May 8, 2018

HQ H275567

FOR 2-06
OT:RR:CTF:ER
H275567 SMS

James Swanson
Director, Cargo Systems and Controls
U.S. Customs and Border Protection
1300 Pennsylvania Avenue, N.W.
Washington, DC 20229

Re: Request for Internal Advice; Application of 19 U.S.C. § 1321(a)(2)(C) from Foreign Trade Zones.

Dear Mr. Swanson:

This is in response to your request for internal advice dated March 10, 2016, as to the application of 19 U.S.C. § 1321(a)(2)(C) from Foreign Trade Zones ("FTZs").

FACTS:

On February 24, 2016, the Trade Enforcement and Trade Facilitation Act of 2015, Pub. L. 114-125, 130 Stat. 122 ("TFTEA"), was signed into law, which increased the *de-minimis* value exemption under 19 U.S.C. § 1321 from $200 to $800. Accordingly, beginning March 10, 2016, articles valued at $800 or less, which are imported by one person on one day, are eligible for duty free entry, under 19 U.S.C. § 1321(a)(2)(C). Because of this increase in value, merchants have expressed their desire to apply the *de-minimis* value exemption to withdrawals from FTZs. Specifically, bulk commercial merchandise shipped to the United States would be brought into the port limits and admitted into an FTZ. Once an e-Commerce purchase, valued at $800 or less is made, based on the aggregate purchase by a single customer on a single day, the merchants propose to enter the merchandise using weekly informal entry procedures pursuant to Section 321 of the Tariff Act of 1930, as amended (19 U.S.C. § 1321) and U.S. Customs and Border Protection ("CBP") Regulations: 19 C.F.R. §§ 10.151, 10.153, 143.21, and 143.23. Your

office seeks internal advice as to whether this proposed activity is consistent with the requirements of the law and regulations.

ISSUE:

Whether merchandise imported in bulk above $800, admitted into an FTZ, and entered for consumption in shipments under $800 qualifies for informal entry procedures pursuant to Section 321 of the Tariff Act of 1930, as amended (19 U.S.C. § 1321).

LAW AND ANALYSIS:

Section 901 of TFTEA amended 19 U.S.C. § 1321(a)(2)(C) to provide for the duty free entry of articles valued at $800 or less which are imported by one person on one day. TFTEA at § 901. Before the enactment of TFTEA, § 1321(a)(2)(C) provided for the duty free entry of articles valued at $200 or less which were imported by one person on one day. Section 321(a)(2)(C) mandates, however, that "[t]he privilege of this subdivision (2) shall not be granted in any case in which merchandise covered by a single order or contract is forwarded in separate lots to secure the benefit of this subdivision." 19 U.S.C. § 1321(a)(2)(C). This administrative exemption from duty was originally established by the Customs Simplification Act of 1953, Pub L. 67-243, 42 Stat. 651, the primary purpose of which is to save time, money, and complexity in the administration of customs laws. *See* Sen. R. No. 632, 83d Cong., 1st Session at 1 (1953). The legislative history indicates that the law "[eliminated] certain unnecessary annoyances and inequities which [plagued] both the Government and private parties engaged in the import-export business." *Id.*

The relevant regulations provide further clarification regarding the administrative exemption. For example, 19 C.F.R. § 10.151 provides that importations, made by one person on one day, valued at not over $800 may be entered under informal entry procedures free of duty and tax, unless there is reason to "believe that the shipment is one of several lots covered by a single order or contract and that it was sent separately for the express purpose of securing free entry therefor or of avoiding compliance with any pertinent law or regulation." 19 C.F.R. § 10.151. Consolidated shipments addressed to one consignee shall be treated for purposes of § 10.151 as one importation. 19 C.F.R. § 10.153(d). A "shipment" is defined as "the merchandise described on the bill of lading or other document used to file or support entry." 19 C.F.R. § 101.1. Further, 19 C.F.R. § 143.22 explains, in pertinent part, that CBP may require formal consumption or appraisement entry for any merchandise if deemed necessary for import admissibility enforcement purposes, revenue protection, or the efficient conduct of Customs business. *See e.g.,* HQ 545017 (Aug. 19, 1994).

You state that various companies assert that the requirements of Section 321 cannot attach to the merchandise, as it is admitted into the subzone, because 19 U.S.C. § 81c, allows for foreign and domestic merchandise to be brought into an FTZ without being subject to the

customs laws of the United States. These companies contend that the two provisions must be read together, which results in the requirements of Section 321 being applied when the merchandise is withdrawn from the FTZ and entered into the customs territory. Lastly, they submit that this interpretation is consistent with the "sense and purpose" of Section 321, intended by Congress; to spare the Government the expense of having to process entries of low value shipments.

Generally, FTZs are considered to be areas outside of the Customs territory of the United States for the purposes of payment of duty. The purpose of establishing FTZs is to "expedite and encourage foreign commerce and other purposes." 15 C.F.R. § 400.1. The FTZ Act, as amended (19 U.S.C. §§ 81a-81u) is administered in the context of evolving U.S. economic and trade policy and economic factors relating to international competition. Pursuant to the provisions of Section 3 of the FTZ Act:

> Foreign and domestic merchandise of every description, except such as is prohibited by law, may, without being subject to the customs laws of the United States . . . be brought into a zone and may be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated, or be manufactured . . . and be exported, destroyed, or sent into customs territory of the United States therefrom, in the original package or otherwise; but when foreign merchandise is so sent from a zone into customs territory of the United States it shall be subject to the laws and regulations of the United States affecting imported merchandise.

19 U.S.C. § 81c(a). Furthermore, informal entry procedures are applicable to withdrawals made from an FTZ or subzone. In pertinent part, the CBP's Foreign Trade Zone Manual states:

> In order to transfer zone merchandise into the Customs territory for consumption, the importer of record shall file a consumption entry under the procedures of 19 CFR 141 and 19 CFR 142. In addition, an appraisement, *informal*, or electronic entry for consumption may be filed as set forth in 19 CFR 143.

Section 9.7 of CBP's Foreign Trade Zone Manual (emphasis added); *see also* 19 C.F.R. § 143.21.

While FTZs are considered outside of the customs territory of the United States, they are not completely exempt from CBP laws and regulations. There are many regulations that apply to how merchandise is admitted into an FTZ and that govern the treatment of merchandise while in an FTZ. CBP regulations pertaining to FTZs are found at 19 C.F.R. Part 146. These regulations outline the specific information and documentation that are necessary to allow admittance into an FTZ. Pursuant to 19 C.F.R. § 146.32, CBP Form 214 accompanied with importation documentation, such as the bill of lading and shipping documents are required, at the point when merchandise is admitted into an FTZ. Additionally, the right to make entry needs to be

documented at the point of admittance into the zone. "The applicant for admission shall submit with the application a document similar to that which would be required as evidence of the right to make entry for merchandise in Customs territory under § 141.11 or § 141.12 of this chapter." 19 C.F.R. § 146.32(b)(2). This information is used to determine the description and value of the merchandise, whether the merchandise is allowed admittance into the zone, the status of the merchandise once in the zone, and who has the right to make entry once the merchandise is removed from the FTZ.

In this instance, in order to determine if the administrative exemption found under Section 321 is permissible, it is necessary to ascertain who is importing the subject merchandise, when this importation occurs, and whether the importation by that importer exceeds $800 on one day. The "date of importation" means:

> in the case of merchandise imported otherwise than by vessel, the date on which the merchandise arrives within the Customs territory of the United States. In the case of merchandise imported by vessel, "date of importation" means the date on which the vessel arrives within the limits of a port in the United States with intent then and there to unlade such merchandise.

19 C.F.R. § 101.1. Furthermore, the FTZ regulations define foreign merchandise as: "*imported* merchandise which has not been properly released from Customs custody in Customs territory." 19 C.F.R. § 146.1 (emphasis added). Therefore, prior to its admission into the FTZ, the merchandise has been "imported," but it simply has not been entered into the Customs territory of the United States.

CBP has considered various scenarios involving FTZs based on the foregoing definition. In HQ 228151, dated January 22, 1999, the arrival of merchandise in the United States, prior to admission into the FTZ was recognized as an importation. The broker inquired, for temporary importation under bond ("TIB") time limitation purposes, whether the date of importation would be the "actual date of importation" or the date the subject merchandise was withdrawn from the FTZ. CBP determined that the importation date, for purposes of the TIB, would be the date the merchandise originally arrived at the port limits of Miami. While the subject merchandise could be withdrawn from the FTZ, the date of importation and the one-year limitation provided for under TIB commenced from the date the merchandise was originally imported into the United States, not the date the merchandise was withdrawn from the FTZ. *See* HQ 228151 (Jan. 22, 1999). In HQ H055447, dated July 14, 2009, A&I Products, Inc. sought a ruling regarding the Generalized System of Preferences ("GSP") eligibility of merchandise admitted into an FTZ, to be later withdrawn and entered into the United States for domestic consumption. CBP held that the GSP requirement, that merchandise must be "imported directly" into the United States from a beneficiary country, was still met even though the merchandise was admitted into the FTZ, outside of customs territory. HQ H055447 (July 14, 2009). We cited HQ 230090, dated December 31, 2003, to demonstrate that the arrival of merchandise in the United States prior to the admission into an FTZ constituted an importation. *Id.* In HQ 547936, dated August 3, 2001,

CBP determined that while, under 19 C.F.R. § 146.65(b)(3), CBP may make an allowance to the entered value for merchandise that is damaged or deteriorated at the time of importation, because the time of importation is "the date on which the vessel arrives within the limits of a port in the United States," the allowance does not apply to merchandise that deteriorates after admission to an FTZ. HQ 547936 (Aug. 3, 2001). Accordingly, CBP has long established that importation occurs prior to the admittance of merchandise into an FTZ.

You state that various companies have argued that the manner in which CBP treats the country of origin marking exceptions, with regards to merchandise admitted into an FTZ, should be a model for the handling of the administrative exemption under Section 321. We disagree. Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. § 1304), provides that, unless excepted, every article of foreign origin

> imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such a manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article.

19 U.S.C. § 1304(a). By enacting 19 U.S.C. § 1304, Congress intended to ensure

> that the ultimate purchaser should be able to know by an inspection of the marking on imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will.

United States v. Friedlaender & Co., 27 C.C.P.A. 297, 302 (1940).

While Section 304 outlines the marking requirements, the statute specifically allows the Secretary of the Treasury, by regulations, to authorize the exception of various articles from these requirements. In pertinent part, 19 U.S.C. § 1304(a)(3) allows exceptions if:

> (F) Such article is imported for use by the importer and not intended for sale in its imported or any other form;
> (G) Such article is to be processed in the United States by the importer or for his account otherwise than for the purpose of concealing the origin of such article and in such manner that any mark contemplated by this section would necessarily be obliterated, destroyed, or permanently concealed . . . .

19 U.S.C. § 1304(a)(3)(F)-(G). Pursuant to this authority, the regulations found in subpart D of 19 C.F.R. Part 134, allow for specific exceptions to the marking requirements. Specifically, country of origin marking is determined from the status of the merchandise at the time of importation, unless the merchandise is substantially transformed, to allow a change in its origin

status. *See* 19 C.F.R. § 134.35. For country of origin marking purposes, a substantial transformation occurs when articles lose their identity and become new articles having a new name, character or use. *United States v. Gibson-Thomsen Co.*, 27 C.C.P.A. 267, 273 (1940); *see also Belcrest Linens v. United States*, 741 F.2d 1368, 1372 (Fed. Cir. 1984). Under this principle, the manufacturer or processor in the United States who converts or combines the imported article into a different article will be considered the "ultimate purchaser" of the imported article, and the article shall be excepted from marking. 19 C.F.R. § 134.35. However, the outermost containers of the imported articles must still be marked. *Id.*

In accordance with this exception, previous CBP rulings have held that, merchandise admitted and processed within an FTZ must be marked to indicate its country of origin at the time it is withdrawn from the FTZ and entered into the United States for consumption, unless it has been substantially transformed while in the FTZ. *See e.g.*, HQ 734076 (Sept. 10, 1991). However, as CBP noted in HQ 735399, dated December 22, 1993, merchandise that is withdrawn from the FTZ for consumption and not substantially transformed must satisfy the country of origin marking requirements at the time of entry. In this instance, admittance into the FTZ is not the reason that the marking requirement does not apply. Rather, this is due to the exception from marking due to the substantial transformation. CBP rulings merely allow for the admittance of merchandise into an FTZ to facilitate this processing and exception. CBP is not concerned with the marking in the FTZ so long as the merchandise is later properly marked for the ultimate purchaser in the U.S., as required by 19 U.S.C. § 1304.

In the context of *de minimis* value, there is no such exception that permits CBP to ignore the Section 321 requirement that merchandise is valued under $800 at the time of importation. Moreover, 19 U.S.C. § 1321 specifically prohibits the value amount to be manipulated in an effort to obtain duty free treatment. *See* 19 U.S.C. § 1321(a)(2)(C); 19 C.F.R. §§ 10.151 & 10.153. All U.S. Customs laws must be complied with before the goods are withdrawn from the FTZ, prior to entry into the Customs territory of the United States. *See* HQ 734076.

Under the pre-TFTEA *de minimis* value exemption, CBP has ruled that imports valued under $200 and made through online or catalog purchases and delivered directly to the purchaser, may enter duty-free. In HQ H236325, dated August 21, 2014, we found that jewelry purchased online from jewelry manufacturer, First Canadian, through Overstock.com Inc., and shipped directly to the purchaser in the U.S. was allowed administrative exemption. HQ H236325 (Aug. 21, 2014). We explained that the focus was on the individual importer for purposes of claiming the exemption and "the $200 per day value limit applies to each individual purchaser." *Id.* Because the individual orders of jewelry of $200 were shipped directly to the customer, the administrative exemption from duty applied. *Id.* We further highlighted that:

> The language of both 19 U.S.C. §1321 and 19 C.F.R. §10.151 put the focus of the exemption from duty on the importer of the merchandise, inasmuch as it may only be claimed on importations of merchandise of $200 or less by one person on one day. Thus, it is necessary to ascertain who is importing the merchandise, and whether the importation by that importer exceeds $200 on one day.

Id.

Here, you indicate that merchants request that the exemption apply after the merchandise is imported into the United States and is admitted into an FTZ. The shipments that arrive in the United States will be commercial bulk shipments that are stored in the FTZ until withdrawn for shipment to their final destination. As discussed above, the merchandise that is shipped to the United States is considered to have been imported before it is admitted to the subzone. 19 C.F.R. §§ 101.1, 146.1. Because the merchandise is already imported into the United States before admittance into the subzone, under 19 U.S.C. § 1321 and 19 C.F.R. § 10.151, we have to analyze the importation at this point in the transaction and not when it is withdrawn from the FTZ. Further, 19 C.F.R. § 10.153(d) provides that "[c]onsolidated shipments addressed to one consignee shall be treated for purposes of §§ 10.151 and 10.152 as one importation." 19 C.F.R. § 10.153(d).

If as described, the bulk shipments are consigned to merchants from the original country to the United States and then admitted into its FTZ subzone, 19 C.F.R. § 10.153(d) would prevent the goods leaving the FTZ duty free under 19 C.F.R. § 10.151 because the importation has already occurred. As we have noted in our prior decisions discussed above, one of the key factors preventing duty free entry is that the individual purchasers of the merchandise are unknown when the goods leave the country of export and are imported into the United States. Specifically, we have noted that the focus for claiming the exemption from duty under 19 U.S.C. § 1321 and 19 C.F.R. § 10.151 must be on the person importing the goods. Accordingly, where orders of merchandise worth $800 or less are ordered online or through a catalog and are delivered directly to the purchaser, such goods may enter duty free pursuant to 19 U.S.C. § 1321 and 19 C.F.R. § 10.151. For example, as we noted in HQ H236325, when a supplier filled a customer's order from inventory and shipped the merchandise directly to the customer in the United States, such shipments could be imported free of duty because the merchandise was imported by one person on one day. However, in this instance, the goods at issue are not being shipped directly to the ultimate purchaser. Instead, the merchants are acting as the importers, importing the goods as one consolidated shipment into an FTZ, and the ultimate purchaser is unknown at the time of importation. The retail customers then place orders with the importer once the goods have already been imported into the United States.

Because the merchandise is received in a bulk consolidated shipment at importation and housed in the FTZ before each individual order is shipped to the ultimate online consumer, 19 C.F.R. § 10.153(d) prevents the goods from leaving the FTZ duty free under 19 C.F.R. § 10.151. Because the aggregate value received by the importer at its distribution center in the FTZ is more

than $800, the duty-free exception in 19 C.F.R. § 10.151 does not apply. Under Section 321, the $800 per day limit applies to the merchant at the point of importation and not the individual purchasers determined subsequent to importation. Accordingly, the shipments and transactions proposed, valued over $800, do not qualify for duty-free treatment and informal entry under the administrative exception of Section 321.

HOLDING:

Based on the above, because the merchandise is imported in bulk and valued at greater than $800 at the time of importation and admission into an FTZ, the proposed transaction and FTZ withdrawals do not qualify for the administrative exemption from duty under 19 U.S.C. § 1321 and 19 C.F.R. § 10.151.

Please note that 19 C.F.R. § 177.9(b)(1) provides that "[e]ach ruling letter is issued on the assumption that all of the information furnished in connection with the ruling request and incorporated in the ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect."

You are to mail this decision to the Internal Advice requester no later than 60 days from the date of the decision. At that time, the Office of Trade, Regulations and Rulings, will make the decision available to CBP personnel and to the public on CBP's website, located at www.cbp.gov by means of the Freedom of Information Act and other methods of public distribution.

Sincerely,

Myles B. Harmon, Director
Commercial and Trade Facilitation Division