

February 27, 2007

By Electronic Mail Notification

To All Interested Parties:

On November 15, 2006, the Department of Commerce (the Department) received a request from Lava Enterprises, Inc. for a scope ruling concerning whether the following candles are covered by the antidumping duty order on petroleum wax candles from the People's Republic of China ("PRC"): Sculpted Gingerbread Man on Cookie Sheet (Style #HOM6216) and Sculpted Gingerbread Boy and Girl on Cookie Sheet (Style #HOM3049). In accordance with 19 CFR 351.225(k)(1), the Department has determined that the above referenced candles are not 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 Matthew Renkey at (202) 482-2312.

Sincerely,

Alex Villanueva
Program Manager, Office 9
AD/CVD Operations
Import Administration

Enclosure

MEMORANDUM FOR: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

FROM: James C. Doyle
Director, Office 9
AD/CVD Operations
Import Administration

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

Summary

On November 15, 2006, the Department of Commerce (the Department) received a request from Lava Enterprises, Inc. ("Lava") for a scope ruling concerning whether the following candles are covered by the antidumping duty order on petroleum wax candles from the People's Republic of China ("PRC"): Sculpted Gingerbread Man on Cookie Sheet (Style #HOM6216) and Sculpted Gingerbread Boy and Girl on Cookie Sheet (Style #HOM3049). 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 Lava's candles are outside the scope of the order.¹

Background

On November 15, 2006, the Department received a letter from Lava requesting a scope ruling on the candles mentioned above. The National Candle Association ("the NCA"), the petitioners in the original investigation, did not submit comments on Lava's scope ruling request.

¹ The Department has developed an internet web site that allows interested parties to access prior scope determinations regarding the Order. This web site lists all scope determinations from 1991 to the present. It can be accessed at <http://ia.ita.doc.gov/download/candles-prc-scope/index>, and will be updated periodically to include newly issued scope determinations.

Lava’s Scope Request

a. Product Descriptions

Lava states that its candles are three-dimensional novelty candles in the form of identifiable objects (i.e., gingerbread figurines) and are composed primarily of paraffin wax. Each candle has a flat bottom since they rest on a cookie sheet. Lava provided the following descriptions of its candles.

Sculpted Gingerbread Man on Cookie Sheet (Style # HOM6216) (“Gingerbread Man Candle”)

Lava states that the Gingerbread Man Candle has depth and dimension and is an accurate portrayal of how this particular object is ordinarily viewed. Lava explains that this candle is formed from a single molding process, with the intricate details done as part of the molding process and not by etching. Lava states that such details include the eyes, smile, candy-striped bowtie, two parallel candy stripes at each end of the arm and leg, and two buttons that are on either side of the wick, which is located in the naval area of the Gingerbread Man Candle. Lava contends that the candle is molded in the typical fashion in which a gingerbread cookie is made, with the arms and legs outstretched, and includes colors normally associated with a gingerbread cookie.

Sculpted Gingerbread Boy and Girl on Cookie Sheet (Style # HOM3049) (“Gingerbread Boy and Girl Candles”)

These candles are similar to the Gingerbread Man Candle, only they are smaller in size and rest side-by-side on a cookie sheet.

Lava provided samples and pictures of its candles.

b. Scope Request

Lava argues that its candles fall outside the scope of the order because they are in the shape of identifiable objects when viewed from most angles, and therefore qualify under the Department’s novelty candle exclusion.

Lava cites to the “Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles from the People’s Republic of China; Globalshop, Inc.,” dated November 24, 2004 (“Globalshop Ruling”), in which Globalshop Inc.’s “Snowman” candles were found to be outside the scope of the antidumping duty order because they were identifiable objects when viewed from most angles.

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 (ITC). This determination may take place with or without a formal inquiry. If the Department determines that these descriptions are dispositive of the matter, the Department will issue a final scope ruling as to whether or not the subject merchandise is covered by the order. See 19 CFR 351.225(k)(1).

Conversely, where the descriptions of the merchandise are not dispositive, the Department will consider the five additional factors set forth at 19 CFR 351.225(k)(2). These criteria are: (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 Lava'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 ITC are dispositive with respect to Lava's candles. Therefore, for these candles, 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 that neither the Department nor the parties placed 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.

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) (“Final Determination”); and the “Order.”

The ITC 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), Publication 1888 (August 1986) (“ITC Determination”), at 4, note 5, and A-2.

Also of relevance to the present scope inquiry are the Department’s instructions to the U.S. Customs Service (now renamed U.S. Customs and Border Protection (“CBP”)) (see Letter from the Director, Office of Compliance, to Burditt, Bowles & Radzius, Ltd., July 13, 1987) (“CBP Notice”) issued in connection with a July 1987 scope determination concerning an exception from the Order for novelty candles, which state:

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 CBP Notice (emphasis added).

In November 2001, the Department changed its practice on the issue of candle shapes. See “Final Scope Ruling, J.C. Penney Purchasing Corp.,” November 9, 2001 (JC Penny Ruling). In this ruling, the Department reviewed the text of the scope of the Order, beginning with the text of the first sentence of the scope which covers “{c}ertain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks.” See Order. The text following this broad inclusive sentence provides a list of shapes; this list is not modified by any express words of exclusivity. The result of our prior practice of not including within the scope of the Order candles of a shape other than those specifically listed in the Order was inconsistent with the fact that the candles were “scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks.”² In the JC Penny Ruling, the Department determined to revise this practice because it had the effect of narrowing the broad

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 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); 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) (where the Department found a sphere or ball-shaped candle not within scope because it is a shape not listed by the scope).

coverage of the first sentence of the Order's scope. The list of shapes in the second sentence of the Order's scope does not provide a textual basis for such a narrowing of the coverage of the first sentence of the Order's scope. Accordingly, 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 ("CIT"), noting that a better approach in scope rulings is to avoid subjective issues of intent and, instead, to look to the petition's language to determine whether the class or kind of merchandise at issue was expressly included. Duferco Steel, Inc. v. United States, 146 F. Supp. 2d 913 (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 petition's description of the subject merchandise. See, e.g., Torrington Co. v. United States, 995 F. Supp. 117, 121 (CIT 1998).

Although the specific scope decision in Duferco Steel has 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 that the Federal Circuit's decision undermines the Department's decision in the JC Penney Ruling. The plain language of the scope of the Order clearly states "{c}ertain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks . . . sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers" 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 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."³ 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."⁴ Thus, as applied to this Order, there is no requirement, nor is it possible, for the shapes of all of the candles to be listed.⁵ 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 is subject to the Order. However, the Department did render the narrowly constructed novelty candle exception, leaving all other petroleum wax candles from the PRC covered by the Order.

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

⁴ Id.

⁵ See Petroleum Wax Candles from China, USITC Pub. No. 3226 Investigation No. 731-TA-282 (Review) (August 1999) (USITC Pub. No. 3226), at 18 ("Candles come in a wide variety of shapes and sizes. Major U.S. candle manufacturers reportedly will offer 1,000 to 2,000 varieties of candles in their product lines.").

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 CBP 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 that the candle is included within the scope of the Order. See JC Penney 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”. (Feb. 12, 2001) (San Francisco Candle); and Endar. 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 a fiber or paper-cored wick, the Department will determine that the candle is within the scope of the Order.

Analysis of Lava’s Candles

With respect to the instant scope request, the Department finds, for the reasons outlined below, that Lava’s Gingerbread Man Candle and Gingerbread Boy and Girl Candles are not within the scope of the order. The Department finds each of these candles to be identifiable objects when viewed from multiple angles, which qualifies these candles for exclusion from the order pursuant to the novelty candle exception.

Gingerbread Man Candle and Gingerbread Boy and Girl Candles

In addition to the Globalshop Ruling cited above by Lava, the Department notes that the “Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles from the People’s Republic of China; New Spectrum Gift Gallery, Inc.,” dated May 10, 2005 (“New Spectrum Ruling”) also provides relevant precedent for determining whether the instant candles are within the scope of the Order. In the New Spectrum Ruling, the Department found that New Spectrum’s dragon candle was an identifiable object when viewed from most angles, despite the fact that it had a flat bottom. When viewed from most angles, the Department noted that this candle appeared to be a dragon, including characteristics commonly associated with dragons such as the tail and jaw. Moreover, the Department determined that no portion of the candle could be viewed as one of the shapes specifically identified in the scope of the Order.

Similarly, Lava’s items consist of the Gingerbread Man Candle on a cookie sheet, and the Gingerbread Boy and Girl Candles on a cookie sheet. All gingerbread candles are the same basic color as gingerbread and have identifiable features such as a head, body, arms and legs. Additional features such as eyes, a mouth, buttons, and other decorative features are also integral to the candles. These candles are distinctly different from candles with the following shapes stated in the petition: tapers, spirals, straight-sided dinner candles, rounds, columns, pillars, or votives. These candles are easily recognizable as gingerbread people from most angles, and their appearance is consistent with that of traditional gingerbread cookies in the shape of a person.

The Department finds that these candles are recognizable as identifiable objects from most angles and therefore fulfill the novelty candle exception.

Recomendation

Based on the preceding analysis, we recommend that the Department find that Lava’s Gingerbread Man Candle and Gingerbread Boy and Girl Candles fall outside 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 J. Claeys
Deputy Assistant Secretary
for Import Administration

Date