

FINAL RESULTS PURSUANT TO COURT REMAND

SUMMARY

On February 12, 2008, the U.S. Court of International Trade (“CIT”) granted the U.S. Department of Commerce’s (“the Department”) Motion for Voluntary Remand in the above-referenced proceeding. This remand concerns the Department’s final determination of the anticircumvention inquiry of the antidumping duty order on petroleum wax candles from the People’s Republic of China (“PRC”). See Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People’s Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order, 71 FR 59075 (October 6, 2006) (“Final Determination”).

The Court ordered the Department to reconsider its Final Determination in light of the issues raised in the Court’s January 15, 2008, Discussion Memorandum, specifically pages three through eight regarding the Department’s interpretation of the significant alteration prong of its analysis. See Discussion Memorandum From Judge Leo M. Gordon For Supplemental Oral Argument dated January 15, 2008 (“Discussion Memorandum”). The Court did not express concern with the issues set out on pages one and two of the Discussion Memorandum regarding the initiation of the anticircumvention inquiry, the congressional limitation on the scope of judicial review, and the Department’s interpretation of the phrase “later-developed merchandise.” Accordingly, we have addressed in this remand only those issues set out on pages three through eight of the Discussion Memorandum. In accordance with the Court’s Order, the Department has reviewed its analysis in the Final Determination and concluded that the statute reflects the views expressed in the legislative history when determining whether mixed-wax candles are later-developed merchandise with respect to the products included in the

scope of the antidumping duty order on petroleum wax candles from the PRC.

BACKGROUND

On October 6, 2006, the Department published the affirmative Final Determination of circumvention of the antidumping duty order on petroleum wax candles from the People's Republic of China. See Final Determination. Target Corporation subsequently challenged certain aspects of the Final Determination. On October 11, 2007, the Court heard the parties' oral arguments, and on January 15, 2008, the Court issued its Discussion Memorandum. On February 11, 2008, the Department filed a motion for a voluntary remand which was granted on February 12, 2008. Also on February 12, 2008, the Court heard supplemental oral arguments. On March 27, 2008, the Department provided the draft remand to the interested parties ("Draft Remand").

ANALYSIS

Section 781(d) of the Tariff Act of 1930, as amended ("the Act"), includes the criteria the Department must consider when determining whether later-developed merchandise is within the scope of an antidumping order. In the Final Determination, the Department concluded that because the language of the statute did not provide further guidance on the meaning of "later-developed" merchandise, it would look to the legislative history of the statute to assist in defining the term. The Department also relied upon the statute itself with regard to the criteria from Section 781(d)(1) of the Act. We have re-examined the statutory criteria and the language of the legislative history, and now find that the statute reflects the views expressed in the legislative history, meaning that the legislative history does not provide more guidance than the statute itself with respect to this issue.

In the Final Determination, the Department cited to the Conference Report on

H.R. 3, Omnibus Trade and Competitiveness Act of 1988. See H.R. Conf. Rep No. 576, 100th Cong., 2d Sess. (1988), reprinted in 134 Cong. Rec. H2031, H2305 (daily ed. April 20, 1988) (“Conference Report”). The Department focused on the following language from the Conference Report to assist in defining the meaning of later-developed merchandise: “...significant technological advancement or a significant alteration of the merchandise involving commercially significant changes.” In the Final Determination, the Department determined that there was a significant alteration of the merchandise involving commercially significant changes. See Final Determination 71 FR at 59077.

In accordance with the Court’s order, however, the Department has now re-evaluated the statutory criteria and found them to be consistent with the full text of the legislative history. In relevant part, the legislative history states: “...significant alteration of the merchandise involving commercially significant changes *in the characteristics and uses of the product.*” See Conference Report at H2035 (emphasis added). In the Court’s Discussion Memorandum, the Court asked the Department to address whether the absence of the language “commercially significant changes” from the statutory text has any significance. We determine that the omission of this language from the statute is not significant because this language is encompassed in the criteria of section 781(d)(1) of the Act.

Section 781(d)(1) of the Act contains the specific criteria which the Department must consider when analyzing whether a product is later-developed. Section 781(d)(1) of the Act states:

For purposes of determining whether merchandise developed after an investigation is initiated...is within the scope of an outstanding antidumping...duty order the administrating authority shall consider whether

(A) the later-developed merchandise has the same general physical characteristics as the merchandise with respect to which the order was

originally issued (hereafter in this paragraph referred to as the “earlier product,”

(B) the expectations of the ultimate purchasers of the later-developed merchandise are the same as for the earlier product,

(C) the ultimate use of the earlier product and the later-developed merchandise are the same,

(D) the later-developed merchandise is sold through the same channels of trade as the earlier product, and

(E) the later-developed merchandise is advertised and displayed in a manner similar to the earlier product.

The significant alteration prong included in the legislative history focuses on whether the alteration involves commercially significant changes in the characteristics and uses of the product. The criteria of section 781(d)(1) of the Act also concern these same principles, as section 781(d)(1)(A) requires the Department to examine the characteristics of the merchandise, and section 781(d)(1)(C) requires the Department to examine the uses of the product. All of the criteria of section 781(d)(1) of the Act require the Department to focus on the commercially significant aspects of the merchandise at issue.¹ Therefore, we conclude that, although the specific language of the legislative history concerning the commercially significant changes in the characteristics and uses of the product was not specifically included in the statute, this is not significant because the criteria of section 781(d)(1) of the Act encompass the same principles and require the Department to undertake a comparable analysis. Accordingly, we find that it is not necessary in this instance to rely on the legislative history, as the statutory criteria are consistent with the legislative history. As a result, relying upon the statutory criteria of section 781(d) of the Act leads the Department to reach the same conclusion that mixed-wax candles are later-

¹ Sections 781(d)(1)(B), (D), and (E) also deal with commercial aspects because they address the expectations of the purchaser, the channels of trade the product is sold through, and how the product is advertised and displayed.

developed merchandise from petroleum wax candles.

In addition to asking the Department to address whether the absence of the language “commercially significant changes” from the statutory text has any significance, the Court also stated that it did not understand the Department’s explanation of the requirement of “commercially significant changes.” In the Final Determination, the Department focused on only part of the legislative history. By focusing only on the phrase “commercially significant changes,” the Department achieved a less accurate interpretation of the legislative history than one that considers the entirety of the language. After re-examining the complete language of the legislative history, we have noted that the phrase “commercially significant changes” is actually “commercially significant changes in the characteristics and uses of the product.” Thus, when this phrase is examined in its entirety, it is clear that section 781(d)(1) of the Act addresses the same principles set out in the legislative history in that the Department is required to examine the commercial factors relating to the characteristics and uses of the product. Therefore, as section 781(d)(1) of the Act reflects Congress’s intent and no conflict remains between the statute and the legislative history, we find it is not necessary to rely on the legislative history in this instance. Therefore, as we concluded in the Final Determination, we find that there was significant alteration of the merchandise and that the criteria of section 781(d) of the Act have been met.

DRAFT REMAND CONCLUSION

We concluded in the Draft Remand that the statute is consistent with the complete legislative history, and therefore, it was not necessary to rely on the legislative history for additional guidance. We also concluded that there was no conflict between the Department’s analysis of the criteria enumerated in section 781(d)(1) of the Act and the Department’s finding that the merchandise at issue incorporated significant alteration of the merchandise involving

commercially significant changes in the characteristics and uses of the product. Therefore, in the Draft Remand, we found that mixed-wax candles were properly considered later-developed merchandise.

COMMENTS FROM INTERESTED PARTIES

On March 27, 2008, the Department provided interested parties a copy of the Draft Remand. On April 3, 2008,² Target Corporation (“Target”), Specialty Merchandise Corporation (“SMC”) and the National Candle Association (“NCA”) submitted comments. No other interested parties submitted comments.

A. Target & SMC

Target notes that having re-examined the legislative history, the Department concludes that its “analysis in the Final Determination that considered ‘commercially significant changes’ only is no longer relevant.” See Draft Remand at 5. According to Target, the Department did not, however, identify precisely what portions of the Final Determination it no longer considers to be relevant, and therefore, meaningful comments to the Draft Remand were not possible.

SMC argues that the Draft Remand is erroneous for the reasons set forth by Target. Therefore, SMC stated that rather than repeat Target’s arguments, it relies instead on the submissions from Target.

Department’s Position:

Target and SMC state that the Department did not identify precisely what portions of the Final Determination it no longer considers to be relevant after having re-examined the legislative history.

On remand, the Department explained it was unnecessary for the Department to include

²The original comment deadline of April 1, 2008, was extended to April 3, 2008. See Letter to Interested Parties, dated March 28, 2008.

an interpretation of the “commercially significant changes” in a later-developed merchandise analysis. As a result, the tension that existed between the factual findings of the “commercially significant changes” analysis and the statutory criteria of section 781(d)(1) of the Act no longer exists. Moreover, the factual findings of the ‘commercially significant changes’ analysis made in the Final Determination which were based on our interpretation of that incomplete language, do not undermine our determination that mixed-wax candles are later-developed products as they do not detract from the statutory criteria. Therefore, the Department finds that relying upon the statutory criteria of section 781(d) of the Act, without also relying on certain portions of the legislative history, leads us to reach the same conclusion that mixed-wax candles are later-developed merchandise from petroleum wax candles.

B. NCA

The NCA agrees with the Department’s conclusion that the legislative history is consistent with the language of the statute, and that the omission of the “commercially significant changes” language from the statutory text is of no significance. Therefore, the NCA argues that mixed-candles are later-developed merchandise from petroleum wax candles relying on the statutory criteria of section 781(d) of the Act. In addition, the NCA believes that it was unnecessary to address the Court’s question regarding the significance of the absence of the language from the statute once the Department determined it was no longer necessary to rely on the legislative history. Finally, the NCA states that the Department should strike certain language from the conclusion that it contends is unnecessary and confusing.³ To this end, the NCA proposed alternative language that could summarize the Department’s conclusion. See id.

³The NCA requested that the Department strike the following language: “We find no conflict between the Department’s analysis of the criteria enumerated in section 781(d)(1) of the Act and the Department’s finding that merchandise at issue incorporated significant alteration of the merchandise involving commercially significant changes in the characteristics and uses of the product.” See NCA’s April 3, 2008, Comments, at 6.

Department's Position:

For the same reasons provided in the Draft Remand, we agree with the NCA that the statute is consistent with the legislative history, and that the omission of the “commercially significant changes” language from the statute is of no significance. Consequently, we also agree with the NCA that mixed-candles are later-developed merchandise relying on the statutory criteria of section 781(d) of the Act.

We also disagree with the NCA that the Department's conclusion in the Draft Remand was confusing. Our intent in the Draft Remand was to explain that a complete reading of the legislative history shows that the concept of “commercially significant changes” is fully reflected in the statutory criteria of 781(d) of the Act and that any factual determinations based on an interpretation of the legislative history were not necessary.

FINAL REMAND CONCLUSION

Pursuant to the CIT's order, the Department has reconsidered the Department's interpretation of the significant alteration prong of the later-developed merchandise analysis. We conclude that the complete text of the legislative history is consistent with the statutory criteria of 781(d) of the Act and therefore, we continue to find mixed-wax candles are properly considered later-developed merchandise.

David M. Spooner
Assistant Secretary
For Import Administration

Date