



A-570-901

Scope Inquiry

Public Document

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MEMORANDUM TO: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

Public file

FROM: Wendy J. Frankel 
Director, Office 8

RE: Final Scope Ruling – Antidumping Duty Order on Certain Lined Paper Products from the People's Republic of China, Request by Avenues in Leather, Inc.

BACKGROUND

On July 13, 2006, Avenues in Leather, Inc. (“Avenues”) an importer, requested that the U.S. Department of Commerce (“the Department”) issue a ruling to find that the padfolios it imports are outside the scope of the antidumping duty order on certain lined paper products (“CLPP”) from the People's Republic of China (“PRC”). The Department published its final determination in the less-than-fair-value investigation of CLPP on September 8, 2006.¹ We stated in the *Final Determination* that the Department will consider the issues raised in the scope requests it had received in the event an antidumping duty (“AD”) order is issued. On September 6, 2006, the International Trade Commission (“ITC”) voted in the affirmative with respect to CLPP from the PRC. Therefore, on September 28, 2006, the Department issued an AD order in this case. See *Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Lined Paper Products from the People's Republic of China; Notice of Antidumping Duty Orders: Certain Lined Paper Products from India, Indonesia and the People's Republic of China; and Notice of Countervailing Duty Orders: Certain Lined Paper Products from India and Indonesia*, 71 FR 56949 (September 28, 2006) (“Order”).

On September 12, 2006, Office Depot Inc. (“Office Depot”), an interested party, submitted a letter in support of Avenues' request. On October 16, 2006, the Department requested further information from Avenues regarding the padfolios for which it had requested a scope ruling. On October 18, 2006, Avenues responded to this request. On November 9, 2006, the Department initiated a formal scope inquiry to analyze Avenue's request under 19 CFR 351.225(k)(2) and requested comments from interested parties. On November 29, 2006, Avenues submitted

¹ See *Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products from the People's Republic of China*, 71 FR 53079 (September 8, 2006) (“*Final Determination*”).



comments. On November 30, 2006, Office Depot and the Association of American School Paper Suppliers and its individual members (MeadWestvaco Corp. (“Mead”), Norcom, Inc., and Top Flight, Inc.) (“Petitioner”), the petitioner in the underlying investigation, submitted comments on Avenues’ request. On December 11, 2006, Avenues and Office Depot each submitted rebuttal comments. On December 12, 2006, Petitioner submitted rebuttal comments. On March 9, 2007, the Department determined it required additional time in which to analyze the comments submitted by interested parties and extended the final deadline for the Avenues scope inquiry until May 8, 2007.

LEGAL 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 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. These factors are known commonly as the *Diversified Products*³ criteria. The Department applies these factors when the 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.

SCOPE OF THE ORDER

The scope of this order includes certain lined paper products, typically school supplies,⁴ composed of or including paper that incorporates straight horizontal and/or vertical lines on ten or more paper sheets,⁵ including but not limited to such products as single- and multi-subject

³ *Diversified Products Corp. v. United States*, 6 CIT 155, 572 F. Supp. 883 (1983) (“*Diversified Products*”).

⁴ For purposes of this scope definition, the actual use or labeling of these products as school supplies or non-school supplies is not a defining characteristic.

⁵ There shall be no minimum page requirement for looseleaf filler paper.

notebooks, composition books, wireless notebooks, looseleaf or glued filler paper, graph paper, and laboratory notebooks, and with the smaller dimension of the paper measuring 6 inches to 15 inches (inclusive) and the larger dimension of the paper measuring 8-3/4 inches to 15 inches (inclusive). Page dimensions are measured size (not advertised, stated, or "tear-out" size), and are measured as they appear in the product (*i.e.*, stitched and folded pages in a notebook are measured by the size of the page as it appears in the notebook page, not the size of the unfolded paper). However, for measurement purposes, pages with tapered or rounded edges shall be measured at their longest and widest points. Subject lined paper products may be loose, packaged or bound using any binding method (other than case bound through the inclusion of binders board, a spine strip, and cover wrap). Subject merchandise may or may not contain any combination of a front cover, a rear cover, and/or backing of any composition, regardless of the inclusion of images or graphics on the cover, backing, or paper. Subject merchandise is within the scope of this order whether or not the lined paper and/or cover are hole punched, drilled, perforated, and/or reinforced. Subject merchandise may contain accessory or informational items including but not limited to pockets, tabs, dividers, closure devices, index cards, stencils, protractors, writing implements, reference materials such as mathematical tables, or printed items such as sticker sheets or miniature calendars, if such items are physically incorporated, included with, or attached to the product, cover and/or backing thereto.

Specifically excluded from the scope of this order are:

1. unlined copy machine paper;
2. writing pads with a backing (including but not limited to products commonly known as "tablets," "note pads," "legal pads," and "quadrille pads"), provided that they do not have a front cover (whether permanent or removable). This exclusion does not apply to such writing pads if they consist of hole-punched or drilled filler paper;
3. three-ring or multiple-ring binders, or notebook organizers incorporating such a ring binder provided that they do not include subject paper;
4. index cards;
5. printed books and other books that are case bound through the inclusion of binders board, a spine strip, and cover wrap;
6. newspapers;
7. pictures and photographs;
8. desk and wall calendars and organizers (including but not limited to such products generally known as "office planners," "time books," and "appointment books");
9. telephone logs;
10. address books;
11. columnar pads & tablets, with or without covers, primarily suited for the recording of written numerical business data;
12. lined business or office forms, including but not limited to: preprinted business forms, lined invoice pads and paper, mailing and address labels, manifests, and shipping log books;
13. lined continuous computer paper;
14. boxed or packaged writing stationery (including but not limited to products commonly

known as “fine business paper,” “parchment paper,” and “letterhead”), whether or not containing a lined header or decorative lines;

- Stenographic pads (“steno pads”), Gregg ruled,⁶ measuring 6 inches by 9 inches;

Also excluded from the scope of this order are the following trademarked products:

- Fly™ lined paper products: A notebook, notebook organizer, loose or glued note paper, with papers that are printed with infrared reflective inks and readable only by a Fly™ pen-top computer. The product must bear the valid trademark Fly™.⁷
- Zwipes™: A notebook or notebook organizer made with a blended polyolefin writing surface as the cover and pocket surfaces of the notebook, suitable for writing using a specially-developed permanent marker and erase system (known as a Zwipes™ pen). This system allows the marker portion to mark the writing surface with a permanent ink. The eraser portion of the marker dispenses a solvent capable of solubilizing the permanent ink allowing the ink to be removed. The product must bear the valid trademark Zwipes™.⁸
- FiveStar®Advance™: A notebook or notebook organizer bound by a continuous spiral, or helical, wire and with plastic front and rear covers made of a blended polyolefin plastic material joined by 300 denier polyester, coated on the backside with PVC (poly vinyl chloride) coating, and extending the entire length of the spiral or helical wire. The polyolefin plastic covers are of specific thickness; front cover is .019 inches (within normal manufacturing tolerances) and rear cover is .028 inches (within normal manufacturing tolerances). Integral with the stitching that attaches the polyester spine covering, is captured both ends of a 1 inch wide elastic fabric band. This band is located 2-3/8 inches from the top of the front plastic cover and provides pen or pencil storage. Both ends of the spiral wire are cut and then bent backwards to overlap with the previous coil but specifically outside the coil diameter but inside the polyester covering. During construction, the polyester covering is sewn to the front and rear covers face to face (outside to outside) so that when the book is closed, the stitching is concealed from the outside. Both free ends (the ends not sewn to the cover and back) are stitched with a turned edge construction. The flexible polyester material forms a covering over the spiral wire to protect it and provide a comfortable grip on the product. The product must bear the valid trademarks FiveStar®Advance™.⁹

⁶“Gregg ruling” consists of a single- or double-margin vertical ruling line down the center of the page. For a six-inch by nine-inch stenographic pad, the ruling would be located approximately three inches from the left of the book.

⁷ Products found to be bearing an invalidly licensed or used trademark are not excluded from the scope.

⁸ Products found to be bearing an invalidly licensed or used trademark are not excluded from the scope.

⁹ Products found to be bearing an invalidly licensed or used trademark are not excluded from the scope.

- FiveStar Flex™: A notebook, a notebook organizer, or binder with plastic polyolefin front and rear covers joined by 300 denier polyester spine cover extending the entire length of the spine and bound by a 3-ring plastic fixture. The polyolefin plastic covers are of a specific thickness; front cover is .019 inches (within normal manufacturing tolerances) and rear cover is .028 inches (within normal manufacturing tolerances). During construction, the polyester covering is sewn to the front cover face to face (outside to outside) so that when the book is closed, the stitching is concealed from the outside. During construction, the polyester cover is sewn to the back cover with the outside of the polyester spine cover to the inside back cover. Both free ends (the ends not sewn to the cover and back) are stitched with a turned edge construction. Each ring within the fixture is comprised of a flexible strap portion that snaps into a stationary post which forms a closed binding ring. The ring fixture is riveted with six metal rivets and sewn to the back plastic cover and is specifically positioned on the outside back cover. The product must bear the valid trademark FiveStar Flex™.¹⁰

Merchandise subject to this order is typically imported under headings 4810.22.5044, 4811.90.9090, 4820.10.2010, 4820.10.2020, 4820.10.2050, and 4820.10.4000 of the Harmonized Tariff Schedule of the United States (“HTSUS”).¹¹ The tariff classifications are provided for convenience and customs purposes; however, the written description of the scope of the order is dispositive.

ANALYSIS

General Arguments

Avenues requests that the Department determine, pursuant to 19 CFR 351.225, that a “class or kind of products,” some of which contain lined paper products, imported from the PRC, are not covered by the scope of this order. Avenues identifies its line of products as cases and folios, some of which contain 3-hole-punched writing pads, with or without a front cover.

Avenues describes style number DA-3533-02 as representative of the class or kind of articles for which it is requesting a scope ruling by the Department. According to Avenues: 1) the item in question measures approximately 13-1/2" x 11-1/2" x 1-1/2" when closed; 2) is zippered on three sides; 3) has one exterior flat pocket; 4) has a single exterior padded carrying handle fitted to the exterior spine; 5) is constructed of paperboard covered with plastic foam and a vinyl/plastic exterior and interior;¹² 6) contains a three-ring metal binder that is permanently affixed to the interior spine; 7) has a horizontal sleeve on the right side, into which is placed a 50-page, cardboard-backed 3-hole lined pad of paper that measures 8-12" x 11"; and 8) has in the interior

¹⁰ Products found to be bearing an invalidly licensed or used trademark are not excluded from the scope.

¹¹ During the investigation additional HTSUS headings were identified.

¹² Avenues notes that similar products are made with leather or textile exterior covers.

left-hand side an open-flap pocket on top of which are a zippered pocket, one large slot measuring approximately 11-3/4" x 4-1/4", two smaller slots designed to hold disks, two loops for writing instruments, and a permanently attached calculator measuring 3" x 5-1/2".¹³

According to Avenues, this class of folios has historically been classified under Chapter 42 of the HTSUS, which encompasses, among other things, attache cases, brief cases and similar containers. Specific classifications varied depending on the outer surface of the case. For instance, Avenues states that leather-covered cases were classified under HTSUS 4202.11.0030, vinyl-covered cases under HTSUS 4202.12.2035, and textile-covered cases under HTSUS 4202.12.8030. Avenues explains that it challenged these classifications before the Court of International Trade ("CIT"), and that the CIT ruled in Avenues' favor and changed the classification to HTSUS subheading 4820.10.2020, "memorandum pads, letter pads and similar articles." Further, Avenues states that the CIT's decision was upheld by the U.S. Court of Appeals for the Federal Circuit ("CAFC") on September 15, 2005, in *Avenues in Leather, Inc. v. United States*.¹⁴

Avenues requests that the Department rule that the scope of this order does not cover 3-hole lined paper pads that are included with imported business cases and executive accessories. According to Avenues, the paper pad is only an incidental component of the products at issue, as is the built-in calculator in the style described above. Avenues contends that cases of the sort at issue in this request are not sold for the paper pad they contain, nor do they compete with the lined paper school supplies that are subject to the order. Moreover, Avenues argues that the pad is an insignificant portion of the cost of the items it imports, and that the pad is integrated within the folio for marketing purposes, to emphasize that the item is being imported as a padfolio. Avenues states that there is no separate negotiation or purchase of any accessory component of the folio, such as the paper pad or the calculator, and that the cost of the paper pad is built into the price of the imported article.

Avenues states that in accordance with 19 CFR 351.225, on matters concerning the scope of an order, the Department looks to the descriptions of the merchandise contained in the petition, and that a scope determination can take place with or without a formal inquiry. Avenues maintains that its imported articles do not meet the descriptions of the merchandise contained in the petition. Avenues argues that the most casual examination of its articles reveals that they are not "certain lined paper products." However, in the event that the Department determines that the descriptions of the merchandise contained in the petition are not dispositive, Avenues submits that its business cases, folios and other executive accessories, are clearly distinguishable from the products covered by the scope of the order under the additional factors set forth under 19 CFR 351.225(k)(2). Should the product description in the petition, specifically as it relates to 3-hole lined paper pads, prove ambiguous and unclear, Avenues requests that the Department apply the

¹³ Avenues notes that this item is not included in all styles of its line of products.

¹⁴ Customs Appeals No. 04-1443 (Fed. Cir. 2005).

additional criteria outlined in this section of the Department's regulations. However, Avenues contends that a literal interpretation of the petition language would lead to an overreaching application of any eventual order should a decision be made to include a class or kind of articles which may include a paper pad as a minor component. Furthermore, according to Avenues, its products, as well as those of its competitors, are produced by factories that produce leather, vinyl and textile products, not paper products.

Office Depot asserts that the scope of the order for CLPP covers lined paper, not items that happen to contain lined paper. First, Office Depot contends that a padfolio is not like the accessory or information item listed in the scope of the order that subject merchandise may contain. Office Depot maintains that a padfolio is more than an accessory; rather the paper is an accessory to the padfolio. Pointing to the section of the scope of the order which excludes three-ring binders as long as they do not contain subject paper, Office Depot states that, while some padfolios contain three-ring binders they are neither three-ring binders nor a "notebook organizer containing a three-ring binder." See Office Depot November 30, 2006, submission at 3. Rather, Office Depot argues, they are a padfolio with a three-ring binder.

Next, Office Depot argues that in considering scope questions the Department is instructed to look at ITC determinations. Office Depot argues that the ITC's "view of the essential features of subject merchandise is apparent from the {ITC's} caption of the case: *Certain Lined Paper School Supplies from China, India, and Indonesia* Invs. No 701-TA-442-443, 731 -TA-1095-1097." See Office Depot November 30, 2006, submission at 3. Office Depot asserts that because Petitioner's goal is to target lined paper that constitutes school supplies, which padfolios are not, padfolios should be found outside the scope of the order pursuant to 19 CFR 351.225(k)(1).

Finally, Office Depot argues that this case is like *Certain Cased Pencils from the People's Republic of China ("Pencils")*¹⁵ wherein the Department has often found that "mixed media" sets that contain art supplies including pencils are outside the scope of the order under "the (k)(2) criteria." According to Office Depot, the Compass Scope Ruling is particularly relevant in this case because the Department rejected the idea that a pencil was a significant part of the compass and found it to be a minor component of the compass, that it was consumed (unlike the compass), and could be replaced with non-subject merchandise.

According to Petitioner, Avenues has made two requests to find its specific list of products outside the scope of the order and to find padfolios with three-hole lined paper pads outside the scope of the order. Petitioner contends that Avenues has provided a couple of examples but has asked the Department to exclude an entire line of merchandise that, depending on the product's

¹⁵ Office Depot cites to Memorandum For: Barbara E. Tillman From Laurie Parkhill: Final Scope Ruling – Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China (PRC) – Request by Target Corporation ("Clip N' Color Scope Ruling") dated March 4, 2005, and Memorandum For: Barbara E. Tillman From Wendy J Frankel: Final Scope Ruling – Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China (PRC) – Request by Fiskars Brands, Inc. (June 3, 2005) ("Compass Scope Ruling").

content, could potentially fall within the scope of the order. Petitioner asserts that the Department should not make a wholesale exclusion of a class of merchandise and should instead make a decision on the specific products which can clearly be found to be outside the scope of the order.

Petitioner argues that without further evidence, some of Avenues' products cannot be found outside the scope of the order. Petitioner contends that the scope of the order is intended to cover all lined paper products that fit into the scope's description and that use in a specific environment, such as a business one, does not exclude an item. According to Petitioner, while the scope language acknowledges that the merchandise under discussion is "typically school supplies," products for a professional environment are not excluded from the scope since the scope of the order does not have end-use requirements. Petitioner points out that the ITC confirmed that the domestic like product included paper products used in a variety of places in addition to schools, including businesses and homes. *See Certain Lined Paper School Supplies From China, India, and Indonesia Investigation*, Nos. 701-TA-442-443 and 731-TA-1095-1097 (Final) ITC Publication 3884 (September 2006) ("*ITC Final Report*"), as quoted by Petitioner at 8. Petitioner maintains that Avenues' arguments that its products are unique from merchandise covered by the scope of the order based on "perceived" use are meritless. *See* Petitioner's November 30, 2006, submission at 9.

Petitioner also maintains that the Department has considered paper products as one class or kind regardless of the target customer. Moreover, Petitioner claims that the Department did not add language to the questionnaire to gather "information that would lead the Department to conclude that there were separate channels of trade or sales processes for 'academic' or 'business' products." *See* Petitioner's November 30, 2006, submission at 4. Petitioner points out that the *ITC Final Report* stated that while the primary purpose of CLPP is for school they may be used for business purposes as well. Therefore, Petitioner maintains that the Department should not accept Avenues' argument that its products are different because the intended market for the merchandise is different.

Petitioner concurs that Avenues' padfolio "DA-3533-02" is not subject merchandise as long as the pad of paper within it does not meet the description of merchandise covered by the scope of the order. Petitioner states that the 3-hole punched 50-page cardboard pad of paper in the padfolio is covered by a scope exclusion because it does not have a front cover. However, Petitioner argues that the paper in the padfolios can be replaced with subject merchandise and that if this is done the product in question would become subject to the CLPP dumping order.

Avenues and Office Depot state that they agree with Petitioner's concession¹⁶ that the Avenues' padfolios are outside the scope of the order. Avenues also agrees with Petitioner's assertion that its pads of paper do not meet the description of merchandise subject to the scope of the order and that its three-ring binders do not include subject paper. Office Depot asserts that its disagreement

¹⁶ Notwithstanding Avenues' and Office Depot's comments, we note that Petitioner did not make a blanket statement that all Avenues' products are outside the scope of the order.

with Petitioner appears to be in theory only and that all parties agree the padfolios in question are not subject to the order. Office Depot disagrees that hypothetical padfolios containing either lined paper in their three-ringed binders or a pad of paper with a front cover would be subject to the scope of the order.

Additionally, Avenues stresses that, as it previously submitted, DA-3533-02 is representative of all of its padfolios. Furthermore, Avenues states that, while some of its padfolios have three-ring binders, the paper is a separate component and is not attached to the binder in the padfolio. Moreover, Avenues asserts that none of its padfolios contain any looseleaf paper or pads with covers. Finally, Avenues argues that Petitioner's hypothetical musing regarding potential future padfolios shows agreement with Avenues' and Office Depot's claims that the padfolios presently imported are outside the scope of the order.

Diversified Products Criteria

(1) Physical Characteristics

Avenues argues that the physical characteristics of its products are significantly different, if not totally dissimilar in physical appearance, from CLPP. According to Avenues, "although the complaint seeks to include pads with covers, {it does} not discern any intent to include within the term 'cover' the fine quality leather, vinyl and textile covers which are the class of articles imported" by it. As a result, Avenues argues that the Department should find material and substantial differences between Avenues' products and "certain lined paper products."

Office Depot argues that legal pads are a small component of the padfolios in question so the Department should find that the main component (*i.e.*, the case of the padfolio) is not subject merchandise. Office Depot points out that the padfolio cases are made of various materials (*e.g.*, leather, micro-fiber, *etc.*), with their own selling points, that they have brand names and patented designations, and are not consumed. This, Office Depot states, is different from the quickly consumed, unadorned, legal pads the padfolio contains. Moreover, Office Depot asserts that the padfolios may be sold with lined paper not subject to the scope of the order and may also be used with no pad of paper at all.

Petitioner argues that the form and content of covers is unimportant for determining if an item is covered by the scope of the order. Petitioner notes that in the Department's memorandum addressing Continental Accessory Corporation's ("Continental"¹⁷) scope request, the Department did not grant fashion notebooks with embellished covers separate class or kind status. According to Petitioner, the Department noted that U.S. producers also made items with embellished covers.

Petitioner also cites to Exhibit 2 of its November 30, 2006, submission to demonstrate that U.S. producers produce notebooks and "affiliated goods" similar in both function and appearance to

¹⁷ Memorandum to: Stephen J. Claeys Re: Scope Exclusion/Clarification Request: Continental Accessory Corporation (March 20, 2006) ("Continental Memo").

the Avenues items in question. Additionally, Petitioner maintains that these U.S.-manufactured goods use premium materials like plastics and jacket wraps. In particular, Petitioner notes a Mead product (code 06579) which has an organizer for loose paper, business cards and writing utensils, and can utilize additional paper. Petitioner asserts that this product is in scope, but goes beyond the function of school products that Avenues argues are covered by the scope of the order. Petitioner also asserts that Mead product 06579 can “easily be used without the notebook physically included in the product.” See Petitioner’s December 12, 2006, submission at 7. In conclusion, Petitioner argues that given the similarity of this and Avenues’ products, which have the potential to include lined paper products covered by the scope of the order, the physical differences between Avenues’ products in question and lined paper products covered by the scope of the order are, at most, small.

Office Depot asserts that Petitioner has confused the issue of the physical characteristics of in-scope lined paper products with the physical characteristics of a product that happens to contain in-scope lined paper products. According to Office Depot, the products to which Petitioner has compared Avenues’ padfolios are themselves in-scope lined paper products. Specifically, Office Depot argues that the fashion items Petitioner cites to are notebooks and, while they may contain leather covers, they are subject to the scope of the order. Office Depot asserts that padfolios are neither notebooks, three-ring binders containing paper, hole-punched legal pads, nor any other type of in-scope lined paper product, but are unique items that may contain in-scope lined paper products as a minor component. Office Depot maintains that the Department should conclude that because the main component of the item in question – the padfolio case – is not like subject merchandise, the whole padfolio is not subject to the scope of the order.

Department Position:

We have reviewed the language in the scope of the order. In providing a description of the physical characteristics of covered merchandise, the scope of this order includes merchandise that may or may not contain any combination of a front cover, a rear cover, and/or backing of any composition, regardless of the inclusion of images or graphics on the cover, backing, or paper. Merchandise is within the scope of this order whether or not the lined paper and/or cover are hole punched, drilled, perforated, and/or reinforced. Subject merchandise may contain accessory or informational items including but not limited to pockets, tabs, dividers, closure devices, index cards, stencils, protractors, writing implements, reference materials such as mathematical tables, or printed items such as sticker sheets or miniature calendars, if such items are physically incorporated, included with, or attached to the product, cover and/or backing thereto.

While Petitioner states that Mead makes an in-scope product that has a removable cover, we consider it incorrect to refer to the padfolio as a removable cover of the pad enclosed therein. Rather, it is more accurate to refer to the pad as being removable from the padfolio without causing any change in the padfolio’s physical characteristics. While the scope clearly states that subject merchandise may contain a notebook cover, we disagree that the padfolio case is a “notebook cover.” The discussion on binding in the *ITC Final Report* describes the binding

process as one where the notebook cover or pad backing is permanently affixed to the paper which it contains. *See ITC Final Report* at I-12. Petitioner argued that the form and content of covers is unimportant for determining if an item is covered by the scope of the order and in the Department's memorandum addressing Continental's scope request, the Department did not grant fashion notebooks with covers separate class or kind status. Rather, we found Continental's notebooks fit within the scope language and, thus, qualify as the same class or kind of merchandise alleged in the petition. *See Continental Memo*. However, in finding this the Department also noted that Continental's notebooks "include a front cover for the privacy of the contents, **they are bound to ensure pages do not fall out**, and finally, they contain lined paper." (Emphasis added.) *See Continental Memo* at 12. In contrast, the Avenues padfolio is not permanently affixed to the pad and, as such, is not a notebook cover.

Furthermore, we do not find that the padfolio's organization components (pencil holder, file folders, card holders) are incorporated into the pad of paper, as discussed by the scope. Rather these organizational components are incorporated into the case itself. The pad of paper in a padfolio that can be removed from the case contains no accessories. The padfolio is an organizational device which may or may not contain subject merchandise. Furthermore, Petitioner's own comments on whether the padfolio constitutes a cover seem contradictory. Indeed, as Petitioner states, Avenues' products such as DA-3533-02 are currently being imported with pads of paper specifically excluded from the scope. Petitioner considers product DA-3533-02 to be outside the scope of the order because the product includes a cardboard-backed, 3-hole punched note pad of lined paper, which "*does not have a front cover on the pad.*"¹⁸ (Emphasis in original.) When discussing Avenues' product DA-3533-02, Petitioner clearly does not characterize the padfolio to be a cover, commenting only on whether the pad contained therein has a cover. Likewise, we consider none of Avenues' other padfolios to be covers of the note pads contained within. Indeed, the pad can be replaced with a different notebook or other paper, including paper that falls within the scope of the order. The nature of the paper included, however, does not alter the physical characteristics of the padfolio case. As Petitioner stated, placing a note pad in the padfolio does not mean there is a front cover "on the pad."

Based on an examination of the physical characteristics of the product imported by Avenues, the Department determines that the single pad of paper (or notebook) is not a substantial component of the padfolios in question. In other cases, where the subject merchandise does not comprise a substantial portion of the merchandise in question, the Department has found the merchandise under review to be outside the scope of the order. *See Clip N' Color Scope Ruling; see also Compass Scope Ruling; see also Memorandum For: Jeffrey A. May From Laurie Parkhill: Final Scope Ruling--Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China--Request by Target Corporation Regarding "Hello Kitty Memory Maker" ("Hello Kitty Scope Ruling")* (September 29, 2004).

(2) Expectations of Ultimate Purchasers

¹⁸ *See* Petitioner's December 12, 2006, submission at 4.

Avenues asserts that its products are “designed as an organizational aid for taking notes by allowing the user to organize and interact with the matter bound by the pad folio,” and are “akin to ‘portfolios’ or flat cases designed and intended to hold papers”¹⁹ in an organized manner. Avenues states that the primary purpose of its products is to facilitate note taking and to aid in the organization of print and other visual flat materials capable of being bound by the product’s metal binder, or to fit within its pockets.

Although its products are sold to large national retailers that also sell school supplies, Avenues maintains that its products are not aimed at the customer base that is the primary purchaser of merchandise subject to the order, nor does it compete with such products. To include its products within the scope of the investigation would, according to Avenues, be analogous to including a remote control toy truck (with batteries) in an investigation of imported batteries. In such a case, the importer of the toy is buying a “toy” which runs on batteries; it is not buying batteries, and the expectation of the ultimate purchaser is to buy a truck and not a battery. Likewise, Avenues argues, its purchasers are buying business cases and executive accessories, at a cost many multiples higher than the cost of the paper pad included within the product.

Office Depot maintains that the padfolio customer is not seeking a cheap legal pad, but rather a portfolio case. Office Depot cites to an example in Appendix 2 of its November 30, 2006, submission and says the fact that the padfolio contains a pad of paper is not discussed on the padfolio’s packing. According to Office Depot, while an expanded product description on the Internet mentions a pad of paper in the padfolio, the cover material and other features of the padfolio take top billing.

Petitioner points out that Avenues has stated that its products are designed to help note taking and organization, which is also the main function of all lined paper products. Petitioner adds that many CLPP contain accessories to aid organization. Next, Petitioner cites to the portion of the scope that provides a sample list of the additional accessory and informational items a CLPP may contain.

According to Petitioner, Avenues’ argument that its target customer is different from the CLPP target customer is unconvincing because CLPP can be sold not just for use in schools but also for use in homes and businesses. Petitioner maintains that “domestic producers actively produce, market, and sell to business, corporate, and professional customers” and market merchandise covered by the scope of the order to meet these customer’s requirements. Petitioner submits that Mead’s Cambridge® product line is designed to help organize items, aid note taking, and is sold to both business and commercial markets.

Office Depot responds that, while Petitioner may be correct that the padfolios’ primary function is note taking, notes may be taken using many items “from laptop computer to the back of a hand.” See Office Depot December 11, 2006, submission at 4. It maintains that the buyer of

¹⁹ Avenues explains that the quoted material is taken from pages 4 - 5 of the Slip Opinion of the CAFC in Customs Appeal 04-1443.

padfolios is looking for the padfolio case regardless of whether it contains a pad of paper. Office Depot contends that the padfolio buyer is not purchasing the padfolio primarily to obtain a pad of lined paper, but to get the case itself. This is, according to Office Depot, akin to the Compass Scope Ruling, where the Department found that the compass purchaser would not buy a compass just to get a pencil.

Department Position:

According to the ITC, “the primary use for {certain lined paper school supplies (“CLPSS”)} is to take notes, perform class assignments, and provide completed work to teachers for correction and grades.” *See ITC Final Report* at I-10 and II-1. We agree with Petitioner that the padfolios can be used in businesses and schools alike, but to say the padfolio aids in note-taking is true only because of the inclusion of the pad. Petitioner has provided no evidence that a buyer would obtain a padfolio with the sole or principal expectation of acquiring a pad of paper. We also note that merchandise subject to the scope of the order may contain many organizational devices, as listed in the scope of the order and we acknowledge that Mead, a member of the Association of American School Paper Suppliers, makes notebooks which aid both in note-taking and organization. However, these organizational devices are contained within the notebooks themselves. Furthermore, CLPP such as filler paper, provide only a writing surface, and a purchaser of a pack of filler paper would not expect the paper to serve as an organizational aid. With respect to the padfolios in question, the padfolio case is the organizational device, and a simple pad of paper, with no organizational devices, is contained within the padfolio.

Therefore, it appears that an ultimate purchaser would buy a padfolio expecting largely to obtain an organizational device but would also expect, through the inclusion of a pad of paper in the padfolio, to be able to take notes. On the other hand, it appears that the ultimate purchaser would buy CLPP expecting to obtain a writing surface on which he could take notes. However, if the ultimate purchaser bought a notebook which included items such as dividers and pockets, he would expect the notebook to aid in organization. Based on the above, we conclude that the expectation of the ultimate purchasers of subject merchandise overlaps the expectation of the ultimate purchasers of Avenues’s imported products. However, the primary expectations of a purchaser of an Avenues padfolio would differ from that of a purchaser of CLPP.

(3) Ultimate Use of the Product

According to Avenues, CLPP are purchased for the primary purpose of note taking and writing assignments at school, not by business executives for organizing their business activities. Avenues submits that the use of lined paper products takes place in an educational setting, which is a very limited and cost-cognizant market. Furthermore, Avenues argues that there is no basis to find that a customer would pay an enormous amount to purchase Avenues’ cases and accessories to use the inexpensive pad included within.

Office Depot asserts that the padfolios ultimate use is more specialized than, and therefore different from, subject merchandise. Office Depot purports the padfolios' ultimate use to be "holding business papers." See Office Depot November 30, 2006, submission at 5. According to Office Depot, the "business person" using the padfolio expects it to hold both subject and non-subject paper (including handouts) items as well as business tools (e.g., writing utensils, cards, file folders, discs). Again, Office Depot points out that the padfolio itself will outlast the pad of paper sold with it. Office Depot states that while note-taking is the principal function of the notepad in the padfolio, it is not the main function of the padfolio itself. Instead, Office Depot asserts that a padfolios' main function is holding business papers and accessories. Therefore, according to Office Depot, CLPP and padfolios have different ultimate uses.

Petitioner asserts that Avenues has not addressed ultimate use of its products. Petitioner argues Avenues has only attempted to create "artificial distinctions" between its merchandise, which Avenues claims is for the business environment, and in-scope merchandise, which Avenues claims is for the school environment. Petitioner maintains that both commercial reality and the ITC injury investigation contradict this artificial distinction. According to Petitioner, CLPP, including Avenues' products, have the same ultimate uses because all products are designed for note taking.

Department Position:

Both padfolios and CLPP may ultimately be used in almost any setting including schools, businesses, and homes. However, we find that while their use in these environments may overlap, their primary use is not the same based upon the evidence on the record and the arguments of the parties. As stated in the *ITC Final Report*, the primary use for CLPP is taking notes, performing class assignments, and providing completed work. See *ITC Final Report* at I-10 and II-1. While padfolios are not precluded from being used to accommodate this function, they do not appear to serve as an aid to "perform class assignments, and provide completed work to teachers for correction and grades." Although the inclusion of things such as a pad of paper, writing surfaces, and penholders in padfolios can aid in note-taking, it does not appear to be a padfolios' primary purpose.

Rather the primary purpose of the padfolio, as evidenced by the inclusion of such things as folders, calculators, and card slots, appears to be organization. We acknowledge that some notebooks may include items that aid in organization such as dividers and pockets. However, not all notebooks contain these features, and as the *ITC Final Report* demonstrates, organizational aid is not a notebook's primary purpose. See *ITC Final Report* at I-10. Therefore, although padfolios and CLPP do have overlapping ultimate uses, the primary use of CLPP appears to be different from that of padfolios.

(4) Channels of Trade in Which the Product is Sold.

Avenues asserts that its products are specifically designed for sale to purchasers who are

primarily executives or managers to facilitate the taking of notes and to assist in the organization of print and other visual flat materials, whereas the purpose of CLPP is limited to that of taking notes. Avenues argues that CLPP can serve no other purpose or use. According to Avenues, there are two different channels of trade involved, and Avenues' products do not impinge on or overlap with the channel of trade of the products covered by the scope of the order.

Office Depot acknowledges that padfolios and subject merchandise are sold in the same stores. However, Office Depot argues that unlike subject merchandise, which is sold in its school supply section, padfolios are sold in its business section. Office Depot concludes that this means padfolios have a slightly different channel of trade than subject merchandise.

Petitioner claims that, with regard to this *Diversified Products* criterion, Avenues has wrongly asked the Department to distinguish the end users, which is irrelevant to channel of trade. According to Petitioner, the Department examines the first customers of the imported goods. For support, Petitioner cites *Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, FR 59075 (October 6, 2006), and accompanying issues and decision memorandum at Comment 5-D. Petitioner asserts that in that case the Department found that both subject merchandise and later-developed merchandise had the same channels of trade, mainly stores (specialty, food, and bath and beauty), salons, spas, and the Internet. Petitioner argues that the Department reached a similar conclusion in a scope ruling in *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles*, from the People's Republic of China. See Memorandum to Barbara E. Tillman Re: Final Scope Ruling- Request by Olympia Industrial Inc. at 18, as cited in Petitioner's November 30, 2006, submission at 14.

Petitioner states that Avenues' website shows that it sells to multiple national retail chains including big office supply stores, one of which – Office Depot – has filed a letter supporting Avenues' scope request. According to Petitioner, similar educational product lines, including basic one-subject notebooks, and professional product lines, including professional quality notebooks, are sold in the same retail stores. Therefore, Petitioner concludes, Avenues' products and other lined paper products have the same channels of trade.

Department Position:

We agree with Petitioner that channels of trade are distribution channels. Office Depot acknowledges that padfolios and subject merchandise are sold in the same stores, but argues that because they are sold in different aisles within the same retail store, there is a slightly different channel of trade. We disagree that such a distinction constitutes a different channel of trade.

According to the ITC report, “{a}ll lined paper products and subject imports of CLPSS are sold through common channels of distribution. These products are primarily sold directly by foreign or domestic producers to retailers, which include general merchandise superstores, drug stores,

grocers, and office supply stores.” *ITC Final Report* at 23. In reviewing the information and arguments on the record, it is clear that Avenues sells its padfolios through these types of stores to retail customers. *See e.g.* Office Depot’s November 30, 2006, submission. Moreover, record evidence suggest that both CLPP and Avenues padfolios are sold through on-line distribution channels as well (See also advertising and display, below). Specifically, Avenues’ website indicates that it sells its products directly to end-use customers via the Internet and through a variety of retailers including office supply stores (Office Depot, Office Max, Staples, *etc.*). *See* <http://www.avenuesinleather.com/retailer.htm> and Memorandum to File from Marin Weaver Re: Certain Lined Paper Products from the People’s Republic of China: Scope: Placing Information On Record for the Avenues in Leather, Inc. Scope Inquiry (“Memo Placing Info. On Record”) (April 11, 2007) at Attachment 1. Additionally, Mead, a member of the Association of American School Paper Suppliers, shows that it also sells CLPP direct to customers via the Internet. *See* <http://www.mead.com/> and Memo Placing Info. On Record at Attachment 2. Since both subject merchandise and the Avenues’ padfolios are sold by retailers (including office supply stores) and on-line (websites), we conclude that there is evidence of overlap in the channels of trade between merchandise covered by the scope of the order and Avenues’ imported products.

(5) Manner in Which the Product is Advertised and Displayed.

Avenues explains that its products are displayed, advertised and sold in a different manner than CLPP. Avenues states that until the favorable court decision it obtained, “Customs’ longstanding position was that the essential character of Avenues’ padfolios was to organize, store, hold and protect papers and **other personal articles.**” (Emphasis in original.) But Avenues submits that the CAFC decision rejected that position – in light of credible and convincing evidence – in favor of a more specific use, limited to the facilitation of note-taking and aiding in the organization of print and other flat materials. Avenues states that it is the products’ close relationship with stationery which moved the classification to Chapter 48 of the HTSUS.

According to Avenues, its products are advertised and displayed in retail areas which typically contain other organizational aids. These include time management systems, address directories, bi-folios, *etc.* Avenues adds that in proximity to these products are areas devoted to the display and marketing of attache cases, briefcases, computer cases and the like. Avenues suggests that one would normally not find CLPP sold in these areas. Instead, lined paper products are advertised and displayed in different areas, typically those devoted to school and office supplies.

Office Depot maintains that CLPP are displayed in the school supply area of stores and advertised for students while padfolios are in the business section and are advertised for business use. It notes that in its stores and on its website padfolios are sold/displayed in the business supply section while CLPP are sold/displayed in the school supply section.

Petitioner contends that items classified as stationary are likely to be found in any location in a retail store, including near the majority of subject merchandise, and thus overlaps occur in the products’ display. Petitioner again points out that some types of subject merchandise “appear as

business products” and disagrees with Avenues’ assertion that its products will not normally be found near subject merchandise. *See* Petitioner’s November 30, 2006, submission at 15. According to Petitioner, business stationary and subject merchandise are sold interchangeably.

Office Depot submits that Petitioner concedes that CLPP and padfolios are normally found in separate departments within a store. Office Depot argues that Petitioner’s argument that this is not an exclusive situation only highlights that the products are normally sold in separate sections of a store. Office Depot maintains that the Department must base its decision on what is normal, not the exceptions to the rule.

Department Position:

Avenues’ website points us to retailers who carry its products. Since these retailers sell both subject merchandise and Avenues’ products, we looked at the manner in which these retailers advertise and display the products in question. While both notebooks and padfolios are found under the general header “Office Supplies” on the Staples’ website, padfolios are classified under “Business Bags & Gifts” while filler paper and notebooks are classified under “Paper & Pads.” *See* <http://www.staples.com/> and Memo Placing Info. On Record at Attachment 3. On the Office Depot website, notebooks and padfolios are also found under the general header “Office Supplies.” However, Avenues’ padfolios are found under “Business Cases” while filler paper and notebooks are classified under “Paper, Forms, Envelopes” as is Mead’s Cambridge® Refillable Business Notebook, 8 1/2" x 11" (Manufacturer # 06579). *See* <http://www.officedepot.com> and Memo Placing Info. On Record at Attachment 4. Department officials observed on-site at a Staples retail outlet in March 2007 that the Avenues’ padfolios are displayed in an aisle with things such as date planners, and separate from the aisle in which CLPP are displayed. Because the Avenues’ padfolios are displayed separately from subject merchandise at Staples and classified differently on office supply stores’ websites, we conclude that Avenues’ padfolios and the merchandise subject to the order are not displayed or advertised in the same manner.

CONCLUSION

We disagree with Petitioner’s assertion that it is inappropriate to make a ruling on padfolios in general and that if the padfolios contained subject paper they would be subject to the scope of the CLPP order. Avenues’ padfolio provides an organizational system that also facilitates note-taking. The nature of Avenues’ padfolio containing one pad of paper does not change if it were it to include a pad of paper which would, by itself, be subject to the scope of the order. We find that the pad of paper included in Avenues’ padfolio is a minor component of the overall padfolio. In the past we have excluded items from the scope of an order when, among other things, they contain subject merchandise as a minor component of the item in question. *See* Hello Kitty Scope Ruling, where we found that “the pencils are not an integral component of the set” at 5; *see also* Clip ‘N Color Scope Ruling at 5 and 9, where the Department stated that the colored pencils in Clip N’ Color set were not a substantial component the set. Moreover, the pad of

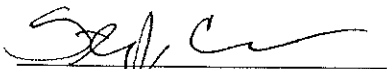
paper, unlike the padfolio cases, is consumable. As Office Depot points out, in the past the Department has excluded items from the scope of an order when a minor component of that item is consumable and can be replaced with merchandise not subject to the scope of the order. *See* Compass Scope Ruling.

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, and the manner in which the Avenues padfolios are advertised, and displayed, are not the same as merchandise covered by the scope of the order on CLPP from the PRC. We find that while the expectations of the ultimate purchasers and the primary ultimate use of the Avenues padfolios are different than those of CLPP, there are ultimate purchaser expectations and uses that overlap between Avenues padfolios and CLPP. While CLPP and Avenue's padfolios are sold in the same channel of trade, no single criterion is dispositive. Based on the criteria, taken together, we find that Avenues padfolios which contain one pad of paper (whether or not the pad of paper meets the description of merchandise covered by the scope of the order) are not subject to the scope of the order.

RECOMMENDATION

Based on the above analysis, we recommend that the Department determine that padfolios containing one pad of paper, imported by Avenues, are outside the scope of the order on CLPP from the PRC.

Agree Disagree



Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

9/8/07

Date