 1991, defines a gaiter as “1. A leather or heavy cloth covering for the legs extending from the instep to the ankle or knee. 2. An ankle-high shoe with elastic sides. 3. An overshoe with a cloth top.” *Id.* (citing *The American Heritage Dictionary*, (2nd College Ed. 1982)). HQ 088454 provides two definitions for “legging”: 1) “[a] leg covering of material such as canvas or leather” and 2) a “[c]overing for leg and ankle extending to knee or sometimes secured by stirrup strap under arch of foot. Worn in 19th c. by armed services and by civilian men. *See* PUTTEE and GAITER. Worn by women in suede, patent, and fabric in late 1960s.” *Id.* (citing *The American Heritage Dictionary*, (2nd College Ed. 1982) and *Fairchild’s Dictionary of Fashion*, (2nd Ed. 1988)). *See also* HQ 089582, dated November 6, 1991 and NY L81551, dated January 4, 2005.

In addition to gaiters and leggings, heading 6406, HTSUS, provides for “similar articles.” To “determine the scope of [a] general . . . phrase”, the United States Court of International Trade has used the rule of *ejusdem generis*. *See A.D. Sutton & Sons v. United States*, 32 C.I.T. 804, 808 (Ct. Int’l Trade 2008) (citing *Aves. in Leather, Inc. v. United States*, 178 F.3d 1241, 1244

<sup>1</sup> “When...a tariff term is not defined in either the HTSUS or its legislative history”, its correct meaning is its common or commercial meaning. *See Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1356 (Fed. Cir. 2001). “To ascertain the common meaning of a term, a court may consult ‘dictionaries, scientific authorities, and other reliable information sources’ and ‘lexicographic and other materials.’” *Id.* at 1356–1357 (quoting *C.J. Tower & Sons v. United States*, 69 C.C.P.A. 128, 673 F.2d 1268, 1271 (CCPA 1982); *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)).

(Fed. Cir. 1999)). Under the rule of *ejusdem generis*, “the general word or phrase is held to refer to things of the same kind as those specified.” *Id.* (citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994)). Therefore, “to fall within the scope of the general term, the imported good ‘must possess the same essential characteristics of purposes that unite the listed examples preceding the general term or phrase.’” *Id.* (citing *Aves. in Leather, Inc.*, 178 F.3d at 1244).

Applying the rule of *ejusdem generis*, we note that the definitions of gaiters and leggings provided in HQ 088454 indicate that the articles are both leg coverings. Similarly, EN 64.06(II) describes gaiters, leggings and similar articles as “designed to cover the whole or part of the leg and in some cases part of the foot....Certain of these articles may have a retaining strap or elastic band which fits under the arch of the foot.” The EN further states that these articles are different from socks because they do not cover the entire foot.

We find that the Viking leg coverings share the same characteristics as leggings and gaiters of heading 6406, HTSUS. The subject leg coverings provide leg coverage like leggings and gaiters, which provide leg coverage extending to the ankle or to the knee. Like some leggings that are secured to the foot with a strap, these gaiters are secured to the shoe with a strap. Finally, consistent with EN 64.06(II), the subject leg coverings do not cover the entire foot. Accordingly, the subject polyester leg coverings are classifiable under heading 6406, HTSUS, as articles similar to leggings and gaiters, and are specifically classified in subheading 6406.90.15, HTSUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials.”

In NY N196588, CBP classified the leg coverings in heading 9505, HTSUS. Heading 9505, HTSUS, provides, in relevant part, for festive articles and “parts and accessories” of festive articles. EN 95.05(A)(3) states that the heading covers costume accessories such as masks, false ears, noses, wigs, false beards, mustaches and paper hats. *See Rubie’s Costume Co. v. United States*, 337 F.3d 1350, 1359 (Fed. Cir. 2003) (stating that the Explanatory Notes do not narrow the scope of heading 9505, HTSUS, to only accessories to costumes). CBP has classified similar costume accessories under heading 9505, HTSUS. *See, e.g.*, NY N245614, dated August 29, 2013 (stretchable sleeves covered in fake tattoos are classifiable in heading 9505, HTSUS) and NY N162276 (butterfly wings and wand are classifiable in heading 9505, HTSUS). Similar to the articles described in the exemplars provided in EN 95.05(A)(3) and the cited rulings, the subject merchandise are costume accessories.

When goods are *prima facie* classifiable under two or more headings, we must proceed to GRI 3. According to GRI 3(a), “[t]he heading which provides the most specific description shall be preferred to headings providing a more general description.” In *Russ Berrie & Co. v. United States*, 381 F.3d 1334 (Fed. Cir. 2004), the U.S. Court of Appeals for the Federal Circuit (“CAFC”) determined that Christmas and Halloween-themed lapel pins and earrings were *prima facie* classifiable as both imitation jewelry of heading 7117, HTSUS, and as festive articles of heading 9505, HTSUS. Applying GRI 3(a), the CAFC reasoned that:

We have recognized that festive articles include such disparate items as ‘placemats, table napkins, table runners, and woven rugs’ depicting ‘Christmas trees, Halloween jack-o-lanterns, [and Easter] bunnies,’ (citation omitted) ‘cast iron stocking hangers[;] ... Christmas water globes; ... [and] Easter water globes,’ (citation omitted) and jack-o-lantern mugs and pitchers (citation omitted).

Because heading 9505 covers a far broader range of items than heading 7117, the latter is more specific than the former. It is also more specific because it describes the item by name (‘imitation jewelry’) rather than by class (‘festive articles’). It therefore follows that the imported merchandise is classifiable under heading 7117 rather than under heading 9505.

*Id.* at 1338.

In the instant case, the “gaiters, leggings and similar articles” heading is more specific than the “festive articles” heading because “it covers a narrower set of items.” *See id.* The relevant portion of heading 6406, HTSUS, pertains to leg coverings, whereas the relevant portion of heading 9505, HTSUS, specifically “‘festive articles’... need only to be closely associated with and used or displayed during a festive occasion.” *Id.* Accordingly, heading 6406, HTSUS, is more specific than heading 9505, HTSUS, and by application of GRI 3(a), the subject leg coverings are properly classified under heading 6406, HTSUS, and specifically in subheading 6406.90.15, HTSUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials.”

#### **HOLDING:**

By application of GRI 3(a), the Adult Viking Costume polyester leg coverings are classified under heading 6406, HTSUS, and specifically, in subheading 6406.90.15, HTSUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials.” The 2021 column one, general rate of duty is 14.9 percent *ad valorem*.

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

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

NY N196588, dated January 5, 2012, is MODIFIED with regard to the tariff classification of the Adult Viking Costume (item numbers: 5147319, 5147320, 5147321, 5147193, 5147194 and 5147195) “boot covers.”

NY N152983, dated April 4, 2011, is MODIFIED with regard to the tariff classification of the Pulp Vintage Cowgirl costume “boot covers.”

NY N141478, dated February 2, 2011, is MODIFIED with regard to the tariff classification of the “boot covers” for the Pirate (style M-3309-00) and Royal King (style M-3321-00) costumes.

NY N141467, dated February 2, 2011, is MODIFIED with regard to the tariff classification of the Pirate costume (style B-2012-00) “boot covers.”

NY N104375, dated June 3, 2010, is MODIFIED with regard to the tariff classification of the Kid Kiss Destroyer Costume (style HWN10-0008) “boot tops” or “boot covers.”

NY N045816, dated December 15, 2008, is MODIFIED with regard to the tariff classification of the French Kiss Showgirl Costume (item numbers: 6869024 Size XS; 6869025 Size S; 6869026 Size M; 6899027 Size L) “boot covers” or “spats.”

NY N043382, dated December 2, 2008, is MODIFIED with regard to the tariff classification of the Deluxe Pirate Costume (style M-1522-00) “boot covers.”

NY N041398, dated November 5, 2008, is MODIFIED with regard to the tariff classification of the Born to be Wild (style 0113) “boot covers.”

NY N005706, dated February 9, 2007, is MODIFIED with regard to the tariff classification of the Deluxe Pirate Captain (style M-1154-00) “boot covers.”

NY M84821, dated July 31, 2006, is MODIFIED with regard to the tariff classification of the Boney Pirate Costume (style numbers: 48691;10612750, 10612751, 10612752, 400009466737, 400009466812, 40000466997 and 400009467079) “boot covers.”

NY M81135, dated March 27, 2006, is MODIFIED with regard to the tariff classification of the Sexy Captain Black Heart Costume (style 5130) “boot covers” or “boot tops.”

NY L85036, dated June 17, 2005, is MODIFIED with regard to the tariff classification of the “boot covers” for the Boney Pirate Costume – DD (style 410014) and the Deluxe Boney Pirate Costume – DS (style 410013).

NY L82557, dated March 11, 2005, is MODIFIED with regard to the tariff classification of the Moonlight Vixen (style 05095) “leg covers” or “boot covers.”

NY E82340, dated June 3, 1999, is MODIFIED with regard to the tariff classification of the Pirate costume (style # 9942) “boot tops.”

NY E80263, dated May 5, 1999, is MODIFIED with regard to the tariff classification of the Pirate King Outfit (#77054) “boot tops.”

NY B86150, dated August 8, 1997, is MODIFIED with regard to the tariff classification of the style HK989000 “boot covers.”

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*

**19 CFR PART 177****REVOCAION OF FIVE RULING LETTERS AND  
REVOCAION OF TREATMENT RELATING TO THE  
TARIFF CLASSIFICATION OF SELF-WRAPPING TUBULAR  
PROTECTIVE SLEEVES**

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

**ACTION:** Notice of revocation of five ruling letters and of revocation of treatment relating to the tariff classification of self-wrapping tubular protective sleeves.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking five ruling letters concerning tariff classification of self-wrapping tubular protective sleeves under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 28, on July 21, 2021. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 7, 2021.

**FOR FURTHER INFORMATION CONTACT:** John Rhea, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0035.

**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. 26, on July 21, 2021, proposing to revoke five ruling letters pertaining to the tariff classification of self-wrapping tubular protective sleeves. 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 New York Ruling Letter ("NY") N282623, dated February 17, 2017, NY N259747, dated May 13, 2016, NY N259737, dated May 13, 2016, NY N259736, dated December 24, 2014, and NY N259746, dated December 23, 2014, CBP classified self-wrapping tubular protective sleeves in heading 5806, HTSUS, specifically in subheading 5806.32.2000, HTSUSA, which provides for "Narrow woven fabrics, other than goods of 5807, narrow fabrics consisting of warp without weft assembled by means of an adhesive (bolducs): Other woven fabrics: Of man-made fibers: Other." In NY N259736 and NY N259746, CBP classified self-wrapping tubular protective sleeves in heading 5808, HTSUS, specifically in subheading 5808.10.7000, HTSUSA, which provides for "Braids in the piece; ornamental trimmings in the piece, without embroidery, other than knitted or crocheted; tassels, pompons and similar articles: Braids in the piece: Other: Of cotton or man-made fibers." CBP has reviewed NY N282623, NY N259747, NY N259737, NY N259746, and NY N259746 and has determined the ruling letters to be in error. It is now CBP's position that self-wrapping tubular protective sleeves are properly classified, in heading 5911, HTSUS, specifically in subheading 5911.90.0080, HTSUSA, which provides for "Textile products and articles, for technical uses, specified in note 7 to this chapter: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N282623, NY N259747, NY N259737, NY N259736, and NY N259746 and revoking or modifying any other ruling not specifically identified to

reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H291579, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

*For*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

*Attachment*



HQ H291579

August 24, 2021

OT:RR:CTF:FTM H291579 JER

CATEGORY: Classification

TARIFF NO.: 5911.90.00

SYDNEY MINTZER  
 MAYER BROWN, LLP  
 1999 K St., NW  
 WASHINGTON, DC 20006

RE: Revocation of NY N282623 (Tariff Classification of Textile Tubular Sleeves Used to Cover Electrical Wiring Harnesses); Revocation of NY N259736, NY N259746, NY N259737, and NY N259747

DEAR MR. MINTZER:

This is in response to your request of October 20, 2017, on behalf of your client Federal Mogul Corporation (“FMC”), for reconsideration of New York Ruling Letter (“NY”) N282623, issued on February 17, 2017, concerning the classification of certain merchandise under the Harmonized Tariff Schedule of the United States (“HTSUS”). In NY N282623, U.S. Customs and Border Protection (“CBP”) classified the imported tubular sleeve, known as the Twist-Tube, under heading 5806, HTSUS. In particular, the Twist-Tube was classified under subheading 5806.32.2000, HTSUSA, which provides for: “Narrow woven fabrics, other than goods of heading 5807; narrow woven fabrics consisting of warp without weft assembled by means of an adhesive (bolducs): Other woven fabrics: Of man-made fibers: Other.” It is your contention that heading 5806, HTSUS, is not the proper heading and that it does not describe the merchandise at issue. After reviewing NY N282623, we have found that ruling to be in error. For the reasons set forth in this ruling, we are revoking NY N282623.

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. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on July 21, 2021, in Volume 55, Number 28, of the *Customs Bulletin*. No comments were received in response to this notice.

**FACTS:**

In NY N282623, CBP described the woven fabric as follows:

TwistTube®, standard color black (samples and literature provided are for style TwistTube® 2420), is a flexible narrow woven fabric, approximately five centimeters (cm) in width in the open flattened state, permanently rolled into an open tubular form, and said to be composed of polyester monofilament and multifilament yarns. These yarns measure under one millimeter (mm) in cross-section...[.] According to the literature provided, “TwistTube® 2420 is a self-wrapping sleeve designed to provide abrasion protection and acoustical noise suppression... [It] maintains a circular profile when flexed. Its self-wrapping design allows for quick and easy bundling of wire and cable assemblies. The unique design easily allows for breakouts and can be installed over completed assemblies.” Typical applications include instrument panel harnesses, engine compartment harnesses, and tubing, hose and cable assemblies, protecting

them from chafing, cutting and abrasion. The product is available in a variety of sizes and lengths, with nominal inner diameter sizes ranging in size from 5 to 38 mm, and in bulk lengths or cut to specification.

In the submission dated October 20, 2017, you described the subject Twist-Tube as follows:

The Twist-Tube is woven of both monofilament and multifilament polyester yarns. The two yarns are combined together on a large spool called a beam using a machine called a warper. The beam is then transported to the loom (weaving machine). The monofilament yarn is introduced perpendicular to the multifilament yarn by the loom in the weaving process. It is produced as a flat woven textile fabric with multiple warp or weft; having a plain weave with dual fill and dual pick. The dual fill means there are two (multiple) weft yarns being inserted and interlacing with each individual warp yarn. The dual pick is a standard of narrow fabric weaving whereby each fill (weft) yarn is inserted back and forth across the fabric structure. Each warp yarn is interlaced by four ends of weft yarn. The finished tape (called feedstock) is collected and then run through a heating process to create a tube shape. The tube is then cut to length.

In a supplemental submission dated April 1, 2019, FCM provided photographs of the installed versions of the Twist-Tube, along with information pertaining to its installation. The April 1, 2019 submission along with the FMC website further described the Twist-Tube as being principally used to cover wiring assemblies in automobiles and light trucks. It is specifically designed as an original equipment manufacturer (“OEM”) certified part and is used by car manufacturers to satisfy National Highway Traffic Safety Administration (“NHTSA”) regulations governing flammability. The Twist-Tube is also said to have the capacity for heat prevention, and to also prevent abrasion while enhancing noise suppression.

CBP Lab Report NY20171862, dated February 2, 2018, described the subject merchandise as a narrow woven fabric with complete selveges on both edges (one woven selvege on one edge and one chain knit stitch on the other edge). It was composed of two yarns (one polyester monofilament and one polyester multifilament) and measured 6.5 centimeters in width in the open flattened state.

#### **ISSUE:**

Whether the subject merchandise is a narrow woven fabric of heading 5806, HTSUS, or a textile fabric intended and designed for technical purposes and therefore classifiable under heading 5911, HTSUS.

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

Classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) is made in accordance with the General Rules of Interpretation (“GRI”). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The HTSUS provisions under consideration are as follows:

5806	Narrow woven fabrics, other than those goods of heading 5807; narrow fabrics consisting of warp without weft assembled by means of an adhesive (bolducs):
	Other woven fabrics:
5806.32	Of man-made fibers:
5806.32.2000	Other...
	*       *       *
5911	Textile products and articles, for technical uses, specified in note 7 to this chapter:
	*       *       *
5911.90.00	Other...
	*       *       *

Section XI, Note 7 provides that:

7. For the purposes of this section, the expression “*made up*” means:
- (a) Cut otherwise than into squares or rectangles;
  - (b) Produced in the finished state, ready for use (or merely needing separation by cutting dividing threads) without sewing or other working (for example, certain dusters, towels, tablecloths, scarf squares, blankets);
  - (c) Cut to size and with at least one heat-sealed edge with a visibly tapered or compressed border and the other edges treated as described in any other subparagraph of this note, but excluding fabrics the cut edges of which have been prevented from unraveling by hot cutting or by other simple means;
  - (d) Hemmed or with rolled edges, or with a knotted fringe at any of the edges, but excluding fabrics the cut edges of which have been prevented from unraveling by whipping or by other simple means;
  - (f) Assembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded); or
  - (g) Knitted or crocheted to shape, whether presented as separate items or in the form of a number of items in the length.

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

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

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

\*       \*       \*

Note 1 to Chapter 59 provides as follows:

Except where the context otherwise requires, for purposes of this chapter the expression “*textile fabrics*” applies only to woven fabrics of chapters 50 to 55 and headings 5803 and 5806, the braids and ornamental trimmings in the piece of heading 5808 and the knitted or crocheted fabrics of headings 6002 to 6006.

Note 7 to Chapter 59 provides as follows:

Heading 5911 applies to the following goods, which do not fall in any other heading of section XI:

- (a) Textile products in the piece, cut to length or simply cut to rectangular (including square) shape (other than those having the character of the products of headings 5908 to 5910), the following only:
  - (i) Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes;
  - (ii) Bolting cloth;
  - (iii) Straining cloth of a kind used in oil presses or the like, of textile material or of human hair;
  - (iv) Flat woven textile fabric with multiple warp or weft, whether or not felted, impregnated or coated, of a kind used in machinery or for other technical purposes;
  - (v) Textile fabric reinforced with metal, of a kind used for technical purposes;
  - (vi) Cords, braids and the like, whether or not coated, impregnated or reinforced with metal, of a kind used in industry as packing or lubricating materials;
- (b) Textile articles (other than those of headings 5908 to 5910) of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).

\* \* \*

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

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

- (1) Warp and weft fabrics in strips of a width not exceeding 30cm, provided with selvages (flat or tubular) on both edges. These articles are produced on special ribbon looms several ribbons often being produced simultaneously; in some cases the ribbons may be woven with wavy edges on one or both sides.

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

\* \* \*

#### EN 59.11

The textile products and articles of this heading present particular characteristics which identify them as being for use in various types of machinery, apparatus, equipment or instruments or as tools or parts of tools.

#### EN 59.11

##### **(B) Textile Articles of Kind Used for Technical Purposes**

All textile articles of kind used for technical purposes (other than those of headings 58.08 to 59.10) are classified in this heading and **not** elsewhere in Section XI (see Note 7(b) to the Chapter); for example :

- (1) Any of the fabrics of (A) above which have been made up (cut to shape, assembled by sewing, etc.)...[.]

\* \* \*

In NY N282623, CBP classified the subject Twist-Tube in heading 5806, HTSUS, as a narrow woven fabric. The decision in NY N282623 determined that the subject Twist-Tube was not classifiable under heading 5911, HTSUS, because the Twist-Tube was not a textile article since it did not satisfy the definition of being “made-up” as set forth in Note 7 to Section XI.

In your request for reconsideration, you assert that the Twist-Tube is properly classified in heading 5911, HTSUS, as a textile product designed for technical uses. In support of your contention, you state that the Twist-Tube meets the requirements of Note 7(a) to Chapter 59, HTSUS, excluding it from heading 5806, HTSUS. You further assert that the Twist-Tube is described by the ENs to heading 5911, as it is a textile product or textile article which is designed for use with a certain type of machinery, specifically, motor vehicles. You note that CBP has previously classified textile products and articles used in motor vehicles and vehicle parts under heading 5911, HTSUS; citing to NY N239632, dated April 12, 2013. Similarly, you state that the Twist-Tube is an OEM certified part used by vehicle manufacturers to satisfy NHTSA regulations governing flammability.

Finally, you argue that the Twist-Tube is classifiable under heading 5911, HTSUS, because it has a technical purpose and allows for the technical

functioning of another good. In support of this contention you cite to Headquarters Ruling Letter (“HQ”) 957218, dated March 24, 1995, arguing that the Twist-Tube creates a barrier between the electrical wiring assemblies and the heat from the vehicle’s engine which allows the electrical wiring assemblies to function properly. From this you conclude that the Twist-Tube has a technical purpose as described by the terms of heading 5911, HTSUS.

Concerning the rationale in NY N282623 that the Twist-Tube was not a textile article because it did not satisfy the definition of being “made-up”, we note that Note 7 to Section XI primarily applies to tariff provisions which include the phrase “made-up” in the terms of its heading or subheading. For example, heading 6307, HTSUS, provides for: “Other made up articles...” Likewise, heading 5608, HTSUS, provides for: “Knotted netting...; made up fishing nets and other made up nets, of textile materials.” Heading 5702, HTSUS, provides, in relevant part, for: “Carpets...whether or not made up...” It follows that Note 7 to Section XI is intended to explain or define the meaning of the phrase “made up” as it is used in various tariff headings of Section XI. Yet, the language of heading 5911, HTSUS, does not include or make reference to the phrase “made up.” Likewise, the legal notes to Chapter 59, HTSUS, do not include or make reference to the phrase “made up.” However, subheading 5911.20, HTSUS, includes the phrase in its terms (i.e., “Bolting cloth, whether or not made up.”). Likewise, EN 59.11 (B)(1) states, in pertinent part, “(1) Any of the fabrics of (A) above which have been made up (cut to shape, assembled by sewing, etc.)” Accordingly, not all goods classifiable under heading 5911, HTSUS, are subject to Note 7 to Section XI unless its classification concerns the specific “made up” requirement.<sup>1</sup>

In the instant case, the Twist-Tube features characteristics that are present in both heading 5806, HTSUS, and heading 5911, HTSUS. In particular, the Twist-Tube is produced as a flat woven textile fabric with multiple warp and weft. The finished tape is run through a heating process to create its tubular shape. Moreover, according to CBP Lab Report NY20171862, the subject Twist-Tube is a narrow woven fabric with two selvages on both ends (one heat sealed; the other knitted), which measures 6.5 centimeters in width in its open flattened state. Hence, based on its woven construction, measurements and dimensions, the subject Twist-Tube meets the definition of a narrow-woven fabric within the meaning Note 5(a) to Chapter 58, HTSUS and EN 58.06(A)(1) and (2).

However, the fact that the Twist-Tube is a narrow woven fabric, does not preclude the Twist-Tube from classification under heading 5911, HTSUS. Instead, we note that the scope of heading 5911, HTSUS, includes flat woven textile fabrics with multiple warp and weft, and other woven textile fabrics – so long as those goods also satisfy the conditions of Note 7, to Chapter 59, HTSUS. In fact, the classification of (flat or tubular) narrow woven fabrics is contemplated by the terms of Chapter 59, HTSUS. Specifically, Note 1 to Chapter 59 provides, in relevant part, that: “Except where the context otherwise requires, for purposes of this chapter the expression “*textile fabrics*” applies only to the woven fabrics of chapters 50 to 55 and headings 5803 and 5806...[.]” It follows that textile fabrics that are considered narrow woven textile fabrics of heading 5806, HTSUS, are not excluded from heading 5911,

<sup>1</sup> The Court of International Trade noted that “the examples of Note 7(b) articles listed in the Explanatory Notes also include articles that have been “made up,” i.e., “cut to shape.” *Airflow Tech., Inc. v. United States*, 804 F. Supp. 2d 1292, 1308 (CIT 2011).

HTSUS. Accordingly, beyond its measurements, dimensions and construction, the fundamental purpose and primary use of the Twist-Tube also warrant consideration.

In particular, classification in heading 5911, HTSUS, requires establishing that the Twist-Tube is either a “textile products used for technical purposes” or a “textile articles suitable for industrial use.” Although the terms: “textile products used for technical purposes” and “textile articles suitable for industrial use” are not specifically defined by the HTSUS, EN 59.11 states that: “[t]he textile products and articles of this heading present particular characteristics which identify them as being for use in various types of machinery, apparatus, equipment or instruments or as tools or parts of tools.” In keeping with the definition set out in EN 59.11, CBP has determined that certain textile products and articles have possessed the characteristics which identify them as being for use in various types of machinery, apparatus, equipment or instruments. For example, in HQ 081817, dated January 17, 1989, CBP classified roll covers for damper rollers used in the printing industry. The covers, were of tubular shape, cut to size and fit over the damper rollers. According to HQ 081817, the function of the host damper rollers is to moisten the non-image areas of a lithographic plate so that the plate will not accept ink from the ink rollers. In HQ 081817, CBP determined that the roll covers were textile articles that served as an integral and necessary part of a lithographic printing press. As such, CBP determined that the roll covers had a technical purpose within the meaning of Note 7(b) to Chapter 59, HTSUS, and therefore classified in heading 5911, HTSUS.

Similarly, in HQ 084937, dated November 29, 1989, CBP classified woven textile tubing fabric used on the plate surface of acid batteries under heading 5911, HTSUS, because it was a flat woven fabric with multiple weft and warp that would be further produced into a tubular battery gauntlet. In HQ 962967, dated November 21, 2000, CBP classified gaskets used in automatic data processing machines and similar computer equipment under heading 5911, HTSUS, after determining that the gaskets had a technical purpose within the meaning of Note 7 to Chapter 59, HTSUS. *See also*, HQ 956956, dated September 23, 1994 (In which CBP classified shielding gaskets in heading 5911, HTSUS, as the gaskets were used to prevent leakage of electromagnetic waves from electrical machinery and apparatus). Likewise, in HQ 967012, dated July 7, 2004, CBP determined that felt washers used in brass musical instruments were classified in heading 5911, HTSUS, because they were constructed of felt textile material, were provided for *eo nomine* in the exemplars of EN 59.11 and presented a particular characteristic which identified them as having a technical use with an instrument. *See* HQ 966913, dated July 7, 2004, (Wherein CBP classified felt piano washers used for pedal rod assemblies, in heading 5911, HTSUS). *See also*, NY G89391, dated April 17, 2001, (In which CBP classified roll covering wrap for use on laundry flatwork ironers that press laundered sheets, pillow cases and table clothes, in heading 5911, HTSUS).

The subject Twist-Tube is principally used to cover wiring assemblies in automobiles and light trucks. Moreover, the Twist-Tube sheaths and protects the electrical cable harnesses and wiring assemblies while simultaneously creating a barrier between the electrical wiring assemblies and the heat from the vehicle’s engine which ultimately allows electrical wiring assemblies to function properly. Accordingly, based on its principal use, the Twist-Tube

presents with an industrial or technical purpose which identifies it as being for use with a particular type of machinery, apparatus, or equipment; namely automotive engine components.

Having established that the subject Twist-Tube is used for a technical purpose or is otherwise suitable for industrial use — we must now determine whether it is a textile “product” or a textile “article” for purposes of Note 7 to Chapter 59. In *Airflow Tech v. United States*, 804 F. Supp. 2d 1292, the Court noted that Note 7 to Chapter 59 articulates a fundamental distinction between “products” and “articles” explaining that “the terms “product” and “article” — for purposes of Note 7 to Chapter 59 — must be given different meanings.” The Court further explained that:

“...as the terms are used in Note 7 to Chapter 59, a “textile product” appears to refer to textile materials (e.g., textile fabrics, felts, cloth), whereas a “textile article” refers to a textile object or item with a fixed identity and dimensions (e.g., gaskets, washers, polishing disks). See Pl.’s Brief at 22 (explaining that “textile materials of Chapter Note 7(a) are textile products which are used to make finished goods; the textile articles of Chapter Note 7(b) are finished goods themselves. . . Unlike Note 7(a) “textile products,” which may be imported in rolls or bolts, Note 7(b) “textile articles” upon importation possess the fixed identity and specific dimensions required for use with a particular machine or for some other specific technical application.”

*Airflow Tech*, at 1308. This fundamental distinction is significant in determining which subsection of Note 7 to Chapter 59, HTSUS, best describes the Twist-Tube. According to the definition in *Airflow Tech*, the Twist-Tube is not a “textile product” of Note 7(a) to Chapter 59 — as it is not used to “make” or later create a finished good. Instead, the Twist Tube is itself a finished article of commerce. According to the April 2019 FMC submission and the FMC website, the Twist-Tube does not require any post-importation modifications or additional manufacturing prior to its use by the ultimate consumer. Instead, the Twist-Tube is cut to specification prior to importation and is ready for use upon delivery. Upon importation, the Twist-Tube can be installed by hand, utilizing its self-wrapping construction. Once wrapped around the bundle or harness, the user must then twist the Twist-Tube around the harness to secure it in place. In instances, where twisting does not sufficiently affix the Twist-Tube to the bundle, tape can be used at each end to secure it in place.

Additionally, the Twist-Tube is produced in its finished state and is ready for use in its condition as imported. Lastly, based on its unique technical uses, fixed dimensions and OEM specifications, we find that the Twist-Tube presents with a fixed identity within the meaning *Airflow Tech*. Moreover, much like the gaskets and washers of HQ 967012 and HQ 956956, which seal the junction between two mating surfaces and secures a greater bearing on the surface of the structure beneath, the Twist-Tube sheaths and protects the electrical cable harnesses and wiring assemblies from abrasion with other engine components. Similarly, like the damper roller covers of HQ 081817, and the textile tubing fabric of HQ 084937, the Twist-Tube’s tubular self-wrapping construction covers cable assembly harnesses and electrical harnesses inside the automotive engine compartment while simultaneously providing OEM certified flame retardation. Accordingly, we find that the Twist-



Tube is a textile article of a kind used for technical purposes within the meaning of Note 7(b) to Chapter 59, HTSUS, and is consistent with the definition of a textile article as set forth in *Airflow Tech*.

**HOLDING:**

By application of GRI 1 and Note 7(b) to Chapter 59, HTSUS, the Twist-Tube textile self-wrapping tubular sleeve is classifiable in heading 5911, HTSUS. The merchandise is specifically classified in subheading 5911.90.0080, HTSUSA, which provides for: Textile products and articles, for technical uses, specified in note 7 to this chapter: Other, Other.” The 2021 column one, general rate of duty is 3.8% *ad valorem*.

**EFFECT ON OTHER RULINGS:**

NY N282623, dated February 17, 2017, is hereby REVOKED.

Additionally, NY N259736, dated December 24, 2014, NY N259746, dated December 23, 2014, NY N259737, dated May 13, 2016, NY N259747, dated May 13, 2016, are hereby REVOKED.

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

*Sincerely,  
For*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

**19 CFR PART 177****MODIFICATION OF FOUR RULING LETTERS AND  
REVOCATION OF TREATMENT RELATING TO THE  
TARIFF CLASSIFICATION OF TEXTILE LEG COVERINGS**

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

**ACTION:** Notice of modification of four ruling letters and of revocation of treatment relating to the tariff classification of textile leg coverings.

**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 four ruling letters concerning tariff classification of textile leg coverings under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 25, on June 30, 2021. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 7, 2021.}

**FOR FURTHER INFORMATION CONTACT:** Parisa J. Ghazi, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0272.

**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. 25, on June 30, 2021, proposing to modify four ruling letters pertaining to the tariff classification of textile leg coverings. 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 New York Ruling Letter ("NY") N295237, dated April 13, 2018, CBP classified the textile leg coverings in heading 6117, HTSUS, which provides for "Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories." In NY N092979, dated March 2, 2010, and NY N092981, dated March 2, 2010, CBP classified the leg coverings in heading 6217, HTSUS, which provides for "Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212." In NY N061590, dated June 16, 2009, CBP classified the leg coverings in heading 6307, HTSUS, which provides for "Other made up articles, including dress patterns." CBP has reviewed NY N295237, NY N092979, NY N092981 and NY N061590 and has determined the ruling letters to be in error. It is now CBP's position that the textile leg coverings are properly classified in heading 6406, HTSUS, specifically in subheading 6406.90.15, HTSUS, which provides for "Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N295237, NY N092979, NY N092981 and NY N061590 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H317808, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. §

1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

*For*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

*Attachment*

HQ H317808

August 24, 2021

OT:RR:CTF:FTM H317808 PJG

CATEGORY: Classification

TARIFF NO.: 6406.90.15

Ms. HELEN COOPER

ORIGINAL CONCEPTS

701 E. 3RD STREET, SUITE 130

LOS ANGELES, CA 90013

RE: Modification of NY N295237, NY N092979, NY N092981 and NY N061590; Classification of Textile Leg Coverings

DEAR Ms. COOPER:

This is in reference to New York Ruling Letter (“NY”) N061590, dated June 16, 2009, issued to you concerning the tariff classification of the Bad Costume (style 36230) under the Harmonized Tariff Schedule of the United States (“HTSUS”). Specifically, the Bad Costume (style 36230) consists of a jacket, trousers, gloves, two belts, a bracelet, and leg coverings, which are referred to as “shoe covers.” This decision concerns only the leg coverings.

In NY N061590, U.S. Customs and Border Protection (“CBP”) classified the leg coverings in subheading 6307.90.98, HTSUS, which provides for “Other made up articles, including dress patterns: Other: Other: Other.” We have reviewed NY N061590 and find it to be in error with regard to the tariff classification of the leg coverings. For the reasons set forth below, we hereby modify NY N061590 and three other rulings with substantially similar textile leg coverings: NY N295237, dated April 13, 2018, NY N092979, dated March 2, 2010, and NY N092981, dated March 2, 2010.

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. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on June 30, 2021, in Volume 55, Number 25, of the Customs Bulletin. No comments were received in response to this notice.

**FACTS:**

In NY N061590, the Bad Costume (style 36230) leg coverings are constructed of knit 95 percent cotton and 5 percent lycra fabric. The leg coverings also “have elastic at the back and numerous straps with metal grommets.” In NY N061590, U.S. Customs and Border Protection (“CBP”) classified the textile leg coverings in subheading 6307.90.98, HTSUS, which provides for “Other made up articles, including dress patterns: Other: Other: Other.”

In NY N295237, the “Loyal Knit” costume (Item CB17006) leg coverings were “composed of 100% polyester knit fabric” and “tubular shape[d].” CBP classified the textile leg coverings in in subheading 6117.80.95, which provides for “Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Other.”

In NY N092979, the Centurion Costume (Turquoise) (Item # 10530) leg coverings were “constructed of woven 90 percent polyester and 10 percent metallic fabric laminated to felt.” They were described as “cylindrical shaped covers represent[ing] armor.” In NY N092979, CBP classified the textile leg

coverings in subheading 6217.10.95, HTSUS, which provides for “Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other.”

In NY N092981, the Centurion Costume (Eggplant) (Item # 10540) leg coverings were “constructed of woven 90 percent polyester and 10 percent metallic fabric laminated to felt.” They were described as “cylindrical shaped covers represent[ing] armor.” In NY N092979, CBP classified the textile leg coverings in subheading 6217.10.95, HTSUS, which provides for “Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other.”

**ISSUE:**

Whether the textile leg coverings are classified as gaiters, leggings and similar articles under heading 6406, HTSUS, as other made up clothing accessories, knitted or crocheted under heading 6117, HTSUS, as other made up clothing accessories under heading 6217, HTSUS, or as other made up articles under heading 6307, HTSUS.

**LAW AND ANALYSIS:**

Classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) is made in accordance with the General Rules of Interpretation (“GRI”). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The 2021 HTSUS provisions under consideration are as follows:

- 6117** Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories:
- 6217** Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212:
- 6307** Other made up articles, including dress patterns:
- 6406** Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof:  
\* \* \*
- 6406.90** Other:  
\* \* \*
- Of other materials:
- 6406.90.15** Of textile materials

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the “official interpretation of the Harmonized System” at the international level. *See* 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989). While neither legally binding nor dispositive, the ENs “provide a commentary on the scope of each heading” of the HTSUS and are “generally indicative of [the] proper interpretation” of these headings. *See id.*

The EN to 64.06(II) provides as follows:

## (II) GAITERS, LEGGINGS, AND SIMILAR ARTICLES, AND PARTS THEREOF

These articles are designed to cover the whole or part of the leg and in some cases part of the foot (e.g., the ankle and instep). They differ from socks and stockings, however, in that they do not cover the entire foot. They may be made of any material (leather, canvas, felt, knitted or crocheted fabrics, etc.) **except** asbestos. They include gaiters, leggings, spats, puttees, “mountain stockings” without feet, leg warmers and similar articles. Certain of these articles may have a retaining strap or elastic band which fits under the arch of the foot. The heading also covers identifiable parts of the above articles.

The EN to 95.05(A)(3) provides as follows:

This heading covers:

(A) **Festive, carnival or other entertainment articles**, which in view of their intended use are generally made of non-durable material. They include:

\* \* \*

- (3) Articles of fancy dress, e.g., masks, false ears and noses, wigs, false beards and moustaches (**not being** articles of postiche - **heading 67.04**), and paper hats. However, the heading **excludes** fancy dress of textile materials, of **Chapter 61** or **62**.

Heading 6406, HTSUS, provides for gaiters and leggings. The terms “gaiters” and “leggings” are not defined in the HTSUS.<sup>1</sup> Headquarters Ruling Letter (“HQ”) 088454, dated October 11, 1991, defines a gaiter as “1. A leather or heavy cloth covering for the legs extending from the instep to the ankle or knee. 2. An ankle-high shoe with elastic sides. 3. An overshoe with a cloth top.” *Id.* (citing *The American Heritage Dictionary*, (2nd College Ed. 1982)). HQ 088454 provides two definitions for “legging”: 1) “[a] leg covering of material such as canvas or leather” and 2) “[c]overing for leg and ankle extending to knee or sometimes secured by stirrup strap under arch of foot. Worn in 19th c. by armed services and by civilian men. *See* PUTTEE and GAITER. Worn by women in suede, patent, and fabric in late 1960s.” *Id.* (citing *The American Heritage Dictionary*, (2nd College Ed. 1982) and *Fairchild’s Dictionary of Fashion*, (2nd Ed. 1988)). *See also* HQ 089582, dated November 6, 1991 and NY L81551, dated January 4, 2005.

In addition to gaiters and leggings, heading 6406, HTSUS, provides for “similar articles.” To “determine the scope of [a] general . . . phrase”, the United States Court of International Trade has used the rule of *ejusdem generis*. *See A.D. Sutton & Sons v. United States*, 32 C.I.T. 804, 808 (Ct. Int’l Trade 2008) (citing *Aves. in Leather, Inc. v. United States*, 178 F.3d 1241, 1244 (Fed. Cir. 1999)). Under the rule of *ejusdem generis*, “the general word or phrase is held to refer to things of the same kind as those specified.” *Id.*

<sup>1</sup> “When...a tariff term is not defined in either the HTSUS or its legislative history”, its correct meaning is its common or commercial meaning. *See Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1356 (Fed. Cir. 2001). “To ascertain the common meaning of a term, a court may consult ‘dictionaries, scientific authorities, and other reliable information sources’ and ‘lexicographic and other materials.’” *Id.* at 1356–1357 (quoting *C.J. Tower & Sons v. United States*, 69 C.C.P.A. 128, 673 F.2d 1268, 1271 (CCPA 1982); *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)).

(citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994)). Therefore, “to fall within the scope of the general term, the imported good ‘must possess the same essential characteristics of purposes that unite the listed examples preceding the general term or phrase.’” *Id.* (citing *Aves. in Leather, Inc.*, 178 F.3d at 1244).

Applying the rule of *ejusdem generis*, we note that the definitions of gaiters and leggings provided in HQ 088454 indicate that the articles are both leg coverings. Similarly, EN 64.06(II) describes gaiters, leggings and similar articles as “designed to cover the whole or part of the leg and in some cases part of the foot....Certain of these articles may have a retaining strap or elastic band which fits under the arch of the foot.” The EN further states that these articles are different from socks because they do not cover the entire foot.

We find that the Bad Costume (style 36230) leg coverings share the same characteristics as leggings and gaiters of heading 6406, HTSUS. The subject leg coverings provide leg coverage like leggings and gaiters, which provide leg coverage extending to the ankle or to the knee. Finally, consistent with EN 64.06(II), the subject leg coverings do not cover the entire foot. Accordingly, the subject polyester leg coverings are classifiable under heading 6406, HTSUS, as articles similar to leggings and gaiters, and are specifically classified in subheading 6406.90.15, HTSUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials.”

In NY N061590, CBP classified the leg coverings in heading 6307, HTSUS, which provides for “Other made up articles, including dress patterns.” In NY N295237, CBP classified the leg coverings in heading 6117, HTSUS, which provides for “Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories.” In NY N092979 and NY N092981, CBP classified the leg coverings in heading 6217, HTSUS, which provides for “Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212.” Note 1(n) to Section XI, HTSUS, states that Section XI, HTSUS, does not cover “Footwear or parts of footwear, gaiters or leggings or similar articles of chapter 64.” Therefore, since the merchandise is classifiable in heading 6406, HTSUS, it cannot also be classifiable in headings 6117, 6212, or 6217, HTSUS.

On the other hand, heading 9505, HTSUS, provides, in relevant part, for festive articles and “parts and accessories” of festive articles. EN 95.05(A)(3) states that the heading covers costume accessories such as masks, false ears, noses, wigs, false beards, mustaches and paper hats. *See Rubie’s Costume Co. v. United States*, 337 F.3d 1350, 1359 (Fed. Cir. 2003) (stating that the Explanatory Notes do not narrow the scope of heading 9505, HTSUS, to only accessories to costumes). CBP has classified similar costume accessories under heading 9505, HTSUS. *See, e.g.*, NY N245614, dated August 29, 2013 (stretchable sleeves covered in fake tattoos are classifiable in heading 9505, HTSUS) and NY N162276 (butterfly wings and wand are classifiable in heading 9505, HTSUS). Similar to the articles described in the exemplars provided in EN 95.05(A)(3) and the cited rulings, the subject leg coverings are costume accessories.



When goods are *prima facie* classifiable under two or more headings, we must proceed to GRI 3. According to GRI 3(a), “[t]he heading which provides the most specific description shall be preferred to headings providing a more general description.” In *Russ Berrie & Co. v. United States*, 381 F.3d 1334 (Fed. Cir. 2004), the U.S. Court of Appeals for the Federal Circuit (“CAFC”) determined that Christmas and Halloween-themed lapel pins and earrings were *prima facie* classifiable as both imitation jewelry of heading 7117, HTSUS, and as festive articles of heading 9505, HTSUS. Applying GRI 3(a), the CAFC reasoned that:

We have recognized that festive articles include such disparate items as ‘placemats, table napkins, table runners, and woven rugs’ depicting ‘Christmas trees, Halloween jack-o-lanterns, [and Easter] bunnies,’ (citation omitted) ‘cast iron stocking hangers[;] ... Christmas water globes; ... [and] Easter water globes,’ (citation omitted) and jack-o-lantern mugs and pitchers (citation omitted).

Because heading 9505 covers a far broader range of items than heading 7117, the latter is more specific than the former. It is also more specific because it describes the item by name (‘imitation jewelry’) rather than by class (‘festive articles’). It therefore follows that the imported merchandise is classifiable under heading 7117 rather than under heading 9505.

*Id.* at 1338.

In the instant case, the “gaiters, leggings and similar articles” heading is more specific than the “festive articles” heading because “it covers a narrower set of items.” *See id.* The relevant portion of heading 6406, HTSUS, pertains to leg coverings, whereas the relevant portion of heading 9505, HTSUS, specifically “‘festive articles’... need only to be closely associated with and used or displayed during a festive occasion.” *Id.* Accordingly, heading 6406, HTSUS, is more specific than heading 9505, HTSUS, and by application of GRI 3(a), the subject leg coverings are properly classified under heading 6406, HTSUS, and specifically in subheading 6406.90.15, HTSUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials.”

#### **HOLDING:**

By application of GRI 3(a), the Bad Costume (style 36230) textile leg coverings are classified under heading 6406, HTSUS, and specifically, in subheading 6406.90.15, HTSUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials.” The 2021 column one, general rate of duty is 14.9 percent *ad valorem*.

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

**EFFECT ON OTHER RULINGS:**

NY N295237, dated April 13, 2018, is MODIFIED with regard to the tariff classification of the “Loyal Knit” costume (Item CB17006) “leg covers.”

NY N092979, dated March 2, 2010, is MODIFIED with regard to the tariff classification of the Centurion Costume (Turquoise) (Item # 10530) “leg covers.”

NY N092981, dated March 2, 2010, is MODIFIED with regard to the tariff classification of the Centurion Costume (Eggplant) (Item # 10540) “leg covers.”

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*

# U.S. Court of Appeals for the Federal Circuit

THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE BEER INSTITUTE,  
Plaintiffs-Appellees v. DEPARTMENT OF THE TREASURY, UNITED STATES  
CUSTOMS AND BORDER PROTECTION, JANET YELLEN, IN HER OFFICIAL  
CAPACITY AS SECRETARY OF THE TREASURY, TROY MILLER, IN HIS OFFICIAL  
CAPACITY AS SENIOR OFFICIAL PERFORMING THE DUTIES OF THE  
COMMISSIONER FOR U.S. CUSTOMS AND BORDER PROTECTION,  
Defendants-Appellants

Appeal No. 2020–1734

Appeal from the United States Court of International Trade in No. 1:19-cv-00053-  
JAR, Senior Judge Jane A. Restani.

Decided: August 23, 2021

PETER D. KEISLER, Sidley Austin LLP, Washington, DC, argued for all plaintiffs-appellees. Plaintiff-appellee National Association of Manufacturers also represented by BARBARA GUY BROUSSARD, TOBIAS SAMUEL LOSS-EATON, VIRGINIA ANNE SEITZ; CATHERINE EMILY STETSON, Hogan Lovells US LLP, Washington, DC.

JAMES EDWARD TYSSSE, Akin Gump Strauss Hauer & Feld LLP, for plaintiff-appellee The Beer Institute. Also represented by LARS-ERIK ARTHUR HJELM, LIDE E. PATERNO, DEVIN S. SIKES.

AUGUST FLENTJE, Appellate Staff, Civil Division, United States Department of Justice, Washington, DC, argued for all defendants-appellants. Also represented by CLAUDIA BURKE, JEFFREY B. CLARK, JEANNE DAVIDSON, JUSTIN REINHART MILLER, ALEXANDER J. VANDERWEIDE, Commercial Litigation Branch, Civil Division, United States Department of Justice, New York, NY; DANIEL J. PAISLEY, United States Department of the Treasury, Washington, DC.

ALEXANDRA KHREBTUKOVA, Office of the Assistant Chief Counsel, Bureau of Customs and Border Protection, United States Department of Homeland Security, New York, NY, for defendant-appellant United States Customs and Border Protection.

JOHN MICHAEL PETERSON, Neville Peterson LLP, New York, NY, for amicus curiae Customs Advisory Services, Inc. Also represented by PATRICK KLEIN, RICHARD F. O'NEILL.

Before LOURIE, PROST\*, and REYNA, *Circuit Judges*.

REYNA, *Circuit Judge*.

This case involves the interaction of federal excise taxes and duty drawbacks for wine in the United States. The United States Government appeals from a judgment by the United States Court of International Trade holding that a set of regulations, collectively described herein as the Rule, promulgated in 2018 by the Department of Treasury and the United States Customs and Border Protection, are invalid as an unlawful interpretation of 19 U.S.C. § 1313(v).

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\* Circuit Judge Sharon Prost vacated the position of Chief Judge on May 21, 2021.

The question presented on appeal is whether the Court of International Trade erred when it invalidated the Rule interpreting 19 U.S.C. § 1313(v) finding that the statute was unambiguous at step one of *Chevron*. We conclude that the Court of International Trade did not err in finding that the Rule, which redefines “drawback” to include excise tax liability on exports that have neither been “paid or determined,” is contrary to the clear intent of Congress as expressed in the language and structure of the statute. Accordingly, we affirm the judgment of the Court of International Trade.

### BACKGROUND

This appeal concerns a set of regulations, promulgated in 2018 by the Department of the Treasury (“Treasury”) and the United States Customs and Border Protection (“CBP” or “Customs”), described herein as the Rule.<sup>1</sup> The Rule is an interpretation of 19 U.S.C. § 1313(v), which states in relevant part:

Merchandise that is exported or destroyed to satisfy any claim for drawback shall not be the basis of any other claim for drawback . . . .

19 U.S.C. § 1313(v).

Generally, imported goods are subject to a variety of payments, such as tariffs, duties, fees, and certain taxes, such as an excise tax. A “drawback” is a customs transaction involving the refund of any payments that were made upon the importation of a good. Drawbacks are designed to incentivize exports from the United States and allow U.S. exporters to compete more fairly with overseas competitors.

The most common form of drawback occurs when duties that are paid when a good is imported are refunded when the same good is exported. Another common form of drawback, known as a “substitution drawback,” involves the refund of duties, taxes, or fees that were paid upon importation and refunded when similar goods, normally merchandise classified under the same subheading of the Harmonized Tariff Schedule of the United States (“USHTS”), are exported. *See* 19 U.S.C. § 1313(j)(2), 19 C.F.R. § 191.22(a). The statute most relevant to substitution drawbacks is 19 U.S.C. § 1313(j)(2), which states in relevant part:

[W]ith respect to imported merchandise on which was paid any duty, tax, or fee imposed under Federal law upon entry or im-

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<sup>1</sup> The Rule comprises the following regulations: 19 C.F.R. §§ 190.171(c)(3), 190.22(a)(1)(ii)(C), 190.32(b)(3), 191.171(d), 191.32(b)(4), the final sentence of 19 C.F.R. § 191.22(a), and the final sentence in the definition of “drawback” and “drawback claim” in 19 C.F.R. § 190.2.

portation [...] that [...] notwithstanding any other provision of law, upon the exportation or destruction of such other merchandise an amount calculated pursuant to regulations prescribed by the Secretary of the Treasury under subsection (l) shall be refunded as drawback.

19 U.S.C. § 1313(j)(2).

Since 2008, substitution drawback has been allowed for wine where the imported wine and exported wine are of the same color and the price variation between the imported wine and the exported wine does not exceed fifty percent. *See* Food, Conservation, and Energy Act of 2008, Pub. L.No. 110–234, § 15421, 122 Stat. 923, 1547 (May 22, 2008)(codified as amended at 19 U.S.C. § 1313(j)(2)). Since this change, companies that both import and export wine or transfer its right to drawback have been claiming drawbacks for taxes, fees, and duties paid on the imported wine based on their exports of similar wine, i.e., substituted wine. As an example, if a company imported 100 bottles of red wine and then exported 100 bottles of similarly priced red wine, that company could claim drawback for nearly all charges assessed on the imported wine. J.A. 4. The substitution in the example can also result in a near total refund of both tariffs and excise taxes<sup>2</sup> paid on the imported wine. This can occur in situations where the substituted exported wine was either not subject to any excise tax by virtue of being exported from a bonded facility<sup>3</sup>, or had received a complete refund of any previously paid excise taxes. This results in a “double drawback.” J.A. 4. As a response to this practice, the Government promulgated the Rule to prevent “double recovery” of excise tax. J.A. 18–19.

The Rule makes two fundamental changes to the drawback regime. First, it includes within the definition of “drawback” and “drawback claim” a “refund or remission of other excise taxes pursuant to other provisions of law.” 19 C.F.R. § 190.2. Under this definition, the export of merchandise even without payment of an excise tax counts as a claim for drawback. *See* J.A. 5. Second, the Rule limits drawbacks to the amount of taxes paid and not previously refunded. *See* 19 C.F.R. §§ 190.171(c)(3), 190.22(a)(1)(ii)(C), 190.32(b)(3), 191.171(d), 191.22(a), and 191.32(b)(4). This second change prevents a domesti-

<sup>2</sup> An excise tax is imposed on certain domestically consumed goods, regardless of origin, such as wine, beer, spirits, tobacco, and petroleum products. J.A. 2. Drawbacks of excise taxes may occur in multiple ways.

<sup>3</sup> An imported good is subject to tariffs, fees, and taxes upon “entry” in the United States. A good is deemed not to enter the United States if upon importation it is placed in a customs bonded warehouse. If the good is taken from a bonded warehouse and sold or consumed in the United States, the good has entered the United States and may be subject to tariffs and fees. But if the good is exported from a warehouse, no import duties are paid.

cally produced exported good, which would have been subject to the excise tax if made available for domestic use (sold or consumed), from qualifying for a claim for substitution drawback under the language of 19 U.S.C. § 1313(j)(2). J.A. 5.

The National Association of Manufacturers (“NAM”) along with Intervenor, The Beer Institute,<sup>4</sup> brought suit against the Treasury and CBP arguing that the Rule is contrary to law, arbitrary and capricious, and impermissibly retroactive. J.A. 5. NAM raised three primary arguments: (1) the language of the statute dealing with substitution drawbacks, § 1313(j)(2), forecloses the agencies’ interpretation of § 1313(v) because § 1313(j)(2) states that under certain conditions, the drawback shall be refunded “notwithstanding any other provision of law”; (2) the Rule’s interpretation of § 1313(v) conflicts with § 1313(l)(2), which provides for the calculation of substitution drawback; (3) the Rule includes a prohibition not contemplated in § 1313(v), namely the prohibition of a substitution drawback for excise taxes paid on imported goods where the substitute exported goods were exempt from excise tax. J.A. 5–6.

The Government responded that the Treasury and CBP’s interpretation of § 1313(v) is “reasonable, historically supported, and necessary to reconcile the purpose of federal excise tax with the drawback regime.” J.A. 7. The Government further argued that a drawback is not only limited to taxes paid, but rather a drawback can extend to cover tax exemptions in order to prevent improper “piggybacking” of exception benefits onto drawback benefits. *Id.* (citing H.R. Rep. No. 103–361 at 130 (1993), reprinted in 1993 U.S.C.C.A.N. 2552, 2680 (stating that 19 U.S.C. § 1313 “codifies current Customs practice against ‘piggybacking’ other duty exemption benefits (foreign-trade zones, bonded warehouses and duty-free temporary importation) onto the drawback benefits.”).

NAM replied that the Government improperly attempts to revert the statute back to CPB’s pre-2004 regime, which Congress rejected by allowing for the drawback of excise taxes. J.A. 7–8.

The United States Court of International Trade (“CIT”) applied the two-part *Chevron* test to find that the Rule is unlawful as to the challenged provisions. Specifically, the CIT addressed whether Congress had “directly spoken to the precise question at issue.” J.A. 8. If Congress’s intent was clear, the CIT explained, then “that is the end of the matter,” as the agency and the court must “give effect to the unambiguously expressed intent of Congress.” *Id.* (citing *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984)). But if

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<sup>4</sup> The Beer Institute submitted a brief concerning the retroactive application of the Rule. Because this court invalidates the Rule, those arguments are moot.

the statute is “silent or ambiguous with respect to the specific issue” then the court must determine whether the agency’s interpretation is “based on a permissible construction of the statute.” J.A. 9. Applying those principles, the CIT determined that the inquiry ends at step one because the Rule conflicts with the unambiguous text of the statute. *Id.*

The CIT also concluded that, while the CBP identified the aforementioned “double-drawback” issue and expressed its concern on multiple occasions to Congress, Congress took no steps to curtail the practice. J.A. 4. Specifically, referring to certain portions of the legislative history, the CIT observed that “it appears that Congress has repeatedly chosen to expand access to drawback at the expense of lost excise tax revenue. The agencies cannot now attempt to alter this policy choice by way of a regulation that does not comport with the animating statute.” J.A. 18; *see also* J.A. 20.

## DISCUSSION

We review the CIT’s interpretation of statutes and regulations *de novo*. *Abbott Labs. v. United States*, 573 F.3d 1327, 1330 (Fed. Cir. 2009). Courts review agencies’ interpretations of statutes by applying the two-step *Chevron* framework. *See* 467 U.S. at 842–43 & n.9. In applying *Chevron*, the Court first uses “traditional tools of statutory construction” to determine whether Congress has “directly spoken to the precise question at issue”; if so, “that is the end of the matter.” *Id.* at 843 & n.9. If not, the Court asks whether the regulation reflects “a permissible construction.” *Id.* at 843.

To prevail, the Government must succeed in both its redefinition of “drawback,” particularly for the purposes of the “double drawback” prohibition of 19 U.S.C. § 1313(v), and in its interpretation of numerous subsections of 19 U.S.C. § 1313.

### I

The Government argues that “claim for drawback” includes not only refunds of already-paid excise taxes on imports under the Tariff Act, 19 U.S.C. § 1313(d), but also includes cancellation of excise-tax liability for exports that have neither been “paid or determined” under the Internal Revenue Code (“IRC”), 26 U.S.C. § 5362(c). *See* Appellant’s Br. 6–7. The Rule was created to reconcile the two separate provisions to address the non-collection of taxes on certain exported merchandise. *See* J.A. 7. 19 U.S.C. § 1313(d) reads in relevant part:

Upon the exportation of bottled distilled spirits and wines manufactured or produced in the United States on which an

internal-revenue tax has been paid or determined, there shall be allowed, under regulations to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, a drawback equal in amount to the tax found to have been *paid or determined* on such bottled distilled spirits and wines.

19 U.S.C. § 1313(d) (emphasis added). 26 U.S.C. §5362(c) of the IRC states, in relevant part, that wine, “on which tax has not been paid or determined” may be withdrawn from a bonded facility<sup>5</sup> “without payment of tax for export.”

Prior to the Government’s promulgation of the Rule, the applicable regulation defining drawback was the following:

Drawback means the refund or remission, in whole or in part, of a customs duty, fee or internal revenue tax which was imposed on imported merchandise under Federal law because of its importation, and the refund of internal revenue taxes paid on domestic alcohol as prescribed in 19 U.S.C. 1313(d).

19 C.F.R. § 191.2(i) (2015); *see also id.* § 191.3. The new regulation, as part of the Rule, reads:

Drawback, as authorized for payment by CBP, means the refund, in whole or in part, of the duties, taxes, and/or fees paid on imported merchandise, which were imposed under Federal law upon entry or importation, and the refund of internal revenue taxes paid on domestic alcohol as prescribed in 19 U.S.C. 1313(d). *More broadly, drawback also includes the refund or remission of other excise taxes pursuant to other provisions of law.*

19 C.F.R. § 190.2 (emphasis added). The final sentence of the new regulation within the Rule expands the definition of drawback to encompass the “refund or remission” of excise taxes on exports.

In support of its broadened definition of drawback, the Government asserts that § 1313(v)’s reference to any “claim for drawback” includes the cancellation of any excise-tax liability that has been paid or determined on exports. 19 U.S.C. § 1313(v). The Government relies on the language in 19 U.S.C. § 1313(d), which states that “a drawback

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<sup>5</sup> According to 19 U.S.C. § 1555(b)(1), “[d]uty-free sales enterprises may sell and deliver for export from the customs territory duty-free merchandise in accordance with this subsection and such regulations as the Secretary may prescribe to carry out this subsection” from a bonded facility.



[is] equal in amount to the tax found to have been paid *or determined* on such bottled distilled spirits and wines.” 19 U.S.C. § 1313(d) (emphasis added). The Government adds that the IRC uses the term “drawback” similarly. *See* 26 U.S.C. § 5062(b) (“there shall be allowed . . . a drawback equal in amount to the tax found to have been paid *or determined*. . . .” (emphasis added)). NAM does not contest this point as to taxes that are paid. *See* Appellant’s Br. 15. However, the Government goes further and argues that “drawback” encompasses the cancellation of excise taxes imposed on domestic products that are exported *without* the payment of tax.

Herein lies the crux of the dispute. The Government contends that the term “drawback” should also be used to describe transactions in which excise-tax liability is extinguished under provisions where products are withdrawn for export without payment of tax. *See* 26 U.S.C. § 5362(c) (stating that wine exported without tax having been “paid or determined” does so without payment of tax); J.A. 12–13; Appellant’s Br. 19. The Government’s rationale is that, when products are withdrawn “without payment of tax” for export, they are not withdrawn “free of tax” because tax liability attaches at the time of production and is covered by bond and cancelled only upon proof of exportation. Appellant’s Br. 28; *compare* 26 U.S.C. § 5362(c)(1) (“without payment of tax for export”) *with* § 5362(c)(7)–(9) (“free of tax” for various uses including experimental and research purposes). We disagree.

The Rule’s broadened definition of “drawback” includes a drawback of excise tax that was *never* “paid or determined” on exported merchandise. *See* 26 U.S.C. §§ 5704(b), 5214(a), 5362(c). This defies logic. A tax that has never been paid or determined cannot be said to have been “drawn back,” and goods that have been exported without payment of tax cannot give rise to a “claim” for drawback, because there would be no refund to be paid out or cancellation of liability to be made.

The Government’s argument that taxes on bonded wine products have been “determined” at the point of production and “cancelled” upon exportation cannot be reconciled with 26 U.S.C. § 5362(c). “Determined” within the IRC refers to situations where tax is both determined and paid at the time the goods are withdrawn from bond, or where “the amount of the tax to be paid is computed and fixed” upon withdrawal, “with payment to be made by return” later for either prepayment or deferred payment. S. Rep. No. 85–2090, at 100 (1958), reprinted in 1958 U.S.C.C.A.N. 4395, 4492; *see also* Appellee’s Br. 52. If bonded goods are withdrawn for export, however, tax liability is not computed and fixed for prepayment or deferred payment

because a tax will never be paid at all. *See, e.g.*, 26 U.S.C. § 5041(a) (stating that wine tax is “determined as of removal for *consumption or sale*” (emphasis added)). Thus, tax in that scenario would not be “determined.” The Government’s assertion that the tax is determined at the time of production is unpersuasive and does not explain the statutory distinction appearing in other IRC provisions between a tax that has been “paid or determined” and one that “has not been paid or determined.” *Compare* 26 U.S.C. § 5062(b) *with* 26 U.S.C. § 5214(a)(4). Moreover, had Congress intended “drawback” to describe all the instances in § 1313 and the IRC to which the agencies attempt to apply the term, it would not have selectively used the term in some sections, but not others. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (“It is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” of language.); *see also BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1539, 209 L. Ed. 2d 631 (2021) (“In the end, all of the parties’ fencing about language Congress didn’t use persuades us of only one thing—that we are best served by focusing on the language it did employ.”). Notably, both § 1313 and the IRC *do not* use the term “drawback” to refer to exportation without payment or determination of tax. Therefore, we conclude that the expansive definition in the Rule, which extends drawback to situations in which tax is never paid or determined, conflicts with the unambiguous text of the statute.

## II

The Government also argues on appeal that the CIT erred in invalidating the Rule by erroneously reading the Rule to create irreconcilable statutory conflicts and irrational results. Appellant’s Br. 38 (citing J.A. 13).

With respect to statutory conflicts, the Government argues that Congress’s addition of the “notwithstanding” clause in § 1313(j)(2), which requires a drawback of “any” tax imposed on importation “notwithstanding another provision of law,” is not indicative of Congress’s intent to allow for a substitution drawback even if excise tax has not been paid on the export because the Supreme Court has explained that a “notwithstanding” clause should not be “unreasonably expanded” to “narrow so dramatically an important provision that [Congress] inserted in the same statute.” Appellant’s Br. 39 (quoting *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 386 (2009)). Next, the Government argues that the CIT erred in finding that the calculation methodology set forth in § 1313(l) is nullified by the Rule. With respect to the CIT’s finding that the Rule produces irrational results

by preventing “an untaxed export from serving as substituted merchandise in a drawback claim on a corresponding import in any capacity,” the Government argues that the Rule does not prohibit this result but merely prohibits double recovery of the same tax. Appellant’s Br. 44 (citing J.A. 17). Additionally, the Government argues that the legislative history of the drawback regime does not support invalidating the Rule. We disagree and address each of the Government’s arguments below.

In 2004, Congress amended 19 U.S.C. § 1313(j)(2) to require drawback of “any” tax imposed on importation, “notwithstanding any other provision of law.” 19 U.S.C. § 1313(j)(2). Section 1313(j)(2) provides the criteria for substitution drawback, which, as the CIT points out, does not include a requirement that a company must have already paid tax on its exports to receive a drawback. *See* J.A. 14–15. When the criteria are met, the CBP must pay a substitution drawback “notwithstanding any other provision of law.” 19 U.S.C. § 1313(j)(2). Congress added this “notwithstanding” clause in 2004 specifically to overrule a series of Customs rulings holding excise taxes ineligible for substitution drawback and to make excise taxes eligible for substitution drawback, like other federal charges imposed “upon entry or [importation].” Pub. L. No. 108–429, § 1557(a), 118 Stat. 2434 at 2579 (Dec. 3, 2004); *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (explaining that a “notwithstanding” clause can be used to “show[] which of two or more provisions prevails in the event of a conflict”). By relying on an “other provision of law”—specifically, subsection (v)—the Rule would trump paragraph (j)(2) and render the “notwithstanding” clause meaningless. *See* J.A. 14. Accordingly, the interpretation of § 1313(v) as set forth in the Rule creates a conflict with the amended language of §1313(j)(2) and thus cannot support the Government’s interpretation.

Next, with respect to the Government’s argument that the CIT erred in finding that the calculation methodology set forth in § 1313(l) is nullified by the Rule, § 1313(l)(2)(B)–(C) provides that the amount of drawback available based on substituted merchandise shall be “equal to 99 percent of the lesser of (i) the amount of duties, taxes, and fees paid with respect to the imported merchandise; or (ii) the amount of duties, taxes, and fees that would apply to the [substituted] exported article if the exported article were imported.” 19 U.S.C § 1313(l)(2)(B)–(C). Essentially, § 1313(l)(2) provides the amount of drawback that the CBP must pay if the substitution statute, § 1313(j)(2), is satisfied. As the CIT properly stated, § 1313(l)(2) requires that a refund be paid on imported goods upon the timely exportation of other goods with the same USHTS code regardless of

whether taxes were paid on those other goods. *See* J.A. 3. This is another example of how the Rule's interpretation of § 1313(v) creates a conflict with § 1313(l) and cannot support the Government's interpretation.

Third, we address the Government's contention that the CIT erred when it recognized that the Rule would create an irrational or absurd result by "prevent[ing] an untaxed export from serving as substituted merchandise in a drawback claim on a corresponding import in any capacity" or, in other words, would bar recovery of any duties, taxes and fees on the import, including the excise tax. J.A. 17. In response, the Government simply contends that the Rule does not prohibit this result but merely prohibits double recovery of the same tax. Appellant's Br. 44. However, once exported merchandise has been used "to satisfy [one] claim for drawback," § 1313(v), it cannot be used for that purpose again under the Rule. Thus, every untaxed exportation of domestic goods creates a "claim for drawback" that triggers this restriction under the Rule. Consequently, such goods can never "be the basis of any other claim for drawback." 19 U.S.C. § 1313(v); *see also Ark. Dairy Coop. Ass'n v. U.S. Dep't of Agric.*, 573 F.3d 815, 829 (D.C. Cir. 2009) (finding that an interpretation producing "absurd" results "fails at *Chevron* step one"). Thus, under the Government's interpretation, the Rule reads into § 1313(v) a restriction that does not exist. The CIT was correct in its finding that this produces an absurd result that fails at *Chevron* step one.

As to the Government's final argument, that the legislative history does not support invalidating the Rule, the Government argues that Congress was clear in guarding against abuse of the substitution-drawback privilege by prohibiting an importer or exporter from counting a drawback twice. The Government concedes that if the CIT's analysis were credited, it suggests, at most, that Congress was aware of, but failed to correct, this issue as to wine. Appellant's Br. 49. The Government further contends that the agencies' estimated revenue loss supports its position more so than the CIT's review of congressional inaction through the legislative history. We disagree.

Here, the legislative history of the drawback regime demonstrates that Congress chose to expand access to drawbacks at the expense of excise taxes. For example, after § 1313(v) was added in 1993, in 2004, Congress amended 19 U.S.C. § 1313(j)(2) to require that drawbacks be paid "notwithstanding any other provision of law," as discussed above. Then, in 2008, Congress liberalized substitution drawback for wine by allowing substitution based on any wine that is the same color and within 50 percent of the same price. *See* Pub. L. No. 110-234 § 15421, 122 Stat. at 1547 (codified as amended at 19 U.S.C. §

1313(j)(2)(2008)). Thereafter, the Treasury and the CBP proposed a regulation to limit drawback granted on exports to only the amount of taxes actually paid. Drawback of Internal Revenue Excise Tax, 74 Fed. Reg. 52,928, 52,931 (Oct. 15, 2009); J.A. 267. In response to opposition from legislators, the agencies eventually withdrew the proposed regulation. See Drawback of Internal Revenue Excise Tax, 75 Fed. Reg. 9,359–60 (Mar. 2, 2010); J.A. 273–74. No further action was taken by Congress.

As the CIT noted, “Congress is presumed to know that the wine industry was filing substitution-drawback claims in situations where no excise tax had been paid and . . . appears to have at least indirectly sanctioned the practice.” J.A. 20. “This history demonstrates that Congress made a policy choice to encourage exports by expanding the ability to claim drawback, even with the knowledge that industries may then avoid some payment of excise tax.” *Id.* We agree.

#### CONCLUSION

We conclude that the challenged provisions of the Rule contravene the unambiguous text of the statute and, therefore, the inquiry ends at *Chevron* step one. Accordingly, we affirm the judgment of the CIT that the Rule is unlawful as to the challenged provisions. We have considered the parties’ remaining arguments and determine that we need not address them in light of our decision.

**AFFIRMED**



# U.S. Court of International Trade

Slip Op. 21–105

ECHJAY FORGINGS PRIVATE LIMITED, Plaintiff, v. THE UNITED STATES, Defendant, and COALITION OF AMERICAN FLANGE PRODUCERS, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge  
Court No. 18–00230

[The court affirms Commerce’s *Remand Results*.]

Dated: August 20, 2021

*Peter J. Koenig*, Squire Patton Boggs (US) LLP, of Washington, D.C., for plaintiff. *Geoffrey M. Long*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Brian M. Boyton*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of Counsel *Kirrin Hough*, Office of the Chief Counsel for Trade Enforcement & Compliance.

*Daniel B. Pickard*, *Stephanie M. Bell* and *Cynthia C. Galvez*, Wiley Rein LLP, of Washington, D.C., for defendant-intervenor.

## OPINION

### Katzmann, Judge:

Referencing the saga of a family that was central to the litigation under review, the prior opinion in this case noted the opening line of the classic novel, *Anna Karenina*: “All happy families are alike; each unhappy family is unhappy in its own way.”<sup>1</sup> *Echjay Forgings Pvt. Ltd. v. United States*, 44 CIT \_\_, \_\_, 475 F. Supp. 3d 1350, 1356 (2020) (“*Echjay I*”). The court now returns to a dispute involving an anti-dumping (“AD”) investigation and the United States Department of Commerce’s (“Commerce”) decision to collapse affiliated entities exclusively owned by members of the same, albeit estranged, family: the Doshi family.

In its original determination, Commerce collapsed the entities for purposes of calculating an AD margin, concluding the companies were affiliated, would not require substantial retooling of their facilities to restructure production priorities, and each had significant potential to manipulate the product pricing or production priorities of the others. *Stainless Steel Flanges From India: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Critical Circumstance Determination*, 83 Fed. Reg. 40,745 (Dep’t

<sup>1</sup> Leo Tolstoy, *Anna Karenina* (1877).

Commerce Aug. 16, 2018) (“*Final Determination*”); Mem. from J. Doyle to J. Maeder, re: Issues and Decision Mem. for the Final Determination of the AD Duty Investigation of Stainless Steel Flanges from India at 14–27 (Dep’t Commerce Aug. 10, 2018), P.R. 406 (“IDM”). Before the court is Commerce’s *Final Results of Redetermination Pursuant to Court Remand* (Dep’t Commerce Feb. 17, 2021), ECF No. 73 (“*Remand Results*”), which the court ordered in *Echjay I* so that Commerce could further explain or reconsider its decision to collapse the Doshi family companies. On remand, Commerce reversed itself and determined not to collapse the entities because they were not affiliated. Plaintiff Echjay Forgings Private Limited (“Echjay”) does not challenge the *Remand Results*. Defendant-Intervenor Coalition of American Flange Producers (“Coalition”) challenges the *Remand Results* as inadequately explained and supported. Def.-Inter the Coalition of Am. Flange Prods.’ Comments on the Results of Remand Redetermination at 1, Mar. 19, 2021, ECF No. 76 (“Def.-Inter’s Br.”). Defendant the United States (“Government”) requests that the court sustain Commerce’s *Remand Results*. Def.’s Reply in Supp. of the Dep’t of Commerce’s Remand Redetermination at 2, May 5, 2021, ECF No. 81 (“Def.’s Br.”). The court affirms Commerce’s *Remand Results* and enters judgment for the Government.

### BACKGROUND

The court detailed the relevant legal and factual background of the proceedings in further detail in its previous opinion, *Echjay I*, 475 F. Supp. 3d at 1357–63. Information relevant to the instant opinion is set forth below.

“In some instances, Commerce will treat related entities as a single entity for purposes of [AD] calculations.” *Prosperity Tieh Enter. Co. v. United States*, 965 F.3d 1320, 1323 (Fed Cir. 2020) (citing *Carpenter Tech. Corp. v. United States*, 510 F.3d 1370, 1373 (Fed. Cir. 2007)). Under Commerce’s collapsing regulation, three requirements must be satisfied in order for Commerce to collapse entities: Commerce must determine that (1) the companies are affiliated; (2) they share “production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities;” and (3) there is “a significant potential for the manipulation of price or production” between the affiliated companies. 19 C.F.R. § 351.401(f); see also *Carpenter Tech. Corp.*, 510 F.3d at 1373. Affiliation is defined by statute, 19 U.S.C. § 1677(33), to include “(A) [m]embers of a family” and “(F) [t]wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person,” among other categories.



On September 11, 2017, Commerce initiated an AD duty investigation of stainless steel flanges imported from India and China from the period of July 2016 through June 2017 (“POI”), which included imports by Echjay. *Stainless Steel Flanges From India and the People’s Republic of China: Initiation of Less-Than-Fair-Value Investigation*, 82 Fed. Reg. 42,649 (Dep’t Commerce Sept. 11, 2017). Commerce investigated all companies owned by members of the Doshi family, even though by the time of the POI and Commerce’s investigation, the Doshi family had fractured into three camps. *Echjay I*, 475 F. Supp. 3d at 1361–62. As a result of inter-family discord leading to legal separation agreements set by the Bombay High Court, the Doshi family separately consisted of: (1) the Doshi family owning the original Echjay Industries Private Limited (“Echjay Industries”); (2) the Sarvadaman Doshi family owning Plaintiff Echjay; and (3) and the Deepak Doshi family owning both Echjay Forging Industries Private Limited (“EFIPL”) and Spire Industries Private Limited (“Spire”) (collectively, the “Doshi Companies”). *Id.* at 1362. In participating in the AD investigation, Echjay explained to Commerce that all Doshi Companies are owned by members of the same Doshi family but that it was not affiliated with any of the other Doshi Companies due to the formal family partitions. *Id.* at 1361. In its *Final Determination*, Commerce nevertheless collapsed the Doshi Companies because it found that they were affiliated through common ownership by the Doshi family, had similar production facilities that would not require substantial retooling to shift manufacturing priorities, and had a significant potential for manipulation of prices or production. 83 Fed. Reg. at 40,746; IDM at 14–27.

Echjay initiated this litigation on November 8, 2018, and filed a complaint on December 8, 2018. Summons, ECF No. 1; Compl., ECF No. 7. On October 8, 2020, the court concluded that Commerce did not adequately explain its decision to collapse the Doshi Companies, which the IDM conveyed largely depended on affiliation between the Doshi family members and Doshi Companies despite the legal separation agreements. *Echjay I*, 475 F. Supp. 3d at 1367–74. The court also determined that Commerce failed to address detracting evidence regarding its substantial retooling conclusion of the collapsing analysis. *Id.* at 1369–71. The court remanded Commerce’s “decision to collapse Echjay with the Doshi Companies in its *Final Determination* for further explanation . . . based on substantial record evidence.” *Id.* at 1364. On remand, Commerce reversed its collapsing determination, and accordingly its application of adverse facts available to Echjay, and calculated a new dumping margin of 4.58%. *Remand*

*Results* at 25. Echjay did not submit comments on the *Remand Results*. Coalition submitted comments on March 19, 2021. Def.-Inter.’s Br. The Government replied in support of the *Remand Results* on May 5, 2021. Def.’s Br.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): “[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” The court also reviews the determinations pursuant to remand “for compliance with the court’s remand order.” See *Beijing Tianhai Indus. Co. v. United States*, 39 CIT \_\_, \_\_, 106 F. Supp. 3d 1342, 1346 (2015) (citations omitted).

## DISCUSSION

In its previous opinion, the court remanded Commerce’s decision “for further explanation of its collapsing determination based on substantial record evidence.” *Echjay I*, 475 F. Supp. 3d at 1364.

On remand, Commerce reconsidered its collapsing determination and reversed itself, finding that none of the three collapsing requirements were met. *Remand Results* at 1. First, Commerce noted that it continued to find the Doshi family members affiliated under 19 U.S.C. § 1677(33)(A), but that “due to particular and explicit legal arrangements, the Doshi family could not control or influence the operations of” the Doshi Companies. *Id.* at 10. Because there was no common control, Commerce concluded that the Doshi Companies were not affiliated under 19 U.S.C. § 1677(33)(F) or under Commerce’s regulation, 19 C.F.R. § 351.401(f). See *id.* at 10–13. Accordingly, Commerce found that “the application of adverse facts available . . . -- which was premised upon Echjay’s failure to provide corporate history/sales/production data on behalf of the other companies -- [was] not warranted.” *Id.* at 1–2. Second, Commerce reevaluated the evidence of the substantial retooling requirement and concluded that “EFIPL and Spire could not produce subject merchandise without substantial retooling.” *Id.* at 14. Similarly, as to the potential for manipulation requirement, Commerce found that, based upon its affiliation analysis, “there is [no] potential for significant manipulation . . . across the Doshi [C]ompanies.” *Id.* at 14. Finally, Commerce explained that “there is no longer any potential inconsistency” with its past collapsing determinations because of its revised decision not to collapse the Doshi Companies. *Id.*

Coalition challenges Commerce's *Remand Results* as inadequately explained and unsupported by record evidence. Coalition contends that Commerce's decision to reverse its affiliation and collapsing determinations is inadequately supported by the partition documents that separate the three branches of the Doshi family, as cited by Commerce. *See* Def.-Inter.'s Br. at 7–8. It claims instead that “there is nothing on the record supporting the conclusion that Echjay’s family partition with Echjay Industries eliminates the potential of the Doshi family members from cooperating and coordinating sales and production activities between the two companies.” *Id.* at 8. Further, Coalition contends that “nothing in this formal separation precludes the Doshi family members from coordinating the activities of these two companies in exactly the same way that the collapsing regulations were meant to address.” *Id.* at 9. Finally, Coalition disagrees that Commerce’s past decision not to collapse the Doshi Companies dictates the same non-collapsing determination in this case because it claims that the evidence regarding the potential for substantial retooling is different in this POI and Commerce’s approach to the potential for manipulation has moved from the individual level to include family groupings. *Id.* at 11. Therefore, Coalition requests that the court again remand Commerce’s decision so that it can address evidence of the potential for manipulation and retooling that it did not address in its *Remand Results*. *Id.* at 12–13.

The court concludes that Commerce complied with its remand order as set forth in *Echjay I*, 469 F. Supp. 3d at 1364. Commerce addressed and adequately explained evidence regarding the Doshi family’s partition and reversed its decision to collapse the Doshi Companies. The court is unpersuaded by Coalition’s challenge to the *Remand Results*, largely for the reasons discussed in *Echjay I*. There, the court rejected the contention that common ownership of a group of companies by members of the same family, without more, can support a basis for affiliation where legal partitions prevent overlap in management or control between each entity. *Id.* at 1368–69. Furthermore, Commerce itself noted that the evidence regarding the Doshi family partitions was un rebutted and uncontradicted. *Remand Results* at 12. In response to Coalition’s comments on the draft remand results, Commerce further explained that “[t]he record does not establish that the Doshi family group exerts actual control over each of the companies; nor does it evince their ‘ability’ to exert control.” *Id.* at 18. Commerce also noted that “notwithstanding the fact that over 30 years have passed since the first agreement took effect, there is no evidence on the record that is suggestive of financial dealings between Echjay and [Echjay Industries] and there were no shared board members or

employees between the companies during the POI.” *Id.* at 19. Thus, Coalition’s arguments about the potential for control between family members cannot prevail on a record such as this one. The unique circumstance of legal separation agreements between family members supports Commerce’s decision to not collapse companies owned by family members in this instance.

Further, the court need not address Coalition’s arguments regarding Commerce’s no substantial retooling determination between Echjay and Echjay Industries because, per Commerce’s regulation, all three prongs must be met in order for Commerce to make a finding that entities should be collapsed. 19 C.F.R. § 351.401(f). Because the court affirms Commerce’s affiliation determination, Commerce’s decision not to collapse the Doshi Companies must stand regardless of any potential for retooling of facilities. Similarly, the court agrees with Commerce that the *Remand Results* are consistent with its previous decision not to collapse the Doshi Companies. Each decision concluded that the potential for manipulation was not met, and each resulted in a decision not to collapse the Doshi Companies. *See Remand Results* at 20–21. Because “consistency with earlier and later pronouncements” weighs in favor of deference to an agency’s decision, *Skidmore v. Swift*, 323 U.S. 134, 140 (1944), the court so defers. The court affirms Commerce’s conclusion that there is no affiliation between the Doshi Companies and it sustains Commerce’s *Remand Results* as supported by substantial evidence and in accordance with law.

### CONCLUSION

For the reasons stated, the court sustains Commerce’s *Remand Results*. Judgment will enter accordingly in favor of Defendant.

**SO ORDERED.**

Dated: August 20, 2021  
New York, New York

/s/ Gary S. Katzmann

JUDGE

Slip Op. 21–106

LOGITECH, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge  
Court No. 16–00017

[Following trial, holding that subject Webcams and ConferenceCams are classified under HTSUS Heading 8517.]

Dated: August 24, 2021

*Patrick D. Gill* and *Deborah B. Stern*, Sandler, Travis & Rosenberg, P.A., of New York, N.Y., for Plaintiff Logitech, Inc.

*Jamie L. Shookman*, *Jason M. Kenner*, and *Peter A. Mancuso*, Trial Attorneys, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, New York, N.Y., argued for Defendant United States. On the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office. Of counsel was *Paula S. Smith*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection of New York, N.Y.

**OPINION**

**Gordon, Judge:**

Plaintiff, Logitech, Inc. (“Logitech” or “Plaintiff”), challenges the denial by U.S. Customs and Border Protection (“Customs”) of Logitech’s protest of Customs’ classification of the imported merchandise that fall into two categories: “Webcams” and “ConferenceCams” (collectively, “subject merchandise”), as “television cameras” under subheading 8525.80.3010 of the Harmonized Tariff Schedule of the United States (“HTSUS”), with a duty rate of 2.1 percent ad valorem.

Plaintiff claims that the subject merchandise are properly classified as “other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network” under HTSUS Subheadings 8517.69.0000 (Webcams) and 8517.62.0050 (ConferenceCams), each duty free.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2018). For the reasons set forth below, the court enters judgment for Plaintiff that the subject ConferenceCams are classifiable under HTSUS Subheading 8517.62.00 and the subject Webcams are properly classifiable under HTSUS Subheading 8517.69.00.

**I. Background**

Plaintiff and Defendant filed cross-motions for summary judgment. See Pl.’s Mot. for Summ. J., ECF No. 31; Def.’s Cross-Mot. for Summ. J., ECF No. 37. The court denied the parties’ cross-motions for summary judgment, explaining that HTSUS Heading 8517 is a principal

use provision, and the court could not grant summary judgment in favor of either party on the fact-intensive principal use factors set forth in *United States v. Carborundum Co.*, 63 CCPA 98, 102, 536 F.2d 373, 377 (1976) without it impermissibly finding facts about the principal use of the subject merchandise (particularly given the summary judgment standard requiring the court to draw all reasonable inferences in favor of the non-movant on contested fact issues). See Memorandum and Order at 2, ECF No. 42. Before trial, the court delineated the uncontested facts in its Pretrial Order. See Pretrial Order, Schedule C, ECF No. 81 (“Joint Uncontested Facts”). The court held a bench trial on November 20–22, 25, 2019. Trial, ECF No. 83.

After the conclusion of the trial, the parties submitted proposed findings of fact and conclusions of law. See Plaintiff’s Proposed Findings of Fact and Conclusions of Law, ECF No. 107 (“Pl.’s FOF & COL”); Defendant’s Proposed Findings of Fact and Conclusions of Law, ECF No. 108 (“Def.’s FOF” & “Def.’s COL”); Defendant’s Confidential Proposed Findings of Fact, ECF No. 109. The parties also submitted post-trial briefs. See Plaintiff’s Post-Trial Brief (“Pl.’s Br.”), ECF No. 110; Defendant’s Confidential Post-Trial Brief (“Def.’s Br.”), ECF No. 112.<sup>1</sup>

## II. Standard of Review and Legal Framework

The court reviews Customs’ protest decisions *de novo*. 28 U.S.C. § 2640(a)(1) (2018). The classification of merchandise involves a two-step inquiry. *ADC Telecomms., Inc. v. United States*, 916 F.3d 1013, 1017 (Fed. Cir. 2019). First, the court ascertains the meaning of the terms within the relevant tariff provisions, which is a question of law; second, the court determines whether the subject merchandise fits within those terms, which is a question of fact. *Id.* This case presents both questions of law, the meaning and scope of HTSUS Headings 8517 and 8525, as well as questions of fact—how the imported products are principally used.

In actions under 28 U.S.C. § 1581(a), the court reviews Customs’ legal interpretations of the tariff schedule relative to their “power to persuade,” *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). A corollary is “the rule of construction of revenue statutes whereby unclear or ambiguous tariff classifications have traditionally been resolved in favor of the importer.” *Anhydrides & Chems., Inc. v. United States*,

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<sup>1</sup> All citations to parties’ briefs and other documents on the record are to their public versions unless otherwise noted.

130 F.3d 1481, 1485 (Fed. Cir. 1997) (citing, *inter alia*, *United States v. Greek Orthodox Church of Evangelismos*, 49 CCPA 35, 40 (1962) (referring to the “rule of liberal construction in favor of the importer”)).

For contested factual issues, a statutory presumption of correctness imposes on Plaintiff the burden of proof. *See* 28 U.S.C. § 2639(a)(1) (2000); *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492 n.2 (Fed. Cir. 1997); *Chrysler Corp. v. United States*, 33 CIT 90, 97, 601 F. Supp. 2d 1347, 1353–54 (2009), *aff’d*, 592 F.3d 1330 (Fed. Cir. 2010). Despite its name, the statutory presumption of correctness is not a true evidentiary presumption governed by Federal Rule of Evidence 301, but rather an “assumption” that allocates to plaintiff the burden of proof on contested factual issues that arise from the protest decision. *Universal Elecs.*, 112 F.3d at 492 n.2; 21B Charles A. Wright & Kenneth W. Graham, Jr., *Fed. Prac. & Proc. Evid.* § 5124 (2d ed. 2021) (“Rule 301 does not apply to ‘assumptions’—rules for allocating the burden of proof that are often mislabeled as ‘presumptions.’ ... the best known include: ... the ‘assumption’ that official duty has been regularly performed.”). Plaintiff’s burden of proof carries an initial burden of production (to make an evidentiary proffer), and an ultimate burden of persuasion to establish by a preponderance plaintiff’s operative facts. *Universal Elecs.*, 112 F.3d at 492. Importantly, the presumption does not “change the rule of strict construction of revenue statutes, or negate judicial responsibility for correct construction of tariff classifications.” *Anhydrides & Chemicals, Inc.*, 130 F.3d at 1486. In this action, the presumption of correctness imposes a burden on Plaintiff to establish by a preponderance that the merchandise is principally used as other apparatus for the transmission or reception of voice, images or other data, for communication in a wired or wireless network.

### **A. Harmonized Tariff Schedule of the United States**

The HTSUS governs the classification of merchandise imported into the United States. *See Wilton Indus., Inc. v. United States*, 741 F.3d 1263, 1266 (Fed. Cir. 2013). The HTSUS “is organized by headings, each of which has one or more subheadings; the headings set forth general categories of merchandise, and the subheadings provide a more particularized segregation of the goods within each category.” *Id.* “The first four digits of an HTSUS provision constitute the heading, whereas the remaining digits reflect subheadings.” *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1163 n.4 (Fed. Cir. 2017). “[T]he headings and subheadings ... are enumerated in chapters 1 through 99 of the HTSUS (each of which has its own section and

chapter notes) ....” *R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1353 (Fed. Cir. 2014). The HTSUS “also contains the ‘General Notes,’ the ‘General Rules of Interpretation’ (‘GRIs’), the ‘Additional [U.S.] Rules of Interpretation’ (‘ARIs’), and various appendices for particular categories of goods.” *Id.* (footnote omitted).

The GRIs and the ARIs govern the classification of goods within the HTSUS. *See Otter Prods., LLC v. United States*, 834 F.3d 1369, 1375 (Fed. Cir. 2016). “The GRI apply in numerical order, meaning that subsequent rules are inapplicable if a preceding rule provides proper classification.” *Schlumberger Tech.*, 845 F.3d at 1163. GRI 1 provides, in relevant part, that “classification shall be determined according to the terms of the headings and any relative section or chapter notes.” GRI 1 (emphasis added). “Under GRI 1, a court first construes the language of the heading, and any section or chapter notes in question, to determine whether the product at issue is classifiable under the heading.” *Schlumberger Tech.*, 845 F.3d at 1163 (internal quotation marks and citation omitted). “[T]he possible headings are to be evaluated without reference to their subheadings, which cannot be used to expand the scope of their respective headings.” *R.T. Foods*, 757 F.3d at 1353 (citations omitted).

“Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same.” *Well Luck Co. v. United States*, 887 F.3d 1106, 1111 (Fed. Cir. 2018) (internal quotation marks and citation omitted). “To discern the common meaning of a tariff term, [the court] may consult dictionaries, scientific authorities, and other reliable information sources.” *Kahrs Int’l, Inc. v. United States*, 713 F.3d 640, 644 (Fed. Cir. 2013) (citation omitted).

“After consulting the headings and relevant section or chapter notes” consistent with GRI 1, the court may consider the relevant Explanatory Notes (“EN”). *Fuji Am. Corp. v. United States*, 519 F.3d 1355, 1357 (Fed. Cir. 2008). “The [ENs] provide persuasive guidance and are generally indicative of the proper interpretation, though they do not constitute binding authority.” *Chemtall, Inc. v. United States*, 878 F.3d 1012, 1019 (Fed. Cir. 2017) (internal quotation marks and citation omitted).

Once the appropriate heading is determined, the court applies GRI 6 to determine the appropriate subheading. *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1442 (Fed. Cir. 1998). GRI 6 provides that “the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any



related subheading notes and, *mutatis mutandis*, to the above [GRIs], on the understanding that only subheadings at the same level are comparable.”

The two distinct types of headings in the HTSUS, *eo nomine* and use provisions, are applicable in this case. Each requires different analyses. *Schlumberger Tech.*, 845 F.3d at 1164 (“We first must assess whether the subject Headings constitute *eo nomine* or use provisions because different rules and analysis will apply depending upon the heading type.”); compare *Kahrs Int’l*, 713 F.3d 640 (*eo nomine* analysis), with *Aromont USA, Inc. v. United States*, 671 F.3d 1310 (Fed. Cir. 2012) (principle use analysis).

An *eo nomine* provision describes articles by specific names, see *Schlumberger Tech.*, 845 F.3d at 1164, and includes all forms of the named article. *Kahrs Int’l*, 713 F.3d at 646; *ADC Telecomms., Inc. v. United States*, 916 F.3d at 1017–18. In an *eo nomine* analysis, the court first construes the headings at issue as a matter of law by defining the elements of the heading; the court then moves to the second classification step, a factual inquiry, to determine whether the subject merchandise is covered by those elements. See, e.g., *R.T. Foods*, 757 F.3d 1349; *Link Snacks, Inc. v. United States*, 742 F.3d 962 (Fed. Cir. 2014).

By contrast, the ARIs govern classification of imported merchandise under *use* headings. In a *use* analysis, the court first construes the headings at issue by defining the uses of the goods described by the heading as directed by ARI 1(a) for principal use headings or by ARI 1(b) for actual use headings. For principal use headings, the court then determines as a factual matter the principal use of the subject merchandise by analyzing the goods using the *Carborundum* factors to determine whether they fall within one of the headings:

[1] use in the same manner as merchandise which defines the class; [2] the general physical characteristics of the merchandise; [3] the economic practicality of so using the import; [4] the expectation of the ultimate purchasers; [5] the channels of trade in which the merchandise moves; [6] the environment of the sale, such as accompanying accessories and the manner in which the merchandise is advertised and displayed; and [7] the recognition in the trade of this use.

*Aromont*, 671 F.3d at 1313–14 (citing *United States v. Carborundum Co.*, 63 CCPA 98, 536 F.2d 373, 377 (1976)).

### III. Discussion

#### A. HTSUS Provisions

The competing Headings are 8517, advocated by Plaintiff, and 8525, advocated by Defendant:

- 8517 Telephone sets, including telephones for cellular networks or for other wireless networks; **other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network)**, other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof;
- 8525 Transmission apparatus for radio-broadcasting or television whether or not incorporating reception apparatus or sound recording or reproducing apparatus; **television cameras**, digital cameras and video camera recorders:

(Emphasis added).

As explained above, the possible headings are first evaluated *without* reference to their subheadings. *R.T. Foods*, 757 F.3d at 1353. Defendant contends the subject Webcams and ConferenceCams are “television cameras”, whereas Plaintiff contends they are “other apparatus for the transmission or reception of voice, images or other data ... for communication in a wired or wireless network.” Both parties agree the term “television cameras” in Heading 8525 is an *eo nomine* provision, and the term “other apparatus for the transmission or reception of voice, images or other data ... for communication in a wired or wireless network” in Heading 8517 is a principal use provision. Broadly speaking, Heading 8517 covers telephony apparatus and Heading 8525 covers broadcast radio and television apparatus. These broad contours of the respective headings are helpful to keep in mind when attempting to classify Plaintiff’s merchandise: Is it more telephonic, or more television?

Starting with the definition of “television camera” under Heading 8525, the ENs to Heading 8525 describe “television cameras” as “cameras that capture images and convert them into an electronic signal that is: (1) transmitted as a video image to a location outside the camera.” See EN 85.25(B)(1). This definition is consistent with the technical dictionary definitions of “television camera.” The Institute of Electrical and Electronic Engineers (“IEEE”) defines television camera as “a pickup unit used in a television system to convert into electrical signals the optical image formed by the lens.” Joint Uncon-

tested Facts ¶ 56. Similarly, McGraw-Hill Dictionary of Scientific and Technical Terms (6th ed. 2003) defines “television camera” as:

The pickup unit used to convert a scene into corresponding electric signals; optical lenses focus the scene to be televised on the photosensitive surface of a camera tube, and the tube breaks down the visual image into small picture elements and converts the light intensity of each element in turn into a corresponding signal. Also known as a camera.

Thus, the ENs to Heading 8525 and technical definitions<sup>2</sup> describe “television cameras” as devices that capture images, convert them to electronic signals, and transmit them to a remote location. The subject merchandise perform all three functions—capturing converting, and transmitting images. *See* Pl.’s FOF & COL at ¶ 12; Def.’s FOF ¶ 76; *see* Tr. at 164:25–165:6 (cross-examination of Plaintiff’s engineer, Mr. Aron Rosenberg, conceding that subject merchandise capture “audio and video”); *id.* at 165:10–12 (subject merchandise converts captured images into “digital signal.”); *see id.* at 168:6–10; Joint Uncontested Facts at ¶ 1 (subject merchandise compress and transmit the digital signals to computer so that they can be sent over internet).

The ENs, which as noted above, offer persuasive guidance and are generally indicative of the proper interpretation of the tariff schedule, specifically reference “webcams” in the notes for Heading 8525:

**Television cameras** may or may not have an incorporated device for remote control of lens and diaphragm as well as for remote control of the horizontal and vertical movement of the camera (e.g., television cameras for television studios or for reporting, those used for industrial or scientific purposes, in closed circuit television (surveillance) or for supervising traffic). These cameras do not have any inbuilt capability of recording images.

Some of these cameras may also be used with automatic data processing machines (e.g., webcams).

World Customs Organization, *Harmonized Commodity Description and Coding System Explanatory Notes*, Explanatory Note, XVI-8525–2 (5th ed. 2012).

<sup>2</sup> Both parties agreed with these technical definitions. *See* Tr. at 732:17–22 (testimony of Dr. Brian D’Andrade referencing IEEE and McGraw-Hill definitions of television cameras, and noting that television cameras do not have ability to capture or transmit audio or have compression capabilities); *id.* at 857:18–24 (testimony of Mr. David Elliot that “television camera” refers to device that “captures images, that transforms those images into electrical or electronic signals and that transmits those signals out to a viewer”).

Defendant emphasizes that the ENs to 8525, with their inclusion of webcams, undercuts Plaintiff's argument that their Webcams or ConferenceCams are not properly classified as television cameras in Heading 8525. Defendant also notes that Heading 8525 explicitly covers "cameras," and that Plaintiff's merchandise abbreviate "camera" in their names, Webcam and ConferenceCam, and do meet the aforescribed definition of television cameras. One can understand how a webcam used to broadcast one-way video would find its way into the ENs for television cameras. As an *eo nomine* provision, the term "television cameras" includes all forms of the named article, and if the court accepts that webcams are televisions cameras, the provision then covers all forms of webcams for whatever use, even those used for purposes unrelated to one-way broadcasting, such as those used for person-to-person or multi-person communication.

Turning to the subject Webcams and ConferenceCams, they are *prima facie* classifiable as television cameras under Heading 8525. Given that, this case would have ended at summary judgment if the carve out in Heading 8517 for "transmission or reception apparatus ... of heading 8525" were applicable. *Cf. ADC Telecomms.*, 916 F.3d at 1022–23. However, both parties agree that the carve out is *not* applicable because it is limited to the first part of Heading 8525 ("Transmission apparatus for ...") and does not apply to "television cameras." *See* Pl.'s Mot. for Summ. J. at 25; Def.'s Cross-Mot. for Summ. J., at 26 n.13 ("We agree that the subject merchandise does not fall within this exclusion because it applies to the first clause of Heading 8525, HTSUS, rather than the second clause of the heading, which includes 'television cameras.'"). Therefore, classification of the subject merchandise under Heading 8517 could not be dismissed as a matter of law. *See, e.g., BenQ Am. Corp. v. United States*, 646 F.3d 1371 (Fed. Cir. 2011) (reversing and remanding lower court classification under *eo nomine* provision for failure to address principal use under competing tariff provision).

For the court to dismiss the applicability of Heading 8517, the court must first undertake a principal use analysis and conclude that Plaintiff's Webcams and ConferenceCams are not principally used "for the transmission ... of voice, images or other data ... for communication in a wired or wireless network." Such a conclusion, however, is not easily reached. After analyzing the *Carborundum* factors, the court concludes that the subject Webcams and ConferenceCams are principally used "for the transmission ... of voice, images or other data ... for communication in a wired or wireless network."

## B. Principal Use Findings of Fact

### 1. General Physical Characteristics

Both the subject Webcams and the ConferenceCams contain lenses that capture light, and in turn, images. *See* Tr. at 194:21–195:3 (statement describing subject merchandise by Mr. Rosenberg). The Webcams consist of a single camera unit and internal microphone, along with mounting clips to position the Webcam atop a computer or elsewhere to capture images at the user’s desired angle. *See* Joint Uncontested Facts at ¶ 4; PX 2–10. The two models of ConferenceCams differ slightly. The Orbit Ali Models contain two attachable pieces: (1) a base that contains a microphone, speaker, USB port, and on-device buttons (call, hang-up, volume controls) and (2) a circular camera that can be attached to the base directly or supported by an adjustable riser stand. *See* PX 11. The Colossus model of the ConferenceCams contain three attachable pieces: (1) a motorized camera with an integrated microphone; (2) a speakerphone with on-device buttons including call, hang-up, and volume control; and (3) a USB-enabled hub. *See* PX 12; Tr. at 116:4–16 (direct examination of Mr. Rosenberg). The Colossus model also includes a remote control. *See* PX 12. Plaintiff argues that the subject merchandise “consist of multiple components all of which working in concert enable communication.” Pl.’s FOF & COL at 22. Plaintiff notes that the subject merchandise contain omnidirectional microphones, on-board video and audio processing, mounting hardware, and are built for low latency to minimize delays in transmission of audio and video. *See id.*; *see also* Tr. at 74:22–75:2; 84:11–16; 102:16–25. Plaintiff maintains that the physical characteristics of the subject merchandise point to a principal use as communication apparatus for voice and images among two or more parties. Defendant argues that EN 85.17(II)(G) demonstrates that subject Webcams and ConferenceCams are not principally used like the other communication apparatus covered by Heading 8517 because the explanation and examples found in EN 85.17(II)(G) are focused on intermediary technical networking equipment such as modems, routers, and multiplexers, none of which have cameras. Def.’s COL at ¶¶ 38–40. *See* Def.’s Br. at 15. Nothing in the actual language of Heading 8517, however, limits the apparatus to those that perform intermediary data transmission. *See Rubie’s Costume Co. v. United States*, 337 F.3d. 1350, 1359 (Fed. Cir. 2003) (“Although the examples in the Explanatory Notes are probative and sometimes illuminating, [the court] shall not employ their limiting characteristics, to the extent there are any, to narrow the language of the classification heading itself.”).

Plaintiff's engineer, Mr. Rosenberg, testified that the internal microphones and noise canceling capabilities are central to the use of the subject merchandise. *See* Tr. at 85:3–25. The subject merchandise are designed for low latency to minimize delays in transmission of audio and video. *Id.* at 123:20–125:24. To do so, the subject merchandise contain H.264 or MJPEG codecs for video compression, analog-digital converters, signal processors, and the ability to process and synchronize audio and video for transmission over a USB wire. *See* Joint Uncontested Facts at ¶ 4; Tr. at 64:5–8; 105:7–10. The camera, internal microphones, and on-board synchronization software all work together to allow for the subject merchandise to facilitate real-time communication. The physical characteristics point to use to communicate voice and images among two or more parties for video-conferencing. Given these considerations, this factor favors classification under Heading 8517.

## **2. Use in the Same Manner as Merchandise Which Defines the Class**

Plaintiff argues that the class of merchandise covered by Heading 8517 is defined by “interpersonal audio and visual communication and apparatus for data communication between devices.” Pl.’s FOF & COL at 23. Plaintiff contends that the primary use of the subject merchandise is for videoconferencing, which Plaintiff describes as “the penultimate form of electronic communication.” *Id.* Plaintiff relies on an internal study, conducted in the normal course of business prior to the dates of entry of the subject merchandise, that found 72% of respondents used the subject Webcams primarily for videoconferencing. *See* PX 18 (“Internal Marketing Study”); Tr. at 396:5–25 (direct examination of Plaintiff’s head of marketing, Ms. Joan Vandermate, and her description of Internal Marketing Study). However, as Ms. Vandermate conceded on cross-examination, the study polled consumers who use the subject merchandise for “business purposes,” and not the entire market. *See* Tr. at 568:17–569:9. Ms. Vandermate was unable to provide an answer as to what percentage of the market for the subject merchandise is actually comprised of “business users.” *See id.* Thus, while it is probative, the Internal Marketing Study is not itself dispositive as to the use of the merchandise.

Beyond the Internal Marketing Study, Mr. Rosenberg explained on direct examination that the principal use of the subject merchandise is “video calling and video communication.” Tr. at 568:17–569:9. When asked for the basis of his knowledge as to the use of the subject merchandise, Mr. Rosenberg explained, “[i]t’s how we sell them. It’s what customers tell us. It’s what’s on the box.” *Id.* Further, Plaintiff’s expert witness, Dr. Brian D’Andrade, on direct examination, high-

lighted that the devices “are optimized with video compression, low latency, and audio for real-time interactive communication.” Tr. at 703:23–704:4.

Defendant argues that the use which defines the class is merely transmitting and receiving data. *See* Def.’s Br. at 17 (relying on examples provided in EN 85.17(II)(G)). Defendant contends that because the subject merchandise are used to “capture, convert, and transmit images to a computer,” they exceed the use which defines the class of good properly classified under Heading 8517. *Id.* Defendant also contends that it is exceedingly rare for consumers to use the subject merchandise for audio-only calls. *See* Tr. at 578:22–579:7 (cross-examination of Ms. Vandermate). Defendant argues that the court should not consider this “fugitive use” in its analysis of this use provision. *See Pomeroy Collection, Ltd. v. United States*, 32 CIT 526, 549, 559 F. Supp. 2d 1374, 1397 (2008) (explaining that fugitive, or “atypical,” use is not considered in principal use analysis). Although the record establishes that the subject merchandise is seldom used for audio-only calls, the audio function is integral to the broader (and apparently most common) use of the subject merchandise, videoconferencing. *See* Tr. at 85: 22–25 (Mr. Rosenberg replying “[n]ot that I know of” when asked if user can have videoconference without audio on direct). Overall, this factor favors Plaintiff’s claimed classification.

### 3. Economic Practicality

The subject merchandise are sold for up to \$1000. *See* Tr. at 202:3–13 (cross-examination of Mr. Rosenberg); 557:21–23 (cross-examination of Ms. Vandermate). At its inception, the subject merchandise were intended to compete with other more expensive video conferencing systems, which can cost upwards of \$100,000. *See id.* at 331:13–23 (direct examination of Ms. Vandermate).

Defendant maintains that the subject merchandise does not actually replace these more expensive videoconferencing systems. Rather, they only replace the camera portion and still rely on “consumers to purchase an entire telepresence system consisting of expensive network infrastructure.” Def.’s Br. at 18. Ms. Vandermate testified on direct that the ConferenceCam market has drastically changed since Logitech entered in the early 2000s. Rather than purchasing expensive infrastructure for video conferencing, consumers today ordinarily rent cloud storage through providers like Microsoft, Zoom, Webex, or Google, and then purchase the videoconferencing hardware, like the subject merchandise. *See* Tr. at 333:9–336:11 (direct examination of Ms. Vandermate comparing videoconferencing market from

2006–2010 to today). In this fragmented, multivendor market, Logitech provides a less expensive alternative than the all-inclusive, “old-school” systems provided by companies like Polycom and Cisco. *See id.* at 336:12–337:9. Plaintiff apparently was at the forefront of that shift from a single-vendor environment, creating and marketing their initial Webcams and ConferenceCams as a cheaper alternative. *See id.* at 337:24–338:13. Even when the cost of a subscription to a cloud service like Zoom is included in the cost of the subject merchandise, it may present a less costly alternative to traditional video conferencing systems offered by companies like Polycom and Cisco. *See Tr.* at 333:9–334:15. Defendant argues that the price of the subject merchandise increases as the quality of the camera component increases. *See Tr.* at 105:19–106:3 (direct examination of Mr. Rosenberg). Defendant therefore contends that it would be impractical to use the subject merchandise in a similar manner to the “other communication devices” in EN 85.17(II)(G) because they are less expensive and merely “connect components, combine signals or convert data.” Def.’s Br. at 17. Overall, this factor supports Plaintiff’s classification of the subject merchandise under Heading 8517.

#### **4. Expectations of the Ultimate Purchaser**

Plaintiff contends that the ultimate purchaser expects to use the subject merchandise for videoconferencing. Defendant argues that the ultimate purchaser expects to use the subject devices as cameras, and highlights that the term “cam” is short for camera. *Id.* at 18. Defendant highlights the importance of the camera in the subject merchandise in contrast to “the ultimate purchasers of codecs, hubs and other goods identified as ‘communication apparatus’ in EN 85.17(II)(G),” who “do not expect to use the goods to capture images, because these goods do not incorporate a camera.” *Id.* at 16. Defendant’s proof on the ultimate purchaser’s expectations is lacking, relying on Plaintiff’s own marketing materials, which emphasize the ability of the subject merchandise to facilitate “face-to-face” communication. *See id.*; *see also Tr.* at 484:7–487:15 (direct examination of Ms. Vandermate).

Plaintiff demonstrated that the ultimate purchaser expects to use the subject merchandise generally for interpersonal communication, and specifically for videoconferencing. *See Tr.* at 360:10–16 (Ms. Vandermate explaining on direct that users “are looking for very good video calls with clear audio that does not echo and can be heard clearly and naturally.”); PX 24. The Internal Marketing Study provides additional support for this proposition for business purchasers.



See PX 24. Moreover, Ms. Vandermate testified that Plaintiff partners with communication platforms like Zoom for marketing purposes to assure customers that the subject merchandise will work well with the videoconferencing platform. See Tr. 418:11–420:6 (Ms. Vandermate describing marketing partnership). Accordingly, the court concludes that this factor supports the classification of the subject merchandise of Heading 8517.

### **5. Channels of Trade**

It is undisputed that the subject merchandise is sold both directly to businesses and through consumer channels like Best Buy, Staples, and Amazon.com. See Tr. at 362:14–20 (direct examination of Ms. Vandermate); PX 24–25. Defendant notes that Logitech also sells the subject merchandise on its own website (see PX 3 at 13) in the “VIDEO” section of products, where Plaintiff emphasizes the ability of the Webcams and ConferenceCams to capture images.

Plaintiff contends that the channels of trade in which it operates demonstrates that it “intentionally went into the channel of trade occupied by enterprise video conferencing companies such as Cisco and Polycom” to target customers “who could not afford the more costly systems that preexisted.” Pl.’s FOF & COL at 25. On the other hand, Defendant notes that when the subject merchandise are sold through consumer channels, the packaging is attractive and includes “pictures of images captured by the products’ cameras,” whereas, the products sold directly to business use a brown box format. Def.’s Br. at 18; see also Tr. at 108:11–20 (Mr. Rosenberg describing packaging of subject merchandise when sold to non-business customers). Overall, the information on the record submitted by the parties does not persuade the court that this factor favors either side.

### **6. Environment of the Sale**

The environment of sale deals with the manner in which the subject merchandise is advertised and displayed, including accompanying accessories. See *Aromont USA, Inc.*, 671 F.3d at 1312. Here, the record establishes that the subject merchandise are sold alongside other computer peripherals and gaming equipment, such as mice, keyboards, and headsets. See Tr. at 580:21–582:12; DX 78; PX 24. Generally, Plaintiff designs a display for the subject merchandise, often with space for gaming devices and other computer peripherals and assists the retailer in determining the optimal location for the display. See Tr. at 423:16–431:18 (statement of Plaintiff’s head of marketing, Ms. Vandermate); PX 24–25 (example store displays for subject merchandise designed by Plaintiff for retailers).

The parties disagree about what implications may be drawn about the use of the subject merchandise itself from the devices sold alongside of the subject merchandise (e.g., mice, keyboards, and headsets). Plaintiff contends that the subject merchandise are classifiable as “other communication apparatus” under Heading 8517, evidenced by the fact that they are sold alongside other videoconferencing and video collaboration apparatus and not in the camera section. *See* Pl.’s FOF & COL at 26.

Conversely, Defendant, relying again on a comparison to the exemplar goods in EN 85.17(II)(G), contends that the computer peripherals sold alongside the subject merchandise are not “other communication apparatus” as defined by Heading 8517. *See* Def.’s Br. at 18. For the reasons set forth in the court’s analysis of previous factors, however, the court remains unconvinced of the relevance of Defendant’s comparison of the environment of sale of the exemplars in EN 85.17(II)(G) with the environment of sale of the subject merchandise.

Overall, it is unclear from the record as to whether the goods sold alongside the subject merchandise, and the manner in which the subject merchandise is advertised and displayed, demonstrate that this factor supports classification of the subject merchandise under Heading 8517. Plaintiff’s argument relies on a comparison between merchandise in the computer peripheral section, where the subject merchandise are typically sold, as opposed to retail sections dedicated to “television cameras.” *See* Pl.’s FOF & COL at 16. The fact-based analysis under *Carborundum*, however, considers whether the subject merchandise are commercially fungible with the goods described in the use provision. *See Carborundum*, 536 F.2d at 377. Plaintiff’s arguments regarding the sale of merchandise defined as “television cameras” under the *eo nomine* provision of Heading 8525 are therefore of little probative value in the court’s evaluation of the applicability of Heading 8517. Thus, the court concludes that the environment of sale factor neither refutes nor supports classification of the subject merchandise under Heading 8517.

### **7. Recognition in the Trade of this Use**

Under this factor, the court considers whether the merchandise is recognized in the trade as having the particular use described by Heading 8517, or whether it meets certain specifications recognized in the trade for that particular class of products. *See Aromont USA, Inc.*, 671 F.3d at 1316. Defendant contends that the subject merchandise are recognized as cameras in the trade, evidenced by the fact that they are designed to comply with industry standards for video reso-

lution and framerate. *See* Def.’s Br. at 16–17; Tr. at 223:19–225:6 (Mr. Rosenberg explaining on cross-examination that subject merchandise can all transmit images at 720p, “one of the standard resolutions” in industry.).

Plaintiff argues that the subject merchandise is known and accepted in the trade as “communication apparatus.” *See* Pl.’s FOF & COL at 26. Plaintiff highlights its partnership with Zoom and maintains that “[t]estimony affirms that [Zoom and Plaintiff] are recognized in the trade as providers of communication systems and were so at the time of importation.” *Id.* at 26–27; *see also* Tr. at 383:11–384:8 (Ms. Vandermate explaining on direct examination that “totality of the products” produced by Plaintiff and companies like Zoom “create a communication system.”).

Plaintiff’s partnership with Zoom consisted of a reciprocal, co-marketing relationship whereby the products would be advertised together to consumers and at trade shows. *See* Tr. at 418:11–421:17 (direct examination of Mr. Rosenberg discussing benefits of Plaintiff’s partnership with Zoom). The partnership between Plaintiff and companies like Zoom, which represent a large portion of the videoconferencing software market, demonstrate that the subject merchandise is recognized in the trade for use as communication apparatus. This factor supports classification of the subject merchandise under Heading 8517.

In sum, given the record, including the credible testimony of Plaintiff’s three witnesses—Mr. Rosenberg, Ms. Vandermate, and Dr. D’Andrade—the first, second, third, fourth, and seventh *Carborundum* factors support classification of the subject merchandise under Heading 8517. The fifth and sixth factors are neutral. Thus, the court concludes that the subject merchandise is classifiable under Heading 8517.

### C. Application of GRI 3

The subject merchandise are *prima facie* classifiable under both Headings 8517 and 8525. GRI 3, provides, in relevant part, that: “[w]hen ... goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows: ... [t]he heading which provides the most specific description shall be preferred to headings providing a more general description.” GRI 3(a). In determining which tariff provision is more specific, the court compares only the language of the headings, and looks to the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty. *Orlando Food*, 140 F.3d at 1440–41.

Defendant argues that the subject merchandise are classifiable under Heading 8525 because it is more specific than Heading 8517 under the relative specificity analysis of GRI 3(a). *See* Def.'s COL at 19–21. Defendant argues that while the “tariff term ‘television camera’ is very specific, describing only cameras that capture, convert and transmit images to a remote location ... Heading 8517, on the other hand, if broadly interpreted by the Court, could potentially cover goods that play an undefined role in the transmission or reception of voice, images or other data.” *Id.* at 19–20.

Heading 8517 is a use provision that covers apparatus used “for the transmission or reception of voice, images or other data.” The subject merchandise must be used in a specific way to satisfy Heading 8517, while the *eo nomine* provision of Heading 8525 describes the article regardless of its use. Heading 8517 has requirements that are more difficult to satisfy and describe the article with a greater degree of accuracy and certainty. *See Len-Ron Mfg Co., Inc. v. United States*, 334 F.3d 1304, 1313 (Fed. Cir. 2003) (“where a product is equally described by both a ‘use’ provision and an *eo nomine* provision, the ‘use’ provision is typically held to be the more specific of the two”). This conclusion is reinforced by the functions and complex features of the devices which facilitate that use. The principal use of the subject merchandise cannot be said to be the mere capture, conversion, and transmission of images, any more than the principal use could be narrowly limited to the conveyance of audio information with the microphone. Rather, the principal use of the subject merchandise combines these features to allow for interactive multi-person real-time communication (*i.e.*, videoconferencing).

#### IV. Conclusion

For the foregoing reasons, the court concludes that Heading 8517 provides a more specific description than Heading 8525. In accordance with GRI 3, the court concludes that the subject merchandise are classified under Heading 8517. Heading 8517 covers “other apparatus for the reception, conversion and transmission or regeneration of voice, images or other data ....” Subheading 8517.62.00 covers such machines “for the reception, conversion and transmission or regeneration of voice, images and other data ....” Subheading 8517.69.00 is the basket provision for Heading 8517 which would include devices that transmit but do not receive. Since the ConferenceCams are machines “for the reception, conversion and transmission of voice, images or other data,” they are properly classifiable under HTSUS subheading 8517.62.00. Since the Webcams are machines “for the conversion and transmission of voice, images or other

data,” but do not receive, they are properly classifiable under HTSUS subheading 8517.69.00. Accordingly, the court will enter judgment for Plaintiff.

Dated: August 24, 2021  
New York, New York

*/s/ Leo M. Gordon*  
JUDGE LEO M. GORDON

## Slip Op. 21–107

POKARNA ENGINEERED STONE LIMITED, Plaintiff, v. UNITED STATES,  
Defendant, and CAMBRIA COMPANY LLC, Defendant-Intervenor.

Before: Leo M. Gordon, Judge  
Consol. Court No. 20–00127

[Commerce’s *Final Determination* is sustained.]

Dated: August 25, 2021

*Lizbeth R. Levinson, Ronald M. Wisla, and Brittney R. Powell*, Fox Rothschild LLP, of Washington, D.C., for Plaintiff Pokarna Engineered Stone Limited.

*Joshua E. Kurland*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. On the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel were *Vania Wang* and *W. Mitch Purdy*, Attorneys, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance, of Washington, D.C.

*Luke A. Meisner* and *Roger B. Schagrin*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Cambria Company LLC.

## OPINION

### Gordon, Judge:

This action involves the U.S. Department of Commerce (“Commerce”) final determination in the antidumping duty (“AD”) investigation of certain quartz surface products (“QSPs”) from India. *See Certain Quartz Surface Products from India*, 85 Fed. Reg. 25,391 (Dep’t of Commerce May 1, 2020) (final affirm. determ.) (“*Final Determination*”), and the accompanying Issues & Decision Memorandum, A-533–889 (Dep’t of Commerce Apr. 27, 2020), <https://enforcement.trade.gov/frn/summary/india/2020–09407–1.pdf> (last visited this date) (“*Decision Memorandum*”). Before the court is the motion for judgment on the agency record of Plaintiff Pokarna Engineered Stone Limited (“PESL”).<sup>1</sup> *See* Pl.’s Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R., ECF No. 36 (“Pl.’s Opening Br.”); *see also* Pl.’s Rev’d R. 56.2 Mot. for J. on the Agency R., ECF No. 41–1 (“Pl.’s Br.”); Def.’s Resp. in Opp’n to Pl.’s R. 56.2 Mots. for J. on the Agency R., ECF No. 45 (“Def.’s Resp.”); Def-Intervenor’s Resp. in Opp’n to R. 56.2 Mots. for J. on the Agency R., ECF No. 47 (“Def-Int.’s Resp.”); Pl.’s Reply Brief, ECF No. 53 (“Pl.’s Reply”). The court has jurisdiction

<sup>1</sup> To facilitate the efficient disposition of this action, this opinion focuses only PESL’s challenge to Commerce’s inclusion of PESL’s paid sample sales in the agency’s calculation of U.S. price of the subject merchandise. *See* Scheduling Order, ECF No. 33 (bifurcating briefing in this matter between issues raised by PESL and Consolidated Plaintiff M S International, Inc.).

pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2018)<sup>2</sup>, and 28 U.S.C. § 1581(c) (2018).

### I. Standard or Review

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

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce’s interpretation of the anti-dumping statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce’s “interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.”).

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<sup>2</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2018 edition.

## II. Discussion

PESL, a foreign producer and exporter of the subject merchandise, argues that Commerce should have performed a bona fide sales analysis of what it characterizes as paid sample sales it made in the United States, and that Commerce ultimately should have excluded those sales. Pl.'s Br. at 7–16; *see also Decision Memorandum* at 12–14. The court could not find merit in this claim. For the reasons that follow, the court sustains the *Final Determination*.

As Commerce explained, it has a practice, followed here, to exclude *free* samples from the U.S. sales database, treating them as a direct selling expense across remaining U.S. sales. *See Decision Memorandum* at 12–14. A corollary of that practice is that Commerce does not, in investigations, exclude *paid* U.S. sample sales from the sales database. More important, Commerce does not perform an ordinary course of trade or bona fide sales analysis for such sales in investigations. Instead, Commerce has a simpler test: a sale occurs if there is a “transfer of ownership to an unrelated party and consideration.” *Id.* at 14 (quoting *NSK Ltd. v. United States*, 115 F.3d 965, 975 (Fed. Cir. 1997)).

Nothing in the statute mandates that Commerce must perform a bona fide sales analysis on paid U.S. sample sales during an investigation. Plaintiff therefore seeks to engraft “ordinary course of trade” and “bona fide sale” concepts from other provisions of the statutory scheme (*i.e.*, 19 U.S.C. § 1677b(a)(1)(B) (normal value); 19 U.S.C. § 1675(a)(2)(B)(iv) (new shipper and administrative reviews)) onto Commerce’s calculation of export price during investigations. Rather than argue that Commerce has a clear non-discretionary duty to act, PESL is left to argue that Commerce has “discretionary authority” to perform a bona fide sales analysis on U.S. sales in an investigation. *See* Pl.’s Br. at 14. And, PESL wants the court to order Commerce to perform this discretionary act. *Id.* at 17. It should go without saying that, without a legal requirement that Commerce perform such an analysis, there is no basis for the court to issue an affirmative injunction that Commerce *must* conduct a bona fide sales analysis on PESL’s paid U.S. sample sales.

PESL also argues that “fundamental fairness” requires that the court override Commerce’s current practice with one of the court’s own making, directing the agency to conduct bona fide sales analyses on the export price side of the equation in investigations. *See* Pl.’s Br. at 14. This fairness “angle” is not persuasive though, especially when measured against the specific objectives of the “bona fide sales” provision 19 U.S.C. § 1675(a)(2)(B)(iv) (rectifying fraud by and *unfairness* of importers abusing the new shipper review process), as well as



the differences between new shipper/administrative reviews, and investigations. The Government explains the difference:

Unlike investigations, both new shipper reviews and administrative reviews involve reviewing exporters and producers under an existing antidumping duty order. Because the exporter or producer in question has notice that it is subject to the discipline of an existing order and potential duty liability, Commerce performs a bona fide sales test to ensure that the exporter or producer has not manipulated their sales in light of the existing order to receive a lower individual rate or margin. *See, e.g., Huzhou*, 324 F. Supp. 3d at 1376; *Novolipetsk*, 483 F. Supp. 3d at 1287 (“The legislative history indicates that Congress was driven by concerns that exporters and producers were abusing the ability to obtain a new shipper rate on an expedited basis in order to circumvent antidumping and countervailing duties.”). In an investigation, however, where an order is not yet in place and the exporter or producer is not yet subject to its discipline, the same incentive does not exist for a producer to make atypical sales to receive a lower dumping rate or margin ....

Consequently, as we noted above, PESL fails to point to a single past instance in which Commerce has applied a bona fide sales analysis in an investigation (and we are not aware of any). Instead, PESL relies heavily on case law discussing application of Commerce’s bona fide sales test in administrative or new shipper reviews. *See* PESL Br. 13–15. But as we explained, those proceedings following issuance of an order present different concerns about potential manipulation than those present in an investigation when no order exists.

Def.’s Resp. at 32–33. Commerce’s practice of not conducting a bona fide sales analysis for paid U.S. sample sales during an investigation seems more than reasonable and fair.

### III. Conclusion

Again, the court could find no merit in Plaintiff’s claim. Accordingly, the court sustains the *Final Determination* as to Commerce’s decision to include PESL’s paid sample sales in the U.S. sales database.

Dated: August 25, 2021

New York, New York

*/s/ Leo M. Gordon*  
JUDGE LEO M. GORDON



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