A-570-504
Scope Review
PUBLIC DOCUMENT
Operations (6): JA

By Electronic Mail Notification

To All Interested Parties:

The Department of Commerce (the Department) received a request from Dollar Tree Stores, Inc. (Dollar Tree) for a scope ruling on seventeen sets of candles it imports to determine whether these candles are covered by the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC).

In accordance with 19 CFR 351.225(k)(1)(2002), the Department has determined that sixteen of Dollar Tree's seventeen sets of candles are included within the scope of the antidumping duty order on petroleum wax candles from the PRC. The Department further determines that the remaining Dollar Tree candle set is not included within the scope of the order on petroleum wax candles from the PRC.

Enclosed is a memorandum containing the Department's analysis. We will notify 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 Office Director
AD/CVD Operations, Office 6
Import Administration

Enclosure

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

FROM: Dana S. Mermelstein
Acting Office 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); Dollar Tree Stores, Inc.

Summary

On March 7, 2003, the Department of Commerce (the Department) received a request from Dollar Tree Stores, Inc. (Dollar Tree) for a scope ruling on seventeen (17) sets of candles (with the following SKU numbers: 806827, 806825, 813804, and 130660) to determine whether these candles 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 sixteen of Dollar Tree's seventeen sets of candles should be included within the scope of the Order. We further recommend that the Department determine that the remaining candle set is not included within the scope of the Order.[1]

[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/. The Department will be update the website periodically, to include newly issued scope rulings.

Background

a. Product Descriptions

Dollar Tree's request concerned 17 floral and holiday candles packaged in sets. The candle sets were identified by the following SKU numbers: 806827, 806825, 813804, and 130660.[2]

SKU 806827 covers five styles of candles. While these candles are sold in sets, Dollar Tree chose to submit one sample of each one of these five candle styles because these sets contain four identical candles in different colors. Attachment 1 of Dollar Tree's May 7, 2003, submission contains copies of digital photographs showing these five styles as sold with four identical candles in each of these five styles.[3]

The first style of candle with SKU 806827 is reported to be a molded "butterfly" floater, which is light purple with white spots and a darker purple trim, resting on a patch of "green flora" and a "pink flower bud." The second style of candle with SKU 806827 is an "orchid stem." The "orchid stem" appears as if its bloom was cut near the top of the stem. The "orchid stem" has individually molded petals in a light pink color with the pistil visible in the interior of the candle. Also, the petals, which rise from the center of the candle and extend outward, have veins etched into the petals. The third, fourth and fifth styles of candles with SKU 806827 are reported to be "flower buds," which are orange, green, and blue in color. Dollar Tree provided one sample of each style of candle with SKU 806827.

SKU 806825 consists of five styles of candles. Dollar Tree provided one sample of each style of candle with SKU 806825. The first four styles of candles are reported to be different molded "flower buds," which are purple, magenta, light magenta, and aqua green in color. The fifth style of candle is reported to be a "yellow butterfly" with two black eyes posed on a stem or post. Dollar Tree provided one sample of each style of candle with SKU 806825.

SKU 813804 consists of three sets of three candles reported to be in the shape of one of three types of autumn leaves in alternating hues of the following three colors: red, green and orange.[4] Each of the

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[2] Both SKU 806827 and 806825 consist of five sets of different styles of candles. SKU 813804 consists of three sets of assorted autumn leaf candles. SKU 130660 consists of four sets of different styles of candles.

[3] Because the copies of photographs provided in Attachment 1 of the May 7, 2003 submission were not very clear, we requested that Dollar Tree email digital photographs to the Department. These color photographs are on the record of this proceeding. See Memorandum from Jacqueline Arrowsmith to the File, dated October 14, 2004.

[4] On September 23, 2004, the Department requested a clarification of what types of leaves were contained in each of the "assorted autumn leaves" floater candle sets. On October 1, 2004, the Department received an email with photographs of three leaves attached from Dollar Tree. Dollar Tree claims that one of the leaves is a flowering dogwood, while the remaining two are oak leaves. See

leaves in all of these sets have molded outlines and veins defining the leaf segments in glitter. The wick is centered on the top side of each candle. Dollar Tree provided one sample of each autumn leaf with SKU 813804.

SKU 130660 consists of four styles of shaped floaters with winter themes sold in sets. The first set of candles with SKU 130660 consists of four individual snowman-head-shaped candles, packaged with a few tiny white snowflake-shaped floaters. Dollar Tree provided one sample of the snowman-head-shaped candle, but Dollar Tree did not provide a sample of the tiny white snowflake-shaped floaters that accompany the snowman-head-shaped candles. Dollar Tree provided a digital photograph of this set. See footnote 3 above. When examining the digital photographs, the snowflake-shaped floaters can be seen in the middle of the package containing four snowman-head-shaped candles. The snowman-head-shaped candle, of which Dollar Tree provided a sample, is made from a white colored wax and has a face with two eyes, a nose and lips painted on, as well as a painted red hat and painted green scarf.

The second set of candles with SKU 130660 is reported to consist of four individual red poinsettias packaged with "tiny" green leaf stem candles. The "tiny" green leaf stem candles can be seen in the middle of the package containing the red poinsettia candles in the digital photograph of this set that Dollar Tree provided to the Department. See footnote 3 above. Dollar Tree provided one sample of the red poinsettia candle, but no samples of the tiny-shaped green leaf stem floaters that accompany the red poinsettia candles. The red poinsettia candle, of which Dollar Tree provided a sample, has yellow dots painted around the wick and glitter sprinkled on top of the molded veins.

The third set of candles with SKU 130660 is reported to consist of four individual "holly leaf with red berries" candles packaged with tiny red berry candles. Originally, Dollar Tree provided one sample of its "holly leaf with berries" candle. This candle is purplish brown (not green as stated in the scope request). Glitter is sprinkled on top of the molded veins, and a wick is centered on the top of the candle. Dollar Tree provided a photograph of this set of candles. See footnote 3 above. In response to the Department's August 25, 2004, request, Dollar Tree provided the Department with a sample of the rest of the candles in the "holly leaf with red berries" set (SKU 130660). The set provided by the respondent consists of three other purplish brown "holly leaf with red berries" candles with glitter sprinkled on top of the molded veins. It also consists of groupings of numerous clusters of red, round berries.

The fourth set of candles with SKU 130660 reportedly contains four larger individual molded white snowflake-shaped candles packaged with "tiny" snowflake-shaped floaters. Dollar Tree provided one sample of the larger individual molded white snowflake-shaped candle; however, Dollar Tree did not provide a sample of the "tiny" snowflake-shaped floaters. The snowflake-shaped candle resembles a six-pronged star-shaped candle with glitter. Dollar Tree provided a digital photograph of the

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Memorandum from Jacqueline Arrowsmith to the File, dated October 14, 2004.

snowflake-shaped candles packaged with "tiny" snowflake-shaped floaters. See footnote 3 above. When the digital photograph is examined, the "tiny" snowflake-shaped floaters can be seen in the middle of the package containing the four large snowflake-shaped candles.

b. Dollar Tree Stores, Inc.'s Request

Dollar Tree filed its request for a scope ruling in proper form on March 7, 2003. On June 5, 2003, the National Candle Association (NCA), petitioner and an interested party in this proceeding, filed comments on Dollar Tree's request.

Dollar Tree states that the shapes, colors, and patterns of its candles subject to this inquiry ("butterfly" floater, molded "orchid stem," molded "flower bud," "assorted autumn leaves," and "Christmas" floater candles) (SKU numbers 806827, 806825, 813804, and 130660) qualify these candles for exclusion from the scope of the Order under 19 C. F. R. § 351.225(k)(1) of the Department's regulations based on the primary criteria.

Dollar Tree argues that in the Letter from the Director, Office of Compliance, U.S. Customs Service to Burditt, Bowles & Radzius, Ltd., dated September 21, 1987, in connection with a July 1987 scope determination (CIE 212/85)(Customs Notice), the Department through the U.S. Customs Service explicitly provides guidance concerning when certain identifiable objects are excluded from the scope of the Order.[5] Dollar Tree argues that the Customs Notice clearly indicates that "identifiable objects" are excluded from the Order. (Dollar Tree's March 7, 2003, submission at page 6).

Dollar Tree argues that the Customs Notice clarifies that figurine candles in the form of identifiable objects were excluded from the scope of the Order because the only shapes covered by the Order are tapers, spirals, straight-sided dinner candles, rounds, columns, pillars and votives. Russ Berrie & Co., Inc. v. United States, 57 F.Supp. 2d 1184, 1194 (CIT 1999)(Russ Berrie).

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[5] The Customs Notice was a notice issued by the Department to the U.S. Customs Service (now known as Customs and Border Protection (CBP)) in connection with a July 1987 scope determination concerning an exception to the Order for novelty candles, which states:

> The Department of Commerce has determined that certain novelty candles, such as Christmas novelty candles, are not within the scope of the antidumping duty order on petroleum-wax candles from the People's Republic of China (PRC). Christmas novelty candles are candles specially designed for use only in connection with the Christmas holiday season. This use is clearly indicated by Christmas scenes and symbols depicted in the candle design. Other novelty candles not within the scope of the order include candles having scenes or symbols of other occasions (e.g. religious holidays or special events) depicted in their designs, figurines candles, and candles shaped in the form of identifiable objects (i.e., animals or numerals).

Additionally, Dollar Tree argues that the Department, in past rulings, has determined that an "identifiable object" has to be identifiable from multiple angles and must have more than minimally decorative features characteristic of the object. Dollar Tree asserts that all of its candles are identifiable objects with the exception of when the candles are viewed from below. However, Dollar Tree argues its candles are not meant to be viewed from below.

Dollar Tree argues that the Department has previously determined that candles similiar to the molded leaf and flower candles submitted as part of this scope request fall outside 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. (November 9, 2001)(J.C. Penney Scope Ruling)(the Department determined that the two rose blossom candles and one autumn leaf candle were outside the scope of the order because they were identifiable as rose blossoms and a leaf from most angles). Specifically, Dollar Tree argues that there does not appear to be any meaningful distinction between Dollar Tree's molded leaf and flower candles and those that were examined in the J.C. Penney Scope Ruling that would justify including them in the scope of the Order.

With respect to the Department's requirement that for a candle to qualify as an identifiable object, the image must be viewable from multiple angles, Dollar Tree cites Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504); Endar Corporation (January 11, 2000)(Endar 2000 Ruling) as the lead scope ruling regarding this requirement, where the Department determined that "a single ring and knot on a bamboo pillar do not make it identifiable as bamboo from most angles." Dollar Tree further argues that the Endar 2000 Ruling did not establish the criterion that the candle must be viewable from the bottom because the bottom of a candle is always obscured.

With respect to Dollar Tree's "Christmas" floater candles (SKU 130660), Dollar Tree argues that the Customs Notice specifically excludes Christmas novelty candles which are "specially designed for use only in connection with the Christmas season" from the scope of the Order. With respect to Dollar Tree's "snowman," "poinsettia," "holly leaf with red berries," and "snowflake" candles, Dollar Tree argues that the candles' shapes, and the arrangement of symbols, colors, and patterns, are clearly evocative of the Christmas holiday and is very specific to Christmas (Dollar Tree's March 7, 2003, submission at page 8). Dollar Tree further argues that regardless of whether the Department analyzes its "Christmas" floater candles within the context of the Christmas novelty or identifiable object exception, these candles should not be included within the scope of the Order.

c. The National Candle Association's Comments

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. 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 Berrie, 57 F. Supp. 2d at 1194-1195. 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.

With regard to Dollar Tree's "assorted autumn leaves" candle sets (SKU 813804) and its "holly leaf with red berries" candle sets (SKU 130660), the NCA argues that these candles have a flat bottom and are too thick to depict the shape of a leaf. Additionally, the NCA argues that Dollar Tree cannot change an in-scope candle (a short pillar) into an identifiable object "by merely putting a molded or textured surface on it." Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504); American Greetings Corporation (May 4, 2000) (American Greetings Ruling)(where the Department determined that a molded decoration depicting multicolored flowers on a taper does not change a taper into an out-of-scope candle). Further, the NCA argues Dollar Tree's "assorted autumn leaves" candle sets (SKU 813804) and its "holly leaf with red berries" candle sets (SKU 130660) resemble short pillars and do not indicate any characteristic of a leaf. With respect to Dollar Tree's "holly leaf with red berries" candle set, the NCA also argues that this candle does not look like a sprig of "holly leaf with red berries," and, therefore, cannot be identified as such.

Turning to Dollar Tree's "molded orchid stem" and "molded flower bud" candles (SKU 806827), "molded flower bud" candles (SKU 806825), and "poinsettia" candle set (SKU 130660), the NCA argues that these candles are in the shape of rounds, a shape that is specifically listed as within the scope of the Order. As with Dollar Tree's "assorted autumn leaves" candle sets (SKU 813804) and its "holly leaf with red berries" candle sets (SKU 130660) listed above, the NCA argues that Dollar Tree cannot change a round candle into an identifiable object merely by putting a textured surface on the top of the candles. With respect to Dollar Tree's "butterfly floater" (SKU 806827) and "butterfly" candles (SKU 806825), the NCA argues that these candles are round candles which should be included within the scope of the Order, and that these candles are not identifiable as a butterfly from any angle except from the top of the candle.

With respect to Dollar Tree's "snowman head" and "snowflake" candle sets (SKU 130660), the NCA argues these candles are not in the shape of identifiable objects. The NCA further argues that the bottom of the candles are flat, and that, from the bottom and sides of the candles, the involved candles cannot be distinguished as being a snowman or a snowflake. The NCA also argues that a snowflake and a snowman are generic designs or themes that are identifiable with the winter season and are not designed solely for use during the Christmas holiday. The NCA argues that these candles are pillar candles that fall within the scope of the Order.

The NCA argues that Dollar Tree'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 "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" (the NCA's June 5, 2003, comments at page 6). The NCA concludes by stating that Dollar Tree 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.

Legal Framework

The Department examines scope requests in accordance with the Department's scope regulations, which may be found at 19 CFR 351.225 (2003). 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 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.

The Department clarified the scope of the Order in relation to certain novelty candles. See Russ Berrie Ruling 57 F. Supp 2d at 1194. In 1987, the Department issued a notice to 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.

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 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.

In November 2001, the Department changed its interpretation of the scope of the Order. See J.C. Penney Scope 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."[6] In the J.C. Penney Scope Ruling, the Department revised this practice because the former 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, 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

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[6] 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 dragonfly 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).

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 CAFC's ruling does not undermine the Department's scope determination in the J.C. Penney Scope 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."[7] 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."[8] Thus, as applied to this Order, there is no requirement, nor is it possible, for all the shapes of candles to be listed.[9] 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, it is within the scope of the Order.

If the Department finds that a candle's shape is not among 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

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

[8] Id.

[9] 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").

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 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 Dollar Tree's Candles

With respect to the involved scope request, the Department finds that, for the reasons outlined below, sixteen of the seventeen candle sets in Dollar Tree's request should be included within the scope of the Order, because these candles are not recognizable as the objects claimed by Dollar Tree, and because these candles do not have any scenes or symbols that are exclusively associated with the Christmas holiday. The Department finds that the one remaining candle set in Dollar Tree's request should not be included within the scope of the Order, because this style of candle is recognizable as the object Dollar Tree claimed, and, thus, this candle set qualifies for the novelty exception. Our analysis of each of these candles is provided below.

1. **Molded "Flower Bud" Candle - Purple (SKU 806825)**
2. **Molded "Flower Bud" Candle - Magenta (SKU 806825)**
3. **Molded "Flower Bud" Candle - Light Magenta (SKU 806825)**
4. **Molded "Flower Bud" Candle - Aqua Green (SKU 806825)**
5. **Molded "Butterfly" Candle - Yellow (SKU 806825)**

Dollar Tree describes its molded "flower bud" candles (candles #1 through #4) as three different single-color, molded flower bud candles, viewable from all angles as if they were cut completely from the stems. Dollar Tree's "flower bud" candles are in purple, magenta, light magenta, and aqua green with petals extending from the base of the candle in all directions. Dollar Tree describes its molded "butterfly" candle as a dark yellow candle, in the shape of a butterfly, containing white patterns painted on the top surface of its wings.

We disagree with Dollar Tree's arguments that candles #1 through #5 are in the shape of identifiable objects and, therefore, should not be included within the scope of the Order. Pursuant to the Department's change in practice stated in the J.C. Penney Scope Ruling, if a candle is not in a shape specifically listed in the Order's scope, it will not automatically be excluded from the scope of the Order. See J.C. Penney Scope Ruling. Instead, the Department will normally evaluate whether the candle is a scented or unscented petroleum wax candle made from petroleum wax and having a fiber or paper-cored wick. In the involved case, the molded "flower bud" candles in purple, magenta, light magenta, and aqua green (SKU 806825), and the molded "butterfly" candle - yellow (also SKU 806825), are petroleum wax candles with fiber-cored wicks. Therefore, we must evaluate whether the characteristics of these candles bring them outside of the scope of the Order pursuant to the novelty candle exception detailed in the Customs Notice.

Based on Dollar Tree's comments, we examined whether candles #1 through #4 are in the shape of flower buds. We found that these candles contain protrusions, which are visible as petals from the top of the candle. However, when the candles are viewed from the sides, the protrusions are not discernible as petals. These petals are not individually molded, so that when viewed from the sides, these four flower bud candles appear to be circular without any identifiable flower motif. Given that the flower bud motif is only identifiable from above the candle, we find the four molded "flower bud" candles in purple, magenta, light magenta, and aqua green (SKU 806825) are not identifiable as flower buds from a majority of angles. See San Francisco Candle Co. v. United States, 265 F.Supp. 2d 1274 (May 14, 2003).

With respect to candle #5, the "molded butterfly" in yellow (SKU 806825), the bright yellow trim and white spots are only visible from the top of the candle. In addition, we find that this candle is only viewable as a butterfly when viewed from the top. We also find that the eyes on the butterfly are only minimally decorative features and are only visible from the front of the candle. When viewed from the various side views, the butterfly shape and the wings are not apparent and the candle does not appear to be in the shape of an identifiable object. Therefore, because these candles are not easily recognizable as molded "flower bud" and "butterfly" candles from multiple angles, we find that they are not identifiable objects and that these candles do not qualify for the novelty exception. Thus, the Department finds that these candles, candles #1 through #5, should be included within the scope of the Order.

6. "Assorted Autumn Leaves" Floater Candle Sets (SKU 813804)
7. "Assorted Autumn Leaves" Floater Candle Sets (SKU 813804)
8. "Assorted Autumn Leaves" Floater Candle Sets (SKU 813804)

Dollar Tree described these candles as three candle sets each containing three of one of three autumn leaf-shaped candles in assorted colors.[10] Dollar Tree also stated that the candles in the

[10] On September 23, 2004, the Department requested a clarification of what types of leaves were contained in each of the "assorted autumn leaves" floater candle sets. On October 1, 2004, the

"assorted autumn leaves" sets have molded outlines and veins clearly defining leaf segments. The leaves consist of colored wax and glitter in alternating hues of red, green, and orange. The wick for these candles is centered on the top of each leaf, e.g., the side intended to be floating (face-up) in the water.

We disagree with Dollar Tree's arguments that candles #6 through #8 should be excluded from the scope of the Order because these candles are identifiable objects. Pursuant to the Department's change in practice stated in the J.C. Penney Scope Ruling, if a candle is not in the shape specifically listed in the Order's scope, it will not automatically be excluded from the scope of the Order. See J.C. Penney Scope Ruling. Instead, the Department will normally evaluate whether the candle is a scented or unscented petroleum wax candle made from petroleum wax and having a fiber or paper-cored wick. In the involved case, the "assorted autumn leaves" candles (candles #6 through #8) with SKU 813804 are petroleum wax candles with fiber-cored wicks. Therefore, we must evaluate whether the characteristics of these candles bring them outside of the scope of the Order pursuant to the novelty candle exception explained in the Customs Notice.

Based on Dollar Tree's comments, we examined whether the candles in these sets are in the shape of identifiable objects. We reviewed the digital photographs of these three candle sets with SKU 813804 ("assorted autumn leaves") contained in Attachment 1 of the submission, which we had Dollar Tree email on August 25, 2004, and have since placed on the record of this scope proceeding. See Memorandum from Jacqueline Arrowsmith to the File, dated October 14, 2004. We also examined a sample of one of each of the candles in the "assorted autumn leaves" candle set that Dollar Tree provided to the Department. We disagree with Dollar Tree that the subject candles' shapes, when viewed from most angles, can be clearly identified as leaves. In fact, only when the candles are viewed from the top is the leaf shape apparent. Moreover, the painted veins on the candle are only viewable from the top of the candle. These candles are not discernible as leaves when viewed from the sides or from the bottom. Therefore, because these candles are not easily recognizable from multiple angles as autumn leaves, they are not an identifiable object and do not qualify for the novelty candle exception. See Hallmark Cards, Inc. Scope Decision (May 17, 2004) at 8; see also San Francisco Candle Co. v. United States, 265 F. Supp. 2d 1274 (May 14, 2003). Thus, we find that these candles should be included within the scope of the Order.

Department received an email with photographs of three leaves attached. Dollar Tree claims that one of the leaves is a flowering dogwood, while the remaining two are identified as oak leaves. See Memorandum from Jacqueline Arrowsmith to the File, dated October 14, 2004.

9. "Christmas" Floater Candle - Snowman Head (SKU 130660)
10. "Christmas" Floater Candle - Red Poinsettia (SKU 130660)
11. "Christmas" Floater Candle - Molded White Snowflake (SKU 130660)
12. "Christmas" Floater Candle - Holly Leaf with Red Berries (SKU 130660)

Dollar Tree describes its "Christmas" floater candles as four sets of shaped floaters with Christmas themes, with the four styles containing the following: four individual snowmen with snowflake-shaped floaters; four individual "red poinsettias" along with green leaf stem floaters; four individual green "holly leaves with red berries;"[11] and four individual molded white "snowflakes" along with smaller snowflake-shaped floater candles.

We disagree with Dollar Tree's arguments that these candles (candles #9 through #12) should be excluded from the scope of the Order because these candles qualify for the novelty exception. As discussed below, Dollar Tree's arguments are incorrect because the involved candles are neither identifiable objects nor do they contain scenes or symbols associated with the Christmas holiday. As the Department has previously found, where a candle is not in the shape specifically listed in the Order's scope, it will not automatically be excluded from the scope of the Order. See J.C. Penney Scope Ruling. Instead, the Department will normally evaluate whether the candle is a scented or unscented petroleum wax candle made from petroleum wax and having a fiber or paper-cored wick. In the involved case, the assorted "Christmas" floater candles with SKU 130660 are petroleum wax candles with fiber-cored wicks. Based on Dollar Tree's comments, we examined whether these four candles are in the shape of identifiable objects.

We reviewed the digital photographs of the four "Christmas" floater candle sets (SKU 130660) contained in Attachment 1 of the submission, which we had Dollar Tree email in color on August 25, 2004, and have since placed on the record. See Memorandum from Jacqueline Arrowsmith to the File, dated October 5, 2004. We examined one sample of each of the following candles: "snowman," "red poinsettia," "snowflake," and "holly leaf with red berries." We considered first whether these four candles sets should not be included in the scope of the Order based on whether these candles are in the shapes of identifiable objects. We further considered Dollar Tree's argument that we should also consider whether these four "Christmas" floater candle sets should not be included in the scope of the Order based on their "Christmas holiday design."

[11] Dollar Tree's March 7, 2003, submission states that "{t}he third style consists of four individual green holly leaves with red berries on the surface that would float face up," at page 4. The digital photographs Dollar Tree emailed the Department on August 25, 2004, show that the set of "holly leaf with berries" candles are green in contrast to the "holly leaf with berries" sample candle, which is a purplish brown color. See Memorandum from Jacqueline Arrowsmith to the File, dated October 14, 2004. For this reason, the Department requested a sample of the entire set of "holly leaf with berries" candles. The three remaining "holly leaf with berries" candles are also purplish brown in color.

We disagree with Dollar Tree's arguments that the "Christmas" floater candles ("snowman head," "red poinsettia," "snowflake," and "holly leaf with red berries") are in the shape of identifiable objects. Dollar Tree's "snowman head" candle is not a snowman-shaped candle, but rather a shaped candle that is decorated from the top so that it is identifiable as a snowman's head only when viewed from above. Dollar Tree's candles are arguably identifiable as "red poinsettia," "molded white snowflake," and "holly with red berries" only when viewed from the top of the candles. None of the "Christmas" floater candles are identifiable as a "snowman," "red poinsettia," "holly leaf with red berries" and "molded white snowflake" from their numerous sides.

We also find that Dollar Tree's "holly leaf with red berries" candle does not qualify as a Christmas holiday candle. Although the CIT previously held in Springwater Cookie & Confections v. United States, 20 CIT 1192 (1996)(Springwater) that holly sprigs are indeed a symbol associated with Christmas, the CIT also held that "in order for a candle to qualify for this exception, the characteristic which is claimed to render it a novelty candle should be easily recognizable in order for the candle to merit exclusion from the Order." See Springwater, 20 CIT at 1196. Dollar Tree's "holly leaf with red berries" is not recognizable as a holly leaf because its shape is not discernible from multiple angles and because it is a purplish brown color and not green as the holly sprig associated with the Christmas holiday. The "holly leaf with red berries" candle is included within the scope of the Order because it is not identifiable from most angles. See San Francisco Candle Co. v. United States, 265 F. Supp. 2d 1274 (May 14, 2003). As we noted in the Department's Remand Determination for SFCC I and affirmed by the CIT, "the Department recognized that the 'identifiable from most angles' benchmark was appropriately applied...to candles allegedly associated with a recognized holiday as well as to candles in the shapes of identifiable objects, because these characteristics both fall under one and the same exception to the scope of the Order: the novelty candle exception." See Id. 1380.

In addition, the Department has ruled in the past that shaped candles not containing "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 Christmas or holiday-specific season. See e.g., Russ Berrie Scope Ruling; see also Final Scope Ruling - Petroleum Wax Candles from the People's Republic of China; Star Merchandise Inc. (Star) (July 27, 1994)(the Department determined not to include a "snowman" candle within the scope of the Order where the candle was in the shape of a snowman with a red Santa hat, cradling a small gift in one arm, and a small Christmas tree in the other). The subject "snowman," "red poinsettia," "molded white snowflake" and "holly leaf with red berries" do not qualify for the novelty exception as "identifiable objects" because these candles are not identifiable objects when viewed from most angles. The "snowman head," "red poinsettia," and "molded white snowflake" candles do not qualify for the holiday novelty exception because these candles do not have any scenes or symbols that are exclusively associated with the Christmas holiday. The "holly leaf with red berries" candle does not qualify for the novelty exception as a holiday candle, because it does not

contain the traditional green color associated with a holly leaf or sprig and because it is not recognizable from most angles as a holly leaf. Therefore, we have determined that the subject candles should be included within the scope of the Order.

13. Molded "Flower Bud" Candle - Orange (SKU 806827)
14. Molded "Flower Bud" Candle - Green (SKU 806827)
15. Molded "Flower Bud" Candle - Blue (SKU 806827)
16. "Butterfly" Floater Candle (SKU 806827)

Dollar Tree describes its molded "flower bud" candles in orange, green, and blue (SKU 806827) as single-color molded flower buds in orange, green, and blue with multiple layers of individually molded petals in the buds. Dollar Tree describes its "butterfly" floater candle (also with SKU 806827) as a purple wax butterfly floater, with a painted pattern on its wings, on green flora with a pink bud. Dollar Tree also states that the flora is identifiable from below but is partially obscured by the butterfly from below.

We disagree with Dollar Tree's arguments that candles #13 through #16 are in the shape of identifiable objects and ,therefore, should not be included within the scope of the Order. Pursuant to the Department's change in practice stated in the J.C. Penney Scope Ruling, if a candle is not a shape specifically listed in the Order, it will not automatically be excluded from the scope of the Order. Instead, the Department will normally evaluate whether the candle is a scented or unscented petroleum wax candle made from petroleum wax and having a fiber or paper-cored wick. In the involved case, the molded "flower bud" candles in orange, green, and blue (SKU 806827) and the molded "butterfly" candle (also SKU 806827) are petroleum wax candles with fiber-cored wicks. Therefore, we must evaluate whether the characteristics of these candles bring them outside of the scope of the Order pursuant to the novelty candle exception detailed in the Customs Notice.

Based on the comments submitted by both Dollar Tree and the NCA, we examined whether candles #13 through #16 are in the shape of identifiable objects (i.e., flower buds and a butterfly). We examined the digital photographs of the molded "flower buds" in orange, green, and blue (SKU 806827), and the "butterfly" candle sets (SKU 806827), contained in Attachment 1 of the submission, which we had Dollar Tree email to the Department on August 25, 2004, and have since placed on the record. See Memorandum from Jacqueline Arrowsmith to the File, dated October 14, 2004. We examined a sample of each of these four candles: molded "flower bud" candles in orange, green, and blue, and "butterfly" candle (all with SKU 806827).

Based on Dollar Tree's comments, we examined whether candles #13 through #16 are in the shape of flower buds. We found that these candles contain protrusions, which are visible as petals only from the top of the candle. Also, the petals are not individually molded. However, when the candle is viewed from the sides, the protrusions are not discernible as petals. Given

that these protrusions are not clearly discernible as petals from the sides, these four "flower bud" candles appear to be circular without any

identifiable flower motif. Given this fact, we find the three molded "flower bud" candles in orange, green, and blue (SKU 806827) are not identifiable as flower buds from a majority of angles. See San Francisco Candle Co. v. United States, 265 F.Supp. 2d 1274 (May 14, 2003).

With respect to candle #16, the "butterfly" floater candle (SKU 806827), we find that this candle is only viewable as a butterfly when viewed from the top. When viewed from the various side views, the butterfly shape and wings are not apparent and the candle does not appear to be in the shape of an identifiable object. Therefore, because these candles are not easily recognizable as molded "flower bud"and "butterfly" floater candles from multiple angles, we find that they do not qualify for the novelty exception. Thus, the Department finds that these candles, candles #13 through #16, should be included within the scope of the Order.

17. Molded "Orchid Stem" Candle (SKU 806827)

Dollar Tree describes its molded "orchid stem" candle as having individually molded petals in white and pink colored wax. Dollar Tree also states that it is as if the bloom were cut near the top of the stem.

Based on the comments submitted by both Dollar Tree and the NCA, we examined whether this candle is in the shape of an identifiable object (i.e., an orchid stem). We examined the digital photograph of the molded "orchid stem" candle (SKU 806827) contained in Attachment 1 of the submission, which we had Dollar Tree email to the Department on August 25, 2004, and have since placed on the record. See Memorandum from Jacqueline Arrowsmith to the File, dated October 14, 2004. We examined the molded "orchid stem" candle (with SKU 806827), which is light pink in color and is shaped as an orchid stem. The candle has a pistil and six individually molded petals with veins. The individual petals on the molded "orchid stem" candle rise from the center of the "orchid stem" and extend outward and down; these petals are visible and easily recognizable from the top of the candle as well as from the sides. We find that the petals are more detailed than the petals of candles #1 through #4 and (SKU 806825) and candles #13 through #15 (SKU 806827). The petals and the flower motif on this molded "orchid stem" candle are visible from multiple angles in contrast to candles #1 through #4 (SKU 806825) and candles #13 through #15 (SKU 806827), where the protrusions are only visible as petals when viewing the candle from the top. Given that the molded "orchid stem" candle can be identified from multiple angles as an orchid stem, this candle falls within the novelty candle exception, and therefore, this candle should not be included within the scope of the Order.

Recommendation

We recommend finding that the following styles of candles should be included within the scope of the Order, because these styles of candle (#1 through #16) are not identifiable objects, the shape of these candles cannot be viewed from multiple angles, and these candles do not have any scenes or symbols that are exclusively associated with a particular holiday.

1. **Molded "Flower Bud" Candle - Purple (SKU 806825)**
2. **Molded "Flower Bud" Candle - Magenta (SKU 806825)**
3. **Molded "Flower Bud" Candle - Light Magenta (SKU 806825)**
4. **Molded "Flower Bud" Candle - Aqua Green (SKU 806825)**
5. **Molded "Butterfly" Candle - Yellow (SKU 806825)**
6. **"Assorted Autumn Leaves" Floater Candle Sets (SKU 813804)**
7. **"Assorted Autumn Leaves" Floater Candle Sets (SKU 813804)**
8. **"Assorted Autumn Leaves" Floater Candle Sets (SKU 813804)**
9. **"Christmas" Floater Candle - Snowman Head (SKU 130660)**
10. **"Christmas" Floater Candle - Red Poinsettia (SKU 130660)**
11. **"Christmas" Floater Candle - Molded White Snowflake (SKU 130660)**
12. **"Christmas" Floater Candle - Holly Leaf with Red Berries (SKU 130660)**
13. **Molded "Flower Bud" Candle - Orange (SKU 806827)**
14. **Molded "Flower Bud" Candle - Green (SKU 806827)**
15. **Molded "Flower Bud" Candle - Blue (SKU 806827)**
16. **"Butterfly" Floater Candle (SKU 806827)**

We recommend finding that the following style of candle should not be included within the scope of the Order because it is in the shape of an identifiable object (candle #17) and its shape is viewable from multiple angles.

17. **Molded "Orchid Stem" Candle (SKU 806827)**

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