

December 13, 2007

By U.S. Postal Service Certified Mail Notification

To All Interested Parties:

On August 6, 2007, the Department of Commerce (“the Department”) received a request from Lamplight Farms, Inc. (“Lamplight”) for a scope ruling on whether its Tiki® Mosquito Candles with the Power of Black Flag (“Tiki Candles”) are covered by the antidumping duty order on petroleum wax candles from the People’s Republic of China (“PRC”).

In accordance with 19 CFR 351.225(k)(1), the Department has determined that Lamplight’s Tiki Candles falls outside the scope of the antidumping duty order on petroleum wax candles from the PRC.

Enclosed is a memorandum containing the Department’s analysis. We will notify U.S. Customs and Border Protection (“CBP”) of this decision. If you have any questions, please contact Javier Barrientos at (202) 482-2243.

Sincerely,

James C. Doyle
Director, Office 9
Import Administration

Enclosure

December 13, 2007

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

FROM: James C. Doyle
Director, Office 9
Import Administration

SUBJECT: Antidumping Duty Order on Petroleum Wax Candles From the
People's Republic of China: Final Scope Ruling, Lamplight
Farms, Inc.'s Tiki® Mosquito Candle with the Power of Black
Flag

Summary

On August 6, 2007, the Department of Commerce (“the Department”) received a request from Lamplight Farms, Inc. (“Lamplight”) for a scope ruling on whether its Tiki® Mosquito Candles with the Power of Black Flag (“Tiki Candles”) are covered by 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), we recommend that the Department determine that Lamplight’s Tiki Candles fall outside the scope of the Order.¹

Background

Lamplight filed its request for a scope ruling in proper form on August 6, 2007. On October 18, 2007, the Department issued a supplemental questionnaire to Lamplight. On October 25, 2007, Lamplight submitted its response to the Department’s supplemental questionnaire. On November 13, 2007, The National Candle Association (“Petitioner”), an interested party in this proceeding, filed comments with respect to Lamplight’s August 6, 2007, request. No other interested parties in this proceeding filed comments regarding Lamplight’s request.

Product Description

Lamplight claims that its Tiki Candle contains a patent-pending formula (2% lemongrass oil, 98% paraffin wax & hydrogenated soybean oil) which it claims is five times more effective than

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

citronella at repelling mosquitos without the toxic fumes. Lamplight states that its Tiki Candles will be offered in two sizes, 11 ounce and 22 ounce wax filled containers. The candles are in containers with the following measurements: 22 ounce (5 inch diameter base, 6 inch diameter top, 3-1/4 inches high) and 11 ounce (4 inch diameter base, 5 inch diameter top, 2-3/4 inches high). According to Lamplight, the candles are classified under Harmonized Tariff Schedule of the United States (“HTSUS”) # 3808.91.5000.

Lamplight’s Scope Request

Lamplight argues that its Tiki Candles fall outside the scope of the Order because:

1. The purchaser will reasonably expect the “Tiki® Mosquito Candle With the Power of Black Flag®” to have an insect repellent function;
2. Given its insect repellent function, the Tiki Candle is purchased for a purpose other than providing light or decoration; and
3. The Tiki Candle is clearly labeled for outdoor use and most candles labeled for outdoor use, which also contain insect repellent oil, are not candles within the scope of the Order.

In support of its argument, Lamplight cites a scope ruling where Lamplight claims the Department found a similar candle outside the scope of the Order because it served as an insect repellent, was labeled for outdoor use, and was for purposes other than providing lighting or decoration. See Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Target Stores (December 15, 1998) (“Target Ruling”). Lamplight argues that in the Target Ruling the Department analyzed a candle containing citronella oil labeled for outdoor use and found that candle to be outside the scope of the Order. Lamplight further notes that in the Target Ruling, the Department found that candles that the purchaser reasonably could expect to have an insect repellent function are not candles within the scope of the Order because these candles are purchased, at least in part, for a purpose other than providing light or decoration, namely, repelling insects. See Target Ruling at 8. Lamplight also claims that the Department applied similar reasoning in another ruling regarding citronella garden torches. Lamplight claims that because these citronella garden torches were labeled for outdoor use and labeled as containing citronella oil, the Department found them to be substantially similar to the candles that it analyzed in the Target Ruling, not a standard petroleum wax candle and, thus, outside 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); Boston Warehouse Trading Corp. (December 18, 1998) (“Boston Ruling”).

Petitioner’s Comments

Petitioner argues that the Order includes all wax-filled containers and does not exclude wax-filled containers that can be used to repel insects. Petitioner states that the proposed candles will have wicks, will be burned, and will emit light and scent, all of which are the characteristics and uses

of the candles subject to the Order. Petitioner maintains that there is no exclusion in the Order for candles that can be used outdoors to repel insects.

Petitioner explains that the Petition states that candles are generally used by retail consumers in the home or yard for decorative or lighting purposes. In addition, Petitioner states that the U.S. International Trade Commission (“ITC”) determined that the subject candles were intended to be used so as to give light, heat, or scent or used for celebration or votive purposes. According to Petitioner, that the scent may also repel insects does not preclude its use for light, decoration, and fragrance, indoors or outdoors.

Petitioner argues that Lamplight’s Tiki Candles can be used indoors and outdoors throughout the year for light, decoration, and/or fragrance throw, and are not merely limited to outdoor use only as an insect repellent. Petitioner provided examples (pictures) of lemongrass oil candles that are used indoors for fragrance purposes in its November 13, 2007, submission. Petitioner also argues that Lamplight’s Tiki Candles contain 98 percent petroleum wax, making them later-developed merchandise that fall within the scope of the Order.²

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 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 this case, the Department has evaluated Lamplight’s request in accordance with section 351.225(k)(1) of the Department’s regulations and 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 ITC are dispositive with respect to Lamplight’s

² See Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People’s Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order, 71 Fed. Reg. 59,075, 59,078 (Oct. 6, 2006) (“Later-Developed Determination”).

“Tiki Candles.” Therefore, for these “Tiki Candles,” the Department finds it unnecessary to consider the additional factors provided in section 351.225(k)(2) of the Department’s regulations.

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 Antidumping Petition on Behalf of the National Candle Association, dated September 4, 1985 (“Antidumping Petition”), 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 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 Order. The ITC adopted a similar definition of the “domestic like product” subject to its determinations, noting that 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) 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 Service³ issued in connection with a July 1987 scope determination concerning an exception from the Order for novelty candles, which states:

³ Now U.S. Customs and Border Protection Bureau (“CBP”).

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.

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); JC Penney Purchasing Corporation, (November 9, 2001) (“JC Penney”). 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 Department stated in JC Penney that:

{t}he text following this broad inclusive sentence provides a list of shapes, which list is not modified by any express words of exclusivity. The result of our prior practice of excluding candles of a shape other than those listed was inconsistent with the fact that such candles were ‘scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks.’

See JC Penney at 4-5, footnote 1.⁴

Furthermore, in JC Penney, the Department stated that:

We now determine that this practice was incorrect 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. Accordingly, in order to give full effect to the first sentence of the inclusive language of the scope, the Department in this and future cases normally will 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

⁴ See also 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).

fiber or paper-cored wicks.

See JC Penney at 5, footnote 1.

This approach of evaluating such candles in light of the entire text of the Order 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, 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, 922 (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 (“CAFC”) in Duferco Steel, Inc. v. United States, 296 F.3d 1087 (Fed. Cir. 2002) (“Duferco Steel II”), we do not believe that the CAFC’s decision undermines the Department’s decision in JC Penney. The plain language of the scope of the Order clearly states “{c}ertain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks . . . sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers” are included within the scope of the Order. Thus, the Order offers a descriptive list of the shapes of candles included within the Order, but, as the courts have recognized, there is no requirement that every single product covered must be identified in the scope. More specifically, the CAFC has stated that “the petitions that led to the issuance of the order did not need to specifically identify the {product} in order to cover {it}; our precedent, to say nothing of the regulations, makes clear that neither a petition nor an antidumping or countervailing duty order requires that level of specificity.”⁵ 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.”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 is subject to 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 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

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

⁶ Id.

⁷ 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.”).

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

Analysis

With respect to the instant request, we find that, for the reasons outlined below, Lamplight’s Tiki Candles fall outside the scope of the Order in accordance with section 351.225(k)(1) of the Department’s regulations, because the descriptions of the products contained in the petition, the initial investigation, final determinations of the Secretary (including prior scope rulings), and the Order are dispositive. Therefore, for these candles, the Department finds it unnecessary to consider the additional factors set forth in 19 CFR 351.225(k)(2).

First, we note that the Department has referred to the insect repellent properties of certain oils in previous cases, such as citronella oil, and stated that the presence of citronella oil in these candles “indicates that these candles do have an additional use as compared to the candles subject to the Order: as an insect repellent.” See Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Fabri-Centers of America, Inc. (September 3, 1991) (Fabri-centers Ruling). In the Fabri-centers Ruling, the Department also stated that the citronella oil candles were marketed as insect repellent candles for outdoor use only and found them to be outside the scope of the Order. Id. In subsequent scope rulings, the Department has found that citronella candles are outside the scope of the Order, because they have insect repellent properties and are labeled as outdoor candles.⁸

Here, as in those cases, the record evidence demonstrates that these Tiki Candles are used for repelling insects rather than for “decorative or lighting purposes.” See, e.g., Target Ruling; Fabri-center Ruling and Star Ruling. In addition, unlike the Target Ruling candles (which were still found to be outside the scope of the Order), the labels affixed to Lamplight’s candles state that the candles have insect-repellant properties (the Target Ruling candles did not have these

⁸ See, e.g., Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Target Stores (December 15, 1998) (Target Ruling); Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Boston Warehouse Trading Corp. (December 18, 1998) (Boston Ruling); Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Meijer, Inc. (September 30, 1999) (Meijer Ruling); and Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Star Merchandise Company (July 27, 1994) (Star Ruling).

labels). Also, and again, unlike the Target Ruling candle, Lamplight has submitted information demonstrating that this candle performs an insect repellent function, and provided documentation on the standard under which its candles contain a sufficient quantity of lemongrass oil to qualify them as an insect repellent. See Lamplight's October 25, 2007, submission ("Lamplight's Response") at 2-3 and Exhibits A and B. This documentation includes a detailed independent testing laboratory report on the efficacy of two percent lemongrass oil as an area-wide insect repellent. Id. at 2 and Exhibit A. Lamplight also provided documentation demonstrating that 36 U.S. states require that lemongrass oil be registered as a pesticide. Id. at 2 and Exhibit B. Finally, Lamplight cited information published by the U.S. Environmental Protection Agency ("EPA") relating to that agency's classification of products containing lemongrass oil, as "25b minimal risk pesticides." Finally, we note that Petitioner did not address the efficacy of lemongrass oil as an insect repellent.

While Lamplight's Tiki Candles are not identical in every respect to the candles analyzed in the previous citronella cases, the reasoning in those cases is the same as in the instant case. Similar to the prior citronella candle scope rulings, the record evidence here demonstrates that the Tiki Candles function as an insect repellent and are for outdoor use only.

The base of both sizes of the Tiki Candles contains a well adhered sticker with, amongst other items:⁹

"FOR OUTDOOR USE ONLY"
"Tiki®: Paradise in your backyard™"
"Black Flag®"

The side of both sizes contains a large sticker (approximately 1/3 the circumference) with, amongst other items:

"Tiki®: Paradise in your backyard™"
"Mosquito Candle"
"Up to 5X more effective than citronella!"
"Black Flag®" logo (i.e., black flag with yellow/orange letters)

The top paper/cardboard disk contains, amongst other items"

"Tiki® Mosquito Candles with the Power of Black Flag®"
"Up to 5X more effective than citronella!"
"Natural Repellecy of Lemongrass Oil"
"FOR OUTDOOR USE ONLY"
"Tiki®: Paradise in your backyard™"
"Black Flag®" logo (i.e., black flag with yellow/orange letters)

⁹ All descriptions come from the actual candles submitted by Lamplight with its August 6, 2007, request.

The labeling of these candles is significant in this case because it clearly indicates that (1) the candles are for outdoor use only and (2) the candles indicate that they are to be used as an insect repellent, and are labeled as such. As the domestic industry has stated in its comments, lemongrass oil is a fragrance that is used in a variety of products, including candles for indoor use, soap, creams, lotions, foodstuff, etc. However, Lamplight has provided documentary evidence that the amount and formulation of lemongrass oil in these specific candles act as an insect repellent, and that burning these candles outdoors is an effective means of repelling insects.

Therefore, consistent with our prior scope rulings, and based on the record evidence in this case, we find that the Tiki Candles are outside the scope of the Order because they are insect repellent candles for outdoor use only. Finally, with regard to Petitioner's argument that the Tiki Candles are within the scope of the Order because of their petroleum wax content, the Department notes that it has found candles to be excluded from the scope of the Order based on reasons other than petroleum wax content.¹⁰

Conclusion

Based on the information submitted by Lamplight and Petitioner, the Department's precedent, and our analysis of the candle's function/labeling for the Tiki Candle, we find that because this candle both (1) contains and displays an insect repellent function; and (2) is labeled for outdoor use, it is not a standard petroleum wax candle and, therefore, is outside the scope of the Order.

¹⁰ See Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504): Lamrite West Inc. dba Darice Inc. (February 2, 2007); Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504): Lava Enterprises, Inc. (February 27, 2007); Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504): Meijer Distribution, Inc. (March 22, 2007); Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China: Final Scope Ruling, Fashion Craft-Excello, Inc.; (April 14, 2007); and, Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504): H S Candle, Inc. ("HS") (May 10, 2007).

RECOMMENDATION

We recommend the Department find Lamplight’s patent-pending product, described as being manufactured by casting at least 2 percent lemongrass oil with paraffin wax & hydrogenated soybean oil, in a container of at least 11 ounces, with labels (at least one well adhered) stating that they are for outdoor use only, with indication on the candles/or labels that they are to serve an insect repellent function, 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