

FINAL RESULTS OF REDETERMINATION PURSUANT TO REMAND ORDER

Mid Continent Nail Corp. v. United States,
CIT Court No. 10-00247, Slip Op. 13-92 (July 23, 2013)

SUMMARY

The Department of Commerce (“Department”) prepared these final results of redetermination pursuant to the decision of the U.S. Court of Appeals for the Federal Circuit (“CAFC” of “Federal Circuit”) in *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295 (Fed. Cir. 2013) (“*Mid Continent III*”).¹ In *Mid Continent III*, the Federal Circuit considered the Department’s appeal of *Mid Continent Nail Corp. v. United States*, 825 F. Supp. 2d 1290 (CIT 2012) (“*Mid Continent II*”), in which the Court of International Trade (“CIT” or “Court”) rejected the Department’s *First Remand Redetermination* which we submitted on October 17, 2011, pursuant to the Court’s order in *Mid Continent Nail Corp. v. United States*, 770 F. Supp. 2d 1372 (CIT 2011) (“*Mid Continent I*”).²

I. Background

In *Mid Continent I*, the Court rejected the Department’s finding that household toolkits imported by Target Corporation (“Target”) from the People’s Republic of China (“China”), which include small quantities of nails, were outside the scope of the antidumping duty order covering steel nails from China.³ The Court held that the Department improperly focused its scope inquiry on Target’s toolkits rather than the nails within because the Department’s decision was made without a clear and consistent standard for determining the proper focus of a mixed-

¹ See also *Mid Continent Nail Corp. v. United States*, Slip Op.13-92 (July 23, 2013) (U.S. CIT’s remand order implementing CAFC decision).

² See *Final Results of Redetermination Pursuant to Remand Order in Mid Continent Nail Corporation v. United States and Target Corporation*, dated October 17, 2011 (“*First Remand Redetermination*”).

³ See *Mid Continent I*, 770 F. Supp. 2d at 1372; see also *Notice of Antidumping Duty Order: Certain Steel Nails from the People’s Republic of China*, 73 FR 44961 (August 1, 2008) (“*Nails Order*”).

media scope inquiry.⁴ The Court explained that, although the Department is the authority which “decides where the scope inquiry should be focused,” its decision to “examin{e} mixed-media items or sets instead of the subject goods they contain” may not be in accordance with law “when such an approach is not warranted.”⁵ The court then ordered the Department to “identify not only a test it will employ consistently, but the legal justification for employing such a test at all.”⁶

Accordingly, the Department issued the *First Remand Redetermination* demonstrating its authority to conduct a mixed-media analysis and articulated a four-factor test for such analysis.⁷ The Department explained that its legal authority to employ a mixed-media test derives from the Tariff Act of 1930, as amended (“Act”), and the subsequent Federal Circuit’s decisions interpreting the Department’s authority to administer the Act.⁸ For the mixed-media analysis, the Department explained that it considered, at the time of importation: (1) the practicability of separating the component merchandise for repackaging or resale; (2) the value of the component merchandise as compared to the value of the product as a whole; (3) the ultimate use or function of the component merchandise relative to the ultimate use or function of the mixed-media set as a whole; and (4) any other relevant factors that may arise on a product-specific basis.⁹ Using this approach, the Department re-examined the scope request, determined that the proper focus of the scope inquiry was the toolkit as a whole and, thus, found the toolkits to not be subject to the *Nails Order*.

⁴ See *Mid Continent I*, 770 F. Supp. 2d at 1382-83.

⁵ *Id.*

⁶ *Id.*

⁷ *First Remand Redetermination* (October 17, 2011).

⁸ See *First Remand Redetermination* at 2-7.

⁹ *Id.*, at 7-11.

In *Mid Continent II*, the Court concluded that the *First Remand Redetermination* was not supported by substantial evidence and was not in accordance with law because the Department did not have the legal authority to conduct a mixed-media analysis.¹⁰ The Court then remanded the matter to the Department for further proceedings consistent with its opinion that “the nails in question here are unambiguously subject to the *Nails Order*, and there is no support in the law or the record for concluding otherwise.”¹¹ The Department complied with the Court’s order and issued the *Second Remand Redetermination*, finding the nails within the scope of the *Nails Order*, and then appealed to the CAFC.¹²

Upon hearing the appeal, the CAFC held that the CIT erred in holding that “Commerce categorically lacks the authority to conduct a mixed-media inquiry and to exclude from the scope of the *Nails Order* otherwise subject merchandise included within a mixed-media item.”¹³ However, the CAFC also held that “Commerce has not yet reasonably interpreted the order in this case so as to justify such an exclusion.”¹⁴ The CAFC held that “a remand is necessary to allow Commerce to revisit its mixed-media determination in light of the requirement that any implicit mixed-media exception to the literal scope of the order must be based on preexisting public sources.”¹⁵ In defining this requirement, the CAFC held that “on remand Commerce may attempt to draw an ascertainable standard from these rulings if they were publicly available at the time the antidumping order was issued in August 2008.”¹⁶ In sum, the CAFC held that “a remand is required to give Commerce one last opportunity to interpret its order.”¹⁷

¹⁰ See *Mid Continent II*, 825 F. Supp. 2d 1290, 1296 (CIT 2012).

¹¹ *Id.*

¹² See *Final Results of Redetermination Pursuant to Remand Order in Mid Continent Nail Corporation v. United States and Target Corporation*, dated March 9, 2012 (“*Second Remand Redetermination*”).

¹³ See *Mid Continent III*, 725 F.3d 1295, 1301.

¹⁴ *Id.*, 725 F.3d at 1301.

¹⁵ *Id.*, 725 F.3d at 1305.

¹⁶ *Id.*

¹⁷ *Id.*, 725 F.3d at 1302.

II. Analysis

Consistent with the CAFC's opinion in *Mid Continent III*, we reviewed the preexisting public sources available at the time the *Nails Order* issued in August 2008 and on March 27, 2014, we issued our Draft Remand¹⁸ identifying the standards for addressing mixed-media that were ascertainable at that time.

Background on Scope Proceedings

As set forth in sections 701 and 731, the Tariff Act gives the Department the authority to impose an order on a class or kind of merchandise. During the initial investigation, the Department defines the class or kind of merchandise subject to the order and sets forth this definition in the scope language of the order. From time to time, parties may seek clarification from the Department about whether that definition captures certain products that may or may not be within the class or kind contemplated by the language of the order. Prior to the regulations currently in place, the Department answered this question by looking to descriptions of the merchandise contained in the petition, the investigation, the International Trade Commission ("ITC") determinations, and other determinations.¹⁹

In 1982, the Department faced a novel issue when, in the review of bicycle speedometers from Japan, a party requested a scope clarification for a product that had not been developed at the time the order was put into place.²⁰ Because the descriptions of the merchandise contained in the usual sources did not speak to this precise kind of product, the Department considered

¹⁸ See Letter from Scot Fullerton, Program Manager, AD/CVD Operations, Enforcement and Compliance, to All Interested Parties, "Draft Redetermination in the Third Remand on the Scope Inquiry of Certain Household Toolkits Imported by Target Corporation in Certain Steel Nails from the People's Republic of China, date March 27, 2014 ("Draft Remand").

¹⁹ See, e.g., *Royal Business Machines*, 507 F. Supp. 1007 (CIT 1980).

²⁰ See *Bicycle Speedometers From Japan; Final Results of Administrative Review of Antidumping Finding*, 47 FR 28978 (July 2, 1982) (original administrative decision applying what later became known as the "Diversified Products" factors).

additional factors to inform its determination.²¹ The requesting party challenged this determination at the CIT.²² In reviewing the Department's analysis, the CIT held that the Department articulated a reasonable set of factors with which to address this particular question.²³ In subsequent administrative proceedings, the Department began to employ these factors in an increasingly diverse array of scope inquiries, not only to analyze later developed products, but also to resolve inquiries where the original descriptive sources were not dispositive; in turn, the CIT affirmed these factors in several decisions.²⁴ In affirming the use of these factors, the CIT held that it was proper for the Department to use the *Diversified Products* factors as well as other appropriate factors to clarify an ambiguity in the descriptions of the merchandise as to whether a preexisting product is covered by the order.²⁵ The Federal Circuit affirmed these factors as well.²⁶ The Federal Circuit affirmed that the *Diversified Products* factors "are a sound approach to determining the status of products that have been modified since the time of the investigation and final order."²⁷ As a result, the Department's practice evolved to take these factors into account whenever the original descriptive sources were not dispositive of the issue. In 1990, the Department first codified these factors in its regulations at 19 CFR 353.29 and

²¹ *Id.*, at cmt. 1.

²² See *Diversified Products Corp. v. United States*, 6 C.I.T. 155, 160-163 (Ct. Int'l Trade 1983).

²³ *Id.*, 6 C.I.T. at 161-163.

²⁴ See, e.g., *Kyowa Gas Chemical Industry Co. v. United States*, 7 C.I.T. 138, 140-141 (Ct. Int'l Trade 1984); *Kyowa Gas Chemical Industry Co. v. United States*, 7 C.I.T. 311, 310-313 (Ct. Int'l Trade 1984).

²⁵ See *American NTN Bearing Mfg. Corp. v. United States*, 739 F. Supp. 1555, 1565 (CIT 1990) (citing *Floral Trade Council v. United States*, 716 F. Supp. 1580 (CIT 1989)).

²⁶ See *Smith Corona Corp. v. United States*, 915 F.2d 683, 687 (Fed. Cir. 1990).

²⁷ *Id.*

355.29.²⁸ The factors are now codified at 19 CFR 351.225 k(1) and k(2) as the result of revisions to the regulations in 1997.²⁹

Background on Mixed-media Scope Requests

In the time since these so-called “*Diversified Products*” factors were first applied, the Department has been called upon to resolve a number of scope inquiries that recent court decisions discussed, collectively, as “mixed-media” scope inquiries.³⁰ In general, these scope rulings involve merchandise that includes a component that appears to have at least some superficial overlap with the literal language of the order, but also consists of elements that do not appear to be covered by the literal language of the order.³¹ As described by *Walgreen* and *Mid Continent I*, although these rulings have employed the k(1) and k(2) analyses, the outcome of the

²⁸ See 19 CFR 353.29 and 355.29 (1990); see also *Antidumping and Countervailing Duties*, 55 FR 9046 (March 9, 1990) (interim-final rules); *Koyo Seiko Co. v. United States*, 21 C.I.T. 146, at 147, 149, n.2 (Ct. Int'l Trade 1997) (“A revised version of 19 C.F.R. § 353.29(i) (1994) (Other Scope Determinations), was promulgated in 1990 to incorporate the factors set forth in *Diversified Prods. Corp. v. United States*, 6 C.I.T. 155, 572 F. Supp. 883 (1983). The section states, in relevant part: In considering whether a particular product is within the class or kind of merchandise described in an existing order, the Secretary will take into account the following: (1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary and the Commission. (2) When the above criteria are not dispositive, the Secretary will further consider: (i) The physical characteristics of the product; (ii) The expectations of the ultimate purchasers; (iii) The ultimate use of the product; and (iv) The channels of trade.”).

²⁹ See 19 CFR 351.225 k(1) and k(2). In relevant part, 19 CFR 351.225(k) provides as follows:

(k) . . . {I}n considering whether a particular product is included within the scope of an order . . . , the Secretary will take into account the following:

(1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.

(2) When the above criteria are not dispositive, the Secretary will further consider:

- (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.

19 CFR 351.225 k(1)-(2) (2010).

³⁰ See *Walgreen Co. v. United States*, 620 F.3d 1350, 1355-1357 (Fed. Cir. 2010) (“*Walgreen*”); *Mid Continent I*, 770 F. Supp. 2d 1372, 1381-1382.

³¹ See *Mid Continent I*, 770 F. Supp. 2d 1372, at 1382 (“This much is clear: a party seeks a scope ruling in a mixed-media case because it is importing an item containing goods subject to an antidumping order.”).

rulings depends largely on whether the product is treated as a whole, cohesive product, or whether the focus is on the component that appears to be at least superficially covered by the literal language of the order. To illustrate, the following scope rulings and court decisions have been discussed in the context of “mixed-media” scope rulings by the *Walgreen* and *Mid Continent* courts.³² In this first set of rulings, the Department focused on the product as a whole and found the requested product to be outside of the class or kind of merchandise subject to the order: Creative Designs Naturally Pretty (Vanity Set) Scope Ruling (February 9, 1998) Pencils;³³ Dollar General (Stationary Sets) Scope Ruling (April 6, 2001) Pencils;³⁴ Hello Kitty (Totes) Scope Ruling (September 29, 2004) Pencils;³⁵ Clip N' Color (Art Sets) Scope Ruling (March 4, 2005) Pencils;³⁶ Fiskars (Compass) Scope Ruling (June 3, 2005) Pencils;³⁷ Avenues

³² For ease of reference, we present the names of these rulings in short form, as follows: name of requestor/requested product (type of product) Scope Ruling (date) name of order.

³³ Final Scope Ruling - Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China (PRC) – Request by Creative Designs Naturally Pretty (Vanity Set) (February 9, 1998) and *see* Memorandum to the File from Alexander Montoro, International Trade Analyst, Enforcement and Compliance, “Remand Redetermination on Target Toolkits Scope Ruling for Certain Steel Nails from the People’s Republic of China: Prior Scope Rulings,” dated April 17, 2014.

³⁴ Final Scope Ruling--Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China--Request by Dollar General Corporation at 3, U.S. Dep't of Commerce Memorandum from Tom Futtner, Acting Office Director, AD/CVD Enforcement, Group II, Office IV, to Holly Kuga, Acting Deputy Assistant Secretary Import Administration, Scope Inquiry No. A-570-827 (April 6, 2001) (“The issue presented by this scope inquiry is whether Dollar’s stationary sets, which include a 3 1/4-inch or 4 1/2 -inch pencil, are within the scope of the order on certain cased pencils from the PRC.”) and *see* Memorandum to the File from Alexander Montoro, International Trade Analyst, Enforcement and Compliance, “Remand Redetermination on Target Toolkits Scope Ruling for Certain Steel Nails from the People’s Republic of China: Prior Scope Rulings,” dated April 17, 2014.

³⁵ Final Scope Ruling--Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China--Request by Target Corporation Regarding “Hello Kitty Fashion Totes” at 4, U.S. Dep't of Commerce Memorandum from Laurie Parkhill, Director, Office 8, AD/CVD Enforcement, to Jeffrey May, Deputy Assistant Secretary for Import Administration, Scope Inquiry No. A-570-827 (September 29, 2004) (“{We} observe{ } that the Totes include a single pencil which, considered individually, is covered by the scope of the order. The Totes are multimedia sets, however . . . {and} the scope of the order does not contemplate mixed-media sets.”) and *see* Memorandum to the File from Alexander Montoro, International Trade Analyst, Enforcement and Compliance, “Remand Redetermination on Target Toolkits Scope Ruling for Certain Steel Nails from the People’s Republic of China: Prior Scope Rulings,” dated April 17, 2014.

³⁶ Final Scope Ruling - Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China (PRC) - Request by Target Corporation, (March 4, 2005) (concluding that art sets containing subject pencils and other non-subject art supplies were outside the scope of the order) and *see* Memorandum to the File from Alexander Montoro, International Trade Analyst, Enforcement and Compliance, “Remand Redetermination on Target Toolkits Scope Ruling for Certain Steel Nails from the People’s Republic of China: Prior Scope Rulings,” dated April 17, 2014.

(Padfolios) Scope Ruling (May 8, 2007) Lined Paper;³⁸ Davis (Padfolios) Scope Ruling (February 21, 2008) Lined Paper.³⁹ In this second set of rulings, the Department focused on the component (finding the additional aspects of the merchandise irrelevant) and found the requested product to be within the class or kind of merchandise subject to the order: Texsport (Cookware) Scope Ruling (August 8, 1990);⁴⁰ Fresh Cut Roses (Bouquets) Scope Ruling (February 6, 1995);⁴¹ Pipe Fittings (Gas Meter Swivels and Nuts) Scope Ruling (2009);⁴² Walgreen (Tissue Paper) Scope Ruling (September 19, 2008).⁴³

Background on Mixed-media Factors

While the Department relied on common analytical factors across these cases, as the court in *Walgreen* observed, the Department has not set forth a bright-line rule for deciding these

³⁷ 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) (concluding that compasses containing subject pencils were outside the scope of the order) and *see* Memorandum to the File from Alexander Montoro, International Trade Analyst, Enforcement and Compliance, "Remand Redetermination on Target Toolkits Scope Ruling for Certain Steel Nails from the People's Republic of China: Prior Scope Rulings," dated April 17, 2014.

³⁸ Final Scope Ruling -Antidumping Duty Order on Certain Lined Paper Products from the People's Republic of China, Request by Avenues in Leather, Inc., (May 8, 2007) (concluding that padfolios containing subject lined paper pads were outside the scope of the order) and *see* Memorandum to the File from Alexander Montoro, International Trade Analyst, Enforcement and Compliance, "Remand Redetermination on Target Toolkits Scope Ruling for Certain Steel Nails from the People's Republic of China: Prior Scope Rulings," dated April 17, 2014.

³⁹ Certain Lined Paper Products from the People's Republic of China - Davis Group of Companies Corp. Scope Ruling Request, (February 21, 2008) (concluding that padfolios containing subject lined paper pads were outside the scope of the order) and *see* Memorandum to the File from Alexander Montoro, International Trade Analyst, Enforcement and Compliance, "Remand Redetermination on Target Toolkits Scope Ruling for Certain Steel Nails from the People's Republic of China: Prior Scope Rulings," dated April 17, 2014.

⁴⁰ Final Scope Ruling on the Request by Texsport for Clarification of the Scope of the Antidumping Duty Order on Porcelain-on-Steel Cooking Ware from the People's Republic of China, (August 8, 1990) (concluding that porcelain-on-steel cookware imported as part of a camping set was subject to the order) and *see* Memorandum to the File from Alexander Montoro, International Trade Analyst, Enforcement and Compliance, "Remand Redetermination on Target Toolkits Scope Ruling for Certain Steel Nails from the People's Republic of China: Prior Scope Rulings," dated April 17, 2014.

⁴¹ *See Final Determination of Sales at Less Than Fair Value: Fresh Cut Roses from Ecuador*, 60 FR 7019 (February 6, 1995) (roses individually dutiable in mixed flower bouquet) and *see* Memorandum to the File from Alexander Montoro, International Trade Analyst, Enforcement and Compliance, "Remand Redetermination on Target Toolkits Scope Ruling for Certain Steel Nails from the People's Republic of China: Prior Scope Rulings," dated April 17, 2014.

⁴² *See Sango Int'l L.P. v. United States*, 567 F.3d 1356, 1363 (Fed. Cir. 2009) (noting that "Commerce is not required as a matter of law to consider components separately simply because they are packaged, sold, and advertised separately").

⁴³ Final Scope Ruling: Antidumping Duty Order on Certain Tissue Paper from the People's Republic of China, (September 19, 2008) (concluding that tissue paper contained in a gift bag set was subject to the order).

mixed-media cases.⁴⁴ This is evident from the body of prior scope rulings on mixed-media products, because the unique circumstances of each order and each scope request vary depending on the language of the order. The *Walgreen* court emphasized that mixed-media scope ruling requests require the Department to answer this question of whether to treat the product as a whole or focus on the component alone (*i.e.*, the *Walgreen* question) when presented with mixed-media scope ruling requests before engaging in its final analysis, but recognized that this threshold determination must be guided by the language of the order itself.⁴⁵

The CIT in *Mid Continent I* recognized that the Department had applied a set of factors to its prior scope rulings, but the court viewed this as two distinct and outcome-determinative sets of factors:

“As relied on by the parties during the scope inquiry, Commerce has previously considered scope ruling requests involving mixed-media items. The relevant rulings all involved similar circumstances: an item or set being imported included a subject good, but the antidumping order at issue was silent regarding coverage of the item or set. In response to these circumstances, Commerce has adopted two different tests utilizing two different sets of factors allowing it to determine the product under examination. The test used is normally outcome determinative as to whether Commerce ultimately finds coverage of the subject good.”⁴⁶

To clarify, the Department did not, in fact, rely on two different sets of factors, but rather relied upon a common set of analytical principles informed and governed by the language of the order in each particular case. To review, the relevant scope rulings are discussed below.

1. In 1990, the Department issued a scope ruling on an outdoor cooking set including teakettles, skillets, frypans, cups and plates, finding that the porcelain-on-steel cookware imported as part of a camping set was subject to the order on *Porcelain-on-Steel Cooking Ware*

⁴⁴ See *Walgreen*, 620 F.3d 1350, 1356.

⁴⁵ *Id.*, 620 F.3d at 1355-1357.

⁴⁶ See *Mid Continent*, 770 F. Supp. 2d 1372, at 1381-1383.

from China.⁴⁷ In the Texsport (Cookware) Scope Ruling, the Department explained that the relevant class or kind of merchandise was cookware which thus included the cookware contained in the camping set.⁴⁸ Kitchenware, in contrast, was specifically excluded from the order.⁴⁹ Thus, the Department ruled that the cups and plates included within the camping set would not be dutiable, although the remaining items in the set would be subject to duties.⁵⁰ Finding that the cookware within the set was dutiable and that the kitchenware within the set was not dutiable, the Department determined that it did not need to engage in an analysis of the *Diversified Products* factors.⁵¹

2. In 1995, the Department determined that roses imported within bouquets comprised of non-dutiable flowers would be subject to the order on Fresh Cut Roses from Ecuador because the language of the order contemplated bouquets, and thus contemplated the roses as individually dutiable.⁵² The Department explained that “[b]ecause the scope covers only the roses in bouquets, not the bouquets themselves, respondents’ arguments that bouquets constitute a separate class or kind are inapposite. Therefore, a *Diversified Products* analysis is not required.”⁵³ Further, we explained that the “packaging and presentation of roses in bunches and bouquets do not transform the roses into merchandise outside the scope of the order. . . . Nor is

⁴⁷ See Final Scope Ruling on the Request by Texsport for Clarification of the Scope of the Antidumping Duty Order on Porcelain-on-Steel Cooking Ware from the People’s Republic of China, (August 8, 1990) (concluding that porcelain-on-steel cookware imported as part of a camping set was subject to the order) OR (concluding that an outdoor cooking set including teakettles, skillets, frypans, cups and plates, was within the scope of an antidumping order covering teakettles, skillets and frypans) (“Texsport (Cookware) Scope Ruling”).

⁴⁸ *Id.*, at 3-4.

⁴⁹ *Id.*, at 4.

⁵⁰ *Id.*

⁵¹ *Id.*, at 2 (explaining that “we found it unnecessary to address the four additional criteria contained in §353.29(i)(2)”). Although we did not explicitly cite to *Diversified Products*, we explained that, at that time, “Section 353.29 of the Department’s regulations, published in the *Federal Register* on March 9, 1990 (55 Fed. Reg. 9046, 9054) (to be codified at 19 C.F.R. 353.29) governs antidumping scope determinations.” *Id.*

⁵² See *Final Determination of Sales at Less Than Fair Value: Fresh Cut Roses from Ecuador*, 60 FR 7019 at cmt. 1 (February 6, 1995) (roses individually dutiable in mixed flower bouquet).

⁵³ *Id.*

the rose transformed into a new article by virtue of being bunched or placed in a bouquet.”⁵⁴ In response to arguments that “there is no legal basis for the Department to include within the scope of an investigation only a component part of imported finished merchandise,” we explained that “the Department is not treating bouquets as a distinct finished product.”⁵⁵ In reaching this determination, we further explained that “the petition covers ‘all fresh cut roses, *whether imported as individual blooms (stems) or in bouquets or bunches,*’” and that the “plain language of the Department’s scope description demonstrates that the merchandise subject to investigation covers the roses *in* the bouquets only and does not expressly state that the bouquets are themselves covered.”⁵⁶ Thus, as in the Texsport (Cookware) decision, the Department relied on the language of the order to inform its analysis and concluded that despite the mix of items in the requested product, individual components would be separately dutiable.⁵⁷

3. In contrast, in 1998, the Department issued a scope ruling that pencils contained within a 10 piece dress-up vanity set were not subject to the order on pencils from the PRC.⁵⁸ In the Creative Designs Naturally Pretty (Vanity Set) Scope Ruling, we explained at the outset that notwithstanding a “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 the ultimate authority to clarify the scope of antidumping duty orders.”⁵⁹ As a threshold matter, the Department decided that in conducting the scope analysis, it would treat the vanity set as a whole product, rather than looking at the pencils individually.⁶⁰ Specifically, we explained that “the Department has determined, as discussed below, that the merchandise subject to this scope

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* (emphasis in original).

⁵⁷ *Id.*

⁵⁸ Final Scope Ruling - Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China (PRC) – Request by Creative Designs Naturally Pretty (Vanity Set) (February 9, 1998).

⁵⁹ *Id.*, at 3.

⁶⁰ *Id.*, at 4.

request is the 10 piece vanity set, and not the two pencils which are only minor components of that set.”⁶¹ We then explained that “the issue presented . . . is whether” the “vanity set, which includes two { } pencils, is within in the scope” of the order on pencils.⁶² Having determined that we would treat the vanity set as a whole product, we turned to the k(1) sources and explained: “[t]he underlying record established in this scope proceeding – 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 . . . are the same class or kind of merchandise as that covered by the order.”⁶³ We then proceeded to examine the vanity set as a whole, according to the k(2) factors.⁶⁴ Regarding physical characteristics, we repeated our statement that we were focusing on the vanity set as a whole, “and not the two pencils which are only minor components of the set.”⁶⁵ We then explained that the record contained no “convincing evidence that a purchaser would obtain CDI’s vanity set with the expectation of solely or principally acquiring pencils.”⁶⁶ Rather, “[b]ased on a review of the packaging and contents” we determined that the purchaser would “expect{ } to obtain a play/make believe product” and not a “writing instrument.”⁶⁷ In examining the ultimate use, we further determined that “[a]lthough the various components may have individual uses, we conclude that the ultimate use of the . . . vanity set is for young girl’s role playing” and therefore “very dissimilar” from the ultimate use of the covered merchandise.⁶⁸ This emphasis in this scope ruling on treating the product as a whole because the covered merchandise was only a “minor component” became a reference point for several subsequent scope determinations, as discussed in detail

⁶¹ *Id.*, at 3.

⁶² *Id.*, at 4.

⁶³ *Id.*, at 4.

⁶⁴ *Id.*, at 5.

⁶⁵ *Id.*, at 5.

⁶⁶ *Id.*, at 6.

⁶⁷ *Id.*, at 6.

⁶⁸ *Id.*, at 7.

below. Similarly, the Department's reliance in this scope ruling on the degree of integration between the components (*i.e.*, "a review of the packaging and contents") and the emphasis on the ultimate use of the product as a whole versus the covered components, also became a point of reference for several subsequent scope decisions, as discussed below.

4. In 2001, the Department issued the Dollar General (Stationary Sets) Scope Ruling, in which we again treated the product as a whole, framing the inquiry as "whether Dollar's stationary sets, which include a 3 1/4-inch or 4 1/2 -inch pencil, are within the scope of the order on certain cased pencils from the PRC."⁶⁹

5. In 2004, the Department issued the Hello Kitty (Fashion Totes) Scope Ruling, finding that "fashion totes" were not subject to the order on pencils from the PRC, despite the fact that "the Totes include a single pencil which, considered individually, is covered by the scope of the order."⁷⁰ The Department began its inquiry by observing that the "single pencil . . . considered individually, is covered by the scope of the order," but that "the Totes are multimedia sets . . . which in addition to a pencil, include" a number of other items.⁷¹ Next, the Department observed that "the scope of the order does not contemplate mixed-media sets."⁷² In the face of this silence, the Department proceeded to rely on the fact that the pencil was only "a minor component," that the set was "not comprised of writing instruments alone," and that the set was

⁶⁹ Final Scope Ruling--Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China--Request by Dollar General Corporation at 3, U.S. Dep't of Commerce Memorandum from Tom Futtner, Acting Office Director, AD/CVD Enforcement, Group II, Office IV, to Holly Kuga, Acting Deputy Assistant Secretary Import Administration, Scope Inquiry No. A-570-827 (April 6, 2001) ("The issue presented by this scope inquiry is whether Dollar's stationary sets, which include a 3 1/4-inch or 4 1/2 -inch pencil, are within the scope of the order on certain cased pencils from the PRC.").

⁷⁰ Final Scope Ruling--Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China--Request by Target Corporation Regarding "Hello Kitty Fashion Totes" at 4, U.S. Dep't of Commerce Memorandum from Laurie Parkhill, Director, Office 8, AD/CVD Enforcement, to Jeffrey May, Deputy Assistant Secretary for Import Administration, Scope Inquiry No. A-570-827 (September 29, 2004) ("{We} observe{} that the Totes include a single pencil which, considered individually, is covered by the scope of the order. The Totes are multimedia sets, however . . . {and} the scope of the order does not contemplate mixed-media sets.").

⁷¹ *Id.*, at 4.

⁷² *Id.*

not comprised of “other components closely associated with writing instruments only.”⁷³ As with the Creative Designs Naturally Pretty (Vanity Sets) Scope Ruling, the principles relied upon in this scope ruling became a reference point for subsequent scope rulings, even across different orders on different products.

6. In 2005, the Department issued a decision in Clip N’ Color (Art Sets), finding that art sets containing subject pencils and other non-subject art supplies were outside the scope of the order.⁷⁴ In this ruling, we determined that the pencils were not a substantial component of the set and treated the set as a whole product instead of looking to the pencils individually.⁷⁵

7. In 2005, the Department issued the Fiskars (Compass) Scope Ruling, finding that pencils included in imports of compasses were not subject to the order on pencils from the PRC.⁷⁶ The respondent in that case argued that “the pencil is not an integral component of the compasses” and that the pencils are only a minor component of the compass.⁷⁷ We began the inquiry by treating the product as a compass and first determined that the k(1) sources were “not dispositive of this precise issue because {the k(1) sources} do{ } not address whether ‘mixed-media’ sets, such as the compasses (with pencil included), are the same class or kind of merchandise as that covered by the Order.”⁷⁸ We then explained that “[t]he Department has previously addressed scope inquiries covering mixed-media sets using the factors listed in 19 CFR 351.225(k)(2).⁷⁹ Thus, we proceeded to analyze whether the pencils “are a minor

⁷³ *Id.*

⁷⁴ Final Scope Ruling - Antidumping Duty Order on Certain Cased Pencils from the People’s Republic of China (PRC) - Request by Target Corporation, (March 4, 2005) (concluding that art sets containing subject pencils and other non-subject art supplies were outside the scope of the order).

⁷⁵ Clip N’ Color (Art Sets) Scope Ruling at 5.

⁷⁶ 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) (concluding that compasses containing subject pencils were outside the scope of the order).

⁷⁷ *Id.*, at 2.

⁷⁸ *Id.*, at 5.

⁷⁹ *Id.*

component of the compasses,” which we determined they were, and then analyzed the degree of integration between the components, finding that “[a]lthough the compasses are sold with the pencil included, the pencil can be removed from the compass and replaced with other writing media.”⁸⁰ We also determined, based on packaging and ultimate use, that the purchaser would ultimately expect to obtain a drawing tool, *i.e.*, the compass, to be used for drawing, rather than expecting to obtain a pencil to be used for writing.⁸¹

8. In 2007, the Department issued the Avenues (Padfolios) Scope Ruling, finding that leather padfolios which included a pad of lined paper were not subject to the order on lined paper from China.⁸² In that ruling, we determined that the writing pad was 1) a minor component of the portfolio that was 2) replaceable and easily removed; and 3) ultimately served a different purpose than the padfolio, which was supposed to serve as an organizational tool which also facilitates note-taking.⁸³ The Department held that “based on the criteria, taken together, we find that Avenue’s 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.”⁸⁴ The principles relied upon in this scope ruling are consistent with the principles found in the scope rulings discussed above, and continue to inform subsequent scope rulings.

9. In 2008, the Department issued a similar scope ruling in Davis (Padfolios).⁸⁵ In that scope ruling, we treated the padfolios as a whole product and began our analysis by explaining that “[i]n the past, the Department has found items that contain subject merchandise to be

⁸⁰ *Id.*, at 6.

⁸¹ *Id.*, at 7-8.

⁸² Final Scope Ruling - Antidumping Duty Order on Certain Lined Paper Products from the People’s Republic of China, Request by Avenues in Leather, Inc., (May 8, 2007) (concluding that padfolios containing subject lined paper pads were outside the scope of the order) (“Avenues (Padfolios) Scope Ruling”).

⁸³ *Id.*, at 11.

⁸⁴ *Id.*, at 18 (emphasis added).

⁸⁵ Certain Lined Paper Products from the People's Republic of China - Davis Group of Companies Corp. Scope Ruling Request, (February 21, 2008) (concluding that padfolios containing subject lined paper pads were outside the scope of the order).

outside the scope of the order when the subject merchandise is 1) a minor component of the item, 2) consumable, and 3) can be replaced with merchandise not subject to the scope of the order.”⁸⁶

We also reiterated our statement that we could rely on the factors “whether or not the pad of paper meets the description of merchandise covered by the scope of the order,” to determine that the padfolios are not subject to the scope of the order.⁸⁷ We further proceeded to find that 1) the pad of paper within the padfolio “is not a substantial component of the overall product;” 2) “the writing pad can be removed from the padfolio without causing any change in the padfolio’s physical characteristics;” and 3) the “pad can be replaced with a different notebook or other paper. In other words, the writing pad is the accessory to the padfolio, not the other way around.”⁸⁸

As is evident from our prior scope rulings, the Department took the language of the individual order into account in each case and then applied a common set of principles, however labeled in each given determination, to determine the focus of the inquiry (*i.e.*, to answer the *Walgreen* question). The CIT in *Mid Continent I* described this approach as arbitrary because the Department had not identified what was the consistent basis for its decisions.⁸⁹ In other words, the CIT observed in *Mid Continent I*, that the Department’s prior scope rulings appeared to skip ahead to the final analysis without answering the *Walgreen* question in a reasoned and consistent manner.

Now, given that the CAFC affirmed that the Department has the authority to identify the factors that inform its interpretation of the language of the order when presented with a potential

⁸⁶ *Id.*, at 6.

⁸⁷ *Id.*, at 6 (quoting *Avenues* at 18).

⁸⁸ *Id.*

⁸⁹ *Mid Continent I*, 770 F. Supp. 2d 1372, at 1383 (“Commerce failed to articulate the reasons it examined the tool kits instead of the nails contained therein . . . and undertook an analysis under 19 C.F.R. 351.225(k)(2) prematurely.”).

mixed-media scope request, the Department is identifying the factors that are ascertainable from its prior scope rulings and past practice.

As we explained in drafting our four-factor mixed-media test, our mixed-media analysis takes into account: the language of the order (which governs the inquiry); whether the component has minor value; the degree of integration; and the ultimate use of the product. These common factors were described in our *First Remand Redetermination* as: (1) the practicability of separating the component merchandise for repackaging or resale; (2) the value of the component merchandise as compared to the value of the product as a whole; (3) the ultimate use or function of the component merchandise relative to the ultimate use or function of the mixed-media set as a whole; and (4) any other relevant factors that may arise on a product-specific basis.⁹⁰ The Department finds that these four factors articulate the common principles relied upon in our prior scope rulings and throughout our past practice. However, to ensure that we address the concern raised in *Mid Continent III* regarding the fourth factor,⁹¹ we restated it as “the unique language of the order” to emphasize that the language of the order itself informs and controls the mixed-media inquiry. Similarly, to clarify the role of the order’s language, we will refer to these factors as follows: (1) the unique language of the order; (2) the practicability of separating the component merchandise for repackaging or resale; (3) the value of the component merchandise as compared to the value of the product as a whole; and (4) the ultimate use or function of the component merchandise relative to the ultimate use or function of the mixed-media set as a whole.

⁹⁰ See *First Remand Redetermination* at 2-7.

⁹¹ *Mid Continent III*, 725 F.3d 1295, 1303 n.2 (“The fourth ‘factor’ announced, but not relied on, by Commerce in this case—‘any other relevant factors that may arise on a product-specific basis,’ see *id.* at 1294—does not provide affected parties with any notice of what facts Commerce will consider in its inquiry, and is therefore not an appropriate factor to rely on.”).

B. Public Availability of Prior Rulings

Consistent with the Federal Circuit’s opinion, we relied upon standards that existed at the time the class or kind of merchandise was defined. Here, the order on nails from the PRC was put in place in 2008.⁹² At the time, it was clear that the Department dealt with potential mixed-media scope inquiries in one of two ways: either treat the product as a whole and apply k(2) or treat the product as a mix and apply k(1), focusing on the component, alone.⁹³ All of these scope rulings, with the exception of tissue paper, had been issued prior to the time of the *Nails Order*.⁹⁴ Consistent with our procedures for access to information, these scope rulings were available in the public reading room and were listed in the quarterly published list of scope rulings.⁹⁵

Further, these rulings were incorporated into decisions published in the *Federal Register* and have frequently been discussed by the courts.⁹⁶ For example, the courts in *Walgreen* and *Mid Continent* recognized that these mixed-media scope requests had been brought before the Department on a number of occasions. As evident in their opinions, these courts were able to discern that certain analytical factors were applied in these mixed-media scope rulings

⁹² See *Notice of Antidumping Duty Order: Certain Steel Nails from the People's Republic of China*, 73 FR 44961 (August 1, 2008).

⁹³ See Analysis section, *supra*.

⁹⁴ See list of mixed-media scope rulings, *supra*.

⁹⁵ See 19 CFR 351.225(o) (“On a quarterly basis, the Secretary will publish in the *Federal Register* a list of scope rulings issued within the last three months. This list will include the case name, reference number, and a brief description of the ruling.”). All interested parties including the general public may access all public documents for all Antidumping and Countervailing Duty Proceedings at the Public File Room. The Public File Room is located in Room 7046, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230. The office hours of the Public File Room are between 8:30 a.m. and 5 p.m. Eastern Time on business days.

⁹⁶ See, e.g., *Certain Cased Pencils from the People's Republic of China; Notice of Final Results of Expedited Sunset Review of Antidumping Duty Order*, 70 FR 67427, 67428 (November 7, 2005); *Certain Cased Pencils From the People's Republic of China; Final Results of Expedited Sunset Review of Antidumping Duty Order*, 65 FR 41431, 41432 (July 5, 2000).

notwithstanding the fact that the Department had not provided a consolidated explanation of its factors in one place.⁹⁷

Based on the number and frequency of these rulings, we find that parties on both the domestic and respondent sides of AD/CVD proceedings had notice that mixed-media scope requests could result in outcomes that excluded some components which were superficially covered by the order and outcomes that included mixed-media sets because of the presence of covered components. In fact, the *Hello Kitty Fashion Totes* ruling was referenced in the *Nails Preliminary Determination* and it was stated that this ruling addressed a type of kit or set of merchandise, in which the merchandise at issue “is subsumed with a set of goods whose essential character is defined as something other than the merchandise itself.”⁹⁸ However, we agree with the court in *Mid Continent III* that prior to articulating our test here, parties may have suffered from a perceived uncertainty about which kind of mixed-media factors would be applied in light of the language of a given order.⁹⁹ By consolidating those principles here, and setting them out explicitly instead of implicitly, we can resolve any remaining uncertainty and provide a more convenient frame of reference for such mixed-media scope inquiries.

⁹⁷ See *Walgreen*, 620 F.3d 1350, 1356 (“Commerce noted that it ‘has previously addressed scope inquiries covering mixed-media sets using the factors listed in 19 C.F.R. 351.225(k)(2).’ *Id.* However, Commerce did not set forth a bright line rule for determining whether imports should be analyzed as ‘mixed-media’ sets, or as combinations of products. Instead, Commerce properly exercised its discretion under the facts and circumstances of the case before it, concluding that the imported products should be considered ‘mixed-media’ sets.”); *Mid Continent I*, 770 F. Supp. 2d 1372, 1381-1382 (“As relied on by the parties during the scope inquiry, Commerce has previously considered scope ruling requests involving mixed-media items. The relevant rulings all involved similar circumstances: an item or set being imported included a subject good, but the antidumping order at issue was silent regarding coverage of the item or set. In response to these circumstances, Commerce has adopted two different tests utilizing two different sets of factors allowing it to determine the product under examination. The test used is normally outcome determinative as to whether Commerce ultimately finds coverage of the subject good. . . . It is true that Commerce has not given a general definition or test for what constitutes a mixed-media set, and that Commerce must issue each scope ruling based upon the facts and circumstances of the specific case before it.”)

⁹⁸ See *Certain Steel Nails from the People’s Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances and Postponement of Final Determination*, 73 FR 3928 (January 23, 2008) at 3929 (“*Nails Preliminary Determination*”).

⁹⁹ See also *Mid Continent III*, 725 F.3d 1295, 1305 (noting the lack of a complete list of criteria and permitting Commerce to draw an ascertainable standard from prior scope rulings).

A. Application of the Mixed-media Test to Target’s Toolkits

I. Factors for a Mixed-media Scope Analysis

The mixed-media analysis addresses the interrelationship between the components of a so-called mixed-media product in order to determine whether the remainder of the scope inquiry should focus on the product as a whole, or on the component that appears to be at least superficially covered by the literal language of the order. Where the analysis suggests treating the product as a whole, we will conduct a k(2) analysis on the whole product; where the analysis suggests that the components are not so interrelated, the scope inquiry will focus on the component that appears to be at least superficially covered by literal language of the order, which can be resolved by looking to the k(1) criteria in most cases.

Thus, the mixed-media analysis is conducted on a case-by-case basis depending upon the particular characteristics of the requested product and the language of the order at issue.¹⁰⁰ Given the uniqueness of each proceeding and because the scope of orders are necessarily written in general terms,¹⁰¹ the Department has not previously provided a complete listing of the factors it may consider when conducting a mixed-media analysis. Rather, as affirmed by the CAFC in *Walgreen*, our practice in considering mixed-media scope determinations has been to take into account the unique product characteristics on a case-by-case basis.

The purpose of the mixed-media analysis is to discern whether the Department’s scope analysis should focus on the product as a whole or just the component of the imported product.¹⁰²

As explained below, to address this question, the Department will consider, at the time of

¹⁰⁰ *Walgreen*, 620 F.3d at 1356 (noting that there was no “bright line rule” for which analysis applies and that the Department will exercise “its discretion under the facts and circumstances” in applying the appropriate analysis).

¹⁰¹ See *Duferco*, 296 F.3d at 1089.

¹⁰² Typically in mixed-media scope inquiries the subject component of the imported product is characterized by parties as subject merchandise. However, the Department notes that the particular component is not determined to be subject to the antidumping duty order until a final determination has been made following a 19 CFR 351.225(k) analysis.

importation: (1) the unique language of the order; (2) the value of the component merchandise as compared to the value of the product as a whole; (3) the practicability of separating the component merchandise for repackaging or resale; and (4) the ultimate use or function of the component merchandise relative to the ultimate use or function of the mixed-media set as a whole. In conducting this analysis, no single factor is dispositive and the Department will consider the totality of evidence on the record with respect to each of the factors outlined above.

(1) Language of the Order

As discussed above, the language of the order controls the analysis and informs the application of the remaining factors. By looking to the language of the order, we can determine whether such an analysis is warranted, either from the silence of the order or language in the order speaking to these factors.

(2) Value

In looking to the value of the component merchandise compared to the value of the imported product, including all non-subject merchandise, the Department seeks to address whether the component merchandise is an insignificant component of the imported product. Indeed, where component merchandise is an insignificant portion of a product, it is unlikely that U.S. customers will purchase the imported product for the component merchandise portion, making the component incidental to a different product. For these reasons, the Department will examine the value of the component merchandise compared to the value of the imported product in determining whether its scope analysis should focus on the entire product incorporating the component merchandise or just the component itself.

(3) Practicability of Repackaging for Resale

In looking to the ease with which the component merchandise may be repackaged or resold separately, the Department seeks to ensure that parties cannot use a mixed-media set to import subject merchandise for purposes of evading antidumping duties. If the component merchandise of a product may be repackaged and resold separately with relative ease, it is more likely that parties may use the mixed-media set to avoid antidumping duties. In contrast, if the component merchandise cannot easily be repackaged for individual sale, it is more likely that the set is a unique product of which the component merchandise is incidental. For these reasons, the Department will examine whether component merchandise may be repackaged and sold separately with relative ease in its determination of whether its scope analysis should focus on the entire product incorporating the subject merchandise or just the component merchandise.

(4) Ultimate Use or Function

In looking to the ultimate use or function of component merchandise as compared to the ultimate use of the entire imported product, the Department seeks to determine whether the imported product's use is distinct enough from that of component merchandise to support a determination that the scope analysis should focus on the entire product incorporating the component merchandise rather than just the component itself. For instance, where the imported product ultimately has a similar use to that of the component merchandise (*e.g.*, a collection of cookware that includes subject and non-subject pots, but all of which share the common use of cooking), this would support a finding that the imported product as a whole was not a unique

product with new characteristics different from that of a component.¹⁰³ Therefore, in such a situation, the Department's scope analysis should focus on the component merchandise.

However, where the imported product's use is distinct from that of component merchandise (*e.g.*, where a pencil is incorporated into a compass for the purpose of drawing circles or circular arcs and for taking measurements rather than retaining the single use of a writing instrument),¹⁰⁴ this would support a finding to examine the entire imported product.

II. Mixed-media Analysis for Target's Toolkits

As stated above, the Department considers four factors when examining mixed-media sets, namely: the language of the order, value, practicability of repacking for resale, and ultimate use or function. As described below, the Department evaluated these four factors in the redetermination to determine whether the correct focus of the scope ruling should be on toolkits or steel nails.

(1) Language of the Order

The language of the order describes subject nails and the harmonized tariff schedules under which these nails may be classified, but does not provide any additional criteria for evaluating the merchandise that is contained in the toolkits. As discussed in our review of prior scope rulings, *supra*, this silence can create an ambiguity when a requested product contains additional components that are not contemplated by the order as part of the class or kind of merchandise at issue. Unlike the orders in certain of the prior scope rulings we reviewed here,

¹⁰³ See Recommendation Memo-Final Scope Ruling on the Request by Texsport for Clarification of the Scope of the Antidumping Duty Order on Porcelain-on-Steel Cooking Ware from the People's Republic of China at 4, U.S. Dept of Commerce Memorandum from Richard Moreland, Director, Office of Antidumping Compliance, to Joseph A. Spetrini, Deputy Assistant Secretary for Compliance, Scope Inquiry No. A-570-506 (August 8, 1990) (concluding that an outdoor cooking set including teakettles, skillets, frypans, cups and plates, was within the scope of an anti-dumping order covering teakettles, skillets and frypans), *also cited* in *Walgreen*.

¹⁰⁴ See Final Scope Ruling – Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China (PRC) – Request by Fiskars Brands, Inc., dated June 3, 2005.

the order in this case also does not speak to the packaging or arrangement of the nails upon importation. Therefore, we are evaluating the remaining factors within this framework.

(2) Value

In determining the value of the component merchandise compared with the total value of the mixed-media set, the Department examined whether the component merchandise comprises a significant portion of the total value of the set. For the toolkits considered in this proceeding, Target stated that the total value of the steel nails in the toolkits was an insignificant percentage of both the retail price and the cost of manufacture.¹⁰⁵ Additionally, at retail, the toolkits are priced between \$25-60.¹⁰⁶ Therefore, the Department finds that the value of the steel nails within the toolkits is very small as compared to the value of the entire toolkit, and this factor supports determining that the scope analysis should focus on the entire product incorporating the component merchandise.

(3) Practicability of Repackaging for Resale

In examining whether the component merchandise could be easily repackaged or resold, the Department examined the way the steel nails were packaged within the toolkits. The toolkits at issue contain between 59 to 161 unique articles intended for home maintenance or repair, of which the steel nails are a small portion.¹⁰⁷ In all the toolkits subject to the review, the steel nails were packaged within a smaller case that contained several different subdivided compartments, each of which contained other types of fasteners.¹⁰⁸ The steel nails were not packaged in a separate, individual box by themselves.¹⁰⁹ Because the component merchandise was packaged in

¹⁰⁵ For the specific amount of value accounted for by the steel nails in question, *see* Target's Scope Ruling Request Regarding Household Toolkits dated December 11, 2009, at 2-3.

¹⁰⁶ Target's Diversified Products Analysis dated April 15, 2010, at 3.

¹⁰⁷ *See* Target's Scope Ruling Request Regarding Household Toolkits dated December 11, 2009, at 2.

¹⁰⁸ *See* Target's Diversified Products Analysis dated April 15, 2010, at 2.

¹⁰⁹ *See* Target's Scope Ruling Request Regarding Household Toolkits dated December 11, 2009, at 2-3.

the same case that contained similar non-subject fasteners, the Department finds that it would be impractical to remove the component merchandise for the purpose of reselling. Furthermore, the steel nails were packaged within a small case that also contained several other different types of fasteners, and, thus did not have the volume or space for large quantities of individual steel nails to be included.¹¹⁰ Accordingly, the small number of steel nails contained in the toolkit could not be assumed to be a product designed for repackaging and resale. For all these reasons, the Department finds that this factor supports determining that the scope analysis should focus on the entire product, *i.e.*, the toolkit, incorporating the component merchandise.

(4) Ultimate Use or Function

In determining the ultimate use or function of the product, the Department examined the use of the toolkit in contrast to the use of component merchandise sold alone. The toolkits were designed to provide a convenient collection of tools and accessories for the intention of home repair and maintenance. The general purpose of steel nails, fastening two objects together, while complementary, is not the same as the purpose of a toolkit. In this regard, the toolkits hold between 59 to 161 individual unique articles.¹¹¹ Each toolkit includes a unique and different combination of tools and accessories, allowing the purchaser to choose a particular toolkit that contains the requisite tools needed.¹¹² Indeed, most articles within the toolkits do not function together, and the majority of tools are not compatible with the function of steel nails.¹¹³ Thus, purchasers of the toolkits select a toolkit based on the specialized types of home repair and maintenance made possible by the included articles. Because steel nails comprise a small portion of the 59-161 components, the choice of the toolkit selected is not based exclusively

¹¹⁰ *Id.*

¹¹¹ *See* Target's Scope Ruling Request Regarding Household Toolkits dated December 11, 2009 at 2-3.

¹¹² *Id.*

¹¹³ *See* Target's Response to Mid Continent Nail Corporation's ("Petitioner") Objection dated January 7, 2010, at 4.

upon the inclusion of the steel nails, which are included in each toolkit. Accordingly, the toolkits have distinct functions and uses from that of the component merchandise and the Department finds that this factor supports determining that the scope analysis should focus on the entire product incorporating the component merchandise.

Conclusion of Mixed-media Analysis

After an analysis of the above factors the Department determines that the proper article to be examined is the toolkit. Thus, the Department's scope analysis will focus on the toolkits imported by Target. Accordingly, we hereby conduct a k(2) analysis on the toolkits as a whole.

Application of 19 CFR 351.225(k)(2) Factors

As stated above, the Department's scope analysis will focus on the toolkits imported by Target and the factors of 19 CFR 351.225(k)(2). For each of the factors listed below, we examined each of the household toolkits as a set containing both brass coated nails and other items.

Physical Characteristics of the Product

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

1. *The Durabuilt 161 Piece Household Toolkit With 14.4 Volt Cordless Drill* contains a total of 161 pieces, including a single fastener set containing 10 thumb tacks, five brass plated cup hooks, 10 brass plated picture hanger, 55 brass coated steel nails, 10 screws, and 10 plastic wall anchors. The tools include a 14.4 volt rechargeable cordless drill, 12 foot tape measure, Phillips 3 inch screwdriver, slotted 3 inch by 1/8 inch screwdriver, 9 inch magnetic level, 6 inch carpenters square, 6 inch long nose pliers, 9 mm snap-off knife, 8 oz. claw hammer, four SAE combination wrenches, bit driver, four metric combination wrenches, and 42 piece drill

set. Therefore, the 161 piece kit contains a set of 100 fasteners, 55 which are nails, and an additional 61 tools.

2. *The Durabuilt 161 Piece Household Toolkit With Rechargeable 4.8 Volt Screwdriver*

contains a total of 161 pieces, including a single fastener set containing 10 thumb tacks, five brass coated cup hooks, 10 brass coated picture hanger, 55 brass coated steel nails, 10 screws, and 10 plastic wall anchors. The tools include 8.5 inch wire crimper/stripper, 6 inch stainless ruler, 9 inch magnetic level, 3 inch spring clamps, Phillips screwdriver, 8 inch adjustable wrench, slotted 1/8 inch by 3 inch screwdriver, UL electrical tape, 2 inch magnetic bit extension, ratcheting bit driver, electrical voltage tester, 12 foot measuring tape, 100 piece fastener, 6 inch long nose pliers, 6 inch diagonal pliers, forty 1 inch CRV, 4.8 volt cordless rechargeable screwdriver with UL recharger, 8 oz. claw hammer, two precision screwdrivers, slotted 1/4 inch x 4 inch screwdriver and Phillips 2 x 4 inch screwdriver. Therefore, the 161 piece kit contains a set of 100 fasteners, 55 which are nails, and an additional 61 tools.

3. *The Apollo Precision Tools 138 Piece Household Toolkit* contains a total of 138 pieces,

including a single fastener set containing 10 thumb tacks, five brass coated cup hooks, 10 brass coated picture hanger, 55 brass coated steel nails, 10 screws, and 10 plastic wall anchors. The tools include a 2 inch putty knife, 6 inch long nose pliers, 6 inch adjustable wrench, 8 inch scissors, 9 inch magnetic level, 12 inch measuring tape, 8 oz. claw hammer, four mini clamps, electrical tape, 4.8 volt cordless screwdriver, and four precision screwdrivers. Therefore, the 138 piece kit contains a set of 100 fasteners, 55 which are nails, and an additional 38 tools.

4. *The Durabuilt 59 Piece Home/Office Toolkit with Soft Sided Bag* contains a total of 59

pieces, including a single fastener set containing 10 thumb tacks, five 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 toolkit 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.¹¹⁴

5. *The Durabuilt 144 Piece Household Toolkit* contains a total of 144 pieces, including a single fastener set containing 10 thumb tacks, five brass coated cup hooks, 10 brass coated picture hanger, 55 brass coated steel nails, 10 screws, and 10 plastic wall anchors. The tools include five SAE combination wrenches, 6 inch long nose pliers, twenty 1 inch CRV bits, ratcheting bit driver, 12 foot measuring tape, eight SAE hex keys, 13 oz. claw hammer, 8 inch plastic level, Phillips screwdriver, slotted screwdriver, 18mm plastic utility knife, 6 inch adjustable wrench, electrical tester, 6 inch diagonal pliers. Therefore, the 144 piece kit contains a set of 100 fasteners, 55 which are nails, and an additional 44 tools.
6. *The Durabuilt 152 Piece Household Toolkit* contains a total of 152 pieces, including a single fastener set containing 10 thumb tacks, five brass coated cup hooks, 10 brass coated picture hanger, 55 brass coated steel nails, 10 screws, and 10 plastic wall anchors. Therefore, the 152 piece kit contains a set of 100 fasteners, 55 which are nails, and an additional 52 tools.

We examined the brass coated steel nails contained in the six household toolkits 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 diamond point. We also note that the parties do not dispute that the brass coated steel nails contained in the toolkits at least superficially meet the physical characteristics of the nails subject

¹¹⁴ 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 *Nails Order*.

to the scope of the *Nails Order*. Additionally, the other items in each of the toolkits do not meet the physical description of subject merchandise, which no party disputes. Thus, with respect to physical characteristics, we find that the toolkits include some merchandise which at least superficially meets the physical description of merchandise subject to the *Nails Order* and some merchandise which clearly does not meet the physical description of merchandise subject to the *Nails Order*.

The Manner in Which the Product Is Advertised

We note that the cardboard sleeve around each of the six toolkits 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 toolkits, 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 Toolkit 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.¹¹⁵ 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 Toolkit with Soft Sided Bag, does contain a side panel on

¹¹⁵ 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.

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 toolkits comprise, at most, a tangential feature in the advertising of these toolkits.

With respect to the argument that the toolkits 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.¹¹⁶ 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.¹¹⁷ In some stores, as is noted by Target, fasteners and nails sold individually may be displayed in a separate aisle from tools and toolkits.¹¹⁸ Thus, although the toolkits may be 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 toolkits directly and then sells the toolkits in their retail stores throughout North America. Target does not purchase the toolkits from wholesalers or distributors, as is typically done for retail stores who intend to sell nails. Target then purchases

¹¹⁶ 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.

¹¹⁷ *Id.*

¹¹⁸ 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.

complete toolkits with attached cardboard sleeves and sells the kits as purchased in their various retail stores throughout the country.¹¹⁹

Therefore, there are several different channels of trade between toolkits and nails in that Target sources directly from the seller for resale at its retail stores whereas in-scope nails, when sold at retail, are generally purchased from distributors and not directly from Chinese suppliers. However, nails are also frequently sold to end users, in addition, to being sold to retailers or other distributors. While there are some different channels of trade for toolkits and nails, there are also some channels of trade that nonetheless overlap. As a result, we find that this criterion is inconclusive when comparing the levels of trade between Target's toolkits and the subject merchandise nails contained within.

The Expectations of the Ultimate Purchaser

When purchasing the toolkits, 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 toolkits 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 toolkit carrying case.¹²⁰ 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 toolkits are not used with any type of nails, thus diminishing the importance of the steel nails within the toolkits. Furthermore, the

¹¹⁹ 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.

¹²⁰ 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.

packaging and advertising on the cardboard sleeve of five of the six toolkits does not specifically mention the presence of steel nails within the kit. The single kit that does advertise steel nails errs and suggests that the steel nails are included with the box of screws and nuts, whereas they are truly to be found in the box of various fasteners.

The Ultimate Use of the Product

The toolkits sold by Target serve the ultimate use of home or office repair. A variety of tools, such as drills, screwdrivers, wrenches, saws and pliers, are included in each kit to aid in various repair tasks. As each kit offers a unique selection of tools, purchasers are able to select a particular kit based upon the ultimate use of the tools included. Many of the tools included within each toolkit do not use nails at all and serve other purposes than solely to fasten or hang objects. Steel nails, on the other hand, only have a single ultimate use, which is to fasten or hang objects. Thus, the toolkits serve a broader use of home or office repairs rather than strictly to fasten or hang objects, the ultimate use of subject steel nails.

CONCLUSION

In summary, our review of the record of this scope inquiry in accordance with 19 CFR 351.225(k)(2) supports the conclusion that Target's six household toolkits, including the brass coated steel nails contained therein, as described above do not fall within the class or kind of merchandise covered by the *Nails Order*. 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 *Nails Order* if they were imported without any of the other toolkit components, we also take into consideration that they are imported in household toolkits containing non-subject merchandise. In reaching this conclusion we note that the four of the five (k)(2) factors support the finding that Target's six household toolkits containing brass coated steel nails differ from subject

merchandise in terms of: (i) the physical characteristics of the six household toolkits; (ii) the manner in which Target’s household toolkits are advertised and displayed; (iii) the channels of trade in which the product is sold; (iv) the expectations of the ultimate purchaser; and (v) the ultimate use. Therefore, taken as a whole, we find that Target’s six household toolkits, including the brass coated steel nails contained therein, are outside the scope of the *Nails Order*.

For the reason described above, and in accordance with 19 CFR 351.225(k)(2), the Department finds that Target’s six household toolkits, including the brass coated steel nails contained therein, are outside the scope of the *Nails Order*. Accordingly, if this remand is affirmed by the Court, the Department will issue revised instructions to U.S. Customs and Border Protection (“CBP”) once this decision is final and conclusive. The Department is issuing draft CBP instructions to the parties along with this draft redetermination to provide the parties with an opportunity to comment on these instructions.

III. Comments from Interested Parties

On April 3, 2014, the Department received comments on the Draft Remand from Target and Mid Continent Nail Corporation (“Petitioner”), respectively.

(1) Legal Authority for Mixed-media Analysis

Petitioner’s Comments

Petitioner claims that the Department failed to conduct notice and comment rulemaking in adopting standards that in effect amend the regulations governing scope inquiries.¹²¹ Petitioner cites to *Gold East. Paper (Jiangsu) Co. v. United States*, 918 F. Supp. 2d 1317 (Ct. Intl. Trade 2013) and claims that the Department is conducting an impermissible rulemaking for a rule of general applicability, beyond the agency’s authority to create rules through the

¹²¹ See Petitioners’ April 3, 2014, submission at 4-7.

adjudicative process.¹²² Petitioner also claims that the mixed-media test impermissibly “skips” k(1) by substituting an outcome determinative test already rejected by the CIT.¹²³

Target’s Comments

Target states that the Department presented a legally and factually sound rationale for why the *Nails Order* cannot be reasonably interpreted to include the small quantity of nails subsumed in the toolkits imported by Target.¹²⁴

Department’s Position

We disagree with Petitioner. Formal rulemaking procedures are not required by the APA here because, pursuant to the court’s order, we are simply clarifying our existing practice and providing additional explanation by reviewing our prior scope rulings. In the process of conducting these proceedings, the Department applies general rules of methodology and procedure laid out in the statute and regulations. Although these rules are reasonably specific, they nevertheless leave unresolved issues that may arise in the course of the many proceedings that the Department conducts. The Department fills in these gaps primarily with case-to-case adjudication, consistent with the Supreme Court’s decision in *SEC v. Chenery*.¹²⁵ Moreover, “[t]he APA does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication.”¹²⁶ We recognize, however, that agencies nevertheless

¹²² *Id.*

¹²³ See Petitioners’ April 3, 2014, submission at 4 and 9.

¹²⁴ See Target’s April 3, 2014, submission at 1.

¹²⁵ In *SEC v. Chenery Corp.*, 332 U.S. 194, 202-203 (1947), the Supreme Court held: “[T]he agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”

¹²⁶ *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 96 (1995) (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *SEC v. Chenery*, 332 U.S. 1947) (“The Secretary { } {of Health and Human Services}’s mode of determining benefits by both rulemaking and adjudication is, in our view, a proper exercise of her statutory mandate”).

are required “to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations.”¹²⁷

By clarifying the mixed-media analysis, and emphasizing that the language of the order controls the mixed-media analysis, we are seeking to ensure adherence to a consistent approach that is not “*ad hoc*,” but rather informed by the unique language of the order at issue as it relates to the requested product. In other words, as a result of the Department’s case-by-case adjudication of the issues common to mixed-media products, we are essentially resolving a gap in the statute and regulations for the purpose of this scope ruling.

Furthermore, the APA explicitly excludes from its notice-and-comment requirements “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”¹²⁸ To the extent our mixed-media analysis achieves such significance, we note that interpretative rules “... clarify or explain existing law or regulations,” in contrast to substantive rules, which “... effect a change in existing policy or . . . affect individual rights and obligations.”¹²⁹ The Court of International Trade has clarified that “{i}f a rule adopts a new position inconsistent with an existing regulation, or effects a substantive change in the regulation, notice and comment are required;” however, “{t}his does not mean that an interpretative rule must be devoid of all significance; an interpretative rule may supply crisper and more detailed lines than the authority being cited. . . Thus, a clarification may prompt a party to behave differently than how it would have acted in the absence of interpretive guidance.”¹³⁰ Here, our mixed-media analysis clarifies the existing practice while also anchoring the analysis in the facts of a given case as governed by the language of the order. Similarly, with regard to

¹²⁷ *Mid Continent III*, 725 F.3d 1295, 1304 (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 199, 232 (1974)).

¹²⁸ See generally 5 U.S.C. § 553.

¹²⁹ *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998).

¹³⁰ *Parkdale Int’l, Ltd. v. United States*, 508 F. Supp. 2d 1338, 1356 (Ct. Intl. Trade 2007) (upholding Commerce’s reseller policy in context of market economy cases, which was adopted without notice and comment, because the policy did not result in a substantive change to an existing regulation; it “fills a gap in the regulatory scheme, but does not alter the way in which {the regulation} governs...”).

developing our analysis through the adjudicative process, the history of the *Diversified Products* criteria, as discussed above, demonstrate how the scope analysis lawfully evolves through the adjudicative process, including the decisions of the courts that interface with the analysis over the course of our practice.

Further, we disagree with petitioners that the mixed-media analysis “skips” k(1). Rather, as the Federal Circuit recognized, the analysis takes place *within* the context of the k(1) analysis, relying on prior determinations of the Department, including prior scope determinations.¹³¹ In a mixed-media scenario where the product in question contains both merchandise that meets the description of subject merchandise (as the toolkit nails do here) as well as merchandise that does not, a (k)(1) analysis may not be not dispositive, depending on the degree or nature of interrelationship between the items, where the other k(1) sources not address whether the ‘mixed-media’ are the same class or kind of merchandise as that covered by the order. In this case, we then turn to the (k)(2) analysis. The Department finds that it would not be appropriate to ignore unique circumstances (*i.e.*, nails contained within a toolkit) surrounding the importation of the in-scope component. Petitioner misapprehends the CIT’s reference to whether the test is “outcome determinative.”¹³² The CIT was describing two lines of mixed-media cases, explaining that selecting one line over the other was outcome determinative.¹³³ Here, we addressed that concern by explaining that both lines of mixed-media cases must be considered together, as a consolidated practice. The mixed-media test does not “skip” k(1), nor is it outcome determinative. Rather, it analyzes the degree of interrelation between the components

¹³¹ *Mid Continent III*, 725 F.3d 1295, 1304 (“In some cases, this guidance may be found in the third of the (k)(1) criteria—the [prior] determinations of [Commerce] (including prior scope determinations),’ *see* 19 CFR 351.225(k)(1)—so long as these prior determinations were publicly available at the time that the antidumping order was issued”).

¹³² *Mid Continent I*, 770 F. Supp. 2d at 1378.

¹³³ *See id.*

of a so-called mixed-media product in order to determine whether the remainder of the scope inquiry should focus on the product as a whole, or on the component that appears to be at least superficially covered by the literal language of the order.

(2) Prior Scope Rulings

Petitioner's Comments

Petitioner claims that the prior scope rulings are neither publicly available nor accessible.¹³⁴ Petitioner also argues that the prior rulings are absent of reasoning that could provide guidance and rules of general applicability for future cases and are instead outcome-determinative in that the analytical framework used dictates whether the mixed-media product is covered by an AD/CVD order. Petitioner further claims that the Department has not complied with the CAFC instruction because the Draft Remand lacks the evidentiary support necessary to overcome the “presumption” suggested by the CAFC that toolkit nails are covered by the antidumping order scope.¹³⁵ Finally, Petitioner argues that the prior scope rulings support the inclusion of toolkit nails.¹³⁶

Target's Comments

Target states that the Draft Results present a comprehensive review of prior scope rulings involving mixed-media dating back to 1990 that are publicly available. In Target's view, these prior scope rulings demonstrate that the Department has a longstanding practice of using a mixed-media analysis that was well known at the time of the *Nails Order*. In addition, these

¹³⁴ See Petitioners' April 3, 2014, submission at 6-7.

¹³⁵ See *id.*, at 8-13.

¹³⁶ Petitioner also refers to the CIT's admonition to consider the nail gun issue which arose during the investigation. See *id.*, at 13-14. While we agree that comments made by the Petitioner during the investigation could be relevant, we also agree with the Federal Circuit's observation that the nail gun comments are irrelevant here because the issue was never reached by Commerce. See *Mid Continent III*, 725 F.3d 1295, at 1304, n.3.

prior scope rulings show that we applied a consistent set of principles that are informed and governed by the language of the order at issue.¹³⁷

Target observes that the Hello Kitty Fashion Totes ruling was one of many mixed-media rulings in which the Department found that the component was not covered by an order, even though it met the physical description in the scope. Target argues that the Department should also note that it was in fact the Petitioner, Mid Continent, which recognized the Hello Kitty ruling as one in which “subject merchandise is subsumed with a set of goods whose essential character is defined as something other than the merchandise itself.”¹³⁸ In Target’s view, parties have no basis to presume that all products imported that contain any quantity of loose nails facially within the scope would be subject to the *Nails Order*, and therefore, the facts show that nails are subsumed in a unique product whose essential character is defined by something other than nails.¹³⁹

Department’s Position

With respect to the publication and public availability of the rulings, as explained in the final remand, consistent with our procedures for providing public access to the Department’s determinations, these scope rulings were available in the Department’s Central Records Unit public reading room and were listed in the quarterly published list of scope rulings.¹⁴⁰ The Federal Circuit expressly stated that these scope rulings satisfy its definition of published guidance “so long as these prior determinations were publicly available at the time that the antidumping order was issued.”¹⁴¹ Further, these rulings were subsequently incorporated into

¹³⁷ See Target’s April 3, 2014, submission at 2.

¹³⁸ See *id.*, at 3.

¹³⁹ See *id.*, at 2-3.

¹⁴⁰ See Final Results of Redetermination Pursuant to Remand Order, *Mid Continent Nail Corp v. United States*, CIT Court No. 10-00247, Slip Op. 13-92 (July 23, 2013) (“Final Remand”) at 18.

¹⁴¹ See *Mid Continent III*, 725 F.3d 1295, at 1304.

decisions published in the Federal Register and have frequently been discussed by the courts.¹⁴² In addition, the prior scope determinations discussed in the final remand reflect our longstanding experience in applying a mixed-media approach that was in place at the time of the *Nails Order* in 2008.¹⁴³ These prior scope rulings also demonstrate that we applied a consistent set of principles when using the mixed-media analysis.¹⁴⁴

We also disagree with Petitioner that the Draft Remand is unsupported by evidence. We relied on and analyzed evidence in the Draft Remand in terms of discussing and analyzing the nine prior scope rulings, as well as providing a sufficient analysis of the mixed-media factors and the (k)(2) criteria with regard to Target's six toolkits containing steel nails. Furthermore, we properly complied with the CAFC's instructions by providing sufficient evidence and explanation for our mixed-media analysis and (k)(2) analysis, both of which support the exclusion of the nails contained in Target's six toolkits from the scope of the *Nails Order*.

Finally, we disagree with Petitioner's conclusion that the prior scope rulings involving mixed-media support the inclusion of toolkit nails. In the "Background on Mixed-media Scope Requests" section¹⁴⁵ and the "Background on Mixed-media Factors" section, we analyzed nine prior scope rulings to illustrate the Department's practice of using a mixed-media analysis in order to determine whether to treat the product as a whole or focus on the component alone (*i.e.*, the *Walgreen* question) before engaging in our final analysis.¹⁴⁶ In the first set of scope rulings, we focused on the product as a whole and either found the requested product to be outside of the class or kind of merchandise subject to the order. In this second set of rulings, the Department

¹⁴² See Final Remand at 18.

¹⁴³ See *id.*, at 8-17.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*, at 6-8.

¹⁴⁶ See *id.*, at 8-17.

focused on the component (finding the additional aspects of the merchandise irrelevant) and found the requested product to be within the class or kind of merchandise subject to the order.

(3) Harmonized Tariff Schedule of the United States (“HTSUS”) Classification

Petitioner’s Comments

Petitioners argue that the Department erred by looking only to prior scope rulings instead of also looking to HTSUS classification system.¹⁴⁷ Petitioner argues that the Department should have followed CBP’s rules for classifying sets, including CBP’s definition of “*de minimis*.”¹⁴⁸

Target’s Comments

Target urges the Department to include the HTSUS classification as a factor to consider in its mixed-media test for determining what product is the proper focus of its scope inquiry, as opposed to its analysis of whether the scope of the order can be interpreted to include that product. In *Mid Continent III*, the CAFC stated that the Department may consider the HTSUS classification system “in deciding if a toolkit is a single, unitary item or a mere aggregation of items, if the Department can point to prior published rulings.”¹⁴⁹

Target states that under 351.225(c)(1)(i) every request for a scope ruling must include the HTSUS of the imported article in question, and therefore, this requirement puts the public on notice that this is a factor that the Department may consider in a scope proceeding. HTS General Rules of Interpretation (“GRI” 3(b)) state that goods made up of different components and goods put up in kits for retail sale shall be classified based on the “materials or component which gives them their essential character,” and thus, these rules align closely with the Department’s mixed-media scope inquiry rulings.¹⁵⁰

¹⁴⁷ See Petitioners’ April 3, 2014, submission at 12.

¹⁴⁸ See *id.*, at 12, n.3.

¹⁴⁹ See Target’s April 3, 2014, submission at 4.

¹⁵⁰ See *id.*

Target argues that the record establishes that the toolkits are each classified under a single tariff heading where the three toolkits containing power tools are classified under the HTS category for the power tools, and the other three toolkits fall under HTSUS 8206.00 (tools of two or more of headings 8202 to 8205, put in sets for retail sale). Thus, Target argues that the HTSUS classifications are evidence that the tools, not the nails, define the essential character of the toolkits, and therefore, the toolkits is the proper article to be examined in the scope analysis.¹⁵¹

Department's Position

We disagree with Target that the HTSUS classification should be included as a new factor in the mixed-media analysis itself. Similarly, we disagree with petitioners that we should adopt CBP interpretative rules or definitions in interpreting the scope of our order. It is well-established that the Department – and not CBP – is the master of the trade remedy laws.¹⁵² As the scope of the *Nails Order* indicates, such classifications are for reference only and not dispositive. To the extent it is relevant, the examination of HTSUS classifications falls under the “unique language of the order” criterion, which describes subject merchandise and the harmonized tariff schedules under which such merchandise may be classified. Therefore, we will not include this factor in our final mixed-media analysis.

¹⁵¹ See *id.*, at 5.

¹⁵² See *OTR Wheel Eng'g v. United States*, 901 F. Supp. 2d 1375, 1380 (Ct. Int'l Trade 2013) (“The authority to clarify the scope of AD and CVD orders rests solely with Commerce, and Customs’ rulings are not within the list of factors to be considered under 19 C.F.R. § 351.225(k). See *Crawfish Processors Alliance v. United States*, 483 F.3d 1358, 1361 (Fed. Cir. 2007) . . . Classification decisions by Customs and scope rulings by Commerce may be in conflict without calling into question the reasonableness of either, even assuming both agencies apply the same legal standard.”)

(4) Proposed New Factor to Add to Mixed-media Analysis

Target's Comments

Target argues that the Department should add a new factor to the mixed-media analysis to examine how the imported article is produced and sold because this provides evidence that the toolkits should be treated as a unitary item and examined as a whole. In support of its position, Target states that the toolkit manufacturer does not produce nails and simply purchases fastener kits (including the nails) and incorporates them into the toolkits as a minor component and the toolkits are priced, purchased and imported as a single item.¹⁵³

Department's Position

We disagree with Target's suggestion of including into our final mixed-media analysis the manner in which the product is produced and sold. The very purpose of articulating the mixed-media analysis here is to clarify the existing practice and not to create a new test.

Even if we were to entertain the possibility of adding new factors, any relevant aspects of the production or sales process for purposes of our mixed-media analysis already are covered under the "value" and "practicability of repackaging for resale" criteria. Moreover, a scope inquiry examines the physical attributes of the product(s) themselves and not the manufacturing process, or which party produced and sold each component of the mixed-media. Therefore, we will not include this factor in our final mixed-media analysis.

(5) The Mixed-media Analysis

(A) Language of the Order

Petitioner's Comments

Petitioner states that the Department acknowledges that "the language of the order controls the analysis," and accordingly, the inquiry should start and end with the scope of the AD

¹⁵³ See Target's April 3, 2014, submission at 5-6.

order, which in this case, does not exclude the nails packaged with non-subject merchandise. Petitioner asserts that the Draft Remand finds the *Nails Order* is silent with respect to mixed-media and explains that “silence can create an ambiguity.” Petitioner argues against the Draft Remand’s statement regarding ambiguity by noting that the CIT found that this silence does not amount to an ambiguity.¹⁵⁴ In addition, Petitioner states that the “language of the order” factor was originally referred to as “any other relevant factors,” and argues that the CAFC stated that the “any other relevant factors” was inappropriate to rely on because this factor “does not provide parties with any notice of what the Department will consider in its inquiry.”¹⁵⁵

Department’s Position

As we explain above, although the language of the order describes subject nails, it does not provide any additional criteria for evaluating the merchandise that is contained in the toolkits and this silence can create an ambiguity when a requested product contains additional components. While the CIT stated that the silence does not create an ambiguity,¹⁵⁶ the CAFC clarified that “prior scope rulings *do* establish that there exists in some circumstances an implicit mixed-media exception even in the absence of explicit language in the final order (as *Walgreen* confirmed).”¹⁵⁷ As a corollary, we believe an ambiguity exists such that we must determine whether in fact this is a circumstance in which there exists “an implicit mixed-media exception even in the absence of explicit language.”¹⁵⁸

(B) Value

Petitioner’s Comments

¹⁵⁴ See *Mid Continent I*, 770 F. Supp. 2d at 1379 (emphasis added).

¹⁵⁵ See Petitioners’ April 3, 2014, submission at 16-17.

¹⁵⁶ See *Mid Continent I*, 770 F. Supp. 2d at 1379 (emphasis added).

¹⁵⁷ See *Mid Continent III*, 725 F.3d 1295, at 1305 (emphasis added).

¹⁵⁸ See *id.*

Petitioner argues that the Department has created an impermissible “*de minimis* exception” to the *Nails Order* where none exists and without any justification. Petitioner argues that it previously submitted evidence that the steel nails are not an insignificant component of the toolkits and that the nails comprised the majority of the fastener set included in Target’s toolkits. In support of its position, petitioner states that the CIT in Tissue Paper from China (*Walgreen*) affirmed the Department’s finding that tissue paper comprising between six and eleven percent of the gift bag value “remains within the AD order’s scope even if accompanied by non-subject merchandise.”¹⁵⁹

Department’s Position

We disagree with Petitioners that we have created a “*de minimis* exception” because value is simply one factor we take into consideration, in light of the record as a whole. The purpose of a mixed-media analysis is not to conduct a scope inquiry, but rather to determine which product should be the focus of the subsequent scope analysis. Although the scope analysis in *Walgreen* did ultimately find that the proper focus of the inquiry should be the component, this simply demonstrates that the analysis takes into account the unique facts of each case and language of each order. As upheld by *Walgreen*, the Department determines which product is at issue in any given scope inquiry on a case-by-case basis and the focus is on the object being imported (*i.e.*, in this case, toolkits) as the basis for its analysis. Therefore, we continue to find the value of the components to be one of several integral parts of the mixed-media test, and not a “*de minimis* exception.” In analyzing the cost of the nails, we continue to find that it comprises a small portion of the overall total cost of the toolkit.

(C) Practicability of Separating Merchandise

Petitioner’s Comments

¹⁵⁹ See Petitioners’ April 3, 2014, submission at 18-19.

Petitioner argues that despite finding that each Target toolkit had separately packaged fasteners, the Department erroneously concludes that the “steel nails contained in the toolkit could not be assumed to be a product designed for repackaging and resale.” This factor lacks¹⁶⁰ relevance because the in-scope status of steel nails has nothing to do with how the nails are packaged and this unreasoned analysis contrasts with that upheld by the CAFC in *Crawfish Tailmeat from China*¹⁶¹ where the Department properly employed a “substantial transformation” test to find the imported etouffe was not subject to the order.¹⁶²

Department’s Position

We disagree with Petitioner. This factor examines whether the subject merchandise can be easily separated from the new article of commerce for the purpose¹⁶³ of resale, not simply whether it is self-contained within the mixed-media. As we explained above, the mixed-media analysis is concerned with examining the interrelationship between the items. In this case, we found that the nails were not easily separated for repackaging and resale, because they are packaged in a separate fastener box within the toolkit that also contains several compartments of other types of non-subject fasteners. We disagree with Petitioner because in this instance, due to the fact that the toolkits contain such a large variety of items in terms of quantity and value, it would not be reasonable for a downstream customer to purchase the toolkits, only to remove the nails for the resale.

(D) Ultimate Use or Function

Petitioner’s Comments

¹⁶⁰ See Final Remand, at 23-24.

¹⁶¹ See *Crawfish Processors Alliance v. United States*, 483 F.3d 1358, 1363 (Fed. Cir. 2007) (“*Crawfish Tailmeat from China*”).

¹⁶² See Petitioners’ April 3, 2014, submission, at 20.

¹⁶³ See Final Remand, at 24-25.

Petitioner argues that the steel nails included in Target’s household toolkits are used exactly for the same purpose as all steel nails; building, fastening, and holding separate pieces of material together and each toolkit is a package of non-subject and subject merchandise with the same general function. In petitioner’s view, the Department’s analysis supports toolkit nails being subject to the *Nails Order* and the nails should be evaluated separately because the Draft Remand explains that “most articles within the toolkits do not function together, and the majority of tools are not compatible with the function of the steel nails.” The Department also states that “purchasers of the toolkits select a toolkit based on the specialized types of home repair and maintenance.” This demonstrates that the toolkits do not have a unique function as a whole since they contain a collection of independent items that are not unique or readily repackaged or sold since any item in the toolkit can be removed or replaced.¹⁶⁴

Department’s Position

We disagree with Petitioner that the ultimate use of the product is the same, as the toolkit offers purchasers a multifunctional product that provides convenience for on-site maintenance and repairs. While the nails contained in the toolkit function as any nails function, the ultimate use of the toolkit vastly expands upon the functions of just the nails alone. As discussed above, the collection of household tools in the toolkits, which include items such as electrical tape, cordless screwdrivers, claw hammers, wire strippers, mini clamps, and utility knives, have functions that include measuring, stripping, clamping, power screwing, and cutting, *etc.*¹⁶⁵

(6) 19 CFR 351.225(k)(2) Analysis

(A) Physical Characteristics

Petitioner’s Comments

¹⁶⁴ See Petitioners’ April 3, 2014, submission at 20-21.

¹⁶⁵ See Final Remand at 26-28.

Petitioner claims that the physical characteristics of the steel nails compel them being subject to the *Nails Order* and the Draft Remand also states that “the brass coated steel nails contained in the toolkits at least superficially meet the physical characteristics of the nails subject to the scope of the *Nails Order*.” Importing nails with other goods does not change the physical characteristics that retain all feature of the class or kind of subject merchandise.¹⁶⁶

Department’s Position

We disagree with Petitioner’s claim that the physical characteristics of the steel nails alone compel a finding that they are subject to the *Nails Order*. While certain steel nails by themselves meet the physical description of products subject to the scope of the *Nails Order*, our analysis focuses on the toolkit. As discussed above, the physical characteristics of the toolkit are distinct from the physical characteristics of the subject merchandise.¹⁶⁷ Based on the physical characteristics of the toolkits, we continue to find the six household toolkits do not meet the physical description of merchandise subject to the *Nails Order*.

(B) Expectations of the Ultimate Purchasers

Petitioner’s Comments

Petitioner argues that the toolkit purchasers expect to use steel nails as demonstrated by Target’s advertising materials which show the inclusion of nails in the toolkit. In Petitioner’s view, the location of the nails within the toolkit does not change the packaging of the toolkit, and therefore, this creates an expectation that nails will be used by the ultimate purchasers.

Furthermore, Petitioner argues that the location of the nails in the fasteners box inside the toolkit

¹⁶⁶ See Petitioners’ April 3, 2014, submission at 23.

¹⁶⁷ See Final Remand at 26-29.

does not change the expectation of the ultimate purchaser. The ultimate purchaser expects to acquire and use the nails in addition, to all the other mixed articles in the toolkit.¹⁶⁸

Department's Position

We disagree with Petitioner's argument that the toolkit purchaser's ultimate expectations are to use steel nails contained in Target's toolkits. The expectations of a toolkit purchaser are more than just acquiring the nails alone, but instead center around the convenience and multifunctionality of having all of the tools located in one kit.¹⁶⁹ While the ultimate purchaser may very well expect to use the nails in the toolkit, the ultimate expectation of the purchaser is to use the toolkit as a whole. Therefore, we continue to find that the ultimate expectations of the purchaser of a toolkit are to use the toolkit as a whole and not just the steel nails. Thus, we continue to find for the final remand that Target's six household toolkits containing brass coated steel nails differ from subject merchandise in terms of the expectations of the ultimate purchaser.

(C) Ultimate Use of the Product

Petitioner's Comments

Petitioner argues that, although the Department concludes that the toolkit nails serve the ultimate use of home or office repair, and nails only have the single use of fastening or hanging objects, the toolkit nails are in fact used for exactly the same purpose as the subject nails. Therefore, just like a toolkit is intended for home or office repair, one common use for any steel nail is also home or office repair.¹⁷⁰

Department's Position

We disagree with Petitioners that the ultimate use of the toolkits and nails are the same. The ultimate use of the product is to provide a multifunctional and convenient collection of

¹⁶⁸ See Petitioners' April 3, 2014, submission at 23-24.

¹⁶⁹ See Final Remand at 31.

¹⁷⁰ See Petitioners' April 3, 2014, submission at 24-25.

various unique tools to the purchaser. Furthermore, the steel nails contained within the toolkits have a very specific function compared to the ultimate use and broader functions of the toolkit as a whole. We thus continue to find for the final remand that Target's six household toolkits containing brass coated steel nails differ from subject merchandise in terms of the ultimate use of the product.

(D) Channels of Trade

Petitioner's Comments

Petitioner states that steel nails are frequently sold to end users as well as distributors and sold through retail channels or trade. In Petitioner's view, because toolkit nails are plainly sold in at least some of the same channels of trade as steel nails that are not combined with other products, this factor does not support the Draft Remand.¹⁷¹

Department's Position

We disagree with Petitioners' position that because toolkit nails are plainly sold in at least some of the same channels of trade as steel nails, that this factor does not support the Draft Remand. As we stated above, Target purchases the six toolkits directly and then sells the toolkits in their retail stores throughout North America.¹⁷² Target does not purchase the toolkits from nail wholesalers or distributors, as is typically done for retail stores who intend to sell nails.¹⁷³ Therefore, there are several different channels of trade between toolkits and nails in that Target sources directly from the seller for resale at its retail stores whereas in-scope nails, when sold at retail, are generally purchased from distributors and not directly from Chinese suppliers.

¹⁷¹ See *id.*, at 25.

¹⁷² See Final Remand at 30-31.

¹⁷³ 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.

However, nails are also frequently sold to end users, in addition, to being sold to retailers or other distributors.¹⁷⁴ While there are some different channels of trade for toolkits and nails, there are also some channels of trade that nonetheless overlap.¹⁷⁵ As a result, we find that this criterion is inconclusive when comparing the levels of trade between Target's toolkits and the subject merchandise nails contained within.

(E) Manner of Advertisement and Display

Petitioner's Comments

Petitioner observes that Target advertises its toolkits as containing nails on the list of items on the toolkit packaging and in fact sells subject merchandise on the same side of the same aisle in its stores. Petitioner states that the Department found that the steel nails contained within the six toolkits compromise, at most, a tangential feature in the advertising of toolkits. However, the Petitioner also observes that the Draft Remand acknowledges "that cardboard sleeve around each of the six toolkits depicts pictures of the tools and fasteners, including the brass coated steel nails."¹⁷⁶

Department's Position

While we do agree that the toolkit packaging indicates that the toolkits contain nails, nails are listed as just one of between 43 and 66 unique items listed on each of the six kits.¹⁷⁷ With respect to the pictures on the advertisement for the toolkits, contrary to Petitioner's argument, the pictures demonstrate that the nails are in fact a minor feature in the advertising of the toolkits because the nails in most cases are not even graphically visible or only appear as a small image

¹⁷⁴ *See id.*

¹⁷⁵ *See id.*


¹⁷⁶ *See* Petitioners' April 3, 2014, submission at 25-26.

¹⁷⁷ *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 and *see* Certain Steel Nails from the People's Republic of China: Amendment to Scope Ruling Request Regarding Household Tool kits, dated December 22, 2009 at Attachment 1.

in one section of the fasteners set in the toolkit.¹⁷⁸ Again, we note that Target is advertising and displaying the toolkits as a set and not the steel nails individually.¹⁷⁹ We therefore continue to find for the final remand that Target's six household toolkits containing brass coated steel nails differ from subject merchandise in terms of the manner of advertisement and display.

IV) Conclusion

Based on the above mixed-media analysis and (k)(2) analysis, we continue to find that Target's six household toolkits, which include steel nails, are outside the scope of the *Nails Order*. To comply with the court's order, we provided a review of prior mixed-media scope rulings since 1990. From these prior rulings, we distilled common principles into a four-factor mixed-media test to apply when a requested product contains merchandise that appears nominally subject to the order. The results of the test determine whether to look at the product as a whole under k(2) or to look instead at the component alone, under k(1). We applied this four factor mixed-media analysis to the toolkits and determined that the proper article to be examined under the (k)(2) criteria were the toolkits as a whole. After applying the (k)(2) analysis, we found the five factors supported finding that the toolkits are outside the scope of the *Nails Order*.



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

30 APRIL 2014
Date

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*