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U.S. Customs Service

1300 Pennsylvania Avenue, N.W. Washington, D.C. 20229

HQ 562529

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CATEGORY: Marking

Mr. Stephen A. Jones
Counsel
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1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-4706

RE NAFTA Advance Ruling Request for Country of Origin Marking Requirements for diamonds mined in Canada but cut and polished in Belgium, India, Israel, Russia, Thailand or another third country

Dear Mr. Jones:

This is in response to your letter of September 4, 2002, on behalf of BHP Billiton Diamonds, Inc. ("BHP Billiton") requesting an advance ruling regarding the country of origin marking of diamonds mined in Canada but cut and polished in Belgium, India, Israel, Russia, Thailand or another third country. Specifically, the issue is whether Canadian rough diamonds, that are cut and polished in a non-NAFTA country, may under NAFTA Marking Rules be marked "Made in Canada" when imported into the United States.

FACTS:

BHP Billiton Diamonds, Inc. headquartered in Vancouver, British Columbia, Canada mines diamonds in the Lac de Gras area of the Northwest Territories of Canada. The mining operation entails the extraction of the rough diamond from a kimberlite deposit located at depths of 200 kilometers or more below the surface of the earth. Your letter states that approximately 85 percent of all costs involved in the production of a polished diamond relate to the mining and on-site processing of the kimberlite ore to extract the rough diamonds. The remaining 15 percent constitute the cutting and polishing of the rough diamond to create a finished diamond.

TRADITION

SERVICE

HONOR

BHP Billiton intends to ship the rough diamonds extracted from the mine in the Northwest Territories, Canada, to diamond cutters in Belgium, Israel, India, Russia, Thailand, or another third country. Diamond cutters in these countries will cut and polish the rough diamonds and create the finished polished diamond. BHP Billiton then intends to export the finished

cut and polished diamonds from their place of finishing to the United States. BHP Billiton, an affiliated company or joint venture, or an unaffiliated customer will act as the importer of record. BHP Billiton proposes to mark the imported diamonds, or their immediate containers, "Made In Canada," and to represent the diamonds as "Canadian diamonds."

ISSUE:

Whether diamonds mined in Canada and sent to Belgium, Israel, India, Russia, Thailand, or another third country for cutting and polishing may be marked with "Made in Canada" upon importation into the United States.

LAW AND ANALYSIS:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such a manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. 1304 was that the ultimate purchaser should be able to know by an inspection of the markings on the imported goods the country of which the good is the product. "The evident purpose is to mark the goods so at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." United States v. Friedlaender & Co., 27 C.C.P.A. 297 at 302 (1940).

Part 134, Customs Regulations (19 CFR 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Section 134.1(b), Customs Regulations (19 CFR 134.1(b)), defines "country of origin" as the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of this part; however, for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin.

Section 134.1(j), Customs Regulations (19 CFR 134.1(j)), provides that the "NAFTA Marking Rules" are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country. Section 134.1(g), Customs Regulations (19 CFR 134.1(g)), defines a "good of a NAFTA country" as an article for which the country of origin is Canada,

Mexico or the United States as determined under the NAFTA Marking Rules, set forth at 19 CFR Part 102.

Section 102.11(a), Customs Regulations (19 CFR 102.11(a)), sets forth the required hierarchy under the NAFTA Marking Rules for determining country of origin for marking purposes. This section states that the country of origin of a good is the country in which:

- (1) The good is wholly obtained or produced;
- (2) The good is produced exclusively from domestic materials; or
- (3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in section 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

Section 102.1(g), Customs Regulations (19 CFR 102.1 (g)), defines, "A good wholly obtained or produced" as including (1) a mineral good extracted in that country. Based on the information provided, the rough diamonds extracted in Canada would constitute a mineral good for Canada and thus be "a good wholly obtained or produced" in Canada. But, since the product for importation is the finished diamonds, which have undergone cutting and polishing in a third country, they do not qualify as "a good wholly obtained or produced" in Canada. Therefore, the country of origin of the finished diamonds may not be determined under section 102.11(a)(1).

The next step is to consider whether the country of origin of the finished diamonds may be determined under section 102.11(a)(2). Based on the information provided, rough diamonds of Canadian origin are exported to a third country for additional processing including cutting and polishing operations prior to the importation of the finished diamonds into the U.S. Because the rough diamonds of Canadian origin are processed in a third country, the finished diamonds are neither wholly obtained or produced nor produced exclusively from domestic materials. Section 102.1(d), Customs Regulations (19 CFR 102.1(d)), defines domestic material as, "a material whose country of origin as determined under these rules is the same country as the country in which the good is produced." Accordingly, neither 19 CFR 102.11(a)(1) nor 102.11(a)(2) may be used to determine the origin of the finished diamonds. Therefore, analysis must continue to 19 CFR 102.11(a)(3) to determine the country of origin of the finished diamonds under the NAFTA Marking Rules.

Your letter indicates that upon exportation from Canada to a third country the rough diamonds are classifiable under subheading 7102.31.0000, HTSUS, which provides for unworked or simply sawn, cleaved, or bruted diamonds. Subsequent to cutting and polishing in the third country, you indicate that the finished diamonds are classifiable under

subheading 7102.39.0010, HTSUS, which provides for "Other" diamonds weighing not over 0.5 carats each or under subheading 7102.39.0050, HTSUS, which provides for "Other" diamonds weighing over 0.5 carats each. For purposes of this ruling, we are assuming that the above classifications are correct.

Pursuant to 19 CFR 102.11(a)(3), the country of origin of a good is the country in which each foreign material incorporated in that good undergoes an applicable change in tariff classification as set forth in 19 CFR 102.20, and satisfies any other applicable requirements of that section. Section 102.1(e), Customs Regulations (19 CFR 102.1(e)) defines "Foreign material" as "a material whose country of origin as determined under these rules is not the same country of origin as the country in which the good is produced." The applicable rule under 19 CFR 102.20(m), Customs Regulation (19 CFR 102.20(m)), states:

7102 – 7103.....A change to heading 7102 through 7103 from any other chapter.

In the case before us, the rough diamonds, which are initially classified under heading 7102, HTSUS, remain classified under heading 7102, HTSUS, subsequent to additional processing in a country other than Canada. Thus, there is no applicable change in tariff classification within the requirements of section 102.20, and country of origin of the good may not be determined in accordance with this provision. Since 19 CFR 102.11(a) (incorporating section 102.20), is not determinative of origin, the next step is section 102.11(b), Customs Regulations (19 CFR 102.11(b)), which states, in part:

Except for a good that is specifically described in the Harmonized System as a set, or is classified as a set pursuant to General Rule of Interpretation 3, where the country origin cannot be determined under paragraph (a), of this section:

- (1) The country of origin of the good is the country or countries of origin of the single material that imparts the essential character to the good...

In this case, the imported finished diamond is composed of a rough diamond of Canadian origin which has undergone additional processing in the form of cutting and polishing. When determining the essential character of a good under section 102.11(b), section 102.18(b)(1), Customs Regulations (19 CFR 102.18(b)(1)), provides that:

For purposes of identifying the material that imparts the essential character to a good under §102.11, the only materials that shall be

taken into consideration are those domestic or foreign materials that are classified in a tariff provision from which a change in tariff classification is not allowed under the §102.20 specific rule or other requirements applicable to the good.

The finished diamond consists of only one material. The one material is classifiable in a tariff provision from which a change in tariff classification is not allowed under the applicable rule in 19 CFR 102.20(m). Therefore, the Canadian rough diamond is the single material, which imparts the essential character of the finished good pursuant to section 102.18(b)(1)(iii), Customs Regulations (19 CFR 102.18(b)(1)(iii)). Accordingly, for country of origin marking purposes, the country of origin of the finished diamonds after having been polished and cut in another country is Canada. Diamonds mined in Canada and sent to Belgium, Israel, India, Russia, Thailand, or another third country for cutting and polishing may be marked with "Made in Canada" upon importation into the United States.

However, based on the facts presented, the finished diamonds may not receive duty preference under the NAFTA if they undergo further production, such as cutting and polishing, in a non-NAFTA country. While the diamonds may be marked as "Made in Canada" they cannot receive NAFTA duty preference based on Section 16 of Part 181, Appendix (19 CFR Part 181, Appendix), which states:

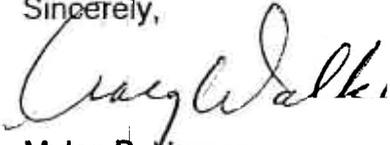
- (1) A good is not an originating good by reason of having undergone production that occurs entirely in the territory of one or more of the NAFTA countries that would enable the good to qualify as an originating good if subsequent to that production
 - (a) the good is withdrawn from customs control outside the territories of the NAFTA countries; or
 - (b) the good undergoes further production or any other operation outside the territories of the NAFTA countries, other than unloading, reloading, or any other operations necessary to preserve the good in good condition, such as inspection, removal of dust that accumulates during shipment, ventilation, spreading out or drying, chilling, replacing salt, sulphur dioxide, or other aqueous solutions, replacing damaged packing materials and containers and removal of units of the goods that are spoiled or damaged and present a danger to the remaining units of the good, or to transport the good to the territory of a NAFTA country. (Page 470, Part 181, Appendix).

HOLDING:

Pursuant to section 102.11(b)(1) of the Customs Regulations, the country of origin of the finished diamonds is Canada for purposes of country of origin marking and they must be so marked.

A copy of this ruling letter should be attached to the entry documents filed at the time the goods are entered. If you have any questions regarding the foregoing, please let us know.

Sincerely,


for Myles B. Harmon
Acting Director
Commercial Rulings Division