

A-570-504
Scope Review
PUBLIC DOCUMENT
DAS III (7): JAF

By Certified Mail, Return Receipt Requested

To All Interested Parties:

On October 24, 2001, the Department of Commerce (the Department) received a request from Fleming International Ltd. (Fleming) for a scope ruling on whether four models of candles it imports 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 three of these four models of candles are not covered by 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. Bureau of Customs and Border Protection of this decision. If you have any questions, please contact Sally Gannon at (202) 482-0162 or Julio Fernandez at (202) 482-0961.

Sincerely,

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

Enclosure

A-570-504
Scope Review
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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);
Fleming International Ltd.

Summary

On October 24, 2001, the Department of Commerce (the Department) received a request from Fleming International Ltd. (Fleming) for a scope ruling on four models of candles (one "B3922" candle, one "B3966" candle, one "B3988" candle and one "EP878" candle), comprised of vegetable and synthetic waxes, 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 three of these four types of candles are not within the scope of the antidumping duty order on petroleum wax candles from the PRC.¹

¹ The Department has developed an internet website that allows interested parties to access prior scope determinations regarding the antidumping duty Order on Petroleum Wax Candles from the People's Republic of China. This website lists all scope determinations from 1991 to the present. It can be accessed at <http://ia.ita.doc.gov/download/candles-prc-scope/>, and will be updated periodically to include newly-issued scope determinations.

Background

Fleming filed its request for a scope ruling in proper form on October 24, 2001. On March 22, 2002 and June 5, 2002, the National Candle Association (NCA), petitioner and an interested party in this proceeding, filed comments on Fleming's request. On April 19, 2002 and June 14, 2002, Fleming submitted its rebuttal comments to the NCA's March 22, 2002 and June 5, 2002 submissions, respectively. On May 2, 2002 and June 21, 2002, Russ Berrie and Company, Inc. (Russ Berrie and Co.), a United States importer and an interested party in this proceeding, submitted rebuttals to the NCA's comments regarding Fleming's request.

In a letter dated December 28, 2001, the Department requested that Fleming provide test results regarding the composition of vegetable and synthetic wax for the four candles included in Fleming's original request, no later than January 25, 2002. On January 18, 2002, Fleming requested an extension of the deadline to submit these test results, and the Department subsequently extended the deadline to February 13, 2002. On February 13, 2002, Fleming notified the Department that it would be unable to provide the Department with testing documentation due to technical difficulties experienced by the testing facility examining Fleming's candles, and requested an extension of the deadline date to submit testing results until February 20, 2002. Fleming submitted test results for its vegetable and synthetic wax candles on February 20, 2002. A memorandum regarding the Department's decision to extend the 45-day deadline for this scope inquiry has been placed on the record. See Memorandum to the File through Sally C. Gannon from Brett L. Royce, Petroleum Wax Candles from the People's Republic of China: Change in Practice Regarding Scope Reviews as a Result of the JCPenney Purchasing Corporation Ruling (Nov. 28, 2001).

Fleming's Scope Request

Fleming argues in its October 24, 2001 and February 21, 2002 submissions, that the raw materials used in the production of its candles, and thus, its candles, do not contain crude oil or petroleum. Fleming also argues that the Commission's definition of domestic like product only included petroleum wax candles and not "exotic" candles, such as Fleming's synthetic and vegetable wax candles. Fleming further argues that because its candles do not contain any petroleum components, they should be excluded from the Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China, 51 FR 30686 (August 28, 1986) (Order), and that vegetable-derived waxes differ from petroleum wax candles because they lack the essential characteristics of petroleum wax candles.

Additionally, Fleming argues that the Department has previously determined that a candle whose majority component is not petroleum wax is not subject to the scope of the Order.² Fleming did not include 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. 2d 1184, 1194 (CIT July 13, 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 Fleming's subject candles.

In its March 22, 2002 comments, the NCA argues that “Fleming's candles do not contain any designs which would make these candles specifically designed for use only in connection with a holiday, nor are they in the shape of a distinct identifiable object” (NCA's March 22, 2002 comments at 4-5). Additionally, the NCA argues that the test results provided by Fleming indicate that the testing laboratory noted that it could not confirm Fleming's allegation that the paraffin wax was not derived from crude petroleum “. . . because it was 'unable to differentiate the difference between this wax and a petroleum based paraffin wax' ”(NCA's March 22, 2002 comments at 5). The NCA also maintains that “. . . vegetable oil alone cannot be used as candle wax because vegetable oils are liquids are room temperature,” and, thus, the vegetable wax for Fleming's candles was hydro-treated. The end result of

² See Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504); J.C. Penney Purchasing Corp. (May 21, 2001) (JCPPC), wherein the Department determined that “[c]onsistent with our most recent ruling on candles in which petroleum wax was not the majority component, and per the Commission's definition that Petroleum wax candles are those composed of over 50 percent petroleum wax, the Department agrees that this item (candles made with 58 percent palm oil) should be excluded from the scope of the order. Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candle From the People's Republic of China (A-570-504); Ocean State Jobbers (December 18, 1998) and Candles from the People's Republic of China, USITC Pub. 1888 Aug. 1986 at 4-5.

this process, the NCA argues, “. . . yields a waxy product with the same physical properties of petroleum wax.” *Id.*

The NCA notes that Fleming’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. The NCA 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 “[t]he 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” (NCA’s January 25, 2002 comments at 10). Petitioner concludes by stating that Fleming is now asking the Department to narrow the scope of the Order on petroleum wax candles from the PRC so that it excludes everyday candles, claiming that they are novelty candles, and that the Department does not have such legal authority (NCA’s March 22, 2002 comments at 8).

Fleming’s Rebuttal Comments

In its April 19, 2002 rebuttal comments, Fleming dismisses the NCA’s allegation that Fleming’s request is an attempt to expand the novelty candle exception, and argues that the Order covers only petroleum wax candles. Fleming goes on to argue that the NCA’s allegations regarding similarities between the physical characteristics of paraffin and vegetable wax candles is flawed because the chemical structure of certain oil waxes (palm oil, soy oil, and cottonseed oil) “. . . continue to differ from the structure of petroleum wax after hydrogenation” (Fleming’s April 19, 2002 rebuttal comments at 3).

As part of its rebuttal, Fleming includes the results of a comparison between the chemical composition of vegetable wax and petroleum-derived wax, and further argues that “[c]ontrary to what is argued by Petitioners, the process of hydrogenating of a vegetable oil does not convert it into a petroleum product” (Fleming’s April 19, 2002 rebuttal comments at 3). Fleming concludes its rebuttal by asserting that “. . . the scope of the order does provide the parameters of the order and it specifically is limited to petroleum wax candles” (Fleming’s April 19, 2002 rebuttal comments at 5).

Russ Berrie and Company, Inc.’s Comments

In its May 2, 2002 comments, Russ Berrie and Co. argues that the Commission, in the initial investigation, determined that the domestic like product would consist only of petroleum wax candles, and that the Commission “. . . defined petroleum wax candles as candles ‘composed of over 50 percent petroleum wax, and may contain other waxes in varying amounts, depending on the size, and shape of the candle’” (Russ Berrie and Co.’s May 2, 2002 comments at 4). Additionally, Russ Berrie and Co. asserts that the vegetable wax in Fleming’s candles is derivative of plants, as the name implies,

whereas it maintains that “[p]etroleum wax of paraffin is a waste product of the petroleum refining process.” Russ Berrie and Co. further argues that the Department has previously “excluded candles that are composed of less than 50 percent petroleum wax from the scope of the antidumping duty order” (Russ Berrie and Co.’s May 2, 2002 comments at 4).

Analysis

The regulations governing the Department’s antidumping scope determinations are found at 19 CFR 351.225(2001). On matters concerning the scope of an antidumping duty order, the Department first examines 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. 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(k)(1).

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 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 Fleming’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 initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission are 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 National Candle Association 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:

[c]ertain 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.

See Petroleum Wax Candles from the People's Republic of China: Initiation of Antidumping Duty Investigation, 50 FR 39743 (September 30, 1985); Petroleum Wax Candles from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, 51 FR 6016 (February 19, 1986); Petroleum Wax Candles from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 51 FR 25085 (July 10, 1986) (Final Determination); See also Order.

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 (Commission Determination) at 4, note 5, and A-2).

Also of relevance to the present scope inquiry is a notice issued to the U.S. Bureau of Customs and Border Protection (Customs) in connection with a July 1987 scope determination concerning an exception to 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).

Petroleum-Wax Candles from the People's Republic of China - Antidumping - A-570-504; C.I.E. -212/85, September 21, 1987; Letter from the Director, Office of Compliance, to Burditt, Bowles & Radzius, Ltd., July 13, 1987 (Customs Notice) (emphasis added).

With respect to the instant request, we find that for the reasons outlined below, three of the four models of candles are not covered by the scope of the Order. Fleming's candles are numbered in the order they appear in its October 24, 2001 request.

1. **Product B3922**
2. **Product B3966**
3. **Product B3988**

The Department determines that candles #1-3 are not included within the scope of the Order on petroleum wax candles from the PRC. Fleming argues that product B3922, comprised of 100 percent vegetable wax, is used for filling containers and pots. Fleming further argues that product B3966, also composed of 100 percent vegetable wax, is a specially-designed vegetable wax product designed for the manufacture of stand-alone pillar candles. With respect to product B3988, Fleming argues this product is suitable for use in containers or molded candles. As with products B3922 and B3966, Fleming argues that this product is composed of 100 percent vegetable wax. In its submission dated February 20, 2002, Fleming provided the Department with test results obtained from an independent testing facility in the United States, which were conducted in accordance with Customs method 34-07.³ These test results illustrate that these products are composed of 100 vegetable wax.⁴ See Fleming's submission dated February 20, 2002 at Exhibit 1.

We have reviewed the information on the record, including the description of these products as well as the test certificate included in Fleming's February 20, 2002 submission, and agree with Fleming that, based on the candles' vegetable wax content, these candles should not be considered within the scope of Order. We do not disagree with the NCA's contention that Fleming's candles "do not contain any

³ United States Customs Method 34-07 (Quantitation of Paraffin in Beeswax and Other Waxes by High Temperature Capillary Gas Chromatography) is a process where gas chromatography is used for the separation of a mixture of compounds into separate components, in order to identify and measure the amount of various sample components.

⁴ The test results submitted by Fleming from an independent testing facility, with respect to products B3922, B3966, and B3988, indicate that the majority component for these candles is not petroleum wax. However, the Department notes that, while the aforementioned test results may assist the Department in making its scope ruling, such results may not be dispositive of the exact composition of candles of this item number when such candles are presented at a future time for entry at one of the several U.S. Customs ports of entry.

designs which would make these candles specifically designed for use only in connection with a holiday, nor are they in the shape of a distinct identifiable object.” However, with respect to the instant request, the relevant issue is the composition of Fleming’s candles and not whether they are in the shape of identifiable objects. Further, Fleming does not allege that its candles are in the shapes of identifiable objects.

Consistent with our past practice on candles in which petroleum (paraffin) or petroleum-based products were not the majority component, and per the Commission’s definition that petroleum wax candles are those composed of over 50 percent petroleum,⁵ the Department agrees that these items should be found outside the scope of the Order because they possess no petroleum-based content, according to the test results submitted on February 21, 2002. See e.g., Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Ocean State Jobbers (December 18, 1998) (Ocean State); JCPenney Corp.; and Candles from the People’s Republic of China, USITC Pub. 1888, Aug. 1986, at 4-5. See also Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Leader Light, Ltd. (December 12, 2002) (Leader Light).

Further, the Commission has defined the domestic like product in this proceeding as “petroleum wax candles.”⁶ In the Commission Determination, the Commission determined “. . . [t]hat the domestic like product shall consist only of petroleum wax candles. The domestic industry, therefore, consists of the producers of petroleum wax candles.” See Commission Determination at 9. In the process of examining the domestic product in greater detail, the Commission recognized the existence of specialty candle-making operations, and, more importantly, such operations’ potential requirement for more “exotic” or different types of waxes. Specifically, as noted by Russ Berrie, the Commission stated the following regarding the domestic product:

Waxes. – There are two broad categories of wax used for commercial purposes: natural and synthetic. The bulk of candle manufacturing utilizes natural waxes, principally paraffins, microcrystallines, stearic acid, and beeswax. However, specialty candle making operations do have requirements for the more “exotic” types of wax, such as hydrogenated vegetable oil or jojoba.

See Commission Determination at A-3. In addition, the Department recognizes that vegetable and synthetic waxes are not obtained from petroleum sources, nor is there a reasonable argument that the origin of vegetable wax is petroleum-based.

⁵ See Commission Determination at 4.

⁶ See USITC Pub. No. 3226 at 4-5, wherein the Commission reaffirmed its long-standing definition of domestic like product.

Consequently, because candles #1-3 have a majority composition of vegetable wax, we find that candles #1-3 are not included within the scope of the Order. Our analysis will now focus on the last candle, product EP878.

4. Product EP878

Fleming argues that this product is a synthetic wax which is not derived from crude oil or petroleum wax components, and is, therefore, not included within the Order's scope. In its February 21, 2002 submission, Fleming provided the Department with test results obtained from an independent testing facility in the United States, which were conducted in accordance with Customs method 34-07. The test results show that product EP878 is composed of 98 percent paraffin wax, and also demonstrate that the testing laboratory noted that it was "currently unable to differentiate the difference between this wax and a petroleum based paraffin wax."⁷

We agree with the NCA that Fleming is unable to ". . . establish that its candles are not petroleum based."⁸ Further, based on our examination of the information on the record, including the description of this product and the results obtained from an independent testing facility, we do not find sufficient record evidence to support excluding this product from the scope of the Order. Therefore, this product should be included within the Order's scope.

Summary

Fleming's B3922, B3966, and B3988 products fall outside the scope of the Order because they are not petroleum wax candles. Additionally, Fleming's remaining product, EP878, falls within the Order's scope because it is composed of wax that could be petroleum-based. These conclusions are consistent with the scope of the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.

Recommendation

⁷ See Fleming's February 21, 2002 submission at Exhibit 1.

⁸ See the NCA's March 22, 2002 submission at 5.

Based on the preceding analysis, we recommend the Department find that Fleming's B3922, B3966, and B3988 products are not included within the scope of the Order. Further, we recommend finding that product EP878, as described above, is included within the scope of the Order.

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

_____Agree

_____Disagree

Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration, Group III

Date

Attachment