

By Electronic Mail Notification

To All Interested Parties:

On May 14, 2002, the Department of Commerce (the Department) received a request from Meijer Distribution, Inc. (Meijer), for a scope ruling on whether eight types of candles it plans to import are covered by the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC). At this time, the Department is ruling on six of the eight candle types presented by Meijer in its request. Regarding Meijer's additional two candle types, the Department cannot make a determination concerning whether these candles are included within the scope of the order on the basis of the criteria in 19 CFR 351.225(k)(1); therefore, the Department will initiate a scope inquiry to consider the additional factors under 19 CFR 351.225(k)(2) for these two candles. The Department will render its decision on the two additional candle types in a separate determination at a later date.

In accordance with 19 CFR 351.225(k)(1), the Department has determined that five of the six "Halloween" candle types are within the scope of the antidumping duty order on petroleum wax candles from the PRC. The sixth candle type ("Halloween floating" candle in four styles) is outside the scope of the order.

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 Sally C. Gannon at (202) 482-0162.

Sincerely,

Barbara E. Tillman
Director
Office of AD/CVD Enforcement VII
Import Administration

Enclosure

MEMORANDUM FOR: Joseph A. Spetrini
Deputy Assistant Secretary
for Import Administration, Group III

FROM: Barbara E. Tillman
Director
Office of AD/CVD Enforcement VII

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

Summary

On May 14, 2002, the Department of Commerce (the Department) received a request from Meijer Distribution, Inc. (Meijer), for a scope ruling on eight types of candles to determine whether they are included within the scope of 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 five of the six "Halloween" candle types are included within the scope of the Order but that the sixth candle type, "Halloween floating" candle in four styles, is outside the scope of the Order.¹ Regarding Meijer's additional two "novelty birthday" candle types, the Department cannot make a determination concerning whether these candles are included within the scope of the order on the basis of the criteria in 19 CFR 351.225(k)(1);

¹ The Department has developed an internet website that allows interested parties to access prior scope determinations regarding the antidumping duty Order on Petroleum Wax Candles from the People's Republic of China. 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/>, and will be updated periodically, to include newly-issued scope determinations.

therefore, the Department will initiate a scope inquiry to consider the additional factors under 19 CFR 351.225(k)(2) for these two candles (see the discussion below under “Legal Framework”). The Department will render its decision on the two additional candle types in a separate determination at a later date.

Background

On May 14, 2002, the Department received a letter from Meijer, dated May 9, 2002, requesting a scope ruling on the eight types of candles. On June 28, 2002, the National Candle Association (NCA), petitioner and the domestic producer in this proceeding, filed comments on Meijer’s scope request. This scope determination covers Meijer’s six “Halloween” candles only; the Department will open a scope inquiry, and make a determination, on Meijer’s two “novelty birthday” candles under 19 CFR 351.225(k)(2) (see the discussion below under “Legal Framework”).² The Department will render its decision on the two additional candle types in a separate determination at a later date.

Meijer’s Scope Request

Meijer argues that six of its candles (item code or vendor style numbers 888797, 8842 (two styles), 888807, 918179, 888799) are “Halloween” candles, with symbols, scenes, words, colors, or objects that are specifically identified with Halloween, which are eligible for the novelty exception either as holiday novelty candles or novelty candles in the form of identifiable objects. Meijer describes the six candles as follows:

1. Item # 888797 is a petroleum wax floating candle in the shape of an eyeball with a green iris and black pupil in the top center of the eye, and red blood vessels coming off the iris. The candle is designed to appear as if the eyeball looks back at you when it is floating on liquid.
2. Vendor style # 8842 (first style) is a petroleum wax candle that is designed to look like eyeballs stacked one on top of the other. Each eyeball has an iris of various colors with a black pupil. Each eyeball has an iris and pupil facing the front and rear of the candle. Each eyeball has various blood vessels running between the two irises. The candle is designed to glow under a black light.
3. Vendor style # 8842 (second style) is a petroleum wax candle that is designed to look

² Meijer argues that these two candles, identified as “MJ10300 Thin Candle” and “MJ70140 Twinkle Thin Candle,” are “novelty birthday” candles. According to Meijer, these candles are fast-burning candles that are designed to be placed in a cake and lit to celebrate a person’s birthday. The latter candle also gives off a sparkler-like appearance when lit.

like skulls of various colors stacked one on top of the other. The candle is designed to glow under a black light.

4. Item # 888807 is a petroleum wax candle poured into a ceramic container, which is designed to look like a witch's cauldron and is labeled "BAT NOG."
5. Item # 918179 is a scented petroleum wax candle that is inside an orange petroleum wax container with a jack o' lantern face cut out of its front.
6. Item # 888799 is a petroleum wax Halloween floating candle in four styles--a spider/cobweb, black cat, ghost, and witch. The candles are orange and black.

To support its argument that its candles qualify for the novelty exception, Meijer quotes from the notice issued to the United States Customs Service (now renamed U.S. Customs and Border Protection) (Customs) 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 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 (Customs Notice).

Meijer included a sample of each candle with its scope request.

The National Candle Association's Comments

In its comments, the NCA retraces the history of this antidumping duty 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,

petitioner cites a Court of International Trade decision, with regards to the novelty exception, 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 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 all of Meijer’s candles should be included within the shapes delineated by the Order and are petroleum wax candles made in China having fiber or paper-cored wicks. The NCA contends that the candles are not in the shape of identifiable objects, nor are they designed for use only in connection with the holiday season and, therefore, these candles should be included within the scope of the Order.

The NCA claims that the “floating eyeball” candle is not in the shape of an eyeball, as this item is flat on the bottom. Therefore, the NCA argues that the candle is a round with a flat bottom. Moreover, the NCA asserts that it is not in the shape of an identifiable object and, thus, 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): Avon Products Inc. (April 8, 2002) (Avon Products Ruling) (where the Department determined that a round candle with a flat bottom is not in the shape of a ball is not an identifiable object, and should be included within the scope of the Order). In addition, the NCA contends that there is nothing in the design of the candle that limits its use to a specific holiday. Therefore, the NCA maintains that this candle is a floating round candle, and should be included within the scope of the Order.

In addition, the NCA claims that the “stacked eyeball” and “skulls’ candle” are pillar candles with designs that are ubiquitous and these candles are not specifically designed for use only in connection with any holiday. The NCA further argues that Meijer cannot change a pillar candle into an identifiable object by merely putting a molded or textured surface on a particular candle. Moreover, the NCA cites the American Greeting Ruling, where the Department concluded that a molded decoration depicting multicolored flowers on a taper does not change a taper into an out-of-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) (American Greetings Ruling). Furthermore, the NCA points out, in American Greetings Ruling, the Department held that the addition of a pattern resembling variegated kernels of corn etched into the sides of a taper does not sufficiently alter the fundamental shape of the candle as a taper to make it a candle in the shape of an identifiable object. On this point, the NCA argues that the Department has determined that “the candle is still in the form of a taper, with or without the decorative etched design, distinguishing this product from other identifiable object rulings in the past.” See American Greetings Ruling. Thus, the NCA contends, like the candle in the American Greetings Ruling, the addition of a molded surface and “skull” or “eyeball” designs to Meijer’s pillar candles does not sufficiently alter the fundamental shape of the candle as a pillar to make it a candle in the shape of an identifiable object. Thus, the NCA argues that the American Greetings Ruling is determinative with respect to this candle. Further, the NCA

contends that since the candles are not specifically designed for use only with respect to a special holiday or event, and can be used throughout the year, they should be included within the scope of the Order.

With regard to the “BAT NOG” candle, the NCA claims that this candle is a wax-filled container and all shapes of wax-filled containers are specifically included within the scope of the Order. In addition, the NCA maintains that there is nothing in the design of this container that limits its use to a specific holiday. The NCA further argues that the genre of bats and horror items are used

throughout the year. Therefore, the NCA contends that this item should be included within scope of the Order.

Next, the NCA claims that the “orange wax-filled container” candle is a wax-filled container which falls specifically within the scope of the Order. Moreover, the NCA argues that there is nothing in the design of this candle that limits its use to a specific holiday or occasion. Therefore, the NCA maintains that the candle should be included within the scope of the Order.

Finally, the NCA contends that the “ghosts, witches, black cats, spiders and cobweb” candles have flat bottoms and ghosts, witches, black cats, spiders and cobwebs do not have flat bottoms. Therefore, the NCA asserts that these candles are not identifiable objects. Moreover, the NCA maintains that these designs are ubiquitous and can be used throughout the year, as they are not specifically designed for use only during a specific holiday or event. Thus, the NCA claims that these candles should be included within the scope of the Order.

The NCA notes that Meijer’s candles compete in the same channels of trade as the candles subject to the Order, and that their sale without the antidumping duty will severely injure the U.S. candle producers. Meijer 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.” Petitioner 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. Petitioner concludes by stating that Meijer is now asking the Department to narrow the scope of the Order so that everyday candles are not included within the scope of the Order, claiming that they are novelty candles. Finally, petitioner argues that the Department does not have the legal authority to narrow the scope of the Order.

Legal Framework

The regulations governing the Department’s antidumping scope determinations are 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 (Commission). 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: (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.

In the instant case, the Department has evaluated Meijer's requests in accordance with 19 CFR 351.225(k)(1) and the Department finds that 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 the six "Halloween" candle types submitted by Meijer (item code or vendor style numbers 888797, 8842 (two styles), 888807, 918179, 888799). Therefore, for these six candles, the Department finds it unnecessary to consider the additional factors set forth at 19 CFR 351.225(k)(2).

With respect to Meijer's two "novelty birthday" candles ("MJ10300 Thin Candle" and "MJ70140 Twinkle Thin Candle"), however, the Department finds that 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 *not* dispositive and that further examination under 19 CFR 351.225(k)(2) is warranted for these candles. Therefore, the Department is not making a determination with respect to these two candles in the instant ruling; the Department will open a scope inquiry to consider the additional factors under 19 CFR 351.225(k)(2) before making a final determination with respect to these two candles. The Department will render its decision on the two additional candle types in a separate determination at a later date.

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 National Candle Association 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 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 Commission Determination, at 4, note 5, and A-2.

Also of relevance to the present scope inquiry is the Customs Notice issued to Customs 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 Customs Notice (emphasis added).

When determining whether or not a particular product claimed as a novelty candle is within the scope of the antidumping duty order, the Department's first line of inquiry is whether the shape of the candle falls within those shapes listed by the inclusive language of the Order's scope, *i.e.*, "tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers." If a candle falls within one of the above delineated shapes, it will be determined to be within the Order's scope. Candles of a shape not listed by the inclusive language of the Order's scope will then be evaluated to determine whether they are "scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks."

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); JCPenney (November 9, 2001) (JCPenney 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.”³ In JCPenney Ruling, the Department determined to revise this practice because such 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. 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 CIT, 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. 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 Commerce to give ample deference to the NCA’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 (CAFC) in Duferco Steel, Inc. v. United States, 296 F.3d 1087 (Fed. Cir. July 12, 2002) (Duferco Steel II), we do not believe that the Court’s decision undermines the Department’s decision in JCPenney 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

³ See, e.g., Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Eandar Corp. (January 11, 2000) (Eandar) (“dragonfly” candle, in the shape of a rough-hewn stone with a dragon fly 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) (sphere or ball shaped candle not within scope because it is a shape not listed by the scope).

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.”⁴ 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.”⁵ Thus, as applied to this Order, there is no requirement, nor is it possible, for all the shapes of candles to be listed.⁶ 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 render the novelty candle exception that offered a narrowly-construed exception, leaving all other petroleum wax candles from the PRC covered by the Order.

If the Department determines that 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 fall outside 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 Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); JCPenney Purchasing Corp. (May 21, 2001) (JCPenney 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. (Feb. 12, 2001) (SFCC); 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 petroleum wax candle made from petroleum wax and having fiber or paper-cored wick, the Department will determine that the candle is within the scope of the Order.

⁴ Novosteel SA v. United States, 284 F.3d 1261, 1264 (March 26, 2002).

⁵ Id.

⁶ 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

With respect to the instant request, we find that for the reasons outlined below, five of Meijer's six "Halloween" candle types should be included within the scope of the Order. The sixth candle type, "Halloween floating" candle in four styles, is outside the scope of the Order.

Floating Eyeball (Item Code #888797, UPC #76023633162)

Meijer contends that the subject "floating eyeball" petroleum wax candle (2.5 inches in diameter and 1 inch in height), with a fiber or paper-cored wick, is a novelty candle associated with Halloween. Meijer maintains that the subject candle is an identifiable object—an eyeball with a green iris, black pupil and red blood vessels coming off the iris—and that it is designed to appear as an eyeball looking back at the viewer when it is floating on liquid. We disagree that Meijer's candle represents an identifiable object. This candle is relatively flat and disc-shaped, rather than rounded like an eyeball. In addition, the claimed "eyeball" characteristics are only identifiable when the candle is viewed from the top, but not from any side view. See San Francisco Candle Co. v. United States, 206 F. Supp. 2d 1304 (May 30, 2002) (where the Court upheld the Department's examination of whether a candle's design is visible from multiple angles in determining whether it qualifies for the novelty candle exception). Instead, the Department finds that the alleged "eyeball" candle is simply a round, a shape listed in the Order's scope. See Avon Products Ruling. Additionally, we agree with the NCA that nothing inherent in the subject candle's design, texture, or colors limits its use specifically to Halloween. Thus, the Department finds that this candle does not fall within the July 1987 novelty candle exception. Therefore, for the aforementioned reasons, we find that this candle is included within the scope of the Order.

Eyeball Candle (Vendor Style #8842, UPC #23168088420 (first style))

Meijer contends that the subject "eyeball" petroleum wax candle (1.5 inches in diameter and 10 inches in height), with a fiber or paper-cored wick, is a novelty candle associated with Halloween. Meijer further contends that the subject candle is an identifiable object—stacked eyeballs, with each eyeball containing an iris and black pupil facing the front and rear of the candle—and that it is designed to glow under a black light. We disagree that Meijer's candle represents an identifiable object. The claimed "eyeball" characteristics are not identifiable when the candle is viewed from the top and two of the four sides. The alleged "eyeball" characteristics are only seen as a whole when viewing the candle from two of the four sides. See San Francisco Candle Co. v. United States, 206 F. Supp. 2d 1304 (May 30, 2002) (where the Court upheld the Department's examination of whether a candle's design is visible from multiple angles in determining whether it qualifies for the novelty candle exception). Even then, we disagree that these characteristics render the stacked balls easily identifiable as eyeballs; they can also be viewed to be merely stacked balls with multi-colored circle designs, since the circle colors are not those normally associated with a human eye (bright purple, blue, green, yellow, orange and pink) and

the so-called “blood vessels” are lightly etched in red and not easily recognizable. Id.

Instead, the Department maintains that the alleged “eyeball” candle is simply a molded column, a shape listed in the Order’s scope. Furthermore, the Department has previously concluded that molded decorations applied to an in-scope candle do not change it into an out-of-scope candle. See, e.g., American Greetings Ruling (where the Department held that the addition of a pattern resembling variegated kernels of corn etched into the sides of a taper does not sufficiently alter the fundamental shape of the candle as a taper to make it a candle in the shape of an identifiable object). Finally, we agree with the NCA that nothing inherent in the subject candle’s design, texture, or colors limits its use specifically to Halloween. Thus, the Department finds that this candle does not fall within the July 1987 novelty candle exception. Therefore, for the above reasons, this candle is included within the scope of the Order.

Skull (Vendor Style #8842, UPC #23168088420 (second style))

Meijer contends that the subject “skull” petroleum wax candle (1.5 inches in diameter and 10 inches in height), with a fiber or paper-cored wick, is a novelty candle associated with Halloween. Meijer further contends that this candle is an identifiable object—stacked skulls—and is designed to glow under a black light. Meijer maintains that the skulls can be recognized as such from all angles. We disagree that Meijer’s candle represents an identifiable object. The claimed “skull” characteristic is not identifiable when the candle is viewed from the top and three out of the four sides. The claimed “skull” design is only discernible when viewed from one side (the front). See San Francisco Candle Co. v. United States, 206 F. Supp. 2d 1304 (May 30, 2002) (where the Court upheld the Department’s examination of whether a candle’s design is visible from multiple angles in determining whether it qualifies for the novelty candle exception). Even then, because each separate, stacked “skull” design is uniform in color (bright purple, blue, green, yellow, orange, and pink) and molded into the candle, the designs are not easily discernible except when viewing the candle up closely.

Thus, the Department finds that the alleged “skull” candle is simply a molded column, a shape listed in the Order’s scope. Furthermore, the Department has previously concluded that molded decorations applied to an in-scope candle do not change it into an out-of-scope candle. See, e.g., American Greetings Ruling. Finally, we agree with the NCA that nothing inherent in the subject candle’s design, texture, or colors limits its use specifically to Halloween. Thus, the Department finds that this candle does not fall within the July 1987 novelty candle exception. Therefore, for the above reasons, this candle is included within the scope of the Order.

“BAT NOG” Ceramic Container Filled With Wax (Item Code #888807, UPC #76023633164)

Meijer contends that the subject “BAT NOG” petroleum wax candle, in a ceramic container (6 inches in diameter and 4 inches in height), with a fiber or paper-cored wick, is a novelty candle associated

with Halloween. Meijer further contends that the ceramic container is an identifiable object—a witch’s cauldron. We disagree that Meijer’s candle represents an identifiable object. The claimed “Halloween” characteristics, a “witch’s cauldron” and the accompanying wording “BAT NOG,” can only be seen when looking at the candle from one side (the front). From the other angles, the so-called Halloween characteristics are not readily discernible. See San Francisco Candle Co. v. United States, 206 F. Supp. 2d 1304 (May 30, 2002) (where the Court upheld the Department’s examination of whether a candle’s design is visible from multiple angles in determining whether it qualifies for the novelty candle exception). Thus, we agree with the NCA that nothing inherent in the subject candle’s design, texture, or colors limits its use specifically to Halloween. As such, the Department finds that this candle does not fall within the July 1987 novelty candle exception. Finally, the Department finds that the candle is simply a wax-filled container, a shape listed in the Order’s scope. Therefore, for the aforementioned reasons, this candle is included within the scope of the Order.

Jack O’ Lantern (Item Code #918179, UPC #76023628972)

Meijer contends that the subject “jack o’lantern” petroleum wax candle, consisting of a scented petroleum wax candle with a fiber or paper-cored wick inside an orange petroleum wax container (4 inches in diameter and 4 inches in height), is a novelty candle associated with Halloween. Meijer further contends that the petroleum wax container has a jack o’lantern cut out of its front. While the Department has previously ruled that candles which incorporated jack-o-lanterns in their design were specific to the Halloween holiday, in this case, the Department finds that the jack o’lantern design cut into the petroleum wax container is not identifiable as such from most angles; it is only identifiable when viewed from one angle (the front). See JCPenney Corp. Ruling (where the Department found a candle that had jack o’ lantern images which were visible from most angles to be outside the scope of the Order). See also San Francisco Candle Co. v. United States, 206 F. Supp. 2d 1304 (May 30, 2002) (where the Court upheld the Department’s examination of whether a candle’s design is visible from multiple angles in determining whether it qualifies for the novelty candle exception). Therefore, the Department finds that this candle does not fall within the July 1987 novelty candle exception. Furthermore, the subject candle is a wax-filled container, consisting of a removable pillar placed inside a wax container; both pillars and wax-filled containers are shapes specifically listed in the Order’s scope. See Order. See also Final Affirmative Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Russ Berrie, Inc (September 25, 1997). Therefore, for the above reasons, this candle is included within the scope of the Order.

Halloween Floating Candles (Item Code #888799, UPC #76023633163)

Meijer contends that the subject “Halloween floating” petroleum wax candles (2 inches in diameter and 2.5 inches in height), with fiber or paper-cored wicks, are novelty candles associated with Halloween. Meijer further contends that the subject orange and black candles are shaped like identifiable objects—a spider/cobweb, black cat, ghost, and witch. We disagree that these candles are in the specified identifiable object shapes; specifically, the designs are molded and depicted in black on the top surface

only of each candle, *i.e.*, each candle in its entirety is not in the shape of the respective alleged identifiable object such that the shape could be identified when viewing the candle from angles other than the top. See San Francisco Candle Co. v. United States, 206 F. Supp. 2d 1304 (May 30, 2002) (where the Court upheld the Department's examination of whether a candle's design is visible from multiple angles in determining whether it qualifies for the novelty candle exception).

However, the Department has ruled in the past that ghost and witch designs are specific to Halloween. See Final Scope Ruling; Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504); JCPenney Purchasing Corporation (JCPPC) (May 21, 2001) and Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504); Meijer, Inc. (October 14, 1999). In addition, these four candles consist predominantly of orange-colored wax with black detailing. The colors orange and black, together, are typically associated with Halloween. Thus, the Department agrees that the combination of the characteristics of these four candles—the spider/cobweb, black cat, ghost, and witch designs combined with the orange and black colors—results in the candles being specific to Halloween. Thus, the Department finds that these candles fall within the July 1987 novelty candle exception. Therefore, for the above reasons, these candles fall outside the scope of the Order.

Summary

Meijer argues that the “floating eyeball,” “eyeball,” “skull,” “BAT NOG,” “jack o’lantern,” and “floating Halloween” candles are in the shapes of identifiable objects and/or designed specifically for Halloween, thus, exempting them from the Order. For the reasons discussed above, with regard to the “floating eyeball,” “eyeball,” “skull,” “BATNOG,” and “jack o’lantern” candles, we disagree and find that these candles are included within the scope of the Order. However, for the reasons discussed above, we agree that the “Halloween floating” candles are outside the scope of the Order. These conclusions are consistent with the scope of the petition, the initial investigation, the determinations of the Secretary (including prior scope determinations), and the Commission.

Recommendation

Based on the preceding analysis, we recommend that the Department find that Meijer’s “floating eyeball,” “eyeball,” “skull,” “BAT NOG,” and “jack o’lantern” candles are included within the scope of the Order but that Meijer’s “Halloween floating” candles fall outside the scope of the Order.⁷

If you agree, we will send the attached letter to the interested parties, and will notify Customs of our determination.

_____ Agree

_____ Disagree

Joseph A. Spetrini
Deputy Assistant Secretary
for Import Administration, Group III

Date

Attachment

⁷ As noted above, the Department is not making a determination with respect to Meijer’s two “novelty birthday” candles in the instant ruling; the Department will open a scope inquiry to consider the additional factors under 19 CFR 351.225(k)(2) before making a final determination with respect to these two candles. The Department will render its decision on the two additional candle types in a separate determination at a later date.