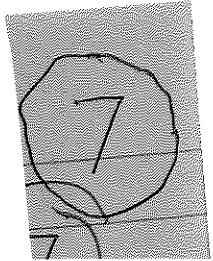




FOR OFFICIAL FILE

UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230




A-570-827
Scope Inquiry
Public Document
IA08 : PMS

MAR - 4 2005

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MEMORANDUM FOR: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

FROM: Laurie Parkhill 
Office Director

SUBJECT: Final Scope Ruling--Antidumping Duty Order on Certain Cased
Pencils from the People's Republic of China (PRC)--Request by
Target Corporation

SUMMARY

On August 16, 2004, Target Corporation (Target), an importer, requested that the U.S. Department of Commerce (the Department) issue a ruling as to whether the RoseArt Clip N' Color (Clip N' Color) imported by Target is within the scope of the antidumping duty order (the order) on certain cased pencils from the People's Republic of China (PRC), 59 FR 66909 (December 28, 1994). The Clip N' Color is comprised of the following items: eight broad-line markers, 12 colored pencils, 38 crayons, and paper in a portable plastic storage case with a metal clip attached to the front of the case. In accordance with 19 CFR 351.225(k)(2), we recommend that the Department determine that the merchandise in question is outside the scope of the order.

BACKGROUND

In its August 16, 2004, submission (dated August 13, 2004), Target argues that for purposes of the Department's scope ruling the Clip N' Color must be viewed as an activity package or set, not as individual items. Target contends that the Clip N' Color is an art set that includes items that are not subject merchandise, *i.e.*, markers, crayons, paper, and the plastic storage case, and that the only items included in the set that are possibly subject merchandise are the colored pencils. Target argues that the colored pencils are but one component of the Clip N' Color and should not control the scope ruling concerning the entire set. Target contends that, because the colored pencils are sold in a set with the other nonsubject articles, the Clip N' Color is outside the scope of the order. Target contends that the language of the order does not contemplate "mixed media" sets such as the Clip N' Color.



On September 30, 2004, the Department initiated a formal scope inquiry and invited all interested parties to submit comments or factual information regarding this matter. On October 20, 2004, Target submitted comments reiterating its position as stated in its August 13, 2004, submission.

On November 1, 2004, Sanford L.P., Musgrave Pencil Co., and General Pencil Co., Inc. (petitioners),¹ submitted rebuttal comments to Target's October 20, 2004, comments. The petitioners argue that the Department has concluded previously that pencils imported with other items in sets may be outside the scope of the order where the pencils are a minor component in the set or the set is neither intended to be, nor is comprised of, writing instruments alone or with other components closely associated with writing instruments only. The petitioners claim that the Clip N' Color does not satisfy these conditions for exclusion. The petitioners argue that the quantity of pencils contained in the Clip N' Color is significant and that all of the items in the kit, along with the container, are useful only for drawing or writing or for holding the drawing and writing instruments. Furthermore, the petitioners state, "mixed-media" sets found previously to be outside the scope of the order included items with no applicability for drawing or writing.

On January 12, 2005, we asked Target to submit additional information regarding the manner in which the Clip N' Color is advertised and displayed. Target submitted additional information on January 14, 2005. The petitioners submitted comments on Target's additional information on January 21, 2005.

ANALYSIS

A. Regulatory Framework

The regulations governing the Department's antidumping scope rulings can be found at 19 CFR 351.225. On matters concerning the scope of an order, the Department first examines the descriptions of the merchandise contained in the petition, the determinations of the Secretary and the International Trade Commission (ITC), and the initial investigation. See 19 CFR 351.225(k)(1). This ruling may take place with or without a formal inquiry. If the Department determines that these descriptions are dispositive of the matter, the Department will issue a final scope ruling as to whether or not the subject merchandise is covered by the order (see 19 CFR 351.225(d)).

Conversely, where the descriptions of the merchandise are not dispositive, the Department will consider the following additional factors set forth at 19 CFR 351.225(k)(2): i) the physical characteristics of the merchandise; ii) the expectations of the ultimate purchasers; iii) the ultimate use of the product; iv) the channels of trade in which the product is sold; and v) the manner in which the product is advertised and displayed. The Department applies these factors when the

¹In their rebuttal comments, petitioners state that Rose Moon, Inc., successor to Moon Products, Inc., is a petitioner in this proceeding but does not join in the rebuttal comments.

product descriptions contained in the petition, the determinations of the Secretary (including prior scope rulings) and the ITC, and the initial investigation are not dispositive. The determination as to which analytical framework is most appropriate in any given scope inquiry is made on a case-by-case basis after consideration of all record evidence before the Department.

In its petition, filed on November 9, 1993, the petitioners described certain cased pencils as follows:

Cased pencils are writing and drawing instruments... Cased pencils are manufactured in varying dimensions... The sheath may be round or may be milled to create multiple-sided surfaces... The term "cased pencils" should be understood to describe pencils cased in wood and/or man-made materials, with cores of graphite or other materials, whether or not decorated and whether or not tipped (e.g., with erasers, etc.) in any fashion, and either sharpened or unsharpened... The class or kind of merchandise that is the subject of this petition does not include mechanical pencils, pens, or any other such writing instruments. All pencils share the characteristic of having their length reduced, through sharpening, as a result of use. The reduction in size attributable to sharpening, and relatively inexpensive cost, means that they readily are disposable.

With respect to the domestic like product, the petitioners state:

Regardless of the materials used... cased pencils retain in common the physical characteristics of having a rigid sheath bonded to a writing core. Cased pencils are rendered usable by means of paring away the rigid bonded sheath to expose the writing core...

See Petition at 8-15.

The scope of the order adopted the language of the petition:

{t}he products covered by this investigation are certain cased pencils of any shape or dimension which are writing instruments and/or drawing instruments that feature cores of graphite or other materials encased in wood and/or man-made materials, whether or not decorated and whether or not tipped (e.g., with erasers, etc.) in any fashion, and either sharpened or unsharpened. The pencils subject to this investigation are classified under subheading 9609.10.00 of the Harmonized Tariff Schedule of the United States ("HTSUS").

Specifically excluded from the scope of this investigation are mechanical pencils, cosmetic pencils, pens, non-cased crayons (wax), pastels, charcoals, and chalks.

See the order.

After citing the above scope language, the ITC made the following comment:

{t}he scope of imported articles includes a variety of cased pencils including commodity or standard yellow pencils, colored pencils (“cased crayons”), decorated, imprinted or specialty pencils, drafting pencils, pencil blanks, and raw pencils. Commerce determined that these imported items constitute a single class or kind of merchandise.

See Certain Cased Pencils from the People’s Republic of China, Investigation No. 731-TA-669 (Final), USITC Publication 2837, December 1994 (ITC Final) at page I-6.

Documents and parts thereof from the underlying investigation deemed relevant by the Department to the scope of the order were made part of the record of this ruling and are referenced herein. Documents that were not presented to the Department or placed by it on the record do not constitute part of the administrative record for this scope ruling.

B. Department’s Analysis

The issue presented by this scope inquiry is whether the Clip N’ Color, which includes 12 colored pencils, is within the scope of the order on certain cased pencils from the PRC. The underlying record established in this scope inquiry – the petition, the Department and ITC determinations (including prior Department scope determinations) and the relevant order – is not dispositive of this precise issue because it does not address whether “mixed media” sets, such as the Clip N’ Color imported by Target, are the same class or kind of merchandise as that covered by the order. The Department has addressed similar scope inquiries covering mixed media sets using the factors listed in 19 CFR 351.225(k)(2), and has found them to be outside the scope of the order. See the memorandum from Holly A. Kuga to Richard W. Moreland dated February 9, 1998: “Final Scope Ruling – Antidumping Duty Order on Certain Cased Pencils from the People’s Republic of China – Request by Creative Designs International, Ltd.” (Designs), and the memorandum from Tom Futtner to Holly A. Kuga dated April 5, 2001: “Final Scope Ruling – Antidumping Duty order on Certain Cased Pencils from the People’s Republic of China – Request by Dollar General Corporation” (Dollar). As a result, the Department has analyzed the current scope inquiry applying the factors set forth in 19 CFR 351.225(k)(2).

1. Physical Characteristics

Target argues that, if the items in the Clip N’ Color are considered individually, the only items that fall within the scope of the order are the colored pencils. Target claims that the Clip N’ Color should be considered in its entirety as an art kit. Target claims that, in Designs, the Department took this approach in its scope ruling with respect to the Naturally Pretty vanity set

in which the Department determined that the merchandise subject to that scope inquiry was “the 10-piece vanity set, and not the two pencils which are only minor components of the set. Target argues that, similarly, the Clip N’ Color is not a cased pencil but an art set. Furthermore, Target contends that the Clip N’ Color can be used to create art without using the colored pencils, suggesting that the colored pencils are a minor component of the kit.

In its comments, the petitioners contend that the unifying physical characteristic of the “artistic tools” that comprise the Clip N’ Color is their “usability” for drawing purposes. The petitioners claim that, therefore, the Clip N’ Color is dissimilar to multimedia kits previously found outside the scope of the order such as the Hello Kitty Fashion Totes and the Naturally Pretty Vanity Set, multimedia kits that included items that have no physical capability of drawing or writing.

We have reviewed the language in the order. In the order, the Department adopted the language of the petition in providing a description of the physical characteristics of covered merchandise:

{t}he products covered by this investigation are certain cased pencils of any shape or dimension which are writing instruments and/or drawing instruments that feature cores of graphite or other materials encased in wood and/or man made materials, whether or not decorated and whether or not tipped (e.g., with erasers, etc.) in any fashion, and either sharpened or unsharpened.

See the order. Based on an examination of the physical characteristics of the product imported by Target, the Department determines that the colored pencils are not a substantial component of the Clip N’ Color, which is comprised of many other items that are not subject merchandise.

2. Expectations of the Ultimate Purchasers

According to Target, the ultimate purchasers of products covered by the scope of the order are buying products solely for use in writing and/or drawing. Target asserts that purchasers of merchandise subject to the order consider factors such as hardness of the lead, type of material used in the casing of the pencil, and the shape and length of the pencil. Target claims that the ultimate purchaser of the Clip N’ Color set is concerned with the variety of art media included in the kit, the storage capability of the plastic case, and the usefulness of the plastic case and attached clip as a drawing surface. Furthermore, Target claims that the physical characteristics of any one component in the kit alone is not dispositive with respect to the scope ruling. Target claims that the ultimate purchaser of the Clip N’ Color would not buy the kit to obtain only one component of the kit. Target claims that, in Designs, the Department found that a response to the ruling request did not provide convincing evidence that a purchaser would obtain the vanity set with the expectation of solely or principally acquiring pencils.

The petitioners state that there is no component of the Clip N’ Color however minor, that is not used for drawing, the Clip N’ Color is designed for drawing, and the purchaser can only expect to obtain “a drawing instrument.”

The petition states that “{t}he ultimate purchaser necessarily must expect to use a pencil as a writing instrument; indeed, there is no other use. A purchaser may also seek an inexpensive, disposable, erasable writing product, and would expect to find these qualities in a cased pencil, but not in other writing instruments.” See Petition, November 9, 1993, at 12 (Public Version).

As we stated in Designs and in Dollar, although we agree with the petitioners that a purchaser acquiring the Clip N’ Color would reasonably be expected to use the kit exclusively for writing or drawing, the petitioners have not provided evidence that a purchaser would obtain the Clip N’ Color with the expectation of solely or principally acquiring pencils. Furthermore, based on a review of the packaging and contents of the Clip N’ Color, it appears that the purchaser of the set expects to obtain a portable art kit, the essence of which is rendered by the variety of writing/drawing instruments and the plastic carrying case. The mere fact that, aside from the plastic carrying case and the paper, all of the components of the Clip N’ Color set are items used for writing or drawing is not enough to consider the set to be covered by the scope. There are many items used exclusively for writing or drawing that are outside the scope of this order. Indeed, the majority of the writing/drawing instruments included in the Clip N’ Color set are not subject merchandise. Thus, while purchasers of both items are getting “drawing instruments,” we conclude that the expectations of the ultimate purchasers of cased pencils and those of the ultimate purchasers of Target’s product at issue are dissimilar.

3. Ultimate Use

Target claims that the merchandise subject to the order and the Clip N’ Color do not share a common ultimate use. Target claims that for purposes of this scope inquiry, the Clip N’ Color should be analyzed based on its “collective purpose,” not the uses of the individual components. Target claims that the pencils covered by the order are used as writing instruments only. Target claims that the paper, the smooth and secure writing surface of the plastic case, and the variety of media included in the kit are marketed and intended to be used collectively to create artwork. Target claims that the Department has considered the collective use of products, which did not require the use of the pencil components, in previous scope rulings and found the products outside the scope of the order, citing Designs and Dollar.

The petitioners argue that the Clip N’ Color is both designed and dedicated to use for drawing. They claim that Target’s assertion that “the merchandise covered by the order and the Clip N’ Color set do not share a common ultimate use” is self-contradictory. The petitioners state that cased pencils are described in the order as “writing and/or drawing instruments.” In addition, the petitioners state that Target argues that the Clip N’ Color consists of drawing instruments (and related media) and will be used by children for drawing. The petitioners argue that this use is identical to the use for cased pencils.

The petition states that all pencils have the ultimate use as writing (including drawing) instruments. “Although different pencils may serve particular writing needs (e.g., drafting

pencils), ultimately all pencils are used to form a written image on a surface medium, such as paper.” See Petition at 12 (Public Version).

The petitioners’ logic seems to imply that 1) all scope merchandise is used for writing and drawing; 2) the Clip N’ Color is used for drawing, therefore 3) the Clip N’ Color is scope merchandise. This is flawed logic. Based on a review of the contents of the Clip N’ Color set, we find that the ultimate use of the merchandise is as a portable art kit. While the kit is intended to be used for writing and/or drawing, the majority of the components are not subject merchandise. Therefore, while the ultimate use of the merchandise covered by the order and that of Target’s product is similar, this is not sufficient to find that the Clip N’ Color set is covered by the scope.

4. Channels of Trade

According to Target, subject merchandise is sold in office-supply stores, stationery shops, and other specialty shops which would not carry art-supply sets such as Clip N’ Color. Target states that the Clip N’ Color may be sold in toy stores or other children’s stores. Target states that merchandise covered by the order and the Clip N’ Color may be sold at mass retailers but that this overlap is insignificant because mass retailers sell a wide array of unrelated merchandise ranging from food and snacks to patio furniture. Target contends that the fact that mass retailers may sell both the subject pencils and the Clip N’ Color does not mean that the products share similar properties or even the same market. In addition, Target argues that subject merchandise and the Clip N’ Color are sold in specialized stores selling niche product lines that do not necessarily overlap.

The petitioners assert that Target did not provide any factual support for its statement that “ ... office supply stores, stationery shops, and other specialty shops ... would not carry art supply sets such as Clip N’ Color.” Moreover, the petitioners argue, there is a common channel of trade for the Clip N’ Color and pencils. The petitioners cite the ITC’s staff report in the final investigation concerning pencils from Thailand which stated, “Cased pencils produced in the United States are mainly sold to retailers such as K-mart, Wal-Mart, Staples, Target, and National Office Supply ... pencils imported from China and Thailand reach the market essentially through the same channels of distribution, including the mass retail The largest segment of the U.S. market for pencils is the retail mass market segment,” citing *Certain Cased Pencils from Thailand*, Inv. No. 731-TA-670 (Final), USITC Pub. 2816 (Oct. 1994)

In discussing channels of trade, the petition states that all pencils are distributed through similar channels of trade, *i.e.*, the producer or importer sells directly to retail customers or to distributors. According to the petition, distributors, in turn, sell to end-users, including individual consumers, businesses, and schools. See Petition at 12 (Public Version).

According to the ITC, pencils are sold through virtually all channels of distribution within the mass merchants and office-products markets, including wholesalers, office-supply superstores,

mail-order catalogs, retail mass marketers, advertisement specialty dealers, and major discount stores. See *Certain Cased Pencils from Thailand*, USITC Pub. 2816 (October 1994), at II-47.² Since both subject merchandise and the Clip N' Color Target imports are sold by Target, itself a mass retailer, we conclude that there is evidence of some overlap in the channels of distribution between merchandise covered by the order and Target's imported product.

5. Advertising and Display

Target states that the Clip N' Color is displayed at Target's stores with other similar art and school supply sets and other products that promote children's creativity. Target argues that pencils covered by the order would be advertised with other types of pencils, namely wooden graphite pencils, mechanical pencils, decorated pencils, and pencils with or without erasers. Target contends that covered pencils could be advertised in mass-retail stores such as Target but also in office-supply stores, stationery stores, and even stores that specialize in high-end gifts, which offer mechanical pencils that are encased in expensive housings. Target claims that the Clip N' Color would not be advertised in office-supply stores, stationery stores, and high-end gift stores. Target claims that the Clip N' Color, on the other hand, might be found in and advertised by toy stores, children's stores, drugstores, and art-supply stores. Furthermore, on January 14, 2005, Target submitted information and photographs demonstrating that, while in inventory, the Clip N' Color is displayed in the aisle labeled "Art Sets" and "Crayons and Markers" and that pencils are displayed in a separate aisle labeled "Office Supplies, Pencils, Pens." Target states that, although the Clip N' Color may not currently be in inventory (it was displayed for sale during the November and December 2004 holiday season), a similar RoseArt kit, which includes crayons, markers, stencils, and other items and is packaged in a plastic case similar to the Clip N' Color plastic case, is currently displayed in the aisle labeled "Art Sets" and "Crayons and Markers." Furthermore, the photographs of the advertising circular submitted by Target do not show the Clip N' Color advertised with pencils.

The petitioners argue that the order covers "certain cased pencils ... which are writing and/or drawing instruments ..." and that the Clip N' Color is advertised and displayed as an item used for artistic purposes, *i.e.*, as a kit for drawing. Petitioners claim that the advertising is directed toward potential patrons that seek drawing items and the in-store display specifically identifies the Clip N' Color as a drawing kit.

According to the petition, "{t}o the extent that pencils are advertised, different varieties typically will be presented in the same catalog. Pencil displays in office supply stores, stationery stores, etc., typically will also present different varieties of pencils in the same area." See Petition at 13 (Public Version).

²The information contained in the final report on Thailand was part of the ITC's record in *Certain Cased Pencils from the People's Republic of China*, USITC Pub. 2837, at II-3 (December 1994).

Department officials observed on-site at a Target retail outlet in January 2005 that the Clip N' Color is displayed in the store's arts and crafts section, separate from the area in which pencils are displayed. Because the Clip N' Color is displayed separately from subject merchandise at Target and because there is no evidence on the record that demonstrates that the Clip N' Color is advertised and displayed in office-supply stores or stationery stores, stores that typically carry merchandise covered by the order, we conclude that Target's Clip N' Color and the merchandise subject to the order are not advertised or displayed in the same manner.

C. Additional Arguments Submitted by the Parties

Target argues that the Clip N' Color should be found to be outside the scope of the order because the entire set must be purchased in order to obtain the colored pencils that are found in the Clip N' Color and that the cost of the colored pencils is only a small percentage of the total cost of the Clip N' Color. Target contends that, as was the case with Dollar, a purchaser would not buy the entire Clip N' Color to obtain the low-cost pencils.

Petitioners argue that, because Target did not provide any information regarding the cost of the cased pencils in the Clip N' Color relative to that of the overall product or the other components, Target's claim is unsubstantiated.

Cost is not one of the factors we consider when making scope rulings pursuant to 19 CFR 351.225(k)(2). The merchandise subject to this scope request is the multi-piece Clip N' Color and not the pencils, which are not a substantial component of the set. Thus, were cost a factor, the relevant cost would be the cost of the entire stationery set and not just the cost of the pencils. See Designs.

CONCLUSION

In summary, in accordance with 19 CFR 351.225(k)(2), based on our review of the record of this scope inquiry, we find that the physical characteristics of the merchandise at issue, the expectations of the ultimate purchasers, the ultimate use, and the manner in which the stationery sets are advertised and displayed are not the same as merchandise covered by the scope of the order on certain cased pencils from the PRC.

RECOMMENDATION

Based on the above analysis, we recommend that the Department determine that the Clip N' Color, imported by Target, is outside the scope of the order on certain cased pencils from the PRC.

Agree

Disagree

Barbara E. Tillman

Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

3/4/05

(Date)