

March 22, 2007

By Electronic Mail Notification

To All Interested Parties:

On October 24, 2006, the Department of Commerce (the Department) received a request from Meijer Distribution, 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"): "Dracula," "Skeleton," and "Mummy" (item number 847346); and "Bats," "Pumpkins," and "Ghosts" (item number 84729). See <http://ia.ita.doc.gov/download/candles-prc-scope/index.html> under "2007 - Meijer Distribution, Inc. - Sample Images."

In accordance with 19 CFR 351.225(k)(1), the Department has determined that the "Bats," "Pumpkins," and "Ghosts" candles are within the scope of the antidumping duty order on petroleum wax candles from the PRC. The Department has also determined that the "Dracula," "Mummy," and "Skeleton" 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 Javier Barrientos at (202) 482-2243.

Sincerely,

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

Enclosure

March 22, 2007

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);  
Meijer Distribution, Inc.

### Summary

On October 24, 2006, the Department of Commerce (“the Department”) received a request from Meijer Distribution, Inc. (“Meijer”) 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”): “Dracula,” “Skeleton,” and “Mummy” (item number 847346); and “Bats,” “Pumpkins,” and “Ghosts” (item number 84729). 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 Meijer’s “Bats,” “Pumpkins,” and “Ghosts” candles are within the scope of the order.<sup>1</sup> Additionally, we find that Meijer’s “Dracula,” “Mummy,” and “Skeleton” candles are outside the scope of the order.

### Background

On October 24, 2006, the Department received a letter from Meijer requesting a scope ruling on the candles mentioned above. The National Candle Association (“the NCA”), the petitioners did not submit comments on Meijer’s scope ruling request.

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<sup>1</sup> 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.

## **Meijer's Scope Request**

### **a. Product Descriptions**

#### **“Dracula,” “Skeleton,” and “Mummy” (item number 847346)**

Set 1 consists of “Dracula,” “Skeleton”, and “Mummy” candles which are all 12 inches in length and about 1 1/2 inches wide. These candles display colors generally associated with these characters and contain additional features (for “Dracula” and “Skeleton”) such as a head, arms and legs. The “Mummy” candle displays what appears to be a totally wrapped figure. Additional features (for the “Dracula” and “Skeleton”) such as eyes, a mouth, and other decorative features (cape for Dracula) are also displayed.

#### **“Bats,” “Pumpkins,” and “Ghosts” (item number 84729)**

Set 2 consists of “Pumpkins” “Ghosts” and “Bats” (a pair of each for a total of six) candles, which are shaped in the form of conical rounded forms and are about 2 inches tall and 1 1/2 inches in diameter. These candles all have a little silver colored metal cup base measuring 3/4 of an inch high. The candles are colored orange, white, and black, respectively. Additional features such as eyes and mouths are also displayed.

Meijer provided samples and pictures of its candles.

### **b. Scope Request**

Meijer argues that the candles covered by this scope request are: (1) specially designed for use only in connection with Halloween; and (2) easily identifiable as Halloween figures, *i.e.*, Dracula, a skeleton, a mummy, a bat, a pumpkin, and a ghost, based on their form and Halloween colors (orange, black, and white). In addition, Meijer states that its candles are generally not purchased or used at any other time of the year - they are only sold from September through October.

Meijer argues that the Department has previously determined that Halloween figurine candles (stacked Jack-O-Lantern pumpkins, a witch, and a ghost/pumpkin combination) were outside the scope of the investigation. See Memorandum from Barbara Tillman to Joseph A. Spetrini Regarding 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) (“Meijer 1999 Scope Ruling”).

## **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. 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 Meijer'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 Meijer'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 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 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.”<sup>2</sup> In the JC Penny 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

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<sup>2</sup> 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).

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 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 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."<sup>3</sup> 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."<sup>4</sup> 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.<sup>5</sup> 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.

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

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

<sup>4</sup> Id.

<sup>5</sup> See Petroleum Wax Candles from China, USITC Pub. No. 3226 Investigation No. 731-TA-282 (Review) (August 1999), 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.").

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); 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 a fiber or paper-cored wick, the Department will determine that the candle is within the scope of the Order.

### **Analysis of Meijer’s Candles**

#### **“Bats,” “Pumpkins,” and “Ghosts” Candles**

Meijer cites to the Department’s Meijer 1999 Scope Ruling arguing that the Department previously determined that Halloween figurine candles (stacked Jack-O-Lantern pumpkins, a witch, and a ghost/pumpkin combination) were outside the scope of the order. The Department notes that in that determination, it stated that while it could be argued that the Halloween Figurine candles are shapes within the scope of the order, other characteristics bring these candles outside the scope. See Meijer 1999 Scope Ruling.

In the instant request, the “Bats,” “Pumpkins,” and “Ghosts” candles do not possess sufficient details to characterize them as identifiable objects when viewed from multiple angles. The “Pumpkins” candles, when viewed from the rear or sides, are simply orange spheres, a candle shape previously found to be included within the scope of the order. See, e.g., Final Scope Ruling - Avon Products, Inc. at 7, n. 2 (April 8, 2002) (“We would not consider a ball or sphere shape to be an identifiable object eligible for exclusion from the Order within the standards set forth in the July 1987 novelty candle exception”). Similarly, the “Ghosts” candle is only identifiable as a ghost when viewed from the front. From the sides, the candle presents only the appearance of a white conical/rounded form. The “Bats” candles are not identifiable from any angle.

#### **“Dracula,” “Mummy,” and “Skeleton” Candles**

These candles are recognizable as Dracula, a Mummy and a Skeleton from multiple angles (i.e., the top, sides and bottom), and the appearance is consistent with that of Dracula (human figurine with dark cape and raised collar), Mummy (human-shaped body wrapped in cloth) and Skeleton (having textured bone detail throughout the surface of the candle). The Department finds that these candles are recognizable as identifiable objects from multiple angles and therefore qualify not to be included within the scope of the order pursuant to the novelty candle exception.

**Recommendation**

Based on the preceding analysis, we recommend that the Department find Meijer’s “Bats,” “Pumpkins,” and “Ghosts” candles are within the scope, and Meijer’s “Dracula,” “Mummy,” and “Skeleton” candles to be outside the scope of the antidumping duty order on petroleum wax candles from the PRC. 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

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Date