

APPENDIX E

**LETTER FROM
BOEN HARDWOOD FLOORING, INC.**

44

GRUNFELD, DESIDERIO, LEBOWITZ, SILVERMAN & KLESTADT LLP
COUNSELORS AT LAW

399 PARK AVENUE

25TH FLOOR

NEW YORK, NEW YORK 10022-4877

TEL (212) 557-4000

OFFICES:

NEW YORK • BOSTON

LOS ANGELES • WASHINGTON, D.C.

AFFILIATED OFFICES:

SHANGHAI • BEIJING

FAX (212) 557-4415

www.gdlsk.com

WRITER'S DIRECT DIAL NUMBER

(212) 973-7758

November 30, 2004

VIA FEDEX

U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

Attention: Office of the Secretary

Re: Comments Regarding the Proposed Modifications to the Harmonized
Tariff Schedule of the United States
Regarding Amendments to Heading 4418
Our Reference: 04-10535-5(1)I

To Whom It May Concern:

The International Trade Commission ("ITC") has invited comments to its Proposed Modifications of the Harmonized Tariff Schedule of the United States, completed pursuant to Investigation 1205-6.¹ On behalf of our client, Boen Hardwood Flooring, Inc., we ask that the ITC consider the comments below regarding its recommendations.

In its Proposed Amendments to the Harmonized Tariff Schedule of the United States, which will become effective on January 1, 2007, the ITC proposed to eliminate the subheading 4418.30, a duty free subheading covering "Builder's joinery and carpentry of wood, including cellular wood panels and assembled parquet panels...Parquet panels." In its stead, the ITC

¹ Proposed Modifications to the Harmonized Tariff Schedule of the United States. 69 FR 55461 (September 14, 2004).

recommends the creation of the following subheadings for “Assembled Flooring Products” under Heading 4418:

Assembled flooring panels:

4418.71.00	For mosaic floors.....	Free
4418.72.00	Other, multilayer.....	3.2%
4418.79	Other:	
4418.79.20	Edge-glued lumber.....	Free
4418.79.45	Other.....	3.2%

It is well established law that recommendations for modifications to the tariff by the ITC are to be rate neutral.² The above noted changes, however, are not rate neutral with regard to multi-layer flooring products. In this regard, multi-layer flooring products are currently properly classified under HTS 4418.30, which is duty free. This classification is supported by a recent decision by the Harmonized System Committee (“HSC”) of the World Customs Organization concerning multi-layer flooring. See *Classification of Multilayer Parquet Panels*, Annex f/5 to Doc. NC0892E2 (HSC/34/Oct. 2004), attached.

In the decision, it was requested that the HSC decide the classification of multi-layer flooring products due to an unresolved dispute between U.S. Customs and the European Union. U.S. Customs had requested the HSC to classify the products in question in HS heading 4412, based upon the premise that the articles consisted of plywood with a thin wood veneer to simulate parquet strips. The US delegation argued that a top layer of 6 millimeters or less should be considered a “thin veneer of wood,” which would result in the classification of the three

² Title 19 U.S.C. § 3005(d)(1)(C) states “The Commission may not recommend any modification to the Harmonized Tariff Schedule unless the modification meets the following requirement: The modification must...ensure substantial rate neutrality.”

products before the HSC in HS heading 4412. The three products had top layers that were 4 mm thick. The EU requested the HSC to classify the products in HS heading 4418, based upon the premise that the article consisted of a parquet strip assembled on one or more layers of wood. According to the EU, a 4 mm thick top layer should not be considered a thin veneer. The HSC ultimately voted to adopt the EU position, and classified the multilayer floorist products in question under HS subheading 4418.30. U.S. Customs' position was rejected.³

Based upon the above HSC decision, it is clear that multi-layer flooring products are carpentry properly classified under 4418.30. As proposed, subheading 4418.72.00 would be dutiable at 3.2%. Since subheading 4418.30 is currently a duty free subheading, the proposed amendment would not be rate neutral. Also, since the HSC decision indicates that nearly all types of multilayer assembled flooring products would be classifiable in subheading 4418.30, a substantial number of products would be subject to a higher duty rate if the proposed modifications were to be effectuated in their current form.

In addition, the HSC decision that dictates the elimination of subheading 4418.30 specifically indicates that that subheading is to be replaced by a subheading covering "assembled flooring panels." See *Classification of Certain Flooring Panels and Study on the Word Parquet in the Nomenclature*, Annex P to Doc. NC0845E2 (HSC/33/May 2004), attached. Thus, the entire breakout proposed by the ITC under "assembled flooring products" must be duty free in order for the amendments to remain rate neutral.

³ We note that a flooring product similar to one of the samples considered in the HSC decision was ruled on in *Boehr Hardwood Flooring, Inc. v. United States* 357 F.3d 1262, 1265 (Fed. Cir. 2004). While the court determined that the merchandise was to be classified in subheading 4412.29.30, HTSUS, subheading 4418.30 was never considered and thus does not preclude the Commission and other U.S. agencies from complying with the HSC decision.

We therefore request that all forms of multilayer flooring products covered by the HSC decision and proposed subheading 4418.72.00 be granted duty free treatment in the Commission's final report on the proposed tariff changes.

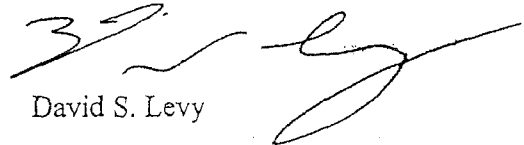
We thank you for providing us with an opportunity to comment on the proposed amendments to the Harmonized Tariff System.

Sincerely,

GRUNFELD, DESIDERIO, LEBOWITZ,
SILVERMAN & KLESTADT LLP



Peter W. Klestadt



David S. Levy

APPENDIX F

**LETTER FROM
BAUER NIKE HOCKEY, USA**

SIDLEY AUSTIN BROWN & WOOD LLP

BEIJING
BRUSSELS
CHICAGO
DALLAS
GENEVA
HONG KONG
LONDON

1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com

FOUNDED 1866

LOS ANGELES
NEW YORK
SAN FRANCISCO
SHANGHAI
SINGAPORE
TOKYO
WASHINGTON, D.C.

WRITER'S DIRECT NUMBER
(202) 736-8335

WRITER'S E-MAIL ADDRESS
rbelanger@sidley.com

*Late filing accepted
per Chairman's
office 1/4/05 (J.G.)*
December 30, 2004

PUBLIC DOCUMENT

Marilyn R. Abbott, Secretary
United States International Trade Commission
500 E Street, SW
Washington, D.C. 20436

2004 DEC 31 PM 1:09
RECEIVED

Re: Proposed Modifications to the Harmonized Tariff Schedule of the
United States; Investigation No. 1205-6

Dear Secretary Abbott:

On behalf of Bauer Nike Hockey, USA of 150 Ocean Road, Greenland, New Hampshire, 03840, we hereby submit these comments on one of the proposed changes contained in the draft preliminary report in the above-captioned investigation. Although the deadline for submission of comments has expired, we believe that a decision that was issued by the United States Court of Appeals for the Federal Circuit (Federal Circuit) on December 20, 2004 is relevant to one of the proposed changes in the draft preliminary report. For the reasons outlined below, we urge the United States International Trade Commission (Commission) to address this issue before forwarding its preliminary report to the United States Trade Representative.

In *Bauer Nike Hockey USA, Inc. v. United States*, the Federal Circuit considered the question of the proper tariff classification of ice hockey pants imported by the plaintiff. A copy of the Federal Circuit's decision is attached to this letter as an Appendix. The Federal Circuit noted that the imported merchandise consisted of soft and hard plastic pads and guards contained within a textile shell or covering. This item is worn by hockey players during the game of hockey to protect against injury. The Federal Circuit concluded that the ice hockey pants should be classified under 9506.99.25, HTSUS as "ice-hockey and field-hockey articles and equipment, except balls and skates . . ." because that subheading provides a more specific description of the articles than any of the garment subheadings in chapter 62.

Honorable Marilyn R. Abbott
December 30, 2004
Page 2

Note @ international level.

On page 160 of Appendix B of the Commission's draft preliminary report, we note that the Commission proposes to add a new note 1(v) to chapter 95. This note would provide that chapter 95 does not cover: "Tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles having a utilitarian function (classified according to their constituent material)." It is not clear to us whether the note is intended to preclude articles such as the ice hockey pants imported by Bauer Nike Hockey from classification in chapter 95. However, we note that the Federal Circuit ruled that note 1(e) to chapter 95 did not preclude the hockey pants from being classified in chapter 95 because it determined that classification in chapters 61 and 62 was incorrect.

Accordingly, we suggest that the Commission adopt language that more clearly indicates the purpose of this exclusionary note. We do not believe that the purpose of the note is to exclude all "apparel . . . having a utilitarian function" regardless of that apparel's non-textile constituents from chapter 95. However, this is one possible reading of the language.

Furthermore, we note that 19 U.S.C. § 3005 provides the following parameters for any recommendations that the Commission may make regarding modifications to the Harmonized Tariff Schedule:

-
- (1) The modification must –
 - (A) be consistent with the Convention or any amendment thereto recommended for adoption;
 - (B) be consistent with sound nomenclature principles; and
 - (C) ensure substantial rate neutrality.
 - (2) Any change to a rate of duty must be consequent to, or necessitated by, nomenclature modifications that are recommended under this section.

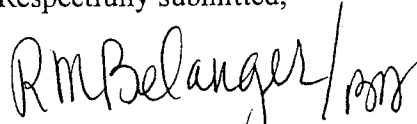
The Federal Circuit decision in *Bauer Nike Hockey USA, Inc. v. United States*, makes clear that sound nomenclature principles dictate that hockey pants be classified in chapter 95. In addition, the statute requires that if the Commission wishes to change the classification of hockey pants to chapter 62, it must do so in a duty rate neutral manner. Thus, a separate classification for hockey pants with a zero duty rate should be created in chapter 62 if the Commission intends to remove hockey pants from classification in chapter 95.

Pursuant to Section 201.8 of the Commission's Rules of Practice and Procedure, we hereby submit an original and fourteen (14) copies of these comments to the Commission.

Honorable Marilyn R. Abbott
December 30, 2004
Page 3

Please feel free to contact the undersigned if you have any questions about the information contained in this submission.

Respectfully submitted,

Handwritten signature of Richard M. Belanger in black ink, written in a cursive style.

Richard M. Belanger
Susan M. Mathews
Counsel to Bauer Nike Hockey USA, Inc.

Enclosure

APPENDIX G

**LETTER FROM THE
FOREIGN TRADE ASSOCIATION OF
SOUTHERN CALIFORNIA**



FOREIGN TRADE ASSOCIATION of SOUTHERN CALIFORNIA

*Serving the
international
trade community
since 1919*

P.O. BOX 743049 • LOS ANGELES, CALIFORNIA 90004 U.S.A.

PHONE (323) 730-1011 • FAX (323) 730-1088 • www.ftasc.org • e-mail: foreigntrade@earthlink.net

January 14, 2005

Ms. Marilyn R. Abbott
Secretary to the Commission
United States International Trade Commission
500 E Street, S.W.
Washington, D.C. 20436

Re: Comments relating to ITC Investigation 1205-6 of
The Foreign Trade Association of Southern California

Dear Ms. Abbott:

On behalf of The Foreign Trade Association of Southern California (FTA)¹, this letter is in response to the Notice which the U.S. International Trade Commission (ITC) had published in the Federal Register of September 14, 2004, in Investigation No. 1205-6, soliciting public comments on certain proposed modifications to the Harmonized Tariff Schedule of the United States (HTSUS). These modifications resulted from a review by the World Customs Organization of certain chapters of the Harmonized Tariff System (HTS) and are scheduled to be implemented in 2007. The specific proposed modifications with respect to which FTA wishes to submit comments are those in Chapter 95, HTSUS, which cover toys, games, festive articles and sporting equipment. While the ITC September 14, 2004 Notice requested that comments be submitted no later than November 1, 2004, we understand that comments submitted by January 17, 2005 will be accepted and considered.

In commenting on the ITC's specific proposals, FTA understands that, among other things, the purpose of the proposals to amend the HTSUS and the Explanatory Notes to the Harmonized System (ENs) is to provide clarity, uniformity and ease in the classification of goods, and is not intended to effectuate changes in classifications or rates of duty. In this regard, Section 1205 of The Omnibus Trade and Competiveness Act of 1988 (19 U.S.C. §3005 (d)(C)) requires that, in making recommendations to change the HTSUS, the ITC "ensure substantial rate neutrality." Accordingly, the applicable statute prohibits changes which would substantially alter the rates of duty assessed on imported goods.

¹ Established in 1919, FTA is a private, non-profit trade association that represents over 230 members of the international trade community, and is the oldest organization promoting international trade in Southern California. The membership includes major exporters, importers, manufacturers, customhouse brokers, freight forwarders, international bankers, attorneys and other prominent service industries.

Additionally, in the United States, the courts having jurisdiction over customs classification matters, have made it very clear that the ENs are advisory only, and that any conflict or ambiguity between the language of the tariff and that in the ENs is to be decided in favor of the legal language in the tariff. Accordingly, proposals to change the legal text of the tariff in an attempt to provide greater clarity and uniformity require particular scrutiny to insure that deviations from established law and practice in classification, and/or changes in applicable rates of duty do not result from proposed changes in the language of the HTS and the ENs.

Bearing in mind the above general principles, FTA submits the following comments on three of the ITC's specific proposals affecting Chapter 95, as follows:

1. NEW CHAPTER NOTE 1(v) IS INCONSISTENT WITH THE STRUCTURE OF CHAPTER 95, HTSUS, AND THE CURRENT LEGAL INTERPRETATIONS OF ITS PROVISIONS.

The modifications to Chapter 95 include a proposal to add an additional Note 1(v), which would exclude from classification in that Chapter the following goods:

Tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles having a utilitarian function (classified according to their constituent material).

Thus, tableware, kitchenware, toilet articles and numerous types of textile articles, including "apparel," are excluded from Chapter 95 if they have any utilitarian function. In addition, undefined "similar articles" are also excluded.

a. NEW CHAPTER NOTE 1(v) WILL ADVERSELY IMPACT THE CLASSIFICATION OF TOYS.

In the United States, the determinative criterion in classifying an article as a toy or a part or accessory of a toy, is whether the article is principally designed for the amusement of children or adults.² This criterion is expressed internationally in the Explanatory Notes (ENs) to the HTS, in the General Notes to Chapter 95, as follows:

² See: Ero Industries, Inc. v. United States, Slip Op. 00-138 (CIT 2000) in which play houses and play tents were classified as toys; J.C. Penney Purchasing Corp. v. United States, 10 CIT 727 (1986) in which small plastic replicas of cash registers incorporating a battery-operated calculator were classified as toys; Ideal Toy Corp. v. United States, 78 Cust. Ct. 28, 33 C.D. 4688 (1977) in which a baby play float was classified as a toy; United States v. Topps Chewing Gum, Inc., 440 F. 2d 1384 (CCPA 1971) in which round metal buttons imprinted with humorous slogans were classified as toys; Carson M. Simon & Co. v. United States, 66 Cust. Ct. 107, C.D. 4177 (1971) in which functional ukeleles were classified as toys; Montgomery Ward & Co. v. United States, 62 Cust. Ct. 718, C.D. 3853 (1969) in which functional

This Chapter covers toys of all kinds whether designed for the amusement of children or adults. It also includes equipment for . . . games, . . . and apparatus for sports, gymnastics or athletics . . . fishing, hunting or shooting, and roundabouts and other fairground amusements.

Each of the headings of the Chapter also covers identifiable parts and accessories of articles of this Chapter which are suitable for use solely or principally therewith and **provided** they are **not** articles excluded by Note 1 to this Chapter.

Additionally, this amusement criterion is restated in the ENs to Heading 95.03, as follows:

This heading covers toys intended essentially for the amusement of persons (children or adults).

Finally, the ENs to Heading 95.03 make it clear that articles principally designed for amusement remain classifiable under Chapter 95 even though they may also have other limited uses, as follows:

Certain toys (e.g., electric irons, sewing machines, musical instruments, etc.) may be capable of a limited "use"; but they are generally distinguishable by their size and limited capacity from real sewing machines, etc.

Notwithstanding this well-established amusement criterion, proposed Note 1(v) would exclude all goods "having a utilitarian function (classified according to their constituent material)" from classification in Chapter 95. This will lead to much confusion and to unintended results because it is inconsistent with the amusement principal criterion, with the present exclusions to Note 1, and with numerous rulings that toy tableware, kitchenware, and textile articles are presently classifiable in Chapter 95.

b. NEW PROPOSED CHAPTER NOTE 1(v) WILL CONFLICT WITH JUDICIAL PRECEDENTS CONCERNING THE CLASSIFICATION OF FESTIVE ARTICLES.

If adopted, proposed new Note 1(v) will apply to all of Chapter 95, including Heading 9505, HTSUS, and will conflict with recent judicial determinations clarifying the scope of this provision. These cases include:

accordians were classified as toys; William Shaland Corp. v. United States, 280 F. Supp. 457 (CIT 1968) in which functional telescopes were classified as toys; and George G. Wagner Co. v. United States, 43 Cust. Ct 360, Abs. 63419 (1959) in which miniature food mixers used for training children were classified as toys.

In Midwest of Cannon Falls, Inc. v. United States, 20 CIT 123 (1996), *aff'd in part, rev'd in part*, 122 F.3d 1423, App. Nos. 96-1271 and 1279 (Fed. Cir. 1997) in which the Court of Appeals for the Federal Circuit held that certain articles made from textiles, earthenware, ceramics, resin and other materials were classified as festive articles in Chapter 95, provided that:

- They are not predominately of precious or semiprecious stones, precious metal or metal clad with precious metal
- They function primarily as a decoration or functional item used in celebration of and for entertainment on, a holiday
- They are associated with or used on a particular holiday

In so holding, the Court did not limit its decision to any particular type of article. Indeed, several of the goods held to be festive articles can readily be determined to fit within the broad categories of utilitarian articles which would be excluded from classification in Chapter 95 by proposed new Note 1(v).

Park B. Smith, Ltd. v. United States, Slip Op. 01-63 (CIT 2001), *aff'd in part, vacated in part*, 347 F.3d 922 (Fed. Cir. 2003), concerned the classification of 62 textile articles consisting of placemats, table napkins, table runners, and woven rugs, many of which were decorated with holiday symbols such as Santa Claus, Christmas trees and wreaths, Halloween ghosts, Easter bunnies and flag motifs, or with colorful designs in solid colors that are often associated with holidays or seasons, such as red and green for Christmas, and brown and orange for autumn. The Court held that articles with symbolic content associated with a particular recognized holiday, meet the Midwest criteria and are prima facie classifiable as festive articles.

Rubie's Costume Co. v. United States, App. No. 02-1373 (Fed. Cir. 2003) concerned the tariff classification of Halloween costumes in toddler, child and adult sizes, which are of flimsy construction, not durable, and which are not made for repetitive or continuous use. In this case, the Court of Appeals for the Federal Circuit interpreted the exclusion in Chapter 95, Note 1(e) for "fancy dress, of textiles, of Chapter 61 or 62," and concluded that such costumes are not a type of "wearing apparel" classifiable in Chapter 61 or 62, and, therefore, held that they are classifiable as festive articles in Heading 9505, HTSUS.

The holding in the Rubie's case has also been applied by Customs to dress-up sets which include textile articles, which are sold year round in toy stores, and which are currently classified as festive articles in Heading 9505, HTSUS, and not as toys. Accordingly, the proposed new Note 1(v) will adversely affect this class of merchandise, as well as the Halloween costumes which were the subject of the Rubie's case.

The adoption of proposed new Note 1(v) would likely alter the current tariff classification of the classes or kinds of articles on which the courts have already ruled, and would lead to their

exclusion from classification in Chapter 95. Many of the excluded textile articles affected would require classification in Chapter 61 or 62, which have substantially higher rates of duty than those found in Chapter 95. In order to correctly deal with the restrictions on rate changes, if proposed new Note 1(v) is incorporated into the HTSUS, it will require the creation of new HTSUS Subheadings in every chapter in which goods will be reclassified, with rates of duty not substantially different from those currently found in Chapter 95. Such a project would entail an enormous amount of work for the government agencies involved, and would likely meet with objections from domestic interests which would oppose the creation of subheadings carrying zero rates of duty in the HTSUS chapters involved.

c. NEW CHAPTER NOTE 1(v) WOULD ADVERSELY AFFECT THE CLASSIFICATION OF SPORTING EQUIPMENT.

In addition to adversely affecting the classification of toys and festive articles, proposed new Note 1(v) would adversely affect the classification of textile sporting equipment currently classified in Heading 9506, HTSUS. In the very recent decision of the Court of Appeals for the Federal Circuit issued on December 20, 2004 in Bauer Nike Hockey USA, Inc. v United States, App. No. 04-1158 (Fed. Cir. 2004), the Court considered the tariff classification of textile ice-hockey pants and concluded that they are a type of ice-hockey equipment classifiable in Subh. 9506.99.25, HTSUS, and not within the provision applied by U.S. Customs for "sports clothing" in Subh. 6211.33.00, HTSUS, which is presently excluded from Chapter 95 by Note 1(e).

Based on these adverse effects on U.S. imports, the ITC should recommend that proposed new Note 1(v) not be included in the HTSUS, and should file a reservation in the World Customs Organization to obtain reconsideration of this provision at the next meeting of the Harmonized System Committee. Alternatively, if it is determined that new Note 1(v) should be retained, FTA recommends that its application be limited to articles having exclusively a utilitarian purpose, which are not designed for the amusement of children or adults (toys), and which do not otherwise meet the definitions of toys, festive articles and sporting equipment established by the courts.

2. THE INTENT OF THE PROPOSED NEW CHAPTER NOTE 4 SHOULD BE CLARIFIED TO INSURE THAT THE TOY INDUSTRY WILL NOT BE ADVERSELY AFFECTED.

The proposed changes to the HTSUS include the addition of a new Chapter Note 4 to define "toy sets" which are currently classified in Subh. 9503.70.00, HTSUS. Subh. 9503.70.00 now covers, "other toys, put up in sets or outfits, and parts and accessories thereof." The proposed new Chapter Note 4 would define "toy sets", as follows:

Subject to the provisions of Note 1 above, heading 95.03 applies, *inter alia*, to articles of this heading combined with one or more items, which cannot be considered as sets under the terms of General Interpretative Rule 3(b), and which, if

presented separately, would be classified in other headings, provided the articles are put up together for retail sale and the combinations have the essential character of toys.

Currently, there is no definition of the term "toys put up in sets or outfits" contained in Subh. 9503.70.00, HTSUS. However, there are detailed definitions and discussions of this phrase contained in the EN to Heading 95.03 and in the EN to Subh. 9503.70, which are too extensive to reproduce as a Chapter Note in the body of the HTSUS.

EN 95.03(A) currently includes descriptions of some of the types of toys classifiable under that provision, a few of which, such as construction sets, toy sporting equipment sets, farmyard sets, etc. are specifically mentioned as being toy "sets." This EN then states, in pertinent part, as follows:

Certain of the above articles (toy arms, tools, gardening sets, tin soldiers, etc.) are often put up in sets.

* * *

Collections of articles, the individual items of which if presented separately would be classified in other headings in the Nomenclature, are classified in this Chapter when they are put up in a form clearly indicating their use as toys (e.g., instructional toys such as chemistry, sewing, etc., sets).

The EN to Subh. 9503.70 further clarifies the definition of "Sets" and "Outfits" as follows:

Subject to substantiated classification in heading 95.03 and for the purpose of this subheading:

- (i) "Sets" are two or more different types of articles (principally for amusement), put up in the same packing for retail sale without repacking. Simple accessories or objects of minor importance intended to facilitate the use of the articles may also be included.
- (ii) "Outfits" are two or more different articles put up in the same packing for retail sale without repacking, specific to a particular type of recreation, work, person or profession.

This clear and detailed explanation in the ENs has been relied on extensively by customs administrations and importers of toys, in determining whether products are toy sets or outfits classifiable under Subh. 9503.70.00, or whether, alternatively, each component in a collection of articles is separately classifiable in different tariff headings.

a. THE PROPOSED DEFINITION OF TOY SETS IN NEW CHAPTER NOTE 4, IN COMBINATION WITH PROPOSED NEW NOTE 1(v), WOULD RESULT IN UNSATISFACTORY CHANGES IN THE CLASSIFICATION OF TOY SETS.

As previously discussed, proposed new Note 1(v) excludes from classification in Chapter 95 entirely new classes of goods which have never before been excluded. Furthermore, the inclusion of the phrase "Subject to the provisions of Note 1 above," in proposed new Chapter Note 4, should be clarified so it will not preclude any collection of articles containing one of the named categories of merchandise in Note 1(v) from being classified as a toy set, even though the current ENs specifically indicate that, "Collections of articles, the individual items of which if presented separately would be classified in other headings in the Nomenclature, are classified in this Chapter when they are put up in a form indicating their use as toys." The inclusion of this phrase would also preclude collections of articles containing any of the other products already excluded by Chapter 95 Note 1 from classification as toy sets in Chapter 95, when imported separately. The inclusion of this phrase at the beginning of proposed new Chapter Note 4 should not be interpreted to change established practice or cause any articles currently classified as toy sets to become individual components for separate classifications, a result which is clearly not in the interest of either the toy industry or the Government.

For example, under proposed new Chapter Note 4, a construction or science kit composed of numerous different components, but which also includes a pump, an electric motor and a transformer would not be classifiable as a toy set, as it contains components specifically excluded from classification in Chapter 95 by current Chapter Note 1(m), and which is specifically made "Subject to the provisions of Note 1" by proposed new Note 1(v). Other examples include:

- A toy cleaning cart set, composed of a plastic cleaning cart, toy broom, toy brush, toy dust pan, and flimsy textile apron, would no longer be classifiable as a toy set because of the inclusion of the textile apron.
- A toy doll carriage accessory set composed of a doll carriage mattress, textile mattress cover, toy rattle and toy milk bottle, would not be classified as a toy set because of the inclusion of the mattress cover.
- Toy arts and crafts sets consisting of numerous types of components, including parts of general use which are excluded by current Chapter 95 Note 1(k), paints, chalk, clay, pencils, beads, textile yarn and loops, toy scissors, paper, and glue, etc. would not be classifiable as toy sets because of the inclusion of the parts of general use.

Because the intent of current Chapter 95 Note 1 is to exclude from classification in that chapter named articles **only** when either imported alone, or when they are not suitable for use solely or principally as parts and accessories of other articles classifiable in Chapter 95, there are several possible ways to clarify the intent of the phrase, "Subject to the provisions of Note 1 above" in proposed new Chapter 95 Note 4. These could include, among other things,

changing the words "Subject to" to "Notwithstanding," or by including the phrase "or which are otherwise components of toy sets or outfits" in current Chapter 95 Note 3 so it would read, as follows:

Subject to note 1 above, parts and accessories which are suitable for use solely or principally with articles of this chapter or which are otherwise components of toy sets or outfits are to be classified with those articles in this chapter.

b. THE TARIFF OR THE EXPLANATORY NOTES MUST ADDRESS THE INCLUSION IN COLLECTIONS OF ARTICLES, OF ITEMS OF MINOR VALUE OR IMPORTANCE WHICH ARE NOT STRICTLY PARTS OF TOY SETS.

Currently, articles of minor value or importance which are not strictly parts of toy sets are classifiable with the remainder of the set, whether or not those components are classified in Chapter 95 (see EN to 9503.70 quoted above at page 6). One example is a set of toy automobiles, trucks, airplanes and ships, packaged with trading or informational cards, which are classifiable in Chapter 49 if imported separately. Because the cards are of little value in relation to the value of toy automobiles, trucks, airplanes and ships, they are presently classified with the set, even though they are not strictly a component thereof.

Continuation of this established practice should be ensured by retaining in the ENs a reference to the fact that articles of incidental value or little value in relation to the remainder of a toy set may be included in toy sets.

c. THE REFERENCE TO "ESSENTIAL CHARACTER" IN PROPOSED NEW CHAPTER NOTE 4 REQUIRES CLARIFICATION.

Proposed new Chapter Note 4 introduces the concept of "essential character" into the classification of toy sets and outfits. Previously, this concept was not specifically used in determining whether a collection of articles is classifiable as a toy set. Rather, in the past, only the less subjective standard of whether the collection was principally designed for the amusement of children or adults was used to determine the classification of toy sets. Accordingly, there should be clarification that the use of the phrase "essential character" was not intended as a substitute for the use of the "principal amusement" test in classifying all toys.

d. THE EXPLANATORY NOTES SHOULD CONTINUE TO DEFINE TOY SETS AND OUTFITS IN DETAIL.

The current ENs to Heading 9503 define and discuss toy sets and outfits in great detail. These ENs include subheading notes specifically defining toy sets and outfits. These ENs, as well as the other ENs to Chapter 95 defining and discussing toy sets and outfits, should be

retained to insure that importers and customs administrations understand what is intended to be classified as a toy set.

3. THE PROPOSED CONSOLIDATION OF CURRENT HEADINGS 95.01 AND 95.02 WITH HEADING 95.03 SHOULD INCLUDE REFERENCE TO TOY SETS AND PARTS AND ACCESSORIES OF TOYS.

The ITC proposes to consolidate current Headings 95.01, 95.02 and 95.03 into one heading. Currently, Heading 95.01 covers "wheeled goods designed to be ridden by children . . . dolls' carriages and dolls' strollers [and] parts and accessories thereof." Current Heading 95.02 covers "dolls representing only human beings and parts and accessories thereof." Current Heading 95.03 is a so-called "basket" provision covering "other toys, reduced-size . . . models and similar recreational models . . . puzzles . . . [and] parts and accessories thereof."

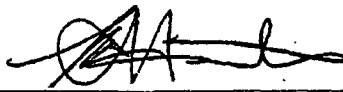
While the toy industry supports consolidating the toy provisions in Chapter 95 to make classification as simple as possible, the well-defined references to toy sets and outfits need to be retained in the legal language of the tariff and Explanatory Notes to insure that the many rulings of customs administrations and the courts are retained and that toy sets continue to be classified in accordance with established practice. Additionally, some reference to parts and accessories of toys needs to appear in the text to insure that identifiable parts and accessories of toys are classified in the new Heading.

We greatly appreciate being afforded the opportunity to submit these substantive comments, and urge the ITC to give careful consideration to the potential problems which can occur if the present proposals are put into effect.

Respectfully submitted,

FOREIGN TRADE ASSOCIATION OF SOUTHERN CALIFORNIA

By



Nancy Hiromoto
President

APPENDIX H

LETTER FROM THE TOY INDUSTRY ASSOCIATION

Law Offices
Shannette, Paley, Carter & Blauvelt, P.C.

Seventy-five Broad Street

New York, N. Y. 10004

Phone: (212) 425-0055

Fax: (212) 425-1797

(212) 742-2180

E-mail: customs@shannette-paley.com

1701 L Street, N.W.

Washington, D.C. 20036

Phone: (202) 223-4433

Fax: (202) 659-3904

January 26, 2005

Ms. Marilyn R. Abbott
Secretary to the Commission
United States International Trade Commission
500 E Street, S.W.
Washington, D.C. 20436

Accepted per
Mr. Heller (TIA)
1-27-05

RECEIVED
SECRETARY
JAN 27 PM 12:25

**Re: Comments on ITC Investigation 1205-6
Toy Industry Association**

Dear Ms. Abbott:

On behalf of our client, the Toy Industry Association (TIA), an organization representing 425 companies involved in the production, marketing and distribution of toys, games, festive articles, and other similar products, we hereby submit additional comments on select proposed modifications to Chapter 95 of the Harmonized Tariff Schedule of the United States (HTSUS) and to the international Explanatory Notes (EN's) to the Harmonized System (HS).¹ The proposed changes, which are to be implemented in 2007, arose in connection with a review by the World Customs Organization (WCO), in which the United States participated.

Proposed Chapter Note 4

Use of the Phrase "Subject to the Provisions of Note 1 Above"

Proposed Note 4 arose from a concern raised by TIA and its members, about the interpretation of the text of heading 9503, HTS, and of Harmonized System (HS) Explanatory Note (EN) 95.03(A), which provides:

¹ In a notice published in the Federal Register of September 14, 2004, the U.S. International Trade Commission (ITC) solicited public comments on the proposed HTSUS modifications. While the notice requested that comments be submitted by November 1, 2004, we understand that comments submitted this week will be accepted. Moreover, TIA already has conveyed its concerns in verbal discussions with ITC officials and this letter simply memorializes these discussions.

Collections of articles, the individual items of which if presented separately would be classified in other headings in the Nomenclature, are classified in this Chapter when they are put up in a form clearly indicating their use as toys (e.g., instructional toys such as chemistry, sewing, etc., sets).

In the view of TIA, although certain sets were classifiable in heading 9503 because of this EN, other collections of articles that, according to the Customs Service's interpretation, did not qualify as sets under General Rule of Interpretation (GRI 3(b), were being wrongly precluded from classification as toys. Accordingly, TIA and its members proposed a new chapter note that would incorporate the language of this Explanatory Note, rendering it crystal clear that collections of articles that, as a whole, are used as toys, will be classified as such in heading 9503, HTS, regardless of their qualification as sets under GRI 3(b) and regardless of whether some or all of the individual components of the sets are classifiable in other headings of the tariff, as follows:

Subject to the provisions of Note 1 above, heading 95.03 applies, *inter alia*, to articles of this heading combined with one or more items, which cannot be considered as sets under the terms of General Interpretative Rule 3(b), and which, if presented separately, would be classified in other headings, provided the articles are put up together for retail sale and the combinations have the essential character of toys.

While the original language proposed by TIA and its members for new Chapter Note 4 did not include the phrase "subject to the provisions of Note 1," it is TIA's position that the meaning of the note has not been changed as a result thereof. The intent of the Note was to provide that collections of articles that are used as toys, containing components that when imported separately are precluded from classification in Chapter 95, either by exclusions in Note 1 to Chapter 95 or for other reasons, will remain classifiable in heading 9503 as a result of this Chapter Note. The phrase "subject to the provisions of Note 1" is, therefore, in keeping with this interpretation.

Accordingly, TIA seeks confirmation from the ITC that sets used as toys are not precluded from classification in heading 9503, regardless of whether their components may be excluded by Note 1, if the sets otherwise meet the tariff definition of toys.

Inclusion of Articles of Minor Value or Importance

It is also TIA's understanding that the language of proposed Note 4 preserves the current practice of classifying articles of minor value or importance with the remainder of toys sets, inasmuch as it specifically contemplates collections of articles that do not qualify as sets under GRI 3(b). Nevertheless, TIA supports the retention of HS Explanatory Notes that have always made it clear that articles of incidental value or little value are classifiable with toys in the provisions applicable to toy sets.

Use of the Phrase "Have the Essential Character of Toys"

The language used in the proposed Note is intended to make heading 9503 more inclusive, rather than more restrictive. The requirement that the collections of articles "have the essential character of toys" is reinforcing the intent that they are clearly to be used as toys, even though they may contain non-toy components. The definition of what constitutes a toy is well-settled; that is, an article that is principally designed for the amusement of children or adults. This definition is not changed by the phrase used in the note and, in fact, could be interchangeable with the phrase.

Proposed Note 4 is Intended to Render Chapter 95 More Inclusive

It is clear from this review of the background and history of proposed Note 4 that the intent was to ensure that toy products that may have been precluded from toy classification in the past by virtue of certain technicalities in the tariff remain classifiable in Chapter 95, HTSUS. The note is not intended to replace existing legal and interpretive text, nor is it intended to restrict the interpretation of that text so as to affect products that already are classifiable in Chapter 95 under the existing body of law.

Proposed New Chapter Note 1(v) Represents a Significant Change of the Legal Text of Chapter 95 and of Judicial and Administrative Interpretation Thereof and Should Not Be Adopted

TIA already has expressed its concerns to ITC officials that proposed Note 1(v), that would exclude utilitarian articles from Chapter 95, HTSUS, is inconsistent with the current legal text of the chapter and conflicts with current legal interpretations of that text. Therefore, TIA simply reiterates its position that: (1) the new chapter note will adversely impact the classification of toys; (2) the new note will conflict with judicial precedents on the classification of festive articles; and (3) the note may adversely affect the classification of sporting equipment.

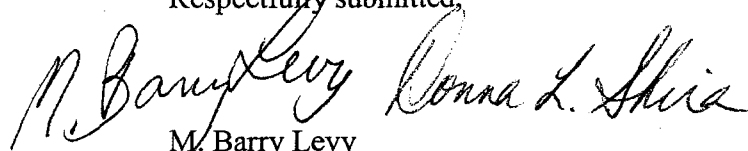
In effect, this proposed note could dramatically change the historic interpretation of many of the provisions in Chapter 95, HTSUS, to the detriment of the toy, game, festive article and sporting goods industries. Thus, the inclusion of this note would be contradictory to the charge given the ITC to “ensure substantial rate neutrality” in making recommendations for changes to the HTSUS. Accordingly, TIA urges the ITC to remove proposed new Note 1(v) from the proposed changes to the HTSUS.

The Legal Notes and Explanatory Notes Should Maintain Reference to Toys Sets and Parts and Accessories of Toys in Connection With the Proposed Consolidation of Headings 9501 and 9502 with Heading 9503

TIA also agrees with concerns raised about the removal of well-defined references to toy sets and outfits in the legal notes and Explanatory Notes. The consolidation of the headings, which will be of great benefit to the toy industry and which TIA fully supports, is not meant to result in the elimination of any products currently provided for in the various headings. Accordingly, existing notes referring to toy sets, parts and accessories, must be retained to avoid potential incorrect interpretations of the text.

TIA stands ready to assist the ITC in finalizing the proposed changes to the Harmonized Tariff Schedules of the United States and the Explanatory Notes as they relate to the provisions of Chapter 95. If you have any questions, please contact the undersigned.

Respectfully submitted,



M. Barry Levy

Donna L. Shira

Customs & International Trade Counsel

Toy Industry Association

APPENDIX I

**LETTERS FROM
U.S. CUSTOMS AND BORDER
PROTECTION**



U.S. Customs and
Border Protection

FEB 22 2005

CLA-02 RR:CR:IN
009606 SS

Marilyn R. Abbott, Secretary
United States International Trade Commission
500 E Street, SW
Washington, DC 20436

Re: International Trade Commission Investigation No. 1205-6, Proposed Modifications to the Harmonized Tariff Schedule of the United States Pursuant to Section 1205 of the Omnibus Trade and Competitiveness Act, Conforming Amendments to the Harmonized Tariff Schedule of the United States to Promote Uniform Application of the Harmonized System and Certain "Adverse" Harmonized System Committee Decisions

Dear Secretary Abbott:

This letter is in response to your request for comments on International Trade Commission (ITC) Investigation No. 1205-6 regarding proposed modifications to the Harmonized Tariff Schedule of the United States (HTS) and possible amendments to the HTS related to certain decisions of the Harmonized System Committee of the World Customs Organization which were adverse to the positions taken by the United States. We appreciate the opportunity to comment on these matters and regret the delay in responding.

Introduction

On September 8, 2004, the Commission instituted investigation No. 1205-6, Proposed Modifications to the Harmonized Tariff Schedule of the United States, pursuant to section 1205 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. 3005). Section 1205 directs the Commission to keep the Harmonized Tariff Schedule of the United States (HTS) under continuous review and to recommend to the President modifications to the HTS (1) when amendments to the International Convention on the Harmonized Commodity Description and Coding System (Harmonized System) are recommended by the World Customs Organization (WCO) for adoption, and (2) as other circumstances warrant.

The Commission has drafted a preliminary report which sets forth proposed changes in the HTS that would be needed to maintain conformity between the HTS and the International Harmonized System. The majority of the proposed changes are the

result of work of the WCO and its Harmonized System Committee (HSC) to update and clarify the Harmonized System nomenclature, as part of the WCO's long-term program to periodically review the nomenclature structure. In accordance with Article 16 of the Harmonized System Convention, the WCO has recommended the adoption of certain modifications to the Harmonized System. The changes are due to become effective in January 2007. The report also describes proposed changes to conform the HTS to the WCO's recommendations and reflect in the HTS certain other decisions taken by the HSC.

It is our understanding that the Commission will forward its preliminary report to the United States Trade Representative (USTR) on or about February 28, 2005. The preliminary report will include proposed modifications to (1) conform the HTS to recommended Harmonized System amendments, (2) promote uniform application of the Harmonized System by conforming the HTS with decisions of the WCO and (3) alleviate administrative burdens, as well as other matters that may be recommended. The Commission is scheduled to submit its final report to the President on March 15, 2006.

In order to promote uniform application of the Harmonized System, this office has undertaken a review of all HSC decisions adverse to the positions taken by the United States since May 1999. Although the United States is able to classify in accordance with most of the decisions, we have determined that there are five (5) decisions that pose unique problems and will require conforming amendments to the HTS in order to classify certain products in accordance with the decisions of the HSC.

Decisions and Recommendations

1. Drilled and Notched Lumber

At the 23rd session of the HSC in October 1999, and again at the 24th session, the Committee decided that drilled lumber studs were classified in heading 4418 rather than 4407. The U.S. takes the view that the drilled lumber studs are not sufficiently advanced to be considered builders' joinery of heading 4418 and classifies drilled lumber studs in heading 4407.

The classification of drilled lumber studs is closely related to the classification of notched lumber studs. The classification of notched lumber studs was raised at the 24th session of the HSC. However, at the 25th session of the HSC, the item was deleted from the Agenda.

It is our belief that the HSC decision does not provide a legally sufficient basis for classification of drilled or notched lumber studs in heading 4418. Accordingly, we respectfully request that the ITC draft an additional U.S. note to exclude drilled or notched lumber studs from heading 4407. Additionally, we request that the ITC create a new 8-digit provision for drilled or notched lumber studs in subheading 4418.90. This would enable us to classify in accordance with the decision of the HSC.

2. Safety Seats for Infants and Toddlers

At the 30th session of the HSC, the Committee decided that safety seats for infants and toddlers were classified in subheading 9401.80 as other seats. The United States takes the view that child safety seats are classified under subheading 9401.20 as seats of a kind used for motor vehicles.

It is our belief that the HSC decision does not provide a legally sufficient basis for classification of child safety seats in subheading 9401.80. Accordingly, we respectfully request that the ITC draft an additional U.S. note to indicate that child safety seats are excluded from subheading 9401.20. We also request that the ITC move current subheading 9401.20.0010, which specifically provides for "child safety seats" to a new provision within subheading 9401.80. This would enable us to classify in accordance with the decision of the HSC.

3. Certain Hygienic Articles Transferred from 3926 to 3924

At the 31st session of the HSC, in May 2003, the Committee decided to classify "teats for baby bottles (nursing nipples)" and "finger-stalls" of plastic in subheading 3924.90 which provides for other household or toilet articles. The US took the view that the products were hygienic articles covered by heading 3926 (the residual provision for other articles of plastic).

Currently, the US does not believe that there is a legally sufficient basis for the classification finger-stalls and nursing nipples in heading 3924. However, the term "hygienic" will be added to the legal text of heading 3924 in 2007. Accordingly, in 2007, hygienic articles, such as nursing nipples and finger cots, should be classified within heading 3924.

The addition of the term "hygienic" will provide a legal basis for the classification of finger-stalls and nursing nipples in heading 3924. We request that the terms "nursing nipples" and "finger cots" be removed from the text of subheadings 3926.90.15 and 3926.90.20, HTSUS. It appears that new eight-digit provisions in heading 3924 for nursing nipples and finger cots may be necessary.

Additionally, we note that subheading 3926.90.20, HTSUS, specifically provides for "crutch tips and grips" and "sanitary belts." After reflecting on this matter, we believe that crutch tips and grips" are classified in heading 9021 rather than Chapter 39. Furthermore, we believe that sanitary belts are not made of plastic. Accordingly, we recommend the deletion of these items from subheading 3926.90.20, HTSUS.

4. Multi-Layer Parquet Panels

At the 34th session of the HSC, the Committee decided that certain multi-layer flooring panels were classified in subheading 4418.30 as "parquet panels" rather than heading 4412 as "plywood, veneered panels and similar laminated wood." Each panel was described as having a top layer of wood measuring 4 mm in thickness. The HS describes sheets for veneering or plywood as not exceeding 6 mm in thickness. Since

the top layer did not exceed 6 mm, the products meet the description of veneered or laminated panels of heading 4412. CBP does not believe the Committee decision provided a legally sufficient basis for classifying these products in heading 4418.

We believe that the decision of the Committee does not disturb the classification of panels which have a top layer which is less than 4 mm in thickness (i.e., we can continue to classify these in heading 4412 as veneered or laminated panels). Furthermore, the decision does not disturb the classification of panels which have a top layer which is greater than 6 mm in thickness (i.e., we can continue to classify in heading 4418). However, in order to classify in accordance with the HSC decision, we must modify the way we treat panels which have a top layer which is between 4 mm and 6 mm in thickness. Moving all multi-layer panels to heading 4418 regardless of the thickness of the top layer is not an option. We note there are decisions from the 18th and 28th sessions of the HSC classifying multi-layer panels with very thin veneers (e.g., .03 mm) in heading 4412.

We respectfully request that the ITC create an additional U.S. note to heading 4412 to exclude flooring panels which have a top layer that is between 4 mm and 6 mm in thickness. We also request that the ITC create 8-digit provisions within new subheadings 4418.71 (mosaic) and 4481.72 (multi-layer) for multi-layer panels where the top layer is 4mm to 6mm in thickness. This would allow us to classify in accordance with the HSC decision.

It should be noted that CBP maintains the view that the products at issue are currently classified in heading 4412. This view is consistent with the decision in *Boen Hardwood Flooring Inc. v. United States*, 357 F.3d 1262 (Fed. Cir. 2004). We would like to emphasize that the creation of the additional U.S. note and new subheadings in heading 4418 will enable CBP to classify in accordance with the HSC decision (i.e., classify in heading 4418 rather than heading 4412).

5. Photo Frame Albums

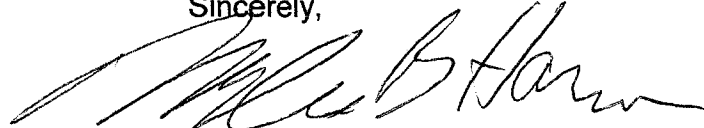
At HSC 34, the Committee decided that photo frame albums were classified in subheading 3926.90 rather than subheading 3924.90 (as other household or toilet articles of plastic). The U.S. position that the photo frame albums were classified in heading 3924 was based on the fact that we have well-established precedent classifying plastic photo albums in subheading 3924.90.55 as other household articles.

It is our belief that there is insufficient legal basis for classification of plastic photo albums in heading 3926. Accordingly, we respectfully request that the ITC draft an additional U.S. note to indicate that plastic photo albums are excluded from heading 3924 and are classified in heading 3926. Additionally, we request that the ITC create an 8-digit provision for "photo albums" within subheading 3926.90. The creation of an additional U.S. note and subheading regarding photo albums would allow us to classify in accordance with the Committee's decision on photo frame albums.

Conclusion

As described above, we recommended that certain changes be made to the HTS in order to promote greater uniformity in the application of the Harmonized System and decisions of the Harmonized System Committee. Again, we thank you for the opportunity to comment on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Myles B. Harmon". The signature is fluid and cursive, with a long horizontal stroke at the end.

Myles B. Harmon, Director
Commercial Rulings Division

[dated February 25, 2005]

CLA-02 RR:CR:IN
009651 BtB

Marilyn R. Abbott, Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

Re: Comments to Comments Submitted to ITC Regarding the Proposed Amendments
to the Harmonized Tariff Schedule of the United States: Investigation No. 1205-6

Dear Secretary Abbott:

This letter is in response to your request for our views on comments submitted to the ITC regarding amendments to the Harmonized Tariff Schedule of the United States (HTS) proposed by the International Trade Commission (ITC) in Investigation No. 1205-6. U.S. Customs and Border Protection (CBP) appreciates the opportunity to comment and we regret the delay in responding.

Specifically, we are addressing comments submitted by the Foreign Trade Association of Southern California (hereinafter "FTASC") and Sidley, Austin, Brown and Wood LLP, on behalf of Bauer Nike Hockey USA, Inc. (hereinafter "Bauer"), regarding certain proposed amendments to Chapter 95 of the HTS.

Background

On September 8, 2004, the Commission instituted investigation No. 1205-6, Proposed Modifications to the Harmonized Tariff Schedule of the United States, pursuant to section 1205 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. 3005). Section 1205 directs the Commission to keep the Harmonized Tariff Schedule of the United States (HTS) under continuous review and to recommend to the President modifications to the HTS (1) when amendments to the International Convention on the Harmonized Commodity Description and Coding System (Harmonized System) are recommended by the World Customs Organization (WCO) for adoption, and (2) as other circumstances warrant.

The Commission has drafted a preliminary report which sets forth proposed changes in the HTS that would be needed to maintain conformity between the HTS and the International Harmonized System. The majority of the proposed changes are the result of work of the WCO and its Harmonized System Committee (HSC) to update and clarify the Harmonized System nomenclature. In accordance with Article 16 of the Harmonized System Convention, the WCO has recommended the adoption of certain modifications to the Harmonized System. Pursuant to Article 16, the changes are due to become effective internationally in January 2007. The report also describes proposed changes to conform the HTS to the WCO's recommendations and reflect in the HTS certain other decisions taken by the HSC.

It is our understanding that the Commission will forward its preliminary report to the United States Trade Representative (USTR) on or about February 28, 2005. The Commission is scheduled to submit its final report to the President on March 15, 2006.

Comments

The FTASC takes issue with new Note 1(v) to Chapter 95. Note 1 to Chapter 95 sets forth the exclusions from the chapter. Note 1(v) provides as follows:

Tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles having a utilitarian function (classified according to their constituent material).

The FTASC argues that the new Note 1(v) will adversely impact the classification of toys.

As an initial matter we observe that under the Harmonized System Convention, the United States as a contracting party is obliged to apply the legal text of the convention of which this new note is a part. Moreover, as discussed at the HSC, the intent of Note 1(v) is not to alter the classification of toys but to reflect the existing scope of chapter 95. Accordingly, articles principally for the amusement of children or adults will continue to be classified as toys in Chapter 95 (under new provision 9503.00.00, HTS).

The FTASC also claims that Note 1(v) will conflict with certain judicial precedents concerning the classification of festive articles. While we do not see a conflict between the note and festive articles generally, we acknowledge that there is a conflict in regard to a limited class of merchandise. Specifically, in the case of Midwest of Cannon Falls, Inc. v. United States, 122 F.3d 1423 (Fed. Cir. 1997), the court ruled that certain articles which are decorative tableware or kitchenware, among other things, were classifiable as "festive articles." Pursuant to the holding in Midwest, utilitarian/functional articles that are three-dimensional representations of an accepted symbol for a recognized holiday have been classified as festive articles in Chapter 95. Note 1(v) appears to conflict with this implementation of the holding in Midwest by specifically excluding all tableware and

kitchenware having a utilitarian function from Chapter 95. As a result of Note 1(v), utilitarian/functional tableware and kitchenware that are three-dimensional representations of an accepted symbol for a recognized holiday may be classified in provisions outside of Chapter 95. To ensure substantial rate neutrality for those articles, we recommend that breakouts for them be inserted in the provisions in the HTS covering tableware and kitchenware.

FTASC also expressed concern about the effect of the new note on the decision in Rubie's Costume Company v. United States, 337 F.3d 1350 (Fed. Cir. 2003), and on Park B. Smith, Ltd. v. United States, 347 F.3d 922 (Fed. Cir. 2003). With respect to Rubies, the merchandise at issue in that case is not affected by the new note as the court ruled that the merchandise classified in Chapter 95 was not "wearing apparel." As to Park B. Smith, it is premature to suggest any changes to the tariff as the case is on remand to the Court of International Trade and is not final.

Finally, the FTASC states that new Note 4 will result in unsatisfactory changes in the classification of toy sets. However, their comment is directed instead to the new heading being created.

Provisions 9501.00 through 9503.90.00 are being superceded by new provision 9503.00.00 which enumerates in its text: "Tricycles, scooters, pedal cars and similar wheeled toys; dolls' carriages; dolls, other toys; reduced-scale ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof." It is correct to observe that there will no longer be a subheading that explicitly covers "other toys, put up in sets or outfits ...," which provision 9503.70 currently covers. There are no breakouts for sets or outfits under new provision 9503.00.00. However, the scope of new provision 9503.00.00, HTS, will encompass the scope of the provisions being superceded and will continue to include toy sets. Chapter 95, interpreted in conjunction with the provisions of GRI 1, will result in toys, put up in sets or outfits, being classified in new provision 9503.00.00, HTS. Perhaps consideration of this issue should be discussed in a new Explanatory Note to heading 9503.

Counsel for Bauer submitted a comment advocating that Note 1(v) be clarified to preclude the possibility of all "apparel ... having a utilitarian function," such as hockey pants, from falling within the Note's scope, thereby directing classification to Chapters 61 and 62, HTS.

Counsel for Bauer also referenced the decision in Bauer Nike Hockey USA, Inc. v. United States, Slip. Op. 04-158 (Fed. Cir. 2004), in which the Court of Appeals for the Federal Circuit held that hockey pants made of an exterior nylon shell and an interior assembly of hard plastic guards and soft foam padding were classified as ice-hockey equipment under heading 9506, HTS. The hockey pants at issue were found not to constitute "sports clothing," which is excluded from Chapter 95 by Note 1(e) to Chapter 95, HTS. Counsel for Bauer emphasized that, if the ITC intends to remove hockey pants from classification in heading 9506, HTS, and move them to Chapter 62, it must do so in a rate-neutral manner.

In light of the Bauer decision, we regard hockey pants like those at issue in that case, to constitute hockey equipment, not "apparel." Therefore, the Bauer pants will not be covered by note 1(v) and will remain classified as hockey equipment.

Thank you for the opportunity to comment on this matter. Please do not hesitate me if I can be of further assistance.

Sincerely,

Myles B. Harmon, Director
Commercial Rulings Division

APPENDIX J

DEFINITIONS OF TARIFF AND TRADE AGREEMENT TERMS

APPENDIX A

TARIFF AND TRADE AGREEMENT TERMS

In the **Harmonized Tariff Schedule of the United States** (HTS), chapters 1 through 97 cover all goods in trade and incorporate in the tariff nomenclature the internationally adopted Harmonized Commodity Description and Coding System through the 6-digit level of product description. Subordinate 8-digit product subdivisions, either enacted by Congress or proclaimed by the President, allow more narrowly applicable duty rates; 10-digit administrative statistical reporting numbers provide data of national interest. Chapters 98 and 99 contain special U.S. classifications and temporary rate provisions, respectively. The HTS replaced the former **Tariff Schedules of the United States** (TSUS) effective January 1, 1989.

Duty rates in the **general** subcolumn of HTS column 1 are normal trade relations rates; many general rates have been eliminated or are being reduced due to concessions resulting from the Uruguay Round of Multilateral Trade Negotiations. Column 1-general duty rates apply to all countries except those listed in HTS general note 3(b) (Cuba, Laos, and North Korea), which are subject to the statutory rates set forth in **column 2**. Specified goods from designated general-rate countries may be eligible for reduced rates of duty or duty-free entry under preferential tariff programs, as set forth in the **special** subcolumn of HTS rate of duty column 1 or in the general notes. If eligibility for special tariff rates is not claimed or established, goods are dutiable at column 1-general rates. The HTS does not list countries covered by a total or partial embargo.

The **Generalized System of Preferences** (GSP) affords nonreciprocal tariff preferences to designated beneficiary developing countries. The U.S. GSP, enacted in title V of the Trade Act of 1974 for 10 years and extended several times thereafter, applies to merchandise imported on or after January 1, 1976, and before the close of December 31, 2006. Indicated by the symbol "A", "A*", or "A+" in the special subcolumn, GSP provides duty-free entry to eligible articles the product of and imported directly from designated beneficiary developing countries (see HTS gen. note 4). Eligible products of listed sub-Saharan African countries may qualify for duty-free entry under the **African Growth and Opportunity Act** (AGOA) (see HTS gen. note 16) through September 30, 2008, as indicated by the symbol "D" in the special subcolumn; see subchapter XIX of chapter 98.

The **Caribbean Basin Economic Recovery Act** (CBERA) affords nonreciprocal tariff preferences to designated Caribbean Basin developing countries. The CBERA, enacted in title II of Public Law 98-67, implemented by Presidential Proclamation 5133 of November 30, 1983, and amended by the Customs and Trade Act of 1990, applies to goods entered, or withdrawn from warehouse for consumption, on or after January 1, 1984. Indicated by the symbol "E" or "E*" in the special subcolumn, CBERA provides duty-free entry to eligible articles, and reduced-duty treatment to certain other articles, which are the product of and imported directly from designated countries (see HTS gen. note 7). Eligible products of listed beneficiary countries may qualify for duty-free or reduced-duty entry under the **Caribbean Basin Trade Partnership Act** (CBTPA) (see HTS gen. note 17), through September 30, 2008, as indicated by the symbol "R" in the special subcolumn; see subchapter XX of chapter 98.

Preferential nonreciprocal duty-free treatment in the special subcolumn followed by the symbol "J" or "J*" in parentheses is afforded to eligible articles from designated beneficiary countries under the **Andean Trade Preference Act** (ATPA), enacted as title II of Public Law 102-182 (effective July 22, 1992; see HTS gen. note 11) and renewed through December 31, 2006, by the **Andean Trade Promotion and Drug Eradication Act** of 2002 (see subchapter XXI of chapter 98).

Free trade agreements in effect: Preferential free rates of duty in the special subcolumn followed by particular symbols apply to eligible goods under these free trade agreements, when such treatment is properly claimed and all requirements of the applicable general note are met (see subchapter XXII of chapter 98 for special provisions):

"IL"--products of Israel under the **United States-Israel Free Trade Implementation Act** of 1985, effective Sept. 1, 1985 under Pres. Proc. 5365 of Aug. 30, 1985 (see HTS general note 8 and subchapter VIII of chapter 99);

"CA"--goods of Canada--and "MX"--goods of Mexico--under the **North American Free Trade Agreement** (NAFTA), effective as of Jan. 1, 1994 under Pres. Proc. 6641 of Dec. 15, 1993 (see HTS general note 12 and subchapter VI of chapter 99);

"JO"--goods of Jordan under the **United States-Jordan Free Trade Area Implementation Act**, (JFTA), effective as of Dec. 17, 2001 under Pres. Proc. 7512 of Dec. 13, 2001 (see HTS gen. note 18 and subchapter IX of chapter 99);

"SG"--goods of Singapore under the **United States-Singapore Free Trade Agreement** (SFTA), effective as of Jan. 1, 2004 under Pres. Proc. 7747 of Dec. 30, 2003 (see HTS general note 25 and subchapter X of chapter 99);

"CL"--goods of Chile under the **United States-Chile Free Trade Agreement** (UCFTA), effective as of Jan. 1, 2004 under Pres. Proc. 7746 of Dec. 30, 2003 (see HTS general note 26 and subchapter XI of chapter 99);

"AU"--goods of Australia under the **United States-Australia Free Trade Agreement** (UAFTA), effective as of Jan. 1, 2005 under Pres. Proc. 7857 of Dec. 20, 2004 (see HTS general note 28 and subchapter XIII of chapter 99) [gen. note 27 and subchapter XII reserved].

Other special tariff treatment applies to particular **products of insular possessions** (gen. note 3(a)(iv)), **products of the West Bank and Gaza Strip** (gen. note 3(a)(v)), goods covered by the **Automotive Products Trade Act** (APTA) (gen. note 5; special symbol "B") and the **Agreement on Trade in Civil Aircraft** (ATCA) (gen. note 6; special symbol "C"), **articles imported from freely associated states** (gen. note 10), **pharmaceutical products** (gen. note 13; special symbol "K"), and **intermediate chemicals for dyes** (gen. note 14; special symbol "L").

The **General Agreement on Tariffs and Trade 1994** (GATT 1994), pursuant to the Agreement Establishing the World Trade Organization, is based upon the earlier GATT 1947 (61 Stat. (pt. 5) A58; 8 UST (pt. 2) 1786) as the primary multilateral system of discipline and principles governing international trade. The agreements mandate most-favored-nation treatment, maintenance of scheduled concession rates of duty, and national treatment for imported goods; GATT provides the legal framework for customs valuation standards, "escape clause" (emergency) actions, antidumping and countervailing duties, dispute settlement, and other measures. Results of the Uruguay Round of multilateral tariff negotiations are set forth in separate schedules of concessions for each participating contracting party, with the U.S. schedule designated as Schedule XX. Pursuant to the **Agreement on Textiles and Clothing** (ATC) of the GATT 1994, member countries have phased out restrictions on imports of covered textiles and apparel implemented under the prior "Arrangement Regarding International Trade in Textiles" (known as the **Multifiber Arrangement** (MFA)).

Rev. 1/11/05