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International Trade, Customs & Export Law

ADVANCED TARIFF CLASSIFICATION
PART II – ITS ALL RELATIVE

By Deborah B. Stern, Esq.

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OUR SPEAKER



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AGENDA

Its all Relative

- GRI 3(a) and Relative Specificity
- Headings Types: *Eo nomine*, Principal Use, Actual Use, Constituent Material
- Principal Use and the Carborundum Factors

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GRI 3(A) RULE OF SPECIFICITY

Goods that are classifiable under more than one heading should be classified in the heading which provides the most specific description.

- For articles that fall in the scope of more than one heading in their entirety
- "Most specific" = the heading with the requirements that are hardest to satisfy; that describe the article with the greatest degree of accuracy and certainty.

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GRI 3(A) RULE OF SPECIFICITY "RULES"

- Use provisions *usually* prevail over eo nomine
- Use and eo nomine will prevail over constituent material
- Legal notes prevail above all (e.g., ARI 1(c); parts/accessories notes)
- A provision that encompasses more and more disparate items almost without limit, ("of all kinds", necessarily begins to lose its specificity.
- "Where a particular part of an article is provided for specifically, a part of that particular part is more specifically provided for as part of the part than as part of the whole."

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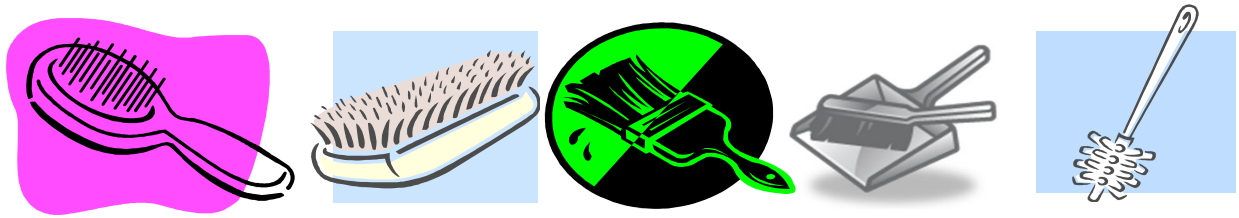
EO NOMINE PROVISIONS

- An *eo nomine* designation is one which describes a commodity by a specific name, usually one well known to commerce.
- An *eo nomine* designation includes all forms of the article, absent contrary intent by Congress or conflicting administrative practice or judicial authority.
- Example: Heading 9603, brooms and brushes. An article which indisputably responds to the name "brush" is properly classifiable as a brush



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EO NOMINE PROVISIONS

- Heading 4202 Cases
- Heading 7010 Preserving Jars
- Heading 8481 Valves
- Heading 8544 Cable
- Heading 8536 Electrical apparatus for switching or protecting electrical circuits
- Heading 8525 Digital cameras
- Chapters 28-29 separate chemically defined elements and compounds
- Subheading 4419.00.40 forks and spoons (*but superior heading text is a use provision*)

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USE PROVISIONS

Identified by the terms of the provision:

- "solely principally used…" (e.g., parts and accessories provisions)
- "Of a kind used…" (e.g., of a kind used for table, kitchen, toilet…and similar purposes)
- "Articles for…" (e.g., articles and equipment for general physical exercise, gymnastics…)
- "…used for…" (e.g., "Feathers of a kind used for stuffing;" "Seeds of a kind used for sowing")
- Terms designating use (e.g., diagnostic or laboratory reagents; kitchenware; household articles; toys)

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EO NOMINE VS. USE PROVISIONS



Hats and Headgear (eo nomine) vs. Festive Article (use) ?

- A festive article of 9505 must:
  (1) Be closely associated with a festive occasion
  (2) Used or displayed principally during that festive occasion.
  (3) Not be excluded by Ch. 95 Note 1(v) (2007) i.e., household-type utilitarian article

- Hat provision encompasses items of all construction and for all purposes and uses.

- The requirements of the festive articles provision are more difficult to satisfy.

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EO NOMINE VS. USE PROVISIONS

- 8512 *Electrical lighting … equipment … of a kind used for … motor vehicles.*

  Whether the good would qualify as an 8539, 8543 or 9405 LED lamp, if its for use in motor vehicles, that use prevails.

- 8513 *Portable electric lamps designed to function by their own source of energy (for example, dry batteries, storage batteries, magnetos)*

  All else being equal, if a "bulb" has a self contained energy source, 8513 prevails (simple GRI 3(a) eo nomine v eo nomine analysis)

8513 8512 8539 9405









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EO NOMINE LIMITED BY USE

- An eo nominee provision may be limited by use, but a use limitation should not be read into an *eo nomine* provision unless the name itself inherently suggests a type of use.

- Look to language of the heading, tariff definitions, common and commercial meanings, to determine whether specific use is explicit or implied.

- Examples
  - "Preparations" made for a specific purpose, e.g., beauty preparations (3304)
  - "Toy" (9503) is defined as designed for the amusement of children or adults;
  - Certain Household Articles (but the court recently held that 3924 is not a use provision)

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EO NOMINE LIMITED BY USE



- Ziplock Bags were found to be more specifically “articles of conveyance” (3923) than “household articles” (3924)
- Court held heading 3924 is eo nomine, and does not define its coverage by reference to the “use” of the goods in question (and therefore principal use analysis did not apply).
- A prior court held “household utensils” because utensil is defined as an instrument used in the home.

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PRINCIPAL USE

Additional U.S. Rule of Interpretation 1(a) - In the absence of special language or context which otherwise requires—(a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the **use in the United States** at, or immediately prior to, the date of importation, **of goods of that class or kind** to which the imported goods belong, and the controlling use is the **principal use**

CBP holds that principal use is the use of the class or kind of merchandise at issue that exceeds any other use.

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PRINCIPAL USE

Carborundum Factors are used to determine whether a particular article belongs to a particular class or kind of good and has been used to determine an article's principal use.

- the expectation of the ultimate purchaser,
- channels of trade,
- environment of sale (accompanying accessories, manner of advertisement and display),
- use in the same manner as merchandise which defines the class,
- economic practicality of so using the import, and
- recognition in the trade of this use,
- the general physical characteristics of the article

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PRINCIPAL USE

Two-step inquiry:

1. How are the articles used, are they principally used for purpose identified in the claimed tariff provision?

2. Are the articles *commercially fungible* with other goods of the claimed provision, the claimed class or kind?

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PRINCIPAL USE - TOYS

Simulator (9023) vs Toy/Doll (9503)

- **Check Notes:** Note 1(k) to Chapter 90, HTSUS, excludes of articles of Ch. 95 ,first determine whether the article can be classified as a doll in heading 9503, thereby excluding classification in heading 9023, HTSUS.
- Consider Scope:
  - Toys intended essentially for amusement; Heading 9503 is a "principal use" provision; “Dolls” are included among “toys” per EN 95.03
- Principal use rule:
  - Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that, in the absence of special language or context which otherwise requires, such use "is to be determined in acordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use." In other words, cthe article's principal use at the time of importation determines whether it is classifiable within a particular class or kind.
- Carborundum analysis
  - Simulator doll is weight of newborn, so heavier than toy; not available for purchase in toy stores; marketed and sold to educational institutions; educational accessories like RFID bracelet; retail price significantly exceeds most dolls
  - Conclusion: this doll does not fall within class of dolls that are toys because not principally designed for amusement

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PRINCIPAL USE: USE VS USE

- Headings 7010 (glassware for conveyance) and 7013 (household and indoor decorative glassware, other than 7010 or 7018), HTSUS, have both been treated use provisions.
- Legal text of Heading 7013 excludes goods of Heading 7010 so must rule Heading 7010 in/out first.
- CBP criteria set forth in T.D. 96-7 to identify/classify the goods that fall in Heading 7010.
- *Carborundum* factors apply in conjunction with this criteria.

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PRINCIPAL USE: USE VS USE

- T.D. 96-7 Criteria for 7010
  1. [The container generally has] a large opening, a short neck (if any) and as a rule, a lip or flange to hold the lid or cap, [is] made of ordinary glass (colourless or coloured) and is manufactured by machines which automatically feed molten glass into moulds where the finished articles are formed by the action of compressed air;
  2. The ultimate purchaser"™s primary expectation is to discard/recycle the container after the conveyed or packed goods are used;
  3. [The container is sold] from the importer to a wholesaler/distributor who then packs the container with goods;
  4. [The container is sold] in an environment of sale that features the goods packed in the container and not the jar itself;
  5. [The container is used] to commercially convey foodstuffs, beverages, oils, meat extracts, etc.; 6. [The container is capable] of being used in the hot packing process; and 7. [The container is recognized] in the trade as used primarily to pack and convey goods to a consumer who then discards the container after this initial use.

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PRINCIPAL USE: USE VS USE



- Storage jars with airtight lids (HQ H032715)
  - Manufactured by automatic machines leaving seam, molding, embossing
  - Wide opening and a short neck
  - Sold to a wholesaler/ distributor who then packs them with mixed nuts, so actually used to convey foodstuffs and are not sold separately.

  The above appeared to operated in favor of 7010, but CBP then said:
  - Physical features *not indicative* of a packaging jar; they are attractive
  - Expectation user would save jar, not discard after nuts are consumed;
  - Environment of sale featured empty and filled;
  - Substantial difference between the wholesale and retail price of the final product.

  CBP concluded 7013, applicable subheading had a 22.5% duty

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ACTUAL USE

Three conditions per 19 C.F.R. § 10.131 through § 10.139

1. Such use is intended at the time of importation
   - Demonstrated by the entry itself *and must be claimed at time of entry*

2. The article is so used
   - Any import not so used does not qualify, even if mostly used that way

3. Proof of use is furnished within 3 years after the date the article is entered or withdrawn from warehouse for consumption.
   - Can be provided at entry where goods are inherently only used that way (e.g., lawnmower)

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AGRICULTURAL OR HORTICULTURAL USE

- 9817.00.50 Machinery, equipment and implements to be used for agricultural or horticultural purposes

and

- 9817.00.60 Parts to be used in articles provided for in headings 8432, 8433, 8434 and 8436, whether or not such parts are principally used as parts of such articles and whether or not covered by a special provision within the meaning of additional U.S. rule of interpretation 1(c)

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AGRICULTURAL OR HORTICULTURAL USE

- Subheadings 9817.00.50 and 9817.00.60 cover ag use products not found in specific “actual use” ag/hort provisions within the Ch 1-97 of the HTSUS

- “Machinery", "equipment" or "implements" used for "agricultural or horticultural purposes“ all defined terms. Need not be commercial.

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AGRICULTURAL OR HORTICULTURAL USE

Primary classification must be determined first because there are numerous exclusions

Notable exclusions include:

- general articles of plastics
- steel, aluminum, other metals, except structures
- textile articles
- certain machinery
- non-designated machinery parts (not falling within “machinery”, “equipment” or “implements” that fulfill the task, and by themselves accomplish the pursuit)

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PROTOTYPES

- Originals or models of originals in preproduction, production, or postproduction stage, used exclusively for development, testing, product evaluation, or quality control (legal note)
- If production or postproduction, may be design change from current production (including a refinement, advancement, improvement, development, or quality control in either the product or production).
- Can only be imported in limited commercial quantities (but sufficient for the purpose)
- Cannot be sold after importation; special rule for scrap.

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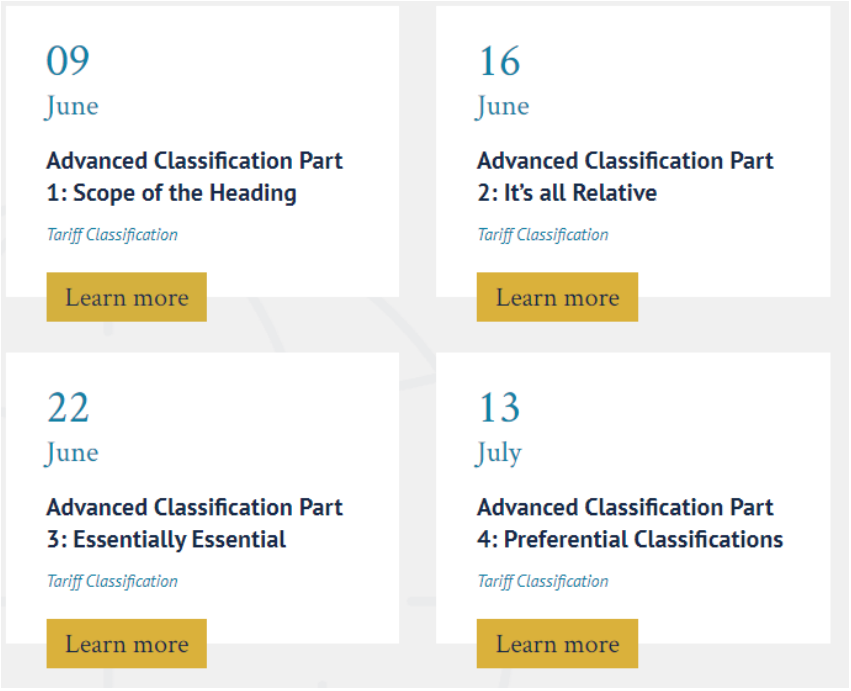

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