

THE APPROPRIATE CUSTOMS CLASSIFICATION IN THE WCO'S HARMONIZED SYSTEM TARIFF NOMENCLATURE OF TOBACCO HEATING PRODUCT CONSUMABLES AND THE CHEMICAL PREPARATIONS USED IN ENDS

SUMMARY OF PROPOSED NEW HEADINGS AND SUB-HEADINGS FOR THE CLASSIFICATION OF THP CONSUMABLES AND CHEMICAL PREPARATIONS USED IN ENDS

- Tobacco Heating Products (THPs) heat tobacco, but do not combust it, to produce a nicotine-containing aerosol.
- Electronic nicotine delivery systems (ENDS) heat a chemical preparation (often, but not always, in liquid form, known as an 'e-liquid'), to create an aerosol which is fundamentally different in its physical composition to both tobacco smoke and to the aerosol created by THPs. Although some chemicals in e-liquids, including nicotine and some soluble flavourings, may be derived from tobacco, e-liquids do not contain tobacco.
- The WCO's Review Sub-Committee (RSC) is currently considering several proposals for creating new headings or subheadings for both THPs and e-liquids under the Harmonized System Tariff Nomenclature (the HS) in the year 2022. These proposals are flawed because they are inconsistent with the fundamental principle by which products are classified for customs purposes based on their essential physical characteristics.
- The Confederation of European Community Cigarette Manufacturers (CECCM) and its members¹ propose that THPs should be classified in the HS under a new subheading 2403.92 as follows:
2403.92 Tobacco products for heated delivery without combustion
- CECCM proposes that the chemical preparations used with ENDS, including e-liquids, should be classified in the HS under a new 4-digit level heading 38.27:
38.27 Chemical preparations, whether or not containing nicotine or flavouring substances and whether or not contained in bottles or special cartridges or capsules, for use with electronic devices heating these preparations without combustion in order to produce an aerosol:
3827.10 - containing nicotine
3827.20 - not containing nicotine
- It would not be appropriate for the chemical preparations used with ENDS to be treated in the same way as THPs in regulation, excise or customs classification. THPs are tobacco products, whereas the chemical preparations used in ENDS contain no tobacco – they are fundamentally different in their essential physical composition.
- These proposed new headings / subheadings adhere to the fundamental principles by which products are classified for customs purposes based on their essential physical characteristics. They maintain simplicity within the existing system. And they will allow the WCO and its contracting parties to achieve all the

¹ CECCM represents the common views of major European-based cigarette manufacturers such as British American Tobacco (BAT), Imperial Brands (IMB), and Japan Tobacco International (JTI).

stated objectives of the HS: to facilitate international trade; to facilitate the collection, comparison and analysis of trade statistics; and to promote the standardisation of trade documentation and the transmission of data.

DEFINITION OF TOBACCO HEATING PRODUCTS AND ENDS

- Tobacco Heating Products (THPs) are products in which the tobacco is heated rather than combusted to produce a nicotine-containing aerosol.
 - THPs contain tobacco – they are different to electronic cigarettes which do not contain tobacco.
 - Several types of THP are currently sold across a range of countries. The most widely available THPs are electrically heated tobacco products. Also available in some countries are: THPs that heat a tobacco rod using a lit carbon tip; and hybrid products that heat an e-liquid to create an aerosol that, when passed over a tobacco pod, heats the tobacco to provide additional flavours and nicotine.
 - The category is rapidly evolving, and it seems likely that other types THPs will be developed in the future. However, the common feature amongst all THPs will remain that they heat tobacco and do not combust it.
- Electronic nicotine delivery systems (ENDS) are comprised of two elements:
 - First, a chemical preparation, often in liquid form known as an ‘e-liquid’. Although some chemicals in the chemical preparations used in ENDS, including nicotine and soluble flavourings, may be derived from tobacco, they do not contain tobacco.
 - Second, an electronic device which heats the chemical preparation to create an aerosol which is fundamentally different in its physical composition to tobacco smoke.

THE CURRENT CLASSIFICATION OF TOBACCO HEATING PRODUCTS AND THE CHEMICAL PREPARATIONS USED IN ENDS

- THP consumables, as a tobacco product, are classified in Chapter 24 of the HS (“Tobacco and Manufactured Tobacco Substitutes”). In October 2017, the WCO Harmonized System Committee (HSC) considered the appropriate classification of Electrically Heated Tobacco Product (EHTP) consumables in the 2017 HS. A large majority of contracting parties voted for classification of these products in subheading 2403.99.
- In September 2011, the HSC agreed that cartridges for ENDS “*whether or not containing nicotine, could not be regarded as tobacco substitutes.*” Consequently, it decided to classify them under heading 38.24 of the HS (in the chapter covering “Miscellaneous Chemical Products”).

TOBACCO HEATING PRODUCTS MUST BE CLASSIFIED IN CHAPTER 24 OF THE HS AND THE CHEMICAL PREPARATIONS USED IN ENDS MUST BE CLASSIFIED IN CHAPTER 38

- For customs classification, *two* criteria must be considered.
 - First, the essential physical characteristics of the product.
 - Second, in some cases, their intended use.
- **The consumables used with tobacco heating products should continue to be classified under a subheading in 2403.9 of the HS nomenclature (under which there is currently 2403.91² or 2403.99³).**
 - THPs contain tobacco, so it follows that they must be classified in Chapter 24 of the HS, covering “Tobacco and manufactured tobacco substitutes”.

² “Homogenised” or “reconstituted tobacco”.

³ Other manufactured tobacco that is not intended for smoking.

- The WCO Secretariat has indicated that two factors are relevant to defining the essential characteristics of the consumables used with electrically heated tobacco products (EHTPs). First, the tobacco used in these products is entirely reconstituted tobacco (combustible tobacco products contain much smaller amounts of reconstituted tobacco). Second, the product's intended use is not to be smoked. The WCO Secretariat stated that if Contracting Parties accept these as the defining essential physical characteristics of EHTP consumables, they should not be classified under the same subheadings as combustible tobacco (i.e. under either heading 24.02⁴, or under subheadings 2403.11⁵ or 2403.19⁶, all of which are for types of smoking tobacco).
 - Moreover, EHTPs cannot be classified under heading 24.01, which covers unmanufactured tobacco.
 - It follows that EHTPs must be classified in the part of heading 24.03 that covers finished tobacco products that are not intended for smoking.
- **The chemical preparations used in ENDS, including e-liquids, should continue to be classified under Chapter 38 of the HS nomenclature.**
 - The chemical preparations used in ENDS, including e-liquids, exhibit *profound* differences in their material composition and physical characteristics to the tobacco products that are classified under Chapter 24 of the HS2017.
 - Since e-liquids (and other chemical preparations used in ENDS) are chemical solutions which, even when partly derived from a tobacco plant, contain no tobacco, they must continue to be classified in HS Chapter 38 ("Miscellaneous chemical products").
 - And because ENDS cartridges / liquids do not display similar physical characteristics to tobacco products, the chemical preparations used in ENDS should not be classified in the same chapter of the HS as tobacco products.
 - Please see Appendix 1 for a legal opinion that provides further background.

PROPOSAL FOR NEW SUBHEADINGS FOR TOBACCO HEATING PRODUCT CONSUMABLES IN CHAPTER 24 OF THE HS IN THE YEAR 2022

- Our proposal for the customs classification of THP consumables in the HS is to create a new subheading 2403.92.
- This approach has several practical benefits:
 - It is wholly consistent with the general principles by which products are classified in the HS according to their essential physical characteristics.
 - It is consistent with the recent guidance from the WCO Secretariat regarding the essential characteristics of EHTP consumables.
 - It is commensurate with the likely scale of global trade in THP consumables relative to other tobacco products. Notably, since cigarettes containing tobacco are classified under a subheading (2402.20) and do not have their own 4-digit heading, it would seem inappropriate for THPs to be classified under anything other than a 6-digit subheading.
- Our proposal for this new sub-heading is as follows:

2403.92 Tobacco products for heated delivery without combustion
- The wording of this proposed new sub-heading is similar to the recent proposal by the Australian customs authority. However, our proposed location in the HS – especially when taken together with our proposed new heading for the chemical preparations used with ENDS – is more logical given the general principles by which products are classified in the HS according to their essential physical characteristics.

⁴ Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes.

⁵ Water pipe tobacco.

⁶ Other smoking tobacco.

- Please see Appendix 2 for a legal opinion that provides further background.

PROPOSAL FOR A NEW HEADINGS FOR CHEMICAL PREPARATIONS USED WITH ENDS IN CHAPTER 38 OF THE HS IN THE YEAR 2022

- Our proposal for the customs classification in the HS of chemical preparations used with ENDS (including e-liquids) is to create, at the 4-digit level, a new heading 38.27.
- This approach has several practical benefits:
 - It is wholly consistent with the general principles by which products are classified in the HS according to their essential physical characteristics. Unlike the recent proposals by Australia, it therefore avoids creating inconsistencies between the classification of ENDS chemical preparations and how other products are classified in the HS.
 - It would make ENDS chemical preparations stand out within Chapter 38 more forcefully than by creating new subheadings under heading 3824.
 - It would leave more room for future subheadings as and when new products are developed.
- Our proposal for the new heading / sub-headings is as follows:

38.27 Chemical preparations, whether or not containing nicotine or flavouring substances and whether or not contained in bottles or special cartridges or capsules, for use with electronic devices heating these preparations without combustion in order to produce an aerosol:

3827.10 - containing nicotine

3827.20 - not containing nicotine

- Please see Appendix 2 for a legal opinion that provides further background.

OUR PROPOSALS FOR A NEW SUBHEADING FOR TOBACCO HEATING PRODUCTS AND A NEW HEADING FOR THE CHEMICAL PREPARATIONS USED WITH ENDS WILL ALLOW ALL THE STATED REQUIREMENTS OF THE HS TO BE MET IN FULL

- The three main objectives of the HS are to:
 - facilitate international trade;
 - facilitate the collection, comparison and analysis of trade statistics; and
 - promote the standardisation of trade documentation and the transmission of data.
- The new headings and subheadings we propose for THPs and ENDS chemical preparations would allow each of these objectives to be met in full. Critically, moving the classification of e-liquids from Chapter 38 to another chapter of the HS would not fundamentally improve the ability of customs authorities to achieve any of these objectives. It would, however, be inconsistent with the fundamental principle by which products are classified for customs purposes based on their essential physical characteristics.

**The Confederation of European Community Cigarette Manufacturers
(CECCM)**