

By: E-mail Notification

To All Interested Parties:

On January 15, 2005, Rokeach Foods' (Rokeach) request for scope ruling on whether a box of 44 Chanukah candles is included within the scope of the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC) was properly filed with the Department of Commerce.

In accordance with 19 CFR 351.225(k)(1), the Department has determined that Rokeach's candles are included 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 and Border Protection (CBP) of this decision. If you have any questions, please contact Jacqueline Arrowsmith at (202) 482-5255.

Sincerely,

Dana S. Mermelstein
Acting Director
AD/CVD Operations, Office 6

Enclosure

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

FROM: Dana S. Mermelstein
Acting Director
AD/CVD Operations, Office 6

SUBJECT: Final Scope Ruling; Antidumping Duty Order on Petroleum
Wax Candles from the People's Republic of China (A-570-504);
Rokeach Foods

Summary

On January 15, 2005, All-Ways Forwarding International Inc. (All-Ways) properly filed a request for a scope ruling on a box of 44 Chanukah¹ candles, on behalf of Rokeach Foods (Rokeach), to determine whether the candles 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); 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), the Department finds that Rokeach's candles are within the scope of the Order.²

Background

All-Ways originally filed its request for a scope determination on Rokeach's Chanukah candles on March 16, 2004, but it was improperly filed. On November 5, 2004, the National Candle Association (NCA), an interested party in this proceeding, filed comments opposing the

¹ In its request, Rokeach Foods alternates between two spellings: Channuka and Channukah, while the National Candle Association uses Channukah. For consistency, the Department has chosen to spell this word as Chanukah as we did in the Final Scope Ruling; Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China (A-570-504); Neatzit Israel International, Ltd. (November 18, 2004) (Neatzit Scope Ruling).

² 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/>. The Department will update the website periodically to include newly issued scope determinations.

March 16, 2004, request filed by All-Ways on behalf of Rokeach. On January 15, 2005, All-Ways confirmed that it had properly served its March 16, 2004, request. No rebuttal briefs were filed.

a. Product Description

The request filed by All-Ways, on behalf of Rokeach, concerns a group of candles, packaged in a box of 44, that are identified as Chanukah candles. Each candle is approximately 4 inches long and is approximately 3/4 of an inch wide at the base. With its request, All-Ways submitted a sample box of the involved Chanukah candles for our review. These candles are solid blue, red, white, orange, and yellow and have a series of colorless grooves that are etched into the wax. These grooves wrap up the candle like a barber's pole rising from the base to the wick of the candle.

b. Rokeach Foods' Request

All-Ways Forwarding describes the involved candles as 44 colored petroleum wax candles packed in a cardboard box. The dimensions of the box are 4 inches by 3 inches by 1.5 inches, according to the scope request. All-Ways provides five arguments as to why Rokeach's candles should not be included within the scope of the Order. First, according to Rokeach, these candles are used for religious purposes. Specifically, Rokeach states that the candles are used "only for the sole purpose of lighting a Menorah during the religious holiday of Chanukah." Rokeach continues by explaining that there are 44 candles in the box because the lighting of the Menorah during the religious holiday of Chanukah requires 44 candles. Second, according to Rokeach, the intended use of these candles is listed on the box and these candles are only offered for sale in the months of November and December. Rokeach also explains that these candles are only imported in the months prior to Chanukah and that the use of these candles is also clearly stated on the import invoice. Rokeach states that these candles are listed as "religious candles" on the entry summary, commercial invoice, and bill of lading. Third, according to Rokeach, the candles should be considered "household /utility candles," which Rokeach alleges are not within the scope of the Order according to the Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China: Simcha Candle Co. (February 12, 1993) (Simcha Scope Ruling). Fourth, according to Rokeach, these Chanukah candles have a specific shape because these candles are used in the religious lighting of the Menorah and therefore should be excluded from the Order. Finally, All-Ways, on behalf of Rokeach, included a copy of a Customs Information Exchange (CIE) - N212/85, dated March 20, 1989, which states that "party candles," which are used on cakes and desserts are not included in the scope of the Order.³

³ CIE -N212/85, which is a letter from the Department of Commerce to the U.S. Customs Service (now known as U.S. Customs and Border Protection (CBP) states:

The Department of Commerce has determined that candles which are 6 and 5/8 inches long and 1/8 inches wide are not within the scope of the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC). These "party candles" are used on cakes and desserts. This merchandise is used in the same manner as birthday candles. Such candles were excluded from the original investigation (3/20/86 telex to Customs). Therefore, these "party candles" are not within the scope of the

The National Candle Association's Comments

The NCA argues that Rokeach's Chanukah candles are tapers or spiral-shaped dinner candles, and as such Rokeach's candles are in the shapes specifically described in the Order. The NCA also argues that there is nothing on Rokeach's candle that indicates that its use would be exclusively limited to the Jewish holiday of Chanukah. The NCA points out that the candle does not have a Star of David on it, a symbol which would indicate that it was specifically designed for use only in connection with the Chanukah holiday. In addition, the NCA attached several candle advertisements to its November 27, 2002, comments, to show that Chanukah candles come in a variety of shapes and sizes. See NCA's November 27, 2002, comments (NCA's comments) at Exhibit 1. Furthermore, the NCA maintains that there does not appear to be any size limitation or color limitation to these alleged Chanukah candles, nor is there any design on the candle to limit their use exclusively to the Chanukah holiday. Finally, the NCA argues that these candles could be used throughout the year.

In its comments, the NCA retraces the history of this 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 on petroleum wax candles from the PRC. In support of its assertion, the NCA cites a Court of International Trade (CIT) decision, with regard to the novelty exception, in which the Court 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." See Russ Berrie & Co., Inc. v. United States, 57 F. Supp. 2d 1184, 1194 (CIT July 1999) (Russ Berrie). 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 solely in connection with a specified holiday.

The NCA notes that Rokeach's candles compete in the same channels of trade as the candles subject to the Order, and that the sale of these candles 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." The NCA 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 comments at 6). The NCA concludes by stating that Rokeach, with its claim that these candles are novelty candles, is now requesting that the Department narrow the scope of the Order so that everyday candles are not included. The NCA contends that the Department does not have such legal authority. With respect to CIE B212/85, September 21, 1987; Letter from the Director, Office of Compliance, to Burditt, Bowles & Radzius, Ltd., July 13, 1987 (Customs Notice),⁴ the NCA argues that the

antidumping duty order.

⁴ The Customs Notice was a notice issued by the Department to the U.S. Customs Service (now known as CBP) in connection with a July 1987 scope determination concerning an exception to the Order for

Department narrowly limited the novelty candle exception to figurine candles, candles shaped in the form of identifiable objects, and candles specifically designed for use solely in connection with a specified holiday. (NCA's comments at 4).

Legal Framework

The Department examines scope requests in accordance with the Department's scope regulations, which may be 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 International Trade Commission (the Commission). See 19 CFR 351.225(k)(1). 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 product 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 determination as to which analytical framework is most appropriate in any given scope inquiry is made on a case-by-case basis, with or without formal inquiry, after consideration of all evidence before the Department.

Pursuant to 19 CFR 351.225(k)(1), the Department will examine the description of the subject merchandise from the petition, the initial investigation, and the Commission's determinations. 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.

See 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 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.

novelty candles.

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); Final Determination; and 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. See Determinations of the Commission (Final), USITC Publication 1888, August 1986, at 4, note 5, and A-2 (Commission Determination). The Commission stated that "we determine that the domestic like product shall consist only of petroleum wax candles." See id. at 9. In its discussion of "like product," the Commission also stated:

Petroleum wax candles are those composed of over 50 percent petroleum wax, and may contain other waxes in varying amounts, depending on the size and shape of the candle, to enhance the melt-point, viscosity, and burning power.

See id., at 4-5.

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.

The Department clarified the scope of the Order in relation to certain novelty candles. See Russ Berrie, 57 F. Supp. 2d at 1194. In July 1987, the Department issued a notice to the United States Customs Service (Customs Notice) in connection with a scope ruling which provides:

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).

In November 2001, the Department changed its interpretation of the scope of the Order. 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) (J.C. Penney Ruling). In this ruling, the Department reviewed the text of the scope of the Order, beginning with the text of the first sentence of the scope which covers "{c}ertain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks." See Order. The text

following this broad, inclusive sentence provides a list of shapes; this list is not modified by any express words of exclusivity. The result of our prior practice of not including within the scope of the Order candles of a shape other than those specifically listed in the Order was inconsistent with the fact that the candles were scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks.⁵ In the J.C. Penney Ruling, the Department revised this practice because the old practice 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.

This approach of evaluating candles in light of the entire text of the Order's scope is in keeping with Duferco Steel, where the Court ruled 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. See Duferco Steel, Inc. v. United States, 146 F. Supp. 2d 913 (CIT 2001) (Duferco Steel).

Although the specific scope decision in Duferco Steel was overturned by the United States Court of Appeals of the Federal Circuit (CAFC) in Duferco Steel, Inc. v. United States, 296 F.3d 1087 (Fed. Cir. 2002) (Duferco Steel II), the CAFC's ruling does not undermine the Department's scope determination in the J.C. Penney Ruling. The plain language of the scope of the Order clearly states “{c}ertain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks . . . sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers” are included within the scope of the Order. Thus, the Order offers a descriptive list of the shapes of candles included within the Order, but as the courts have recognized, there is no requirement that every single product covered must be identified in the scope. More specifically, the CAFC has stated that “the petitions that led to the issuance of the order did not need to specifically identify the {product} in order to cover {it}; our precedent, to say nothing of the regulations, makes clear that neither a petition nor an antidumping or countervailing duty order requires that level of specificity.”⁶ The CAFC further stated “{a}s a matter of law, a petition need not list the entire universe of products . . . in order {for the petition} to cover those products.”⁷ Thus, as applied to this Order, there is no requirement, nor is it possible, for all the

⁵ 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. (January 11, 2000)(Endar Scope Ruling)(the Department determined that a “dragonfly” candle, in the shape of a rough-hewn stone with a dragonfly carved on top, should not be included within the scope because it is a shape not specifically listed by the language of the scope) and Final Scope Ruling Antidumping Duty Order on Petroleum Wax Candles from The People's Republic of China (A-570-504); American Drug Stores, Inc. (March 16, 1998)(the Department determined that a sphere or ball-shaped candle could not be included within the scope because it is a shape not specifically listed by the language of the scope).

⁶ Novosteel SA v. United States, 284 F.3d 1261, 1264 (Fed. Cir. 2002).

⁷ Id.

shapes of candles to be listed.⁸ In fact, if the list were exhaustive, there would have been no need for the Department to render a decision on novelty candles or any other candle that was not explicitly listed as a shape in the scope of the Order. However, the Department did issue the novelty candle exception, which offered a narrowly construed exception and left all other petroleum wax candles from the PRC covered by the Order.

When determining whether a particular novelty candle is within the scope of the Order, the Department will first determine whether the candle is made of petroleum wax. If the candle is made of petroleum wax, the Department will look to see whether the shape of the candle falls within those shapes listed in the second sentence of the scope as defined in the Order, *i.e.*, “tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers.” If the Department determines that a candle is one of these shapes explicitly listed in the Order, it is within the scope of the Order.

However, if the Department finds that a candle is not shaped like the shapes listed in the second sentence of the scope as defined in the Order, *i.e.*, taper, spiral, straight-sided dinner candle, round, column, pillar, votive, and various wax-filled containers, then the candle will be evaluated to determine whether it is a novelty candle. For a candle to qualify for this exception, the characteristic, which is claimed to render it, a novelty candle (*i.e.*, the shape of an identifiable object or a holiday-specific design) should be easily recognizable in order for the candle to merit not being included within the scope of the Order. Specifically, among other determining factors, the Department will examine whether the characteristic is identifiable from most angles and whether or not it is minimally decorative, *e.g.*, small and/or singularly placed on the candle. If the identifiable object or holiday-specific design is not identifiable from most angles, or if the design or characteristic is minimally decorative, the Department may determine that the candle should be included within the scope of the Order. 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); Final Scope Ruling Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); San Francisco Candle Co. (Feb. 12, 2001) (SFCC Ruling); San Francisco Candle Company, Inc. v. United States, 265 F. Supp. 2d 1374, 1379 (CIT 2003) (SFCC); and Endar Scope Ruling. If the 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 a fiber or paper-cored wick, the Department will determine that the candle is within the scope of the Order.

Analysis of Rokeach Foods’ Candles

With respect to the involved scope request, the Department finds that, for the reasons outlined below, the Chanukah candles in Rokeach’s request are included within the scope of the Order. We find that these candles are included within the scope of the Order because these candles are not recognizable objects, and because the candles do not otherwise qualify for the novelty exception, because these candles do not have any scenes or symbols that are exclusively

⁸ See Petroleum Wax Candles from China, USITC Pub. No. 3226 Investigation No. 731-TA-282 (Review) (August 1999) (USITC Pub. No. 3226), at 18 (“Candles come in a wide variety of shapes and sizes. Major U.S. candle manufacturers reportedly will offer 1,000 to 2,000 varieties of candles in their product lines”).

associated with Chanukah. We find that these candles are tapers, which are shapes specifically listed as falling within the scope of the Order. Our analysis of these candles is provided below.

All-Ways describes the involved candles as a box of 44 Chanukah candles, sold by Rokeach, which are used for religious purposes – during Chanukah. Rokeach contends that its candles should not be included within the scope of the Order because its candles are used in a religious observance.

First, we disagree with All-Ways’ argument that the involved candles are exclusively associated with the Chanukah holiday and should therefore not be included within the scope of the Order. There is nothing in the design, color, or decorations of the candles that would indicate that these candles are associated exclusively with the Chanukah holiday. These candles do not “{have} scenes or symbols of other occasions (e.g., religious holidays or special events) depicted in their designs.” See, e.g., Russ Berrie, 57 F. Supp. 2d. at 1194. Furthermore, the Department recently determined that Chanukah candles are included within the scope of the Order. See Neatzit Israel International, Ltd. (November 18, 2004) (Neatzit Scope Ruling).

The involved candles are identical to those examined in the Neatzit Scope Ruling; they are petroleum wax candles and they are in the shape of a taper. These candles are round and narrow or tapered to a smaller circumference at the top of the candle, as noted in the product description above. The explicit language of the Order specifically lists tapers, spirals, straight-sided dinner candles, rounds, columns, pillars, and votives, and various wax-filled containers as included within the scope of the Order. Because a taper is a shape listed by the inclusive language of the Order’s scope, these candles are included within the scope.

We find that All-Ways’ reliance on the Simcha Scope Ruling is misplaced. Under the Department’s new practice, the alleged use of the candle -- in this case the use of the candle as a “household/utility” candle -- is no longer considered. See Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles from the People’s Republic of China (A-570-504); TS Group, Inc. (May 21, 2002) (TS Group Scope Ruling); see also J.C. Penney Ruling. Pursuant to the new practice, we determine whether the subject candle is a shape 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”).

All-Ways provided the Department with copies of CIE-N212/85, which states that certain “party candles” are not within the scope of the Order. Given the fact that we no longer consider the alleged use of the candle, as noted above, All-Ways’ reference to the “party candles” exception is unavailing because we find that these candles are in the shape of tapers which are within the scope of the Order. See TS Group Scope Ruling; see also J.C. Penney Ruling.

As discussed above, we find that Chanukah candles are tapers, which are included within the scope of the Order. Moreover, the Chanukah candles do not qualify for any recognized exception. Therefore, we find that Rokeach’s Chanukah candles are included within the scope of the Order.

Recommendation

We recommend finding that Rokeach’s Chanukah candles are included within the scope of the Order because these are petroleum wax candles that do not have any scenes or symbols that are exclusively associated with a particular holiday and because the candles are in the shape of tapers. If you agree, we will send the attached letter to the interested parties, and will notify CBP of our determination.

_____Agree

_____Disagree

Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

Date