

[Billing Code 3290-F1]

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Docket Number USTR–2021–0005

Notice of Action in the Section 301 Investigation of Spain’s Digital Services Tax

AGENCY: Office of the United States Trade Representative (USTR).

ACTION: Notice.

SUMMARY: On January 14, 2021, the U.S. Trade Representative announced a determination that Spain’s Digital Services Tax (DST) is unreasonable or discriminatory and burdens or restricts U.S. commerce. This notice announces the U.S. Trade Representative’s determination to take action in the form of additional duties of 25 percent on the products of Spain specified in Annex A to this notice. The U.S. Trade Representative has further determined to suspend application of the additional duties for a period of up to 180 days.

DATES:

June 2, 2021: The U.S. Trade Representative determined to take action in the form of additional duties of 25 percent on products of Spain specified in Annex A.

November 29, 2021: The end of the 180-day suspension period for the additional duties.

FOR FURTHER INFORMATION CONTACT: For questions concerning the investigation, please contact Benjamin Allen, Thomas Au, or Patrick Childress, Assistant General Counsels at: (202) 395-9439, (202) 395-0380, and (202) 385-9531, respectively; Robert Tanner, Director, Services and Investment at (202) 395-6125; or Michael Rogers, Director for Europe and the Middle East at (202) 395-2684. For specific questions on

customs classification or implementation of additional duties on products, contact traderemedy@cbp.gov.

SUPPLEMENTARY INFORMATION:

I. Proceedings in the Investigation

Spain has adopted a DST that applies a three percent tax on certain digital services revenues related to online advertising services, online intermediary services, and data transmission services. Companies with worldwide revenues of €750 million or more and €3 million in certain digital services revenues are subject to the DST. On June 2, 2020, the U.S. Trade Representative initiated an investigation of Spain's DST pursuant to section 302(b)(1)(A) of the Trade Act of 1974, as amended (Trade Act). *See* 85 FR 34709 (June 5, 2020) (notice of initiation). The notice of initiation solicited written comments on, *inter alia*, the following aspects of Spain's DST: discrimination against U.S. companies; retroactivity; and possibly unreasonable tax policy. With respect to tax policy, USTR solicited comments on, *inter alia*, whether the DST diverged from principles reflected in the U.S. and international tax systems including extraterritoriality; taxing revenue not income; and a purpose of penalizing particular technology companies for their commercial success. Interested persons filed over 380 written submissions in response. The public submissions are available on www.regulations.gov in docket number USTR–2020–0022.

Under section 303 of the Trade Act, the U.S. Trade Representative requested consultations with the government of Spain regarding the issues involved in the investigation. Consultations were held on December 17, 2020. Based on information obtained during the investigation, USTR prepared a comprehensive report on Spain's

DST, which is posted on the USTR website at <https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-digital-services-taxes>. The report includes a full description of Spain's DST, and supports findings that Spain's DST is unreasonable and discriminatory and burdens or restricts U.S. commerce. On January 14, 2021, based on the information obtained during the investigation and the advice of the Section 301 Committee, the U.S. Trade Representative determined that Spain's DST is unreasonable or discriminatory and burdens or restricts U.S. commerce, and therefore is actionable under sections 301(b) and 304(a) of the Trade Act. *See* 86 FR 6407 (January 21, 2021).

On March 31, 2021, USTR issued a notice proposing that appropriate action would include additional *ad valorem* duties of up to 25 percent on products of Spain to be drawn from a list of 36 tariff subheadings of the Harmonized Tariff Schedule of the United States (HTSUS) included in the annex to that notice. The March 31, 2021 notice requested comments on the proposed action as well as on other potential actions in the investigation. Witnesses provided testimony at public hearings on May 3 and May 6, 2021, and interested persons filed written comments. Transcripts from the hearings are available on the USTR website at: <https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-digital-services-taxes>. The written public submissions are available at: <https://comments.ustr.gov/s/docket?docketNumber=USTR-2021-0005> and <https://comments.ustr.gov/s/docket?docketNumber=USTR-2021-0008>.

II. Determination of Action To Be Taken in the Investigation

In accordance with section 301(b) of the Trade Act, the U.S. Trade Representative has determined that action is appropriate in this investigation. Section 301(b) provides

that upon determining that the acts, policies, and practices under investigation are actionable and that action is appropriate, the U.S. Trade Representative shall take all appropriate and feasible action authorized under section 301(c) of the Trade Act, subject to the specific direction, if any, of the President regarding such action, and all other appropriate and feasible action within the power of the President that the President may direct the U.S. Trade Representative to take under section 301(b), to obtain the elimination of that act, policy, or practice. Section 304(a)(2)(B) provides that the U.S. Trade Representative shall make the determination of what action to take on or before the date that is 12 months after the date on which the investigation was initiated, or in this case, by June 2, 2021.

Pursuant to sections 301(b) and (c) of the Trade Act, and in accordance with the advice of the Section 301 Committee, the U.S. Trade Representative has determined that appropriate action is the imposition of *ad valorem* duties of 25 percent on products of Spain specified in Annex A to this notice. Annex A contains a list of 27 tariff subheadings, with an estimated trade value for calendar year 2019 of approximately \$324 million. In making this determination, the U.S. Trade Representative considered the public comments submitted in the investigation, as well as advice of advisory committees. In determining the level of trade covered by the additional duties, the U.S. Trade Representative considered the value of digital transactions covered by Spain's DST and the amount of taxes assessed by Spain on U.S. companies. Estimates indicate that the value of the DST payable by U.S.-based company groups to Spain will be up to approximately \$155 million per year. The level of trade covered by the action takes into

account estimates of the amount of tariffs to be collected on goods of Spain and the estimates of the amount of taxes assessed by Spain.

Section 305(a) of the Trade Act provides, in pertinent part, that the U.S. Trade Representative may delay implementation of the action to be taken for up to 180 days “if the Trade Representative determines ... that a delay is necessary or desirable ... to obtain ... [a] satisfactory solution with respect to the acts, policies, or practices that are the subject of the action.” Pursuant to section 305(a), the U.S. Trade Representative has determined to suspend the additional duties for up to 180 days (that is, up to November 29, 2021) to allow additional time for multilateral and bilateral discussions that could lead to a satisfactory resolution of this matter.

In order to implement this determination, subchapter III of chapter 99 of the HTSUS is modified by Annex A of this notice. Annex A is effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern standard time on November 29, 2021, which is 180 days after the determination of action. In the event the U.S. Trade Representative determines that the suspension of the additional duties should be for less than a period of 180 days, USTR will issue a subsequent notice amending the effective date. For informational purposes, Annex B contains a list of the tariff subheadings covered by the tariff action along with short product descriptions. In all cases, the formal language in Annex A governs the tariff treatment of products covered by the action. As specified in Annex A, products provided for in new HTSUS heading 9903.90.05 will be subject to an additional *ad valorem* duty of 25 percent. The additional duties provided for in the new HTSUS heading established by Annex A apply in addition to all other applicable duties, fees, exactions, and charges.

Any product listed in Annex A, except any product that is eligible for admission under ‘domestic status’ as defined in 19 CFR 146.43, which is subject to the additional duty imposed by this determination, and is admitted into a U.S. foreign trade zone on or after 12:01 a.m. eastern standard time on November 29, 2021, only may be admitted as ‘privileged foreign status’ as defined in 19 CFR 146.41. Such products will be subject upon entry for consumption to any *ad valorem* rates of duty or quantitative limitations related to the classification under the applicable HTSUS subheading.

The U.S. Trade Representative will continue to monitor the effect of the trade action, the progress of discussions in the Organisation for Economic Co-operation and Development and G20, the progress of discussions with Spain, and may adopt appropriate modifications. If a modification to the action may be appropriate, the U.S. Trade Representative will consider the comments received in response to the March 31, 2021 notice.

Greta Peisch
General Counsel
Office of the United States Trade Representative.

ANNEX A

Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern standard time on November 29, 2021, subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States (HTSUS) is modified:

1. by inserting the following new U.S. notes 26(a) and 26(b) to subchapter III of chapter 99 in numerical sequence:

“26 (a) For the purposes of heading 9903.90.05, products of Spain, as specified in this note, shall be subject to additional duties as provided herein. All products of Spain that are classified in the subheadings enumerated in this note are subject to the additional duties imposed by heading 9903.90.05. The duties imposed by heading 9903.90.05 shall be in addition to the general duty rates provided for in the applicable provisions of the tariff schedule.

Products of Spain that are classified in the subheadings enumerated in this note and that are eligible for temporary duty exemptions or reductions under subchapter II to chapter 99 shall be subject to the additional duties imposed by heading 9903.90.05, and any such duty exemption or reduction shall apply only to the permanent general rate prescribed in provisions of chapters 1 through 97 of the tariff schedule.

The additional duties imposed by heading 9903.90.05 do not apply to goods for which entry is properly claimed under a provision of chapter 98 of the HTSUS, except for goods entered under subheadings 9802.00.40, 9802.00.50 and 9802.00.60 and heading 9802.00.80. For subheadings 9802.00.40, 9802.00.50 and 9802.00.60, the additional duties apply to the value of repairs, alterations or processing performed in Spain and as described in the applicable subheading. For heading 9802.00.80, the additional duties apply to the value of the article less the cost or value of such products of the United States, as described in heading 9802.00.80.

Products of Spain that are provided for in heading 9903.90.05 and classified in one of the subheadings enumerated in note 26(b) to this subchapter shall continue to be subject to antidumping, countervailing or other duties (including duties imposed by other provisions of subchapter III of this chapter and safeguard duties set forth in provisions of subchapter IV of this chapter), fees, exactions and charges that apply to such products, as well as to the additional duties imposed herein.

(b) Heading 9903.90.05 shall apply to all products of Spain that are classified in the subheadings enumerated below:

| | | |
|------------|------------|--------------|
| 0306.16.00 | 6402.99.31 | 6404.20.40 |
| 0306.17.00 | 6403.51.30 | 6404.20.60 |
| 0307.52.00 | 6403.51.60 | 6405.90.90 |
| 1605.21.05 | 6403.51.90 | 6504.00.60 |
| 1605.21.10 | 6403.59.30 | 6505.00.08 |
| 1605.55.05 | 6403.59.60 | 6505.00.15 |
| 4202.21.90 | 6403.59.90 | 6505.00.30 |
| 4202.22.15 | 6403.99.90 | 7013.99.80 |
| 4203.30.00 | 6404.19.39 | 7013.99.90”. |

2. by inserting the following new heading 9903.90.05 in numerical sequence, with the material in the new heading inserted in the columns of the HTSUS labeled “Heading/Subheading”, “Article Description”, and “Rates of Duty 1-General”, respectively:

| Heading/ Subheading | Article Description | Rates of Duty | | 2 |
|------------------------|---|--|---------|---|
| | | 1 | | |
| | | General | Special | |
| “9903.90.05 | “Articles the product of Spain, as provided for in U.S. note 26(a) to this subchapter and as provided for in the subheadings enumerated in U.S. note 26(b) to this subchapter | The duty provided in the applicable subheading + 25%”. | | |

Annex B

Note: The product descriptions that are contained in this Annex are provided for informational purposes only, and are not intended to delimit in any way the scope of the action. In all cases, the formal language in Annex A governs the tariff treatment of products covered by the action. Any questions regarding the scope of particular HTSUS subheadings should be referred to U.S. Customs and Border Protection. In the product descriptions, the abbreviation "nesoi" means "not elsewhere specified or included".

| HTSUS Subheading | Product Description |
|---------------------|---|
| 0306.16.00 | Cold-water shrimps and prawns, cooked in shell or uncooked, dried, salted or in brine, frozen |
| 0306.17.00 | Other shrimps and prawns, cooked in shell or uncooked, dried, salted or in brine, frozen |
| 0307.52.00 | Octopus, frozen |
| 1605.21.05 | Shrimp & prawns not in airtight containers: fish meat and prepared meals |
| 1605.21.10 | Shrimp & prawns not in airtight containers: other than fish meat and prepared meals |
| 1605.55.05 | Octopus, as containing fish meat or prepared meals |
| 4202.21.90 | Handbags, with or without shoulder strap or without handle, with outer surface of leather, composition or patent leather, nesoi, over \$20 ea. |
| 4202.22.15 | Handbags, with or without shoulder straps or without handle, with outer surface of sheeting of plastics |
| 4203.30.00 | Belts and bandoliers with or without buckles, of leather or of composition leather |
| 6402.99.31 | Footwear w/outer soles & uppers of rubber or plastics, nesoi, n/cov. ankle, w/ext. surf. of uppers o/90% rubber or plastics, nesoi |
| 6403.51.30 | Footwear w/outer soles and uppers of leather, nesoi, covering the ankle, welt |
| 6403.51.60 | Footwear w/outer soles and uppers of leather, nesoi, covering the ankle, n/welt, for men, youths and boys |
| 6403.51.90 | Footwear w/outer soles and uppers of leather, nesoi, covering the ankle, n/welt, for persons other than men, youths and boys |
| 6403.59.30 | Footwear w/outer soles and uppers of leather, not covering the ankle, welt, nesoi |
| 6403.59.60 | Footwear w/outer soles and uppers of leather, not cov. ankle, n/welt, for men, youths and boys |
| 6403.59.90 | Footwear w/outer soles and uppers of leather, not cov. ankle, n/welt, for persons other than men, youths and boys |
| 6403.99.90 | Footwear w/outer soles of rubber/plastics/comp. leather & uppers of leather, n/cov. ankle, for persons other than men, youths and boys, val. over \$2.50/pair |
| 6404.19.39 | Footwear w/outr sole rub/plast & upp. textile, nesoi, w/open toes/heels or slip-on, >10% by wt. rub./plast not subj note 5 ch 64 |
| 6404.20.40 | Footwear w/outer soles of leather/comp. leath., n/o 50% by wt. rub./plast. or rub./plast./text. & 10%+ by wt. rub./plast., val. o/\$2.50/pr |
| 6404.20.60 | Footwear w/outer soles of leather/comp. leather & uppers of textile, nesoi |

| | |
|------------|--|
| 6405.90.90 | Footwear, nesoi, w/outer soles and uppers o/than leather/comp. leather/text. not disposable |
| 6504.00.60 | Hats and headgear, plaited or assembled from strips of veg. fibers or unspun fibrous veg. materials and/or paper yarn, not sewed |
| 6505.00.08 | Hats and headgear made up from felt made from hat forms or hat bodies of 6501, except of fur felt |
| 6505.00.15 | Hats and headgear, of cotton and/or flax, knitted |
| 6505.00.30 | Hats and headgear, of wool, knitted or crocheted or made up from knitted or crocheted fabric |
| 7013.99.80 | Glassware for toilet/office/indoor decor. or similar purposes, nesoi, n/cut or engraved, valued over \$3 but n/over \$5 each |
| 7013.99.90 | Glassware for toilet/office/indoor decor. or similar purposes, nesoi, n/cut or engraved, valued over \$5 each |