

HQ 562533

September 24, 2002

CLA-2 RR:CR:SM 562533 JLV

CATEGORY: NAFTA Certificate of Origin

TARIFF NO.: 8544.41; 8504.3140; 8504.4080

Director, Port of Nogales
U.S. Customs Service
Nogales, Arizona 85621

RE: Protest 2608-97-100006; verification of Certificate of Origin;
negative determination; denial of claim for NAFTA preference; 19
C.F.R. 181.74(c)

Dear Port Director:

You have forwarded Protest 2608-97-100006 which was filed on July 31, 1997, against your decision to deny a claim for tariff preference under the North American Free Trade Agreement (NAFTA). A list of 74 entries is attached to the protest. Our decision follows.

FACTS:

Protest 2608-97-100006 was timely filed on July 31, 1997, against your decision to deny the importer's claim for tariff preference under the North American Free Trade Agreement (NAFTA). Attached to the protest is a list of 74 entries, all of which were liquidated on May 2, 1997. A review of the list indicates that one entry number is duplicated. Therefore, only 73 entries are actually in issue. Furthermore, protestant notes that ten transformers, identified by part number, do not satisfy the RVC requirement and, therefore, are not part of the protest.

Of the 73 entries, one was made on December 21, 1993, two were made in December 1994, and the remainder were made in 1995. Inasmuch as the NAFTA preferential tariffs were not implemented until January 1, 1994, the entry made in 1993 would not appear to be eligible for any NAFTA claim. However, the original CF-7501 and the ACS data confirm that the entry was ID-released on December 21, 1993, with a claim for NAFTA preference at the time the summary filed January 6,

1994. Therefore, this entry was among the entries for which NAFTA preference was claimed during the period of January 1 to December 31, 1994. As such, Entry No. 264-xxxxxxx3 is considered with the other 1994 entries that were subject to verification by Customs.

Protest 2608-97-100006 concerns entries of products that were the subject of a verification performed by Customs. The verification involved claims for NAFTA preference for wire harnesses, transformers and power supplies that were imported during two distinct periods, 1994 and 1995. For the period of 1994, almost all of the claims for NAFTA preference were based on a post-importation claim dated December 20, 1994. However, in 1994 the importer did claim NAFTA preference at the time of filing the summary on the ID-release or at the time of entry for three of the 1994 entries. For the period of 1995, all of the claims for NAFTA preference were made at the time of entry.

The negative determinations and denials issued by Customs address the goods imported in both periods. The entries identified in Protest 2608-97-100006 are only the entries on which a claim for NAFTA preference was made at the time of entry. Notice of intent to issue a negative determination and to deny the NAFTA claim for wire harnesses was issued by Customs on February 20, 1996, and notice of intent to issue a negative determination and to deny the NAFTA claims for transformers and power supplies was issued by Customs on November 21, 1996. On April 11, 1997, Customs issued a CF29 notice of action taken to rate advance the entries of these goods.

For each family of harnesses, power supplies and transformers the protestant submits documentation, which includes an analysis of the RVC content, in support of the claim that the goods satisfy the RVC criteria under the NAFTA rule of origin for these goods. Separate calculations are submitted for 1994 and 1995. Protestant appears to agree with Customs that, contrary to the original claim by the exporter (manufacturer), the goods can only qualify if they satisfy the RVC rules applicable to the goods. This information was not available to Customs at the time of the on-site visit in December 1995. Although Customs had requested the information after the visit, the information was not provided prior to denial of the claim and liquidation of the entries in May 1997.

The Port Director has submitted documentation which provides a chronology of events related to the verification of the NAFTA claims for preference made by the importer and exporter (manufacturer) of the wire harnesses, transformers and power supplies. Because the verification involved both a post-entry claim (for most of the 1994 entries which are not at issue in this protest) and claims made at entry (for the entries at

issue in this protest), it is helpful to list the events that took place. The following is a list of the principal documents and a summary of the actions, in chronological order, that are relevant to the entries at issue:

Dec 12, 1995, typewritten notes of Customs Officers (at time of verification visit): indicated that Customs needed revised Certificates of Origin (COs) for 1995 (and 1994); cited evidence that the goods failed the change in tariff test, as claimed by manufacturer, and should be subject to RVC rules

Dec 19, 1995, CF28 issued: written request to the manufacturer for information, with reasons, as a result of verification visit; identified the two periods under consideration; asked for revised COs for 1994 and 1995, a revised bill of materials, and COs from suppliers for materials (parts) used in the production; copies to importer and broker

Jan 18, 1996, Letter from Customs to manufacturer, copies to importer and broker: a reminder that a request for information had been made; gave them 20 days to submit information; advised exporter that failure to comply would result in the issuance of a negative determination

Feb 20, 1996, CF29: issuance of a negative determination for 1994 and 1995 periods; determined that the goods did not qualify; negative determination only applied to harnesses under 8544.41; includes some of the entries on this protest; issued to importer, copies faxed to manufacturer and broker

Feb 22, 1996, letter from manufacturer to Customs, copies of letter to importer and broker: in response to negative determination, manufacturer stated that additional information would be submitted within 30 days (on or before March 21, 1996)

Mar 5, 1996, letter from Customs to manufacturer, copies to importer and broker: specified the problems with the information on power supplies and transformers; repeated that certain critical components needed to be identified, and that the corrected COs had not submitted; also noted that there was no evidence of specific identification used to identify the critical components

Nov 21, 1996, CF29: issuance of a negative determination and intent to deny NAFTA claims made by 520(d) claim of 12/20/94 for the period of 1994 and the NAFTA claims made for the goods entered during the period of 1995; addressed NAFTA claims for transformers and power supplies; issued to manufacturer, copies to importer and broker

Feb 18, 1997, CF29: notice of action taken with regard to denial of post-entry NAFTA claim of December 20, 1994 and to denial of NAFTA claims made at entry for 1995; indicated that importer could consider this notice as a reissued denial and negative determination (see Feb 20, 1996, for harnesses; see Nov 21, 1996 for transformers and power supplies); notice applied to 1994 entries; separate notice would be given for 1995 entries; issued to importer, copies to manufacturer and broker

Feb 18, 1997, CF29: notice of action taken with regard to denial of post-entry NAFTA claim of December 20, 1994; listed an additional 11 entries; issued to importer, copies to manufacturer and broker

Apr 11, 1997, CF29: notice of action taken with regard to denial of NAFTA claim based on negative determinations (see Feb 20, 1996, for harnesses; see Nov 21, 1996 for transformers and power supplies); applied to some entries made in December 1994 and all entries made in 1995; list of entries includes all of the entries on Protest No. 2608-97-100006; rate advance based upon negative determinations issued by this office; issued to importer, copies to broker and manufacturer

May 2, 1997: liquidation of the entries which are the subject of Protest No. 2608-97-100006

May 5, 1997, Letter from the importer: recognized that this was a late response; importer was unaware of the need for reply to letter of March 5, 1996 (letter had been sent to exporter/producer); submitted copies of COs from suppliers to support origin of critical materials; agreed that RVC applies to all; proposed to submit the worksheets on the RVC calculations for the goods

Jul 31, 1997: Protest filed on the 74 [sic] entries; attached to the protest was a document with calculations of RVC in support of the claim that the goods qualified under the NAFTA RVC rule of origin for all of the goods, except for ten specific transformers which were identified by part number; protestant also alleged that the NAFTA Certificates of Origin for these goods were on file with Customs

Protest 2608-97-100006 was forwarded to our office for review without comment on, or verification of documentation submitted by Protestant.

ISSUE:

Whether a claim for NAFTA tariff preference is properly denied when an exporter or producer fails to provide or make available information requested by Customs during a verification.

Or: alternative statement of the issue:

[Whether certain information, submitted with a protest that is timely filed against the denial of a claim for NAFTA preference, is sufficient to support protestant's challenge to the denial by Customs of a claim for NAFTA preference when the denial of the claim for NAFTA preference is based on the failure of the exporter or producer to provide or make available, in a timely manner, the information requested as a result of an on-site verification performed under 19 CFR §§181.71 through 181.76?]

LAW AND ANALYSIS:

Protest 2608-97-100006, filed on July 31, 1997, was filed on the 90th day after May 2, 1997, the date on which the entries were liquidated.

Under 19 U.S.C. §1514(c)(3) a protest of a decision, order or finding described in subsection (a) of that section shall be filed as follows:

shall be filed with the Customs Service within ninety days after but not before—
(A) notice of liquidation or reliquidation, or (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

This provision is implemented in §174.12(e) of the Customs Regulations. In this case, the protest was filed on the 90th day after liquidation and, therefore, is timely filed. The protest covers 73 entries.

Denial of a claim for NAFTA tariff preference, based on a negative determination, is a protestable action under 19 U.S.C. §1514 and Part 174 of the Customs Regulations.

The protestant does not challenge the sufficiency of the procedure by which Customs performed the verification and gave notice to the importer that Customs intended to issue a negative determination and deny the claims for NAFTA preference for the wire harnesses, transformers and power supplies. Pursuant to 19 CFR §§181.71 through 181.76 of the Customs Regulations, and specifically 19 CFR §§181.75 and 181.76, Customs performed a verification of the NAFTA claims by importer.

After a visit to the producer's premises, and after a review of the initial information received by Customs, it was apparent to Customs that the goods could not qualify solely on the basis of a change in tariff classification, as apparently claimed by the producer. However, the producer did not provide documentation that could support a regional value content criterion at the time of the visit. Therefore, Customs requested this information, in addition to revised Certificates of Origin, in order to complete the verification.

After several documented and specific requests for additional information (see written transmittals of December 19, 1995, January 20, 1996, March 5, 1996), Customs issued notices (see CF 29 notices dated February 20, 1996 and November 21, 1996) that it intended to make a negative determination and deny the NAFTA claims. In these written requests and notices Customs explained that the goods failed to qualify under the NAFTA change-in-tariff rules, as claimed by the producer at the time of the verification visit, and requested that the producer provide Customs with bills of materials, Certificates of Origin from its suppliers, revised Certificates of Origin for the three categories of goods (harnesses, transformers and power supplies) imported in 1994 and 1995, and other information to support the alternative rule of origin that is based on a regional value content (RVC) requirement.

Despite these requests by Customs, and despite assurance from the manufacturer on February 22, 1996, no documentation or other information was submitted to Customs. Customs finally took action and liquidated the entries in issue on May 2, 1997. Verification of the claims under §181.72(a)(3)(iii) and §§181.73 to 181.75 had been completed on the basis of the information available from the visit on premises, and action was taken after a negative origin determination had been issued under §181.75(b). The entries were liquidated in accordance with the determination that the goods did not qualify for NAFTA tariff preference.

Article 506 of the NAFTA sets forth the procedures for the conduct of verifications of claims for NAFTA preference. Article 511 of the NAFTA provides that the Parties shall establish and implement uniform regulations regarding the interpretation, application and administration of the rules of origin. Pursuant to Article 511, the NAFTA Parties issued uniform regulations which were implemented in the United States in Part 181 of Title 19, Code of Federal Regulations. With respect to the failure to comply with requests for verification, section 181.74(c) provides, in pertinent part, as follows:

§ 181.74 Verification visit procedures.

(c) *Failure to provide written consent or to cooperate or to maintain records.* Except as otherwise provided in paragraph (d) of this section, where a Canadian or Mexican exporter or producer of a good, * * * has not given its written consent to a proposed verification visit within 30 calendar days of receipt of notification pursuant to § 181.73 of this part, Customs may deny preferential tariff treatment to that good, * * * A failure on the part of the Canadian or Mexican exporter or producer of a good, or on the part of the Canadian or Mexican producer of a material, to maintain records or provide access to such records or otherwise cooperate during the verification visit shall mean that the verification visit never took place and may be treated by Customs in the same manner as a failure to give written consent to a verification visit. * * * [Underscoring added for emphasis].

The events subsequent to the visit by Customs in December 1995 support a conclusion that the producer failed to provide access to the records requested by Customs. Customs allowed more than thirty days to provide the producer with the opportunity to submit the information.

Whereas a producer has the right to protest a denial of a claim for NAFTA preference, if the denial is a result of the producer's failure to provide information within the meaning of §181.74(c) of the Regulations, then the decision to deny is based on the failure of the producer to comply with the procedural requirements in the verification procedures.

The failure of the producer to provide the information requested by Customs after the verification visit is a proper basis for Customs to

take action on the information available to it. In this case, the claims for NAFTA tariff preference were properly denied.

Based on the record of events during the verification procedure, it appears that Customs did give the exporter and importer proper notice and provided ample opportunity for compliance with the requests prior to issuance of the written denial on February 18, 1997 and April 11, 1997. The producer failed to provide the information, as requested, within a period of time that was in excess of the 30 days required under §181.74(c) of the Regulations. To allow such information to be submitted in connection with the protest would undermine the integrity of the regulatory scheme.

We conclude that the NAFTA claims for preference were properly denied based on the facts before Customs and the failure of the producer to supply the requested information.

HOLDING:

The protest was timely filed within 90 days after the date of liquidation of the 73 entries in question. The entries were rate advanced and liquidated in accordance with the negative determination and denial of the claims for NAFTA benefits for the three different products. In accordance with §181.74(c) of the Regulations, the failure of the producer to provide or make available, in a timely manner, the additional information identified during the visit constitutes a proper basis for denial of the claims for NAFTA preference. The protest should be denied.

In accordance with Section 3A(11)(b) of Customs Directive 099 3550-065, dated August 4, 1993, Subject: Revised Protest Directive, you are to mail this decision, together with the Customs Form 19, to the Protestant no later than 60 days from the date of this letter.

Sixty days from the date of the decision, the Office of Regulations and Rulings will make the decision available to Customs personnel and to the public on the Customs Home Page on the World Wide Web at www.customs.gov and by means of the Freedom of Information Act and other methods of public distribution.

Sincerely,

Myles B. Harmon
Director
Commercial Rulings Division

Attachment:

**Area Port of Champlain
Information Notice 07-F0-19
May 22, 2007**