

A-570-504
Scope Review
PUBLIC DOCUMENT
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By Electronic Mail Notification

To All Interested Parties:

On October 15, 2002 The Department of Commerce (the Department) received a request from Sears for a scope ruling on a “wrapped present candle garden” set (item number 21075), an imported candle set consisting of three individual candles displayed on a mirror tray, to determine whether those 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 Sears’ candle set should be 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 U.S. Customs and Border Protection (CBP) (formerly the United States Customs Service) of this decision. If you have any questions, please contact Jeff Boord at (202) 482-6345 or Jacqueline Arrowsmith at (202) 482-5255.

Sincerely,

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

Enclosure

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

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

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

Summary

On October 15, 2002, the Department of Commerce (the Department) received a request from Sears for a scope ruling on a “wrapped present candle garden” set (item number 21075) to determine whether this candle set is 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 Sears' “wrapped present candle garden” set is included within the scope of the Order.¹

Background

Sears filed its request for a scope ruling in proper form on October 15, 2002. On November 22, 2002, the National Candle Association (NCA), the petitioner and a domestic interested party in this proceeding, filed comments opposing Sears' request.

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 update the website periodically to include newly issued scope determinations.

Product Description

Sears' request for its "wrapped present candle garden" set (item number 21075) concerns three molded petroleum wax, square pillar-shaped candles and a mirror tray with a gold frame. The "wrapped present candle garden" set is reported to be sold during the holiday season (October through December) and then later reduced for clearance and sold throughout the remainder of the year. Sears' October 15, 2002, submission contained a detailed photograph showing the candle set, which is comprised of three candles and the mirror tray with golden frame. Sears also provided a sample set of the three candles and the tray from the "wrapped present candle garden."

The first of the three candles is a rectangular pillar intended to represent a "wrapped present." The candle has a cream color with three horizontal gold embossed stripes. The candle has one horizontal stripe around the top, a second around the middle and a third around the bottom. The candle also has a gold embossed stripe running vertically down the center of each side. There is a wax, three-dimensional "gold bow" on the top with the wick in the center. The candle measures 2.5 inches by 2.5 inches by 3.5 inches tall.

The second candle is also a rectangular pillar intended to represent a "wrapped present." The candle has a cream color with an embossed gold stripe running vertically down the center of each side. This candle has gold embossed swirls on all visible surfaces and a wax three-dimensional "gold bow" on the top with the wick in the center. The candle measures 2.5 inches by 2.5 inches by 4.25 inches tall.

The third candle in the set is a rectangular pillar intended to represent a "wrapped present." This candle has a cream color with embossed gold stars on all visible surfaces and four embossed gold stripes, one running vertically down each side of the candle. There is a wax three-dimensional "gold bow" on the top with the wick in the center. This candle measures 2.5 inches by 2.5 inches by 4.75 inches tall.

Sears' Request

In its October 9, 2002, submission, Sears argues that its "wrapped present candle garden" set consists of novelty candles and should not be included within the scope of the Order. Specifically, Sears argues that the Department should determine that its "wrapped present candle garden" set should not be included within the Order because its candle set represents identifiable objects, wrapped presents. Additionally, Sears argues that the set consists of novelty candles because the candles are specifically designed for use in connection with the holiday season. In support of its argument, Sears alleges that its "wrapped present candle garden" set will be sold in the stores during the holiday months of October, November, and December, after which all remaining stock will be reduced for clearance. Sears intends to target the "holiday" shopper as their end consumer of the "wrapped present candle garden" set. See Sears October 9, 2002, submission at 2.

The National Candle Association's Comments

In its comments, the NCA retraces the history of the 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 this assertion, the NCA cites a Court of International Trade (CIT) ruling, which held that, “a candle must be specifically designed for use only in connection with a religious holiday or special event to fall within the novelty candle exception.” See Russ Berrie & Co., Inc. v. United States, 57 F. Supp. 2d 1184, 1194 (CIT July, 1999) (Russ Berrie). Thus, the NCA argues that the Department narrowly limited the novelty candle exception to figurine candles, candles shaped in the form of identifiable objects, and candles specifically designed for use only in connection with the holiday season.

The NCA argues that Sears’ “wrapped present candle garden” set is comprised of petroleum wax candles in the form of columns or pillars, shapes that fall specifically within the inclusive language of the Order’s scope. See NCA November 22, 2002, submission at 4. The NCA further argues that the decoration on Sears’ candles (an embossed ribbon and bow on the top of the candle) is minimally decorative, and as such these candles should be included within the scope of the Order. In support of its position, the NCA points to previous scope rulings where the Department determined that molded decorations or shapes do not alter the appearance of an otherwise in-scope candle. See Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); American Greetings Corp. (May 4, 2000) (where the Department determined that molded decorations depicting multi-colored flowers on a taper do not change the fact that it was a taper, and 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); Atico Corp. (April 8, 2002) (where the Department determined that a molded rose on the top of a votive candle does not change the fact that it is a votive, and 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); Cherrydale Farms (October 5, 2000) (where the Department determined that the addition of an insect shape molded on top of a round candle does not change the fact that it is a round, and within the scope of the Order.)

The NCA notes that Sears’ 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 duties would 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 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 concludes by stating that Sears is now asking the Department to narrow the scope of the Order so that it excludes everyday candles by 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 (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 Determination 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, 57 F. Supp. 2d at 1194. In 1987, the Department issued a notice to the United States Customs Service (now 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 Petroleum-Wax Candles from the People’s Republic of China - Antidumping - A-570-504; C.I.E.-212/85, September 21, 1987; Letter from the Director, Office of Compliance, to Burditt, Bowles & Radzius, Ltd., July 13, 1987.

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 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 J.C. Penney 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 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 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

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 determined that a “dragonfly” candle, in the shape of a rough-hewn stone with a dragonfly carved on top, should not be included within the scope because it is of a shape not specifically listed by the language of the scope); See also, 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).

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

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.

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 enumerated 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 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.

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”).

Analysis of Sears' Candles

With respect to the involved scope request, the Department finds that, for the reasons outlined below, Sears' "wrapped present candle garden" set (item number 21075) is included within the scope of the Order. We find that these candles are within the scope of the Order because these candles do not represent identifiable objects (i.e., wrapped presents) and these candles do not contain scenes or symbols that are exclusively associated with the Christmas holiday. Thus, the Department finds that these candles do not qualify for exclusion from the Order based on the novelty candle exception.

We disagree with Sears' arguments that these candles are in the shape of identifiable objects and, therefore, should not be included within the scope of the Order. Sears describes its molded candle set as comprised of three candles that resemble "wrapped presents" with either gold embossed stars, swirls or ribbons and three-dimensional gold bows on top with the wick in the center. Based on Sears' comments, the Department examined whether the candles that make up the "wrapped present candle garden" set are identifiable as wrapped presents. We find that these candles are not identifiable as "wrapped presents" and do not otherwise qualify for exclusion from the Order on the basis of the novelty candles exception. We find that Sears' candles are in the shape of "pillars." Pillars are listed in the language of the scope of the Order. While the candles have a three-dimensional gold wax bow attached to the top of each candle, the gold wax is only discernible when the candle is viewed from the top of the candle and two of each candle's four sides. From the other two sides of the candle, the bow is not discernible. In addition, we find that the candles as a whole are not identifiable as "wrapped presents" from multiple angles. From the sides, the candles appear to be rectangular pillars with a rounded wax feature on top of the candles and gold embossed stars, swirls, and stripes. The molded decoration depicting a gold bow does not change the shape of the candles from pillars, which are within the scope of the Order, to an identifiable object which would not be included within the scope of the Order because the "wrapped present" motif is not easily and readily identifiable from multiple angles. Therefore, we determine the candles are rectangular pillars. Additionally, we find that these candles do not qualify for the novelty exception because these candles are not holiday candles. The stars, swirls, and stripes are not symbols that are exclusively associated with the Christmas holiday. See 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) (where the Department determined that candle #5 with gold colored stars molded on the surface did not make the candle exclusively related to the Christmas holiday, and was therefore within the scope of the Order.) Thus, because we find that the candles are devoid of scenes or symbols that are exclusively associated with the Christmas holiday, these candles do not qualify for the novelty exception and are included within the scope of the Order.

Because we find that these candles are in a shape expressly included within the language of the scope of the Order and that the candle set does not contain scenes or symbols exclusively associated with a particular holiday, we find that "wrapped present candle garden" set (item number 21075) does not qualify for the novelty exception and therefore is included within the scope of the Order.

Recommendation

We recommend finding that the “wrapped present candle garden” set is included within the scope of the Order, because this candle is not an identifiable object, and because there is no scene or symbol that is exclusively associated with a particular holiday. We find that the candles comprising the “wrapped present candle garden” set identified as item number 21075, with a wrapped present motif, are pillars. Because pillars are one of the shapes specifically listed in the explicit language of the scope of the Order, this candle is included within the Order.

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