



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

FOR OFFICIAL FILE

SEP 15 1997

A-570-827

Scope Inquiry
Public Document
AD/CVD Enforcement: RMT

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CERTIFIED MAIL, RETURN RECEIPT REQUESTED

To All Interested Parties:

On November 20, 1996, Nadel Trading Corporation (Nadel) requested that the Department of Commerce (the Department) issue a scope ruling that Bensia pencils imported by Nadel from the People's Republic of China (PRC) are outside the scope of the antidumping duty order on certain cased pencils from the PRC

On July 1, 1997, the Department issued a preliminary determination that Bensia pencils are outside the scope of the order. Interested parties were invited to comment on this preliminary decision. Pursuant to 19 CFR 353.29(i)(1), the Department has reached a final determination that Bensia pencils imported by Nadel from the PRC are outside the scope of the antidumping duty order on certain cased pencils from the PRC.

We will notify the U.S. Customs Service of this decision. If you have any questions concerning this matter, please contact Ron Trentham at (202) 482-4793 or Irene Darzenta at (202) 482-6320.

Sincerely,

Holly A. Kuga
Senior Director
AD/CVD Enforcement, Group II

Enclosure





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MEMORANDUM FOR: Jeffrey P. Bialos
Principal Deputy Assistant Secretary
for Import Administration

FROM: Holly A. Kuga, Senior Director *HAK*
Office of AD/CVD Enforcement, Group II

SUBJECT: Final Scope Ruling--Antidumping Duty Order on Certain Cased
Pencils from the People's Republic of China--Request by Nadel
Trading Corporation for a Ruling on the Bensia Pencil

Summary

Pursuant to 19 CFR 353.29(i)(1), we recommend that the Department of Commerce (the Department) determine that Bensia pencils imported by Nadel Trading Corporation (Nadel) are outside the scope of the antidumping duty order on certain cased pencils from the People's Republic of China (PRC), 59 FR 66909, December 28, 1994.

Background

On November 20, 1996, Nadel requested that the Department issue a scope ruling that Bensia pencils imported by Nadel from the PRC are outside the scope of the order. In its scope application, Nadel describes the Bensia pencil as a mechanical or "quasi-mechanical" pencil having a number of plastic inserts each of which holds a piece of lead. According to Nadel, the user of the Bensia pencil pushes a plastic insert with an expended lead cartridge into one end of a plastic sleeve causing, in turn, a sharpened cartridge or new plastic insert with a sharpened piece of lead to pop out of the end of the tube to be used for writing. Nadel contends that the Bensia pencil is not within the scope of the order because unlike the subject merchandise, the Bensia pencil involves the use of a cartridge system that "quasi mechanically" dispenses a new lead when a "spent" cartridge is pushed in the non-writing end of the instrument. Thus, according to Nadel, the Bensia pencil falls within the specific exclusion for mechanical pencils as provided for in the antidumping duty order.



On June 13, 1997, the Pencil Section of the Writing Instrument Manufacturers Association (petitioners) submitted comments arguing that there is no basis for Nadel's assertion that its Bencia pencils are "mechanical or quasi-mechanical." Citing a U.S. Customs Service (Customs) ruling on Bencia pencils, petitioners maintain that the pencils imported by Nadel are not mechanical in nature because they have no screwing, spring or sliding mechanism for extending and retracting the lead by propelling or sliding the lead out of its housing so that it can be functional. Thus, petitioners argue that because Bencia pencils are not mechanical there is no basis for excluding them from the scope of the order.

Moreover, petitioners contend that based on the description of the subject merchandise contained in the Department's final determination and antidumping duty order, Nadel's pencils are clearly covered by the order. According to petitioners, Nadel does not argue that its product is not covered by the product description. Rather, petitioners maintain that Nadel's entire argument is based on the false premise that Bencia pencils are mechanical and, thus, excluded from the order. Petitioners point out that the order specifies the types of articles that were not subject to the less-than-fair-value (LTFV) investigation (i.e., mechanical pencils, cosmetic pencils, non-cased crayons (wax), pastels, charcoals, and chinks) and assert that Nadel's pencils do not fall in any of these categories. Thus, petitioners claim that the specific exclusion of certain articles indicates that all other pencils are covered by the order, and since Bencia pencils do not fit any of the specified excluded articles, there is no other basis for excluding them.

Further, petitioners state that during the investigation of certain cased pencils from Thailand the International Trade Commission (ITC) concluded that there was no basis for concluding that Bencia pencils were not subject to investigation. While admitting that the ITC does not determine investigation scope issues, petitioners argue that the ITC's conclusion is based on a plain reading of the scope language of the Department's final determination. Thus, according to petitioners, because the ITC's analysis is based on a "straight forward application of the scope language to the Bencia pencils," and Nadel has not asserted or proven that the ITC's analysis was incorrect, the Department should rely on the ITC's determination pursuant to 353.29(i)(1) of Department's regulations.

On July 1, 1997, the Department issued a preliminary determination that Bencia pencils are outside the scope of the order (see Preliminary Scope Ruling--Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China--Request by Nadel Trading Corporation for a Ruling on the Bencia Pencil). Interested parties were invited to comment. Comments were filed by petitioner on July 16, 1997, and rebuttal comments were filed by Nadel on July 23, 1997. No other interested party responded.

Petitioner's July 16, 1997, comments reiterate the arguments presented in its June 13, 1997, submission (referenced above). These arguments were addressed by the Department in its preliminary determination. In addition, petitioner alleges that in its preliminary scope ruling the Department was mistaken in referring to petition language describing the domestic like product,

i.e., that the writing core is always bonded to the sheath. According to the petitioner, the Department was incorrect in relying on this description of domestic products to somehow limit the imported articles that were subject to the investigation and subsequent order. Petitioner claims that the discussion was describing domestically-produced pencils only, and made no reference to the imported articles.

In its July 23, 1997 rebuttal comments, Nadel states that the Department properly concluded in its preliminary scope ruling that the Bencia pencil is outside the scope of the order by referring to the petition and other means as directed by 19 CFR 353.29(i). Nadel argues that the order requires that covered products are either sharpened or unsharpened. According to Nadel, Bencia pencils are not capable of being sharpened and, unlike covered merchandise, cannot exist in an unsharpened state. Moreover, Nadel argues that petitioner's assertion that Bencia pencils fit the description of the order and underlying final determinations because they fall within the "literal terms" is an overly simplistic approach which dictates that even those pencils specifically excluded would be included within the scope of the order.

Analysis

The regulations governing the Department's antidumping scope determinations can be found at 19 CFR 353.29. On matters concerning the scope of an antidumping duty order, the primary bases for determining whether a product is included within the scope of the order are the descriptions of the product contained in the determinations of the Secretary and the ITC, and the petition. This determination may take place with or without a formal inquiry (see 19 CFR 353.29(b) and (i)(1)).

Documents, or parts thereof, from the underlying investigation deemed relevant by the Department to the scope of the outstanding order were made part of the record of this scope determination 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 record for this scope determination.

The petition, filed on November 9, 1993, requested the imposition of antidumping duties on imports of certain cased pencils which were described 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.

In discussing the domestic like product, petitioner stated:

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 (emphasis added).

The Department's preliminary and final determinations and the antidumping duty order adopt the language of the petition in providing a description of the physical characteristics of cased pencils by stating:

The 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....

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

See Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cased Pencils From the People's Republic of China, 59 FR 30911 (June 15, 1994); Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils From the People's Republic of China, 59 FR 55625 (November 8, 1994) and; Antidumping Duty Order: Certain Cased Pencils from the People's Republic of China, 59 FR 66909 (December 28, 1994).

As noted in our preliminary determination, Nadel claims that the Bencia pencil is an excluded product because it is mechanical or "quasi-mechanical," but provides no support for its argument such as a generally accepted definition of a mechanical or "quasi-mechanical" pencil. Petitioner, on the other hand, cites a Customs ruling¹ which determined that Bencia pencils are not

¹ The ruling, dated April 13, 1993, was for Customs classification purposes not antidumping purposes. The antidumping petition was not filed until November 9, 1993 and the antidumping duty order on certain cased pencils from the PRC did not take effect until December 28, 1994.

mechanical pencils. Based on the description of mechanical pencils as found in the Harmonized Tariff Schedule of the United States (HTS), Customs found that Bensia pencils do not have a "mechanical action, e.g, screwing, spring or sliding mechanisms, for extending and retracting the lead by propelling or sliding the lead out of its housing so that it can be functional" (see Department of the Treasury, United States Customs Service Ruling HQ 951918, Concerning Non-Sharpening Pencils, April 13, 1993, submitted as an Attachment to Petitioners Comments, dated June 13, 1997). In our preliminary determination, we concluded based on the description of mechanical pencils found in the HTS and lacking any other evidence on the record of this scope inquiry to the contrary, that the Bensia pencil is not a mechanical pencil (see HTS, Chapter 96, Item 9608.40). No new arguments have been presented on this point and we have not modified our conclusion.

Both Nadel's and petitioners' comments submitted on November 20, 1996 and June 13, 1997, respectively, mentioned that the ITC in its final negative injury determination on certain cased pencils from Thailand noted that while the Department defined the scope of an investigation, it saw no basis for deeming Bensia pencils not within the scope of the Department's investigation (see Certain Cased Pencils from Thailand, (Final), Publication 2816, October 1994, at I-6). Petitioners maintain that we should rely on the ITC's determination pursuant to the Department's regulations. We disagree with petitioners' argument that we should rely primarily on the ITC's comments in determining whether Bensia pencils are within the scope of the order. First, we note that the ITC's comments regarding Bensia pencils were made in relation to its investigation of certain cased pencils from Thailand. Neither the ITC's nor the Department's determinations in the investigation of certain cased pencils from the PRC made mention of Bensia pencils. Further, as discussed above, the Department's scope determinations are governed by regulations found at 19 CFR 353.29. Even assuming that the ITC's comments were made during the investigation in this case, we would rely not only on the determinations of the ITC but also on the petition, the determinations of the Secretary, and subsequent scope determinations.

As discussed in the preliminary determination, petitioners claim that the specific exclusion of certain articles indicates that all other pencils are covered by the order, and since Bensia pencils do not fit any of the specified excluded articles, there is no other basis for excluding them. Contrary to petitioners arguments, there is no evidence on the record of the LTFV investigation to indicate that by specifically excluding certain articles from the scope of the investigation the Department meant to preclude the possibility of excluding other products as not meeting the general definition of the covered merchandise.

In comments submitted on July 16, 1997, and discussed previously, the petitioner argues that the preliminary scope ruling is wrong in inferring that the description of the domestically-produced merchandise somehow addressed the entirely different issue of the scope of imports subject to investigation. In this regard, we note that in a rebuttal brief submitted during the LTFV concerning the "class or kind" of imported merchandise, the petitioner stated:

First, all pencils undergo an identical production process, a factor that

Commerce weighs heavily in determining class or kind issues. Slats are manufactured into sandwich "halves", a core is glued into one half, the halves are glued to make a sandwich, and the sandwich is cut into slats...

...as petitioners have consistently pointed out in this case, all pencils are disposable, delible, portable marking instruments that require sharpening to renew the writing core. These essential features are shared by all pencils and distinguish pencils from all other marking instruments (emphasis added).

See Rebuttal Brief of Petitioners, The Pencil Section of the Writing Instrument Manufacturers Association, Inc., and the Domestic Pencil Industry, in the Matter of: Certain Cased Pencils from the People's Republic of China, October 3, 1994, at 2-4. As this description of imported cased pencils mirrors the language in the petition concerning the domestic like product, it is not in error for the Department to conclude that the language used to describe the domestic like product was also meant to apply to merchandise covered by the scope of the investigation.

Unlike the merchandise subject to the LTFV investigation, the Bencia pencil is a non-disposable, "non-sharpening" writing and drawing instrument. A physical examination of Nadel's product reveals that its plastic sheath contains a series of lead points partially housed in a tapered plastic core. We note that this series of lead points is not bonded to the pencil's sheath. Moreover, the Bencia pencil is not rendered usable by means of paring away the bonded sheath to expose the writing core, nor is it characterized by having its length reduced through sharpening. Instead, the pencil comes with a sharpened point in the writing end of the sheath. When the point becomes worn, it is removed and pushed into the non-writing end of the instrument which causes a new sharpened cartridge to be dispensed. Further, since the Bencia pencil has replaceable points and does not have its size reduced due to sharpening, it is not readily disposable

Consequently, based on an analysis of the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Department and the ITC, we conclude that Nadel's Bencia pencil is not the same class or kind of merchandise as the merchandise covered by the scope of the order of certain cased pencils from the PRC.

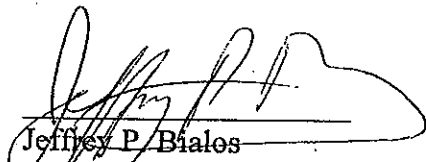
Recommendation

We recommend that the Department determine that the Bencia pencils imported by Nadel are outside the scope of the antidumping duty order because their length is not reduced through sharpening, the sheath is not bonded (glued) to the writing core and they are not rendered usable by means of paring away the rigid bonded sheath to expose the writing core.

Agree _____

Disagree _____

If you agree, we will send a letter to interested parties, and will notify Customs our determination.



Jeffrey P. Biales
Principal Deputy Assistant Secretary
for Import Administration

September 15, 1997
Date