



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

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A-570-827

Scope Inquiry
Public Document
AD/CVD Enforcement: RMT

MEMORANDUM FOR: Richard W. Moreland
Deputy Assistant Secretary
Import Administration

FROM: Holly A. Kuga *HAK*
Senior Director,
AD/CVD Enforcement
Group II, Office 4

SUBJECT: Final Scope Ruling--Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China (PRC)--Request by Creative Designs International, Ltd.

SUMMARY

On July 22, 1997, Creative Designs International, Ltd., (CDI), an importer, requested that the U.S. Department of Commerce (the Department) issue a determination as to whether "Naturally Pretty," a young girl's 10 piece dress-up vanity set (vanity set), including two 3-inch pencils, imported by CDI, is within 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. 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 July 22, 1997, submission, CDI argues that its "Naturally Pretty" vanity set, containing two pencils as minor components, does not belong to the class or kind of merchandise subject to the order. Moreover, CDI asserts that an analysis based on the criteria established in Diversified Products Corp. v. United States, 572 F. Supp. 883 (CIT 1983) (Diversified Products), clearly establishes that the merchandise at issue is outside the class or kind of merchandise covered by the order. In addition to the criteria established in Diversified Products, CDI maintains that cost is a factor that supports a conclusion that its vanity set is outside the scope of the order. According to CDI, the pencils included in the set are of low cost and the only way to obtain them



is to pay for a full 10-piece dress-up/vanity set, which costs more than dozens of comparable pencils purchased separately. Along with its request for a scope ruling, CDI submitted a sample of its vanity set.

On August 26, 1997, we informed CDI that we could not proceed with its scope application until it provided information regarding the manner in which CDI's vanity set is advertised and displayed. On August 29, 1997, CDI responded to the Department's request regarding the advertising and display of its vanity set (see CDI's Supplemental Information, August 29, 1997).

In comments submitted on September 26, 1997, the Writing Instrument Manufacturers Association (WIMA) (the petitioners) requested that the Department rule that the pencils contained in CDI's vanity set, and similar sets imported by other companies, fall squarely within the scope of the order. According to WIMA, for the Department to rule otherwise would allow CDI, and countless other importers, to evade the order simply by packing subject merchandise together with other products prior to importation into the United States.

Moreover, WIMA points out that a U.S. Customs Service (Customs) classification ruling concerning CDI's vanity set stated that "[e]ach component is a fully functional article of commerce and is of a kind usually sold at retail sale on its own merits" (see New York Customs Ruling 899587, July 15, 1994, submitted as an Attachment to Response by WIMA to Scope Request by CDI, September 26, 1997 (WIMA Response)). In other words, according to WIMA, the Customs ruling indicates that the individual components of CDI's vanity set do not lose their separate identities by virtue of being packaged together, but instead retain their separate identities (see WIMA Response at 3).

Further, WIMA argues that the International Trade Commission (ITC) understood that pencils contained in sets, such as those contained in CDI's vanity set, were subject to investigation. According to WIMA, the ITC in its final determination on Certain Cased Pencils from Thailand, USITC Pub. 2816 (Oct. 1994) at I-15 n. 82, noted that import totals would be understated by failing to include pencils imported as sets. The petitioner claims that if pencils in sets, such as CDI's, were outside the scope of investigation, the ITC would not have been concerned that they may not have been reported in import statistics.

Regarding cost, WIMA maintains that although CDI asserts that the cost of its ten piece play set differs from the cost of a pencil, "this is clearly not a fair "apples-to-apples" comparison of the kind required in a proper scope analysis. Rather, the cost of producing the pencils which are components of the set is the only relevant consideration, not the cost of producing brushes, combs, bags and other items which are not pencils" (see WIMA Response at 6).

Based on a review of the record, the Department initiated a formal scope inquiry on October 10, 1997, and invited all interested parties to submit comments or factual information regarding this matter. No comments or rebuttal comments were submitted by CDI. WIMA submitted comments on October 30, 1997.

The comments submitted by WIMA reiterate many of the arguments presented by the petitioners in their September 26, 1997, submission. In addition, WIMA claims that if pencils were meant to be excluded based on their packaging, they would have been so excluded in the scope language, just as (e.g.) mechanical pencils were excluded (see WIMA's Comments Concerning Scope Inquiry Submitted by CDI, October 30, 1997, at 3 (WIMA's Comments)).

ANALYSIS

The regulations governing the Department's antidumping scope determinations can be found at 19 CFR 351.225. On matters concerning the scope of an antidumping duty 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 determination 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 351.22(d)).

Conversely, where the descriptions of the merchandise are not dispositive, the Department will consider the additional factors set forth at 19 CFR 351.225(k)(2). These criteria are: 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, i) through iv) of which are known commonly as the Diversified Products criteria, when the product descriptions contained in the petition, the determinations of the Secretary and the ITC, and the initial investigation are ambiguous or unclear. 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.

Documents and 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 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 administrative record for this scope determination.

With respect to Customs' classification ruling that the individual components of CDI's vanity set do not lose their separate identities by being packaged together, it is the Department that has ultimate authority to clarify the scope of antidumping duty orders and findings. Although the Department may consider the decisions of Customs, it is not obligated to follow nor is it bound by the classification determinations of Customs for purposes of clarifying the scope of an antidumping or countervailing duty finding or order (see Diversified Products, 572 F. Supp. at 887-888, and Royal Business Machines v. United States, 507 F. Supp. 1007 (CIT 1980)).

Furthermore, we disagree with WIMA's claim that the ITC understood that pencils contained in sets, such as those included in CDI's vanity set, were subject to investigation. The ITC did state, based on petitioners' allegations, that there was "some indication" from the record of the final investigation that pencils contained in "school packets or office kits" were often not classified as pencils, "thereby allegedly understating pencil imports in some instances," (see Certain Cased Pencils from Thailand, USITC Publication 2816 (October 1994) at I-15 n.82). However, although the ITC's report indicates that the petitioners and ITC expressed some concern about imports of pencils in "school packets or office kits," there is no indication that either the petitioners or ITC were concerned about the importation of pencils as components of "mixed media" merchandise such as CDI's 10 piece vanity set. In addition, there is no evidence that the ITC considered "mixed media" sets such as the merchandise imported by CDI to be included within the scope of the investigation (Id.)

As stated above, CDI argues that cost is a factor which supports a conclusion that its vanity set is outside the scope of the order because the entire vanity set must be purchased in order to obtain the component pencils. WIMA agrees that the cost of the vanity set imported by CDI differs from the cost of a pencil. It argues, however, that the cost of producing the pencils which are components of the vanity set is the only relevant consideration. Cost is a factor which the Department normally considers in making anticircumvention determinations, and is not one of the Diversified Products factors which Department considers when making a scope determination in accordance with 19 CFR 351.225(k)(2). However, in response to the parties' arguments concerning cost, the Department has determined, as discussed below, that the merchandise subject to this scope request is the 10 piece vanity set, and not the two pencils which are only minor components of the set. Thus, were cost a factor, the relevant cost would be the cost of the entire 10 piece vanity set and not just the cost of the two pencils.

Additionally, in regard to WIMA's argument that if pencils were meant to be excluded based on their packaging, they would have been excluded in the scope language, as were mechanical pencils, the Department has determined in a previous scope determination with respect to this same antidumping duty order that 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 (see 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, September 15, 1997, at 5).

The issue presented by this scope inquiry is whether CDI's "Naturally Pretty" vanity set, which includes two 3-inch 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 final determinations and the relevant order--is not dispositive of this precise issue because it does not address whether "mixed media" sets, such as the vanity set imported by CDI, are the same class or kind of merchandise as that covered by the order. Therefore, the Department has considered the factors set forth in 19 CFR 351.225(k)(2) as noted above.

Physical Characteristics

CDI states that the physical characteristics of the merchandise at issue are extremely different from the products covered by the scope of the order. According to CDI, the order is directed at pencils. CDI argues that the imported merchandise is a young girl's 10 piece, dress-up/vanity set, that includes two very small pencils (see CDI's Scope Determination Request, July 22, 1997, at 3 (Scope Request)).

In rebuttal, WIMA contends that CDI's pencils are wooden-cased articles with cores of graphite that may be sharpened and whose marking may be erased. According to WIMA, the physical characteristics of CDI's pencils comport precisely with the physical characteristics of pencils described as being within the order (see Petitioners' Comments, at 3 and WIMA Response at 5).

The Department's antidumping duty order 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 Antidumping Duty Order: Certain Cased Pencils from the People's Republic of China, 59 FR 66909, December 28, 1994.

An inspection of a sample of the merchandise imported by CDI reveals that the product is a collection of personal accessories for a child. It includes a shoulder bag and a small snap pouch of plastic sheeting, a plastic comb, brush and mirror, sunglasses with plastic frame, two lead pencils, a note pad and an address book. The product is sold in a cardboard retail package which has a clean view top and is printed with the trade name "Naturally Pretty", "10 Piece Deluxe Set", a listing of contents, and an illustration depicting a young girl wearing sunglasses and two shoulder bags.

Based on an examination of the physical characteristics of the product imported by CDI, the Department determines that the merchandise subject to this scope inquiry is the 10 piece vanity set, and not the two pencils which are only minor components of the set. The various components contained in CDI's vanity set including the comb, brush, mirror, and sunglasses, demonstrate that it is a set of items, similar to those found in a grown woman's purse, that allows a little girl to play/act like her mother. The set is not comprised of writing instruments alone, or even writing instruments along with other components that are closely associated with writing instruments only. Therefore, based on examination of the physical characteristics of the covered merchandise as stated in the order and an inspection of the 10 piece vanity set imported by CDI,

we conclude that CDI's product, unlike subject merchandise, is not a writing instrument and/or drawing instrument.

Expectations of the Ultimate Purchasers

According to CDI, the ultimate purchasers of products covered by the scope of the order are buying a functional product, "a writing instrument." CDI asserts that the ultimate purchaser of covered merchandise considers factors such as eraser, or no eraser; hardness, shape; length, and; sometimes appearance. CDI claims that the purchaser of its vanity set, on the other hand, cares about none of these factors. Rather, the purchaser is buying a play/make believe product for a young girl's role playing. Thus, CDI contends that there is no similarity between the expectations of the ultimate purchasers of its vanity set and those of the ultimate purchasers of covered merchandise (see Scope Request at 3).

WIMA states that purchasers of a package that includes pencils, a pencil pouch, an address book and a notepad would expect to use the pencil as a writing and drawing instrument in exactly the same manner as other pencils are used. Moreover, WIMA argues that there is no reason to believe that the purchasers would discard the pencils after purchasing the package. Further, WIMA states that half of the articles in CDI's vanity set-- the two pencils, the notepad, the address book, and the pencil pouch--are products that facilitate writing. Rather than being a minor element of CDI's "Naturally Pretty" package, WIMA claims that writing is the paramount function served by the package.

In short, WIMA contends that a purchaser acquiring pencils along with stationery items on which to write and a pencil storage case would reasonably be expected to write on the stationery items with the pencils and store the pencils in the pencil case. According to WIMA, CDI has failed to present any information indicating that this would not be the purchaser's expectation (see Petitioners' Comments at 3).

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)).

Although we agree with WIMA that a purchaser acquiring pencils and stationery would reasonably be expected to write on the stationery with the pencils, WIMA has failed to provide any convincing evidence that a purchaser would obtain CDI's vanity set with the expectation of solely or principally acquiring pencils. Based on a review of the packaging and contents of CDI's "Naturally Pretty" vanity set, it would appear that the purchaser of the vanity set expects to obtain a play/make believe product for a little girl's role playing. Thus, we conclude that the expectations of the ultimate purchasers of cased pencils and the ultimate purchasers of CDI's product at issue are very dissimilar.

Ultimate Use

CDI claims that the ultimate use of the merchandise covered by the order and its vanity set are highly dissimilar. CDI argues the pencils covered by the order are intended to be used as writing instruments, and are clearly purchased for that use. Further, CDI maintains that no one interested in obtaining a writing instrument would consider purchasing the 10 piece vanity set in question in order to obtain two very simple 3-inch pencils. CDI contends that the intended use of the young girl's 10 piece dress-up/vanity set, on the other hand, is play and make believe, in which the included pencils play an extremely minor role (see Scope Request at 4).

WIMA asserts that a functioning pencil sold for a child's use ultimately will be used as all other pencils are used: as a writing instrument. According to WIMA, the inclusion of the notepad and address book in the package reasonably indicates that the pencils are intended to be, and will be, used to write on those media. Thus, the ultimate use of CDI's pencils is the same as all other cased pencils (see Petitioners' Comments at 3-4).

The petition states that all pencils have the following 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)).

Based on a review of the packaging and the contents of CDI's vanity set, it seems clear that the ultimate use of the merchandise is play and make believe. Although the various components may have individual uses, we conclude that the ultimate use of the "Naturally Pretty" vanity set is for young girl's role playing. Therefore, we conclude that the ultimate use of the covered merchandise and CDI's product is very dissimilar.

Channels of Trade

According to CDI, the vanity set is sold by toy stores, and in the toy departments of retailers and mass merchants (see Scope Request at 4). In rebuttal, WIMA states that the ITC found that pencils are sold through retail mass marketers and major discount stores. According to WIMA, CDI admits that there is an overlap between the channels of distribution for its product and the pencils sold by the domestic industry (see Petitioners' Comments at 4).

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).¹

Since both covered merchandise and the product CDI imports are sold by retailers and mass merchandisers, we conclude that there is evidence of an overlap in the channels of distribution between merchandise covered by the order and CDI's imported product.

Advertising and Display

CDI states that "Naturally Pretty" is bought, sold and advertised as a dress-up role play set, with the intent that the child will pretend role play with the purse, comb, brush, mirror and memo pad holder. According to CDI, its product is marketed so that a child can pretend to act like her mother (see CDI's Supplemental Information, August 29, 1997, Exhibit 1).

WIMA contends that CDI has provided no documentation to support its assertions concerning advertising of the product, and provided no information concerning the way in which the articles are displayed in stores. According to WIMA, even assuming that the vanity set is sold in the "girls role play aisle", the first four factors clearly demonstrate that CDI's pencils are identical to those covered in the order (see Petitioners' Comments at 4).

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)).

Since there is no evidence that demonstrates that CDI's "Naturally Pretty" vanity set is advertised and displayed in office supply stores and stationery stores and that the covered merchandise is sold and advertised as a dress up role play set in the toy departments of mass merchandisers, we conclude that CDI's "Naturally Pretty" vanity set and the covered merchandise are not advertised or displayed in the same manner.

CONCLUSION

In summary, in accordance with 19 CFR 351.225(k)(2), based on our review of the record of this scope inquiry, the physical characteristics of the merchandise at issue, the expectations of the ultimate purchasers, the ultimate use, and the manner in which the merchandise is advertised and displayed, all support the conclusion that the 10 piece dress-up vanity sets imported by CDI are not the same class or kind as the merchandise covered by the scope of the antidumping duty order on certain cased pencils from the PRC.

¹The 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 (see USITC Pub. 2837 (December 1994, at II-3)).

RECOMMENDATION

We recommend that the Department determine that the "Naturally Pretty" dress-up/vanity set imported by CDI is outside the scope of the antidumping duty order on certain cased pencils from the PRC.

✓ Agree _____ Disagree

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



Richard W. Moreland
Deputy Assistant Secretary
Import Administration

July 9, 1998
(Date)



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

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CERTIFIED MAIL, RETURN RECEIPT REQUESTED

To All Interested Parties:

On July 22, 1997, Creative Designs International, Ltd., (CDI), requested that the Department of Commerce (the Department) issue a scope ruling that "Naturally Pretty," a young girl's 10 piece dress-up vanity set, including two 3-inch pencils, imported by CDI, is outside the scope of the antidumping duty order on certain cased pencils from the PRC

Pursuant to 19 CFR 351.225(k)(2), the Department has reached a final determination that the "Naturally Pretty" dress-up vanity set, imported by CDI, is 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 Wendy Frankel at (202) 482-5849.

Sincerely,

Ronald M. Trentham

for
Holly A. Kuga
Senior Director
AD/CVD Enforcement
Group II, Office 4

Enclosure

