

A-570-504
Scope Review
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By Certified Mail, Return Receipt Requested

To All Interested Parties:

On March 14, 2002, the Department of Commerce (the Department) received a request from Peerless Umbrella Co., Inc. (Peerless), for a scope ruling on whether one type of candle it imports is 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 Peerless' candle falls 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 Sally Gannon at (202) 482-0162 or Brett Royce at (202) 482-4106.

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);
Peerless Umbrella Co., Inc.

Summary

On March 14, 2002, the Department of Commerce (the Department) received a request from Peerless Umbrella Co., Inc. (Peerless), for a scope ruling on one candle (a "five-pointed" 3.50 inch high star-shaped candle) to determine if it is covered by the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC) (the Order). 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 Peerless' candle falls within the scope of the Order.

Background

Peerless filed its request for a scope ruling in proper form on March 14, 2002. On April 25, 2002, the National Candle Association (NCA), an interested party in this proceeding, filed comments on Peerless' 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(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 Peerless' 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 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. Petroleum Wax Candles from the People's Republic of China: Initiation of Antidumping Duty Investigation, 50 FR 39743 (September 30, 1985); Preliminary Determination of Sales at Less Than Fair

Value, 51 FR 6016 (February 19, 1986); Final Determination; 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) (emphasis added).

Peerless' Scope Request

Peerless argues that the subject candle, a “five-pointed” star-shaped candle, is in the shape of an identifiable object, *i.e.*, a star, and, therefore, is not covered by the Order's scope. Peerless included a sample of its candle with its request.

Peerless notes that its candle stands upright on two of its five points, with the wick extending up from the point extending straight up. Peerless further notes that its scented candle is made from wax and contains a fiber or paper-cored wick. Peerless argues that the five-pointed star is clearly visible, and identifiable, from virtually all angles, citing Final Scope Ruling: Atico International, Inc. (February 19, 2002). Peerless notes that the Department's reliance on the July 1987 novelty candle exemption has been sanctioned by the CIT in its ruling in Russ Berrie & Co., Inc. v. United States (Slip-Op 99-61).

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, 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 contends that the subject candle is a column or pillar, and is not an identifiable object which can be discerned from the sides, the top, or the bottom. According to the NCA, “The Department has consistently held that candles such as that proposed by Peerless are columns or pillars that specifically fall within the scope of the Order” (NCA comments at 4). Furthermore, the NCA holds that the sole basis for the respondent’s claim for exclusion is its allegation that the subject candle is an identifiable object. The NCA also argues that the Department has previously held that star symbols or designs are not Christmas designs, and cites Final Scope Ruling: Meijer, Inc. (September 8, 1997) (Meijer) in support of its position. Further, the NCA argues that “[s]tar candles do not contain scenes or symbols specifically related to Christmas, nor is their use attributed solely to the Christmas season” (NCA comments at 5).

The NCA notes that Peerless’ “star-shaped” candle competes in the same channels of trade as the candles subject to the Order, and that its 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 Peerless 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.”

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) (Endar Corp.) (“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); and Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); 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 “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 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 (CIT 2001) (Duferco Steel). Such an approach is a 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 (CIT 1998).

Although the specific scope decision in Duferco Steel has recently been overturned by the United States Court of Appeals of the Federal Circuit (CAFC) in Duferco Steel, Inc. v. United States, 01-1443 (July 12, 2002) (Duferco Steel II), we do not believe that the Court's decision undermines the Department's decision in JC 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" fall within the scope of the Order. Thus, the Order offers a descriptive list of the shapes of candles falling 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."¹ It 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."² Thus, as applied to this Order, there is no requirement, nor is it possible, for all the shapes of candles to be listed.³ 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 render the novelty candle exception that offered an narrowly-construed exclusion, leaving all other petroleum wax candles from the PRC covered by the Order.

If the Department determines that the candle is made from petroleum wax and has a 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 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 exclusion from 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 does not qualify for exclusion from the Order under the novelty candle exception. See Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China

¹Novosteel SA v. United States, No. 01-1274, slip. op. at 2 (Fed. Cir., March 26, 2002) (reh'g and reh'r'g en banc denied).

²Id.

³See Petroleum Wax Candles from China, USITC Pub. No. 3226, Investigation No. 731-TA-282 (Review), at 18 (August 1999) ("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.").

(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 respect to the instant request, we find that for the reasons outlined below, the following candle falls within the scope of the Order.

Five-Pointed “Star-Shaped” Candle

Peerless argues that this candle, measuring 3.50 inches in height, 3.50 inches in width, and 2 inches in thickness, is an identifiable object, and should, therefore, be excluded from the scope of the Order. The Department disagrees with Peerless’ argument that its “star-shaped” candle is clearly an identifiable object. The star shape of this candle is unidentifiable when viewed from the candle’s top, bottom, and two of four sides, and is only identifiable as a star shape when viewed from either the candle’s front or back. Thus, since the star shape is not identifiable as such from most angles, Peerless’ candle cannot be considered a novelty candle.

Further, the Department has previously ruled that alleged star-shaped candles are within the scope of the Order. See Final Scope Ruling: Meijer, Inc. (September 30, 1999) and Final Scope Ruling: Barthco Trade Consultants, Inc. (April 30, 2001). In these two scope rulings, the Department noted that the star shape was not identifiable from most angles and that, instead, the candles at issue were pillar candles. Additionally, in Final Scope Ruling: Russ Berrie and Company, Inc. (September 2, 1997) the Department noted that “pillar candles come in various shapes and sizes, including straight-sided, fluted, triangular, hexagonal, and cylindrical shapes.” Standing the candle on its side does not alter the fundamental shape of the candle as a pillar. Thus, we find that the subject candle is a five-pointed pillar, a shape listed by the inclusive language of the Order’s scope, scented, made from petroleum wax and having a fiber-cored wick. For these reasons, this candle falls within the scope of the Order.

Summary

Peerless’ “star-shaped” candle, measuring 2 inches in thickness and 3.50 inches in height, is a five-pointed pillar. Thus, this candle falls within the scope of the Order. This conclusion is consistent with the scope of the investigation and the Order, as defined in the petition, as well as the Department’s and the Commission’s prior determinations.

Recommendation

Based on the preceding analysis, we recommend that the Department find Peerless' five-pointed "star-shaped" candle 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

Attachment