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CUSTOMS OVERVIEW

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REVOCATIONS WITHDRAWN

Customs and Border

Protection (“CBP”) has withdrawn two proposed ruling modifications, which if adopted, would have had adverse consequences for importers of textiles and apparel.

The first proposed modification involved a New York ruling on the eligibility of certain women’s cotton knit pullovers for preferential duty-treatment under the Singapore Free Trade Agreement.

The garment at issue was a women’s short sleeve pullover constructed of 100 percent cotton knit fabric. The pullover had a V-shaped neckline, a pocket with a button tab closure in the upper left side front and a hemmed bottom. The yarns used to manufacture the fabric for the pullover body were of U.S. origin. The yarns were imported into Singapore and knitted into fabric. The fabric was cut and sewn to create the body of the pullover. The fabric used in the pocket originated in China.

The question addressed in the proposed modification was whether the fabric used to make the pocket affects the garment’s eligibility for preferential treatment. The New York ruling letter held that the pocket fabric was not relevant in determining eligibility. The proposed modification would have taken the position that the fabric used to make the pocket was relevant and because it did not satisfy the applicable tariff change rule, the garment did not qualify for duty-free treatment.

The pertinent rule is the tariff change rule which states that a garment is eligible for preferential treatment when the non-originating materials undergo an applicable change in tariff classification. The tariff change rule applicable for this garment is a change in tariff classification to a garment from any other chapter except from cotton yarn or cotton fabric, provided the garment is cut and sewn in Singapore. A chapter note to the rules for Chapter 61 (knit apparel) states:

For purposes of determining the origin of the good of this chapter, the rule applicable to that good shall only apply to the component that determines the tariff classification of the good and such component must satisfy the tariff change requirement set out in the rule for that good.

USA-ITA submitted comments urging that the proposed modification be abandoned.

USA-ITA's principal argument was that the tariff change rule was limited to the "component" that determined classification, which was the body, and that the pocket did not affect classification. Ultimately CBP agreed and has published a notice that it has withdrawn the proposed change. 44:5 *Cust. Bull. & Decs.*15 (January 27, 2010).

The second proposal concerned the treatment of elastomeric yarn under CAFTA, specifically the eligibility of certain hosiery. All of the hosiery incorporated a non-originating elastomeric yarn. The New York ruling held that the hosiery was entitled to the CAFTA preference because the non-originating yarns used in production met the terms of the tariff shift rule. Note that for most apparel products the use of a non-originating elastomeric yarn means that the tariff change rule is not satisfied.

CBP proposed a position that the tariff change rules are not governing. The proposed ruling relied on General Note 29 (d), Harmonized Tariff Schedule of the United States ("HTS"), which states that a textile or apparel good containing elastomeric yarn in the component of the good that determines the tariff classification of the good shall be considered to be originating goods only if such yarn is wholly formed in the territory. Accordingly, the proposed ruling held that the hosiery is not eligible for the CAFTA preference because the elastomeric yarn was not an originating material.

USA-ITA filed comments opposing the proposed change. In general, USA-ITA argued that General Note 29 (d) applied only when the *de minimis* rule was invoked because a garment

otherwise did not satisfy the applicable tariff change rule. Since the hosiery satisfied the applicable rule, General Note 29 (d) did not come into play.

Again, CBP has had second thoughts and has withdrawn the proposal. 44:5 *Cust. Bull. & Decs.* 17 (January 27, 2010).

PROPOSITION 65 SETTLEMENTS

The Center for

Environmental Health (“CEH”), one of the leading Proposition 65 bounty hunters has announced a settlement with four handbag sellers.

CEH claimed that these bags contained excessive amounts of lead.

The settlements reached vary. Generally, the handbag sellers agree to limit the amount of lead in these products and make a cash payment. In one case, the seller agreed to a limit of 90 ppm in paint or surface coatings, PVC and leather materials and no more than 600 ppm in any other materials. This limit is effective as of March, 2010. In addition, the seller agreed to lower the lead levels in all materials to no more than 300 ppm by December 2010. Other sellers agreed to settlements under which they would limit the amount of lead in surface paint or surface coatings to 90 ppm, to no more than 200 ppm in PVC, no more than 600 ppm in leather and no more than 300 ppm in other materials. These limits would be applicable as of September 2010. In addition, the amount of lead and leather would be reduced to 300 ppm by September 2011.

The settlements also involve cash payments in the amount of \$35,000. This settlement is typical of the settlements entered with bounty hunters. The cash settlements are paid to the bounty hunter in part and also to the State of California. The agreements are generally approved by a court and for that reason are binding on the parties as well as the State of California.

ROYALTY RULING

CBP recently

issued a ruling concerning the proper procedures for the deposit of duties in respect to royalties

or licenses fees paid by importers to unrelated third-party licensors upon the resale of imported merchandise. HQ H078555 (December 18, 2009).

The royalty at issue was paid to a third-party software producer for the right to programs loaded or packed with imported electronic devices. The royalties were based on the resale price of the imported electronic devices and were not paid until after the imported products were sold. The issue arises because the importers maintain extensive stocks of the imported merchandise, and in many cases, the merchandise may remain in inventory for a considerable time after entry. The importers requested a ruling that they were not required to use the reconciliation process.

Reconciliation is the process that allows an importer at the time of filing an entry to flag information which has yet to be determined. Reconciliation allows the importer to provide the outstanding information at a later date. The importers argued that in this circumstance, because merchandise could remain inventory for a considerable period of time, the actual cost of the royalty would, in many cases, not be determined prior to the expiration of the 21-month reconciliation filing period. Under reconciliation, a reconciliation entry must be filed no later 21 months after the date the importer declares the intent file reconciliation i.e., the date of entry.

CBP responded by saying that since reconciliation is identical to a consumption entry for legal purposes, liquidation may be withheld or extended. Thus, the liquidation of a reconciliation entry may be extended if the importer substantiates why the missing information is not available at the time of the reconciliation filing deadline.

The Headquarters Office indicated that the importers' accounting practices provide good cause for a possible extension of the reconciliation period. Therefore, taken together with the 21-month period allowed for filing a reconciliation and the availability of an extension of the reconciliation period for an additional three years, CBP ruled that reconciliation is the appropriate vehicle for importers to account for the royalty payments.

While the circumstances present here may not be of direct interest to importers of textiles and apparel, this ruling does illustrate that CBP is now insisting that most post-entry adjustments be made in the reconciliation process. This applies particularly to royalty payments, assists and the like. Whereas, in the past, and even since the development of the reconciliation procedure, importers have been allowed to make voluntary tenders of various sorts to deal with information which is not available at the time of entry. That seems to be changing and there seems to be a clear push to require that all such filings be made through the reconciliation procedure.

HTS MODIFICATIONS

The United States

International Trade Commission (“ITC”) has published a notice of intent to review the Harmonized Tariff Schedule (“HTS”). *75 Federal Register* 5118 (February 1, 2010). The ITC is requesting comments, which are due on or before November 1, 2010. Please note that the comments must be directed at the four and six-digit levels.

As part of the review, the ITC particularly invites proposals concerning the following matters:

- The deletion of HTS headings or subheadings with low trade volume;
- The separate identification of new products important to international trade;
- And/or the simplification of the HTS by the elimination of classification provisions that are difficult to administer.

It seems unlikely that there are provisions in the apparel chapters which could be subject to modification at either the four or six-digit level.

It is obvious that there are a number of unnecessary provisions in the textile and apparel chapters, most of which are remnants of the quota system. This request does not cover those provisions. There are, however, other avenues for modification and USA-ITA is input from members on potential changes in the HTS at the 10-digit level. One example would be the

elimination of the statistical breakouts relating to additional US Note 6 to Chapter 61, covering certain knit-to-shape articles which were not subject to the PRC MOU.

The Customs Overview is a newsletter of Customs legal, administrative and other developments affecting importers of textiles and wearing apparel prepared as a service for USA-ITA members and other interested parties. Matters reported on or summarized herein should not be construed as legal advice on specific situations.

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