

September 5, 2006

A-570-504
Scope Review
PUBLIC DOCUMENT
AD/CVD Ops 7: LMK

By Electronic Mail Notification

To All Interested Parties:

On June 30, 2006, the Department of Commerce (the Department) received a request from Kohl's Department Stores, Inc. (Kohl's) for a scope ruling on whether its "Berry Ball" candle, model number X5478, is covered by the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC).

In accordance with 19 CFR 351.225(k)(1), the Department has determined that the Kohl's "Berry Ball" candle is 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 of this decision. If you have any questions, please contact the undersigned at (202) 482-0649.

Sincerely,

Robert James
Program Manager
Operations Office 7
Import Administration

Enclosure

MEMORANDUM FOR: Stephen Claeys
Deputy Assistant Secretary
for Import Administration

FROM: Richard Weible
Office Director
AD/CVD Operations, Office VII

SUBJECT: Final Scope Ruling: Antidumping Duty Order on Petroleum Wax
Candles From the People's Republic of China (A-570-504);
Kohl's Department Stores, Inc.

Summary

On June 30, 2006,¹ the Department of Commerce (the Department) received a request from Kohl's Department Stores, Inc. (Kohl's) for a scope ruling to determine whether its "Berry Ball" candle is included within the scope of the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC). *See 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 Kohl's's "Berry Ball" candle is within the scope of the *Order*.²

¹ Kohl's request is dated June 26, 2006. However, it was received and date stamped by the Department's Central Records Unit on 30 June. *See* 19 CFR 351.103(b) ("no document will be considered as having been received by the Secretary unless it is submitted to the Import Administration Dockets Center in Room 1870 and stamped with the date and time of receipt").

² The Department has developed an internet website that allows interested parties to access prior scope determinations regarding the *Order*. This website lists all scope determinations from 1991 to the present. It can be accessed at <http://ia.ita.doc.gov/download/candles-prc-scope/index.html>, and will be updated periodically to include newly issued scope determinations.

Kohl's Scope Request

Kohl's argues this candle should be excluded from the scope of the *Order* pursuant to 19 CFR 351.225(k)(1) and the novelty candle exception described in a September 21, 1987, Customs Information Exchange instruction sent to the U.S. Customs Service.³ Kohl's claims its "Berry Ball" candle qualifies for the novelty candle exception because the candle is uniquely associated with the Christmas holiday. Kohl's provided samples of the candle for the Department's review.

Kohl's describes the "Berry Ball," further identified as item number X5478, as being made of 100 percent paraffin wax, with three-dimensional holly leaves, berries and fruit in a round and covered with beaded glaze and glitter. Kohl's states each candle measures 5 inches in height and approximately 5½ inches in diameter. Kohl's indicates the candle is classified under *Harmonized Tariff Schedule of the United States* item number 3406.00.0000 (the HTS item number for both subject and non-subject petroleum wax candles).

Kohl's argues the candle is: (1) sculpted and painted to look like holly leaves, berries and fruit; (2) advertised and sold only during the Christmas holiday season, and displayed with Christmas holiday candles and decorations only; and (3) intended for use in the home as a decoration during the Christmas holiday. Thus, Kohl's argues its candle "possesses characteristics uniquely associated with the Christmas holiday, and therefore is outside the scope" of the *Order*. *See* Kohl's Request.

Petitioner, the National Candle Association, did not comment on this scope request.

Legal Framework

The regulations governing the Department's antidumping scope determinations are found at 19 CFR 351.225. On matters concerning the scope of an antidumping duty order, the Department first examines the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the U.S. International Trade Commission (the Commission). This determination may take place with or without a formal inquiry. If the Department determines these descriptions are dispositive of the matter, the Department will issue a final scope ruling as to whether or not the merchandise is covered by the order. *See* 19 CFR 351.225(k)(1).

³ In the Customs Information Exchange referenced by Kohl's, the Department described a narrowly limited exception to the scope of the order for so-called "novelty candles," including figurine candles, candles shaped in the form of identifiable objects, and candles specifically designed for and used only in connection with the holiday season. *See* Customs Information Exchange, CIE N212/85, dated September 21, 1987 (Customs Notice). We note the Customs Notice contains the same language concerning the novelty candle exception as an earlier communication between the Department and counsel for a candle importer. *See* Letter from the Director, Office of Compliance, to the law firm of Burditt, Bowles & Radzius, Ltd., July 13, 1987.

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: (1) the physical characteristics of the merchandise; (2) the expectations of the ultimate purchasers; (3) the ultimate use of the product; (4) the channels of trade in which the product is sold; and (5) the manner in which the product is advertised and displayed. The determination as to which analytical framework is most appropriate in any given scope inquiry is made on a case-by-case basis after consideration of all evidence before the Department.

In the instant case, the Department has evaluated Kohl's request in accordance with 19 CFR 351.225(k)(1) and finds the descriptions of the products contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission are dispositive with respect to Kohl's "Berry Ball" candle. Therefore, for this candle the Department finds it unnecessary to consider the additional factors set forth at 19 CFR 351.225(k)(2).

Documents and parts thereof from the underlying investigation that the Department deemed relevant to this scope ruling were made part of the record of this determination and are referenced herein. Documents neither the Department nor the parties placed on the record do not constitute part of the administrative record for this scope determination.

In its original 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 eventual antidumping duty order:

[c]ertain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks. They are sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers.

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); *Petroleum Wax Candles from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 51 FR 25085 (July 10, 1986) and the *Order*.

The Commission adopted a similar definition of the “like product” subject to its determinations, noting the investigations did not include “birthday, birthday numeral and figurine type candles.” See *Candles from the People’s Republic of China: Determination of the Commission in Investigation No. 731-TA-282 (Final)*, USITC Publication 1888 (August 1986) at 4, note 5, and A-2.

Also of relevance to the present scope inquiry is the Department’s Customs Notice referenced in footnote 3, above, issued in connection with a July 1987 scope determination concerning an exception from the *Order* for novelty candles, which states:

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

See CIE N-212/85, September 21, 1987; see also Letter from the Director, Office of Compliance, to Burditt, Bowles & Radzius, Ltd., July 13, 1987 (Customs Notice).

In November 2001, the Department changed its practice on the issue of candle shapes. 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.”⁴ In the *J.C. Penney Ruling*, the Department determined to revise this practice because it had the effect of narrowing the broad coverage of the first sentence of the *Order*’s scope. The list of shapes in the second sentence of the *Order*’s scope does not provide a textual basis for such a narrowing of the coverage of the first sentence of the *Order*’s scope.

⁴ 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 Ruling*) (where the Department found a “dragonfly” candle, in the shape of a rough-hewn stone with a dragonfly carved on top, not within scope because it is of a shape not listed by the scope); and “Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); American Drug Stores, Inc.” (March 16, 1998) (where the Department found a sphere or ball-shaped candle not within scope because it is a shape not listed by the scope).

Accordingly, to give full effect to the first sentence of the inclusive language of the scope, the Department now will normally evaluate whether candles of a shape not listed by the inclusive language of the *Order*'s scope are scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks.

This approach of evaluating such candles in light of the entire text of the *Order*'s scope is in keeping with the opinion of the Court of International Trade, noting that a better approach in scope rulings is to avoid subjective issues of intent and, instead, look to the petitioner's language to determine whether the class or kind of merchandise at issue was expressly included. *Duferco Steel, Inc. v. United States*, 146 F. Supp. 2d 913 (May 29, 2001) (*Duferco Steel*). Such an approach is a departure from past CIT precedent that required the Department to give ample deference to the petitioner's intent when examining a petitioner's description of the subject merchandise. *See, e.g., Torrington Co. v. United States*, 995 F. Supp. 117, 121 (CIT 1998).

Although the specific scope decision in *Duferco Steel* has been overturned by the United States Court of Appeals of the Federal Circuit (Federal Circuit) in *Duferco Steel, Inc. v. United States*, 296 F.3d 1087 (Fed. Cir. 2002) (*Duferco Steel II*), we do not believe the Federal Circuit's decision undermines the Department's decision 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 Federal Circuit has stated "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."⁵ The Federal Circuit 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."⁶ Thus, as applied to this *Order*, there is no requirement, nor is it possible, for all the shapes of candles to be listed.⁷ In fact, if the list were exhaustive, there would have been no need for the Department to determine whether any other candle that was not explicitly listed as a shape in the scope of the *Order*. However, the Department did render the novelty candle exception narrowly, leaving all other petroleum wax candles from the PRC covered by the *Order*.

⁵ *Novosteel SA v. United States*, 284 F.3d 1261, 1264 (Fed. Cir. 2002).

⁶ *Id.*

⁷ *See Petroleum Wax Candles from China, 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.").

If the Department determines the candle is made from petroleum wax and has a fiber or paper-cored wick, but the candle possesses characteristics set out in the Customs Notice, it will not fall within the scope of the *Order*. In order for a candle to qualify for this exception, the characteristic which is claimed to render it a novelty candle (*i.e.*, the shape of an identifiable object or a holiday-specific design) should be easily recognizable in order for the candle to merit 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 the candle is included within the scope of the *Order*. See *J.C. Penney Corp. Ruling*; “Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); San Francisco Candle Co.” (February 12, 2001) (*San Francisco Candle Ruling*); and *Endar Ruling*. If a candle does not possess the characteristics set out in the July 1987 novelty candle exception, and it is a scented or unscented candle having fiber or paper-cored wick, the Department will determine that the candle is within the scope of the *Order*.

Analysis

Our examination of the sample candle provided by Kohl’s shows the candle to be in all essential respects as described by Kohl’s in its submission. The surface of the entire candle is further decorated with a glittery finish reminiscent of frost.

With respect to the instant request, we find that for the reasons outlined below, Kohl’s Berry Ball candle is within the scope of *Order*. This candle is a petroleum wax candle having a fiber or paper-cored wick. Furthermore, the candle is not in the shape of any identifiable objects, nor does it contain any identifiable holiday-specific design which would limit the candle’s use specifically to any particular holiday season, as is suggested by the novelty candle exception.

Pursuant to the Department’s change in practice, as described in the *J.C. Penney Ruling*, 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. The Kohl’s Berry Ball candle is a petroleum wax candle with a fiber or paper-cored wick. Therefore, we must evaluate whether the characteristics of the candle brings it outside the scope of the *Order* pursuant to the novelty candle exception detailed in the Customs Notice and our interpretation set forth in the *J.C. Penney Ruling*.

We find these candles are roughly in the shape of a round, a shape specifically listed in the scope of the *Order*, that has fruit or berry shapes and leaves decorating the surface. We also examined whether the design of this candle could be associated exclusively with the Christmas holiday. We find that, although the Berry Ball candle is painted in multiple colors with what purport to be leaves, berries and fruit, none of these colors or designs are exclusively associated with the Christmas holiday. See *Springwater Cookie & Confections Inc. v. United States*, 20 CIT 1192

(September 26, 1996) (affirming the Department’s finding that “colors *per se* will not exempt a candle from the scope of the antidumping duty order.”). Furthermore, the Customs Notice indicated that the holiday nature of such a candle “is clearly indicated by Christmas scenes and symbols depicted in the candle design.” We find no such indications in the design of the “Berry Ball” candle. Thus, we disagree with Kohl’s that this candle is uniquely associated with the Christmas holiday. These findings are consistent with “Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Target Corporation, Inc.” (March 9, 2005) (where the Department found that Target’s “Cranberry” candles did not qualify for the novelty candle exclusion because these candles do not have the shape of an identifiable object or a holiday-specific design). *See also* the September 1987 Customs Notice cited above.

With respect to Kohl’s argument that these candles are displayed with Christmas holiday candles and decorations, sold and advertised only during the Christmas holiday season, and are intended to be used as home decoration during the Christmas holiday, under the Department’s current practice, the Department focuses only on whether the candles at issue are in the form of identifiable objects or whether the candles can be exclusively associated with a specific holiday. Under this analytic framework, the Department does not reach the manner in which the candles were sold or their intended use, as contemplated under 19 CFR 351.225(k)(2).

As discussed above, we find that Kohl’s candle is not in the shape of any recognizable object. Moreover, we find nothing in this candle’s design limits its use exclusively to Christmas or any other specific holiday. Accordingly, Kohl’s “Berry Ball” candle is included within the scope of the *Order*.

Recommendation

Based on the preceding analysis, we recommend that the Department find that the Kohl’s “Berry Ball” candle, item number X5478, falls within the scope of the *Order*. If you agree, we will send the attached letter to the interested parties, and will notify CBP of our determination.

_____ Agree

_____ Disagree

Stephen Claeys
Deputy Assistant Secretary
for Import Administration

Date