

FINAL RESULTS OF REDETERMINATION PURSUANT TO REMAND ORDER

Mid Continent Nail Corp. v. United States,
CIT Court No. 10-00247, Slip Op. 14-118 (October 6, 2014)

SUMMARY

The Department of Commerce (“Department”) has prepared these final results of redetermination pursuant to the U.S. Court of International Trade’s (“Court” or “CIT”) remand order in *Mid Continent Nail Corp. v. United States*, Slip Op. 14-118 (October 6, 2014) (“*Mid Continent IV*”). In *Mid Continent IV*, the Court addressed the Department’s *Third Remand Redetermination*,¹ which was submitted on April 30 2014, pursuant to the opinion of U.S. Court of Appeals for the Federal Circuit (“CAFC” or “Federal Circuit”) in *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295 (Fed. Cir. 2013) (“*Mid Continent III*”).² 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 CIT further remanded 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*”).³

I. Background

Mid Continent I

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

¹ See Final Results of Redetermination Pursuant to Remand Order, ECF No. 99 (Apr. 30, 2014) (“*Third Remand Redetermination*”).

² 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).

³ 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*”).

covering steel nails from China.⁴ 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-media scope inquiry.⁵ 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."⁶ 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."⁷

First Remand

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. The Department explained that its legal authority to employ a mixed-media test derives from the Tariff Act of 1930, as amended ("Act"), and 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

⁴ 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*").

⁵ See *Mid Continent I*, 770 F. Supp. 2d at 1382-83.

⁶ *Id.*

⁷ *Id.*

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

⁹ *Id.*, at 7-11.

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*.

Mid Continent II and Second Remand

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

Mid Continent III

In *Mid Continent III*, upon 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

¹⁰ See *Mid Continent II*, 825 F. Supp. 2d at 1296.

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 at 1301.

¹⁴ *Id.*, 725 F.3d at 1301.

based on preexisting public sources.”¹⁵ In defining this requirement, the CAFC instructed that in order for Commerce to overcome the presumption that the nails in the toolkits are subject to the scope of the *Nails Order*, and show that any implicit mixed-media exception to the literal scope of the order exists, the following requirements must be satisfied: (1) use of preexisting sources that were publically available at the time the antidumping order was issued in August 2008, (2) identification of prior mixed-media scope rulings that demonstrate an ascertainable mixed-media standard was in place at the time of the *Nails Order*, and (3) explanation of how the unique language of the Order is relevant to Commerce’s mixed media test.¹⁶ In sum, the CAFC held that “a remand is required to give Commerce one last opportunity to interpret its order.”¹⁷

Third Remand

On April 30, 2014, the Department issued its *Third Remand Redetermination* and continued to find that the steel nails within the toolkits were outside the scope of the *Nails Order* based on a four-factor mixed media test derived from prior mixed media scope rulings that were publically available at the time of the *Nails Order*.

In order to comply with the Court’s order, we provided a review of nine prior mixed-media scope rulings dating back to 1990 that were publically available at the time of the *Nails Order*.¹⁸ 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 19 CFR 351.225(k)(2) or to look instead at the component alone, under 19 CFR 351.225(k)(1). We applied this four-factor mixed-media analysis to the toolkits and determined

¹⁵ *Id.*, 725 F.3d at 1305.

¹⁶ *Id.*

¹⁷ *Id.*, 725 F.3d at 1302.

¹⁸ See *Third Remand Redetermination* at 9-19.

that the proper article to be examined under the (k)(2) criteria were the toolkits as a whole.¹⁹

After applying the (k)(2) analysis, we found that four of the five factors supported finding that the toolkits are outside the scope of the *Nails Order*.²⁰

Mid Continent IV

On October 6, 2014, the CIT ruled on the *Third Remand Redetermination in Mid Continent IV*, holding that our mixed media test is inconsistent with *Mid Continent III*, and declining to find whether the application of its four factor mixed media test was supported by substantial evidence.

The CIT in *Mid Continent IV* found that these scope rulings were publically available at the time of the *Nails Order*.²¹ The Court then reviewed our analysis as to how the nine prior scope rulings demonstrated that an ascertainable mixed-media standard was in place at the time of the *Nails Order*.

The Court held that the mixed media test failed to comply with the instructions the CAFC articulated in *Mid Continent III*, which required Commerce to draw an ascertainable mixed media standard from information that was publically available at the time the *Nails Order* was issued.²² The Court determined that unlike in this case where the scope language is silent with respect to mixed media, in both the Cookware Scope Ruling²³ and the Bouquets Scope Ruling,²⁴ the language of the order clearly addresses all of the relevant merchandise in the mixed media

¹⁹ See *Third Remand Redetermination* at 20-26.

²⁰ See *id.*, at 26-33.

²¹ See *id.*, at 14.

²² See *id.*, at 23.

²³ 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 PRC,” (August 8, 1990) (concluding that porcelain-on-steel cookware imported as part of a camping set was subject to the order) (“Cookware Scope Ruling”).

²⁴ 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) (“Bouquets Scope Ruling”).

set.²⁵ As a result, the Court also held that Commerce failed to comply with the direction of the CAFC because Commerce did not demonstrate how the unique language of the order is relevant to its mixed media test.²⁶

In addition, the Court held that Commerce failed to support its contention that the language of the order controls the mixed media analysis and informs the application of the remaining factors in its mixed media test. The Court rejected Commerce's argument that by looking at the language of the order, it can determine where such an analysis is warranted, either from the silence of the order or language in the order speaking to these factors.²⁷ The Court also held that apart from the fact that both the Cookware Scope Ruling and the Bouquets Scope Ruling involve a mixed media set, neither scope ruling contemplated a mixed media analysis. The Court stated that it is well established that the process must begin with the language of the order, which provides the predicate for the interpretive process, but that these scope rulings do not provide guidance with regard to how this factor is relevant to a mixed media analysis.²⁸

The Court then determined that the other seven scope rulings Commerce relied on involve orders which clearly address the subject merchandise or the mixed media set, and the rulings appear to be isolated examples of how the test is outcome-determinative as to whether Commerce finds that the mixed media set is subject to the order. The Court also held that all of the remaining scope rulings involve an ambiguous order, and rely on the (k)(2) factors in order to justify excluding the subject merchandise from the scope of the order.²⁹

Finally, the Court determined that these nine scope rulings relied on a number of different bases for excluding a product from the scope of an order and do not identify a coherent and

²⁵ *Mid Continent IV* at 19.

²⁶ *Id.* at 18.

²⁷ *Id.* at 20.

²⁸ *Id.* at 20.

²⁹ *Id.* at 20.

ascertainable standard encompassing all of the factors in Commerce’s mixed media test.

Therefore, the Court determined that these nine scope rulings failed to support that an ascertainable mixed-media standard was in place at the time of the *Nails Order*, and did not provide guidance that would allow importers to predict how Commerce would treat their mixed media products³⁰.

Finally, the Court held that Commerce’s test is inconsistent with *Mid Continent III*, and declined to find whether Commerce’s application of its four-factor mixed media test was supported by substantial evidence.³¹

In response to *Mid Continent IV*, the Department released the Draft Remand to parties for comment on December 18, 2014.³² On December 29, 2014, the Department received comments on the Draft Remand from Mid Continent Nail Corporation (“Petitioner”).³³ Petitioner supports the Draft Remand and requests that the Department finalize its position in the Final Results of Redetermination.³⁴ No comments were received from Target.

I. Analysis

The Court has determined that no ascertainable standard exists, and neither the CIT nor CAFC would agree that the nails in the toolkits are outside the scope of the *Nails Order*. Because the Court has rejected our position that a mixed-media standard is ascertainable from the prior scope rulings described in the *Third Remand Redetermination*, the mixed-media test is not applicable in determining whether the nails in the toolkits are subject the scope of the *Nails Order*. Therefore, we will examine the nails themselves, without regard to the toolkits, and

³⁰ *Id.* at 21.

³¹ *Id.* at 23.

³² See *Draft Results of Redetermination Pursuant to Remand Order Mid Continent Nail Corp. v. United States*, dated December 18, 2014 (“*Draft Remand*”).

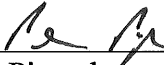
³³ See Petitioners’ December 29, 2014, submission.

³⁴ *Id.* at 2.

analyze the nails pursuant to the factors identified in 19 CFR 351.225(k). Throughout this proceeding, the courts and all parties have acknowledged that the nails, by themselves, would be subject to the order.³⁵ Specifically, Target's brass coated steel nails contained in the toolkits meet the physical requirements of steel nails that fall within the scope of the *Nails Order*.³⁶ Thus, without the guidance of a mixed-media test, we find that the nails are subject to the order pursuant to 19 CFR 351.225(k)(1).

II. Conclusion

Although the Department respectfully disagrees with the Court's opinion in *Mid Continent IV* and is conducting this remand under respectful protest,³⁷ the Department now determines that the steel nails found within the toolkits are subject to the *Nails Order*. In accordance with the CIT's order that the *Third Remand Redetermination* is neither supported by substantial evidence, nor in accordance with the law, the Department finds the steel nails within the toolkits to be subject to the scope of the *Nails Order*. Accordingly, if these remand results are affirmed by the Court, the Department will issue revised instructions to U.S. Customs and Border Protection once this decision is final and conclusive.



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

21 JANUARY 2015
Date

³⁵ *Mid Continent IV* at 22.

³⁶ See Final Scope Ruling – Certain Steel Nails From the People's Republic of China ("PRC"), Request by Target Corporation (August 10, 2010) ("Scope Ruling") at 3-4; see also *Nails Order* at 44961-44962.

³⁷ See *Viraj Group, Ltd. v. United States*, 343 F.3d 1371 (Fed. Cir. 2003).