

MEMORANDUM FOR: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

FROM: James C. Doyle
Director, Office IX
Import Administration

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

Summary

The Department of Commerce ("the Department") received a request from Kathryn Beich, Inc. ("Kathryn Beich"), dated September 23, 2004, for a scope ruling on three models of candles to determine whether they are covered by the antidumping duty order on petroleum wax candles from the People's Republic of China ("PRC"). Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China, 51 FR 30686 (August 28, 1986) ("Order").

In accordance with 19 CFR 351.225(k)(1), we recommend that the Department determine that all three of Kathryn Beich's candles fall within the scope of the Order.¹

Background

Kathryn Beich filed its request for a scope ruling in proper form on September 23, 2004 (see Kathryn Beich Scope Request of September 23, 2004). On October 8, 2004, the Department extended the deadline for the scope ruling. On October 20, 2004, the Department issued a deficiency questionnaire to Kathryn Beich requesting additional information in order to clarify the laboratory test results conducted by Bureau Veritas Consumer Product Services ("Bureau Veritas") concerning the testing of the paraffin content of the candles. On October 26, 2004, Kathryn Beich submitted the requested information regarding the tested candles.

On November 19, 2004, the Department received comments from the National Candle Association ("NCA") concerning Kathryn Beich's scope request. On December 6, 2004, the Department received Kathryn Beich's response to the NCA's comments of November 19, 2004.

¹ The Department has developed an internet website that allows interested parties to access prior scope determinations regarding the Order. 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.

On January 11, 2005, the Department received comments from the NCA which note that the submitted test results do not specifically indicate what the contents of “Other” is in the candles.

Kathryn Beich’s Scope Request

In its September 23, 2004, submission, Kathryn Beich states that its three models of candles fall outside the scope of the Order because “each of the aforementioned candles is composed of less than 50 percent petroleum wax.” See Kathryn Beich Scope Request at page 3. Kathryn Beich notes that the International Trade Commission (“the Commission”) has determined that only wax candles composed of over 50 percent petroleum are subject to the Order (see Candles from the People’s Republic of China, Investigation No. 731-TA-282 (Final), USITC Publication 1888, August 1986, at 5)).

Kathryn Beich also notes in its September 23, 2004, submission that the Department’s policy is to use United States Customs Laboratory Method 34-07 and 34-08 in determining the petroleum content of a candle, citing the Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles from the People’s Republic of China (A-570-504), Garden Ridge (April 22, 2003), and the Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles from the People’s Republic of China (A-570-504), Atico International, Inc. (March 31, 2003). In its submission, Kathryn Beich attached Technical Report (5104) 169-0134 (Exhibit A), Technical Report (5104) 156-0136 (Exhibit B), and Technical Report (5104) 205-0119 (Exhibit C), each of which indicates that the “percentage of paraffin wax was analyzed according to United States Customs Laboratory Method 34-07.” See Kathryn Beich Scope Request at page 4. Kathryn Beich’s three lab results (Exhibits A, B, and C) suggest that the candles contain less than 50 percent paraffin wax content based on the results of the tests conducted by Bureau Veritas.

Description and Results:

The following is a description of Kathryn Beich’s candle lab results:

- (1) 1.5 inch square “Jewel” candle: 42.9% paraffin wax; 57.1% palm oil/other (Exhibit A).
- (2) 1.75 inch diameter “Red Rose” spherical candle: 46.8% paraffin wax; 53.2% palm wax/other (Exhibit B).
- (3) 2 inch diameter, 2.75 inch height “Polka Dot” pillar candle: 45.8% paraffin wax; 54.2% palm oil/other (Exhibit C).

Bureau Veritas’ lab results indicate that the three candles consist of “paraffin wax” and “palm oil (wax)/other.” Specifically, the “palm oil (wax)” contents include palmitic acid and stearic acid, while the “other” contents “may include fragrance, colorant, and other kinds of fatty acids or materials” (see Note to Exhibits A, B, and C). These results indicate that the three candles are “composed of a majority of fatty acids derived from vegetable or animal fats, and not petroleum.” See Kathryn Beich Scope Request at page 4. Kathryn Beich argues that, as the Commission defines petroleum wax candles as those which are composed of over 50 percent petroleum, these three candles should be found to be outside the scope of the Order. See id. at pages 4 and 5.

Kathryn Beich's Submission of Supplemental Information

On October 26, 2004, the Department received Kathryn Beich's response to the Department's October 20, 2004, request for supplemental information. See Kathryn Beich October 26, 2004 Submission of Supplemental Information. Kathryn Beich stated that "Bureau Veritas has confirmed that the candles that were tested are the same candles included in the scope review" See id. at 2. Kathryn Beich also clarified that the sample size numbers noted on the test results and explained that Bureau Veritas randomly chose one candle from each sample to conduct the test. Regarding the "Retest" notation on the laboratory results, Kathryn Beich explained that:

"...initially samples of each candle were submitted by the importer to Bureau Veritas for domestic testing. However, the results failed to provide evidence that the composition of palm wax was 50% or more for all samples. Therefore, a representative of Kathryn Beich instructed the importer to direct the manufacturer to resubmit samples using at least 60% palm oil and to take all necessary measures to ensure homogeneity." See id.

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. The NCA 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, the NCA cites a Court of International Trade ("CIT") decision, with regard to the novelty exception, in which the CIT noted 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." Russ Bernie, 57 F. Supp. 2d 1184, 1194-1195 (CIT 1999). Thus, the NCA argues 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 further notes that the Commission has defined a "like product" as a "product which is like, or in the absence of like, most similar in characteristics and uses with the articles subject to the investigation...." and that "like products have the same intrinsic qualities and essential characteristics and uses as the subject imports."² Moreover, the NCA argues that Kathryn Beich's candles have the same intrinsic qualities and essential characteristics of petroleum wax candles and therefore, are 'like' petroleum wax candles. Kathryn Beich's candles are the same class or kind of merchandise as are the candles subject to the Order, and are covered by the same

² *Candles from the People's Republic of China (Final)*, USITC Pub. 1888 (Aug. 1986).

Harmonized Tariff Schedule of the United States (“HTSUS”) tariff provision. Thus, the NCA argues that Kathryn Beich’s candles fall within the scope of the Order. To support its argument, the NCA refers to Exhibit 1 of the NCA’s November 19, 2004, submission, which highlights scientific evidence that indicates the similarity of the chemical composition and physical characteristics of palm wax candles and petroleum wax candles.

The NCA also argues in its November 19, 2004, submission that Kathryn Beich’s candles are within the scope, as the initial, original lab results for the three candles failed to provide evidence that the composition of palm wax was 50 percent or more for all samples. Therefore, the NCA argues that Kathryn Beich instructed its importer to direct the manufacturer to submit samples using at least 60 percent palm oil. The NCA claims that for purposes of the lab tests for this scope request, Kathryn Beich intended to submit samples for testing that contained over 50 percent palm wax, but failed to do so.

Kathryn Beich’s Response to NCA’s Comments

In a December 6, 2004, response to the NCA’s comments, Kathryn Beich addresses the NCA’s claim that palm oil candles are “like” petroleum wax candles. Kathryn Beich cites Floral Trade Council v. United States, 13 CIT 638 (1989) in which the Floral Trade Council (“FTC”) sought to include “marguerite daisies” within an antidumping duty order that resulted from a petition that the FTC had submitted applying to carnations, chrysanthemums, alstroemeria, gerberas, and gypsophila. The FTC claimed that daisies were within the scope because chrysanthemums and gerberas are also referred to as “daisies.” However, the CIT rejected the FTC’s claim on the basis that all forms of daisies were not part of the original petition. Likewise, Kathryn Beich states, petroleum wax candles (which are included in the NCA’s Antidumping Petition of September 3, 1985) and palm wax candles (which are not included in the NCA’s Antidumping Petition of September 3, 1985) are not the same, and, thus, the two types of candles do not have “the same intrinsic qualities and essential characteristics.”

Kathryn Beich also rebuts the NCA’s allegation that Kathryn Beich attempted to manipulate the content of the retested candles, as the original tests failed to demonstrate that the palm wax content was greater than 50 percent. Kathryn Beich states that once it became aware that the sample failed to provide evidence that the composition of palm wax was greater than 50 percent and that such failure was due to inadequate mixing of the products, Kathryn Beich instructed the manufacturer to ensure that the candles contained at least 60 percent palm oil. Kathryn Beich notes that this action indicates its intent to comply with the requirements of the Order, rather than an attempt to manipulate the results of the tests.

Legal Framework

The regulations governing the Department’s antidumping scope determinations are found at 19 CFR 351.225 (2004). 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 antidumping duty 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 this case, the Department has evaluated Kathryn Beich's requests 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 Antidumping Petition of September 3, 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. See the National Candle Association's Antidumping Petition of September 3, 1985 at pages 6 and 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 the Order.

Analysis

With respect to Kathryn Beich’s request for a scope ruling on the three candles (“Jewel” candle, “Red Rose” candle, and “Polka Dot” candle), the Department finds that for the reasons outlined below, all three of Kathryn Beich’s candles are within the scope of the Order.

The Department has determined in prior scope rulings where the petroleum-based content of a candle model is less than 50 percent that the candle is outside of the scope of the Order. See, e.g., Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Avon Products Inc. (November 17, 2003). This is consistent with the Commission’s definition of the domestic like product that petroleum wax candles are those composed of over 50 percent petroleum (see Petroleum Wax Candles from China, USITC Pub. No. 3226 Investigation No. 731-TA-282 (Review) (August 1999), at pages 4 and 5, wherein the Commission reaffirmed its long-standing definition of the domestic like product). Moreover, the Commission has determined that only wax candles composed of over 50 percent petroleum are subject to the Order (see Candles from the People’s Republic of China, Investigation No. 731-TA-282 (Final), USITC Publication 1888, August 1986, at 5).

In the instant case, Kathryn Beich submitted laboratory results from an independent U.S. laboratory that analyzed the percentage of paraffin wax of the subject candles according to United States Customs Laboratory (“USCL”) Method 34-07. Kathryn Beich only provided the Department with the re-test of the laboratory results; it did not provide the original testing results as requested by the Department. The following is a detailed description of Kathryn Beich’s candle lab results:

Test Result (Retest) - Jewel Candle

| Content | Lab Analysis |
|---------------------------|--------------|
| Paraffin Wax | 42.9% |
| Palm Oil/Other* | 57.1% |
| - Lauric Acid (C12:0) | < 0.1% |
| - Myristic Acid (C14:0) | < 0.1% |
| - Palmitic Acid (C16:0) | 28.1% |
| - Stearic Acid (C18:0) | 11.9% |
| - Oleic Acid (C18:1) | < 0.1 % |
| - Linoleic Acid (C18:2) | < 0.1 % |
| - Linolenic Acid (C18:3) | < 0.1 % |
| - Eicosanoic Acid (C20:0) | < 0.1 % |

Test Result (Retest) - Red Rose Candle

| Content | Lab Analysis |
|---------------------------|--------------|
| Paraffin Wax | 46.8% |
| Palm Wax/Other* | 53.2% |
| - Lauric Acid (C12:0) | < 0.1% |
| - Myristic Acid (C14:0) | < 0.1% |
| - Palmitic Acid (C16:0) | 23.3% |
| - Stearic Acid (C18:0) | 12.9% |
| - Oleic Acid (C18:1) | < 0.1 % |
| - Linoleic Acid (C18:2) | < 0.1 % |
| - Linolenic Acid (C18:3) | < 0.1 % |
| - Eicosanoic Acid (C20:0) | < 0.1 % |

Test Result (Retest) - Polka Dot Candle

| Content | Lab Analysis |
|---------------------------|--------------|
| Paraffin Wax | 45.8% |
| Palm Oil/Other* | 54.2% |
| - Lauric Acid (C12:0) | < 0.1% |
| - Myristic Acid (C14:0) | < 0.1% |
| - Palmitic Acid (C16:0) | 28.2% |
| - Stearic Acid (C18:0) | 13.2% |
| - Oleic Acid (C18:1) | < 0.1 % |
| - Linoleic Acid (C18:2) | < 0.1 % |
| - Linolenic Acid (C18:3) | < 0.1 % |
| - Eicosanoic Acid (C20:0) | < 0.1 % |

* Note: Others may include fragrance, colorant, and other kinds of fatty acids or materials.

Kathryn Beich’s laboratory results establish that the petroleum wax content of the *tested* candles is less than 50 percent. However, based on incomplete information, such as lack of clarification as to whether the tested candle samples are representative of all candles to be imported, lack of clarity as to whether the candles were reconfigured or reconstructed for testing purposes, and lack of an explanation regarding the differences in the test results between the unsubmitted original test results and the submitted re-tested results, we do not find that there is substantial

evidence that establishes that the composition of petroleum wax for the three candle models, which should be representative of the three specified candle model types to be imported, is less than 50 percent.

The laboratory results submitted by Kathryn Beich in its initial request represent a “re-test.” Kathryn Beich indicated that the initial laboratory test results for these three candle models failed to establish that the palm oil (wax) content of the candles was 50 percent or more (see Kathryn Beich’s October 26, 2004, Supplemental Response at page 2). According to Kathryn Beich, based on the initial failure, “a representative of Kathryn Beich instructed the importer to direct the manufacturer to resubmit *samples* using at least 60% palm oil and to take all necessary measures to ensure homogeneity” (emphasis added). See *id.* at 2. Based on these new samples, the three candle models were re-tested. It is these second test results that Kathryn Beich submitted to the Department in its September 23, 2004, request for a scope ruling. Given the fact that Kathryn Beich resubmitted *samples* for retesting (as the first batch of tests did not demonstrate that the candles contained less than 50 percent petroleum wax), the Department concludes that these samples are not representative of *all* the candles of the specified model destined for importation into the United States because the samples should be identical to the other candles contained in the batch.

The record is unclear as to whether the test results upon which Kathryn Beich submitted its request are representative of only the *candle samples* that were submitted for testing or are representative of *all candles* of the specified model type. As indicated above, in its original request, Kathryn Beich stated that upon notice of the failure, it instructed the manufacturer to resubmit *samples* for testing. However, in its December 6, 2004, response Kathryn Beich stated that “{o}nce Kathryn Beich became aware that the sample failed to provide evidence that the composition of palm wax was greater than 50% and that such failure was due to inadequate mixing of the products, Kathryn Beich instructed the manufacturer to ensure that the *candles* contained at least 60% palm oil” (emphasis added). See Kathryn Beich’s Response to Comments Received from the National Candle Association of December 6, 2004 at page 3.

Thus, based on Kathryn Beich’s submission of October 26, 2004, Kathryn Beich states that the manufacturer was instructed to resubmit *samples* containing at least 60 percent palm oil for retesting. However, based on Kathryn Beich’s submission of December 6, 2004, the manufacturer was instructed to resubmit *candles* containing at least 60 percent palm oil for retesting. Given Kathryn Beich’s statement on December 6, 2004, that it resubmitted *candles*, without specifying whether the *candles* referred to samples, batches, lots, etc., the Department finds that it is unclear whether the manufacturer reconfigured the palm oil (wax) content to ensure 60 percent palm oil (wax) for *all candles* to be imported into the United States, or only for the *candle samples* that the candle manufacturer sent to the laboratory for retesting (emphasis added). Because the original, unsubmitted test results failed to demonstrate that the composition of palm wax (oil) was greater than 50 percent (as was indicated in Kathryn Beich’s Submission of Supplemental Information of October 26, 2004), while the submitted retest results show that the palm oil (wax) content is greater than 50 percent, clear indication exists that the candles that were submitted for the re-test are not from the same batch as the candles under which the scope request was initially submitted. If the candles were from the same batch, the palm oil (wax) and petroleum percentage results would be identical in both the unsubmitted and submitted test

results. However, because the unsubmitted and submitted test results were different, the Department concludes that the new candles that were submitted for the re-test are not the candles that were submitted for investigation under the scope ruling request.

Moreover, the record is similarly unclear with respect to why tests of candles taken from the same batch would produce such different results. Based on the information provided by Kathryn Beich, the sample candle models tested in the initial laboratory tests are apparently the same candle models tested in the 're-test.' Although we requested that Kathryn Beich provide the original laboratory results, Kathryn Beich declined. Therefore, the Department can only presume that the original sample models tested are from a different batch of the candles sampled in the re-test. We find that the test results should not vary for different samples within the same batch because the involved candles are supposed to have the same chemical composition. Other than to explain that the failure was due to inadequate mixing, Kathryn Beich has not addressed how laboratory tests conducted using the same method (USCL 34-07) on samples taken from the same batch of candles would produce such different results. Because we cannot be sure of the candles that Kathryn Beich has actually submitted for testing, we find that these re-test results do not demonstrate the actual chemical composition of Kathryn Beich's candles.

Finally, while Kathryn Beich has indicated that Bureau Veritas has confirmed that the candles tested are the same candles included in its scope request, there is information on the record that the candles that were tested are in fact different from the candles for which Kathryn Beich has originally requested a scope ruling. For example, Kathryn Beich has not addressed why the palm oil (wax) content among the three models varied from 53.2 percent to 57.1 percent, when it specifically directed the manufacturer to ensure 60 percent palm oil (wax) content for all the samples. This fact suggests that the manufacturer may have failed to adhere to Kathryn Beich's instruction of obtaining a specified amount of palm oil (wax) content in all three candle models. Specifically, the discrepancy between Kathryn Beich's instructions to the manufacturer to submit candles containing 60 percent palm oil (wax) and the actual test results that indicate that palm oil (wax) content did not surpass 57.1 percent among any one of the three candles prompts the Department to conclude that the tested candle samples are different from the candles that were submitted for investigation under the scope ruling request.

The candle test results that the Department relies on to make a scope ruling for a specified candle model should have the same exact composition for all identical candle models that may arrive at a United States Customs port of entry. Specifically, the test results upon which the Department relies to make its scope ruling must be a true representation of the candles to be imported. Since Kathryn Beich stated in its October 26, 2004, Supplemental Response at page 2 that it instructed the importer to direct the manufacturer to resubmit *samples* using at least 60 percent palm oil, there is clear indication that the composition of the palm oil (wax) content for the *samples* was modified. However, these tested *samples* may not have the same composition and may not necessarily be a true representation of all the specified candle models that Kathryn Beich plans to import into the United States.

As the Department has found Kathryn Beich's "Red Rose," "Polka Dot," and "Jewel" candles to be within the scope for the aforementioned reasons, the Department has disregarded the NCA's comments submitted on January 11, 2005.

In order for the Department to find a candle model outside the scope of the Order, the Department must have conclusive evidence that the tested candle model is representative of all such candles to be imported, and not merely that the tested candle contains less than 50 percent petroleum wax. Based on the information submitted by Kathryn Beich, the Department cannot conclude that this is the case. Thus, in accordance with 19 CFR 351.225(k)(1) and after reviewing the information submitted for the record of this scope request, the Department determines that the three candles submitted by Kathryn Beich fall within the scope of the Order.

Recommendation

Based on the preceding analysis, we recommend that the Department find that Kathryn Beich’s “Jewel” candle, “Red Rose” candle, and “Polka Dot” candle are within the scope of the Order. This conclusion is consistent with the scope of the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.

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

Date

Attachment