

GENERAL NOTICE

19 CFR PART 177

MODIFICATION OF RULING LETTER ALLOWING CONTAINERS CONTAINING RESIDUAL CHEMICALS TO BE ENTERED AS EMPTY CONTAINERS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of modification of a headquarters ruling letter allowing containers containing residual chemicals to be entered as empty containers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (“CBP”) is modifying one ruling letter allowing containers containing residual chemicals to be entered as empty containers. Notice of the proposed 138 CUSTOMS BULLETIN AND DECISIONS, VOL. 43, NO. 28, JULY 17, 2009 action was published in the Customs Bulletin, Vol. 42, No. 35, on August 20, 2008.

DATE: This action is effective for containers arriving in the United States on or after August 16, 2009.

FOR FURTHER INFORMATION CONTACT: Christina Kopitopoulos, Cargo Security, Carriers, and Immigration Branch, at (202) 325–0217.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter “Title VI”), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the Customs Bulletin, Vol. 42, No. 35, on August 20, 2008, proposing to modify HQ 113129, dated July 12, 1994, which allowed containers meeting the requirements of 19 U.S.C. 1322(a) and 19 CFR 10.41a as instruments of international traffic (IITs) and containing residual chemicals to be entered as empty containers. In order to be consistent with CBP's treatment of similar commodities, such as petroleum slops, and to ensure the safety and security of the transportation of such containers and CBP Officers who examine them, CBP proposed that the containers should not be entered, nor manifested, as empty, and the chemical residue contained should be classified, entered, and manifested.

Fourteen (14) comments were received in response to the notice. Numerous comments were received seeking clarification of the scope of the modified ruling, i.e., was it limited to steel containers and chemicals? CBP in this notice is specifically modifying HQ 113129, U.S. CUSTOMS AND BORDER PROTECTION 139 and any other ruling not specifically identified that is contrary to the determination set forth in this notice. Containers with cargo, regardless of the amount of the cargo, will need to be manifested and entered in compliance with all customs laws.

One commenter suggested CBP use the term "portable tank" to reference these containers. CBP agrees that this is one type of container that is at issue in the proposed modification and this notice.

Henceforth, when CBP refers to containers, that reference includes "portable tanks," but is not limited to that type of container.

Three commenters stated that their containers are already marked and placarded as required by the Department of Transportation and the shipping documentation accompanying the containers includes a Material Safety Data Sheet that describes the residue inside the container, so the modified ruling is unnecessary. CBP disagrees, as these containers are not actually empty and therefore are not in compliance with the advance cargo information transmission requirements under 19 CFR 123.91 and 123.92. They are also not in compliance with the requirement to make entry pursuant to 19 CFR 141.4 as they are not merely empty IITs. The lack of compliance with customs laws is not only a security risk to the United States, but a potential risk to the health and safety of CBP officers unaware of the volume or contents of the containers they are encountering. In addition, the revenue collection responsibilities of CBP are affected due to such lack of compliance.

Numerous commenters stated that they fail to see how the new requirements will protect CBP officers, and that those officers should not be opening containers used to transport hazardous materials nor should CBP's treatment of the containers differ based on the contents. CBP disagrees as CBP officers have a right to know if they are in close proximity to, or working with, an empty container or a partially empty container that may pose a risk not only to the United States, but also to their own health and safety.

Numerous commenters stated that the costs associated with filing the entries and manifests would be burdensome resulting in exorbitant expenses. CBP is aware that costs for these containers would increase as advance cargo declarations and entries would be required to be filed. As to manifests, empty containers have always been required to be manifested, and a container must be empty to be

manifested as such. Furthermore, these costs would merely bring the containers in compliance with customs laws they should have been subject to all along.

A number of commenters stated they believe this requirement is new and should be submitted to OMB as a new information collection request and/or is a new significant rulemaking. CBP disagrees, and notes that this modification merely brings these containers in line with customs legal requirements from which they were incorrectly exempted in HQ 113129.

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Three commenters stated that under NAFTA these new requirements will not generate revenue. CBP demurs because whether revenue is generated is not pertinent since this change is being made for the safety and the security of the CBP officers at the ports of entry. One commenter stated that it is common industry practice not to “clean and purge” bulk packaging if it is to be refilled with the same or compatible products. This common industry practice does not obviate the trade’s responsibility for knowing what is in the containers, where they originated, or the amount actually in the containers. If anything, it further illustrates the need for manifesting and filing entries on the residue.

Two commenters stated that in terms of exact quantities, railcars and bulk containers are filled to visible capacity, but not “scaled” until well en route. CBP believes that industry practice must be reconciled with CBP’s advance cargo information transmissions required pursuant to 19 CFR 123.91 and 123.92, which provide that the quantity information is required 2 hours prior to arrival for rail, 1 hour prior to arrival for non-FAST truck carriers, and 30 minutes prior to arrival for FAST truck carriers.

Numerous commenters stated the modified ruling will increase border crossing congestion, decrease the effectiveness of FAST lanes, and underutilize ACE. CBP disagrees with this statement as there is no evidence supporting these claims beyond these unsubstantiated statements.

Two commenters expressed reservations in relying on an unrelated party to provide “estimated” quantities of residue or to know what is in the shipping containers prior to importation. Any information provided by an unrelated party could be incorrect and lead to penalties. CBP believes again that this further bolsters the need to receive accurate advance cargo information and entries on the residue in these containers. Either the carrier or importer is responsible to CBP for knowing what is in the containers, where it originated, or the actual amount that has been deemed to be “residue” for purposes of manifesting and entry.

One commenter stated that they believe there exists the potential for environmental waste because of U.S. suppliers refusing the return of containers with residuals. The commenter offers no information beyond the unsubstantiated statement that this concern would cause a prohibitive increase in refused containers leading to environmental waste.

One commenter asked about the liability involved in “dedicated” shipping containers that just go back and forth across the border to move the same chemical and are never cleaned, but may be used by the foreign customer for whatever purposes they want, and are then sealed for movement across the border. CBP does not believe those containers would be outside the scope of this notice, if they fell

within the class of containers described herein arriving at a United States border.

One commenter asked if new drums would require documentation that the container is new and unused. CBP will not require certification that containers are new. Used and new containers are used as IITs in international trade in all contexts and certifications as to their new or used status is not required.

Two commenters sought a definition of "empty." CBP clarifies with the following. Empty means an empty container. There is no de minimus allowance.

As stated in the proposed notice, this modification is specifically referring to Headquarters Ruling Letter ("HQ") 113129, dated July 12, 1994 (Attachment). This notice also covers any rulings raising this issue which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the containers subject to this notice should have advised CBP during this notice period.

As mentioned above, fourteen (14) comments were received in response to the proposed notice. The comments and CBP's response are discussed above. Accordingly, pursuant to 19 U.S.C. 1625(c)(1), CBP is modifying HQ 113129 and any other ruling not specifically identified that is contrary to the determination set forth in this notice and HQ H026715 (Attachment) to correctly reflect CBP's position regarding the treatment of containers containing residual chemicals.

DATED: June 19, 2009

JEREMY BASKIN,
Director,
Border Security and Trade Compliance Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
HQ 113129
July 12, 1994
BOR-4-07-CO:R:IT:C 113129 GOB

CATEGORY: Carriers
ROGER E. GOBROGGE
PATENT ATTORNEY
DOW CORNING CORPORATION
P.O. Box 994
Midland, Michigan 48686-0994

RE: Instruments of International traffic; 19 U.S.C. 1322; 19 CFR 10.41a;
Empty containers

DEAR MR. GOBROGGE:

This is in response to your letter dated May 11, 1994. You have also provided additional information to us since that time.

FACTS:

On behalf of Dow Corning, you request a ruling as follows. You request a ruling that certain items be designated as instruments of international traffic within the meaning of 19 CFR 10.41a. You describe the items as follows: 40 steel containers which are 20 feet by eight feet by eight feet. Some of the containers are stainless steel, others are carbon steel. The containers are used to ship chemicals.

You also request a ruling with respect to the importation of certain residual chemicals in these containers. In your letter of May 11, 1994, you describe the facts thusly:

In a proposed transaction, Dow Corning will fill one of these large containers with a chemical (eg., ethyltrichlorosilane). The filled container will be exported to its subsidiary (eg., in Barry, Wales). The Welsh plant will empty this container and use the chemical therein to produce products. The empty container will be imported back into the United States, cleaned, refilled and re-exported.

By virtue of the size of the container, it is nearly impossible to empty it completely. Accordingly, when the container is imported into the United States, it will contain some residual of the original chemical, i.e., it will not be completely empty.

We could attempt to quantify the chemical (which would be very difficult from a practical standpoint) and reimport it as returned US goods under HTS 9801.

Alternatively, we could consider the container "empty". Recently, however, Dow Corning discovered that such residuals are covered by the Toxic Substances Control Act (TSCA). As such, there would appear to be an inconsistency in attaching a TSCA certificate to an "empty" container.

In a letter dated June 20, 1994, you provided the following additional information:

. . . Each container holds approximately 3600 gallons, although the contents are generally weighed rather than measured in volume.

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. . . The residual in these tanks is generally about 50 gallons [approximately 1.4 percent of the amount when the container is filled], although this can vary over a wide range.

. . . The residual in these containers is generally not discarded (unless the tank is to be repaired). Rather, additional chemicals are merely added to the tank.

ISSUES:

1. Whether the subject items may be designated as instruments of international traffic within the meaning of 19 U.S.C. 1322(a) and 19 CFR 10.41a.
2. The appropriate manner in which to enter the containers which contain residual chemicals.

LAW AND ANALYSIS:

19 U.S.C. 1322(a) states in part:

Vehicles and other instruments of international traffic, of any class specified by the Secretary of the Treasury, shall be excepted from the application of the customs laws to such extent and subject to such terms and conditions as may be prescribed in regulations or instructions of the Secretary of the Treasury.

The Customs Regulations issued under the authority of 19 U.S.C 1322 are contained in 19 CFR 10.41a. 19 CFR 10.41a(a)(1) designates lift vans, cargo vans, shipping tanks, skids, pallets, caul boards, and cores for textile fabrics as instruments for international traffic.

19 CFR 10.41a(a)(1) also authorizes the Commissioner of Customs to designate as instruments of international traffic such additional articles or classes of articles as he shall find should be so designated. Instruments so designated may be released without entry or the payment of duty, subject to the provisions of 19 CFR 10.41a.

To qualify as an instrument of international traffic within the meaning of 19 U.S.C. 1322(a) and 19 CFR 10.41a, an article must be used as a container or holder; the article must be substantial, suitable for and capable of repeated

use, and used in significant numbers in international traffic. See Headquarters decisions 108084, 108658, 109665, and 109702.

After a review of the information submitted, we determine that the steel containers meet the requirements to be designated as instruments of international traffic.

We also determine that under the facts described supra, the containers which contain a residue of chemicals may be entered as empty. This determination is limited to the facts of this case, including the fact that the residue is a very small part of the amount of a full container (approximately 1.4 percent) and the fact that the residue remains in the container because it is virtually impossible to completely empty the container.

As we informed you telephonically, we are unable to express any opinion with respect to any requirements of the laws and regulations administered by the Environmental Protection Agency.

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HOLDINGS:

1. The subject steel containers are designated as instruments of international traffic within the meaning of 19 U.S.C. 1322(a) and 19 CFR 10.41a.
2. Under the facts of this case, the steel containers may be entered as empty containers.

ARTHUR P. SCHIFFLIN,
Chief Carrier Rulings Branch.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
HQ H026715
June 19, 2009
RR:BSTC:CCI H026715 CK

CATEGORY: Carriers
ROGER E. GOBROGGE
PATENT ATTORNEY
DOW CORNING CORPORATION
*P.O. Box 994
Midland, Michigan 48686-0994*

RE: Instruments of International Traffic; 19 U.S.C. 1322; 19 CFR 10.41a;
Entry and Manifesting of Containers

DEAR MR. GOBROGGE:

This is in regard to ruling letter HQ 113129, dated July 12, 1994, in which we held that the containers at issue containing residual chemicals therein were "instruments of international traffic" and should be entered as empty. We have reconsidered our position that the containers should be entered as empty and we are thus informing you we are modifying our position as to this holding. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice of the proposed action was published on August 20, 2008, in Volume 42, Number 35, of the CUSTOMS BULLETIN. CBP received 14 comments in response to the notice.

FACTS:

In your letters of May 11, 1994 and June 20, 1994, on behalf of Dow Corning, you requested a ruling that certain items be designated as instruments of international traffic within the meaning of 19 CFR 10.41a. You describe the items as follows: 40 steel containers which are 20 feet by eight feet by eight feet. Some of the containers are stainless steel, others are carbon steel. The containers are used to ship chemicals. You also request a ruling with respect to the importation of certain residual chemicals in these containers.

You describe the facts thusly:

In a proposed transaction, Dow Corning will fill one of these large containers

with a chemical (eg., ethyltrichlorosilane). The filled container will be exported to its subsidiary (eg., in Barry, Wales). The Welsh plant U.S. CUSTOMS AND BORDER PROTECTION 145 will empty this container and use the chemical therein to produce products. The empty container will be imported back into the United States, cleaned, refilled and re-exported.

...

By virtue of the size of the container, it is nearly impossible to empty it completely. Accordingly, when the container is imported into the United States, it will contain some residual of the original chemical, i.e., it will not be completely empty.

...

We could attempt to quantify the chemical (which would be very difficult from a practical standpoint) and reimport it as returned US goods under HTS 9801.

Alternatively, we could consider the container "empty". Recently, however, Dow Corning discovered that such residuals are covered by the Toxic Substances Control Act (TSCA). As such, there would appear to be an inconsistency in attaching a TSCA certificate to an "empty" container.

... Each container holds approximately 3600 gallons, although the contents are generally weighed rather than measured in volume.

... The residual in these tanks is generally about 50 gallons [approximately 1.4 percent of the amount when the container is filled], although this can vary over a wide range.

... The residual in these containers is generally not discarded (unless the tank is to be repaired). Rather, additional chemicals are merely added to the tank.

ISSUES:

1. Whether the subject items may be designated as instruments of international traffic within the meaning of 19 U.S.C. 1322(a) and 19 CFR 10.41a.

2. The appropriate manner in which to enter the containers which contain residual chemicals.

LAW AND ANALYSIS:

19 U.S.C. 1322(a) states in part:

Vehicles and other instruments of international traffic, of any class specified by the Secretary . . . , shall be excepted from the application of the customs laws to such extent and subject to such terms and conditions as may be prescribed in regulations or instructions of the Secretary

...

The Customs and Border Protection ("CBP") regulations issued under the authority of 19 U.S.C 1322(a) are contained in 19 CFR 10.41a. Section 10.41a(a)(1) designates lift vans, cargo vans, shipping tanks, skids, pallets, caul boards, and cores for textile fabrics as instruments for international traffic.

Section 10.41a(a)(1) also authorizes the Commissioner of CBP to designate as instruments of international traffic such additional articles or classes of articles as he shall find should be so designated. Instruments so designated may be released without entry or the payment of duty, subject to the provisions of 19 CFR 10.41a.

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To qualify as an instrument of international traffic within the meaning of 19 U.S.C. 1322(a) and 19 CFR 10.41a, an article must be used as a container or holder; the article must be substantial, suitable for and capable of repeated use, and used in significant numbers in international traffic. See Headquarters decisions 108084, 108658, 109665, and 109702.

After a review of the information submitted, we determine that the steel containers meet the requirements to be designated as instruments of international traffic.

In order to be consistent with CBP's treatment of similar commodities, such as petroleum slops, and to ensure the safety and security of the transportation of such containers and the CBP officers who may examine or work in close proximity to them, CBP believes that these containers should not be

entered as empty, nor should they be manifested as empty. This position is in furtherance of the advance cargo information reporting requirements authorized pursuant to 19 U.S.C. 2071 note; and the implementing CBP regulations set forth in 19 CFR 4.7; 123.91; and 123.92.

Petroleum slops is a generic term of the petroleum industry used to describe the pumpable residue crude oil that is washed or scraped from the inside of petroleum cargo tanks on vessels. Since the gross weight (expressed in pounds or kilos) of slops cannot be determined until they are generated, the weight must be estimated prior to arrival in the U.S., so as to be in compliance with 19 CFR 4.7. The slops can be manifested as "crude oil residue," "crude oil slops" or other product specific slops. The petroleum slops of foreign origin must also be entered as imported merchandise.

With respect to the residual chemicals under consideration, in your letter of May 11, 1994, you offered to quantify the amount of chemicals upon importation and enter the chemical residue as American Goods Returned (Chapter 9801, Harmonized Tariff Schedule of the United States ("HTSUS")). We have determined that this is the more accurate procedure for the subject residual chemicals to be entered, should they so qualify for the aforementioned classification, and is in accord with the purpose of the aforementioned advance cargo information reporting requirements. Since, the exact amount of the residual chemical may not be known at the time the advance cargo information is required to be transmitted, the importer may estimate the amount when providing that information to the carrier for transmitting to CBP. Additionally, the same estimated amount should be used at the time of entry of the chemicals. Of course, if a more precise amount is obtained after arrival then the entry should be amended.

HOLDINGS:

1. The subject steel containers are designated as instruments of international traffic within the meaning of 19 U.S.C. 1322(a) and 19 CFR 10.41a.
2. The subject steel containers may not be manifested, and entered, as empty containers. Furthermore, the chemical residue within the containers should be classified, entered, and manifested

EFFECT ON OTHER RULINGS:

HQ 113129, dated July 12, 1994 is hereby MODIFIED.

JEREMY BASKIN,
Director,
Border Security and Trade Compliance Division.