

By Electronic Mail Notification

To All Interested Parties:

On September 22, 2003, the Department of Commerce (the Department) received a request from Kuehne & Nagel, Inc., customs broker (agent) for Pacific Enterprise, LLC (Pacific Enterprise), for a scope ruling on whether three “Chubby Palm Candles” (item numbers: 02717, 02724 and 02700) are 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)(2002), the Department has determined that Pacific Enterprise’s candles are not 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 (formerly the United States Customs Service) of this decision. If you have any questions, please contact Kimberley Hunt at (202) 482-1272.

Sincerely,

Dana S. Mermelstein
Acting Office Director
AD/CVD Operations, Office VI
Import Administration

Enclosure

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

FROM: Dana S. Mermelstein
Acting Office Director
Office of AD/CVD Operations, Office VI

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

Summary

On September 22, 2003, the Department of Commerce (the Department) received a request from Kuehne & Nagel, Inc., customs broker (agent) for Pacific Enterprise, LLC (Pacific Enterprise), for a scope ruling on a set of three "Chubby Palm Candles" (Item numbers: 02717, 02724 and 02700) to determine whether they are covered by 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), the Department finds that Pacific Enterprise's candles are not within the scope of the order on petroleum wax candles from the PRC.¹

Background

Pacific Enterprise properly filed its request for a scope ruling on September 22, 2003. No response or comments to Pacific Enterprise's request have been filed.

a. Product Descriptions

Pacific Enterprise's request concerns three separate candles, which are described as "Chubby Palm Candles."

¹ The Department has developed an internet website that allows interested parties to access prior scope determinations regarding the 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/>. The Department will update the website periodically to include newly issued scope rulings.

All three candles are identical in color and shape, but differ only in height. “Chubby Palm One” (item number 02724) is a 6.5 inch high palm tree candle, “Chubby Palm Two” (item number 02717) is a 7.5 inch palm tree candle and “Chubby Palm Three” (item number 02700) is a 9 inch palm tree candle.

Each candle, in the shape of a palm tree is centered on its own individual base, so that there is only one candle per base. The base consists of two levels, one slightly higher than the other creating the effect of a step. These bases are decorated with tan and brown colors made to look like a braided rope and a wooden-like texture with a marble-like fill which is the color of sand.

The candle itself is four separate shades of brown and yellow on the trunk and consists of a textured cylinder which is fatter at the base and curves inward to a thinner column before fattening up at the top. The top is not as thick as the base, which creates a waist-like curvature up the trunk of the tree. Above this textured brown colored trunk sits green leaf-like branches which form the branches of the top of the palm tree.

The green leaf-like foliage protrudes outward from atop the trunk. They are conjoined in the center but stem out from where they are joined and create individual palm branches. The number of branches varies per candle in that the smallest, 6.5 inch “Chubby Palm One” has 15 branches, the middle sized 7.5 inch palm, “Chubby Palm Two,” has 17 branches and the largest 9 inch palm, “Chubby Palm Three,” has 18 branches. The width of all of the candles branches, as a unit, is approximately as tall as the base of each of the trees, respectively. Pacific Enterprise provided samples for each of its candles.

b. Pacific Enterprise, LLC’s Request

Pacific Enterprise claims that its “Chubby Palm Candles” are three-dimensional identifiable objects which are representations of palm trees, regardless of the angle at which they are viewed, and thus fall outside of the scope of the Order under 19 C. F. R. § 351.225(k)(1). Specifically, Pacific Enterprise argues that a Customs Notice issued in 1987 states that the Department has determined that certain novelty candles are not within the scope of the antidumping duty order on petroleum wax candles from the PRC. Such novelty candles not within the scope of the order include candles shaped in the form of identifiable objects.² Pacific Enterprise argues that these candles clearly represent an identifiable object, here palm trees, and thus are outside of the scope of the Order.

Legal Framework

² The Customs Notice was a notice issued by the Department to the U.S. Customs Service (renamed U.S. Customs and Border Protection (CBP)) in connection with a 1987 scope determination concerning an exception to 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 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, figurines candles, and candles shaped in the form of identifiable objects (i.e., animals or numerals).

The Department examines scope requests in accordance with the Department's scope regulations, which may be found at 19 CFR 351.225 (2002). On matters concerning the scope of an antidumping duty order, the Department first examines the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the International Trade Commission (the Commission). See 19 CFR 351.225(k)(1). 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 product is covered by the order. See 19 CFR 351.225(d).

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, with or without formal inquiry, after consideration of all evidence before the Department.

Pursuant to 19 CFR 351.225(k)(1), the Department will examine the description of the subject merchandise from the petition, the initial investigation, and the Commission's determinations. 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 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); Final Determination; and Order.

The Commission adopted a similar definition of the “like product” subject to its determinations, noting that the investigations did not include “birthday, birthday numeral and figurine type candles.” See Determinations of the Commission (Final), USITC Publication 1888, August 1986, at 4, note 5, and A-2 (Commission Determination). 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.

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.

The Department clarified the scope of the Order in relation to certain novelty candles. See Russ Berrie Ruling at 1194. In 1987, the Department issued a notice to the United States Customs Service (since renamed CBP) in connection with a scope ruling which provides:

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 interpretation of 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); 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.”³ In the J.C. Penney Ruling, the Department revised this practice because the former practice had the effect of narrowing the broad coverage of the first sentence of the Order’s scope. The list of shapes in the second sentence of the Order’s scope does not provide a textual basis for such a narrowing of the coverage of the first sentence of the Order’s scope.

This approach of evaluating candles in light of the entire text of the Order’s scope is in keeping with Duferco Steel, 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. See Duferco Steel, Inc. v. United States, 146 F. Supp. 2d 913 (CIT 2001) (Duferco Steel).

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), the CAFC’s ruling does not undermine the Department’s scope determination 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.”⁴ The CAFC further stated “[a]s a matter of law, a petition need not list the entire universe of products . . . in order {for the petition} to cover those products.”⁵ Thus, as applied to this Order, there is no requirement, nor is it

³ See, e.g., Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Endar Corp. (January 11, 2000) (Endar) (The Department determines that a “dragonfly” candle, in the shape of a rough-hewn stone with a dragonfly carved on top, should not be included within the scope because it is of a shape not specifically listed by the language of 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) (The Department determined that a sphere or ball-shaped candle should not be included within the scope because it is a shape not specifically listed by the language of the scope).

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

⁵ Id.

possible, for all the shapes of candles to be listed.⁶ In fact, if the list were exhaustive, there would have been no need for the Department to render a decision on novelty candles or any other candle that was not explicitly listed as a shape in the scope of the Order. However, the Department did issue the novelty candle exception, which offered a narrowly construed exception and left all other petroleum wax candles from the PRC covered by the Order.

When determining whether a particular novelty candle is within the scope of the Order, the Department will first determine whether the candle is made of petroleum wax. If the candle is made of petroleum wax, the Department will look to see whether the shape of the candle falls within those shapes listed in the second sentence of the scope as defined in the Order, i.e., “tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers.” If the Department determines that a candle is one of these shapes, it is within the scope of the Order.

However, if the Department finds that a candle’s shape is not among the shapes listed in the second sentence of the scope as defined in the Order, i.e., taper, spiral, straight-sided dinner candle, round, column, pillar, votive, and various wax-filled containers, then the candle will be evaluated to determine whether it is a novelty candle. 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 should be included within the scope of the Order. See Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); J.C. Penney Purchasing Corp. (May 21, 2001); 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 Ruling); San Francisco Candle Company, Inc. v. United States, 265 F. Supp. 2d 1374, 1379 (CIT 2003) (SFCC); and Endar. If the candle does not possess characteristics set out in the July 1987 novelty candle exception, and it is a scented or unscented petroleum wax candle made from petroleum wax and having a fiber or paper-cored wick, the Department will determine that the candle is within the scope of the Order.

⁶ See Petroleum Wax Candles from China, USITC Pub. No. 3226 Investigation No. 731-TA-282 (Review) (August 1999) (USITC Pub. No. 3226), at 18 (“Candles come in a wide variety of shapes and sizes. Major U.S. candle manufacturers reportedly will offer 1,000 to 2,000 varieties of candles in their product lines”).

Analysis of Pacific Enterprise's Candles

With respect to the involved scope request, the Department finds that, for the reasons outlined below, “Chubby Palm One,” “Chubby Palm Two” and “Chubby Palm Three” in Pacific Enterprise’s request are not included within the scope of the Order, because these candles are easily recognizable as identifiable objects, namely palm trees.

Pacific Enterprise describes its “Chubby Palm Candles” as three-dimensional representations of palm trees, regardless of the angle at which they are viewed. “Chubby Palm One” (item number 02742) is 6.5 inches tall, “Chubby Palm Two” (item number 02717) is 7.5 inches tall and “Chubby Palm Three” (item number 02700) is 9.0 inches tall.

We agree with Pacific Enterprise that all three “Chubby Palm Candles” are not included within the scope of the order on petroleum wax candles from the PRC because these candles are identifiable objects. Pursuant to the Department’s change in practice stated in J.C. Penney Scope Ruling, if a candle is not in a shape specifically listed in the Order’s scope, 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 scented or unscented petroleum wax candle made from petroleum wax and having a fiber or paper-cored wick and whether it has an identifiable shape from multiple angles pursuant to the ITC ruling in San Francisco Candle Co v. United States. (265 F.Supp. 2d., at 1274). The “Chubby Palm Candles” (items 02717, 02724 and 02700) are petroleum wax candles with fiber core wicks. Therefore, we must evaluate whether the characteristics of these candles bring it outside of the scope of the Order pursuant to the novelty candle exception detailed in the Customs Notice and our interpretation set forth in the J.C. Penney Scope Ruling.

Based on Pacific Enterprise’s comments, we examined whether “Chubby Palm One,” “Chubby Palm Two” and “Chubby Palm Three” are in the shape of identifiable objects, namely, palm trees. We found that they are all shaped as palm trees and are identifiable as such from multiple angles for several reasons. First, the tree trunks rise from the base, which makes both the trunk and the palm branches visible from the top and all sides of the candles. Second, the colors of the tree trunk, which is brown, and the leaves, which are a darkish green color, give these candles the appearance of palm trees. Third, there are etchings on both the tree trunk and the leaves, which gives the candles the appearance of real palm trees. The branches also protrude far enough that they are visible when the tree is viewed from the underside. Given that the “Chubby Palm Candles” are identifiable from multiple angles, these candles, with item numbers 02717, 02724 and 02700, fall within the novelty candle exception, and therefore are not included within the scope of the Order.

Recommendation

We recommend finding that Pacific Enterprise’s three “Chubby Palm Candles” are not included within the scope of the order on petroleum wax candles from the PRC because these candles are in the shape of identifiable objects (i.e., palm trees), and they are identifiable as palm trees from multiple angles.

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

Pacific Enterprise LLC - Product Samples



6.5" & 7.5" Palm Tree Candles



9" Palm Tree Candle