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Thornburg**

Chapter 98 Tariff Mitigation Strategies: Agricultural Actual Use Provisions & Nairobi Protocol

Advanced Topics in Customs Compliance Conference

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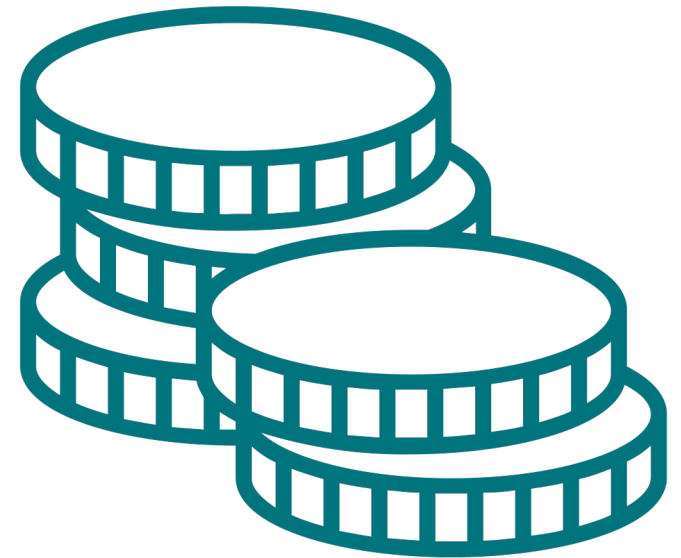
Agenda

- Why do we care?
- *Agriculture Actual Use Provisions*
 - Terms of subheadings 9817.00.50 & 9817.00.60
 - Three Part Test
 - Compliance Considerations
- *Nairobi Protocol*
 - Terms of 9817.00.96
 - Scope and Exclusions
 - Compliance Considerations



Complete Exemption from Certain Duties!

- Chapter 98's Agricultural Actual Use Provisions and Nairobi Protocol provide an exemption on the total value of the imported goods from certain trade remedy duties:
 - Section 301-China
 - Section 232- Steel & Aluminum
 - IEEPA
 - Fentanyl, Reciprocal, Brazil, India





AGRICULTURE ACTUAL USE PROVISIONS

Subheadings 9817.00.50 & 9817.00.60

- 9817.00.50: Machinery, equipment and implements to be used for agricultural or horticultural purposes
- 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 specific provision within the meaning of additional U.S. rule of interpretation 1(c)

Three Part Test

1. The commodity tariff classification of the article must not be among the long list of exclusions to heading 9817.00.50 or 9817.00.60 under Section XXII, Chapter 98, Subchapter XVII, U.S. Note 2.
2. Under GRI 1, the article must meet the terms of subheadings 9817.00.50 or 9817.00.60.
3. The merchandise must meet the actual use requirements (19 C.F.R. §§ 10.131–10.139).



Not Excluded by U.S. Note 2

- The commodity classification must not appear on the exclusion list in Section XXII, Chapter 98, Subchapter XVII, U.S. Note 2, which contains a broad list of ineligible goods.
- **This is a threshold requirement.**
- If an item's classification is excluded by Note 2, then it is automatically ineligible regardless of its use or function.
- *Articles provided for in
 - Chapter 72 (iron or steel)
 - Chapter 73 (articles of iron or steel) (except subheadings 7308.10, 7308.20, 7308.40 and 7308.90, 7315.81 through 7315.89, 7319.40, 7325.10, 7325.91, 7326.11 and 7326.19);
 - Chapter 76 (except heading 7610);
 - subheadings 8419.81.50, 8419.81.90, 8427.10, 8427.20, 8427.90 and 8431.20, headings 8432, 8433 and 8434, subheadings 8435.10 and 8435.90, heading 8436, subheadings 8438.80, 8468.10, 8472.90.40 and 8479.89, subheadings 8482.10.10 through 8482.99.65 (other than subheading 8482.91) and subheadings 8483.10.50 and 8485.10;
 - chapter 85 (except subheadings 8519.81.20, heading 8523, subheadings 8532.90 and 8539.90, heading 8542, subheadings 8543.11 through 8543.30, subheadings 8543.70.60, 8543.70.80; 8543.70.85; 8543.70.92; 8543.70.96, 8543.89.93, 8543.90, 8544.70, 8546.90, 8547.20 and 8548.90);

Meets the Terms of the Heading

- The article must fall within the language of heading 9817.00.50 or 9817.00.60, as determined under GRI 1:
 - 9817.00.50: Must be a *machine, equipment, or implement* used for agricultural or horticultural purposes.
 - 9817.00.60: Must be *parts* used in machinery classified under HTSUS headings 8432, 8433, 8434, or 8436.
- An agricultural or horticultural pursuit must be clearly identified.

Terms of the Subheading 9817.00.50

- 9817.00.50:
 - *Machine*: A mechanically, electrically or electronically operated device for performing a task.
 - *Equipment*: The set of articles or physical resources serving to equip a person or thing: as (1) the implements used in an operation or activity.
 - *Implement*: 1. An article serving to equip. 2. a device used in performance of a task.
 - *Agriculture*: The science, art, and practice of cultivating the soil, producing crops, and raising livestock.
 - *Horticulture*: The science and art of growing fruits, vegetables, flowers, or ornamental plants.
- The importer must establish that the article is a “machine”, “equipment” or “implement” and an agricultural or horticultural pursuit must be identified.

Terms of the Subheading 9817.00.60

- 9817.00.60: **Parts** used in **machinery** of headings 8432, 8433, 8434 or 8436
- **Heading 8432**: Agricultural, horticultural or forestry machinery for soil preparation or cultivation; lawn or sports ground rollers; parts thereof:
- **Heading 8433**: Harvesting or threshing machinery, including straw or fodder balers; grass or hay mowers; machines for cleaning, sorting or grading eggs, fruit or other agricultural produce, other than machinery of heading 8437; parts thereof:
- **Heading 8434**: Milking machines and dairy machinery, and parts thereof:
- **Heading 8436**: Other agricultural, horticultural, forestry, poultry-keeping or bee-keeping machinery, including germination plant fitted with mechanical or thermal equipment; poultry incubators and brooders; parts thereof:

Actual Use Requirements

- The importer must certify and provide proof that the item is actually used for agricultural or horticultural purposes:
 - (i) The item was intended for such use **at the time of importation**.
 - (ii) The item was **actually used** for that purpose **after entry**.
 - (iii) Supporting documentation (e.g., affidavits or records) is submitted **within 3 years of entry**.
- Actual use is required for agricultural or horticultural purposes in an agricultural or horticultural setting.

Compliance Considerations



- Subheadings 9817.00.50 and 9817.00.60 are special classification provisions, so a comprehensive classification analysis is critical!
 - For example, the primary commodity classification must *not* be excluded by U.S. Note 2.
- 9817.00.60 requires a “parts” classification analysis:
 - If an item is dedicated solely for use with another article and is not a separate and distinct commercial entity, or is an integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article, then the item is a part.
- For 9817.00.60, U.S. Note 2 excludes articles provided for in headings 8432, 8433, 8434, or 8436. But, the exclusionary note refers only to “articles” and not “parts”!
 - See HQ H264768 (Sept. 7, 2017).

Compliance Considerations



- Declaration of intent as to the actual use of the imported merchandise.
- Proof of use by importer that proves actual use; retain records 3 years, may be inspected by CBP.
- Within 3 years of date of entry, importer submits a certificate executed by actual end-user or person with knowledge of actual end use.
 - If a blanket certificate is used for multiple items, it must be particular to importer during a set period, with a statement in detail of the entry, merchandise sold to such end user and use during the period.
 - There is no set format for the certification, but it should include the requisite information for CBP to confirm compliance of the use of the product for an agricultural purpose.
 - End user is the provider of the certificate, not the distributor.
- The ultimate question is whether the merchandise is entered into a chain of commerce that will result in the required end-use, and the importer may show this through evidence of a sale to an appropriate end-user or distributor, or by tracing the articles along the distribution chain until such use can be established.
- When evaluating the sufficiency and type of evidence presented, CBP may consider a range of factors, including, but not limited to, the nature of the imported article, level and type of distribution, value and size of the importation, whether the part may be used with multiple types of equipment and machinery and whether the importer has genuine knowledge of end-use.

What Every Member of the
Trade Community Should Know About:

The Agricultural Actual Use Provisions

Tariff Classification Issues of Headings
9817.00.50 and 9817.00.60



U.S. Customs and
Border Protection

AN INFORMED COMPLIANCE PUBLICATION

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U.S. CUSTOMS and BORDER PROTECTION

<https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/ICP-Agricultural-Actual-Use-Provisions-2015-Final.pdf>

- CBP is not issuing any binding rulings on the agricultural actual use provisions because of pending cases at the CIT:
 - Great States Corporation DBA American Lawn Mower Co. v. United States, Court No. 24-00216;
 - Melnor Inc. v. United States, Court No. 25-00052; and
 - Hydro Gear v. United States, Court No. 23-00044.



NAIROBI PROTOCOL

Subheading 9817.00.96



- The Nairobi Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials of 1982, Pub. L. No. 97-446, 96 Stat. 2329, 2346 (1983) established duty-free treatment for certain articles for the handicapped.
- Presidential Proclamation 5978 and Section 1121 of the Omnibus Trade and Competitiveness Act of 1988, provided for the implementation of the Nairobi Protocol into subheadings 9817.00.92, 9817.00.94, and 9817.00.96, HTSUS.
- 9817.00.96: Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles: Other.

Presidential Proclamation 6821 (Sept. 12, 1995)

- Pre-1995: Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons
- Proclamation (Annex II): Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; **parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles**
 - Proclamation 6821 expanded the scope of Nairobi Protocol to allow for most parts and accessories
- Scope of subheading covers:
 - (1) articles that are specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons, or
 - (2) parts and accessories that are specially designed or adapted for use in the foregoing articles

Scope and Exclusions

- U.S. Note 4(a): The term “blind or other physically or mentally handicapped persons” includes any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working.
 - “This non-exhaustive list of activities indicates that the definition of handicapped persons should be interpreted liberally and encompasses a wide range of conditions, as long as the condition substantially inhibits a person's ability to perform essential daily tasks.”
- U.S. Note 4(b): 9818.00.96 does not cover:
 - articles for acute or transient disability;
 - spectacles, dentures, and cosmetic articles for individuals not substantially disabled;
 - therapeutic and diagnostic articles; or
 - medicine or drugs

Analytical Framework (*Sigvaris*)

- The plain language of the heading focuses the inquiry on the “persons” for whose use and benefit the articles are “specially designed,” and not on any disorder that may incidentally afflict persons who use the subject merchandise.
 - Ask first, for whose, if anyone’s, use and benefit is the article specially designed? Then, are those persons physically handicapped?
 - In other words, we must consider whether such persons are suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities.
- *Sigvaris, Inc. v. United States*, 899 F.3d 1308 (Fed. Cir. 2018)

Analytical Framework

1. Is the article excluded by U.S. Note 4(b)?
 - E.g. therapeutic and diagnostic articles or articles for acute or transient disability?
2. Is the article specially designed for the use or benefit of the blind or physically and mentally handicapped persons?
 - *Sigvaris* factors and Treasury Decision 92-77, 26 Cust. B. & Dec. 240 (1992)
3. Is the item a component part that is specifically designed to work exclusively with a device classifiable in subheading 9817.00.96?



U.S. Note 4(b) Exclusions



- What is a therapeutic article?
 - “Therapeutic” articles are those that are used to heal or cure the condition causing a handicap, as opposed to those articles which are designed to compensate for, or adapt to, the handicapped condition.
 - *Richards Medical Co. v. United States*, 720 F.Supp. 998 (CIT 1989), aff'd, 910 F.2d 828 (Fed.Cir.1990)
- What is a diagnostic article?
 - Articles that “assist a health professional to detect the signs and symptoms of a condition or disease.”
 - *Trumpf Med. Sys., Inc. v. United States*, 753 F.Supp.2d 1297, 1308 (CIT 2010)

Sigvaris Specially Designed Factors

- To be “specially designed,” the subject merchandise must be intended for the use or benefit of a specific class of persons to an extent greater than for the use or benefit of others.
 1. Physical properties of the article itself (e.g., whether the article is easily distinguishable in design, form and use from articles useful to non-handicapped persons);
 2. Presence of any characteristics that create a substantial probability of use by the chronically handicapped, so that the article is easily distinguishable from articles useful to the general public and any use thereof by the general public is so improbable that it would be fugitive;
 3. Importation by manufacturers or distributors recognized or proven to be involved in this class or kind of articles for the handicapped;
 4. Sale in specialty stores that serve handicapped individuals; and
 5. Indication at the time of importation that the article is for the handicapped.

Is the item a component part?

- CBP has determined that component parts that are specifically designed to work exclusively with a device classifiable in subheading 9817.00.96, HTSUS, are eligible for subheading 9817.00.96, HTSUS treatment.
 - HQ H349574 (Sept. 25, 2025)
- Requires “parts” classification analysis:
 - If an item is dedicated solely for use with another article and is not a separate and distinct commercial entity, or is an integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article, then the item is a part.

Compliance Considerations



- Subheading 9817.00.96 is a special classification provision, so a comprehensive classification analysis is critical!
- Nairobi Protocol eligibility under 9817.00.96 is narrow and fact-dependent – CBP rulings turn on product design, marketing, distribution, and whether the article is clearly dedicated to permanent impairments at importation.
- Consider CBP ruling request but be prepared for heavy factual analysis.



Thank you!

Any Questions?

Please send any follow-up questions to:

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