U.S. Customs and Border Protection

19 CFR PART 177

REVOCATION OF FIVE RULING LETTERS, PROPOSED MODIFICATION OF TWO RULING LETTERS, AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF HUMAN TISSUE SAMPLES AND OTHER HUMAN BODILY SPECIMENS NOT PREPARED FOR THERAPEUTIC OR PROPHYLACTIC USES

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

ACTION: Notice of revocation of five ruling letters, proposed modification of two ruling letters and proposed revocation of treatment relating to the tariff classification of human tissue samples and other human bodily specimens not prepared for therapeutic or prophylactic uses.

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 and modifying two ruling letters concerning tariff classification of human tissue samples, human fecal specimens, extracted human teeth, human urine specimens and other human bodily specimens not prepared for therapeutic or prophylactic uses under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 57, No. 46, on December 13, 2023. One comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 15, 2024.

FOR FURTHER INFORMATION CONTACT: Reema R. Bogin, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–7703.

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. 57, No. 46, on December 13, 2023, proposing to revoke five ruling letters and to modify two ruling letters pertaining to the tariff classification of human tissue samples, human fecal specimens, extracted human teeth, human urine specimens and other human bodily specimens not prepared for therapeutic or prophylactic uses. 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 NY C80101, NY B80750, NY B82258 and NY 870664, CBP classified human tissue samples and other human bodily specimens in heading 3001, HTSUS, specifically in subheading 3001.90, HTSUS, which provides for "[g]lands and other organs for organotherapeutic uses, dried, whether or not powdered; extracts of glands or other organs or of their secretions for organotherapeutic uses; hepa-

rin and its salts; other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included: [o]ther."

In NY R03338, CBP classified human tissue specimens in heading 9705, HTSUS, specifically in subheading 9705.00.00, HTSUS (2006), which provides for "Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest: [o]ther]." CBP has reviewed NY C80101, NY B80750, NY B82258, NY 870664 and NY R033338, and has determined the ruling letters to be in error. It is now CBP's position that human tissue samples and other human bodily specimens not prepared for therapeutic or prophylactic uses are properly classified in heading 0511, HTSUS, specifically in subheading 0511.99.40, HTSUS, which provides for "[a]nimal products not elsewhere specified or included; dead animals of chapter 1 or 3; unfit for human consumption: [o]ther."

In NY 870664, CBP classified human urine samples in heading 3001, HTSUS, specifically in subheading 3001.90, HTSUS, which provides for "[o]ther human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included: [o]ther. In NY N283432 and NY R03056, CBP classified human urine samples in heading 3825, HTSUS, specifically in subheading 3825.90, HTSUS, which provides for "[r]esidual products of the chemical or allied industries, not elsewhere specified or included; municipal waste; sewage sludge; other wastes specified in note 6 to this chapter: [o]ther." CBP has reviewed NY 870664, NY N283432, and NY R03056, and has determined the ruling letters to be in error. It is now CBP's position that human urine samples not prepared for therapeutic or prophylactic uses are properly classified in heading 0511, HTSUS, specifically in subheading 0511.99.40, HTSUS, which provides for "[a]nimal products not elsewhere specified or included; dead animals of chapter 1 or 3; unfit for human consumption: [o]ther."

It is now CBP's position that human tissue samples, human fecal specimens, human urine specimens and other human bodily specimens not prepared for therapeutic or prophylactic uses are properly classified, in heading 0511, HTSUS, specifically in subheading 0511.99.4070, HTSUS, which provides for "[a]nimal products not elsewhere specified or included; dead animals of chapter 1 or 3, unfit for human consumption: [o]ther: [o]ther: [o]ther...[o]ther."

As noted above, CBP received one comment in response to the notice of the proposed revocation of NY B82258 concerning the classification of extracted human teeth, preserved in formaldehyde, to be used for dental research purposes. Upon further review of the com-

ment, it is now CBP's position that the human teeth described in NY B82258 are properly classified in subheading 0507.10.0000, HTSUSA, as "ivory."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking revoke NY R033338, NY C80101, NY B80750, NY B82258, and NY N283432, modifying NY 870664 and NY R03056 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H317142 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*.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H317142
January 23, 2024
OT:RR:CTF:CPMMA H317142 RRB
CATEGORY: Classification
TARIFF NO.: 0511.99.40; 0507.10

MR. JUSTIN MCCREARY
EMD BIOSCIENCES, INC.
10394 PACIFIC CENTER COURT
SAN DIEGO, CA 92121

RE: Revocation of NY R03338, NY N283432; NY C80101, NY B80750, and NY B82258; Modification of NY 870664 and NY R03056; tariff classification of human tissue samples and other human bodily specimens not prepared for therapeutic or prophylactic uses

DEAR MR. MCCREARY:

This letter is in reference to New York Ruling Letter ("NY") R03338, dated March 13, 2006, regarding the classification of human tissue samples under the Harmonized Tariff Schedule of the United States ("HTSUS"). In NY R03338, U.S. Customs and Border Protection ("CBP") classified human tissue samples, specifically breast invasive ductal carcinoma sections, in subheading 9705.00.0090, HTSUSA ("Annotated") (2006), as "Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest: Other." After reviewing the ruling in its entirety, we find it to be in error. For the reasons set forth below, we are revoking NY R03338.

In NY C80101, dated October 3, 1997; NY B80750, dated January 16, 1997; and NY B82258, dated March 3, 1997, CBP classified certain human tissue samples and other bodily specimens not prepared for therapeutic or prophylactic uses under subheading 3001.90.00, HTSUS, as "Glands and other organs for organotherapeutic uses, dried, whether or not powdered; extracts of glands or other organs or of their secretions for organotherapeutic uses; heparin and its salts; other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included: Other." In NY N283432, dated March 15, 2017, CBP classified human urine samples not prepared for therapeutic or prophylactic uses in subheading 3825.90.00, HTSUS, as "Residual products of the chemical or allied industries, not elsewhere specified or included; municipal waste; sewage sludge; other wastes specified in note 6 to this chapter: Other." For the reasons set forth below, we are also revoking NY C80101, NY B80750, NY B82258, and NY N283432.

Similarly, in NY 870664, dated February 12, 1992, CBP classified human tissue and human urine specimens not prepared for therapeutic or prophylactic uses in subheading 3001.90.00, HTSUS, as "[g]lands and other organs for organotherapeutic uses, dried, whether or not powdered; extracts of glands or other organs or of their secretions for organotherapeutic uses; heparin and its salts; other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included: Other." In NY R03056, dated February 1, 2006, CBP classified human urine samples in subheading 3825.90.00, HTSUS. After reviewing NY 870664 in its entirety, we find it to be partially in error with respect to the classification of the human tissue and human urine specimens. We also find NY R03056 to be partially in error with respect to the classification of human urine samples.

For the reasons set forth below, we hereby modify NY 870664 with respect to the classification of the human tissue and human urine specimens. We also hereby modify NY R03056 with respect to the classification of the human urine samples. The remaining analyses of NY 870664 and NY R03056 remain unchanged.

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, notice proposing to revoke NY R03338, NY N283432, NY C80101, NY B80750, and NY B82258; and to modify NY 870664 and NY R03056 was published on December 13, 2023, in Volume 57, No. 46 of the Customs Bulletin. One comment was received in response to this notice and is addressed below.

FACTS:

In NY R03338, CBP described the subject merchandise as follows:

> The articles under consideration are Breast Invasive Ductal Carcinoma Sections (paraffin tissue section slides) to be imported from Abcam PLC. Abcam's and EMD's equivalent product names and item codes for the specific quantity sizes are as follows:
>
> > Abcam: ab4697, Breast tumor (human): ductal carcinoma (invasive) tissue slides, 5 slides, 5 grams
> >
> > EMD: 70332, Human Breast Invasive Ductal Carcinoma Sections, 5 slides, 5 grams.
>
> Paraffin tissue sections are ideal for rapidly identifying cellular localization of RNA or protein. The tissues were excised, immediately fixed by formalin, and then pathologically identified. Each slide contains tissue from a single human tumor. A single tissue section with 5 microns thickness is mounted on a positively charged glass slide.
>
> The paraffin tissue section slides will be sold in packages containing 5 slides each. The tissue slides are to be used for in vitro laboratory research only. Using these tissue slides scientists can further study the mechanisms by which cancer develops and proliferates.

In NY N283432, an entity known as the "US Anti-Doping Agency" asked for a ruling on the classification of human urine samples collected from athletes from Brazil for testing purposes.

In NY C80101, CBP described the subject merchandise as follows:

> The subject product consists of human cancerous tumor tissue, which, you indicate, will be imported by your client for use in the development of a new, in-vitro, testing procedure in order to determine the most effective treatment for a particular patient.

In NY B80750, CBP described the subject merchandise as follows:

> The subject product you wish to import consists of frozen, human fecal specimens containing or suspected of containing parasites, including: Entamoeba histolytica, Giardia lambia, Cryptosporidium parvum, and various helminths. According to your letter, these specimens will be used in the development of diagnostic tests to detect the presence of the aforementioned organisms.

In NY B82258, CBP described the subject merchandise as follows:

> According to your letter, the subject product consists of extracted human teeth, preserved in formaldehyde, to be used for dental research purposes.

In NY 870664, CBP described the subject merchandise as follows:

> The specific items in question which you wish to import are as follows: specimens of human blood and urine, and tissue specimens of human skin biopsies, intestine and lung. You state that these items are for analysis only, and that a report on the chemical, biochemical or microscopic examination will be generated and reported to the requesting party in the country of origin.

In NY R03056, CBP described the subject merchandise as follows:

> The specific items in question consist of human. . . urine samples from real patients that will be imported for diagnostic analysis only.

ISSUE:

Whether various human tissue samples, human fecal specimens, extracted human teeth, human urine specimens and other human bodily specimens not prepared for therapeutic or prophylactic uses are classified in heading 0507, HTSUS, as "ivory.... unworked or simply prepared but not cut to shape," in heading 0511, HTSUS, as "animal products not elsewhere specified or included," in heading 3001, HTSUS, as "other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included," in heading 3825, HTSUS, as "residual products of the chemical or allied industries, not elsewhere specified or included; municipal waste; sewage sludge; other wastes specified in note 6 to this chapter," or in heading 9705, HTSUS, as "collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest."

LAW AND ANALYSIS:

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

The 2024 HTSUS headings under consideration are as follows:

0507 Ivory, tortoise-shell, whalebone and whalebone hair, horns, antlers, hooves, nails, claws and beaks, unworked or simply prepared but not cut to shape; powder and waste of these products:

0511 Animal products not elsewhere specified or included; dead animals of chapter 1 or 3, unfit for human consumption:

3001 Glands and other organs for organotherapeutic uses, dried, whether or not powdered; extracts of glands or other organs or of their secretions for organotherapeutic uses; heparin and its salts; other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included:

3825 Residual products of the chemical or allied industries, not elsewhere specified or included; municipal waste; sewage sludge; other wastes specified in note 6 to this chapter:

9705 Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest:

* * * *

Note 4 to chapter 38, HTSUS, defines "municipal waste" throughout the tariff schedule as follows:

> [W]aste of a kind collected from households, hotels, restaurants, hospitals, shops offices, etc., road and pavement sweepings, as well as construction and demolition waste. Municipal waste generally contains a large variety of materials. Municipal waste generally contains a large variety of materials such as plastics, rubber, wood, paper, textiles, glass, metals, food materials, broken furniture and other damaged or discarded articles. The term "*municipal waste*," does not cover:
>
> ...
>
> (d) Clinical waste as defined in note 6(a), below.

Note 5 to chapter 38, HTSUS, defines "sewage sludge," for purposes of heading 3825, HTSUS, as follows:

> [S]ludge arising from urban effluent treatment plants and includes pretreatment waste, scourings and unstabilized sludge.

Under note 6 to chapter 38, HTSUS, the expression "other wastes" for purposes of headings 3825, HTSUS, applies to:

> (a) Clinical waste, that is, contaminated waste arising from medical research, diagnosis, treatment or other medical, surgical, dental or veterinary procedures, which often contain pathogens and pharmaceutical substances and require special disposal procedures (for example, soiled dressings, used gloves and used syringes);
>
> ...
>
> (d) Other wastes from chemical or allied industries.

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 at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The EN 38.25 states, in pertinent part, the following:

(D) OTHER WASTES SPECIFIED IN NOTE 6 TO THIS CHAPTER

> The heading also covers a wide variety of other wastes specified in Note (6) to this Chapter. They include:
>
> (1) **Clinical waste** which is contaminated waste arising from medical research, diagnosis, treatment or other medical, surgical, dental or veterinary procedures. Such waste often contains pathogens, pharmaceutical substances and body fluids and request special disposal procedures (e.g., soiled dressings, used gloves and used syringes).
>
> ...

(4) **Other wastes from the chemical or allied industries.** This group includes, *inter alia*, **wastes from the production, formulation and use of inks, dyes, pigments, paints, lacquers and varnishes, other than municipal waste and waste organic solvents.**

The EN 97.05 states, in pertinent part, the following:

These articles are very often of little intrinsic value but derive their interest from their rarity, their grouping or their presentation....

(A) **Collections and collectors' pieces of zoological, botanical, mineralogical or anatomical interest**, such as;

(1) Dead animals of any species preserved dry or in liquid; stuffed animal for collections.

(2) Blown or sucked eggs; insects in boxes, frames, etc. (**other than** mounted articles constituting imitation jewellery or trinkets); empty shells, **other than** those of a kind suitable for industrial use.

(3) Seeds or plants, dried or preserved in liquid; herbariums.

(4) Specimens of mineral (**not being** precious or semi-precious stones falling in **Chapter 71**); specimens of petrification.

(5) Osteological specimens (skeletons, skulls, bones).

(6) Anatomical and pathological specimens.

* * * *

The articles in NY R03338, NY C80101, NY B80750, and NY B82258, and some of the articles in NY 870664 and NY R03056 consist of various types of human tissue samples, such as breast invasive ductal carcinoma sections, human cancerous tumor tissue, and tissue specimens of human skin biopsies, intestines and lung; human fecal specimens; and extracted human teeth. The articles in NY N238432, and some of the merchandise in NY 870664 and NY R03056 consist of human urine samples. The human tissue specimens in NY C80101, NY B80750, NY B82258, and NY 870664, and the human urine specimens in NY 870664 were classified in heading 3001, HTSUS, as "[o]ther human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included." The human tissue specimens in NY R03338 were classified in heading 9705, HTSUS, as "[c]ollections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest."

Subheading 0511.99.40, HTSUS, which covers "[a]nimal products not elsewhere specified or included; ... [o]ther: [o]ther: [o]ther..." a "basket provision," as indicated by the terms "not elsewhere specified or included." Similarly, subheading 3001.90.01, HTSUS, which covers "[o]ther human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included: [o]ther" is also "basket provision." Classification in a basket provision is only appropriate if there is no tariff category that covers the merchandise more specifically. *See E.M. Industries v. U.S.*, 999 F. Supp. 1473, 1480 (CIT 1998) ("'Basket' or residual provisions of HTSUS headings ... are intended as a broad catch-all to encompass the classification of articles for which there is no more specifically applicable subheading"). On the other hand, heading 9705, HTSUS, specifically provides for "[c]ollections and collectors' pieces of ... anatomical interest." Therefore, we will first address whether the subject human tissue samples are more specifically classifiable under heading 9705, HTSUS."

The EN 97.05 states that articles in this heading "are very often of little intrinsic value but derive their interest from their rarity, their grouping or their presentation." The EN also provides for "collections and collectors' pieces of zoological, botanical, mineralogical or anatomical interest, such as. . . [a]natomical or pathological specimens." Within the context of an article's rarity, grouping and presentation, the EN 97.05(A)(1)-(6), HTSUS, describes various preservation techniques for preparing specimens as parts of collections or collectors' pieces. Along these lines, CBP have classified items such as natural fossils,[1] stuffed animals and animal heads,[2] and mounted animal heads[3] in subheading 9705.00.00, HTSUS, based on their rarity and presentation as collectors' items. Unlike items such as natural fossils and stuffed animals or animal heads, which are noted for their rarity and are displayed as collectors' pieces, the human tissue samples, and other bodily specimens in NY R03338, NY C80101, NY B80750, NY B82258, and NY 870664 will not be preserved for longevity in a manner within the context of chapter 97, HTSUS, for collections and collectors' pieces. Moreover, unlike the fossils and stuffed animal heads, the human tissue samples and other bodily specimens in NY R03338, NY C80101, NY B80750, NY B82258, and NY 870664 will be further examined, analyzed, dissected, or otherwise adulterated for laboratory research and diagnostic purposes, rather than for preservation or display. Therefore, we find that the human tissue samples in NY R03338 were improperly classified in heading 9705, HTSUS. Similarly, none of the human tissue samples and other bodily specimens in NY C80101, NY B80750, NY B82258, and NY 870664 are classifiable in heading 9705, HTSUS.

Turning to heading 3001, HTSUS, we note that the terms "therapeutic" and "prophylactic" are not defined in chapter 30 of the HTSUS, nor are they defined elsewhere in the Nomenclature or the ENs. In the absence of a definition of a term in the HTSUS or ENs, the term's correct meaning is its common and commercial meaning. *Nippon Kogasku (USA), Inc. v. United States*, 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. *C.J. Tower & Sons v. United States*, 69 CCPA 128, 673, F.2d 1268 (1982). The Court of Appeals for the Federal Circuit ("CAFC") has defined "therapeutic" as "having healing or curative powers." *See Lonza, Inc. v. U.S.* 46 F.3d 1098 (Fed. Cir. 1995). Additionally, according to Merriam-Webster's Online Dictionary, "prophylactic" means (1) "guarding from or preventing the spread of occurrence of disease or infection"; (2) "tending to prevent or ward off".[4] *See also* Headquarters Ruling Letter ("HQ") H095405, dated June 15, 2010.

Based on the above definitions, we find that the human tissue samples and other human bodily specimens, including human fecal specimens, extracted human teeth, and human urine samples, in NY C80101, NY B80750, NY 870664, and NY B82258 were wrongly classified in heading 3001, HTSUS,

[1] In NY N004185, dated December 26, 2006, CBP classified natural fossils from Morocco in subheading 9705.00.0090, HTSUSA.

[2] In NY G81800, dated September 8, 2000, CBP classified stuffed animals and animal heads from Namibia, Zambia and South Africa in subheading 9705.00.0090, HTSUSA.

[3] In NY D88270, dated February 26, 1999, CBP classified mounted animal heads from South Africa in subheading 9705.00.0090, HTSUSA.

[4] MERRIAM-WEBSTER.COM, *https://www.merriam-webster.com/dictionary/prophylactic?src=search-dict-box* (last visited Feb. 1, 2021).

which is limited to human substances that are prepared for therapeutic or prophylactic uses. The human cancerous tumor tissue samples in NY C80101 are utilized for the development of *in vitro* diagnostic testing procedures for determining the most effective treatment for a particular patient. The human fecal specimens containing or suspected of containing parasites in NY B80750 will be used in the development of diagnostic tests to detect the presence of such parasites. The extracted human teeth, preserved in formaldehyde, in NY B82258, will be used for dental research purposes. The human urine samples in NY 870664 are used for laboratory analysis purposes only. Nowhere in the definition of therapeutic or prophylactic is use for dental research or *in vitro* laboratory research for purposes such as developing diagnostic tests to help determine effective treatment at a future, indefinite time included. Therefore, the human tissue samples and other human bodily specimens in NY C80101, NY B80750, NY 870664, and NY B82258 are not prepared for therapeutic or prophylactic uses and are thus, precluded from classification in heading 3001, HTSUS. Likewise, none of the other human tissue samples and other human bodily specimens in the rulings at issue here, including those in NY R03338, NY R03056 and NY N283432, are prepared for therapeutic or prophylactic uses, and are also precluded from classification in heading 3001, HTSUS. Moreover, CBP recently affirmed in HQ H304055, dated March 31, 2021, that human tissue samples utilized for the development of in vitro diagnostic tests are precluded from classification in heading 3001, HTSUS, and are more appropriately classified in heading 0511, HTSUS. Much of our analysis in that ruling applies here.

Heading 3825, HTSUS, covers "[r]esidual products of the chemical or allied industries, not elsewhere specified or included; municipal waste; sewage sludge; other wastes specified in note 6 to this chapter." In NY N283432 and NY R03056, the human urine samples were specifically classified in subheading 3825.90, HTSUS, as "[r]esidual products of the chemical or allied industries" *other than* "municipal waste" (subheading 3825.10), "sewage sludge" (subheading 3825.20), "clinical waste" (3825.30), "waste organic solvents" (subheadings 3825.41 and 3825.49), "wastes of metal-pickling liquors, hydraulic fluids, brake fluids and anti-free fluids" (subheading 3825.50), "other wastes from the chemical or allied industries" (subheadings 3825.61 and 3825.69).

Notes 4, 5, and 6 to chapter 38 define the terms "municipal waste," "sewage sludge," and "other wastes" in heading 3825, HTSUS, but do not provide guidance as to what is meant by "residual products." Note 4 to chapter 38 describes municipal waste as the type of waste that is "collected from households, hotels, restaurants, hospitals, shops offices, etc., road and pavement sweepings, as well as construction and demolition waste. . .[and] generally contains a large variety of materials such as plastics, rubber, wood, paper, textiles, glass, metals, food materials, broken furniture and other damaged or discarded articles." Note 5 defines "sewage sludge" as "[s]ludge arising from urban effluent treatment plants." Note 6 states that "other wastes" applies to "[c]linical waste, that is, contaminated waste arising from medical research, diagnosis, treatment or other medical, surgical, dental or veterinary procedures, which often contain pathogens and pharmaceutical substances and require special disposal procedures (for example, soiled dressings, used gloves and used syringes)." Pursuant to EN 38.25, the phrase "other wastes

from the chemical or allied industries. . . includes, *inter alia*, wastes from the production, formulation and use of inks, dyes, pigments, paints, lacquers and varnishes, other than municipal or waste organic solvents."

First, we note that the human urine specimens in N283432 and NY R03056, which were classified in heading 3825, HTSUS, bear no resemblance to the exemplars of municipal and sewage waste in notes 4 and 5 to chapter 38, HTSUS. The exemplars of "other wastes from the chemical or allied industries" in EN 38.25 refer to by-products of industrial production processes rather than bodily specimens such as human urine samples. Clinical waste as defined in note 6 to chapter 38 and EN 38.25 is also inapplicable to the human urine samples at issue. These urine samples are not discarded waste as a result of medical research, diagnosis, treatment, or other medical procedures. Rather, the specimens in N283432 and NY R03056, as well as those in NY 870664, are being imported for diagnostic and testing purposes to be performed after importation. They do not potentially become waste until after importation once testing has been completed. Heading 3825, HTSUS, on the other hand, describes materials that are *imported as waste*, following the performance of any testing procedures prior to importation.

The term "residual product" is not statutorily defined in the HTSUS. In 2001, Presidential Proclamation 7515, issued pursuant to the Omnibus Trade and Competitive Act of 1988, created heading 3825, HTSUS, to cover environmentally sensitive and hazardous waste products. *See* HQ H018547, dated December 12, 2007. In HQ 967288, dated March 10, 2005, we noted that chapter 38 was suggested by the United States to track certain environmentally sensitive substances important to international trade. The importation of human urine specimens for testing and diagnostic analysis to be completed post-importation does not involve environmentally sensitive substances important to international trade for purposes of heading 3825, HTSUS.

In sum, based on the legal notes to chapter 38, EN 38.25, and the legislative history of heading 3825, HTSUS, we find that human urine samples imported for testing and diagnostic analysis post-importation are precluded from classification in heading 3825, HTSUS.

Having excluded the subject human tissue samples, human urine samples and other human bodily specimens from classification in headings 9705, 3001, and 3825, HTSUS, we turn to heading 0511, HTSUS. As we noted in HQ H304055, the term "human" is not defined in chapter 5 of the HTSUS, nor is it defined elsewhere in the Nomenclature or the ENs. The EN 05.11(1)-(14) identifies examples of products covered under this heading, which are derived from animals. Nowhere in the EN is there reference to products derived from human tissue. In HQ H304055, dated March 31, 2021, CBP noted that the Encyclopedia Britannica defines human being as a "culture-bearing primate classified in the genus *Homo*, especially the species *H. sapiens*. Human beings are anatomically similar and related to the great apes but are distinguished by a more highly developed brain and a resultant capacity for articulate speech and abstract reasoning." Additionally, "a primate is any mammal of the group that includes lemurs, lorises, tarsiers, monkeys, apes, and humans."

Furthermore, there is clear precedence in CBP's past rulings for classifying human tissue samples and other human bodily specimens within chapter 5, heading 0511, HTSUS. For example, in NY 887293, dated June 29, 1993, and in NY H82224, dated June 28, 2001, CBP classified human embryos that

were frozen and shipped to the United States in heading 0511, HTSUS. In NY R03056, dated February 1, 2006, CBP classified human prostrate, bladder, and gastrointestinal tract tissue specimens, imported in formalin or in an alcohol-based fixative, which were intended for diagnostic analysis only—and not for therapeutic or prophylactic uses such as the development of new drugs—in heading 0511, HTSUS. Similarly, in NY N003566, dated December 14, 2006, CBP classified human dental pulp cells in vials and human colon carcinoma tissue arrays in paraffin-embedded blocks, which were used solely for non-clinical research, in heading 0511, HTSUS. Moreover, in NY N133477, dated December 13, 2010, CBP classified samples of human fecal matter imported for laboratory testing in heading 0511, HTSUS, while in NY N284008, dated March 28, 2017, CBP also classified human placenta tissue specimens used in non-clinical research in heading 0511, HTSUS.

Based on the foregoing, we find that the human tissue samples and other human bodily specimens, including human fecal specimens, and human urine samples not prepared for therapeutic or prophylactic uses are properly classified in subheading 0511.99.4070, HTSUSA, as "[a]nimal products not elsewhere specified or included; dead animals of chapter 1 or 3, unfit for human consumption: [o]ther: [o]ther: [o]ther...[o]ther.

As noted above, we received one comment in response to the notice of the proposed revocation of NY B82258 concerning the classification of extracted human teeth, preserved in formaldehyde, to be used for dental research purposes. While the commenter agrees that the human tissue samples and other human bodily specimens covered by the proposed ruling are properly classified in subheading 0511.99.0470, HTSUSA, they disagree with respect to the classification of the human teeth in NY B82258. The commenter cites to note 3 to chapter 5 of the HTSUS, which states that '[t]hroughout the tariff schedule, elephant, hippopotamus, walrus, narwhal and wild boar tusks, rhinoceros horns and the teeth of all animals are regarded as "*ivory.*" As such, the human teeth described in NY B82258 fall within this scope as "teeth of all animals." Accordingly, the commenter asserts that the human teeth in NY B82258 are properly classified as ivory in subheading 0507.10.0000, HTSUSA.

While there is clear precedence for classification of human tissue samples and other human bodily specimens in chapter 5 of the tariff of the schedule, classification of extracted human teeth is a matter of first impression. The ENs to 05.07 state that "[t]his heading covers the products described below, unworked or simply prepared but not cut to shape, i.e., not having undergone processes extending beyond rasping, scraping, cleaning, removal of superfluous parts, trimming, splitting, cutting other than to shape, rough planing, straightening or flattening." While the human teeth in NY B82258 were prepared in formaldehyde, such preservation does not rise above the level of "simply prepared" as stated in the EN, and therefore, would not preclude classification of the human teeth in heading 0507, HTSUS. Moreover, heading 0511, HTSUS, which describes "animal products *not elsewhere specific or included,*" is a basket provision in which classification is only appropriate if there is no tariff category that covers the human teeth more specifically. Not only is heading 0507 anterior to heading 0511 in the tariff schedule, but pursuant to note 3 to chapter 5, it also describes the human teeth more specifically as ivory. Accordingly, we find that the human teeth described in NY B82258 are properly classified in subheading 0507.10.0000, HTSUSA, as "ivory."

HOLDING:

By application of GRIs 1 and 6, the human tissue samples, human fecal specimens, , human urine specimens and other human bodily specimens, except for extracted human teeth, not prepared for therapeutic or prophylactic uses are classified in heading 0511, HTSUS, specifically under subheading 0511.99.4070, HTSUSA, which provides for "[a]nimal products not elsewhere specified or included; dead animals of chapter 1 or 3, unfit for human consumption: [o]ther: [o]ther: [o]ther...[o]ther." The 2024 column one, general rate of duty is 1.1% *ad valorem*.

By application of GRIs 1 and 6, the extracted human teeth, not prepared for therapeutic or prophylactic uses are classified in heading 0507, HTSUS, specifically under subheading 0507.10.0000, HTSUSA, which provides for "[i]vory, tortoise-shell, whalebone and whalebone hair, horns, antlers, hooves, nails, claws and beaks, unworked or simply prepared but not cut to shape; powder and waste of these products: [i]vory; ivory powder and waste." The 2024 column one, general rate of duty is Free.

EFFECT ON OTHER RULINGS:

NY R03338, dated March 13, 2006; NY C80101, dated October 3, 1997; NY B80750, dated January 16, 1997; and NY B82258, dated March 3, 1997; and NY N283432, dated March 15, 2017, are hereby revoked.

NY 870664, dated February 12, 1992, is hereby modified with respect to the classification of the human urine specimens and human tissue specimens only. NY R03056, dated February 1, 2006, is hereby modified with respect to the classification of the human urine samples only.

This ruling will become effective 60 days from the date of publication in the Customs Bulletin.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Cc: Bruce H. Chiu, Esq.
Cohen & Grigsby, P.C.
2900 CNG Tower
625 Liberty Avenue
Pittsburgh, PA 15222–3115

John F. Bruni, Ph.D.
Biosite Diagnostics
11030 Roselle Street
San Diego, CA 92121

Donna R. Harvey, Esq.
2633 Lincoln Boulevard, No. 131
Santa Monica, CA 90405

Mr. Logan Jett
U.S. Anti-Doping Agency
555 Tch Center Drive, Suite 200
Colorado Springs, CO 80919

Mr. Michael T. Grady
Tampa Pathology Laboratory
6515 North Armenia Avenue
Tampa, FL 33604

Mr. Pablo Fel
Prost – Data Inc.
1854 Airline Drive (Suite 17A)
Nashville, TN 37210

AGENCY INFORMATION COLLECTION ACTIVITIES

Extension; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

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

ACTION: 60-Day notice and request for comments.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than March 26, 2024) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0136 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_ PRA@cbp.dhs.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

OMB Number: 1651–0136.

Form Number: N/A.

Current Actions: CBP proposes to extend the expiration date of this information collection with a change in burden hours.

Type of Review: Extension (with change).

Affected Public: Individuals and Businesses.

Abstract: Executive Order 12862, Setting Customer Service Standards, directs Federal agencies to provide service to the public that matches or exceeds the best service available in the private sector. Executive Order 14058, Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government, reiterates that Federal agencies should continually improve their understanding of their customers and their customer experience challenges. In order to work continuously to ensure that our programs are effective and meet our customers' needs, CBP seeks to obtain OMB approval of a generic clearance to collect qualitative feedback on our service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions but are not statistical surveys that yield quantitative results that can be generalized to the population of study.

This collection of information is necessary to enable CBP to garner customer and stakeholder feedback in an efficient, timely manner, in accordance with our commitment to improving service delivery. The information collected from our customers and stakeholders will help ensure that users have an effective, efficient, and satisfying experience with CBP's programs. This feedback will provide insights into customer or stakeholder perceptions, experiences, and expectations, provide an early warning of issues with service, or focus attention on

areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative, and actionable communications between CBP and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Type of Information Collection: Customer Feedback.

Estimated Number of Respondents: 620,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 620,000.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 51,000.

Dated: January 23, 2024.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

AGENCY INFORMATION COLLECTION ACTIVITIES

Revision of Existing Collection; U.S. Customs Declaration (CBP Form 6059B)

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

ACTION: 30-Day notice and request for comments.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than March 1, 2024) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (88 FR 13452) on March 03, 2023, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: U.S. Customs Declaration.

OMB Number: 1651–0009.

Form Number: 6059B.

Current Actions: CBP is submitting a revision package to terminate the APC Program, announce MPC Expansion, and add the CBP One Mobile Application to the collection.

Type of Review: Revision.

Affected Public: Individuals.

Abstract: CBP Form 6059B, Customs Declaration, is used as a standard report of the identity and residence of each person arriving in the United States. This form is also used to declare imported articles to U.S. Customs and Border Protection (CBP) in accordance with 19 CFR 122.27, 148.12, 148.13, 148.110, 148.111; 31 U.S.C. 5316 and Section 498 of the Tariff Act of 1930, as amended (19 U.S.C. 1498).

Section 148.13 of the CBP regulations prescribes the use of the CBP Form 6059B when a written declaration is required of a traveler entering the United States. Generally, written declarations are required from travelers arriving by air or sea. Section 148.12 requires verbal declarations from travelers entering the United States. Generally, verbal declarations are required from travelers arriving by land.

CBP continues to find ways to improve the entry process through the use of mobile technology to ensure it is safe and efficient. To that end, CBP has deployed a process which allows travelers to use a mobile app to submit information to CBP prior to arrival in domestic locations and prior to departure at preclearance locations. This process, called Mobile Passport Control (MPC) allows travelers to self-segment upon arrival into the United States or departing a preclearance location. The MPC process also helps determine under what circumstances CBP should require a written customs declaration (CBP Form 6059B) and when it is beneficial to admit travelers who make an oral customs declaration during the primary inspection. MPC eliminates the administrative tasks performed by the officer during a traditional inspection and in most cases will eliminate the need for respondents/ travelers to fill out a paper declaration. MPC provides a more efficient and secure in person inspection between the CBP Officer and the traveler.

Another electronic process that CBP has in lieu of the paper 6059B is the Automated Passport Control (APC). This is a CBP program that facilitates the entry process for travelers by providing self-service kiosks in CBP's Primary Inspection area that travelers can use to make their declaration.

Both APC and MPC allow an electronic method for travelers to answer the questions that appear on form 6059B without filling out a paper form. APC program will continue to collect this information until the program is terminated on September 30, 2023.

A sample of CBP Form 6059B can be found at: *https://www.cbp.gov/newsroom/publications/forms?title=6059.*

This collection is available in the following languages: English, French, Vietnamese, German, Italian, Japanese, Korean, Polish, Portuguese, Russian, Chinese, Hebrew, Spanish, Dutch, Arabic, Farsi, and Punjabi.

New Change

APC Program Termination

The Automated Passport Control (APC) program is terminated as of September 30, 2023. Termination of the APC program will allow CBP passenger processing to streamline into a single Simplified Arrival workflow without need of interacting with a kiosk. The removal of the kiosk space will also provide additional queueing space for travelers that will utilize MPC to expedite their entry process into the United States.

MPC Expansion

Mobile Passport Control (MPC) program will expand to include U.S. Legal permanent residents (LPR) and Visa Waiver Program (VWP) country visitors arriving for their second visit to the United States. The Automated Passport Control (APC) program previously captured this population, and CBP is now expanding the MPC program to be used by these populations. U.S. LPRs are eligible for SA's photo biometric confirmation upon arrival into the United States. Other classes of admission eligible for SA's photo biometric confirmation will be considered for MPC inclusion as a future update.

CBP One™ Mobile Application

A new mobile application testing the operational effectiveness of a process which allows travelers to use a mobile application to submit information to CBP, in advance, prior to arrival. This second mobile capability is under the current CBP One™ application which is a platform application that serves as a single portal for travelers and stakeholders to virtually interact with CBP. The CBP One™ application will also allow travelers to self-segment upon arrival at land borders in the United States.

Similar to the MPC application, the CBP One™ application eliminates the administrative tasks performed by the officer during a traditional inspection and in most cases will eliminate the need for respondents/travelers to fill out a paper declaration. In addition, the CBP One™ application will also provide a more efficient and secure in person inspection between the CBP Officer and the traveler at the land border.

Unique to the CBP One™ application is that while the MPC sub-

mission is completed upon arrival, the CBP One™ application must be submitted in advance and will require the additional data elements:

1. Traveler Identify the Port of Entry (POE).
2. Time and/or date of arrival.

In addition, like the MPC application, travelers will provide their answers to CBP's questions, take a self-picture/selfie and submit the information via the CBP One™ application, after the plane lands. This will allow for advance vetting and proper resource management at the POE. This capability through the CBP One™ application is available to all travelers arriving with authorized travel documents, including foreign nationals.

Type of Information Collection: Customs Declarations (Form 6059B)

Estimated Number of Respondents: 5,206,850.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 5,206,850.
Estimated Time per Response: 4 minutes.
Estimated Total Annual Burden Hours: 348,859.

Type of Information Collection: Verbal Declarations.

Estimated Number of Respondents: 384,793,150.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 384,793,150.
Estimated Time per Response: 10 seconds.
Estimated Total Annual Burden Hours: 1,154,380.

Type of Information Collection: MPC APP.

Estimated Number of Respondents: 4,500,000.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 4,500,000.
Estimated Time per Response: 2 minutes.
Estimated Total Annual Burden Hours: 148,500.

Type of Information Collection: CBP One APP.

Estimated Number of Respondents: 500,000.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 500,000.
Estimated Time per Response: 2 minutes.
Estimated Total Annual Burden Hours: 16,500.

Dated: January 25, 2024.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

Slip Op. 24–9

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

Before: Jane A. Restani, Judge
Consol. Court No. 18–00136

[Defendant's USCIT Rule 37 motion for sanctions is granted in part and denied in part.]

Dated: January 29, 2024

Mandy E. Kirschner, Stein Shostak Shostak Pollack & O'Hara, LLP, of Los Angeles, CA, for plaintiff Ildico Inc.

Marcella Powell, Senior Trial Counsel, International Trade Field Office, U.S. Department of Justice, of New York, NY, for the defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office.

MEMORANDUM AND ORDER

Restani, Judge:

In this matter plaintiff filed a third supplemental response to defendant's first request for production after discovery had been completed and all time periods had expired. As a sanction, defendant seeks to prevent the use of the new responses as evidence in this matter, or in the alternative, to reopen discovery.

The first aspect of the motion concerns photographs that contain written information not contained on earlier provided photographs. The new photographs were "discovered" by counsel soon after formal discovery ended but were not immediately provided for reasons irrelevant here. Counsel claims the discovery happened because it only recently learned of an internal internet site at the company of one of the witnesses. Companies normally have internal internet sites, and it is unclear why plaintiff did not seek them out earlier. In the absence of such an explanation the court concludes a sufficiently diligent search for responsive documents wasn't made during the discovery period. Further, plaintiff's response to the Rule 37 motion asserts that the commercial invoices submitted contain more information than the new photographs and that it only provided the photographs as a

courtesy, not because it was required to under USCIT Rule 26.[1] Pl.'s Resp. to R. 37 Mot. at 3–4, ECF No. 28 (Jan. 24, 2024). The Government, however, does not accept this courtesy. Accordingly, this supplementation is not permitted and the new photographs containing written information will not be permitted as evidence, except by consent of the Government.

The second aspect of the Government's Rule 37 motion concerns samples of crystals. It is unclear to the court why the crystals are produced now and why the Government objects. The sample watches contain crystals, and the sample crystals apparently have been seen by the Government during depositions. Plaintiff alleges that the government did not request separate crystals for examination and testing previously.

Discovery sanctions appear unsupported as to the crystals.[2] The court admittedly, is mystified by both parties' actions as to the crystals. Accordingly, this aspect of the motion is denied without prejudice. Presumably, if this aspect of the discovery proceedings remains of concern to the parties, future proceedings will ensue.

For the foregoing reasons, the court **GRANTS in part and DENIES in part** the Rule 37 motion, *see* ECF No. 26 (Jan. 9, 2024).

Dated: January 29, 2024
New York, New York

/*s*/ *Jane A. Restani*
JANE A. RESTANI, JUDGE

Slip Op. 24–10

SPIRIT AEROSYSTEMS, INC., Plaintiff, v. UNITED STATES et al., Defendants.

Before: Claire R. Kelly, Judge
Court No. 20–00094

[Granting the U.S. Customs and Border Protection's motion for summary judgment on Spirit AeroSystems, Inc.'s claim for denial of substituted unused merchandise drawback claim.]

Dated: January 30, 2024

[1] The operative language of Rule 26(e) requires a party to supplement a prior disclosure or response if "the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing . . . ." USCIT R. 26(e)(1)(A).

[2] "If a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information . . . unless the failure was substantially justified or is harmless." USCIT R. 37(c)(1).

William Randolph Rucker, Faegre Drinker Biddle & Reath, LLP of Chicago, IL, for plaintiff Spirit AeroSystems, Inc.

Alexander Vanderweide, Senior Trial Counsel, and *Patricia M. McCarthy*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY for defendant United States. Also on the brief was *Brian M. Boynton*, Principal Deputy Assistant Attorney General. Of counsel on the brief was *Matt Rabinovitch*, Attorney, Office of the Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection, and *Justin R. Miller*, Attorney-In-Charge for the International Trade Field Office, U.S. Department of Justice.

OPINION AND ORDER

Kelly, Judge:

Before the Court are cross-motions for summary judgment. Plaintiff Spirit AeroSystems, Inc. ("Spirit") seeks summary judgment on its claim contesting the United States Customs and Border Protection's ("CBP") denial of Spirit's protest for substituted unused merchandise drawback on imported civil aircraft parts under 19 U.S.C. § 1313(j). *See* Pl. Mot. Summ. J. at 1, Mar. 24, 2023, ECF No. 39 ("Pl. Mot."). Defendant opposes Spirit's motion and cross-moves for summary judgment in its favor. *See* Def. Cross-Mot. Summ. J., June 2, 2023, ECF No. 42 ("Def. Mot."). For the following reasons, Defendant's motion is granted, and Spirit's motion is denied.

BACKGROUND

The Harmonized Tariff Schedule of the United States ("HTSUS")[1] is an authoritative classification system that lays out the tariff rates and statistical categories for all merchandise imported into the United States.[2] *See* U.S. Int'l Trade Comm., Preface to the 30th Edition – Revision 1.1: Guide to the HTSUS and Statistical Reporting, 1 (Feb. 8, 2018) ("Preface to the HTSUS"). Under each edition of the HTSUS, the schedule's tabular format categorizes tariff rates on all commercial goods according to their internationally agreed upon "structured product nomenclature"—commonly referred to as the "Harmonized System" ("HS")—as set forth by the World Customs

[1] All references to the HTSUS and Code of Federal Regulations refer to the 2020 edition, the most recent version of the HTSUS in effect at the time of Spirit's entries of subject merchandise. *See* Def. Statement of Material Facts Not In Issue at ¶ 1, June 2, 2023, ECF 42–1 ("Def. Stmt. Facts"); Pl. Resp. to Def.'s Statement of Material Facts Not In Issue at ¶ 1, Aug. 18, 2023, ECF No. 48–2 ("Pl. Resp. Def. Stmt."); Pl. Statement of Material Facts Not In Issue at ¶ 1, Mar. 24, 2023, ECF No. 39 ("Pl. Stmt. Facts"); Def's Resp. to Pl.'s Statement of Material Facts Not In Issue at ¶ 1, June 2, 2023, ECF No. 42–2 ("Def. Resp. Pl. Stmt.").

[2] The HTSUS is published by the U.S. International Trade Commission and subject to frequent revisions that reflect the global system of nomenclature applied to most world trade in goods. *See* U.S. Int'l Trade Comm., HTSUS Revision 11 (2023). The schedule was established at Congress' direction in accordance with section 1207 of the Omnibus Trade and Competitiveness Act of 1988. *See* 19 U.S.C. § 3007.

Organization. *See id.* at 2. The HS organizes tariff rates through a series of reporting numbers consisting of 4-digit "headings" and 6-digit subordinate "subheadings,"[3] depending upon the type of imported merchandise as classified in HTSUS chapters one through ninety-seven. *See id.* These category codes are often further broken down into 8-digit subheadings, comprising the narrowest legal category of the good that controls its rate of duty.[4] *See id.* An 8-digit subheading may contain a subordinate statistical provision appearing as a 10-digit statistical reporting number ("SRN"); however, such 10-digit numbers do not affect the legal classification of the good for purposes of its tariff rate. *See id.*

The United States implements the HS by statute through 19 U.S.C. § 1202. *See* 19 U.S.C. § 1202. Pursuant to the Omnibus Trade and Competitiveness Act of 1988, the United States International Trade Commission publishes the HTSUS containing the legal and non-legal provisions applicable to goods in trade. *See* 19 U.S.C. § 3007; Preface to the HTSUS at 1. The HTSUS's provisions include tables containing the legal 4-, 6-, and 8-digit headings and subheadings and the non-legal 10-digit SRNs. *See* Preface to the HTSUS at 2, 5. The tables also include a column titled "Article Description" that corresponds with each 4-, 6-, 8-, and 10-digit sublevel of the good's reporting number. U.S. Customs and Border Protection, What Every Member of the Trade Community Should Know About: Tariff Classification, 34 (May 2004), https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/icp017r2_3_0.pdf (last visited Jan. 16, 2024) ("CBP Tariff Classification Compliance Publication"). Article descriptions classify a good based upon its material composition, intended functions, or product name. U.S. Int'l Trade Comm., Harmonized Tariff Schedule System External User Guide, 1, 14 (2015), https://www.usitc.gov/documents/hts_external_guide.pdf (last visited Jan. 25, 2024) ("HTSUS User Guide"). Thus, each good falls into only one category at the 4-, 6-, 8-, or 10-digit level depending on the article description.[5] HTSUS User Guide at 14. Moreover, to ensure that every good falls into one classification in the schedule, the HTSUS has catchall article descriptions with corresponding SRNs titled "Other," also known as "basket pro-

[3] The HTSUS emphasizes the importance of indentations when distinguishing between headings and subheadings: "[a] 'heading' is a provision whose article description is not indented, while a 'subheading' (6- or 8- digit) has an indented and subordinate description covering a subset of the heading's product scope." Preface to the HTSUS at 2 n.5.

[4] Some goods, as classified in the HTSUS, do not contain subdivisions and instead end in zeroes, with their respective duty rates attached. *See* Preface to the HTSUS at 2.

[5] For example, the 8-digit classification for "copper cathodes" is subheading 7403.11.00, while the 8-digit classification for "cotton sewing thread put up for retail sale" is subheading 5204.20.00. *See generally* Chapter 50, Revision 11, HTSUS (2023); HTSUS Ch. 70; Harmonized Tariff Schedule System External User Guide at 14.

visions." *EM Indus., Inc. v. United States*, 999 F. Supp. 1473, 1480 (Ct. Int'l Trade 1998) (("'Basket' or residual provisions of HTSUS headings . . . are intended as a broad catch-all to encompass the classification of articles for which there is no more specifically applicable subheading"); CBP Tariff Classification Compliance Publication at 11. These basket provisions can appear at the 6-, 8- and 10-digit levels. *See id.* at 11–12. The article descriptions correspond to each HTSUS classification number at each heading and subheading and delineate the items included in each heading and subheading, creating an organized and uniform system that contains all relevant information on the tariff rate of duty on any given good. *See* Preface to the HTSUS at 1–3; CBP Classification Compliance Publication at 11–12, 33–34.

Imported merchandise not used within the United States before its exportation or destruction may be eligible for a refund of duties known as a drawback ("unused merchandise drawback"). *See* 19 U.S.C. § 1313(j)(2). Additionally, merchandise may be substituted for imported merchandise for drawback purposes under 19 U.S.C. § 1313(j)(5) ("substituted unused merchandise drawback") if certain conditions are met. Section 1313 allows for refund of duties when exported (or destroyed) merchandise is classifiable under the same 8-digit subheading as the imported merchandise. 19 U.S.C. § 1313(j)(2)(A). However, merchandise is ineligible if the article description for the 8-digit subheading begins with the term "other," unless the imported merchandise and the exported or destroyed merchandise are classified under the same 10-digit SRN, and the article description for that 10-digit SRN does not begin with the term "other." 19 U.S.C. § 1313(j)(5).

To identify substituted unused merchandise that is eligible for drawback under Section 1313(j)(5), CBP uses a software program called the "Automated Commercial Environment" ("ACE").[6] ACE and Automated Systems, U.S. Customs and Border Protection (Sept. 20, 2023), https://www.cbp.gov/trade/automated (last visited Jan. 12, 2023); Drawback in ACE, U.S. Customs and Border Protection (Oct. 6, 2022), https://www.cbp.gov/trade/automated/news/drawback (last visited Jan. 12, 2023). When the SRN of an unused good fails to conform to the statutory eligibility criteria after an importer files a drawback claim, ACE returns a specific error code and message signifying the goods ineligibility for substituted unused merchandise drawback under 19 U.S.C. § 1313(j)(5)(A) that rejects the claim due to

[6] The parties dispute whether ACE is properly programmed to "enforce the exclusion of tariff provisions that are not eligible for substituted unused merchandise drawback under 19 U.S.C. § 1313(j)(5)." Def. Stmt. Facts at ¶1; Pl. Resp. Def. Stmt. at ¶ 1. However, the parties do not dispute how ACE is currently programmed to work. *See* Pl. Stmt. Facts at ¶¶ 19–22; Def. Resp. Pl. Stmt. at ¶¶ 19–22.

its status as a basket provision.[7] *See* Ace Drawback Error Dictionary, U.S. Customs and Border Patrol (June 30, 2023), https://www.cbp.gov/document/guidance/ace-drawback-error-dictionary (last visited Jan. 12, 2023); *see* Pl. Stmt. Facts at ¶ 19; Def. Resp. Pl. Stmt. at ¶ 19.

UNDISPUTED FACTS

On January 29, 2018, Spirit, an aerostructure designer and manufacturer, imported aircraft parts into the United States through the Los Angeles Port of Entry, Am. Summons, Apr. 27, 2020, ECF No. 18, classifiable under HTSUS SRN 8803.30.0030. Pl. Stmt. Facts at ¶¶ 23–24; Def. Resp. Pl. Stmt. at ¶ 24. The full text of the corresponding article description to 8803.30.0030 at the time of import read: "Parts of goods of heading 8001 or 8002: [. . .] Other parts of airplanes or helicopters: For use in civil aircraft: [. . .] Other." Pl. Stmt. Facts at ¶ 24; Def. Resp. Pl. Stmt. at ¶ 24. All applicable duties and fees were paid by Spirit upon importation of the parts. Pl. Stmt. Facts at ¶ 25; Def. Resp. Pl. Stmt. at ¶ 25.

On January 29, 2020, Spirit used CBP's ACE drawback module to file a substituted unused merchandise drawback claim for the imported plane parts under Claim No. AA6 03265726. Pl. Stmt. Facts at ¶ 26; Def. Resp. Pl. Stmt. at ¶ 26. That same day, CBP's ACE drawback module rejected Spirit's drawback claim, resulting in error code "F519." Pl. Stmt. Facts at ¶ 27; Def. Resp. Pl. Stmt. at ¶ 27. Spirit filed an administrative protest, which was denied by CBP. *See* Am. Summons. Spirit then filed a summons under 28 U.S.C. § 1581(a), which was granted by the Court. *Spirit AeroSystems, Inc. v. United States*, 468 F. Supp.3d 1349, 1352 (Ct. Int'l Trade 2020).

On April 27, 2020, Spirit filed the instant action against CBP. *See generally* Compl., Apr. 27, 2020, ECF No. 6. On March 24, 2023, Spirit filed its motion for summary judgment, to which Defendant responded to by filing a cross-motion for summary judgment on June 6, 2023. *See generally* Pl. Mot.; Def. Mot. On December 7, 2023, the Court heard oral arguments by the parties on the issues presented in the moving briefs. *See* Digital Audio File re Courtroom Proceeding 55, Dec. 7, 2023, ECF No. 56.

The parties do not dispute that the imported and substituted aircraft parts at issue are classifiable under SRN 8803.30.0030. Pl. Mot. at 2; Def. Mot. at 3–4.

---

[7] For example, an SRN inputted into ACE that yields the error code "F519" is accompanied with the error message "HTS[US] NBR NOT ALLOWED UNDER BASKET PROVISION." *See* Pl. Stmt. Facts at ¶¶ 19–20; Def. Resp. Pl. Stmt. at ¶¶ 19–20.

Harmonized Tariff Schedule of the United States (2020)
Annotated for Statistical Reporting Purposes

XVII
88-4

Heading/ Subheading	Stat. Suf-fix	Article Description	Unit of Quantity	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
8803		Parts of goods of heading 8801 or 8802:				
8803.10.00		Propellers and rotors and parts thereof		Free[2/]		27.5%
		For use in civil aircraft:				
	15	For use by the Department of Defense or the United States Coast Guard[3/]	kg			
	30	Other[3/]	kg			
	60	Other	kg			
8803.20.00		Undercarriages and parts thereof		Free[2/]		27.5%
		For use in civil aircraft:				
	15	For use by the Department of Defense or the United States Coast Guard[3/]	kg			
	30	Other[3/]	kg			
	60	Other	kg			
8803.30.00		Other parts of airplanes or helicopters		Free[2/]		27.5%
		For use in civil aircraft:				
	15	For use by the Department of Defense or the United States Coast Guard[3/]	kg			
	30	Other[3/]	kg			
	60	Other	kg			

Spirit believes it is entitled to summary judgment because 19 U.S.C. § 1313(j)(5) renders SRN 8803.30.0030 eligible for substituted unused merchandise drawback as it mandates that the preceding indented text to any 10-digit SRN be read as part of the "article description" for that 10-digit number. Pl. Mot. at 11, 18, 24–25. Spirit supports its argument with canons of statutory construction and legislative intent. *See id.* at 2, 25–29. Specifically, Spirit requests the Court to (1) order that merchandise classifiable under SRN 8803.30.0030 of the HTSUS is eligible for substituted unused merchandise drawback; (2) require CBP to reprogram ACE to allow for substituted unused merchandise drawback claims classifiable for SRN 8803.30.0030; and (3) order CBP to approve Claim No. AA6 03265726 and refund excess duties paid with interest. *Id.* at 1–2. Defendant argues it is entitled to summary judgment and that ACE properly rejected Spirit's claim because drawback eligibility under 19 U.S.C. § 1313(j) is determined by reading only the attached description at the 8- and 10-digit numerical levels, therefore rendering SRN 8803.30.0030 an "other" category and thus ineligible for substituted unused merchandise drawback. Def. Mot. at 4–5, 6–35. To support its position, Defendant argues that Section 1313(j)(5) does not implicate the numerically unaligned text between the 8-and 10-digit levels to determine substituted unused merchandise drawback eligibility, and that Spirit's interpretation collapses distinct 10-digit SRNs into broad categories and leads to inconsistent and absurd results. *Id.* at 4–5. For the following reasons, Defendant's motion is granted, and Spirit's motion is denied.

JURISDICTION AND STANDARD OF REVIEW

The Court has exclusive jurisdiction over "any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930."[8] 28 U.S.C. § 1581(a). Denied protests are subject to de novo review "upon the basis of the record made before the court." *See* 28 U.S.C. § 2640(a)(1).

The Court will grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). In order to raise a genuine issue of material fact, it is insufficient for a party to rest upon mere allegations or denials, but rather that party must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing versions of the truth at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986); *Processed Plastic Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006); *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835–36 (Fed. Cir. 1984).

DISCUSSION

Spirit argues the exception to 19 U.S.C. § 1313(j)(5)(B), stating that substituted unused merchandise drawback is available if "the article description for [imported merchandise and the substituted merchandise classifiable under the same 10-digit SRN] does not begin with the term 'other,'" renders the SRN 8803.30.0030 of the HTSUS eligible for substituted unused merchandise drawback because it begins with the phrase "For use in civil aircraft[.]" Pl. Mot. at 2. Spirit supports its reading with invocations of statutory interpretation canons and legislative history. *Id.* at 11–31. Defendant contends that Spirit's reading of the statute fails to implement the plain meaning and purpose of the statute. Def. Mot. at 4–5. More specifically, Defendant argues that the text of 19 U.S.C. § 1313(j)(5) stating substituted unused merchandise drawback is "based on the 8-digit [HTSUS] subheading number," "the article description for the 8-digit [HTSUS] subheading number," and the "article description for that 10-digit [HTSUS] [SRN]" do not implicate unattached HTSUS language. *Id.* at 11. Rather, Defendant argues substituted unused merchandise drawback eligibility under 19 U.S.C. §§ 1313(j)(2) and (5) is determined by looking at the text directly aligned with the 8- and 10-digit numerical level because "the term 'for' refers to the descriptive text that aligns with 'the 8-digit

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

HTSUS subheading number' and '10-digit [HTSUS] [SRN].'" *Id.* Under Defendant's reading of 19 U.S.C. § 1313(j)(5), SRN 8803.30.0030 begins with the word "other" in its article description and therefore is ineligible for substituted unused merchandise drawback. *Id.* at 4–5.

Unused merchandise drawback eligibility is governed by 19 U.S.C. § 1313(j), allowing for the refund of duties paid upon importation under certain conditions if merchandise is unused and subsequently exported or destroyed.[9] 19 U.S.C. § 1313(j). Subsection 1313(j)(2) allows for refund of duties when exported (or destroyed) merchandise classified under the same 8-digit subheading as the imported merchandise is exported or destroyed.[10] 19 U.S.C. § 1313(j)(2).

Congress limited the availability of substituted unused merchandise drawback:

> (5)(A) For purposes of paragraph (2) and except as provided in subparagraph (B), merchandise may not be substituted for imported merchandise for drawback purposes based on the 8-digit [HTSUS] subheading number if the article description for the 8-digit [HTSUS] subheading number under which the imported merchandise is classified begins with the term "other".

---

[9] The unused merchandise drawback portion of 19 U.S.C. § 1313(j) reads in relevant part:

> (1) if imported merchandise, on which was paid any duty, tax, or fee imposed under Federal law upon entry or importation--
>
> (A) is, before the close of the 5-year period beginning on the date of importation and before the drawback claim is filed--
>
> (i) exported, or
>
> (ii) destroyed under customs supervision; and
>
> (B) is not used within the United States before such exportation or destruction;
>
> then upon such exportation or destruction an amount calculated pursuant to regulations prescribed by the Secretary of the Treasury under subsection (l) shall be refunded as drawback. The exporter (or destroyer) has the right to claim drawback under this paragraph, but may endorse such right to the importer or any intermediate party.

19 U.S.C. § 1313(j)(1).

[10] Section § 1313(j)(2) states:

> Subject to paragraphs (4), (5), and (6), if there is, with respect to imported merchandise on which was paid any duty, tax, or fee imposed under Federal law upon entry or importation, any other merchandise (whether imported or domestic), that--
>
> (A) is classifiable under the same 8-digit [HTSUS] subheading number as such imported merchandise;
>
> (B) is, before the close of the 5-year period beginning on the date of importation of the imported merchandise and before the drawback claim is filed, either exported or destroyed under customs supervision; and
>
> (C) before such exportation or destruction--
>
> (i) is not used within the United States, and
>
> (ii) is in the possession of . . . the party claiming drawback under this paragraph, if that party--
>
> (I) is the importer of the imported merchandise, or
>
> (II) received the imported merchandise, other merchandise classifiable under the same 8-digit [HTSUS] subheading number as such imported merchandise . . .
>
> then, notwithstanding any other provision of law, upon the exportation or destruction of such other merchandise . . . shall be refunded as drawback.

> (B) In cases described in subparagraph (A), merchandise may be substituted for imported merchandise for drawback purposes if--
>
> (i) the other merchandise and such imported merchandise are classifiable under the same 10-digit [HTSUS] [SRN] and
>
> (ii) the article description for that 10-digit [HTSUS] [SRN] does not begin with the term "other".

19 U.S.C. § 1313(j)(5). Thus, if the "article description for the 8-digit [HTSUS] subheading number under which the imported merchandise is classified begins with the term 'other'", substituted unused merchandise drawback is inapplicable unless the imported merchandise and the exported or destroyed merchandise are classified in the same 10-digit HTSUS SRN, and the article description for that 10-digit HTSUS SRN does not begin with the term "other." *Id.*

The plain meaning of the phrase "article description for that 10-digit [HTSUS] [SRN]" refers to the words describing the article adjacent to the 10-digit number. 19 U.S.C. § 1313(j)(5)(B)(ii). The words "for that 10-digit SRN" necessarily limit the description to the words adjacent to the numbers.[11] The preposition "for" operates as a functional word to indicate purpose. *For*, Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/for (last visited Jan. 8, 2024) ("1 a : used as a function word to indicate purpose"). The pronoun "that" refers to the kind or thing specified as follows in the preceding clause. *That*, Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/that (last visited Jan. 8, 2024) ("1 c : the kind or thing specified as follows | the purest water is *that* produced by distillation"). The pronoun "that" is singular, meaning it refers to only one item. *See id.* (identifying the plural of "that" is "those"). Unattached unifying language in the HTSUS, as prefatory language, necessarily refers to more than one 10-digit SRN where there are multiple preceding 10-digit SRNs. *See, e.g.*, HTSUS 4418.50.00.[12] Thus, the plain language of the statute indicates the

---

[11] When referring to the article description at the 8-digit level, Congress spoke of the article description for "the" 8-digit HTSUS subheading. 19 U.S.C. § 1313(j)(5)(A). However, when referring to the article description at the 10-digit level, Congress referenced the article description for "that" 10-digit HTSUS number. 19 U.S.C. § 1313(j)(5)(B)(ii).

[12] For example, the article description for the 8-digit HTSUS subheading 4418.50.00 is "Shingles and shakes." In between the 8- and 10-digit levels, there is the indented unifying heading "Shingles:"—unattached from any 8-digit subheading number and 10-digit SRN. Directly underneath this unifying heading, there are two further indented subheadings at the 10-digit level, which read "Of western red cedar" and "Other." Therefore, the two 10-digit SRNs and their article descriptions under the 8-digit HTSUS subheading 4418.50.00 "Shingles and shakes" are: (1) 4418.50.0010 "Of western red cedar;" and (2)

term "for that article description" can refer only to the description attached to one "10-digit [HTSUS] [SRN]." 19 U.S.C. § 1313(j)(5)(B)(ii). Accordingly, the HTSUS article descriptions attached to the 10-digit SRN, meaning the descriptions on the same line and level of the statutory suffices, control substituted unused merchandise drawback eligibility under 19 U.S.C. § 1313(j)(5)(B). So long as the article description adjacent to the 10-digit SRN does not begin with the term "other," drawback for substituted unused merchandise is available.

The plain reading of Section 1313(j)(5) is consistent with its legislative history. In February of 2016, Congress enacted the Trade Facilitation and Trade Enforcement Act of 2015 ("TFTEA"). *See* P.L. 114–125. In drafting and implementing the TFTEA, Congress intended to simplify laborious and time-consuming drawback procedures under the "commercially interchangeable" standard that previously governed drawback eligibility by tying eligibility to HTSUS numbers.[13] *See* Modernized Drawback, 83 Fed. Reg. 37886–01, 37889 (Aug. 2, 2018);[14] S. Rep. No. 114–45 at 53 (2015).[15] Consequently,

"Other." The two 10-digit SRNs are unified under the prefatory, unattached subheading "Shingles" to distinguish between shingles that might fall into the HTSUS heading and shakes that might fall into the HTSUS heading.

[13] The Court of Appeals for the Federal Circuit held that the commercially interchangeable standard, which CBP used to determine drawback eligibility under 19 U.S.C. § 1313(j) prior to enactment of the TFTEA, was "determined objectively from the perspective of a hypothetical reasonable competitor; if a reasonable competitor would accept either the imported or the exported good for its primary commercial purpose, then the goods are 'commercially interchangeable' according to 19 U.S.C. § 1313(j)(2)." *See Texport Oil Co. v. United States*, 185 F.3d 1291, 1295 (Fed. Cir. 1999); *see also* 19 C.F.R. § 191.2. Thus, prior drawback determinations focused on a case-by-case examination of the imported merchandise that was not susceptible to automation. *See* S. Rep. 114–45 at 53 (2015) ("Drawback is currently a paper-based labor intensive process for both the government and private sector. [The TFTEA] reflects the view . . . that drawback needs to be simplified and automated. ...").

[14] The proposed rules by the Department of Homeland Security, CBP, and the Department of the Treasury for 19 C.F.R. part 113, 181, 190, and 191 reveal intentions to streamline substituted unused merchandise drawback eligibility determinations:

> [TFTEA § 906(b)] provides a new standard for determining which merchandise may be substituted for imported merchandise as the basis for a substitution claim. . . . This standard replaces the "same kind and quality" and "commercially interchangeable" standards that were applied, respectively, to substitution manufacturing drawback claims and substitution unused merchandise drawback claims. . . . The new standard will reduce much of the [] burdens by generally eliminating uncertainty as to whether the standard for substitution has been met.

Modernized Drawback, 83 Fed. Reg. 37886–01, 37889 (Aug. 2, 2018).

[15] The Senate Report for the TFTEA identifies Congress' desire to simplify drawback determinations through an automation by ACE:

> Drawback is currently a paper-based labor intensive process . . . [t]his section reflects the view of this Committee that drawback needs to be simplified and automated by (1) allowing drawback claimants to generally use the 8-digit [HTSUS]number in lieu of obtaining a ruling prior to submitting a drawback claim with CBP; (2) allowing claims to be submitted in the Automated Commercial Environment.

S. Rep. No. 114–45 at 53 (2015).

eligibility could be assessed through an automated process in which HTSUS numbers are compared at the 10-digit level.[16] Indeed, any given dutiable good has exactly one specific corresponding 10-digit HTSUS number. *See* HTSUS User Guide at 14 ("The [HTSUS] is designed so that each article falls into only one category"); Harmonized System (HS) Codes, Int'l Trade Admin., https://www.trade.gov/harmonized-system-hs-codes (last visited Jan. 9, 2024) ("The United States uses a 10-digit code to classify products . . . There is a [10-digit code] for every physical product, from paper clips to airplanes"). Using HTSUS numbers ensures merchandise is similar enough to warrant substituted unused merchandise drawback except when the description of the HTSUS number begins with "other." "Other" signifies a basket category which may include dissimilar items. *See R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1354 (Fed. Cir. 2014) ("A basket provision is not a specific provision . . . classification of imported merchandise in a basket provision is only appropriate if there is no tariff category that covers the merchandise more specifically"); *EM Indus., Inc.*, 999 F. Supp. at 1480 ; *Nat'l Presto Indus., Inc. v. United States*, 783 F. Supp. 2d 1287, 1292 (Ct. Int'l Trade 2011) (explaining that merchandise falls within a basket provision if it is "not specific or included elsewhere [in the HTSUS]"); CBP Tariff Classification Compliance Publication at 11. Excluding article descriptions that begin with the word "other" from substituted unused merchandise drawback eliminates the need for CBP to investigate on a case-by-case basis whether merchandise is sufficiently similar to be eligible for drawback. Thus, a plain reading of the statute which disallows merchandise that may contain dissimilar items is consistent with the legislative history of the TFTEA. Here, in light of the plain reading of the statute and congressional intent, Defendant's interpretation must prevail.

Moreover, Spirit's reading would render illogical results. For example, consider the 4-digit HTSUS heading 8504:

[16] As of February 24, 2019, all drawback claimants must file drawback claims through ACE. *See* Drawback in ACE, U.S. Customs and Border Protection (Oct. 6, 2022), https://www.cbp.gov/trade/automated/news/drawback (last visited Jan. 12, 2023); 19 C.F.R. § 190.32. Thus, the ACE system is intended to implement the purposes of the TFTEA to automate drawback eligibility under 19 U.S.C. § 1313(j) based on the 8-digit subheading numbers and 10-digit SRNs of the HTSUS.

Heading/ Subheading	Stat. Suffix	Article Description
8504 (con.)		Electrical transformers, static converters (for example, rectifiers) and inductors; parts thereof: (con.)
8504.90		Parts:
		***
		Other:
		***
8504.90.96		Other:
		Ferrites:
	10	For transformers
	30	Other
		Other Parts:
		Of transformers:
	34	Laminations for incorporation into stacked cores
	38	Stacked cores for incorporation into transformers
	42	Wound cores for incorporation into transformers
	46	Other
	50	Of static converters
	90	Other

Under Spirit's reading, 8-digit subheading numbers 8504.90.96 that end at the 10-digit level with the statutory suffices -34, -38, -42, -46, -50 would all be ineligible for substituted unused merchandise drawback due to the superior, unattached heading "Other Parts" directly underneath SRN 8504.90.9630. The article description for SRN 8504.90.9634 would read "Other Parts: Of transformers: Laminations for incorporation into stacked cores," which would be precluded for substituted unused merchandise drawback because its article description begins with the word "other" in violation of 19 U.S.C. § 1313(j)(5)(B)(ii). The article description for SRN 8504.90.9638 would be "Other Parts: Of transformers: Stacked cores for incorporation into transformers," and would similarly be ineligible for substituted unused merchandise drawback due to the article description beginning with the word "other." But such a reading would appear to violate the 484(f) Committee's decision to begin the article descriptions at the 10-digit SRN level with specific and detailed descriptive language that explicitly do not begin with the word "other."[17] *See* 19 U.S.C. § 1484(f) (establishing the committee to provide for the "enumeration of articles in such detail as in their judgment may be necessary"); Preface to the HTSUS at 2.

Plaintiff makes a number of arguments to refute this plain meaning interpretation that fail to persuade. Spirit contends that canons of

[17] The interagency committee formulates nonlegal statistical elements of the HTSUS at the 10-digit level as authorized under 19 U.S.C. § 1484(f). *See* 19 U.S.C. § 1484(f); Preface to the HTSUS at 2.

statutory construction support its determination that SRN 8803.30.0030 begins with the words "For use in civil aircraft[.]" Pl. Mot. at 11–12. As a preliminary matter, use of canons of statutory construction are subordinate to the plain meaning and text of an authority. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("When words of a statute are unambiguous, then, [the plain text of the statute] canon is also the last: 'judicial inquiry is complete'"). Because the Court has discerned its interpretation from the plain text of the drawback statute, Spirit's use of canons of constructions is inapposite.

Nonetheless, Spirit's resort to these canons would be of no avail. First, Spirit invokes in para materia—meaning statutes dealing with related subjects must be read together—to argue that Section 1313(j) must be read in conjunction with the HTSUS because they relate to the same subject matter. Pl. Mot. at 12–13. But the plain meaning of 1313(j)(5) does not violate this canon. The two statutes at issue are the HTSUS—19 U.S.C. § 1202—and the substituted unused merchandise drawback statute—19 U.S.C. § 1313(j)(2) and (5). Within the HTSUS are the General Rules of Interpretation ("GRIs"), which provide for a set of numerical principles that govern the reading of the HTSUS. *See Victoria's Secret Direct, LLC v. United States*, 769 F.3d 1102, 1106 (Fed. Cir. 2014) (explaining and applying the GRIs); *see also* CBP Tariff Classification Compliance Publication at 13–24, 26. CBP classifies imports to determine the rate of duty applicable to the merchandise. *See* Preface to the HTSUS at 2 ("The HTS contains the internationally agreed structured product nomenclature commonly known as the Harmonized System (HS), whose numbered provisions appear in the schedule as 4-digit headings and subordinate 6-digit subheadings in chapters 1 through 97. The narrowest legal categories appear as 8-digit U.S. subheadings together with their rates of duty"); CBP Tariff Classification Compliance Publication at 1. By contrast, the purpose of 19 U.S.C. § 1313(j) implements Congress' intent to identify substituted unused goods that are sufficiently similar to the levied merchandise so that they are eligible for drawback. *See* 19 U.S.C. § 1313(j)(5)(B) ("merchandise may be substituted for imported merchandise drawback purposes if—(i) the other merchandise and such imported merchandise are classifiable under the same 10-digit [SRN]; and (ii) the article description for that 10-digit [SRN] does not begin with the term 'other'"). The GRIs are just that: interpretive rules to be applied to classify goods. They do not shed light on the meaning of 19 U.S.C. § 1313(j).

Next, Spirit invokes the scope-of-the-subparts canon, which generally requires that "[m]aterial within an indented subpart relates only to that subpart; material contained in unindented text relates to all the following or preceding indented subparts." Pl. Mot. at 25–27; *see Dong-A Steel Co. v. United States*, 475 F.Supp.3d 1317, 1338 n.15 (Ct. Int'l Trade 2020) (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts xii (2012)). Spirit argues that this canon requires the article description for SRN 8803.30.0030 to include superior indented but unattached subheadings, thus beginning SRN 8803.30.0030 with "For use in civil aircraft." Pl. Mot. at 26. Spirit's use of the canon is inapposite because it is inapplicable to the context of substituted unused merchandise drawback eligibility. The text of Section 1313(j)(5)(B)(ii) contradicts Spirit's position, stating substituted unused merchandise may be eligible for drawback if "the article description for that 10-digit [SRN] does not begin with the term 'other.'" 19 U.S.C. § 1313(j)(5)(B)(ii).

Spirit next turns to the punctuation canon, which provides that "punctuation is a permissible indicator of meaning." Pl. Mot. at 26; *see* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 161 (2012; *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993) ("the meaning of a statute will typically heed the commands of its punctuation"). Spirit claims the canon supports its reading because the colon after "For use in civil aircraft" indicates a continuation of the preceding clause. Pl. Mot. at 26–29. Spirit's interpretation is correct that the colon indicates a continuation of the preceding clause, but it does not mean that the unifying text serves as the language that begins the article description for the preceding SRNs. As explained above, the text instructs which preceding 10-digit SRNs fall within that prefatory subheading. Here, "For use in civil aircraft:" guides correct SRN placement between civil aircraft parts that are used by the Department of Defense or Coast Guard—thus falling with SRN 8803.30.0015—and those used by all others, including Spirit—thus falling within SRN 8803.30.0030. Accordingly, the canon does not support Spirit's interpretation.

Finally, Spirit alleges Defendant's interpretation violates the canon against surplusage, which requires that all provisions in a statute be given effect so that no provision has no consequence. *See* Pl. Mot. at 33–34; *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019). Spirit argues that reading SRN 8803.30.0030 to begin with the term "other" rather than "For use in civil aircraft:" would render the latter term superfluous. Pl. Mot. at 33. However, as described above, "For use in civil aircraft:" is a unifying, prefatory clause that draws distinction between the

10-digit SRNs that fall underneath the 8-digit HTSUS subheading 8803.30.00. The unifying clause instructs where a good falls within the 8-digit subheading number 8803.30.00 relating to "Other parts of airplanes or helicopters" depending upon its use: either (1) "For use in civil aircraft," or (2) "Other." A good used in civil aircraft under 8803.30.00 must then further be distinguished by whether it is used by the Department of Defense or the United States Coast Guard under SRN 8803.30.0015 or if it is used by anyone else under SRN 8803.30.0030. Thus, the prefatory language directs classification where the HTSUS requires categorical breakdown in order to classify merchandise within the system. That it is not included in a discrete SRN's article description does not mean the language is ignored.

Spirit also suggests that Defendant's reading conflicts with the 1997 and 1998 changes to the HTSUS and prior agency decisions. Pl. Mot. at 37–38. Spirit argues that changes in 1997 and 1998 narrowed the scope of goods covered by SRNs under the 8-digit subheading 8803.30.00, and that Defendant's reading impermissibly broadens this narrowed scope. *Id.* at 39. Furthermore, Spirit asserts that Defendant's interpretation conflicts with past rulings by CBP, including various ruling letters. *Id.* at 40–41. Spirit's arguments are inapposite. Changes to the HTSUS that occurred over two decades before the 2020 iteration of the schedule governing Spirit's substituted unused merchandise drawback claim are irrelevant. The HTSUS is updated numerous times each year, with eleven revisions in 2023 alone. *See* [HTSUS] Download Archive, Int'l Trade Comm'n, https://hts.usitc.gov/download/archive (last visited Jan. 9, 2024). Spirit's reference to the previous versions of the HTSUS and statistical number 8803.30.00 are not helpful because the 8-digit subheadings and 10-digit SRNs involved separate and distinct classifications that are not at issue. Indeed, the 1997 version of the HTSUS that Spirit cites did not make a distinction between parts used by the Department of Defense or United States Coast Guard and all other users, and therefore was a distinct subheading with its own 10-digit SRNs and tariff rates. Pl. Mot. at 38–39. Moreover, Spirit's reliance on past classification rulings by CBP continues to conflate HTSUS classification considerations with drawback determinations under 19 U.S.C. § 1313(j). Accordingly, Spirit's arguments are unpersuasive, and its motion for summary judgment is denied.

CONCLUSION

For the foregoing reasons, Defendant's interpretation of 19 U.S.C. § 1313(j) is correct, and it properly rejected Spirit's substituted unused merchandise drawback Claim No. AA6 03265726. Therefore, Defen-

dant's cross-motion for summary judgment is granted, and Spirit's motion for summary judgment is denied. Judgment will enter accordingly.

Dated: January 30, 2024
New York, New York

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

Slip Op. 24–11

NEW AMERICAN KEG, d/b/a AMERICAN KEG COMPANY, Plaintiff, v. UNITED STATES, Defendant, AND NINGBO MASTER INTERNATIONAL TRADE CO., LTD., AND GUANGZHOU JINGYE MACHINERY CO, LTD., Defendant-Intervenors.

Court No. 20–00008
Before: M. Miller Baker, Judge

[The court again remands to Commerce for further proceedings.]

Dated: January 31, 2024

Whitney M. Rolig, *Andrew W. Kentz*, and *Nathaniel Maandig Rickard*, Picard Kentz & Rowe LLP of Washington, DC, on the comments for Plaintiff.

Brian M. Boynton, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; and *Ashley Akers*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, on the comments for Defendant. Of counsel on the comments was *Vania Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

Gregory S. Menegaz and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, on the comments for Defendant-Intervenors.

OPINION

***Baker*, Judge:**

This antidumping case involving beer kegs imported from China returns for a third time.[1] In its most recent decision, the court remanded for the Department of Commerce to explain why it used a Mexican wage rate adjusted with Brazilian inflation data rather than employing the latter country's rate to calculate a surrogate labor costs value for Chinese producer and mandatory respondent, Ningbo Master. *See Am. Keg II*, Slip Op. 22–106, at 9, 2022 WL 4363320, at *3.

[1] The court presumes the reader's familiarity with its two previous opinions in this matter. *See New Am. Keg v. United States*, Ct. No. 20–00008, Slip Op. 21–30, 2021 WL 1206153 (CIT Mar. 23, 2021) (*Am. Keg I*); *New Am. Keg v. United States*, Ct. No. 20–00008, Slip Op. 22–106, 2022 WL 4363320 (CIT Sept. 13, 2022) (*Am. Keg II*).

The court also directed the agency to identify the evidence supporting a separate rate for Ulix, another Chinese producer. *See id*.

After reexamining the issue, Commerce acknowledged that adjusting Mexican wage rates with Brazilian inflation data was "improper." Appx4430. The Department nevertheless rebuffed domestic producer American Keg's request to use Brazilian information because unlike that country, which only makes comparable products, Mexico produces "identical" steel kegs. *Id*. Instead, the agency reopened the record and used a different data set for Mexico—one that was contemporaneous with the period of review. Appx4430–4431.[2] It also identified evidence on the record that it characterized as justifying a separate rate for Ulix. Appx4431–4434.

I

American Keg contests Commerce's decision to reopen the record and use new Mexican wage rate data rather than the Brazilian statistics provided by the parties. The company argues the Department abused its discretion because contrary to the latter's stated rationale, *see* Appx4435–4436, informational accuracy did not require any such reopening, and the agency disregarded its general policy of relying on the litigants to create the record.

The court agrees. To begin with, "a Commerce determination . . . is 'accurate' if it is correct as a mathematical and factual matter . . . ." *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1344 (Fed. Cir. 2016). It's undisputed that the Brazilian information on the record *was* correct as a factual matter—indeed, the Department so found in its draft redetermination results. Appx1006. The agency's reopening the record because of a purported need for accurate data is not supported by substantial evidence.

Insofar as the Department reopened the record because of its preference for data from countries that produce identical, as opposed to merely comparable, goods, that reopening was arbitrary and capricious for two related reasons. First, Commerce uses figures from countries that produce comparable products when there are "data difficulties" with countries that produce identical products. Import Administration Policy Bulletin 04.1, *Non-Market Economy Surrogate Country Selection Process*, at 2 n.6 (Mar. 1, 2004). On the record created by the parties, there were data difficulties with the Mexican

[2] In its prior determination, the Department used non-contemporaneous Mexican wage rates from the Conference Board's International Labor Comparisons (ILC) that the parties placed on the record. Appx1469. On remand, Commerce placed on the record contemporaneous Mexican wage data from the International Labour Organization (ILO). Appx4430–4431. The Department prefers to use ILO data. *See* Appx4431 (citing *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092 (Dep't Commerce June 21, 2011)).

ILC wage data because it lacked an inflation adjustor, but there was no such difficulty with the Brazilian information.

Second, "the burden of creating an adequate record lies with interested parties and not with Commerce." *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (brackets omitted). To that end, regulations provide that "[t]he Department obtains most of its factual information in antidumping . . . duty proceedings from submissions by interested parties during the course of the proceeding." 19 C.F.R. § 351.301(a). Thus, "Commerce generally does not consider untimely filed factual information." *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012) (citing 19 C.F.R. § 351.302(d)(1)). Nor does the agency reopen the record to admit evidence that it prefers, such as ILO data, when the parties have introduced otherwise-acceptable evidence that allows an accurate margin calculation. *See, e.g.*, *Multilayered Wood Flooring from the People's Republic of China*, 85 Fed. Reg. 78,118 (Dep't Commerce Dec. 3, 2020) and accompanying I&D Memo at 12 (selecting between two non-ILO sources placed on the record by interested parties and explaining that "[a]lthough Commerce stated a preference for ILO data, it did not preclude reliance on data from another source").

As "[c]onstant reopening and supplementation of the record would lead to inefficiency and delay in finality," *Essar*, 678 F.3d at 1277, supplementation is permissible in "a small number of" circumstances. *Id*. One such circumstance is "when the underlying agency decision was based on 'inaccurate data' . . . ." *Id*. Because the Department made no showing that the Brazilian wage information on the record was inaccurate or otherwise unsuitable for calculation of Ningbo Master's margin, Commerce abused its discretion in reopening the record to use Mexican ILO wage data.[3]

II

To qualify for separate-rate status, an applicant must provide evidence of sales to an unaffiliated U.S. customer. *See Am. Keg I*, Slip Op. 21–30, at 45, 2021 WL 1206153, at *17. The government acknowledges that because of the undisputed affiliation between Company A (an American company) and Ulix's U.S. customer, if Ulix and Company A were affiliated, "that would mean [Ulix] and its U.S. customer . . . were affiliated." ECF 90, at 32. In its previous decision, the court therefore remanded for the Department to identify evidence on the

[3] The court acknowledges that it previously declined American Keg's invitation to preemptively bar the Department from reopening the record on remand because the company failed to identify "any authority for the court to so limit the Department's discretion." *Am. Keg II*, Slip Op. 22–106, at 6 n.3, 2022 WL 4363320, at *2 n.3. Whether the agency abused that discretion is a different question, and one within the court's purview.

record that Company A and Ulix were unaffiliated. *Am. Keg II*, Slip Op. 22–106, at 8–9, 2022 WL 4363320, at *3.

Commerce complied by pointing to various parts of the record, including Ulix's separate-rate application, which represented that the company was not affiliated with any U.S. entity. Appx4432. The Department also cited the fact that the list of Ulix's shareholders did not overlap with the owner of Company A. *Id.* Although American Keg challenges the sufficiency of that evidence, reweighing the record is not for the court. Substantial evidence supports the agency's remand determination that Ulix is eligible for a separate rate.

* * *

The court remands for further proceedings consistent with this opinion.

Dated: January 31, 2024
New York, NY

/s/ *M. Miller Baker*
JUDGE

Index

Customs Bulletin and Decisions
Vol. 58, No. 06, February 14, 2024

U.S. Customs and Border Protection

General Notices

U.S. Court of International Trade
Slip Opinions

GPO U.S. G.P.O.: 2024—427-373/30062