

A-570-504
Scope Review
PUBLIC DOCUMENT
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By Certified Mail, Return Receipt Requested

To All Interested Parties:

On May 21, 2002, the Department of Commerce (the Department) received a request from Avon Products, Inc. (Avon) for a scope ruling on whether one type of candle it imports (one "Resin Topper Jar" candle, Product Profile No. 231051) should be included within the scope of 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 Avon's candle 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. 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);
Avon Products, Inc.

Summary

On May 21, 2002, the Department of Commerce (the Department) received a request from Avon Products, Inc. (Avon) for a scope ruling on one type of candle (one "Resin Topper Jar" candle, Product Profile No. 231051) to determine if it should be included within the scope of the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC) (Petroleum Wax Candles from the PRC: Final Determination of Sales at Less Than Fair Value, 51 FR 25085 (July 10, 1986) (Final Determination); 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 Avon's candle is not within the scope of the antidumping duty order on petroleum wax candles from the PRC.¹

Background

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.

Avon filed its request for a scope ruling on the “Resin Topper Jar” candle on November 9, 2001. In a letter dated December 28, 2001, the Department requested that Avon provide test results regarding the exact composition of Avon’s candle, no later than January 25, 2002. On January 24, 2002, Avon requested an extension of the deadline to submit these test results, and the Department subsequently extended the deadline to February 8, 2002. On February 7, 2002, Avon notified the Department of its intent to withdraw its request for a scope ruling for this candle, and indicated it would resubmit its request with the appropriate testing results at a later date. On May 21, 2002, Avon refiled its scope ruling request, including composition test results, for its “Resin Topper Jar” candle. On July 12, 2002, the National Candle Association (NCA), an interested party in this proceeding, filed comments on Avon’s request. On August 26, 2002, Avon filed rebuttal comments to the NCA’s July 12, 2002 submission. On August 9, 2002, Russ Berrie and Company, Inc. (Russ Berrie), an importer of candles from the PRC, submitted comments regarding Avon’s request.

On July 14, 2003, the Department contacted Avon’s counsel by telephone and requested that Avon provide additional testing information regarding the exact composition of its “Resin Topper Jar” candle. The Department also requested that Avon provide further clarification regarding the testing facility it used to test this and other candles before the Department (if applicable to this candle). In a July 16, 2003 letter to Avon, the Department reiterated its request for additional testing information regarding the candle’s composition. See Memorandum to the File from Julio A. Fernandez through Sally C. Gannon Regarding Scope Inquiry: Petroleum Wax Candles from the People’s Republic of China / Requests from Avon Products Inc. (July 14, 2003) and Letter from Barbara E. Tillman, Director, Office of AD/CVD Enforcement VII, Import Administration, to Avon Products Inc., c/o Barbara Y. Wierbicki, Tompkins & Davidson, LLP (July 16, 2003). On July 14, 2003, Avon submitted the requested additional testing information via facsimile, and the Department subsequently filed this information on the official record. See Memorandum to the File from Julio A. Fernandez through Sally C. Gannon Regarding Scope Inquiry: Petroleum Wax Candles from the People’s Republic of China / Additional Test Results for Resin Topper Jar Candles: Avon Products, Inc. (July 21, 2003). On July 21, 2003, Avon formally submitted for the record the additional testing information for the “Resin Topper Jar” candle as well as the requested clarification regarding the testing facility used by Avon in testing this and other candles before the Department. See Avon’s July 21, 2003 submission (July 21st Submission).

Avon Products, Inc.’s Scope Request

Avon argues in its May 21, 2002 submission that this candle (Product Profile No. 231051), a wax-filled glass container with removable polyresin lid incorporating a foam stopper and featuring a three-dimensional depiction of a hummingbird in flight, is a poured candle containing approximately 70 percent palm oil wax, 27 percent paraffin wax, and three percent fragrance. Additionally, Avon argues that its candle, because of its palm-oil composition, is derived from different sources than petroleum wax candles, and is, thus, chemically distinguishable.

Further, Avon argues that the Department has previously issued scope rulings confirming that candles which contain less than 50 percent petroleum wax are not included within the scope of the Order. Avon provided two samples with its request.

In its May 21, 2002 submission, Avon provided the Department with test results obtained from an independent testing facility in the United States, which were conducted in accordance with U.S. Customs Laboratory (USCL) Method 34-07. These test results indicated that “. . . the sample contains 21.8 percent paraffin wax. The remainder consists primarily of palm oil wax.”² In response to the Department’s request, Avon later provided additional testing results regarding the exact composition of its candle. See July 21st Submission. These test results indicate the composition of Avon’s “Resin Topper Jar” candle to be as follows: 27.8 percent paraffin wax, 0.23 percent lauric acid, 0.55 percent myristic acid, 29.8 percent palmitic acid, 17.0 percent stearic acid, 6.4 percent oleic acid and 1.1 percent linoleic acid. Avon maintains in its submission that these test results are consistent with the previous test results in that they reach the conclusion that “. . . the subject candle is made in principal part of vegetable derived wax.” Id.

The new test results also contain the following statement:

This testing was performed by an MTL-ACTS approved outside laboratory.

Id. Because the Department requests that scope requesters use an independent testing laboratory in the United States to conduct testing for these purposes, the Department requested further clarification from Avon on the meaning of this statement. In its July 21st Submission, Avon provided a letter from the testing laboratory with the following explanation:

MTL-ACTS now known as Bureau Veritas Consumer Products Services (BVCPS), is allowed to subcontract to other laboratories as provided by its quality manual. The laboratory used for testing the candles submitted by Avon is a domestic laboratory with no association to Avon (i.e. not an Avon in-house laboratory).

Id.

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

² See Avon’s May 21, 2002 submission.

preserve the efficacy of the Order. In support of its assertion, the NCA cites a Court of International Trade (CIT) decision regarding the novelty exception where the Court stated 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 July 13, 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 first notes that Avon describes its candle as a “Resin Topper Jar” candle, however, the NCA believes that this candle is a wax-filled container and falls specifically within the scope of the Order.³ Additionally, the NCA argues that there is no design on this candle that would limit its use to a specific holiday or event. Therefore, the NCA maintains that this candle should be included within the scope of the Order.

The NCA points out that test results submitted by Avon indicate the candle is composed of 21.8 percent paraffin wax, but does not report the percentage of palm oil in the candle. Because of this, the NCA argues that the Department should require Avon to provide test results from a U.S. laboratory to determine the percentage of palm oil wax and petroleum wax in the candle.

The NCA goes on to argue that even if Avon’s candle was 100 percent palm oil wax, it would be included within the scope of the Order. It is the NCA’s position that Avon’s palm wax candle has similar chemical composition and the same range of essential physical characteristics of petroleum wax candles and, therefore, must be included within the scope of the Order.⁴ The NCA points out that palm oil alone cannot be used as a candle wax because palm oils are liquids at room temperature. The NCA contends that to make candles from palm oil, Avon had to change the chemical structure of the oil so that it was no longer palm oil. The NCA explains that through a process of hydrogenation, the palm oil is substantially transformed into a new product that has similar chemistry to, and the same physical characteristics of, petroleum-derived waxes. Consequently, the NCA argues that the effect of the chemical conversion essentially turns the palm oil into the same product as petroleum wax. The NCA further maintains that the term “petroleum wax” in the Order is not limited to the derivation of the wax, but rather the chemical composition and physical characteristics and uses of the wax. Therefore, the NCA argues that by substantially changing the chemical composition of palm oil into essentially similar chemical composition and the same physical characteristics of petroleum wax, Avon brought its candle within the scope of the Order.

³ See Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Request by Simcha Candle Co. (Feb. 12, 1993).

⁴ See NCA Comments submitted in Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Request by Leader Light (Oct. 24, 2001); Request by Fleming International, Ltd. (Oct. 24, 2001).

In addition, the NCA argues that the International Trade Commission (the Commission) has consistently defined “like product” as a product which is like, or in the absence of like, most similar in characteristics and uses with the article subject to the investigation. . . .⁵ The NCA continues, stating that like products have the “same intrinsic qualities and essential characteristics and uses as the subject imports.”⁶ Next, the NCA argues that any minor differences in the chemical composition or physical characteristics of Avon’s candle cannot lead to the conclusion that Avon’s candle is not like the candles included within the scope of the Order.⁷ Furthermore, the NCA contends that Avon’s candle has the same intrinsic qualities and essential characteristics as petroleum wax candles and therefore, are “like” petroleum wax candles. The NCA also argues that Avon’s candle is the same class or kind of merchandise as are the candles subject to the Order, and are covered by the same HTSUS tariff provision. Thus, the NCA argues that Avon’s candle should be included within the scope of the Order.

To support its position, the NCA cites Bohler-Uddeholm Corporation v. United States (Bohler),⁸ where the Court of Appeals for the Federal Circuit held that the respondent’s two products, based on their physical and chemical characteristics and uses, were included in the class of merchandise within the 1973 antidumping finding against Stainless Steel Plate from Sweden,⁹ even though the products were not specifically mentioned by name. The Court found that although two of the respondent’s products were not specifically mentioned in either the petition or in the antidumping determination, that was not a sufficient basis for the exclusion of these respondent’s products. However, the Court rejected this fact as a basis for exclusion.

The Court explained that:

To require that antidumping determinations be limited to the products they name would be inconsistent with the statutory requirements, then in force, that antidumping duties be imposed upon a “class or kind” of merchandise found to be injurious to domestic industry. While the trade names of BU’s products were not used in the 1973 finding,

⁵ See Determination of the Commission (Final), USITC Publication 1888, August 1986, at 4, note 5, and A-2 (Commission Determination).

⁶ Id., at 4, n.4.

⁷ Id. See also Final Determination of Sales at Less Than Fair Value: Sulfur Dyes, Including Sulfur Vat Dyes, From the United Kingdom, 58 FR 3253 (January 8, 1993).

⁸ 1999 U.S. App. LEXIS 34552 (Fed. Cir. 1999).

⁹ Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate from Sweden, 38 FR 15079 (June 8, 1973) (Stainless Steel Plate from Sweden).

there is sufficient evidence to support Commerce's conclusion that Stavax and Ramax were nevertheless identified by, among other things, their physical and chemical attributes, and by the applications for which they are used.¹⁰

The NCA argues that for the same reasons, the physical and chemical attributes and the applications for which Avon's candle is used are the same as the class or kind of merchandise subject to the Order.

The NCA attached as an exhibit to its July 12, 2002 submission, a memorandum from an Eric E. Wigg, Ph.D., a wax consultant, that the NCA argues establishes the scientific evidence as to the similarity of chemical composition and physical characteristics of palm oil wax candles as compared to petroleum wax candles. However, the NCA does not claim that Avon's candle is petroleum derived. Instead, the NCA claims that this candle has been engineered to have the same physical and burning properties as that of petroleum wax candles with the sole intent to get around the scope of the Order. In fact, the NCA points out, the goal of the development of vegetable wax candles was to "develop vegetable lipid-based candles which are comparable to traditional petroleum wax candles in appearance and performance."¹¹ Thus, the NCA maintains that for the vegetable wax candles to compete against petroleum wax candles, they must both be the same or similar in terms of the important characteristics related to candle performance.

Next, the NCA argues that consumers will have no knowledge of the chemistry of Avon's candle and petroleum wax candles because palm wax and petroleum wax candles have the same physical appearance and functions. The NCA further argues that palm wax and petroleum wax candles have the same physical appearance and functions. The NCA points out that the essential physical characteristics will be in the same range of melt point, color, odor and viscosity. In addition, the NCA argues, Avon's candle is made of wax and has a wick. The NCA adds that palm wax and petroleum wax candles can be engineered to have higher or lower melt points. Moreover, the NCA maintains that it is the alkane-like part of the palm wax molecule to which 90 percent of the carbon atoms are associated which makes these palm waxes have the same physical characteristics and function as candle waxes, *i.e.*, with physical and combustion properties similar to those of petroleum waxes, the primary standard for candle wax. Therefore, the NCA argues that it is through the hydrogenation process that the substantial transformation takes place to yield these alkane-like structures.

As part of its comments, dated July 12, 2002, the NCA states that the consumer will compare the physical characteristics and performance of the palm wax candles to petroleum wax candles, which is the standard in the marketplace. In addition, the NCA contends that if Avon's candle does not have the same intrinsic qualities and essential characteristics of petroleum wax candles, consumers will not

¹⁰ Bohler, 1999 U.S. App. LEXIS at 34554 (emphasis added).

¹¹ See Bernard Y. Tao, Development of Vegetable Lipid-Based Candles, attached as Exhibit 2 to the NCA's July 12, 2002 Comments on Avon's Scope Request.

purchase Avon's candle. Therefore, the NCA argues, Avon has engineered its candle so that it is the same or similar to the candles which are subject to the Order.

The NCA maintains that the issue which merits consideration in the instant request is not whether Avon's candle is petroleum derived, but whether it has the same or similar intrinsic qualities and essential characteristics of petroleum wax candles. The NCA argues that the Department has never previously conducted an in-depth investigation of the chemical composition and physical characteristics of palm wax candles. To support its position, the NCA once again cites Bohler, where the Court concluded that it is not the name of the product, but rather the physical and chemical attributes and applications for which the candles are used that is determinative.¹² For the same reasons, the NCA maintains that the physical and chemical attributes and the applications for which Avon's candle is used are the same as the class or kind of merchandise subject to the Order. Therefore, the NCA argues that in order to compete against petroleum wax candles, Avon's candle must have the same physical appearance and the same or similar range of melt point, color, odor and viscosity.

The NCA points out that the only candle that was excluded by the Commission, other than novelty candles, was the beeswax candle because the Commission determined that it had different characteristics and uses. In that instance, the Commission found that 94 percent of beeswax shipments were for wax-filled glass containers used in religious observances and "other" miscellaneous candles, such as straight-sided altar and sanctuary candles. The NCA adds that the Commission concluded that, "based on different characteristics and uses for petroleum and beeswax candles, we determine that beeswax candles should not be included within the scope of the domestic-like product."¹³ The NCA maintains that the term "petroleum wax" in the Order is not limited to the derivation of the wax, but rather the chemical composition and physical characteristics and uses of the candles. As discussed above, it is the NCA's conclusion that Avon's candle has the same intrinsic qualities and essential characteristics and uses as the subject imports, which are the criteria used by the Commission to determine like product. Moreover, the NCA argues, in contrast to the beeswax candles, the palm wax candles have similar chemical composition and the same physical characteristics, and similar uses as petroleum wax candles. The NCA quotes Russ Berrie's expert, Mr. Roger Crain, from the memorandum attached to Russ Berrie's comments in the Leader Light scope investigation, who concedes that "vegetable wax and petroleum (paraffin) wax are similar. . . ."¹⁴ Nevertheless, NCA maintains, that the essential characteristics for which Avon's candle is purchased and used, to provide light, heat, or scent, remains the same as these candles that are already included within the scope of the Order.

¹² See Bohler, 1999 U.S. App. LEXIS at 34554.

¹³ Commission Determination, at note 5.

¹⁴ Mr. Crain's memorandum at 6, submitted as part of Russ Berrie's August 9, 2002 submission.

The NCA argues that the Department's reference to candles composed of 50 percent petroleum wax can only apply to candles that are over 50 percent beeswax. The NCA believes that the 50 percent rule was based upon the Commission's beeswax exclusion. The NCA maintains that it does not apply to other waxes that were not excluded and have the same intrinsic qualities and physical characteristics and uses as petroleum wax candles. The NCA argues that the Commission's conclusion was based on the following:

[Beeswax candles] are manufactured by U.S. producers principally for religious and specialty markets, and are priced considerably higher than petroleum wax candles. Ninety-five percent of beeswax candle shipments from 1983 to 1985 were to churches and religious dealers. The remaining 5 percent were beeswax dinner candles. Ninety-four percent of the domestic beeswax shipments were for wax-filled glass containers used in religious observances and "other" miscellaneous candles, such as straight-sided alter and sanctuary candles.... Based on different characteristics and uses for petroleum and beeswax candles, we determine that beeswax candles should not be included within the scope of the domestic like product.¹⁵

The NCA notes that in contrast to beeswax candles, Avon's palm wax candle has the same physical characteristics and uses as petroleum wax candles and, therefore, was not excluded from the scope of the domestic-like product.

The NCA also argues that the legislative history of title VII is clear in pointing out that "the requirement that a product be 'like' the imported article should not be interpreted in such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not 'like' each other, nor should the definition of 'like product' be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under investigation."¹⁶

The NCA claims that of primary importance to the Commission in its exclusion is that beeswax candles were principally used in religious and speciality markets. Moreover, the NCA alleges that only 5 percent of the beeswax candles competed against the subject products, thus, sales of beeswax candles were limited to a very special niche in the candle market.

The NCA concludes its comments by noting that Avon's candle competes in the same channels of trade as the candles subject to the Order, and that without the antidumping duty the U.S. candle producers would be injured. The NCA further notes what it characterizes as the long-standing efforts

¹⁵ Commission Determination, at 5-6.

¹⁶ See the NCA's July 12, 2002 submission, at page 8, citing to S. Rep. No. 96-249 at 90-91 (1979).

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.” The NCA 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. The NCA concludes by stating that Avon is now asking the Department to narrow the scope of the Order so that it excludes everyday candles, claiming that they are novelty candles, and that the Department does not have such legal authority.

Avon Products, Inc.’s Responses

In response to the NCA’s comments, Avon argues that the Department has consistently and distinctly stated that merchandise such as the “Resin Topper Jar” candle (poured or not) is not within the scope of the Order. Avon maintains that the NCA’s assertion that petroleum and palm oil are essentially chemically indistinguishable is patently wrong. Furthermore, Avon adds that the NCA is trying to expand the scope of the 1985 petition to include all candles, regardless of composition. Avon counters by arguing that the Department and the CIT have categorically rejected this position as contrary to fundamental due process and as an afterthought attempt to improperly sweep into a dumping order merchandise that was in fact not part of the petition or subject to the investigation and, thus, could not have been included within the scope of the Order.

In support of its argument, Avon cites to Floral Trade Council v. United States, 13 CIT 638 (1989), where the Floral Trade Council (FTC) sought to include “marguerite daisies” within an antidumping order that resulted from a petition that FTC had submitted which covered carnations, chrysanthemums, alstroemeria, gerberas and gysophila.¹⁷ Avon further argues that “FTC later argued that daisies were also/always included because certain chrysanthemums and gerbers are also referred to as ‘daisies.’”¹⁸ Avon points out that the Court rejected this claim, stating:

FTC appears to argue that because ‘chrysanthemums’ are discussed in its petition for relief as to the seven flowers, and because the word ‘daisies’ is mentioned there, as well as in some questionnaire responses, that all chrysanthemums, including all daisies which fall within the botanical genus ‘chrysanthemum,’ are included within the scope of the resulting orders.

It seems odd to the court that the petition and investigation would speak of pompon chrysanthemums, standard chrysanthemums and gerbera daisies (which are in another genus), if all daisies were intended to be covered as part of the chrysanthemum genus.¹⁹

¹⁷ See Floral Trade Council v. United States, 13 CIT 638 (1989)

¹⁸ Id., at 639.

¹⁹ Id., at 639-640.

Similarly, Avon argues the NCA only identified petroleum wax candles in its petition. Moreover, Avon contends that if the NCA had intended candles of other components to be included, it should have so stated. Avon points out that candles of other than petroleum wax components existed generally and were recognized commercially at the time the NCA filed its complaint.²⁰

With respect to the NCA's assertion that Avon's candle has the "same intrinsic qualities and essential characteristics of petroleum wax candles. . . ." Avon maintains that this argument totally ignores the fact that the NCA chose to define the terms of its relief in its petition and argues that its candle is not composed of petroleum wax, and that the scope of the investigation and order pertain solely to petroleum wax candles. Avon also argues that the NCA's claim has no more merit than the assertion advanced by the FTC: that a flower is a flower and that there were substantial similarities with respect to "use" and "channels of trade." Avon maintains that the Court was not impressed and not only rejected FTC's attempt to minimize the distinctions among different types of "daisies" but also underscored that the Department's "later developed" analysis was unnecessary, inasmuch as the petition and order did not include the afterthought flowers. Avon quotes from the CIT, which stated:

In an effort to be comprehensive, ITA attempted to apply the analysis applicable to newly developed products to this case of an existing product. ... The record indicates that there are significant physical differences and differences in purchaser expectations between flowers which are commercially described as either standard or pompon chrysanthemums on one hand, and flowers which are commercially described as "daisies" on the other hand. Although this secondary reasoning was unnecessary, it is also found to be supported.

Accordingly, after having reviewed the record, including the petition and prior ITC and ITA statements with regard to the covered products, the court finds that ITA's determination that daisies are not included within the scope of its antidumping orders, is substantially supported by the record.²¹

²⁰ See, e.g., Explanatory Notes to the Brussels Nomenclature, Volume 1 (1966) describing "Candles, tapers (including ball or coiled tapers), night-lights, etc., are usually made of tallow, stearin, paraffin wax or other waxes." The Brussels Nomenclature is said to have had a significant influence on the TSUS, (which was in effect at the time of the NCA's petition) and its explanatory notes are often referred to as a source of legislative history for the TSUS, when the statute is ambiguous and the language of the TSUS and the Brussels provisions are identical or similar. See W.R. Filbin & Co. v. United States, 306 F. Supp. 440 (1969); Pitney-Bowes, Inc. v. United States, 59 Cust. Ct. 181, 192, C.D. 3116 (1967); J.E. Bernard & Co., Inc. v. United States, 60 Cust. Ct. 296, 303, C.D. 3372 (1968); and Kyocera Int'l, Inc. v. United States, 2 CIT 91, 527 F. Supp. 337, 440 (1981), aff'd 69 CCPA 168, 681 F.2d 796 (1982).

²¹ Floral Trade Council, 13 CIT at 640-641.

Avon next contends that the NCA's claim that Avon's palm oil derived candle has the "same intrinsic qualities and essential characteristics" is no more correct than FTC's claim that all daisy flowers have the "same intrinsic qualities and essential characteristics."

Avon maintains that the NCA's reliance on Bohler is misplaced. Avon points out that the court emphasized that the issue is not whether the product was "'mentioned,' but the applications for which they are used." Avon further points out that the NCA admits that "different kinds of candles require different kinds of wax."²² Avon further argues that contrary to the position regarding chemical composition adopted before the Department, and refuted by Avon in earlier submissions,²³ the NCA has indicated in its published internet website statements that:

By far, the most common wax is petroleum-derived paraffin wax. Plant- and animal-derived waxes are more complex in composition, containing not only simply hydrocarbons (alkanes but also esters, fatty acids, and alcohols. [sic]

Waxes differ with regards to important physical characteristics such as melting point, color, and odor.²⁴

Avon maintains that, despite the NCA's arguments, it is beyond doubt, and self-evident, that palm oil derived wax, such as that in Avon's candle, is obviously a "plant-derived wax." Avon points out that the NCA itself acknowledges that it is more complex in composition, containing esters, fatty acids and alcohols in addition to the hydrocarbons and, thus differs (from petroleum wax candles) with regard to important physical characteristics such as melting point, color, and odor, not to mention the soot emissions.

Avon points out that the NCA requested that an investigation be initiated to cover:

candles [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.²⁵

²² http://www.candles.org/Candlemaking/qa_wax.htm.

²³ See submissions by, and exhibits to, Coudert Brothers dated April 19, 2002 and Serko & Simon dated April 18, 2002 and August 8, 2002, for additional reasoning, as well as details regarding chemical analyses.

²⁴ http://www.meltablesandmore.com/CMI_Wax.htm.

²⁵ Letter from Randolph J. Stayin, Taft, Stettinius & Hollister, to Secretary of Commerce (September 3, 1985).

Avon maintains that at every stage of the proceeding thereafter, right up to the Order, the topic and focus of the investigation was identified as:

Certain 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.²⁶

Avon then argues that it has long been the case that “[e]ach stage of the statutory proceeding maintains the scope passed on from the previous stage.”²⁷ And, that “[a]n expansion of the scope of the order is impermissible and not in accordance with law.”²⁸

Avon further contends that pursuant to the Commission’s original determination of what constituted a “petroleum wax candle,”²⁹ subject to the investigation and Order, the Department has repeatedly affirmed both, and found that “if the petroleum wax content does not exceed 50 percent, a product does not fall within the scope of the order,”³⁰ and specifically, has found in its scope rulings³¹ that candles which contain less than 50 percent petroleum wax are not³² within the scope of the Order.

Avon argues that palm oil’s chemical composition consists mainly of palmitic acid (43 percent), stearic acid (4.4 percent), oleic acid (39.9 percent) and linoleic acid (10.3 percent).³³ Avon further argues

²⁶ See Final Determination, 51 Fed. Reg. at 25085. See also Determination and Views of the Commission (USITC Pub. No. 3226) (August 1999) (Review) at page 4.

²⁷ UST, Inc. v. United States, 9 CIT 352, 356 (1985).

²⁸ Eckstrom Indus., Inc. v. United States, 27 F. Supp. 2d 217, 222 (CIT 1998).

²⁹ “Petroleum wax candles are those composed of over 50 percent petroleum wax, and may contain other waxes in varying amounts, depending on the size and shape of the candle, to enhance the melt-point, viscosity, and burning power.” Commission Determination at 4.

³⁰ Letter from Sally Gannon of the Department of Commerce to Arlen T. Epstein at Tompkins & Davidson, LLP (May 31, 2001).

³¹ See Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Et Al Imports (Dec. 11, 1998) (20 percent petroleum wax); 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) (JCPenney Ruling) (42 percent petroleum wax).

³² Avon is referring to its April 24, 2002 submission in opposition to the NCA.

³³ See, e.g., <http://mpob.gov.my/faq05.html>.

that the NCA's suggestion that the palm oil is indistinguishable from petroleum/paraffin wax is refuted by USCL Method 34-07,³⁴ which readily distinguishes between petroleum/paraffin wax and other waxes, being designed and able to detect and distinguish the presence of paraffin and other substances such as palm oil, based on their respective carbon levels, using the Fourier Transform Infrared Spectroscopy (FTIR) method.³⁵

Consequently, Avon maintains that in view of the specific language contained in the Order, prior scope determinations, and its arguments presented here, Avon's candle, which is of substantially less than 50 percent petroleum or paraffin wax, should not be included within the scope of the antidumping duty order. Therefore, Avon argues its candle should not be subject to assessment of antidumping duties.

Avon requests that the Department conduct this scope determination and reach a conclusion consistent with the plain language of the Order, the Department's earlier determinations and the arguments presented above, as well as those submitted earlier by Avon and others. Therefore, Avon concludes that the Department should find that the "Resin Topper Jar" candle is appropriately not included within the scope of the antidumping duty order and is not subject to assessment of additional antidumping duties.

Russ Berrie & Company, Inc.'s Comments

In its August 9, 2002 comments, Russ Berrie argues that while the Department "has inherent authority to define the scope of an antidumping duty order," the Department "does not have authority to alter,

³⁴ USCL Method 34-07 has been developed to specifically provide for the quantitation of the total amount of paraffin of petroleum origin that has been added to a natural wax sample. The total paraffin-type hydrocarbons in each sample in a set of reference samples and the analysis sample is determined. The average of the total amount of paraffin-type hydrocarbons in the set of reference samples is then subtracted from that in the analysis sample to develop an assessment of the total amount of petroleum based paraffin that had been added to the analysis sample. USCL Method 34-07 can also be used to qualitatively detect the present of waxes other than paraffin in articles of wax by comparison with other reference chromatograms. See U.S. Customs Laboratory Method 34-07, at http://www.customs.ustras.gov/ImageCache/cgov/content/import/operations_5fsupport/labs_5fscientific_5fsvcs/sampling_5fprocedures_5ftesting_5fmethods/lab_5fmethods/chap34_2epdf/v1/chap34.pdf.

³⁵ Petroleum derived paraffin wax consists of hydrocarbons which span the range from C20 through C39. See "Scope" in U.S. Customs Laboratory Method 34-07. Their carbons register different "peaks," allowing one to discern the presence of and distinguish between paraffin wax and, e.g., palm oil within a particular candle and determine the percentage of paraffin wax. See also, Wax Analysis in Conservation Objects by Solubility Studies, FTIR and DSC, Ulla Knuutinen, EVITech Institute of Art and Design, at <http://www.ndt.net>.

amend, or expand the scope of an antidumping duty order.”³⁶ Russ Berrie further argues that the Department’s regulations regarding scope inquiries direct the Department look to “[t]he description of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.”³⁷ Based on this, Russ Berrie contends, sufficient information exists with respect to Avon’s candles for the Department to make a determination without initiating a formal scope inquiry in accordance to 19 CFR § 351.225(e).

As part of its arguments, Russ Berrie maintains that “. . . palm oil is derived from the fruit of certain types of palm trees,” and is, therefore, of vegetable origin. Russ Berrie also argues that the NCA only included candles made from petroleum wax in its petition, adding that the Commission also considered the PRC’s ability to produce petroleum wax in issuing its determination of material injury. In addition, Russ Berrie contends that the Commission’s definition of domestic like product, as well as prior scope determinations issued by the Department and the scope used in the original investigation, are clear and that “. . . they are dispositive in this case and Commerce should end the scope review without opening a formal inquiry and considering any additional criteria.”³⁸

Turning to comments made by Dr. Wigg and submitted by the NCA in support of its assertions that palm oil is similar to petroleum wax, Russ Berrie included as part of its August 9, 2002 comments a submission from Roger J. Crain, chemist and President, Customs Services, Inc. In support of its assertion that palm oil and petroleum wax are indeed not similar, Russ Berrie points to Mr. Crain’s statement that “[p]alm wax consists of saturated triglycerides while paraffin wax consists of saturated straight-chain hydrocarbons. They are not the same thing.” (Russ Berrie’s August 9, 2002 comments at 8). Further, Russ Berrie argues that the Department has previously determined that candles containing more than 50 percent palm oil are not within the scope of the Order.³⁹

Russ Berrie concludes its comments by arguing that palm oil candles were in existence during the investigation, stating that “. . . candles primarily made of hydrogenated vegetable oils such as the palm oil candles subject to this scope inquiry were commercially available prior to the initiation on September 30, 1985 of the investigation of Petroleum Wax Candles from the People’s Republic of China” (Russ Berrie’s August 9, 2002 comments at 9). Russ Berrie also argues that in the original investigation, the Commission defined the domestic like product as petroleum wax candles, and that the domestic

³⁶ See Russ Berrie, 57 F. Supp. 2d at 1192-93 (CIT 1993) (citing to Koyo Seiko, 834 F. Supp. at 1402 and UST, Inc. V. United States, 9 CIT 352 (1985)).

³⁷ See 19 CFR § 351.225(k)(1).

³⁸ Id.

³⁹ See JCPenney Ruling; see also Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles from the People’s Republic of China (A-570-504), Leader Light, Ltd., (Leader Light) (Dec 12, 2002).

industry consisted of producers of petroleum wax candles (Russ Berrie's August 9, 2002 comments at 10).

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 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 Avon's request 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, in fact, dispositive. Therefore, 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 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); Preliminary Determination of Sales at Less Than Fair Value, 51 FR 6016 (February 19, 1986); see also 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. The Commission stated that “. . . we determine that the domestic like product shall consist only of petroleum wax candles.” See Commission Determination, at 9. In its discussion of like product, the Commission also stated:

Petroleum wax candles are those composed of over 50 percent petroleum wax, and may contain other waxes in varying amounts, depending on the size and shape of the candle, to enhance the melt-point, viscosity, and burning power.

See Commission Determination, at 4-5.

Also of relevance to the present scope inquiry is a notice issued to the U.S. 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 CIE N-212/85, September 21, 1987; Letter from the Director, Office of Compliance, to Burditt, Bowles & Radzius, Ltd., July 13, 1987) (Customs Notice).

Analysis of “Resin Topper Jar” Candle - Product Profile No. 2310151

With respect to the instant request, we find that for the reasons outlined below, Avon’s “Resin Topper Jar” candle is not within the scope of the Order.

Initial test results, performed by an independent U.S. testing facility and submitted as part of Avon’s May 21, 2002 submission, indicated that the palm oil wax content of this candle exceeded 50 percent.⁴⁰ According to the test results and Avon’s submission, the percentage of paraffin wax was analyzed according to USCL Method 34-07, including the use of the FTIR method, and the presence of palm oil wax was determined using gas chromatography.⁴¹ These test results indicated that this candle sample contained 21.8 percent paraffin wax and that the remainder consisted primarily of palm oil wax.

As detailed above, Avon later submitted additional testing information pursuant to the Department’s request. See July 21st Submission. These test results were conducted using USCL Method 34-07, in conjunction with gas chromatography and ASTM test method D-1386.⁴² Specifically, these additional test results provided the following information with respect to the percentage of paraffin wax in Avon’s “Resin Topper Jar” candle.⁴³

NEW TEST

ORIGINAL

⁴⁰ See initial testing certificate included in Avon’s May 21, 2002 submission.

⁴¹ Id.

⁴² American Society for Testing Methods (ASTM) test method D-1386, Standard Test Method for Acid Number (Empirical) of Synthetic and Natural Waxes, is a testing methodology which covers the determination of the acid number of synthetic waxes and natural waxes. The number is obtained by direct titration (e.g., the process, operation, or method of determining the concentration of a substance in solution by adding to it a standard reagent of known concentration in carefully measured amounts until a reaction of definite and known proportion is completed) of the material and indicates the amount of free acid present. See search results at www.astm.org for ASTM D-1386; see also search results at www.dictionary.com for titration.

⁴³ The Department notes that, while the aforementioned test results may assist the Department in making its scope ruling, such results may not be dispositive of the exact composition of candles of this item number when such candles are presented at a future time for entry at one of the several Customs ports of entry.

	<u>RESULTS</u> ⁴⁴	<u>TEST RESULTS</u> ⁴⁵
“Resin Topper Jar” Candle (PP231051)	27.8%	21.8%

The new testing results further analyzed the composition of Avon’s candle, revealing the additional components, as follows:

“Resin Topper Jar” Candle (PP231051)	Palmitic acid	29.80%
	Stearic acid	17.00%
	Oleic acid	06.40%
	Linoleic acid	01.10%
	Myristic acid	00.55%
	Lauric acid	<u>00.23%</u>
	Total	55.08%

Thus, the additional test results submitted by Avon confirm that the majority of the wax contained in Avon’s “Resin Topper Jar” candle consists of fatty acids derived from vegetable or animal fats.⁴⁶

⁴⁴ Indicates the percentage of paraffin wax demonstrated as a result of additional testing conducted by an independent testing facility in the United States, and included as part of Avon’s July 21st submission.

⁴⁵ Indicates the percentage of petroleum wax demonstrated as a result of initial testing conducted by an independent testing facility in the United States, and included as part of Avon’s May 21, 2002 submission.

⁴⁶ Specifically, palmitic acid is defined as a fatty acid, C₁₅H₃₁COOH, occurring in many natural oils and fats and used in making soaps. Stearic acid is defined as a colorless, odorless, waxlike fatty acid, CH₃(CH₂)₁₆COOH, occurring in natural animal and vegetable fats used in making soaps, candles, lubricants, and other products. Oleic acid is defined as an oily liquid, C₁₇H₃₃COOH, occurring in animal and vegetable oils and used in making soap. Linoleic acid is defined as an unsaturated fatty acid, C₁₇H₃₁COOH, considered essential to the human diet, that is an important component of drying oils, such as linseed oil. Myristic acid is defined as a fatty acid, CH₃(CH₂)₁₂COOH, occurring in animal and vegetable fats and used in the manufacture of cosmetics, soaps, perfumes, and flavorings. Lauric acid is defined as a fatty acid, CH₃(CH₂)₁₀COOH, obtained chiefly from coconut and laurel oils and used in making soaps, cosmetics, esters, and lauryl alcohol. See www.dictionary.com for search results for “palmitic acid,” “stearic acid,” “oleic acid,” “linoleic acid,” “myristic acid,” and “lauric acid,” respectively.

After reviewing the information submitted for the record of this scope request, the Department determines that Avon’s “Resin Topper Jar” candle, a wax-filled glass container, is outside the scope of the Order on petroleum wax candles from the PRC because the majority of the candle’s components (55.08 percent) is derived from vegetable or animal fats, whereas the petroleum (paraffin) wax content is less than 50 percent. The record evidence indicates that the acids at issue in these candles—palmitic, stearic, lauric and myristic—are obtained from vegetable or animal fat sources, and there is no contradictory evidence on the record indicating that their origins are petroleum-based. Consistent with the Commission’s definition that petroleum wax candles are those composed of over 50 percent petroleum,⁴⁷ the Department agrees that this candle should be found outside the scope of the Order, not only because its petroleum-based content is less than 50 percent, but also because its combined palmitic acid, stearic acid and other vegetable/animal fat-derived acid content is greater than 50 percent, according to additional test results submitted by Avon. See July 21st Submission and Commission Determination, at 4-5. See also, e.g., Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Ocean State Jobbers, Inc. (December 18, 1998); JCPenney Ruling; and Leader Light.

Further, the ITC has defined the domestic like product in this proceeding as “petroleum wax candles.”⁴⁸ In the Commission Determination, the ITC determined “. . . [t]hat the domestic like product shall consist only of petroleum wax candles. The domestic industry, therefore, consists of the producers of petroleum wax candles.” See Commission Determination, at 9.

Consequently, because Avon’s “Resin Topper Jar” candle has a majority composition of palmitic, stearic, oleic, linoleic, lauric, and myristic acids, we find that it is outside the scope of the Order.

Recommendation

Based on the preceding analysis, we recommend that the Department find that Avon’s “Resin Topper Jar” candle, Product Profile No. 231051, falls outside the scope of the Order. This conclusion is consistent with the scope of the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.

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

_____ Agree

_____ Disagree

⁴⁷ See Commission Determination at 4.

⁴⁸ See Petroleum Wax Candles from China, USITC Pub. No. 3226 Investigation No. 731-TA-282 (Review) (August 1999), at 4-5, wherein the Commission reaffirmed its long-standing definition of domestic like product.

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

Date

Attachment