

June 1, 2009

By Certified Mail Notification

To All Interested Parties:

On March 25, 2009, the Department of Commerce (“Department”) received a request from All-Ways Forwarding Int’l Inc. (“All-Ways”) on behalf of their client, RAB Foods (“RAB”) for a scope ruling to determine whether their candle is outside the scope of the antidumping duty order on petroleum wax candles from the People’s Republic of China (“PRC”): [See <http://ia.ita.doc.gov/download/candles-prc-scope/index.html>](http://ia.ita.doc.gov/download/candles-prc-scope/index.html) under “2009 - RAB Foods-Sample Images.”

In accordance with 19 CFR 351.225(k)(1), the Department has determined that RAB’s candle falls 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 Emeka Chukwudebe at (202) 482-0219.

Sincerely,

Alex Villanueva
Program Manager, Office IX
Import Administration

Enclosure

June 1, 2009

MEMORANDUM FOR: John M. Andersen
Acting Deputy Assistant Secretary
for Import Administration

FROM: James C. Doyle
Director, Office 9
Import Administration

SUBJECT: Final Scope Ruling: Antidumping Duty Order on Petroleum Wax
Candles From the People's Republic of China ("PRC"):

Summary

On March 25, 2009, the Department of Commerce ("Department") received a request from All-Ways Forwarding Int'l Inc. ("All-Ways") on behalf of their client, RAB Foods ("RAB") for a scope ruling to determine whether their candle is outside 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), we recommend that the Department determine that RAB's candle falls within the scope of the Order.¹

Background

On March 25, 2009, the Department received a scope inquiry letter from All-Ways filed on behalf of RAB Foods requesting a scope ruling on a candle described as a "Yahrzeit"² candle. The Petitioner, The National Candle Association ("NCA") submitted comments regarding All-Ways' scope request on April 22, 2009. All-Ways filed rebuttal comments on April 28, 2009.

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.html>, and will be updated periodically to include newly issued scope determinations.

² All-Ways states that the term "Yahrzeit" translates as "day of memory." The candles are also called memorial or prayer candles. See letter from All-Ways Forwarding, filed on behalf of RAB Foods requesting a scope ruling, (March 25, 2009).

All-Ways' Scope Request

All-Ways submitted physical samples of the candle for which it is requesting a scope ruling.³ All-Ways explains that the candle is a multi-colored paraffin wax Jewish Yahrzeit candle in a clear glass container with an open top. All-Ways further explains that the candle has a religious symbol, the Star of David and the word “Yahrzeit,” embossed on top of the candle. All-Ways states that the candle’s intended use is at the cemetery for people of the Jewish faith to remember the dearly departed. All-Ways explains that it is customary in the Jewish religion to burn a candle for 24 hours on the anniversary of a death of a loved one. Therefore, All-Ways argues that this candle should not be included within the scope of the Order because the candle is a religious novelty candle and has religious symbols that are clearly visible from multiple angles. Finally, All-Ways references a previously submitted Yahrzeit candle scope ruling filed on behalf of Rokeach Foods⁴ stating that their current Yahrzeit candle is different from Rokeach’s in that this particular candle has the word “Yahrzeit” embossed in blue on top and the Star of David on top and on the side.

Petitioner Comments

The NCA argues that the candle submitted by All-Ways is a small pillar/votive petroleum wax candle in a glass container and as such it is in a shape specifically covered by the scope of the Order. The NCA explains that the label, appearing on only one side of the glass container, can be removed, thus making the candle available for use both indoors and outdoors throughout the year. The NCA also states that the Star of David appears on two sides only and therefore cannot be observed from multiple angles. The NCA argues that there is nothing on this candle that indicates that it is exclusively designed for use only in connection with a Jewish religious holiday. Finally, the NCA states there is no need to conduct a formal inquiry, nor to conduct an investigation under 19 C.F.R 351.225(k)(2).

All Ways' Rebuttal Comments

All-Ways states that the NCA’s argument that the candle can be used throughout the year is insignificant and has no bearing on whether it is ruled within or outside of the scope of the Order. All-Ways also states that any candle with religious symbols can have the same qualities and characteristics as those subject to the Order. All-Ways references a prior J.C Penney Candle ruling dated November 9, 2001 stating that with the religious symbol on the side and the top, the candle is identifiable from multiple angles. 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”). Finally, All-Ways argues that a formal inquiry is needed to make a true determination.

³ See All-Ways’ Scope Inquiry, (March 25, 2009).

⁴ See Rokeach Foods, (April 15, 2005).

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 this instant case, the Department has evaluated All-Ways' 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 All-Ways' Memorial candle series. 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 are 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 that 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 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.”⁵ 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. See 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 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.”⁶ 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.”⁷ Thus, as applied to this Order, there is no requirement, nor is it possible, for all the shapes of candles to be listed.⁸ In fact, if the list were exhaustive, there would have been no

⁵ 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 found a “dragonfly” candle, in the shape of a rough-hewn stone with a dragonfly carved on top, to not be 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) (the Department found a sphere or ball-shaped candle to not be within scope because it is a shape not listed by the scope).

⁶ See Novosteel S.A. v. United States, 284 F.3d 1261, 1264 (Fed. Cir. 2002).

⁷ *Id.*

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.

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 the novelty candle 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

We find that the candle submitted by All-Ways is not in the shape of an identifiable object from multiple angles and is therefore within the Order pursuant to the CBP Notice.

Pursuant to the Department’s change in practice, as described in the J.C. Penney 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. 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. The candle submitted by All-Ways is a petroleum wax candle with what appears to be a fiber or paper-cored cotton wick.⁹ Therefore, we must evaluate whether the characteristics of this candle would exclude it from the scope of the Order pursuant to the

⁸ 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.”).

⁹ On October 6, 2006, the Department published its final determination of circumvention of the antidumping duty order on petroleum wax candles from the PRC. The Department determined that mixed-wax candles composed of petroleum wax and more than 50 percent or more palm and/or other vegetable oil-based waxes (“mixed-wax candles”) are later-developed products of petroleum wax candles. In addition, the Department determined that mixed-wax candles containing any amount of petroleum are covered by the scope of the antidumping duty order on petroleum wax candles from the PRC. See Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People’s Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order, 71 FR 59075 (October 6, 2006).

novelty candle exception detailed in the CBP Notice and our interpretation set forth in the J.C. Penney Ruling.

In analyzing the candle submitted by All-Ways, we first examined whether it had a shape that was specifically enumerated in the scope of the Order (i.e., tapers, spirals, straight-sided dinner candles, rounds columns, pillars, or votives). We find that this candle has a pillar shape, which was specifically enumerated in the scope of the Order. Further, the religious symbols on this particular candle are not visible from most angles, as required by the identifiable object exception, but only from two angles (a top-down and a front view). Though All-Ways claims that its Yahrzeit candle is distinct from the Rokeach Foods candle in that its religious symbols are viewable from the top and therefore from multiple angles, the Yahrzeit candle is in fact similar to the Rokeach Food candle in that the religious symbols are not viewable from most angles. Accordingly, this candle does not meet the definition of an identifiable object pursuant to the CBP Notice and, therefore, should be included within the Order. Finally, as discussed in the Legal Background section above, because we are making this determination based on 19 CFR 351.225 (k)(1) and not on 351.225 (k)(2), a formal inquiry is not needed.

Recommendation

Based on the preceding analysis, we recommend that the Department find that RAB’s Yahrzeit candle falls 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

John M. Andersen
Acting Deputy Assistant Secretary
for Import Administration

Date

RAB Foods (Memorial Candle) Sample Images



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