

March 4, 1998

CLA-2 RR:CR:GC 960697ptl

CATEGORY: CLASSIFICATION G-37/40

TARIFF NO.: 3004.90.9090; 3307.90.00.

Mr. Les Tobin

L. Tobin

5 Island Avenue

Miami, FL 33139

RE: Aroma Inhalers; NY 811343, 848883, B88485.

Dear Mr. Tobin:

This is in response to your letter of April 24, 1997, to the Area Director of Customs, New York, NY, requesting a ruling on the classification under the Harmonized Tariff Schedule of the United States (HTSUS), of two types of aromatic inhalers made in Thailand. Your letter and the samples were forwarded to this office for a response.

**FACTS:**

The merchandise consists of two "inhalers." One, referred to as an "Aroma Fragrance Inhaler" is a base metal canister type container with a "salt shaker type top" underneath the canister lid. Inside the container is a bag of herbs which produces the desired aroma. The herbs are: Citrus-Medical L. Var Sarcodactylus, Citrus-Chachitensis Hort., Clove-Eugenis Caryophyllata Tumb, Cinnamomum Japonicum sied, menthol crystals, camphor crystals and oil of peppermint. The aroma is released by removing the outer lid of the inhaler. The second article, referred to as a "Herbal Inhaler," is made of plastic. It consists of three parts. The bottom segment contains the active ingredients, which are liquid drops of the oils which produce the aroma. The center segment is designed to be inserted into the nostril so the concentrated aroma can be inhaled. The third segment is a cap which effectively closes the inhaler. The "Herbal Inhaler" contains menthol, camphor and oils of eucalyptus and peppermint. Both articles are products of Thailand, where they are reportedly widely used. While the aromas may "clear the nasal passages or sinus cavities", you state that you do not intend to make any claims as to the product's therapeutic qualities or benefits.

**ISSUE:**

Are the products classifiable as medicaments of heading 3004, HTSUS, mixtures of odiferous substances of heading 3302, HTSUS, or toilet preparations of heading 3307, HTSUS?

**LAW AND ANALYSIS:**

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Both versions of the articles under consideration contain a combination of herbs and/or oils which produce a scent which identifies the particular product. It is this particular scent, combined with the use for which the products will be imported, that presents us with the alternative classifications under consideration. When using this product, the overwhelming scent appears to be a combination of camphor and menthol. The following subheadings are under consideration:

3004 Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale: \* \*

3004.90.90 Other

Medicaments primarily affecting the eyes, ears or respiratory system:

3004.90.9075 Cough and cold preparations

Other:

3004.90.9080 Antihistamines

3004.90.9085 Other

3004.90.9090 Other

3302 Mixtures of odoriferous substances and mixtures (including alcoholic solutions) with a basis of one or more of these substances, of a kind used as raw materials in industry; other preparations based on odiferous substances, of a kind used for the manufacture of beverages.

3307 Pre-shave, shaving or after-shave preparations, personal deodorants, bath preparations, depilatories and other perfumery, cosmetic or toilet preparations, not elsewhere specified or included; prepared room deodorizers, whether or not perfumed or having disinfectant properties:

3307.90.00 Other

Of the three headings under consideration, one is easily rejected. The products under consideration are definitely mixtures of odoriferous substances and the resulting aroma is rather distinctive. However, in their condition as imported, they do not fall within heading 3302, HTSUS. Products classifiable in that heading are mixtures of odoriferous substances used as raw materials in various industries. These products are finished products to be sold at retail.

The two remaining headings under consideration cover products which can fall within the jurisdiction of the U.S. Food and Drug Administration (FDA) as either a drug

or a cosmetic scent. Therefore, in determining where the products are properly classified, we look at the treatment similar articles receive from the FDA. Traditionally, perfumes and scents have been considered cosmetics by the FDA. The Food, Drug and Cosmetic Act defines cosmetics as articles to be introduced into or otherwise applied to the body to cleanse, beautify, promote attractiveness or alter appearance (21 U.S.C. 321(i)). On the other hand, articles intended for use in the diagnosis, treatment or prevention of disease, and which are intended to affect the structure or any function of the body are usually considered to be drugs (21 U.S.C. 321(g)).

While cosmetics and drugs are both under the FDA's jurisdiction, the legal requirements applying to them are different. A claim that a perfume's aroma is good or beneficial, in general, is a cosmetic claim not requiring FDA approval before the product is sold. However, if a scent was marketed with the claim that it was for the treatment or prevention of allergies or some other symptom, this could be considered a drug claim requiring premarket approval.

We note that you are calling the particular scent formula produced by the samples "Chinese." This ruling will apply to that formulation only. Other formulations are called by such names as: "Tranquility," "Energize," "Inspiration," and "Nitecap." Since you have not provided specific information about the marketing of those products, we cannot suggest a classification.

However, these names suggest that the products are intended to produce a physical benefit to the user. As such, the products could be considered medicaments.

In the United States, the scents of camphor and menthol, either individually or in combination, are often used in and associated with products which are used for medicinal or hygienic purposes. However, simply being associated with a use is not always enough to require that a product be classified as a medicament. Some claim regarding the therapeutic benefit or use of the product usually needs to be made. Vicks cream and ointments which contain camphor, menthol and eucalyptus oil as active ingredients were classified as medicaments in heading 3004, HTSUS, by

NY Ruling 811343, dated June 29, 1995, because they were labeled and marketed as products which would relieve nasal and coughing due to colds. A rabbit-shaped sealed sachet filled with flax seed, lavender and peppermint called "Thumper" was classified as a medicament by NY B88485, dated August 25, 1997, because wording on the label indicated that the product is used to enhance one's well-being and ease away tension and eyestrain.

You have stated that you do not intend to make any claims regarding any therapeutic benefits or medicinal properties when you market these products. However, the two articles differ significantly in how they function. The "Herbal Inhaler", is specifically designed so that the herbal ingredients will either come into direct contact with the user, or will be inhaled deeply through the product's traditional inhaler end. This use, combined with the traditionally recognized therapeutic properties of the ingredients, makes it difficult to distinguish these inhaler containers from other similarly shaped articles which contain similar ingredients. We believe that the combination of factors exhibited by the "Herbal Inhaler" require that we consider it to be imported and offered for sale and use as a medicament within the scope of heading 3004, HTSUS.

When we turn to the canister you call an "Aroma Fragrance Inhaler", we encounter different circumstances and factors. The canister shaped device is designed so that the user will, at most, hold the article under the nose while sniffing the aroma. This positioning and use of the article can be considered consistent with perfuming or deodorizing products. This does not suggest a direct application of the product on or into the user's person. Rather, it is designed to release the aroma into the air surrounding the user.

Heading 3307, HTSUS, covers cosmetic and toilet preparations such as: shaving or after-shave preparations, personal deodorants, and other perfumery, cosmetic or toilet preparations, not elsewhere specified or included.

The fact that the scents of menthol and camphor are not usually associated with perfume or cosmetics in the United States, should not preclude classifying a product with such a scent in heading 3307. The ENs to Chapter 33 provide that the heading 3307 applies to products suitable for use as goods of the heading and which are put up in packages of a kind sold by retail for such use. The canister is put up in packages of a kind sold by retail. No attempt is being made to describe the qualities of its scent as being sweet or light. Use of the term "aroma", suggests a stronger smell than the term "herbal." The Random House Dictionary of the English Language lists "aroma" as a synonym for the word "perfume," but in comments says that "Aroma is restricted to a somewhat spicy smell." The product does have a sharp, spicy smell which gives it its distinctiveness.

In NY 848883, dated January 25, 1990, Customs ruled that a non-aerosol spray used as a room freshener, consisting of essences of eucalyptus, peppermint, rosemary, pine and clove with camphor and menthol was classifiable under subheading 3307.49.0000. The canister called an "Aroma Fragrance Inhaler" is not a spray room freshener, but it has similar components and is capable of disseminating its scent throughout a room, is properly classifiable under subheading 3307.90.00.

**HOLDING:**

The plastic article identified as a "Herbal Inhaler" is classified in subheading 3004.90.9090, HTSUS, as medicaments (excluding goods of subheading heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale: other; other.

The metal canister, identified as an "Aroma Fragrance Inhaler" is classified in subheading 3307.90.0000, HTSUS , as pre-shave, shaving or after-shave preparations, personal deodorants, bath preparations, depilatories and other perfumery, cosmetic or toilet preparations, not elsewhere specified or included; prepared room deodorizers whether or not perfumed or having disinfectant properties: other.

Sincerely,

John Durant, Director

Commercial Rulings Division

[Previous Ruling](#) [Next Ruling](#)

See also:

[Tariff No.: 3004.90.90 - Medicaments not elsewhere specified or included](#)

[Tariff No.: 3307.49.00 - Preparations for perfuming or deodorizing rooms, including odoriferous preparations used during religious rites, nesoi](#)

[Tariff No.: 3307.90.00 - Depilatories and other perfumery, cosmetic or toilet preparations. nesoi](#)