

July 22, 2005

By Electronic Mail Notification

To All Interested Parties:

On June 7, 2005, the Department of Commerce (“the Department”) received a request from Kohl’s Department Stores, Inc. (“Kohl’s”) for a scope ruling on whether its “Easter Egg” 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 the Kohl’s “Easter Egg” candles are included 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 Cindy Lai Robinson at (202) 482-3797.

Sincerely,

Alex Villanueva  
Program Manager  
China/NME Unit, Office 9  
Import Administration

Enclosure

MEMORANDUM FOR: Barbara E. Tillman  
Acting Deputy Assistant Secretary  
for Import Administration

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

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

### Summary

On June 7, 2005, the Department of Commerce ("the Department") received a request from Kohl's Department Stores, Inc. ("Kohl's") for a scope ruling to determine whether its "Easter Egg" candles are included within the scope of 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), the Department finds that Kohl's's "Easter Egg" candles are within the scope of the Order.<sup>1</sup>

### Background

On June 7, 2005, the Department received a letter from Kohl's requesting a scope ruling on its "Easter Egg" candles that, according to Kohl's, it sells and advertises only during the Easter holiday season. On June 27, 2005, the National Candle Association (the "NCA") submitted comments on Kohl's's scope ruling requests. Kohl's did not submit any additional comments.

### Kohl's Scope Request

Kohl's argues that its "Easter Egg" candles qualify for the July 1987 novelty candle exception<sup>2</sup> because the candles are uniquely associated with the Easter holiday. Further, Kohl's argues that

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<sup>1</sup> 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/index>, and will be updated periodically to include newly issued scope determinations.

<sup>2</sup> See page 4 of this memorandum below for further details of the July 1987 novelty candle exception.

these candles qualify to be excluded from the scope of the Order pursuant to 19 CFR 351.225(k)(1) and the novelty candle exception of the September 21, 1987 Customs Information Exchange (“CIE”) scope determination.<sup>3</sup> Kohl’s provided samples of the candles for the Department’s review.

The Kohl’s “Easter Egg” candles consist of six candles that are made of 100 percent paraffin wax, contained in a ceramic basket. Each candle measures 2" in height and approximately 1 ½" in diameter at the widest width. Kohl’s indicates that these candles are classified under HTSUS subheading 3406.00.0000.

Kohl’s argues that these candles are: (1) in the shape of Easter eggs; (2) painted and decorated with multiple colors, with stripes, dots, zig zags and flowers; (3) advertised and sold only during the Easter holiday season, and displayed with Easter holiday candles and decorations only; and (4) intended to be used as home decoration during the Easter holiday. Thus, Kohl’s argues that its candles are in the shape of identifiable objects, possess characteristics that are uniquely associated with the Easter holiday, and therefore, are outside of the scope of the Order.

### **NCA Comments**

The National Candle Association (“NCA”) submitted comments regarding the Kohl’s scope ruling request on June 27, 2005. In its comments, the NCA retraces the history of the antidumping duty order, including the import surges and resultant injury suffered by domestic manufacturers which prompted the original September 1985 antidumping petition. The NCA argues that the antidumping statute and antidumping duty orders are remedial in nature and exceptions to them should be construed as narrowly as possible to preserve the efficacy of the Order. In support of its assertion, the NCA cites a Court of International Trade decision, with regard to the novelty exception, that “Commerce also may find that a holiday candle is within the scope of the Order...when the design is not visible or identifiable from most angles.” See San Francisco Candle Company, Inc. v. United States, 265 F. Supp. 2d 1374, 1380 (CIT 2003), *affirmed by*, San Francisco Candle Company, Inc. v. United States, 104 Fed. Appx, 714, 26 ITRD 2024 (Fed. Cir. 2004). The NCA argues that the Department narrowly limited the novelty candle exception to figurine candles, candles shaped in the form of identifiable objects, and candles specifically designed for use only in connection with the holiday season.

The NCA argues that Kohl’s candles are not in the shape of identifiable objects and they are not designed for use only in connection with a recognized holiday and, therefore, these candles fall within the scope of the Order. Specifically, the NCA maintains that these Kohl’s candles are not identifiable as eggs from any angle; rather, they are in the shape of a round that gradually tapers to the top. The NCA further points out that an egg does not have a flat bottom as do the Kohl’s candles. Furthermore, the NCA contends that there is nothing in the designs of the candles that limits their use to the Easter holiday. According to the NCA, the decorations on the Kohl’s

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<sup>3</sup> In CIE, the Department narrowly limited the novelty candle exception to figurine candles, candles shaped in the form of identifiable objects, and candles specifically designed for and used only in connection with the holiday season. See Customs Information Exchange, CIE N212/85, September 21, 1987.

candles are not Easter related and these candles can be used throughout the year. Therefore, the NCA argues that the Kohl's "Easter Egg" candles must fall within the scope of the Order.

## **Legal Framework**

The regulations governing the Department's antidumping scope determinations are found at 19 CFR 351.225. On matters concerning the scope of an antidumping duty order, the Department first examines the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the U.S. International Trade Commission ("ITC"). This determination may take place with or without a formal inquiry. If the Department determines that these descriptions are dispositive of the matter, the Department will issue a final scope ruling as to whether or not the subject merchandise is covered by the order. See 19 CFR 351.225(k)(1).

Conversely, where the descriptions of the merchandise are *not* dispositive, the Department will consider the five additional factors set forth at 19 CFR 351.225(k)(2). These criteria are: (1) the physical characteristics of the merchandise; (2) the expectations of the ultimate purchasers; (3) the ultimate use of the product; (4) the channels of trade in which the product is sold; and (5) the manner in which the product is advertised and displayed. The determination as to which analytical framework is most appropriate in any given scope inquiry is made on a case-by-case basis after consideration of all evidence before the Department.

In the instant case, the Department has evaluated the Kohl's request in accordance with 19 CFR 351.225(k)(1) 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 the Kohl's "Easter egg 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 Order.

The ITC 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 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 is 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 – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); J.C. Penney (November 9, 2001) (“J.C. Penney 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>4</sup> In the J.C. Penney 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 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, look to the petition’s language to determine whether the class or kind of merchandise at issue was expressly included. Duferco Steel, Inc. v. United States, 146 F. Supp. 2d 913 (May 29, 2001) (“Duferco Steel”). Such an approach is a departure from past CIT precedent that required the Department to give ample deference to the petitioner’s intent when examining a petition’s description of the subject merchandise. See, e.g., Torrington Co. v. United States, 995 F. Supp. 117, 121 (CIT 1998).

Although the specific scope decision in Duferco Steel has been overturned by the United States Court of Appeals of the Federal Circuit (“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 the J.C. 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 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.”<sup>5</sup> 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.”<sup>6</sup> Thus, as applied to this Order, there is no requirement, nor is

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<sup>4</sup> See, e.g., Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Eandar Corp. (January 11, 2000) (“Eandar”) (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).

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

<sup>6</sup> Id.

it possible, for all the shapes of candles to be listed.<sup>7</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. 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.

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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 CBP Notice, it will not fall within the scope of the Order. In order for a candle to qualify for this exception, the characteristic which is claimed to render it a novelty candle (*i.e.*, the shape of an identifiable object or a holiday-specific design) should be easily recognizable in order for the candle to merit not being included within the scope of the Order. Specifically, among other determining factors, the Department will examine whether the characteristic is identifiable from most angles and whether or not it is minimally decorative, *e.g.*, small and/or singularly placed on the candle. If the identifiable object or holiday-specific design is not identifiable from most angles, or if the design or characteristic is minimally decorative, the Department may determine that the candle is included within the scope of the Order. See J.C. Penney Corp. Ruling; Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); San Francisco Candle Co. (Feb. 12, 2001) (“SFCC”); and Endar. If a candle does not possess the characteristics set out in the July 1987 novelty candle exception, and it is a scented or unscented 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, Kohl’s candles are within the scope of Order. These candles are petroleum wax candles having what appears to be a fiber or paper-cored wick. Furthermore, they are not identifiable objects, nor do they contain any identifiable holiday-specific design which would qualify these candles for exclusion from the Order under the July 1987 novelty exception.

Kohl’s claims that its candles are in the shape of an identifiable object (*i.e.*, Easter eggs) and are uniquely associated with a specific holiday (*i.e.*, the Easter holiday), and therefore, its candles qualify for the novelty candle exception. Kohl’s points to the fact that its candles are displayed with Easter holiday candles and decorations, sold and advertised only during the Easter holiday season, and intended to be used as a decoration for the home during the Easter holiday.

We disagree with the Kohl’s argument that its candles are in the shape of identifiable objects, and that its candles are uniquely associated with the Easter holiday, and therefore, should not be included within the scope of the Order. Pursuant to the Department’s change in practice, as described in the J.C. Penney Scope Ruling, if a candle is not in a shape specifically listed in the scope of the Order, it will not automatically be excluded from the scope of the Order. See J.C. Penney Scope Ruling. Instead, the Department will normally evaluate whether the candle is a

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<sup>7</sup> See Petroleum Wax Candles from China, USITC Pub. No. 3226 Investigation No. 731-TA-282 (Review) (August 1999) (“USITC Pub. No. 3226”), at 18 (“Candles come in a wide variety of shapes and sizes. Major U.S. candle manufacturers reportedly will offer 1,000 to 2,000 varieties of candles in their product lines.”).

scented or unscented petroleum wax candle made from petroleum wax and having a fiber or paper-cored wick. The Kohl's candles are petroleum wax candles with a wick.<sup>8</sup> Therefore, we must evaluate whether the characteristics of these candles bring them outside the scope of the Order pursuant to the novelty candle exception detailed in the CBP Notice and our interpretation set forth in the J.C. Penney Scope Ruling.

Based on the comments by Kohl's, we first examined whether these candles are in the shape of identifiable objects: Easter eggs. We find that these candles are in the shape of a round that gradually tapers to a point at the top, but all six candles contained in the ceramic basket have flat bottoms. Therefore, we disagree with Kohl's that these candles are recognizable as eggs when viewed from their sides and bottoms. We also examined whether the designs of these candles are exclusively associated with the Easter holiday. We find that, although the candles are painted in multiple colors with stripes, dots, zig zags and flowers, none of these colors or designs are exclusively associated with the Easter holiday. Moreover, there is no indication on the candles or the ceramic basket that these candles are specifically used for the Easter holiday. Thus, we disagree with Kohl's that these candles are uniquely associated with the Easter holiday. These findings are consistent with Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504); Abrim Enterprises, Inc. (January 19, 2005) (where the Department found that Abrim's "Easter Egg/Flower Basket" candles did not qualify for the novelty candle exclusion because these candles do not have the shape of an identifiable object or a holiday-specific design). *See also* September 1987 CIE. With respect to the Kohl's argument that these candles are displayed with Easter holiday candles and decorations, sold and advertised only during the Easter holiday season, and are intended to be used as home decoration during the Easter holiday, under the Department's new practice, the Department focuses only on whether the candles at issue are in the form of identifiable objects or whether the candles can be exclusively associated with a specific holiday. The Department does not consider the manner in which the candles were sold or their intended use.

As discussed above, we find that the Kohl's candles are not in the shape of any recognizable object. Moreover, we find that these candles are not exclusively associated with the Easter holiday or any other specific holiday. Therefore, the Kohl's "Easter Egg" candles are included within the scope of the Order.

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<sup>8</sup> Kohl's did not specify what type of wick is used in its "Easter egg candles."



**Recommendation**

Based on the preceding analysis, we recommend that the Department find that the Kohl’s “Easter Egg” candles fall within 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

\_\_\_\_\_  
Barbara E. Tillman  
Acting Deputy Assistant Secretary  
for Import Administration

\_\_\_\_\_  
Date

Attachment