

DEC 9 1996

A-570-504
Scope Inquiry
Public Document
AD/CVD Enforcement: RMT

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To All Interested Parties:

On March 28, 1995, the Department of Commerce (the Department) received a request from Mervyn's for a ruling on whether a candle in the shape of a cube or square is outside the scope of the order on petroleum wax candles from the People's Republic of China (PRC). On October 11, 1995, Enesco Corporation (Enesco) requested that the Department determine whether its square or cube shaped candles are outside the scope of the order. Similarly, on December 5, 1995, Midwest of Cannon Falls (Midwest) requested that the Department issue a ruling on whether its cube or square shaped candles are within the scope of the order.

Because these inquiries presented an issue of significant difficulty, the Department preliminarily determined that the above referenced products are within the scope of the order. Interested parties were invited to comment on this preliminary determination. Pursuant to 19 CFR 353.29(i)(2), the Department has reached a final determination that petroleum wax candles in the shape of a cube or square, imported by Mervyn's, Enesco, and Midwest, are within the scope of the order.

We will notify the U.S. Customs Service of this decision. If you have any questions concerning this matter, please contact Ron Trentham or Zev Primor at (202) 482-5253.

Sincerely,

Holy A. Kuga
Senior Director
AD/CVD Enforcement, Group II

Enclosure

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MEMORANDUM Jeffrey P. Bialos
FOR: Principal Deputy Assistant Secretary
 for Import Administration

FROM: Holly A. Kuga, Senior Director
 Office of AD/CVD Enforcement, Group II

SUBJECT: Final Scope Ruling--Antidumping Duty Order on Petroleum Wax
 Candles from the People's Republic of China--Request for Rulings
 on a Petroleum Wax Candle in the Shape of a Cube or Square

Summary

Pursuant to 19 CFR 353.29(i) (2), we recommend that the Department of Commerce (the Department) determine that petroleum wax candles in the shape of a cube or square, imported by Mervyn's, Enesco Corporation (Enesco) and Midwest of Cannon Falls (Midwest) are within the scope of the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC) (51 PR 20686, August 28, 1986)

Background

On March 28, 1995, Mervyn's wrote to the Department seeking clarification as to whether a candle in the shape of a cube or square, imported by Mervyn's, is covered by the antidumping duty order on petroleum wax candles from the PRC. The candle in question is made of petroleum wax and it is in the shape of a cube or square which has a wick and measures 3" x 3" x 3". The National Candle Association (NCA), petitioner in the original less than fair value (LTFV) investigation, objected to Mervyn's exclusion request in a June 12, 1995, letter.

Based on Mervyn's request, the Department initiated a formal scope inquiry on June 28, 1995, to determine whether the product in question is included within the scope of the antidumping duty order pursuant to 19 CFR 353.29(b). Interested parties were invited to submit comments and/or factual information concerning the matter. Comments were received from Mervyn's and NCA on July 18, 1995. Rebuttal comments were received from NCA on July 28, 1995.

On October 11, 1995, Enesco requested that the Department determine that its candles of blue, red, or white wax, approximately 3" x 3" x 3" with a star, moon or sun decoration and with gold glitter are outside the scope of the order. Enesco argues that its candles are outside the scope of the order because the Department has ruled "that only "listed shapes are within the scope of the order" and cube or square is not one of the shapes listed. Similarly, on December 5, 1995, Midwest requested that the Department find its cube shaped candles which are described as being 3-1/4" x 3-1/4" x 3-1/4" and consisting of white transparent petroleum wax outside the scope of the order. According to Midwest, under the surface of the candles, there are pine cones and pine branches that are visible on the surface. Midwest claims that its candle should be excluded because it is not one of the listed shapes covered by the order. Further, Midwest contends that the decorative material on or in the wax excludes the candle from the order.

On January 26, 1996, NCA submitted comments in response to Enesco's submission. According to NCA, the physical characteristics of cube-shaped candles are similar to those of straight-sided column or pillar candles which are covered by the order and, thus, are within the scope of the order. In addition, NCA argues that neither the colors

nor the star, moon, or sun decorations in gold glitter provide anything that differentiates these candles from those that are subject to the order. In addition, on July 19, 1996, NCA submitted comments in response to Midwest's scope request. NCA maintains that square shaped candles fall in the category of straight-sided or column candles. Further, it claims that the pine cones and pine branches are not exclusionary characteristics that limit the candles to a specific holiday.

On October 23, 1996, the Department issued a preliminary determination that the cube or square candles, imported by Mervyn's, Enesco, and Midwest, are within the scope of the order. Interested parties were invited to comment within 25 days of the date of the preliminary determination. No interested party submitted comments.

Analysis

The regulations governing the Department's antidumping scope determinations can be found at 19 CFR 353.29. On matters concerning the scope of an antidumping duty order, the normal bases for determining whether a product is included within the scope of the order are the descriptions of the product contained in the determinations of the Secretary and the ITC, the petition, and subsequent scope rulings. This determination may take place with or without a formal scope inquiry (see 19 CFR 353.29(b)). If these descriptions are not dispositive, the Department refers to the criteria listed under 19 CFR 353.29(i)(2).

Documents, or parts thereof, from the underlying investigations and prior scope rulings deemed relevant by the Department to the scope of the outstanding order 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 record for this scope determination.

The petition stated that the candles subject to investigation were made "from petroleum wax and contain fiber or paper-cored wicks." According to the petition, the candles 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...

See Petition at 6-7.

The ITC in its final determination stated that the imports from the PRC are:

scented and unscented petroleum wax candles having fiber or paper-cored wicks. They are made in various shapes and sizes, including tapers, spirals, straight-sided dinner candles, rounds, columns, pillars, votives, and various wax filled containers as provided in the Tariff Schedules of the United States (TSUSA) item number 755.25 "Candles and Tapers."

See Candles from the People's Republic of China, (Final) USITC Publication 1888, August, 1986, at 4.

The Department defined the scope of the order as:

[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 Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China, 51 FR 30686 (August 28, 1986).

Relevant to the present scope issue is a notice issued to the United States Customs Service (Customs) by the Department in connection with a July 1987 scope determination, 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 CIE N-212/85. September 21, 1987; Letter, Director, Office of Compliance to Burditt, Bowles & Radzius. Ltd., July 13, 1987.

The issue presented by this scope inquiry is whether the cube or square shaped candles imported by Mervyn's, Enesco, and Midwest are straight-sided pillar or column candles covered by the scope of the order. Since the underlying record established in this scope inquiry--the petition, the Department and ITC final determinations and the order--does not provide a definition of the shapes included within the scope of the order, the Department has considered the factors provided under 19 CFR 353.29(i) (2), known commonly as Diversified Products criteria. These criteria are: (1) physical characteristics of the product; (2) the expectations of the ultimate purchasers; (3) the ultimate use of the product, and (4) the channels of trade. In considering these criteria we will discuss almost entirely submissions regarding Mervyn's candle because the arguments presented by Enesco and Midwest mirror those presented by Mervyn's and because the comments presented for the record by both the applicant and petitioner in Mervyn's scope inquiry are more extensive. However, because of the similarity of the candles covered by the Mervyns, Enesco and Midwest request, we intend that this ruling apply to Enesco and Midwest as well.

Physical Characteristics

The candle imported by Mervyn's is a petroleum wax candle in the shape of a cube or square which has a wick and measures 3" x 3" x 3". In addition, the candle possesses a raised relief design of the sun with a face. Mervyn's asserts that it is clear from the language of the order that a candle in the shape of a cube or square is not within the scope of the order. According to Mervyn's, the order specifically names the shapes covered, and cube or square shaped candles are not listed. Moreover, Mervyn's alleges that the Department in a scope ruling issued to the San Francisco Candle Company (the Company) on May 28, 1993, clarified its intent to limit the scope to the shapes named in the order by stating that "[s]hapes not specifically listed are considered novelty candles and are therefore outside the order." See Mervyn's Letter, March 28, 1995. Further, Mervyn's argues that by its very definition, a cube or square is not a column nor is it a pillar. Mervyn's maintains that "[t]he definitional exclusion of 'cube' or 'square' candles from the traditional columns' or 'pillars' defined in the order" is evidenced by the pages from the 1994 catalogue of Colonial Candle of Cape Cod which show "that the industry distinguishes 'square candles' from 'pillar' candles." Moreover, Mervyn's claims that the "peculiar cube shape" of its candle "in conjunction with the permanent molded raised-relief design of the sun with a face clearly makes the candle a novelty candle outside the scope of the order." See Mervyn's Letter, July 18, 1995.

The NCA counters that the physical characteristics of the candle, imported by Mervyn's, are the same as those candles subject to the scope of the order. NCA states that the candle in question is not a Christmas or novelty candle and that the design of the sun with a face does not relate to any holiday recognized in the United States. Further, NCA contends that Mervyn's candle is a scented or unscented petroleum wax candle, it has a wick, it burns and it emits light, and it is sold in the shape of a pillar or column. NCA explains that pillars or 'columns come in various shapes and sizes, including straight-sided, fluted, triangular, hexagonal and cylindrical shapes. According to NCA, the candle, imported by Mervyn's, is a straight-sided column or pillar, and therefore falls within the scope of the order. See NCA Letter, July 18, 1995. Finally, as support for its claim that the subject merchandise is a column or pillar, NCA attaches as Exhibit 1 to its July 28, 1995, submission, a page from a CandleLite Company catalogue, which contains variations of the Terrazzo model pillars, including a cube or square shaped candle. See NCA Letter, July 28, 1995.

We note that Mervyn's candle, like the merchandise subject to the LTFV investigation, is made of petroleum wax and contains a wick. Moreover, the dimensions of Mervyn's candle (height and width) are similar to columns and pillars covered in the petition (see Petition Exhibits 13 and 14). Although the underlying record established in this order does not provide a clear definition of the shapes covered by its scope, a product brochure submitted to the Department by a respondent, the China Native Product and Animal By-Products Corporation, in the LTFV investigation, indicates that the respondent considered cube or square shaped candles to be pillars (see Questionnaire Response on Behalf of the China Native Product and Animal By-Products Corporation, January 3, 1986, Exhibit B--Sunflower Candles). Moreover, the generic terms column and pillar include straight-sided as well as covered cylinder-like articles. Therefore, based on the common usage of these terms and the information in the record of this order, we conclude that Mervyn's candles appear to fall within the description of straight-sided or column candle. Furthermore, neither the raised relief design of the sun on Mervyn's candle, nor the decorative characteristics displayed by Enesco's candle (star, sun, moon, etc.) and Midwest's candle (pine cones and pine branches) symbolize any religious holiday or special event that would otherwise justify these candles' exclusion. Accordingly, we conclude that the cube candle is very similar in physical characteristics to the column and pillar candles covered by the order.

Expectations of the Ultimate Purchaser and Ultimate Use

Only the petition and the ITO determinations address the intended uses of the merchandise subject to the LTFV investigation and neither the petition nor the determinations of the Department and ITC address the expectations of the ultimate purchaser. The petition states that "these candles...are generally used by retail consumers in the home or yard for decorative or lighting purposes." See Petition at 7. The ITC reports that the subject candles are intended to be used "so as to give light, heat, or scent or used for celebration or votive purposes." See Candles from the People's Republic of China, (Final), USITC Publication 1888, August 1986, at A-2.

According to Mervyn's, the ultimate consumer purchases the square or cube shaped candle with the expectation of using it as a novelty candle. Mervyn's contends that consumers do not buy the candle for light but rather for the aesthetic effect of the smiling sun design. Furthermore, Mervyn's claims that consumers do not expect to use the candle as a dinner candle, which Mervyn's argues is the traditional way tapers, spirals, columns and pillars are put to use. See Mervyn's Letter, July 18, 1995.

NCA counters that the expectations of the ultimate purchaser and the ultimate use of the candle are not limited. According to NCA, the product at issue is a decorative candle which can be used for light or heat on many occasions throughout the year. In other words, "the uses are not confined for specific instances (i.e., Christmas, Halloween)."

Mervyn's has provided no evidence to support its contention that people do not intend to burn this candle. The product appears to be a candle that will be used by the retail consumer in the home or yard for decoration and to provide heat or light, a description that is completely consistent with the scope coverage the petition sought to achieve. Moreover, the use of these candle types is not confined to specific religious holidays or special events during the year. As they can be used on many occasions throughout the year, we conclude that the expectations of the ultimate purchaser and the ultimate use of the square or cube shaped candle are similar to the ultimate expectations and use of merchandise covered by the scope of the order.

Channels of Trade

The ITC found that the candles subject to the order are sold directly to department stores, specialty (gift) stores, mass merchandisers, and wholesale distributors (see Candles from the People's Republic of China, (Final), USITC Publication 1888, August, 1986, at A-17). Moreover, the Department has found that novelty candles, e.g., Christmas candles, are sold by retailers who customarily carry candles; however, "such candles may be sold in a different channel of trade as well, because they are sold during a specific limited time period and some merchants who do not normally sell candles may sell these candles in conjunction with holiday gift material and decorations" (see Letter, Director, Office of Compliance to Burditt, Bowles and Radzius, Ltd., July 12, 1987).

Mervyn's argues that because its cube shape candle is a novelty candle it is often marketed with figures and other peculiar-shaped candles which do not meet the traditional definitions that are set out in the antidumping order (see Mervyn's Letter, July 18, 1995). NCA counters that the subject candle is marketed along with other pillars and columns (see NCA Letter, July 28, 1995).

A review of Mervyn's submission of July 18, 1995, included the pages from the 1994 catalog of Colonial Candle of Cape Cod, which does not show that the product in question is sold in a different channel of trade or marketed separately from candles subject to the scope of the order. On the contrary, e note that the catalogue indicates that square or cube shaped candles are marketed with other candles, e.g., cylindrical pillars, covered by the scope of the order (see, Mervyn's Letter, July 18, 1995). Thus, on the basis of the review of the record, we conclude that the product in question is sold and marketed in the same channels of trade as candles subject to the scope of the order.

Conclusion

In summary, based on our review of the record of this scope request, the physical characteristics of the candle type in question, the expectations of the ultimate purchaser, the ultimate use of the product, and the channels of trade, all support the conclusion that the cube or square shaped candles, imported by Mervyn's, Enesco and Midwest, are within the same class or kind as the merchandise covered by the scope of the order.

Recommendation

We recommend that the Department determine that the cube or square shaped candles, imported by Mervyn's, Enesco, and Midwest, are within the scope of the antidumping duty order on petroleum wax candles from the PRC.

_____√_____ Agree _____ Disagree

If you agree, we will send a letter, enclosing this memorandum, to interested parties. Further, we will notify the U.S. Customs Service of our determination.

Jeffrey P. Bialos
Principal Deputy Assistant Secretary for Import Administration

December 9, 1996

Date