

September 26, 2005

By Electronic Mail Notification

To All Interested Parties:

On August 12, 2005, the Department of Commerce (“the Department”) received a request from Avon Products Inc. (“Avon”) for a scope ruling on whether its “Chalet” and “Cottage” 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 Avon’s “Chalet” and “Cottage” candles are not 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 Javier Barrientos at (202) 482-2243.

Sincerely,

Alex Villanueva
Program Manager, Office 9
Import Administration

Enclosure

MEMORANDUM FOR: Holly A. Kuga
Acting Deputy Assistant Secretary
for Import Administration

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

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 August 12, 2005, the Department of Commerce (“the Department”) received a request from Avon Products Inc. (“Avon”) for a scope ruling to determine whether its “Chalet” and “Cottage” 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 Avon’s “Chalet” and “Cottage” candles are not within the scope of the Order.¹

Background

On August 12, 2005, the Department received a letter from Avon requesting a scope ruling on its “Chalet” and “Cottage” candles that, according to Avon, are intended for sale during the Christmas holiday season. The National Candle Association (the “NCA”) did not provide comments on Avon’s scope ruling request. Avon did not submit any additional comments.

Avon’s Scope Request

Avon argues that its “Chalet” and “Cottage” candles qualify for the July 1987 novelty candle exception² because the candles are shaped in the form of an identifiable object. Further, Avon

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.

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

argues that 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.³ Avon provided samples of the candles for the Department’s review.

Avon’s “Chalet” and “Cottage” candles are made from petroleum wax and feature a single top wick. The “Chalet” is approximately 4" in height, 4" in width and 2" in depth, with two brick chimneys, eaves, and a bluish grey roof which is covered with snow. The “Cottage” measures approximately 4" in height, 3" in width and 3" in depth, with a brick chimney, eaves, and brown roof which is covered with snow. These candles are classified under Harmonized Tariff Schedule of the United States (HTSUS) item number 3406.00.0000.

Avon argues that the candles at issue are each a three dimensional candle molded in the shape of an identifiable object; one is shaped as a chalet while the other is shaped as a cottage. Avon states that both the “Chalet” and “Cottage” candles contain such details as “doors,” “windows,” “window treatments” which are visible from the outside, distinctive “slate” or “thatched” shaped “over hanging roofs” and “brick chimneys.” According to Avon, each is also appropriately painted (*i.e.*, brown or slate bluish gray roofs) as one would envision the particular object to be painted. Avon explains that, the “Chalet” candle also has three dimensional verandas outside the two second-story windows and incorporates features such as “brick and lumber” construction. The “Cottage” candle has three dimensional “awnings” over the “windows” and incorporates features such as exposed “beam eaves” and a paneled front “door.” In addition, Avon argues that each candle is intended for sale during the Christmas holiday season, as each has “snow” all around and on the “roof” and “fur tree” or “bushes.” According to Avon, it is plainly evident that each candle replicates a readily identifiable object when viewed from the top and all sides.

Thus, Avon argues that its candles are in the shape of identifiable objects, possess characteristics that are associated with the Christmas holiday, and therefore, are outside of the scope of the Order.

NCA Comments

The NCA did not submit comments regarding Avon’s scope ruling request.

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

³ 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.

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 Avon'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 Avon's "Chalet" and "Cottage" 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.”⁴ In the J.C. Penney Ruling, the Department determined to revise this practice because it had the effect of narrowing the broad

⁴ 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”) (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).

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."⁵ The CAFC further stated "{a}s a matter of law, a petition need not list the entire universe of products . . . in order {for the petition} to cover those products."⁶ Thus, as applied to this Order, there is no requirement, nor is it possible, for all the shapes of candles to be listed.⁷ In fact, if the list were exhaustive, there would have been no need for the Department to determine whether any other candle that was not explicitly listed as a shape fell within 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.

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

⁶ Id.

⁷ See Petroleum Wax Candles from China, USITC Pub. No. 3226 Investigation No. 731-TA-282 (Review) (August 1999) ("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.").

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. 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, Avon’s candles are not within the scope of the Order. Even though these candles are petroleum wax candles with a fiber or paper-cored wick, they are in the shape of identifiable objects which would qualify these candles for exclusion from the Order under the July 1987 novelty exception. Because we find these candles to not be included within the scope of the Order on the basis that these candles are identifiable objects, we are not addressing Avon’s argument that each is intended for sale during the Christmas holiday season.

We agree with Avon’s argument that its candles are in the shape of identifiable objects, 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 as excluded from 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 scented or unscented petroleum wax candle made from petroleum wax and having a fiber or paper-cored wick. Avon’s candles are petroleum wax candles with a wick.⁸ Therefore, we must evaluate whether the other characteristics of these candles render 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 information provided by Avon, we examined whether these candles are in the shape of identifiable objects: “Chalet” and “Cottage.” We find that these candles are in the shape of a “Chalet” or “Cottage” when viewed from most angles. These candles appear to be formed from a single molding process, with the intricate details formed as part of the molding process and not etched. These details include doors, windows, distinctive slate or thatched shaped over hanging roofs, and brick chimneys for both candles. For the “Chalet” candle, this further includes verandas and a brick and lumber construction. For the “Cottage” candle, this further includes

⁸ Avon’s did not specify what type of wick is used in its “Chalet” and “Cottage” candles.

projecting awnings over the windows and exposed beam eaves and a paneled front door. The shape of either the “Chalet” or “Cottage” candle is visible from multiple angles and thus we find these candles to be identifiable objects.

As discussed above, we find that Avon’s “Chalet” and “Cottage” candles are in the shape of identifiable objects and, therefore, are not included within the scope of the Order.

Recommendation

Based on the preceding analysis, we recommend that the Department find that Avon’s “Chalet” and “Cottage” candles are not 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

Holly A. Kuga
Acting Deputy Assistant Secretary
for Import Administration

Date

Avon Product Samples (Chalet and Cottage Candles)



Chalet 1



Chalet 2



Chalet 3



Chalet 4



Chalet 5



Chalet 6



Cottage 1



Cottage 2



Cottage 3



Cottage 4



Cottage 5



Cottage 6