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International Trade Administration
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Scope Inquiry
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August 10, 2010

MEMORANDUM FOR: Edward C. Yang
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

FROM: James C. Doyle
Director, Office 9
Import Administration

SUBJECT: Final Scope Ruling -- Certain Steel Nails From the People's
Republic of China ("PRC"), Request by Target Corporation

SUMMARY

In accordance with 19 CFR 351.225(k)(2), the Department of Commerce ("Department") has determined that Target Corporation's ("Target") six household tool kits, including the brass coated steel nails contained therein, are outside the scope of the antidumping duty order of certain steel nails from the People's Republic of China. See Notice of Antidumping Duty Order: Certain Steel Nails from the People's Republic of China, 73 FR 44961 (August 1, 2008) ("Order").

BACKGROUND

On December 11, 2009, Target requested that the Department determine that its six household tool kits encompassing brass coated steel nails are outside the scope of the Order. See Target's Scope Inquiry, dated December 11, 2009. Additionally, Target submitted photographs of its household tool kits and described its household tool kits in detail.

On December 22, 2009, January 7, 2010, and March 8, 2010, Target submitted additional comments in support of its request that its brass coated steel nails in household tool kits should be found outside the scope of the Order. On December 22, 2009, January 19, 2010, and March 3, 2010, the Petitioner¹ submitted rebuttal comments on Target's scope inquiry.

On January 20, 2010, and January 27, 2010, respectively, the Department met with counsel for Target and Petitioner where each party addressed the comments submitted on the record. See Memorandum to the File Re: Certain Steel Nails From the People's Republic of China ("PRC"): Meeting with Outside Party, Dated January 21, 2010 and January 28, 2010. Additionally, Target provided the Department with physical samples of its household tool kits, including the brass

¹ Mid Continent Nail Corporation.



coated steel nails contained therein. Photographs of the samples accompanied Target's December 22, 2009, submission.

On March 18, 2010, the Department initiated a formal scope inquiry to analyze Target's request under 19 CFR 351.225 (k)(2) and requested comments from interested parties. Target submitted additional comments on April 15, 2010. On April 16, 2010 and April 22, 2010, the Petitioner submitted rebuttal comments.

COMMENTS

Target

i. Physical Characteristics of the Product

Target argues that because neither the scope of the Order nor record of the investigation provide specific language addressing subject nails packaged with non-subject merchandise, its household tool kits should be found outside the scope of the Order.

Target cited prior scope determinations in which subject merchandise was imported with non-subject merchandise, and asserts that the Department made these scope determinations on the basis of 19 CFR 351.225(k)(2) criteria.² Target contends that in these prior scope determinations, the Department found that subject merchandise imported with non-subject merchandise is outside the scope of an antidumping duty order when the subject merchandise is a minor component of the kit, consumable, and can be replaced with non-subject merchandise. Additionally, Target contends that its brass coated steel nails are a minor component of non-subject household tool kits and should be excluded from the Order under 19 CFR 351.225(k)(2). Specifically, Target claims that its brass coated nails are between []% and []% of the cost of the household tool kits based on the cost of the brass coated steel nails versus the price that Target pays for the tool kits. Target also notes that its brass coated steel nails are consumable, whereas the tool kits and toolboxes are non-consumable. Target claims that its brass coated steel nails can be replaced with any other non-subject merchandise such as small screws, tacks, and washers. Thus, Target claims that because its brass coated steel nails in household tool kits are a minor component of the tool kit, consumable, and replaceable, its brass coated steel nails should be found outside the scope of the Order.

ii. The Manner in Which the Product is Advertised and Displayed

Target contends that its brass coated steel nails in household tool kits are not advertised or displayed with other nails or fasteners, but instead are sold with other home improvement

² Target cited Final Scope Ruling - Antidumping Duty Order on Certain Cased Pencils From the PRC - Requested by Target Corporation (September 29, 2004) and Final Scope Ruling - Antidumping Duty Order on Certain Cased Pencils From the PRC - Requested by Target Corporation (March 4, 2005) ("Target Rulings"); Final Scope Ruling - Antidumping Duty Order on Certain Cased Pencils From the PRC - Requested by Fiskars Brands, Inc (June 3, 2005) ("Fiskars Ruling"); Final Scope Ruling - Antidumping Duty Order on Certain Lined Paper Products From the PRC, Requested by Avenues in Leather, Inc (July 13, 2006) ("Avenues in Leather Ruling"); Final Scope Ruling - Certain Lined Paper Products From the PRC - Requested by Davis Group of Companies Corp (February 21, 2008) ("Davis Group Ruling").

merchandise at Target stores. Furthermore, Target asserts that its brass coated steel nails are pictured and listed with non-subject merchandise as “fasteners” and not as “nails” on the exterior cover of each household tool kit. Because of the manner in which its brass coated steel nails in household tool kits are advertised, Target argues that its brass coated steel nails in household tool kits should be found outside the scope of the Order.

iii. The Channels of Trade in Which the Product is Sold

Target claims that while other retailers of subject merchandise typically purchase nails through distributors, Target purchased the tool kits from a manufacturer that [] but instead []. Target then purchases the complete tool kits from this manufacturer and sells the tool kits as a complete set, which it argues is a different channel of trade from the retailers of subject merchandise.

iv. The Expectations of the Ultimate Purchaser

Notwithstanding this, Target argues that the ultimate purchasers have no expectations concerning the nails because Target does not advertise the nails in the tool kits. Instead, Target contends that its tool kits containing brass coated steel nails should be found outside the scope of the Order because the ultimate purchasers spend \$25 to \$60 to acquire a set of household tools in a convenient toolbox for routine home maintenance and improvements, and purchasers of the tool kits do not purchase the tool kit with an intention of simply obtaining nails, which are a fraction of the price of the tool kit.

v. The Ultimate Use of the Product

Target contends that the ultimate use of brass coated nails is to fasten or hang objects, specifically to hang picture frames using the matching picture hangers also included in the household tool kits. Target argues that the ultimate use of the household tool kits as a set is to do routine home maintenance and home improvements. Additionally, Target asserts that many of the non-subject tools included in the tool kits cannot be used with the brass coated steel nails.

Petitioner

i. Physical Characteristics of the Product

With respect to Target’s claim that its brass coated steel nails were sized and finished to match the picture hooks also included in the tool kits, the Petitioner argues that each tool kit contains 55 subject nails, but only 10 picture hooks, and that if Target intended for the subject nails to be part of a *de facto* set of picture hooks, Target would have provided the same number of nails and hooks. Furthermore, the Petitioner claims that even if Target’s brass coated steel nails were truly intended to be used with the picture hooks, they still remain subject merchandise used for the same purpose as steel nails subject to the Order—fastening picture hooks to the wall.

With respect to Target’s claim that its brass coated steel nails are a minor component of a unique set based on cost and retail value, the Petitioner argues that this is irrelevant since there is no *de minimis* exception to in-scope merchandise. Despite its irrelevancy, the cost of the nails is

between []% and []%, which []. Additionally, 55 pieces of the 100 piece fastener set included in each of the six tool kits are subject nails, which demonstrates that the brass coated steel nails are not a minor component.

ii. The Manner in Which the Product is Advertised and Displayed

The Petitioner argues that while Target does not specifically identify the nails on the tool kit cardboard sleeves, the subject nails are clearly pictured on the cardboard sleeves. Therefore, Target is clearly advertising that the household tool kits include subject nails.

iii. The Channels of Trade in Which the Product is Sold

Additionally, the Petitioner contends that Target sells its six household tool kits in the same channels of trade as subject steel nails. The Petitioner adds that Target also sells steel nails packaged individually within its stores, demonstrating that regardless of whether [], the household tool kits and subject nails are sold through the same channels of trade.

iv. The Expectations of the Ultimate Purchaser

The Petitioner contends that while the ultimate purchasers spend between \$25 to \$60 to attain a tool kit, and not to solely attain a handful of nails, this does not support Target's position because the ultimate purchasers could buy most, if not all, of the individual items at a lower price than the price of the household tool kits.

v. The Ultimate Use of the Product

The Petitioner claims that the ultimate use of the brass coated steel nails in household toolboxes is the same as subject steel nails, which are used for building and fastening. In addition, the fact that many of the items in the tool kits do not require the use of nails is inapposite since many of the items included in the tool kits do not require the use of any of the other items included in the tool kits. Moreover, the facts in this inquiry differ from the facts of prior scope determinations in which the Department uses the "mixed media" approach to find that the subject merchandise is outside the scope of the order. In those cases, the unique sets had a primary use that was vastly different than the subject merchandise, such as to play dress up than act as a writing implement (Target Rulings), or to serve as an organizational device for adults rather than writing paper for school children (Avenues in Leather Ruling). In this inquiry, whether packaged with a household tool kit or not, the steel nails are still used for fastening.

ANALYSIS

A. Regulatory Framework

The issue presented by this scope inquiry is whether the household tool kits, including the brass coated steel nails contained therein, and imported by Target fall within the scope of the Order. On matters concerning the scope of an antidumping duty order, our initial basis for determining whether a product is included within the scope of the antidumping duty order is the description of the product contained in the application, petition, the initial investigation, and prior

determinations of the Secretary and the International Trade Commission (“ITC”). See 19 CFR 351.225(d) and 351.225(k)(1). The description of the product in the petition and the initial investigation were ultimately adopted in the Order without change. If the Department determines that these descriptions are dispositive of the matter, it will issue a final scope ruling as to whether or not the merchandise in question is covered by order. See 19 CFR 351.225(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 product; 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* criteria.³ 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.⁴

Pursuant to 19 CFR 351.225(k)(1) and as stated above, the Department first examined the descriptions of the merchandise contained in the petition, the determinations of the Secretary and the ITC, and the initial investigation in examining Target’s scope request. On March 18, 2010, we initiated a formal scope inquiry of Target’s brass coated steel nails in household tool kits, finding that the descriptions of the merchandise contained in the petition, the determinations of the Secretary and the ITC, and the initial investigation were not dispositive in this case. Therefore, we have examined Target’s brass coated steel nails in household tool kits pursuant to the criteria set forth in section 351.225(k)(2) of the Department’s regulations to determine if they are covered by the scope of the Order.

The ITC

On August 2007, the ITC issued a preliminary determination on certain steel nails from the PRC and the United Arab Emirates (“UAE”), and on July 2008, the ITC published a final determination on certain steel nails from the PRC. The ITC did not consider subject steel nails imported with non-subject merchandise in either the preliminary or final determinations.

B. Application of 351.225(k)(2) Criteria

As stated above, the Department has based its decision in this case on the criteria of a 19 CFR 351.225(k)(2) analysis. For each of the criteria listed below, we have examined each of the household tool kits as a set containing both brass coated nails and other items. While we acknowledge that Target’s brass coated steel nails would meet the physical requirements of steel nails that fall within the scope of the Order if they were imported without any of the other tool kit components, we also take into consideration that they are imported in household tool kits containing non-subject merchandise. Thus, the proper focus of the analysis is on the nails as contained in the household tool kits.

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

⁴ The Department only relied on those documents placed on the record of this scope proceeding in making this scope determination.

For the reasons discussed below, we find that Target's brass coated steel nails as contained in the household tool kits subject to this ruling are not within the scope of the Order.

Physical Characteristics of the Product

We examined each of the six tool kits imported by Target subject to this review, and note the following information for each household tool kit:

1. *The Durabuilt 161 Piece Household Tool kit With 14.4 Volt Cordless Drill* contains a total of 161 pieces, including a single fastener set containing 10 thumb tacks, 5 brass plated cup hooks, 10 brass plated picture hanger, 55 brass coated steel nails, 10 screws, and 10 plastic wall anchors. The entire fastener kit is counted as a single item within the tool kit.
2. *The Durabuilt 161 Piece Household Tool kit With Rechargeable 4.8 Volt Screwdriver* contains a total of 161 pieces, including a single fastener set containing 10 thumb tacks, 5 brass coated cup hooks, 10 brass coated picture hanger, 55 brass coated steel nails, 10 screws, and 10 plastic wall anchors. The entire fastener kit is counted as a single item within the tool kit.
3. *The Apollo Prevision Tools 138 Piece Household Tool kit* contains a total of 138 pieces, including a single fastener set containing 10 thumb tacks, 5 brass coated cup hooks, 10 brass coated picture hanger, 55 brass coated steel nails, 10 screws, and 10 plastic wall anchors. The entire fastener kit is counted as a single item within the tool kit.
4. *The Durabuilt 59 Piece Home/Office Tool Kit with Soft Sided Bag* contains a total of 59 pieces, including a single fastener set containing 10 thumb tacks, 5 brass coated cup hooks, 10 brass coated picture hanger, 55 brass coated steel nails, 10 screws, and 10 plastic wall anchors. The entire fastener kit is counted as a single item within the tool kit. This particular tool kit also contains a separate small plastic box with a total of 150 various screws and nuts. The description of the small plastic box with screws and nuts states that it contains an assortment of nails, screws and nuts.⁵
5. *The Durabuilt 144 Piece Household Tool kit* contains a total of 144 pieces, including a single fastener set containing 10 thumb tacks, 5 brass coated cup hooks, 10 brass coated picture hanger, 55 brass coated steel nails, 10 screws, and 10 plastic wall anchors. The entire fastener kit is counted as a single item within the tool kit.
6. *The Durabuilt 152 Piece Household Tool kit* contains a total of 152 pieces, including a single fastener set containing 10 thumb tacks, 5 brass coated cup hooks, 10 brass coated picture hanger, 55 brass coated steel nails, 10 screws, and 10 plastic wall anchors. The entire fastener kit is counted as a single item within the tool kit.

We examined the brass coated steel nails contained in the six household tool kits imported by Target and note that they are: (1) made of steel; (2) coated in brass; (3) one inch long; (4) made with a flat head; (5) made with a smooth shank; (6) made of one piece; and (7) made with a

⁵ We note however, that this assortment contains various sizes and types of screws, washers and nuts, but no nails that would appear to meet the physical description of nails subject to the scope of the Order.

diamond point. We also note that the parties do not dispute that the brass coated steel nails contained in the tool kits meet the physical characteristics of the nails subject to the scope of the Order. Additionally, the other items in each of the tool kits do not meet the physical description of subject merchandise, which no party disputes. Thus, with respect to physical characteristics, we find that the tool kits include some merchandise which meets the physical description of merchandise subject to the Order and some merchandise which clearly does not meet the physical description of merchandise subject to the Order.

The Manner in Which the Product is Advertised

We note that the cardboard sleeve around each of the six tool kits depicts pictures of the tools and fasteners, including the brass coated steel nails found in a small, multi-compartment plastic box labeled as an assortment of fasteners. The brass coated steel nails found in the plastic box are only one of several different type of fasteners stored in the box and are designed to match the small picture hangers also included in the box. The toolboxes that hold the fastening kit also contain a variety of electric or manual tools, including drills, screwdrivers, wrenches and other tools that are not used with nails.

On five of the six cardboard sleeves surrounding the tool kits, no specific mention is made of steel nails being included in the box of fasteners or anywhere else in the kit. All kits but one are sold solely at physical retail locations. Only the 135 Piece Pink Tool Kit by Apollo is advertised online on Target's website. The online description states that the kit is "loaded with household tools", mentions some of the various tools included and gives a brief description of the molded plastic case that encompasses all of it.⁶ The description online makes no mention of either the fastener kit included or the steel nails found within the fastener kit. One of the kits, the 59-piece Durabuilt Home/Office Tool Kit with Soft Sided Bag, does contain a side panel on the cardboard sleeve that mentions a "150 Piece Nail, Screw and Nut Assortment". However, this is an error, as the nails are actually contained within the second small plastic box advertised on the side panel as the "100 Piece Fastener Assortment". In fact, the "150 Piece Nail, Screw and Nut Assortment" box only contains screw and nuts, not nails. We find that the brass coated steel nails contained within the six tool kits comprise, at most, a tangential feature in the advertising of these tool kits.

With respect to the Petitioner's argument that the tool kits are displayed in the same aisles as subject nails at Target stores, not all home improvement departments are organized in the same way in all Target stores.⁷ The organization of the home improvement department within each Target store is dependent upon the size of the store, the types of products available, and the amount of shelf space granted to the department.⁸ In some stores, as is noted by Target, fasteners

⁶ See Target's comments in Certain Steel Nails from the People's Republic of China: Scope Ruling Request Regarding Household Tool Kits (December 11, 2009) at page 7 and corresponding Attachment 1.

⁷ See Petitioner's comments in Certain Steel Nails from the People's Republic of China: Opposition to Target Corporation's Request to Exclude Steel Nails Packaged With Non-Subject Merchandise From the Scope of This Order (December 22, 2009) at page 19-20 and Exhibit 7.

⁸ See id.

and nails sold individually may be displayed in a separate aisle from tools and tool kits.⁹ Thus, although the Petitioner claims that the tool kits are sold in the same aisle as other fasteners for one store in the Washington, DC metro area, this is not the case for all Target stores throughout the country.

The Channels of Trade in Which the Product is Sold

Target purchases the six tool kits direct from the []. Target then sells the tool kits in their retail stores throughout North America. Target does not purchase the tool kits from wholesalers or distributors, as is typically done for retail stores who intend to sell nails. Additionally, the producer of the tool kits []. Instead, the tool kit producer []. Target then purchases complete tool kits with attached cardboard sleeves and sells the kits as purchased in their various retail stores throughout the country.¹⁰

This channel of trade is distinctly different from the channel of trade for nails, which are typically purchased from distributors for sale in retail stores such as Target. Although it is possible to buy nails at retail stores such as Lowes or Home Depot, the quantity needed for retail purposes would need to be purchased from a distributor. However, the tool kits are purchased directly from the [] who is selling a complete packaged tool kit to Target for resale in their retail stores. Target does not purchase the tool kits from distributors and does not sell the tool kits in bulk to industrial consumers or other distributors, as is possible for steel nails.

The Expectations of the Ultimate Purchaser

When purchasing the tool kits, ultimate purchasers are expecting to buy an assortment of electronic or manual tools in a convenient nylon or plastic carrying case that can be used for a variety of home or office repair purposes. The price range of the tool kits is between \$25 to \$60, which would lead the ultimate purchaser to believe that this accounts for the cost of various electric or manual tools and the convenient nylon or plastic tool kit carrying case.¹¹ It is reasonable to conclude that the ultimate purchaser would not pay \$25 or more to receive a small quantity of steel nails, when steel nails can be purchased in larger quantities for a much lower price. In fact, the majority of the tools included in the tool kits are not used with any type of nails, thus diminishing the importance of the steel nails within the tool kits. Furthermore, the packaging and advertising on the cardboard sleeve of five of the six tool kits does not specifically mention the presence of steel nails within the kit. The single kit that does advertise

⁹ See Target's comments in Certain Steel Nails from the People's Republic of China: Scope Ruling Request Regarding Household Tool Kits – Response to Petitioner's Objection, January 7, 2010 at page 7 and Attachment 6.

¹⁰ See Target's comments in Certain Steel Nails from the People's Republic of China: Scope Ruling Request Regarding Household Tool Kits (December 11, 2009) at page 8-9 and Certain Steel Nails from the People's Republic of China: Scope Ruling Request Regarding Household Tool Kits – Diversified Products Analysis (April 15, 2010) at page 4.

¹¹ See Target's comments in Certain Steel Nails from the People's Republic of China: Scope Ruling Request Regarding Household Tool Kits (December 11, 2009) at page 8.

