

A-570-504
Scope Review
PUBLIC DOCUMENT
Enforcement Group III: JAF

By Certified Mail, Return Receipt Requested

To All Interested Parties:

On December 6, 2001, the Department of Commerce (the Department) received a request from Atico International, Inc. (Atico) for a scope ruling on whether seven types of candles it plans to import are covered by the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC).

In accordance with 19 CFR 351.225(k)(1), the Department has determined that all of Atico's candles are within the scope of the antidumping duty order on petroleum wax candles from the PRC.

Enclosed is a memorandum containing the Department's analysis. We will notify the U.S. Customs Service of this decision. If you have any questions, please contact Julio Fernandez at (202) 482-0190.

Sincerely,

Barbara E. Tillman
Director
Office of AD/CVD Enforcement VII
Import Administration

Enclosure

MEMORANDUM FOR: Joseph A. Spetrini
Deputy Assistant Secretary
Enforcement Group III

FROM: Barbara E. Tillman
Director
Office of AD/CVD Enforcement VII

SUBJECT: Final Scope Ruling; Antidumping Duty Order on Petroleum Wax
Candles From the People's Republic of China (A-570-504); Atico
International, Inc.

Summary

On December 6, 2001, the Department of Commerce (the Department) received a request from Atico International, Inc. (Atico) for a scope ruling on seven types of candles (a "Valentine Heart-Shaped" candle, "Easter Egg" candles, "Easter Floating" candles, Lantern candles, and a Floating "Valentine" candle) to determine if they are covered by the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC) (Petroleum Wax Candles from the PRC: Final Determination of Sales at Less Than Fair Value, 51 FR 25085 (July 10, 1986) (Final Determination)). In accordance with 19 CFR 351.225(k)(1), we recommend that the Department determine that all of Atico's candles are covered by the scope of the antidumping duty order on petroleum wax candles from the PRC.

Background

Atico filed its request for a scope ruling in proper form on December 6, 2001. On January 25, 2002, the National Candle Association (NCA), an interested party in this proceeding, filed comments on Atico's request.

The regulations governing the Department's antidumping scope determinations are found at 19 CFR § 351.225. On matters concerning the scope of an antidumping duty order, the Department first examines the descriptions of the merchandise contained in the petition, the determinations of the Secretary and the International Trade Commission (the Commission), the initial investigation, and the antidumping duty order. This determination may take place with or without a formal inquiry. If the Department determines that these descriptions are dispositive of the matter, the Department will issue a final scope ruling as to whether or not the subject merchandise is covered by the order. See 19 CFR 351.225(d).

Conversely, where the descriptions of the merchandise are *not* dispositive, the Department will consider the five additional factors set forth at 19 CFR 351.225(k)(2). These criteria are: i) the physical characteristics of the merchandise; 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. The Department applies these criteria when it is unclear whether the product which is the subject of the scope ruling fits within the product descriptions contained in the petition, the determinations of the Secretary and the Commission, the investigation, and the order. The determination as to which analytical framework is most appropriate in any given scope inquiry is made on a case-by-case basis after consideration of all evidence before the Department.

In the instant case, the Department has evaluated Atico's request in accordance with 19 CFR 351.225(k)(1); and the Department finds that the descriptions of the products contained in the petition, the final determinations of the Secretary (including prior scope determinations) and the Commission, the initial investigation, and the antidumping duty order are, in fact, dispositive. Therefore, the Department finds it unnecessary to consider the additional factors set forth at 19 CFR 351.225(k)(2).

Documents and parts thereof from the underlying investigation deemed relevant by the Department to this scope ruling were made part of the record of this determination and are referenced herein. Documents that were not presented to the Department, or placed by it on the record, do not constitute part of the administrative record for this scope determination.

In its petition of September 4, 1985, the NCA requested that the investigation cover:

[c]andles [which] are made from petroleum wax and contain fiber or paper-cored wicks. They are sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars; votives; and various wax-filled containers. These candles may be scented or unscented ... and are generally used by retail consumers in the home or yard for decorative or lighting purposes (Antidumping Petition, September 4, 1985 at 7).

The Department defined the scope of the investigation in its notice of initiation. This scope language carried forward without change through the preliminary and final determinations of sales at less than fair value and the eventual antidumping duty order:

certain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks. They are sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers (Petroleum Wax Candles from the People's Republic of China: Initiation of Antidumping Duty Investigation, 50 FR 39743 (September 30, 1985); see also Preliminary Determination of Sales at Less Than Fair Value, 51 FR 6016 (February 19, 1986); Final Determination, 51 FR 25085 (July 10, 1986); and Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China, 51 FR 30686 (August 28, 1986)).

The Commission adopted a similar definition of the “like product” subject to its determinations, noting that the investigations did not include “birthday, birthday numeral and figurine type candles” (Determinations of the Commission (Final), USITC Publication 1888, August 1986, at 4, note 5, and A-2 (Commission Determination)). Also of relevance to the present scope inquiry is a notice issued to the United States Customs Service in connection with a July 1987 scope determination concerning an exception from the Order for novelty candles, which states:

The Department of Commerce has determined that certain novelty candles, such as Christmas novelty candles, are not within the scope of the antidumping duty order on petroleum-wax candles from the People's Republic of China (PRC). Christmas novelty candles are candles specially designed for use only in connection with the Christmas holiday season. This use is clearly indicated by Christmas scenes and symbols depicted in the candle design. Other novelty candles not within the scope of the order include candles having scenes or symbols of other occasions (*e.g.*, religious holidays or special events) depicted in their designs, figurine candles, and candles shaped in the form of identifiable objects (*e.g.*, animals or numerals), (CIE N-212/85, September 21, 1987; Letter from the Director, Office of Compliance, to Burditt, Bowles & Radzius, Ltd., July 13, 1987).

Atico's Scope Request

Atico argues that the models subject to this inquiry are novelty candles in the shape of identifiable objects, *i.e.*, heart, egg, oval, barrel, and half-sphere shapes, and, therefore, are not covered by the Order's scope. Atico included a sample of each candle with its request.

The National Candle Association's Comments

In its comments, the NCA retraces the history of this antidumping duty order, including the import surges and resultant injury suffered by domestic manufacturers which prompted the original September 1985 antidumping petition. Petitioner contends that the antidumping statute and antidumping duty orders are remedial in nature and exceptions to them should be construed as narrowly as possible to preserve the efficacy of the Order. In support of its assertion,

petitioner cites a Court of International Trade conclusion, with regards to the novelty exception, that “. . . a candle must be specifically designed for use only in connection with a religious holiday or special event to fall within the novelty candle exception.” See Russ Berrie & Co., Inc. v. United States, 57 F. Supp. 2nd 1184, 1194 (CIT July, 1999) (Russ Berrie). Thus, petitioners argue that the Department narrowly limited the novelty candle exception to figurine candles, candles shaped in the form of identifiable objects, and candles specifically designed for use only in connection with the holiday season. The NCA commented on all of Atico’s subject candles.

With respect to Atico’s candles, the NCA argues that Atico’s “Valentine Heart Shaped” candle is made of petroleum wax, contains a wick, and is a small pillar candle not in a distinguishable shape, which should be excluded from the Order.

The NCA further argues that Atico’s “Easter Egg” candle is in the shape of a round (a shape clearly delineated in the Order’s scope) and that the candle’s indented duck design is ubiquitous. Therefore, the NCA argues, nothing about this candle’s design specifically limits its use to the Easter holiday.

Turning to Atico’s “Easter Glowing Egg” candle, the NCA argues that this candle is in the same shape as Atico’s “Easter Egg” candle, and is not in the shape of a distinct identifiable object. The NCA also argues that the candle’s designs are not specifically designed for use only in connection with Easter (e.g., the flower designs are ubiquitous).

With respect to Atico’s “Easter Floating” candle, the NCA points out that this candle, which is flat on the top, bottom, and sides, is also not a distinctly identifiable object. The NCA also argues that this candle’s apparent clouds and flowers designs, which are ubiquitous, do not limit the candle’s use to the Easter holiday season.

Regarding Atico’s “Circular Grooves Lantern” candle, the NCA argues that this candle is in a shape clearly identified in the scope of the Order, a round. The NCA cites Final Scope Ruling: Endar Corporation (May 11, 2000) (Endar 2000) and Final Scope Ruling: Endar Corporation (December 24, 1998) (Endar 1998) in support of its contention that the Department has previously determined Endar Corporation’s floating round candles to be within the scope of the Order. The NCA further argues, citing Endar 2000, that the Department has also determined that Endar Corporation’s “round Chinese lantern” candles, which it contends are the same shape as Atico’s “Circular Grooves Lantern” candles, are rounds within the scope of the Order. The NCA contends that Atico cannot convert a round candle into an identifiable object by adding fluted or straight horizontal grooves to the candle’s design, citing Final Scope Ruling: American Greetings Corporation (May 11, 2000). Additionally, the NCA argues that Atico’s “Straight Grooves Lantern” candle is the same as the “Circular Grooves Lantern” candle, but with vertical rather than horizontal grooves.

The NCA argues that Atico’s “Floating Valentine” candle is made from petroleum wax, contains a wick in the candle’s center, and is in the shape of a round. The NCA also argues that nothing about the candle’s heart or lip design limits the candle’s use specifically to the Valentine holiday. Regarding the ubiquitousness of the heart design, the NCA cites to Russ Berrie, Final Scope Rulings: Meijer, Inc. (June 11, 1998) (Meijer 1998), and Russ Berrie (September 25, 1997).

The NCA notes that Atico’s candles compete in the same channels of trade as the candles subject to the Order, and that their sale without the antidumping duty will severely injure the U.S. candle producers. It further notes what it characterizes as the long-standing efforts of candle importers to “expand the ‘novelty candle’ loophole in the Order through a continuing stream of scope requests, causing the Order on PRC candles to be subjected to over seventy Final Scope Rulings and many more requests.” Petitioner maintains that the success of the scope requests in eroding the Order has resulted in geometric increases in the volume of PRC candles coming into the United States. Petitioner concludes by stating that Atico is now asking the Department to narrow the scope of the Order so that it excludes everyday candles, claiming that they are novelty candles, and that the Department does not have such legal authority.

Analysis

When determining whether or not a particular product claimed as a novelty candle is within the scope of the antidumping duty order, the Department’s first line of inquiry is whether the shape of the candle falls within those shapes listed by the inclusive language of the Order’s scope, *i.e.*, “tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers.” If a candle falls within one of the above delineated shapes, it will be determined to be within the Order’s scope. Candles of a shape not listed by the inclusive language of the Order’s scope will then be evaluated to determine whether they are “scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks.”¹ If the Department determines that the candle is made from petroleum wax and has a

¹ The Department has changed its practice on this issue. In past scope rulings, the Department has determined that candles not of a shape listed by the language of the Order’s scope were outside the scope. See, e.g., Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Endar Corp. (Jan. 11, 2000) (“dragonfly” candle, in the shape of a rough-hewn stone with a dragon fly carved on top, not within scope because it is of a shape not listed by the scope); American Drug Stores, Inc. (Mar. 16, 1998) (sphere or ball shaped candle not within scope because it is a shape not listed by the scope); San Francisco Candle Co. (June 10, 1993) (ball shaped candle not within scope because it is of a shape not listed by the scope). The reason for the change is that, upon review of the text of the scope of the Order, the text of the first sentence of the scope covers “scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks.” The text following this broad inclusive sentence provides a list of shapes, which list is not modified by any express words of exclusivity. The result of our prior practice of excluding candles of a shape other than those listed was inconsistent with the fact that such candles were

fiber or paper-cored wick, but the candle possesses characteristics set out in the July 1987 novelty candle exception, it will fall outside the scope of the Order. In order for a candle to qualify for this exception, the characteristic(s) which are claimed to render it a novelty candle must be visible from most angles, as opposed to minimally visible. See Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); JCPenney Purchasing Corp. (May 21, 2001); San Francisco Candle Co. (Feb. 12, 2001); Endar Corp. (Jan. 11, 2000). If a candle does not possess characteristics set out in the July 1987 novelty candle exception, and it is a scented or unscented petroleum wax candle made from petroleum wax and having fiber or paper-cored wick, the Department will determine that the candle is within the scope of the Order.

With regard to the instant request, we find that for the reasons outlined below, all of the seven types of candles fall within the scope of the Order.

1. Valentine Heart Candle (Item No. C78H-0251)

Atico maintains that this candle, measuring approximately 3 inches in width by 2.75 inches in height, is in the shape of a heart, and therefore, should be excluded from the scope of the Order as an identifiable object. This candle, which has a flat bottom, is, in fact, not recognizable as a heart when viewed from the top, bottom, front, back, and sides. Additionally, this candle is made of petroleum wax and contains a cotton fiber wick at the center. Thus, we do not subscribe to

“scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks.” We have now determined that this practice was incorrect because it had the effect of narrowing the broad coverage of the first sentence of the Order’s scope. The list of shapes in the second sentence of the Order’s scope does not provide a textual basis for such a narrowing of the coverage of the first sentence of the Order’s scope. Accordingly, in order to give full effect to the first sentence of the inclusive language of the scope, the Department normally will evaluate whether candles of a shape not listed by the inclusive language of the Order’s scope are scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks. See Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); J.C. Penney November 9, 2001 (JC Penney Ruling).

This approach of evaluating such candles in light of the entire text of the scope is in keeping with the recent opinion of the Court of International Trade (CIT), noting that a better approach in scope rulings is to avoid subjective issues of intent and, instead, look to the petition's language to determine whether the class or kind of merchandise at issue was expressly included. Duferco Steel, Inc. v. United States, 146 F. Supp. 2d 913 (Ct. Int’l Trade 2001). Such an approach is a recent departure from past CIT precedent that required Commerce to give ample deference to the petitioner's intent when examining a petition's description of the subject merchandise, see, e.g., Torrington Co. v. United States, 995 F. Supp. 117, 121 (Ct. Int'l Trade 1998).

Atico's claim that this candle should be excluded from the Order's scope on the basis of its shape, and agree with the NCA that Atico's "Valentine Heart" candle should be included within the scope of the Order.

2. Easter Egg with Engraved Duck Candle (Item No. C81H-0017)

This candle measures approximately 4 inches in height and 3 inches in width, with a duck design on two of the candle's sides, and a fiber wick in the center of the candle's top. We disagree with Atico's position that this candle is in the shape of an egg and can be identified with the Easter holiday. We agree generally with the NCA that this candle is not in the shape of a distinct identifiable object; rather, this candle is in the shape of a round that gradually tapers to a point at the top. In Final Scope Ruling: Avon Products (June 11, 2001) (Avon 2001), the Department determined that a similarly-shaped candle, which Avon Products claimed was in the shape of a tear, was within the scope of the Order because its shape constituted a taper. Likewise, this "Easter Egg" candle constitutes a taper, a delineated shape within the scope of the Order. Additionally, nothing inherent in the instant candle's duck design limits its use specifically to the Easter holiday. Therefore, this candle should be included in the scope of the Order.

3. Easter Glowing Egg Candle (Item No. H81H-0296)

Atico's "Easter Glowing Egg" candle contains a cotton fiber wick at the center of the candle's top, and measures approximately 2 inches in height. The candle is also decorated with multi-colored floral designs. We disagree with Atico's assertion that this candle is in the shape of an egg and should be excluded from the scope of the Order on the basis of its shape. As with candle #2 above, we agree generally with the NCA that this candle is not in the shape of a distinct identifiable object; rather, this candle is in the shape of a round that gradually tapers to a point at the top. See Avon 2001. Thus, we consider Atico's "Easter Glowing Egg" candle to constitute a taper, a delineated shape within the scope of the Order. We further disagree with Atico's position that this candle can be identified with the Easter holiday. Nothing about this candle's design limits its use solely to the Easter season. Therefore, this candle should not be excluded from the scope of the Order.

4. Easter Floating Candle (Item No. C81H-0016)

This candle, measuring approximately 3 inches in height, contains various floral and cloud designs on the candle's top. This floating candle also contains a cotton fiber wick at the candle's top, and is oval-shaped. We cannot subscribe to Atico's assertion that this candle should be excluded from the scope of the Order on the basis of its shape. This candle is flat on the top, bottom, and sides, as noted by the NCA, and, thus, does not resemble an egg when viewed from most angles. We also agree with the NCA that the use of clouds and flowers is ubiquitous and that the candle's design does not limit its use to the Easter holiday. Therefore, this candle should be included in the Order's scope.

5. Circular Grooves Lantern Candle (Item No. C05F-2325)

Atico asserts that its “Circular Grooves Lantern Candle,” measuring approximately 4 inches in diameter and containing circular horizontal grooves, is identifiable as a barrel. We disagree with Atico that this candle’s shape renders it identifiable as either a barrel or a lantern. The Department has previously ruled that similar candles are within the scope of the Order because they are rounds. In Endar 2000, the candle at issue was in the shape of a round, made of petroleum wax, and contained a wick. The Department ruled it was a round, a shape enumerated in the scope of the Order, rather than any identifiable shape. In Endar 1998, the candle at issue was a floating round candle made from petroleum wax and contained a wick. The Department ruled it was not an identifiable object but rather a round, a shape delineated in the scope of the Order. See Endar 2000; see also Endar 1998. Like those cases, Atico’s candle is in the shape of a round, a shape clearly identified in the scope of the Order. See Endar 2000. Additionally, we note that Atico’s candle appears to be a wax-filled container. Therefore, for these reasons, this candle should be included within the scope of the Order.

6. Straight Grooves Lantern Candle (Item No. C05F-2324)

This candle’s shape and design are similar to those of Atico’s “Circular Grooves Lantern” candle, but with vertical grooves. As with candle #5 above, we cannot subscribe to Atico’s assertion that its “Straight Grooves Lantern Candle” is identifiable as a barrel or lantern based on the candle’s shape. Nothing in this candle’s shape renders it identifiable as either a barrel or a lantern. As noted for candle #5 above, the Department has previously ruled that similar candles are within the scope of the Order because they are rounds. In Endar 2000, the candle at issue was in the shape of a round. In Endar 1998, the candle at issue was a floating round candle. Atico’s “Straight Grooves Lantern Candle” is actually in the shape of a round, a shape clearly identified in the scope of the Order. See Endar 2000. Further, this candle appears to be a wax-filled container. Thus, for these reasons, this candle should be included within the scope of the Order.

7. Floating Candle with Valentine Heart and Lip Design (Item No. C78H-0384)

This candle is in a shape similar to a half-sphere, but with a flat bottom, and contains a cotton fiber wick at the candle’s center. The candle is decorated with either a lip design or a heart design, and measures approximately 3 inches in width. Atico claims that this candle is in the shape of a half-sphere and is, thus, an identifiable object. We disagree with Atico that this candle is in the shape of a half-sphere because it is flat on the bottom rather than rounded, as would be the case with a half-sphere. Further, the flat bottom may be viewed from the bottom and all sides. Thus, the characteristic which Atico claims renders this candle a novelty candle, a half-sphere, is not visible from most angles.²

² We further disagree with Atico’s assertion that a half-sphere candle would merit exclusion from the scope of the Order as an identifiable object. We would not consider a half-sphere shape to be an identifiable object eligible for exclusion from the Order within the

Additionally, we agree with the NCA that the heart and lip designs do not limit the candle's use specifically to the Valentine holiday. We also agree with the NCA's contention that the year-round ubiquity of the heart design results in its use not being limited solely to the Valentine's Day holiday. See Meijer 1998 wherein the Department decided that a heart is not a holiday scene or symbol because of its year-round ubiquity. We further note that this candle is made from petroleum wax and contains a cotton fiber wick. Thus, for these reasons, this candle should be included within the scope of the Order.

standards set forth in the July 1987 novelty candle exception. The July 1987 novelty candle exception indicates that Christmas novelty candles specially designed for use only in connection with the Christmas holiday season are excluded from the Order. This exception also includes other novelty candles with depictions of scenes or symbols of other occasions (such as religious holidays or special events), and candles in the form of identifiable objects, "e.g., animals or numerals." Thus, the determining characteristics in granting an exclusion under the 1987 novelty candle exception are scenes or symbols specifically connected to the Christmas holiday season and other occasions, or candles shaped in the form of identifiable objects. Unlike candles shaped as animals or numerals, given as illustrative examples of the identifiable object novelty exception, a candle in the shape of a half-sphere is a geometric-shaped candle, not a more specific identifiable object.

The difference between a shape and an object generally is one of specificity. A shape is generally the characteristic surface configuration of a thing, the outline or contour. See The American Heritage Dictionary of the English Language (Fourth Ed. 2000), reprinted at www.bartleby.com. An object is more specific, something perceptible by one or more senses, especially vision or touch, a material thing. Id. We would not consider the geometric shape of a half-sphere to constitute a material thing that has sufficient specificity to warrant treatment as an identifiable object under the July 1987 novelty candle exception. Rather, more specifically shaped material things such as leaves, hearts and pine cones, all ruled outside of the scope of the Order by the Department in the past, would constitute identifiable objects falling within the July 1987 novelty exception. See JCPenney Ruling; see also Final Scope Ruling: Avon Products (July 11, 2001) and Final Scope Ruling: Avon Products (May 4, 2001). Furthermore, we note that certain shapes enumerated in the Order's scope approximate geometric shapes, e.g., straight-sided dinner candles can be cubes or irregular cubes, rounds and votives can be spheres or cylinders, and tapers may approximate pyramids or tetrahedrons.

Recommendation

Based on the preceding analysis, we recommend the Department find that all of Atico’s candles, as described above, are within the scope of the antidumping duty order on petroleum wax candles from the PRC.

If you agree, we will send the attached letter to the interested parties, and will notify the U.S. Customs Service of our determination.

_____ Agree

_____ Disagree

Joseph A. Spetrini
Deputy Assistant Secretary
for Import Administration, Group III

Date