



HARMONIZED SYSTEM  
REVIEW SUB-COMMITTEE

NR0193E1

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24<sup>th</sup> Session  
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O. Eng.

Brussels, 30 July 2001.

PROPOSAL BY THE US ADMINISTRATION TO DELETE

NOTE 6 TO CHAPTER 85

(Item III.B.8 on Agenda)

I. BACKGROUND

1. On 10 July 2001, the Secretariat received the following Note from the US Administration.

II. NOTE FROM THE US ADMINISTRATION

2. "During the second HS review cycle, Note 6 to Chapter 85 was modified with the intent to clarifying its coverage. In preparing for the 2002 implementation of the Nomenclature changes resulting from the Recommendation of 25 June 1999, it became apparent to us that the 2002 changes will result in much more difficult classification procedures and uncertain classification outcomes for media. We are unable to determine any reason why unrecorded or recorded media should be singled out for special treatment, forcing certain media to be separately classified either in heading 85.23 or 85.24, when an application of General Interpretative Rule 3 (b) might permit the media to be reasonably considered to be part of a set put up for retail sale, and therefore classified with the accompanying article as an entirety.
3. Under the existing version of Note 6, media are always separately classified either in heading 85.23 or 85.24 [see paragraph 7 to Annex G/4 to Doc. 42.750 (HSC/22 - Report)]. In 2002, the Nomenclature will permit some imported media to be classified with the articles they accompany, pursuant to General Interpretative Rule 3 (b). The new version of Note 6 to Chapter 85, however, will continue to force separate classification in many cases. We are not aware of any purpose to be served by requiring the separate classification and declaration of media as prescribed by amended Note 6 to Chapter 85 for the year 2002. Therefore, we propose that Note 6 to Chapter 85 be deleted, permitting media to be classified in accordance with the General Rules for the Interpretation of the Harmonized System without the need to resort to a Chapter Note.

File No. 2635

Explanation

4. In 2002, Note 6 to Chapter 85 will read as follows :

6. Records, tapes and other media of heading 85.23 or 85.24 remain classified in those headings, when entered with the apparatus for which they are intended.

This note does not apply to such media when they are entered with articles other than the apparatus for which they are intended.

The effect of the change in the text of the Note will depend upon the interpretation given to the expression, "apparatus for which they are intended." That Note will require that when media of headings 85.23 and 85.24 are presented with the apparatus for which intended, the media are to be separately classified. For example, when computer software recorded on CD-ROMs or floppy discs is presented in sets put up for retail sale, if the set includes an automatic data processing machine of heading 84.71, the software discs must be separately classified in heading 85.24 because the ADP machine is clearly "apparatus for which they are intended."

5. A similar situation will occur when a set put up for retail sale consisting of a video camcorder and a prerecorded video tape instruction manual is presented : the video tape must be separately classified in heading 85.24. It appears to us, however, that when a set put up for retail sale consisting of a washing machine and a prerecorded video tape instruction manual is presented, the new version of the Note will not apply, and the video tape can be classified with the washing machine in heading 84.51 as a set (under General Interpretative Rule 3 (b)). In both of these examples, the classification of the prerecorded videotape will depend upon the interpretation of "articles for which they are intended" – an expression that might well be subject to widely differing interpretations, especially after translation into languages beyond French and English. In these last two examples, the new version of the Note will force widely different outcomes for the treatment of what is essentially the same product – a prerecorded instructional video tape accompanying the article which it assists the consumer in using.

6. Separate classification of recorded media carries with it not only the administrative burden of separately classifying the media and declaring multiple classifications of products that in many instances could be classified as sets under General Interpretative Rule 3 (b), but it also carries with it the administrative burden of separately appraising and declaring the value of the media. In some countries that can require the appraisal of the value of the intellectual property recorded on the media. This requirement is burdensome because the importer must arrive at a price for what amounts to an intangible. For example, a computer is generally shipped with operating system software and device driver software recorded on a CD-ROMs and/or floppy discs. The value of this software is built into the price of the computer. These discs are not separately valued by the assembler who manufactures the computer. The administrative burden of compliance, which necessitates that the importer obtain information, either directly or indirectly, from the software suppliers of the computer manufacturer, could be considerable.

7. In our view, the burden associated with administering Note 6 to Chapter 85 far outweighs any possible benefit that results from requiring separate classification.

8. If this Note is deleted, commercially meaningful shipments of recorded media will continue to be identified in heading 85.24. Large shipments of unrecorded and recorded media are generally not entered with other merchandise and are classified in heading 85.23 or 85.24 without reference to Note 6. This will not change.
9. Deleting Note 6 to Chapter 85 will permit media to be classified in accordance with the General Rules for the Interpretation of the Harmonized System without the need to resort to a Chapter Note. This will allow for media to be classified with other merchandise when it is reasonable to do so. For example, a compact disc containing an operating system could be classified with a computer as a set put up for retail sale. Similarly, a music CD imported as a promotional item with a compact disc player could be classified with the player as a set put up for retail sale."

### III. HISTORICAL BACKGROUND

10. At its 19<sup>th</sup> Session, the Harmonized System Committee continued discussion of the classification of the "Children's Bible Book (Look, Listen, Read)". The Secretariat, in Doc. 41.130, pointed out that, if the Committee decided to classify the cassette at issue separately in heading 85.24, the Secretariat considered that it would be highly desirable (or even necessary) to clarify the classification of goods of this kind in the HS by amending Note 6 to Chapter 85.
11. The Committee, at its 19<sup>th</sup> Session, decided to classify the "Children's Bible Book (Look, Listen, Read)" in heading 49.01 by application of General Interpretative Rule 3 (b), feeling that Note 6 to Chapter 85 did not apply to the article at issue. However, given that two different interpretations had been put forward for Note 6 to Chapter 85, the Committee asked the Secretariat to prepare, for the Committee's 20<sup>th</sup> Session, two alternative texts for a draft amendment to that Note to clarify the classification of audio cassettes presented together with other items in the form of sets put up for retail sale.
12. At the 20<sup>th</sup> Session of the Harmonized System Committee, the Delegate of Canada (supported by the Delegate of Australia) noted a certain confusion in the application of this Legal Note. These two administrations therefore favoured deletion of the Note. The Harmonized System Committee voted on the future of Note 6 to Chapter 85 and decided, by 13 votes to 9, to retain the Note.
13. At its 21<sup>st</sup> Session, the Harmonized System Committee continued discussion on the two draft texts (by the Secretariat and the United States). At the conclusion of its discussions, the Committee instructed the Secretariat to prepare a new working document for the 18<sup>th</sup> Session of the Review Sub-Committee.

### IV. SECRETARIAT COMMENTS

14. The aforementioned is a brief history of the origins of new Note 6 to Chapter 85. The Secretariat feels that it is important to draw the Sub-Committee's attention to the fact that the Committee, during the last Review Cycle, took a decision to maintain Note 6 to Chapter 85. However, as this is a new Review Cycle, administrations are free to present proposals on any issue for consideration by the Review Sub-Committee.

15. Having examined the US proposal to delete Note 6 to Chapter 85, the Secretariat is in complete agreement with the proposal. The application of this Note, as shown in the example mentioned in paragraph 5 above, is dependent on one's interpretation of the expression "articles for which they are intended". As rightly explained, this expression is open for interpretation and the Sub-Committee has often heard about the translation problems encountered by countries where the first language is neither French nor English. The goal of the new Note was to give clarity to the classification of audiocassettes presented together with other items. If the application of the Note leads to essentially the same product being classified in different headings, then one may conclude that the result is not different than classification by end use. As we all are aware, one of the tenets of the Harmonized System is that the same product has only one correct classification in the Harmonized System, regardless of end use.
16. At the time of the vote to retain Note 6 to Chapter 85, one delegate provided information in support of the Note. He said that it would be useful to give separate identity to the software on account of its value, and for intellectual property protection reasons. The Secretariat understands the ideas behind this statement. However, when such a value is arbitrarily arrived at, with the intended problems as outlined in paragraph 6 above, one can question the usefulness and validity of the information that is obtained.
17. The Secretariat understands that the Harmonized System must arrive at its decisions according to its rules, without regard to the wishes or needs of outside forces. However at the same time, when drafting legal text, it should be incumbent upon us to draft texts that do not place an undue burden on the users of the Nomenclature. The Secretariat would agree with the position of the United States that the burden associated with administering Note 6 to Chapter 85, both for Customs and the trade, far outweighs any possible benefit that results from requiring separate classification.

## V. CONCLUSION

18. The Sub-Committee is invited to take account of the note from the US Administration and the Secretariat's comments when it examines this Agenda item.
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