DEPARTMENT OF HOMELAND SECURITY

U.S. CUSTOMS AND BORDER PROTECTION

NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING CERTAIN NETWORK TAP PRODUCTS

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

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection ("CBP") has issued a final determination concerning the country of origin of certain network tap products known as Net Optics Slim Tap network taps. Based upon the facts presented, CBP has concluded that the country of origin of the Net Optics Slim Tap network taps is China for purposes of U.S. Government procurement.

DATES: The final determination was issued on April 18, 2017. A copy of the final determination is attached. Any party-at-interest, as defined in 19 C.F.R. § 177.22(d), may seek judicial review of this final determination within [insert 30 days from date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Antonio J. Rivera, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325-0226.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on April 18, 2017 pursuant to subpart B of Part 177, U.S. Customs and Border Protection Regulations (19 C.F.R. Part 177, subpart B), CBP issued a final determination concerning the country of origin of certain network tap products known as Net Optics Slim Tap network taps, which may be offered to the U.S. Government under an undesignated government procurement contract. This final

determination, HQ 280619, was issued under procedures set forth at 19 C.F.R. Part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. §§ 2511-18). In the final determination, CBP concluded that the last substantial transformation took place in China. Therefore, the country of origin of the Net Optics Slim Tap network taps is China for purposes of U.S. Government procurement.

Section 177.29, CBP Regulations (19 C.F.R. § 177.29), provides that a notice of final determination shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 C.F.R. § 177.30), provides that any party-at-interest, as defined in 19 C.F.R. § 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: April 18, 2017

Alice A. Kipel
Executive Director
Regulations and Rulings
Office of Trade

Attachment

HQ H280619

April 18, 2017

OT:RR:CTF:VS H280619 AJR

CATEGORY: Origin

Mr. Jackson C. Pai
Bryan Cave LLP
120 Broadway, Suite 300

Santa Monica, CA 90401-2386

RE: U.S. Government Procurement; Country of Origin of Network Tap; Substantial Transformation

Dear Mr. Pai:

This is in response to your letter, dated October 13, 2016, requesting a final determination on behalf of Ixia, pursuant to subpart B of Part 177 of the U.S. Customs and Border Protection ("CBP") Regulations (19 C.F.R. Part 177). Under these regulations, which implement Title III of the Trade Agreements Act of 1979 ("TAA"), as amended (19 U.S.C. § 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

This final determination concerns the country of origin of Ixia's Net Optics Slim Tap network tap ("Slim Tap"). We note that Ixia is a party-at-interest within the meaning of 19 C.F.R. § 177.22(d)(1) and is entitled to request this final determination. In addition, we have reviewed and grant the request for confidentiality pursuant to 19 C.F.R. § 177.2(b)(7), with respect to certain information submitted.

FACTS:

The Slim Tap is a network tap produced by Ixia. A network tap is a fiber optic device that provides a physical connection or access to a network. Network taps enable users to physically connect a computer or other monitoring device to a network for the purpose of evaluating, monitoring, or checking network issues.

The Slim Tap consists of three optic to LC-LC adapters from Taiwan, two fiber optic splitters from China, a chassis from the United States, a foam tube holder from the United States, a bracket from the United States, screws from the United States, and three tamper proof labels from the United States. The components from Taiwan and China are imported into the United States, separately in different shipments at different times. In the United States, these foreign and domestic components are assembled into the finished product, the Slim Tap, by specially trained technicians. During this assembly process, the technicians must install the adapters from Taiwan and splitters from China in a specific manner per the wiring diagram for the Slim Tap, or else the finished product will not work properly. After assembly, the Slim Tap is tested to determine if the signal or line drops fall within acceptable parameters and to assure that the unit is otherwise functioning properly. According to Ixia, this assembly and testing process in the United States takes approximately 15 minutes.

In correspondence with the National Commodity Specialist Division ("NCSD"), Ixia provided the following information concerning the imported adapter and splitter components:

Adapters – the adapters connect the outside fiber connection to the internal fiber connections inside the tap. The adapter merges these two fiber optic connectors into one connection, which allows the light to pass with very little disruption.

Splitters – the main source of the optical splitters is glass from glass fibers that are fused together, and these fused glass fibers are held in a protective aluminum tube. The fiber optic splitter allows light frequency to pass through at very high speeds over long distances. The splitters are considered completely passive because there is no change to the data that is passed through the splitters within the Slim Tap.[1] According to Ixia, "[t]he main purpose of splitters is the passing of data from one product to another, but splitting it into two signals allows the customer to input data into data analyzing tools."

Ixia provided us with a product sample of the Slim Tap. We note that the three adapters on the front of the Slim Tap are labeled "A", "B", and "A/B", with the "A" and "B" adapters having both an "in" and "out" component, while "A/B" adapter only has two "out" components. The reason for there being two "in" components and four "out" components is because the splitters splits one incoming signal into two outgoing signals.

ISSUE:

What is the country of origin of the Slim Tap for purposes of U.S. Government procurement?

LAW AND ANALYSIS:

Pursuant to subpart B of Part 177, 19 C.F.R. § 177.21 *et seq*., which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 *et seq*.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

[1] There is no change to data passing through the splitters in the Slim Tap because the splitters lack electronic components required to convert data in the form of light frequency into electronic data in digital form. For instance, data is delivered into and out of the Slim Tap via the adapters that are connected to external fiber connections, which permits data in the form of light frequency to enter and exit the Slim Tap with very little disruption. Within the Slim Tap, the adapters are connected to the fiber optic splitters, permitting the light frequency to pass through and exit the Slim Tap in the same form that it entered. The data remains in this form, as an untouched wavelength of light, until it reaches an external transceiver from another device, which converts the data into electronic form.

Under the rule of origin set forth under 19 U.S.C. § 2518(4)(B):

> An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 C.F.R. § 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of part 177 consistent with the Federal Acquisition Regulations. *See* 19 C.F.R. § 177.21. In this regard, CBP recognizes that the Federal Acquisition Regulations restrict the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 C.F.R. § 25.403(c)(1). The Federal Acquisition Regulations define "U.S.-made end product" as:

> [A]n article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

48 C.F.R. § 25.003.

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. *See Nat'l Hand Tool Corp. v. United States*, 16 CIT 308, *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993); and *Belcrest Linens v. United States*, 573 F. Supp. 1149 (Ct. Int'l Trade 1983), *aff'd*, 741 F.2d 1368 (Fed. Cir. 1984). The primary consideration in substantial transformation cases is whether the processing of the components renders a product with a new name, character, and use. *See Energizer Battery, Inc. v. United States*, 2016 CIT LEXIS 116, 12-15. In *Energizer Battery*, the court examined the name, character, and use test to determine that imported components did not undergo a substantial transformation when assembled into a flashlight in the United States. *Id*.

With regard to a change in name, *Energizer Battery* stated that the "issue is not whether Plaintiff imported approximately fifty 'flashlights,' but rather whether the Plaintiff's imported components retained their names after they were assembled into the […] flashlight. Thus, the proper query would be whether the 'lens ring with overmold' or the 'switch lever' or the 'TIR lens' or any of the LEDs or any other component would still be called by their pre-importation name after assembly into the finished flashlight, or whether they would be indistinguishable in name from the finished product." *See id*. at 25. It was also noted that a change in name was the least compelling of the factors in the name, character, and use test. *Id*. The court in *Energizer*

Battery found that there was no change in name because the constituent components of the flashlight had not lost their individual names as a result of the post-importation assembly. *Id*.

With regard to a change in character, *Energizer Battery* stated that there often needs to be a substantial alteration in the characteristics of the imported components. *See id*. at 18-19. It was noted that courts have been reluctant to find a change in character when the imported articles did not undergo a physical change. *Id*. Additionally, the court indicated that analyzing this factor may require comparing the imported articles to the "essence" of the completed article. *Id*. In *Energizer Battery*, the assembly process in the United States required completing the lens head subassembly which had already been partially assembled in China, and then assembling the completed lens head assembly with the remaining flashlight components. *Id*. The court in *Energizer Battery* held that there was no change in character because these assembly operations in the United States were not considered to have changed the shape or material composition of the imported components. *Id*.

With regard to a change in use, *Energizer Battery* stated that previous courts have found a change in use when the end-use of the imported product was no longer interchangeable with the end-use of the product after post-importation processing. *See id*. at 26. Furthermore, *Energizer Battery* noted that "the proper query for this case is not whether the components as imported have the form and function of the final product, but whether the components have a pre-determined end-use at the time of importation." To this extent, "[w]hen articles are imported in prefabricated form with a pre-determined use, the assembly of those articles into the final product, without more, may not rise to the level of substantial transformation." *Id*. Here, the court in *Energizer Battery* held that there was no change in use because all of the imported components had a pre-determined end-use as parts and components of the flashlight at the time of importation. *Id*. The court noted that even the imported wire had been pre-cut to particular lengths needed to assemble the flash light. *Id*.

In this case, we are similarly examining whether imported components undergo a substantial transformation when assembled into the final product in the United States. Namely, while network taps and flashlights are different products, both this case and *Energizer Battery* ultimately require an analysis of the same underlying scenario – whether the post-importation assembly of foreign subassemblies, where such assembly consists of physically connecting the subassemblies through wiring and relatively simple insertions and fastening, render the foreign subassemblies into a product with a new name, character, and use. For the following reasons, we find that the imported splitters and adapters do not change in name, character, or use.

As noted above, the Slim Tap consists of three adapters from Taiwan, two splitters from China, a foam tube holder from the United States, brackets and screws from the United States, and labels from the United States. Per the assembly diagram provided by Ixia, the foreign subassemblies are removed from their packaging, with the adapters being snapped into the chassis and the splitters being inserted into the foam tube holder that has already been attached to the chassis. After the adapters and splitters are placed into their proper positions within the chassis, the adapters and splitters are connected according to the precise instructions of the

wiring diagram. Once the adapters and splitters are properly wired, the bracket, labels, and chassis cover are attached with screws to complete the assembly of the Slim Tap.

In examining whether a change in name occurred, we note that the foreign adapters and splitters do not lose their individual names as a result of this post-importation assembly process. Per the assembly description and wiring diagram, the adapters and splitters would still be identified as the adapter and splitter components of the Slim Tap. To this extent, each imported component retains its pre-importation name after post-importation assembly in the same manner that the various lenses retained their pre-importation name after their assembly into the flashlight. Accordingly, we find that the imported adapters and splitters do not change in name as a result of the post-importation assembly.

We also find that the assembly of the Slim Tap in the United States does not render a change in character to the adapters and splitters. Like in *Energizer Battery*, the imported adapters and splitters do not change in shape or material composition as a result of the post-importation assembly. *See Ferrostaal Metals Corp. v. United States*, 11 CIT 470, 477 (1987) (holding that a change in character occurred when a continuous hot-dip galvanizing process transforms a strong, brittle product which cannot be formed into a durable, corrosion-resistant product which is less hard, but formable for a range of commercial applications); and *Nat'l Hand Tool*, 16 CIT at 311 (holding that a change in character did not occur when a heating process changed the microstructure of the materials, but did not change the chemical composition of the materials, and the form of the components remained the same). Here, through an examination of the wiring diagram and Slim Tap product sample, the imported adapters and splitters remain physically recognizable as such despite their further attachments resulting from the post-importation assembly. Moreover, the adapters and splitters are imported with a specific material composition that permits data in the form of light frequency to travel through these components without disruption. While the post-assembly importation physically connects the imported components with the other components of the Slim Tap, this process does not alter the material composition of the adapters and splitters.

In examining whether a change in use occurred, we note that Ixia uses the imported adapters and splitters because such are comprised of precise materials that permit passing data through the Slim Tap in the manner required by the product. As in *Energizer Battery*, the imported materials are imported in a prefabricated form with a pre-determined end use as components of the Slim Tap. *See Ferrostaal Metals*, 11 CIT at 477 (holding that there was a change in use because the galvanizing process resulted in steel that was only rarely interchangeable with the imported steel); and *Ran-Paige Co., Inc. v. United States*, 35 Fed. Cl. 117, 121-122 (1996) (holding that there was no change in use because attaching handles to pans and covers did not change the use of the components, especially given the fact the use was predetermined at the time of importation). Here, the adapters and splitters are prefabricated with a specific material composition that serves the purpose of the Slim Tap. Though these imported components are attached to the other components of the Slim Tap, this post-importation assembly does not permanently alter the components in a manner that would prevent the components in the Slim Tap from being considered interchangeable with the imported

components. Accordingly, we find that the imported adapters and splitters do not change in use as a result of the post-importation assembly.

Therefore, through an analysis of the name, character, and use test, we find that the imported components do not undergo a substantial transformation when assembled into the Slim Tap in the United States. Nonetheless, Ixia makes two other arguments that the imported components are substantially transformed into the Slim Tap. First, Ixia argues that we should consider whether the Slim Tap would have originating status under the North American Free Trade Agreement ("NAFTA") tariff shift rules when determining whether a substantial transformation occurred. However, as noted in *Energizer Battery*, the comparison to NAFTA "is inapposite because NAFTA is a specialized trade regime, the benefits of which do not mirror the more generalized 'most favored nation' treatment afforded to countries not party to the agreement in question." *See id*. at 32.

Additionally, Ixia argues that the assembly of the Slim Tap results in a substantial transformation of the imported components because the assembly process in the United States requires skilled technicians to do a microscopic examination of the splitters, install the parts according to a complex wiring diagram, and engage through complex testing procedures. In support of this argument, Ixia cites *Carlson Furniture Industries v. United States*, 65 Cust. Ct 474 (1970) (holding imported unfinished chairs where substantially transformed into finished chairs by an assembly process that involved fitting and gluing the wooden parts together, cutting the parts to length, leveling the legs, and, in some cases, upholstering the chairs, and fitting the legs with glides and casters); and New York Ruling Letter ("NY") N120765, dated September 24, 2010 (holding that a network security manager was substantially transformed by a process that involved assembling and wiring various imported hardware components together, as well as installing and configuring software onto the product).

As noted by Ixia, examining whether a substantial transformed occurred may require the consideration of subsidiary factors such as the resources expended on product design and development, the extent and nature of post-assembly inspection and testing procedures, and the degree of skill required during the actual manufacturing process. *See Energizer Battery*, 2016 CIT LEXIS at 20. Moreover, in cases in which post-importation processing entails assembly, the nature of the assembly has been considered together with the name, character, and use test in making a substantial transformation determination. *See id*; *Belcrest Linens*, 741 F.2d at 1371; and *Uniroyal, Inc. v. United States*, 542 F. Supp. 1026, 1031, *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983). However, assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. *See* C.S.D. 80-111, C.S.D. 85-25, C.S.D. 89-110, C.S.D. 89-118, C.S.D. 90-51, and C.S.D. 90-97.

Here, we find that the assembly process is not sufficiently complex or meaningful to render a substantial transformation of the imported components. We distinguish the comparisons to the assembly processes in *Carlson Furniture* and NY N120765 because such involve additional procedures (e.g. cutting wooden parts to length, downloading software, etc.) that do not take place in the present case. Rather, in this case, the assembly primarily consists of

inserting and fastening the imported components into the chassis, and wiring the imported components together. Including the testing process after assembly, the total process in the United States takes about 15 minutes. In *Energizer Battery*, the process of assembling and testing about 50 components (of which about 40 percent consisted of fasteners) into flashlights in the United States took between 7 and 13 minutes, and was not considered to rise above the level of a simple assembly. *See id* at 27 – 28. Similarly, we find that the process of assembling and testing fewer components into the Slim Tap does not constitute a complex assembly and testing process that would render a substantial transformation of the imported components.

Accordingly, in this case, there are two foreign components, neither of which are substantially transformed by the further processing in the United States. As a result, the Slim Tap cannot be considered a product of the United States for purposes of U.S. Government procurement. However, since the adapters are from a designated country (Taiwan) and the splitters are from a non-designated country (China), and both are incorporated into one end-product (the Slim Tap), it still needs to be determined which of these two countries is the country of origin of the Slim Tap for purposes of U.S. Government procurement.

As noted in *Energizer Battery*, within the name, character, and use test, determining the country of origin through a substantial transformation analysis may require comparing the "essence" of the imported articles to that of the completed article. Here, we note that the "essence" of a network tap is to enable users to physically connect a computer or other monitoring device to a network for the purpose of evaluating, monitoring, or checking network issues. Moreover, with the Slim Tap, users of this network tap can use data incoming from a single source on multiple analyzing tools because the splitter from China splits incoming data into two signals. While both the adapters and splitters permit this connection between external devices and networks without disruption, both permitting the ingress and egress of data via the Slim Tap, the splitters from China enable the actual splitting of the signal, which permits the user to access the data on multiple analyzing tools. Therefore, we find that China is the country of origin of the Slim Tap for purposes of U.S. Government procurement.

HOLDING:

Based on the facts provided, the imported components will not be substantially transformed into the Slim Tap because the post-importation assembly process in the United States does not change the name, character and use of the imported adapters and splitters. As such, because the imported splitters constitute the "essence" of the Slim Tap, China will be considered the country of origin of the product for purposes of U.S. Government procurement.

Notice of this final determination will be given in the Federal Register, as required by 19 C.F.R. § 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 C.F.R. § 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 C.F.R. § 177.30, any party-at-interest may, within 30 days of publication of the Federal Register Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Alice A. Kipel, Executive Director
Regulations and Rulings
Office of Trade

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