

FINAL RESULTS PURSUANT TO COURT REMAND

SUMMARY

On September 18, 2008, the U.S. Court of International Trade (“Court”) issued a remand in the above-referenced proceeding. See Target Corporation v. United States, Consol. Court No. 06-00383, Slip Op. 08-101 (September 18, 2008) (“Target”). This remand concerns the Department of Commerce’s (“Department”) final determination of the anticircumvention inquiry of the antidumping duty order on petroleum wax candles from the People’s Republic of China. 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) and accompanying Issues and Decision Memorandum (“Final Determination”).

The Court ordered the Department to reconsider its finding that it “cannot definitively conclude that mixed-wax candles were available in the market at the time of the {less than fair value (“LTFV”)} investigation.” See Target, at 22-23. As part of the remand, the Court stated the Department may (a) make a straightforward finding of commercial unavailability at the time of the LTFV, or (b) further explain its proposed “definitive conclusiveness” evidentiary standard as a reasonable application and interpretation of the later-developed merchandise anticircumvention provision. See Target, at 23. The Court also held that the Department misinterpreted 19 U.S.C. § 1677j(e) and its legislative history by inferring that its reference to a significant technological advance or significant alteration of subject merchandise in every instance defines “later-developed merchandise” under 19 U.S.C. § 1677j(d). As such, the Court

ordered the Department to reconsider this aspect of its definition of later-developed merchandise. Id.

The Department has reconsidered its finding of commercial availability and hereby makes a straightforward finding of commercial unavailability at the time of the LTFV investigation. The Department has also reconsidered the definition of later-developed merchandise and finds that the International Trade Commission (“ITC”) consultation provision referenced in the Final Determination does not exclusively limit the meaning of later-developed merchandise to instances involving a significant technological advancement or significant alteration of subject merchandise, though we continue to find that these terms do define some types of later-developed merchandise. Still, we have reviewed the record and found that mixed-wax candles do not constitute this category of later-developed merchandise. Instead, we find that there have been changes to the production of petroleum wax candles (e.g., mixing vegetable-oil based waxes with petroleum wax) since the time of the LTFV investigation that represent a gradual evolution in the technology of candle production, and these changes have resulted in the later-development of mixed-wax candles. As such, we find that mixed-wax candles qualify as later-developed merchandise within the meaning of 19 U.S.C. § 1677j(d).

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 September 18, 2008, the Court remanded the Department’s Final Determination. On October 20, 2008, the Department provided the draft remand to the interested parties (“Draft Remand”). On October 27, 2008, the National Candle

Association (“NCA”), Target Corporation (“Target”), and the Grunfeld Companies¹ submitted comments on the Draft Remand. Also on October 27, 2008, the Grunfeld Companies re-filed their October 27, 2008, comments to correct errors in the previously submitted certificate of service.

ANALYSIS

1. Finding of Commercial Unavailability

19 U.S.C. § 1677j(d) includes the criteria the Department must consider when determining whether later-developed merchandise is within the scope of an antidumping order. In the Preliminary Determination, the Department concluded that in addition to the legislative history, prior cases involving later-developed merchandise also provide further guidance, foremost of which is that the Department has considered “commercial availability in some form.” See Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People’s Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order, 71 FR at 32033 (June 2, 2006) (“Preliminary Determination”). In the Preliminary Determination, the Department explained that commercial availability is the “product’s presence in the commercial market or whether the product was fully “developed,” i.e., tested and ready for commercial production.” See Preliminary Determination, 71 FR at 32037. During the course of conducting this anti-circumvention inquiry, the Department requested that parties submit evidence concerning the presence of mixed-wax candles in the market at any time before, during, or after the LTFV

¹ Qingdao Kingking Applied Chemistry Co., Ltd., Dalian Talent Gift Co., Ltd., Shanghai Autumn Light Enterprise Co., Ltd., Zhongshan Zhongnam Candle Manufacturer Co., Ltd., Amster Business Company Limited, Jiaying Moonlight Candle Art Co., Ltd., Nantucket Distributing Co., Inc., and Shonfeld’s (USA), Inc.

investigation. In addition, the Department conducted its own research and placed the resulting information on the record. Id. We received no information either through relevant product brochures, annual sales data, or any other information from any party unequivocally demonstrating that mixed-wax candles were in fact commercially available prior to the LTFV investigation. Therefore, in the Final Determination, the Department concluded that it “cannot definitively conclude that mixed-wax candles were available in the market at the time of the LTFV investigation.” See Final Determination, at Comment 4.

It was the Department’s intent to clearly state that there was no information on the record that mixed-wax candles were commercially available prior to the LTFV investigation. In fact, information on the record shows that mixed-wax candles did not appear in the market until 1999. The record shows a dramatic increase in patents concerning mixed-wax candles in the 1990’s, and this would indicate that mixed-wax candles were not being produced commercially until this time.² This is also consistent with the conclusion made by the ITC in the second sunset review that “there was no commercial production in the United States (or elsewhere) of blended candles in 1986, when the Commission made its original determination. The Commission therefore did not consider in the original investigation whether to include blended candles containing 50 percent or less petroleum wax in the domestic like product.” See Petroleum Wax Candles from China, Inv. No. 731-TA-282 (Second Review), USITC Pub. 3790 (July 2005) at 7. Based on the above, the record establishes that mixed-wax candles were not commercially available at the

² See Memorandum to the File, through Alex Villanueva, Program Manager, Import Administration, from Julia Hancock, Case Analyst, Subject: Evidence Memorandum for the Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People’s Republic of China, (September 29, 2006) (“Evidence Memorandum”).

time of the LTFV investigation. Therefore, we find that mixed-wax candles were not commercially available in the market at the time of the LTFV investigation.

2. Application of ITC Consultation Provision to Later-Developed Merchandise

Analysis

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. 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. 100-576, 100th Cong., 2d Sess. (1988), reprinted in 134 Cong. Rec. H2031, H2305 (daily ed. April 20, 1988) (“Conference Report”). The Department focused upon 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.” Id. 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 re-evaluated the full text of the legislative history and agrees that the ITC consultation provision does not exclusively limit the meaning of later-developed merchandise to instances involving a significant technological advancement or significant alteration of subject merchandise. The Department agrees that this particular legislative history identifies specific types of later-developed merchandise that may raise significant injury issues and require the Department to consult with the ITC before including such merchandise in the scope of an order.

However, after reviewing the record, we find that mixed wax candles do not constitute this category of later-developed merchandise. Instead, we find that there have been changes to petroleum wax candles since the time of the LTFV investigation (e.g., mixing vegetable-oil based waxes with petroleum wax) that represent a gradual evolution in candle production, and these changes have resulted in the later development of mixed-wax candles. The record establishes that there has been industry research and development in the mixing of petroleum and vegetable waxes since the time of the LTFV investigation, and mixed-wax candles subsequently appeared in the market.³ The evolution of the wax-mixing technology in concert with the timing of the appearance of this new product, mixed-wax candles, from the previously known petroleum wax candles, is relevant to our analysis. The mixing of vegetable-oil based waxes with petroleum wax has allowed for the commercial appearance of mixed-wax candles after the time of the LTFV investigation, and mixed-wax candles can therefore be considered later-developed merchandise in accordance with 19 U.S.C. § 1677j(d).

DRAFT REMAND CONCLUSION

For the purposes of these draft remand results, we conclude that the record establishes that mixed-wax candles were not available at the time of the LTFV investigation. Therefore, we find that mixed-wax candles were not commercially available in the market at the time of the LTFV investigation. In addition, we reviewed the full text of the legislative history and agree that the ITC consultation provision does not exclusively limit the meaning of later-developed merchandise to instances involving a significant technological advancement or significant alteration of subject merchandise, though we continue to find that these terms do define some

³ Through a large number of submitted patents, manuals, and brochures, the record supports that there has been a sustained and significant series of scientific studies since the LTFV investigation centered on the composition of waxes and the application of those waxes to candle-making. See Evidence Memorandum.

types of later-developed merchandise. Still, we have reviewed the record and find that mixed-wax candles do not constitute this category of later-developed merchandise. Instead, we find that advancements in the mixing of vegetable-oil based waxes with petroleum wax represent a gradual evolution of the production of candles since the time of the LTFV investigation and has allowed for the commercial appearance of mixed-wax candles since the time of the LTFV investigation, and mixed-wax candles can therefore be considered later-developed merchandise in accordance with 19 U.S.C. § 1677j(d).

COMMENTS FROM INTERESTED PARTIES

A. Commercial Unavailability

NCA agrees with the Department's finding that mixed-wax candles were commercially unavailable at the time of the LTFV investigation and is supported by substantial evidence on the record. See NCA's October 27, 2008, comments at 2-3.

Target disagrees with the Department's finding that mixed-wax candles were commercially unavailable at the time of the LTFV investigation. Specifically, Target argues that the sole basis the Department cites for that conclusion is a dramatic increase in patents concerning mixed-wax candles in the 1990's. See Target's October 27, 2008, comments at 3. According to Target, the Department fails, however, to explain how patents for a variety of specific mixed-wax recipes give rise to a reasonable inference that no other mixed candles were available in the market at the time of the LTFV investigation.

Target also argues that the Department is applying a rebuttable presumption of commercial unavailability in its analysis that can only be rebutted by specific proof of a product's commercial availability. Id. at 3. Further, Target argues that the Department's conclusion that there was no information on the record that mixed-wax candles were

commercially available prior to the LTFV investigation ignores evidence on the record such as patents that date back to more than 50 years prior to the LTFV investigation, treatises on candle-making and the original determination of the ITC. Id. Target concludes that when the record is viewed as a whole, there is no reasonable basis to conclude that mixed-wax candles containing less than fifty percent petroleum wax were commercially unavailable at the time of the LTFV investigation.

The Grunfeld Companies argue that instead of explaining how the record evidence now allows the Department categorically to conclude that mixed-wax candles were unavailable in the market at the time of the LTFV investigation, the Department makes only a perfunctory citation to the very same Evidence Memorandum that served as the basis for the previous conclusion. The Grunfeld Companies argue that the Department has erroneously concluded that the absence of evidence on the record either that mixed-wax candles were or were not in existence in the market at the time of the LTFV investigation somehow supports the conclusion that they were not in existence. According to the Grunfeld Companies, it is this lack of evidence in the first place that caused the Department to be unable to definitively conclude whether mixed-wax candles were commercially available at the time of the LTFV investigation, so this same evidence cannot be used to reach another conclusion.

The Grunfeld Companies also argue that citing to a dramatic increase in patents as evidence that mixed-wax candles were not being commercially produced in the market at the time of the LTFV investigation is inconsistent with the Department's Final Determination. See Final Determination at Comment 4. The Grunfeld Companies argue that the Department must find that either patents can or cannot be evidence of commercial availability. Finally, the Grunfeld Companies discounts the Department's references to the ITC sunset review documents,

arguing that the record is replete with evidence that this particular ITC decision was baseless and not supported by any evidence. See The Grunfeld Companies' October 27, 2008, Comments at 4. Ultimately, the Grunfeld Companies argue that the Department has inappropriately used the same references to the same evidence as the basis for a new conclusion.

Department's Position:

For the reasons provided in the Draft Remand, we agree with NCA's comments and continue to find that mixed-wax candles were commercially unavailable at the time of the LTFV investigation.

We disagree with Target. First, we disagree that the sole basis for finding that mixed-wax candles were commercially unavailable at the time of the LTFV investigation is the dramatic increase in patents. In the Draft Remand we explained that in the Final Determination we invited parties to submit evidence concerning the commercial presence of mixed-wax candles in the market at any time before, during, or after the LTFV investigation. We also noted that the Department conducted its own research and placed the information on the record. Finally, we also explained in the Draft Remand and the Final Determination that we received no information either through relevant product brochures, annual sales data, or any other information from any party unequivocally demonstrating that mixed-wax candles were in fact commercially available prior to the LTFV investigation. Therefore, in the Draft Remand the Department reconsidered all the evidence on the record and concluded that mixed-wax candles were not available in the market at the time of the LTFV investigation.

Additionally, the Department disagrees with Target that it has applied a rebuttable presumption of commercial unavailability in its analysis. The Department has not placed an evidentiary burden on any party in this proceeding. Instead, it invited all interested parties to

submit evidence on the record concerning the commercial availability of mixed-wax candles at the time of the LTFV investigation, and the Department then reached a conclusion on the basis of this record evidence. As explained above, the Department provided all parties numerous opportunities to submit any evidence that mixed-wax candles were available at the time of the LTFV investigation and specifically identified numerous types of evidence that would be acceptable. Although any information would have been from the time of the LTFV investigation, this would be the most relevant in reaching a determination supported by substantial evidence that mixed-wax candles were available at the time of the LTFV investigation as Target would have the Department conclude in this case.

We disagree with Target that the Department did not consider patents that date back more than 50 years prior to the LTFV investigation, treatises on candle-making and the original determination of the ITC. Target continues to identify information on the record to support its argument that mixed-wax candles were available at the time of the LTFV investigation that was previously considered in the Department's Final Determination. See Final Determination at Comment 4. Moreover, in the Draft Remand the Department explained that it reconsidered all evidence on the record and continued to find that no evidence clearly establishes the commercial availability of mixed-wax candles at the time on the LTFV. See Draft Remand at 3-4. On the contrary, the Department has concluded that the record clearly and affirmatively establishes that mixed-wax candles only became commercially available in 1999, well after the LTFV investigation. Id. Target has not presented any new arguments or evidence here that would support a different conclusion.

Finally, we disagree with the Grunfeld Companies argument that the Department neglected to cite to evidence supporting its finding that mixed-wax candles were unavailable in

the market at the time of the LTFV investigation. First, we note that in the Draft Remand, the Department reconsidered all the information on the record including the findings made in the Final Determination, which was within the scope of the Court's order. See Target, at 22-23. In reconsidering all the information on the record, the Department concluded that its findings were not clearly stated and clarified them in the Draft Remand. See Draft Remand, at 5-6. In this case, the Department did not reach a different conclusion after reconsidering the evidence of the record; it merely elucidated its previous conclusions.

In addition, we disagree with the Grunfeld Companies that citing to a dramatic increase in patents as evidence that mixed-wax candles were not being commercially produced in the market at the time of the LTFV investigation in the Draft Remand is inconsistent with the Department's Final Determination. The Grunfeld Companies misconstrue our statements in the Draft Remand. As noted above, in the Draft Remand, the Department explained that it is clear that there was continued research and development in the mixing of vegetable-based oil waxes with petroleum wax and, given the timing of the appearance of mixed-wax candles in the market, mixed-wax candles can be considered later-developed merchandise. See Evidence Memorandum. In other words, these two pieces of evidence, when considered jointly, support a conclusion that mixed-wax candles were not available in the market prior to the LTFV investigation and, therefore, can be considered later-developed merchandise from petroleum wax candles. Similarly, it was not merely a lack of record evidence concerning the market presence of mixed-wax candles that the Department found to be substantial evidence, but this lack of evidence considered jointly with the affirmative evidence of on-going research on mixed waxes and the later appearance in the market of mixed-wax candles that the Department found to be

substantial and controlling. Ultimately, in the Draft Remand, the Department clarified the findings made in the Final Determination.

The Department finds that the Grunfeld Companies' attacks on the ITC sunset review are inapposite. As the Court has already noted, no party challenged the ITC decision. As such, that decision is final. See Target at 21-22. Further, the Department notes that its citation to the ITC sunset review was merely to note the consistency of these decisions, not to assert additional evidence of commercial unavailability. The Department's finding of commercial unavailability was based on record evidence in the current proceedings, not the results of the ITC sunset review.

B. ITC Consultation Provision

NCA agrees with the Department's interpretation that the ITC consultation provision does not exclusively limit the meaning of later-developed to only those instances involving a significant technological advancement or significant alteration of subject merchandise, and NCA agrees that this interpretation is consistent with the Court's order and the Department's precedent. See NCA's October 27, 2008, comments at 4-5. NCA agrees with the Department's finding that changes in the wax compositions, and in the production of petroleum wax candles, led to the commercial appearance of mixed-wax candles in the market after the LTFV investigation and is supported by substantial evidence on the record and is based on a reasonable interpretation of the statute and, therefore, mixed-wax candles are later-developed merchandise within the meaning of 19 U.S.C. § 1677j(d).

Target agrees with the interpretation of the ITC consultation provisions; however, Target does not agree that a gradual evolution in candle production should be the later-developed standard applied in this case. Specifically, Target argues that even assuming that candle

production did not cease to evolve prior to 1985, that this does not logically lead to the conclusion that no mixed-wax candles were developed until after the LTFV investigation. Id. at 4. Target contends that the Department failed to cite any record evidence that the mixing of vegetable oil-based waxes with petroleum wax did not allow for the commercial appearance of any mixed-wax candles before the time of the LTFV investigation.

The Grunfeld Companies disagree that there is substantial evidence to show that there has been industry research and development in the mixing of waxes since the time of the LTFV investigation, and mixed-wax candles subsequently appeared in the market. Specifically, the Grunfeld Companies argue that the Will Patent of 1934 alone is evidence that the evolution began in 1934, prior to the LTFV investigation and therefore, the resulting product cannot be considered later-developed now. See The Grunfeld Companies' October 27, 2008, Comments at 5-6. Further, the Grunfeld Companies argue that the Department's finding of a "gradual evolution" of technology is not sufficiently explained. Therefore, the Department has failed to support with substantial evidence the application of the gradual evolution concept introduced in the Draft Remand to the facts of this case.

Department's Position:

We agree with NCA that the ITC consultation provision does not exclusively limit the meaning of later-developed to only those instances involving a significant technological advancement or significant alteration of subject merchandise, and that that changes in the wax compositions, and in the production of petroleum wax candles, led to the commercial appearance of mixed-wax candles in the market after the LTFV investigation.

We disagree with Target. Target argues that the even if the candle production did not cease to evolve until 1985, this does not necessarily indicate that mixed-wax candles were

developed after the LTFV investigation. Target misinterprets the Department's Draft Remand. In the Draft Remand, the Department explained that it is clear that there was on-going research and development in the mixing of vegetable-based oil waxes with petroleum wax after the LTFV investigation and, given the timing of the appearance of mixed-wax candles in the market after the LTFV investigation, it is clear that mixed-wax candles can be considered the result of this on-going research and therefore later-developed merchandise. In other words, these two pieces of evidence, when considered jointly, support a conclusion that mixed-wax candles were not available in the market prior to the LTFV investigation and therefore, mixed-wax candles can be considered later-developed merchandise from petroleum wax candles in accordance with 19 U.S.C. § 1677j(d).

We disagree with the Grunfeld Companies. Specifically, we disagree with the Grunfeld Companies that that Will Patent of 1934 alone is sufficient evidence that the evolution began in 1934, prior to the LTFV investigation and, therefore, the resulting product cannot now be considered later-developed. The Grunfeld Companies continue to identify information on the record to support its argument that mixed-wax candles were available at the time of the LTFV investigation that were previously considered in the Final Determination. See Final Determination, at Comment 4. In fact, the Department acknowledged in the Preliminary Determination that technology was available to mix different waxes prior to the LTFV investigation. See Preliminary Determination, at 32038-32039. The Grunfeld Companies seek to infer that mixed-wax candles cannot be considered later-developed from petroleum wax candles because of the existence of a single patent issued prior to the LTFV investigation. Although the Will Patent was issued prior to the LTFV investigation, more research and development contributing to the gradual evolution explained in the Draft Remand occurred such

that mixed-wax candles were produced and available commercially in the market much later than the LTFV investigation. See Evidence Memorandum and Final Determination, at Comment 4. Further, the term “gradual evolution” refers to the record evidence that establishes (1) on-going research in mixing waxes that occurred after the LTFV investigation and (2) the subsequent appearance of mixed-wax candles in the market in 1999, both factors discussed in the Draft Remand. The use of this term describes the substantial evidence on the record of the later-development of mixed-wax candles, and this term in no way establishes a new standard.

FINAL REMAND CONCLUSION

After considering the comments submitted by the parties, we affirm our Draft Remand conclusion that (1) mixed-wax candles were not commercially available in the market at the time of the LTFV investigation, (2) the ITC consultation provision does not exclusively limit the meaning of later-developed merchandise to instances involving a significant technological advancement or significant alteration of subject merchandise, though we continue to find that these terms do define some types of later-developed merchandise, and (3) mixed-wax candles do not constitute this category of later-developed merchandise, but instead, find that advancements in the mixing of vegetable-oil based waxes with petroleum wax represent a gradual evolution of the production of candles since the time of the LTFV investigation and has allowed for the commercial appearance of mixed-wax candles since the time of the LTFV investigation, and

mixed-wax candles can therefore be considered later-developed merchandise in accordance with section 19 U.S.C. § 1677j(d).

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Assistant Secretary
for Import Administration

Date