

By: E-mail Notification

To All Interested Parties:

On September 30, 2002, the Department of Commerce (the Department) received a request from Neatzit Israel International, Ltd. (Neatzit) for a scope ruling on whether a box of 44 “Chanukah candles” are included within the scope of 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)(2002), the Department has determined that Neatzit’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 Service of this decision. If you have any questions, please contact Sebastian Wright at (202) 482-5254.

Sincerely,

Barbara E. Tillman
Director
AD/CVD Operations, Office VI
Import Administration

Enclosure

MEMORANDUM FOR: Jeffrey A. May
Deputy Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Director
AD/CVD Operations, Office VI

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

Summary

On September 30, 2002, the Department of Commerce (the Department) received a request from Neatzit Israel International Ltd. (Neatzit) for a scope ruling on a box of 44 "Chanukah candles" to determine whether 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)); 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 Neatzit's candles are within the scope of the order on petroleum wax candles from the PRC.¹

Background

Neatzit filed its request for a scope ruling in proper form on September 30, 2002. On November 27, 2002, the National Candle Association (NCA), an interested party in this proceeding, filed comments opposing Neatzit's request. No rebuttal briefs were filed.

¹ The Department has developed an internet website that allows interested parties to access prior scope determinations regarding the order on Petroleum Wax Candles from the PRC. 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 rulings.

a. Product Description

Neatzit's request concerns a group of candles, which are packaged in a box of 44 that Neatzit identifies as "Chanukah candles." Each candle is approximately 4 inches long and is approximately ¼ of an inch wide near the wick, which expands to approximately ½ of an inch wide at the base. Neatzit submitted several samples of the candles for our review. These candles are solid yellow, white, and blue and have a series of colorless grooves that are etched into the wax, which wrap up the candle like a barber's pole rising from the base to the wick of the candle.

b. Neatzit's Request

Neatzit describes its candles as a box of 44 "Chanukah candles." Neatzit states that the candles' intended use is for people of the Jewish faith celebrating the Jewish holiday of Chanukah. Neatzit explains that Chanukah lasts 8 days, and that Jewish people are required to light 2 candles on the first night, 3 candles on the 2nd night, 4 candles on the 3rd night, 5 candles on the 4th night, 6 candles on the 5th night, 7 candles on the 6th night, 8 candles on the 7th night and 9 candles on the 8th night for a total of 44 candles. Neatzit points out that Jewish law prohibits anyone from using these candles as a source of light and that the candles can only be used to observe the Jewish law of lighting candles to celebrate Chanukah. Neatzit notes that these candles are classified under HTS 9505.90 for festive articles. Neatzit contends that its candles should be excluded from the scope of the Order because they are used in a religious observance.

The National Candle Association's Comments

The NCA argues that Neatzit's "Chanukah candles" are tapers or spiral-shaped dinner candles which are in the shapes described in the Order. The NCA also argues that there is nothing on Neatzit's candle that indicates that its use would be 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 Exhibit 1, NCA's November 27, 2002 response. 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. Therefore, the NCA argues that, neither the candles in the advertisements, nor Neatzit's candle, qualify for the novelty candle exclusion.

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) conclusion, 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 Ruling). 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 Neatzit’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.” 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 5). The NCA concludes by stating that Neatzit 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. With respect to CIE –212/85, September 21, 1987; Letter from the Director, Office of Compliance, to Burditt, Bowles & Radzius, Ltd., July 13, 1987 (Customs Notice), 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. (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 (2002). 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.

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 Commission Determination, 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 Commission Determination, 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 Ruling at 1194. In July 1987, the Department issued a notice to the United States Customs Service (since renamed the U.S. Customs and Border Protection) (CBP) 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).

See Customs Notice. 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.”² 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.

² 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) (The Department determines that a “dragonfly” candle, in the shape of a rough-hewn stone with a dragon fly carved on top, should not be included within the scope because it is of 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 should not be included within scope because it is a shape not specifically listed by the language of the scope).

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

Although the specific scope decision in Duferco Steel has been 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 Court'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.”³ 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.”⁴ Thus, as applied to this Order, there is no requirement, nor is it possible, for all the shapes of candles to be listed.⁵ 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.

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

⁴ Id.

⁵ 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”).

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, 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. 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 Neatzit’s Candles

With respect to the instant scope request, the Department finds that, for the reasons outlined below, the “Chanukah candles” in Neatzit’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, nor do the candles qualify for the holiday novelty exception because these candles do not have any scenes or symbols that are exclusively associated with Chanukah. These candles are tapers which are specific shapes covered by the Order. Our analysis of these candles is provided below.

1. “Chanukah Candle”

Neatzit describes its candles as a box of 44 “Chanukah candles.” Neatzit states that the intended use of the candles is for people of the Jewish faith celebrating the Jewish holiday of Chanukah. Neatzit explains that Chanukah lasts 8 days, and that Jewish people are required to light 2 candles on the first night, 3 candles on the 2nd night, 4 candles on the 3rd night, 5 candles on the 4th night, 6 candles on the 5th night, 7 candles on the 6th night, 8 candles on the 7th night and 9 candles on the 8th night for a total of 44 candles. Neatzit points out that Jewish law prohibits anyone from using these candles as a source of light and that the candles can only be used to observe the Jewish law of lighting candles to celebrate Chanukah. Neatzit notes that these candles are classified under HTS 9505.90 for festive articles. Neatzit contends that its candles should be excluded from the scope of the Order because they are used in a religious observance.

We disagree with Neatzit’s argument that the involved candles are exclusively associated with the Chanukah holiday and should therefore be excluded from the scope of the order on petroleum wax candles from the PRC. The Department disagrees with Neatzit’s contention that these candles are exclusively associated with a recognized holiday. There is nothing in the design, color, or decorations that would indicate that these candles are associated solely with the Chanukah holiday. More specifically, the candles are not novelty candles “{h}aving scenes or symbols of other occasions (e.g., religious holidays or special events) depicted in their designs.” See e.g., Russ Berrie Ruling. These candles are tapers that are solid blue, yellow, and white in color. There is nothing on the candles indicating that it is specifically a “Chanukah candle.” Thus, the Department has ruled in the past that candles, which do not contain “scenes or symbols specifically related to a holiday or other special event,” are within the scope of the Order because their use is not attributable solely to the holiday season. See e.g., Russ Berrie Ruling; see also Final Scope Ruling – Petroleum Wax Candles from the People’s Republic of China; Star Merchandise Inc. (Star) (July 27, 1994).

The subject candles are petroleum wax candles in the shape of a taper; they are round and narrow or tapered to a smaller circumference at the top of the candle, as noted in the product description above. Tapers are a shape described within the scope of the Order and accordingly, these candles are included in the order. The language of the order includes tapers, spirals, straight-sided dinner candles, rounds, columns, pillars, and votives and various wax-filled containers. Because a taper is a shape listed by the inclusive language of the Order’s scope, these candles are included within the scope. Neatzit’s explanation of the use of the candles, the Jewish law, and the marketing of the candles does not warrant excluding an otherwise in-scope candle from the Order. Consistent with our practice, we do not consider the requestor’s intent or marketing, i.e., the intended use of the candles. See J.C. Penney Ruling.

Recommendation

We recommend finding that the Neatzit’s “Chanukah candles” are included within the scope of the order on petroleum wax candles from the PRC because these candles 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

Jeffery A. May
Deputy Assistant Secretary
for Import Administration

Date