

By Electronic Mail Notification

To All Interested Parties:

On June 15, 2004, the Department of Commerce (“the Department”) received a request from Coppersmith Inc. (“Coppersmith”) on behalf of its client, Specialty Merchandise Corp. (“SPC”) for a scope ruling on whether one type of candle it plans to import is 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)(2004), the Department has determined that SPC’s “Xmas JOY” candle is 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 (“CBP”) of this decision. If you have any questions, please contact Nicole Bankhead at (202) 482-9068.

Sincerely,

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

Enclosure

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

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

SUBJECT: Final Scope Ruling: Antidumping Duty Order on Petroleum Wax
Candles From the People's Republic of China (A-570-504);
Coppersmith Inc. on behalf of Specialty Merchandise Corp. ("SPC")

Summary

On June 15, 2004, the Department of Commerce ("the Department") received a request from Coppersmith Inc. ("Coppersmith") on behalf of their client, SPC, for a scope ruling to determine whether its "Xmas JOY" candles are included within the scope of the antidumping duty order on petroleum wax candles from the People's Republic of China ("PRC"). 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 SPC's "Xmas JOY" candles are within the scope of the Order.¹

Background

On June 15, 2004, the Department received a letter from Coppersmith requesting a scope ruling on its "Xmas JOY" candles. On November 5, 2004, the National Candle Association ("NCA") submitted comments on Coppersmith's scope ruling requests.

Coppersmith's Scope Request

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

Coppersmith argues that its “Xmas JOY” candles are a festive article as they are identified with Christmas, which would make them eligible for the novelty exception either as novelty candles in the form of identifiable objects or holiday novelty candles. Specifically, Coppersmith argues that because the “Xmas JOY” candles contain the words “Xmas” and “JOY” they should not be included within the scope of the Order. The following is a brief excerpt of Coppersmith’s description of its candles from its June 15, 2004, submission:

The Xmas “JOY” candle consists of three block candles all supported by the metal stand. The red block candle has the letter “J” that protrudes from sides of the block. The green block candle has the letter “O” that protrudes from the sides of the block. The blue block candle has the letter “Y” that protrudes from the sides of the block.

U.S. Customs has issued Binding Ruling NY H84509 dated September 6, 2001 classifying this candle as a festive article under HTS#9505.10.2500.

Coppersmith included a sample of the “Xmas JOY” candle with its scope ruling request.

The NCA’s Comments to Scope Request

The NCA submitted comments objecting to the exclusion of the candles proposed by Coppersmith. In its submission, the NCA detailed the history of the Order and the criteria for determining candle exclusions from the scope of the Order. Specifically, the NCA discusses the narrow definitions pertaining to the novelty candle exceptions, identifiable object candle exceptions, and candles designated for holiday season use. The NCA argues that Coppersmith’s candles are not in the shape of identifiable objects or designed for use only in connection with the holiday season and, therefore, they fall within the scope of the Order. The NCA notes that:

Coppersmith’s “JOY” candles, has a “J” embossed on one candle on one side, an “O” embossed on another candle on one side, and a “Y” embossed on another candle on one side. Each candle has two blank sides, and each candle has “Merry Xmas” embossed on one side. The Department has previously ruled that the word “JOY” does not limit the use of a candle only in connection with the Christmas holiday. {Final Scope Ruling–Antidumping Duty Order on Petroleum Wax Candles from the People’s Republic of China (A-570-504); Atico International, Inc. (Nov.1, 2002) and Meijer Inc. (Dec. 15, 1997)}...Furthermore, the words “Merry Xmas” only appear on one side of each cube, and therefore cannot be viewed from a majority of angles, and therefore, the candles must be included within the scope of the Order.

Legal Framework

The regulations governing the Department's antidumping scope determinations are found at 19 CFR 351.225 (2004). 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 Coppersmith's requests 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 Coppersmith's "Xmas JOY" 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 the Department did not present, or place 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*).

When determining whether a particular product claimed as a novelty candle is within the scope of the Order, the Department's first line of inquiry is whether the shape of the candle falls within those shapes listed by the inclusive language of the Order's scope, *i.e.*, "tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers." If a candle falls within

one of the above-delineated shapes, it will be determined to be within the Order's scope. Candles of a shape not listed by the inclusive language of the Order's scope will then be evaluated to determine whether they are "scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks."

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); JCPenney (November 9, 2001) ("JCPenney 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."² In the JCPenney 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 consistent 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 NCA'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

² 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") ("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) (sphere or ball-shaped candle not within scope because it is a shape not listed by the scope).

(Fed. Cir. 2002) (“Duferco Steel II”), we do not believe that the CAFC’s decision undermines the Department’s decision in the JCPenney 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.”³ 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.”⁴ Thus, as applied to this Order, there is no requirement, nor is it possible, for all the shapes of candles to be listed.⁵ 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 render the novelty candle exception that offered a narrowly construed exception, leaving all other petroleum wax candles from the PRC covered by the Order.

If the Department determines that the candle is made from petroleum wax and has a fiber or paper-cored wick, but the candle possesses characteristics set out in the 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 Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); JCPenney Purchasing Corp. (May 21, 2001) (“JCPenney 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

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

⁴ Id.

⁵ 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.”).

possess the 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 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, Coppersmith's "Xmas JOY" candles fall within the scope of the Order, because they are not identifiable as a holiday design from multiple angles and, therefore, do not qualify for the novelty exception.

Coppersmith contends that the subject "Xmas JOY" petroleum wax candles are novelty candles associated with Christmas. Coppersmith's "Xmas Joy" candles consist of three individual blocks of candles, each with the letter "J," "O," or "Y", respectively, on two sides, that when properly arranged, spell "JOY." Additionally, "Merry X'mas" appears on one side of each of the three blocks and the fourth side remains blank. However, although the words "Merry X'mas" and "JOY" appear on the candles, they are not visible from all angles of the candles and thus the candles do not qualify for the novelty exception. We find that the words are not visible from multiple angles given that the blocks must be properly aligned to spell "JOY" and the blocks could be arranged so that a blank side appears rather than the letter. For example, if the three blocks are placed together on its base with the word "Merry X'mas" not facing outward, the word "JOY" would be misspelled. Because the positioning of the individual candle blocks can be manipulated to hide the words "Merry X'mas" and misspell "JOY," which is not a word solely attributed to the Christmas holiday, we find that the candles are not identifiable as a holiday candle from multiple angles. Therefore, for the above reasons, the "Xmas JOY" candles are included within the scope of the Order.

Additionally, the Department notes that a candle containing similar markings and features, such as the word "JOY," has already been found to be within the Order by the Department in a previous scope ruling. See Final Scope Ruling Meijer Inc. (Meijer) (December 15, 1997).

Summary

We disagree that the "Xmas JOY" candles are specific to a certain holiday or special event. We, therefore, find that these candles are included within the scope of the Order. This conclusion is consistent with the scope of the petition, the initial investigation, the determinations of the Secretary (including prior scope determinations), and the ITC.

Recommendation

Based on the preceding analysis, we recommend that the Department find that Coppersmith's "Xmas JOY" 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

Specialty Merchandise Corp - Product Samples



Christmas Joy 1



Christmas Joy 2



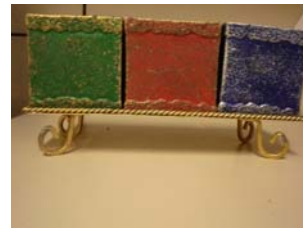
Christmas Joy 3



Christmas Joy 4



Christmas Joy 5



Christmas Joy 6