

A-570-504
Scope Review
PUBLIC DOCUMENT
DAS III (7): BLR

By Certified Mail, Return Receipt Requested

To All Interested Parties:

On July 25, 2001, the Department of Commerce (the Department) received a request from Avon Products, Inc. (Avon) 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), the Department has determined that this candle is 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 the U.S. Customs Service of this decision. If you have any questions, please contact Brett L. Royce at (202) 482-4106.

Sincerely,

Barbara E. Tillman
Director
Office of AD/CVD Enforcement VII
Import Administration

Enclosure

MEMORANDUM FOR: Joseph A. Spetrini
Deputy Assistant Secretary
for Import Administration, Group III

FROM: Barbara E. Tillman
Director
Office of AD/CVD Enforcement VII

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 July 25, 2001 the Department of Commerce (the Department) received a request from Avon Products, Inc. (Avon) for a scope ruling on its "ball-shaped candle," to determine if it is covered by the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC) (the Order) (Petroleum Wax Candles from the PRC: Final Determination of Sales at Less Than Fair Value, 51 FR 25085 (July 10, 1986) (Final Determination)). In accordance with 19 CFR 351.225(k)(1), we recommend that the Department determine that this candle is within the scope of the Order.

Background

Avon filed its request for a scope ruling in proper form on July 25, 2001. On September 10, 2001 the National Candle Association (NCA), an interested party in this proceeding, filed comments on Avon's request. On December 4, 2001, the Department received comments from Avon concerning its "ball-shaped candle," and the Department's November 9, 2001 decision to amend its practice as a result of its ruling on a scope request by JCPenney Purchasing Company Corporation (JCPPC). 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). On December 14, 2001, Avon submitted a letter referencing its December 3, 2001 letter (received by the Department on December 4, 2001) and stating that the referenced letter constituted its comments, solicited by the Department in a December 14, 2001 letter, in response to JCPenney.

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 determinations of the Secretary and the International Trade Commission (the Commission), the initial investigation, and the antidumping duty order. 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(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 after consideration of all evidence before the Department.

In the instant case, the Department has evaluated Avon's requests in accordance with 19 CFR 351.225(k)(1) and the Department finds that the descriptions of the products contained in the petition, the final determinations of the Secretary (including prior scope determinations) and the Commission, the initial investigation, and the antidumping duty order are, in fact, dispositive. Therefore, 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 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.

In its petition of September 4, 1985 the National Candle Association 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 (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. Petroleum Wax Candles from the People's Republic of China: Initiation of Antidumping Duty Investigation, 50 FR 39743 (September 30, 1985); Preliminary Determination of Sales at Less Than Fair Value, 51 FR 6016 (February 19, 1986); Final Determination; and Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China, 51 FR 30686 (August 28, 1986).

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” (Determinations of the Commission (Final), USITC Publication 1888, August 1986, at 4, note 5, and A-2 (Commission Determination)).

Also of relevance to the present scope inquiry is a notice issued to the United States Customs Service 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), (CIE N-212/85, September 21, 1987; Letter from the Director, Office of Compliance, to Burditt, Bowles & Radzius, Ltd., July 13, 1987) (emphasis added).

Avon's Scope Request

Avon argues that the candle subject to this inquiry is in the form of an identifiable object, a ball. Avon included a sample of the candle with its scope request. According to Avon, the subject candle “...is a ball-shaped molded wax novelty candle measuring approximately 2 inches in diameter with a slightly flattened bottom and single wick.” (Avon's Request at 1).

Avon argues that the Department and the courts have held that novelty candles, including those shaped as identifiable objects, are outside the scope of the Order and that the Department has long recognized that candles shaped other than tapers, columns, spirals, straight-sided dinner candles, votives and petroleum wax-filled containers are clearly outside the scope of the Order. Avon supports its argument by referencing the July 1987 novelty candle exception, stating that the candle at issue is a ball and, therefore, in the form of an identifiable object. Avon also cites

Final Scope Ruling – Petroleum Wax Candles From the People’s Republic of China (A-570-504): San Francisco Candle Company (May 28, 1993) (San Francisco Ruling), wherein the Department stated “[B]all-shaped candles are not included on the list of shapes of candles encompassing the order.”

In its December 3, 2001 response to the Department’s change in practice letter, Avon disputes the Department’s decision to base its scope rulings in part on whether the candles at issue initially are scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks. Avon notes that, by not adhering to the previous standard of first inquiring whether the shape of the candles is not within those shapes listed by the inclusive language of the antidumping Order’s scope, the Department is in flagrant disregard of the express opinion of the Court of International Trade, which has interpreted the guidelines issued by the Department as limiting the antidumping duty Order to those candles specifically identified as being within the scope. See Russ Berrie & Co., Inc. v. United States, 57 F. Supp. 2d 1184 (CIT 1999) (Russ Berrie). Thus, Avon claims that this change in practice constitutes an impermissible expansion of the scope of the Order, not in accordance with law.

NCA’s Comments

In its comments, the NCA retraces the history of this antidumping duty order, including the import surges and resultant injury suffered by domestic manufacturers which prompted the original September 1985 antidumping petition. Petitioner contends that the antidumping statute and antidumping duty orders are remedial in nature and exceptions to them should be construed as narrowly as possible to preserve the efficacy of the Order. In support of its assertion, petitioner cites a Court of International Trade conclusion, with regards to the novelty exception, that “. . . a candle must be specifically designed for use only in connection with a religious holiday or special event to fall within the novelty candle exception.” See Russ Berrie, 57 F. Supp. 2d at 1194. Thus, petitioners argue that the Department narrowly limited the novelty candle exception to figurine candles, candles shaped in the form of identifiable objects, and candles specifically designed for use only in connection with the holiday season.

The NCA contends that Avon’s ball-shaped candle is not a true sphere or ball since it has a flat bottom. According to the NCA, “a ball or spherically-shaped candle would have to be completely round on all sides” (NCA comments at 5). The NCA, therefore contends that the subject candle is not in the form of an identifiable object, and that the candle’s flat bottom makes it a round, a shape specifically listed in the scope of the Order.

The NCA notes that Avon’s candles compete in the same channels of trade as the candles subject to the Order, and that their sale without the antidumping duty will severely injure the U.S. candle producers. It further notes what it characterizes as the long-standing efforts of candle importers to “expand the ‘novelty candle’ loophole in the Order through a continuing stream of scope requests, causing the Order on PRC candles to be subjected to over seventy Final Scope Rulings

and many more requests.” Petitioner maintains that the success of the scope requests in eroding the Order has resulted in geometric increases in the volume of PRC candles coming into the United States. Petitioner concludes by stating that Avon is now asking the Department to narrow the scope of the Order so that it excludes everyday candles, claiming that they are novelty candles, and that the Department does not have such legal authority.

Analysis

When determining whether or not a particular product claimed as a novelty candle is within the scope of the antidumping duty 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.”¹ If the Department determines that the candle is made from petroleum wax and has a

¹ The Department has changed its practice on this issue. In past scope rulings, the Department has determined that candles not of a shape listed by the language of the Order’s scope were outside the scope. See, e.g., Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Ender Corp. (Jan. 11, 2000) (“dragonfly” candle, in the shape of a rough-hewn stone with a dragon fly carved on top, not within scope because it is of a shape not listed by the scope); American Drug Stores, Inc. (Mar. 16, 1998) (sphere or ball shaped candle not within scope because it is a shape not listed by the scope); San Francisco Candle Co. (June 10, 1993) (ball shaped candle not within scope because it is of a shape not listed by the scope). The reason for the change is that, upon review of the text of the scope of the Order, the text of the first sentence of the scope covers “scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks.” The text following this broad inclusive sentence provides a list of shapes, which list is not modified by any express words of exclusivity. The result of our prior practice of excluding candles of a shape other than those listed was inconsistent with the fact that such candles were “scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks.” We have now determined that this practice was incorrect 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, in order to give full effect to the first sentence of the inclusive language of the scope, the Department normally will 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. 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 (JC Penney Ruling).

fiber or paper-cored wick, but the candle possesses characteristics set out in the July 1987 novelty candle exception, it will fall outside the scope of the Order. In order for a candle to qualify for this exception, the characteristic(s) which are claimed to render it a novelty candle must be visible from most angles, as opposed to minimally visible. 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); San Francisco Candle Co. (Feb. 12, 2001); Endar Corp. (Jan. 11, 2000). If a 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 fiber or paper-cored wick, the Department will determine that the candle is within the scope of the Order.

With respect to the instant request, we find that for the reasons outlined below, this candle falls within the scope of the Order.

“Ball-Shaped Candle” (PP229284)

This candle is in a shape similar to a sphere, but with a flat bottom. Avon claims that its candle is in the shape of a molded ball, an identifiable object. Citing the July 1987 novelty candle exception, Avon argues that this “ball-shaped candle” is, thus, a novelty candle outside the Order’s scope. However, in prior rulings involving candles in a shape similar to a ball or sphere, the Department never reached the conclusion that a sphere or ball shape is an identifiable object. Rather, the Department has clarified that the term “round” in the scope language refers to round-shaped columns or pillars, but not to spherical candles. See American Drug Stores, Inc. (March 16, 1998) and San Francisco Candle Co. (June 10, 1993). The Department, in those scope rulings and pursuant to our practice at that time, concluded that sphere or ball-shaped candles are not included within the Order’s scope because they were not of a shape listed by the inclusive text of the scope of the Order.

In this case, we apply our current practice to Avon’s “ball-shaped” candle. Because a “ball” shape is not listed in the scope of the Order, we then evaluate whether this candle is made of petroleum wax and contains a fiber or paper-cored wick. Avon has not explicitly stated whether its “ball-shaped” candle is made of petroleum wax and contains a fiber or paper-cored wick, nor did the NCA comment specifically on these characteristics in relation to this candle. Since Avon

This approach of evaluating such candles in light of the entire text of the scope is in keeping with the recent 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 (Ct. Int’l Trade 2001). Such an approach is a recent departure from past CIT precedent that required Commerce 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 (Ct. Int'l Trade 1998).

has claimed its ball-shaped candle is outside the scope of the Order and no party has questioned the composition of Avon's candle in this scope proceeding, we find that these characteristics (petroleum wax composition and fiber or paper-cored wick) are implied in Avon's submissions to the Department. Furthermore, there is no evidence to the contrary on the record of this scope inquiry.

Therefore, we must turn to an analysis of whether Avon's "ball-shaped candle" qualifies under the July 1987 novelty candle exception as an identifiable object. Avon claims that this candle is in the shape of a ball and is, thus, an identifiable object. However, we disagree that this candle is in the shape of a ball because it is flat on the bottom rather than rounded, as would be the case with a ball. Further, the flat bottom may be viewed from the bottom and all sides. Thus, the characteristic which Avon claims renders this candle a novelty candle, a ball, is not visible from most angles.² Because we do not agree with Avon's claim that its candle is in the shape of a ball,

² We further disagree with Avon's assertion that a ball-shaped candle would merit exclusion from the scope of the Order as an identifiable object. We would not consider a ball or sphere shape to be an identifiable object eligible for exclusion from the Order within the standards set forth in the July 1987 novelty candle exception. The July 1987 novelty candle exception indicates that Christmas novelty candles specially designed for use only in connection with the Christmas holiday season are excluded from the Order. This exception also includes other novelty candles with depictions of scenes or symbols of other occasions (such as religious holidays or special events), and candles in the form of identifiable objects, "e.g., animals or numerals." Thus, the determining characteristics in granting an exclusion under the 1987 novelty candle exception are scenes or symbols specifically connected to the Christmas holiday season and other occasions, or candles shaped in the form of identifiable objects. Unlike candles shaped as animals or numerals, given as illustrative examples of the identifiable object novelty exception, a candle in the shape of a ball or sphere is a geometric-shaped candle, not a more specific identifiable object.

The difference between a shape and an object generally is one of specificity. A shape is generally the characteristic surface configuration of a thing, the outline or contour. See The American Heritage Dictionary of the English Language (Fourth Ed. 2000), reprinted at www.bartleby.com. An object is more specific, something perceptible by one or more senses, especially vision or touch, a material thing. Id. We would not consider the geometric shape of a ball or sphere to constitute a material thing that has sufficient specificity to warrant treatment as an identifiable object under the July 1987 novelty candle exception. Rather, more specifically shaped material things such as leaves, hearts and pine cones, all ruled outside of the scope of the Order by the Department in the past, would constitute identifiable objects falling within the July 1987 novelty exception. See JCPenney Ruling; see also Final Scope Ruling: Avon Products (July 11, 2001) and Final Scope Ruling: Avon Products (May 4, 2001). Furthermore, we note that certain shapes enumerated in the Order's scope approximate geometric shapes, e.g., straight-sided dinner candles can be cubes or irregular cubes, rounds and votives can be spheres or cylinders, and tapers may approximate pyramids or tetrahedrons.

we do not reach an analysis of whether a ball shape is in fact an identifiable object. Accordingly, we determine that Avon’s “ball-shaped” candle is made of petroleum wax and contains a fiber or paper-cored wick. For these reasons, we find that Avon’s candle should be included within the scope of the Order.

Summary

Avon argues that its “ball-shaped candle” is in the form of identifiable object, thus exempting it from the Order. For the reasons discussed above, we disagree. Therefore, we find that the subject candle is within the scope of the Order. This conclusion is consistent with the scope of the investigation and the Order, as defined in the petition, and the Department’s and the Commission’s determinations.

Recommendation

Based on the preceding analysis, we recommend that the Department find that Avon’s “ball-shaped candle” is within the scope of the Order.

If you agree, we will send the attached letter to the interested parties, and will notify the U.S. Customs Service of our determination.

_____ Agree

_____ Disagree

Joseph A. Spetrini
Deputy Assistant Secretary
for Import Administration, Group III

Date

Attachment