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ORIGINAL

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September 15, 2009

Secretary of Commerce
United States Secretary of Commerce
United States Department of Commerce
14th Street and Constitution Ave., N.W.
Washington, D.C. 20230

Case No. A-570-504
Total No. of Pages: 9
Request for Comments on the Scope
AD/CVD Operations, Office 9

Attn: Import Administration
APO/Dockets Unit, Room 1870

Public Document

Re: Petroleum Wax Candles from the People's Republic of China; A-570-504;
Comments on the Scope of the Antidumping Duty Order on Petroleum Wax
Candles from the People's Republic of China and the Impact on Scope
Determinations By Trade Associates Group, Ltd.

Dear Mr. Secretary:

We are counsel to Trade Associates Group, Ltd. ("TAG"), 1730 N. Wrightwood Ave., Chicago, Illinois 60614, and we hereby submit comments on the scope of the antidumping duty order on petroleum wax candles from the People's Republic of China ("Order") as requested by the Department of Commerce ("Department") in the Federal Register of August 21, 2009, (74 *Fed. Reg.* 42230). See *Petroleum Wax Candles from the People's Republic of China; A-570-504; Comments on the Scope of the Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China and the Impact on Scope Determinations*, (74 *Fed. Reg.* 42230). This response is filed within the time period provided by the Department in the August 21, 2009 Federal Register Notice.

In its notice, the Department seeks comments from interested parties on the best method to consider whether novelty candles should or should not be included within the scope of the

Order given the extremely large number of scope determinations requested by outside parties. TAG is a U.S. importer of candles from China, and therefore, is an interested party pursuant to 19 U.S.C. 1677 (9)(A).

The Department has requested comments on whether it is proper to continue analyzing whether novelty candles are outside the scope of the Order pursuant to the JC Penney methodology. The comments are being requested given the large number of candle scope requests submitted each year and pursuant to an evaluation of the resources needed to complete these analyses. While we agree that the change in practice on the issue of candle shapes provided in the 2001 JC Penney ruling has created uncertainty among the importing community as to what candles fall within the scope of the Order, we note that the Options proposed by the Department, depending on how they are interpreted by the Department, could have the effect of not only improperly expanding the scope of the Order but also eliminating the novelty exception, which has been in effect since 1987, and which the importing community has relied on for many years.

Moreover, while we recognize the heavy workload of the Department, we note that the regulations do not permit the Department to refuse to issue scope rulings because of insufficient or overtaxed resources. In fact, the regulations clearly state that “when issues arise as to whether a particular product is included within the scope of an antidumping or countervailing duty order . . . the Department issues ‘scope rulings’ that clarify the scope of an order or suspended investigation with respect to particular products.” 19 C.F.R. §351.225(a). In this regard, we bring to your attention to a recent case, *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, Slip-Op 09-87, in which the Court determined that the Department may not rely upon its workload in assessing whether the number of exporters or

producers in an administrative review is “large” to find that individual determinations are impracticable.

Comments as to Option A Proposal

The “Option A” proposal states that the “Department would consider all candle shapes identified in the scope of the *Order*, (*i.e.*, tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers) to be *within* the scope of the *Order*, regardless of etchings, prints, moldings or other artistic or decorative enhancements including any holiday-related art. All other candle shapes would be considered outside the scope of the *Order*.”

We believe that the language of the “Option A” proposal is unclear and open to various interpretations and should be clarified. The language states that the Department would consider “all” candle shapes identified in the scope of the *Order*, (*i.e.* tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers) to be within the scope of the *Order* and that all other candle shapes would be considered outside the scope of the *Order*. Thus, as written, the language simply would remove the holiday exception for any holiday candle that the Department determines to be one of the shapes identified in the scope. This would completely gut the holiday candle exception importers have relied upon since 1987. Moreover, this change in long-standing practice would be unilateral and not based on whether the candles properly fall within the scope, but rather would be based on the convenience of the Department.

Moreover, the language does not clarify as to how the Department defines the specific shapes identified in the scope of the *Order*. As written, the language would permit the Department to include almost any petroleum wax candle within one of the shapes identified in

the scope of the Order. For example, it is possible that the above language could be interpreted to include within the scope egg shaped candles, ornament shaped candles, snowball shaped candles, and any round-like fruit or vegetable such as a pumpkin, apple, orange, etc. We note that this type of interpretation has been repeatedly urged by the National Candle Association (NCA) in its comments to scope ruling requests when arguing that certain candles are not subject to the novelty exception but rather fall within one of the shapes identified in the scope of the Order.¹ Similarly, we note that the Department has held certain shaped candles to be included within the scope of the Order because they were one of the shapes identified in the scope of the Order.²

We believe that clearer guidance has to be provided as to what is covered by the shapes specifically named in the scope of the Order. Moreover, we note that the Department's expanded view of what is a "pillar," "round," "taper," etc. has resulted in the anomalous situation where an importer who produces an identifiable object such as a candy corn is subjected to a higher standard of replication than the actual candy. For example, the Department has held snowball candles to be within the scope of the order, stating that they are rounds specifically

¹ See *New Spectrum Gift Gallery, Inc.*, May 10, 2005 at page 18 ("NCA holds that despite the additional molded frog on top of the candle, it remains a round candle and an unidentifiable object;" See also, *New Spectrum Gift Gallery, Inc.*, May 10, 2005 at page 24 ("NCA claims that New Spectrum's gold dragon candle is a column candle which is specifically covered by the Order") See also *Garden Ridge*, February 2, 2005 at page 5 ("Further, NCA argues that the candle [Christmas ornament] is a round-shaped candle not in the shape of an identifiable object;" See also *Endar Corporation*, February 13, 2002, at page 6 ("NCA then argues that the"[c]andle [floating pumpkin lantern candle] is a fluted round candle," adding that "Round candles are specifically defined as being within the scope of the Order" (citing NCA comments at 4).

² See *Wal-Mart Stores Inc.*, December 17, 2004 at page 13, ("We determined that the three candles in this "snowball" candle set (Style SC02-320) are rounds. Rounds are among the shapes, which are specifically listed in the explicit language of the Order's scope. We found that these candles are rounds because every part of their circumference appears to be equidistant from the center;" See also *Target Corporation*, April 1, 2005, ("The Department finds that when viewed from all angles, these "snowball" candles are rounds, a shape specifically listed within the scope of the Order;" See also *Endar Corporation scope ruling*, July 7, 2000 ("Green Christmas Taper is a ten-inch high, narrow, tapered candle which includes leaf-like decorations with randomly-placed red berries. As such, this candle is simply a decorated taper which resembles neither a Christmas tree nor a holly bush. Previous scope inquiries support a determination that a decorated taper candle is still within the scope in instances where the candle, when viewed as a whole, retains the form of a taper. See *American Greetings*; see also, *Final Scope Ruling*; *Meijer, Inc.*, June 11, 1998 at 7.

listed within the scope and that the ridges, protrusions and indentations on the surface of the candles do not sufficiently alter the fundamental shape of the candles.³

Comments as to Option B Proposal

TAG vigorously objects to the “Option B” proposal, which states that the “Department would consider all candle shapes, including novelty candles, to be within the scope of the *Order* including those not in the shapes listed in the scope of the *Order*, as that is not an exhaustive list of shapes, but simply an illustrative list of common candle shapes.” 74 Fed. Reg. at 42231

The Department has inherent authority to define the scope of an antidumping duty order.⁴ However, Commerce does not have authority to alter, amend, or expand the scope of an antidumping duty order.⁵ If Option B is adopted, the novelty candle exception would be eliminated. While this unilateral action would make the Department’s job easier, it would eliminate an exception that importers have relied upon for 22 years and would reverse the Department’s own finding that such candles are not within the scope. Further, it would break new ground by permitting the Department to tailor the scope of investigations to its perceived staffing capabilities instead of doing its regulatorily mandated job of determining whether articles are within or outside the scope of investigations. Thus, if Option B is adopted importers would have no access to administrative due process, and would have to seek redress in the courts. The practical result would be that Customs and Border Protection (CBP) would be the final administrative arbiter of all candle scope questions, not the Department. CBP’s present practice is to require importers to obtain scope rulings on virtually all candles that clearly are not

³ See also *Atico International USA, Inc. scope ruling*, December 16, 2004 at page 10 (“Candy corn candle is simply shaped in the form of a geometric shape (*i.e.*, a cone). The combination of the colors of the orange, yellow, and white band around the candles does not render this candle identifiable as a piece of candy corn.”)

⁴ *Russ Berrie Co., Inc. v. United States*, 57 F. Supp. 2d 1184, 1188 (1999) (citing to *Koyo Seiko Co. v. United States*, 17 CIT 1076, 1078, 843 F. Supp. 1401, 1403 (1993), *aff’d*, 31 F.3d 1177 (Fed. Cir. 1994).

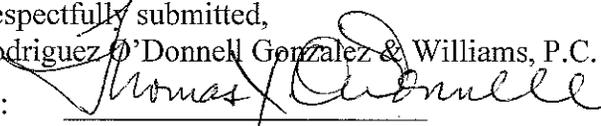
⁵ *Id.* at 1192-1193 (citing *Koyo Seiko, supra*, 17 CIT at 1078, 834 F. Supp. at 1042 and *UST, Inc. v. United States*, 9 CIT 352, 356 (1985)).

outside the scope. If Option B is provided, Customs simply will include all such questionable candles within the scope. It is questionable whether this state of affairs would reduce the Department's workload. Finally, it would eliminate a long-standing exception for products that are not even made in the U.S. If Option B is adopted, scope determinations for candles would be eliminated.

Suggestions to the Department

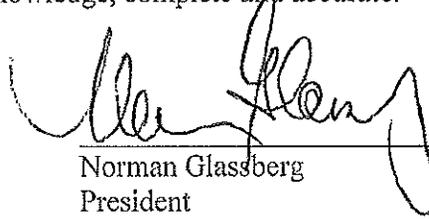
We believe the current interpretations and practices should remain in effect, with one modification. The identifiable object exception should be based on realistic guidelines. The current guidelines requiring that articles be recognizable from multiple angles, including the bottom of the candle, and that they be more realistic than the real object the candles depict, is confusing, requires endless scope rulings, and is overly formalistic.

For all the reasons set forth above, TAG requests that the Department amend and further clarify the Option A proposal and reject the Option B proposal.

Respectfully submitted,
Rodriguez O'Donnell Gonzalez & Williams, P.C.
by: 
Thomas J. O'Donnell
Lara A. Austrins

COMPANY OFFICIAL CERTIFICATION

I, Norman Glassberg, President, currently employed by Trade Associates Group, Ltd., hereby certify that (1) I have read the attached submission and (2) the information contained in this submission is, to the best of my knowledge, complete and accurate.

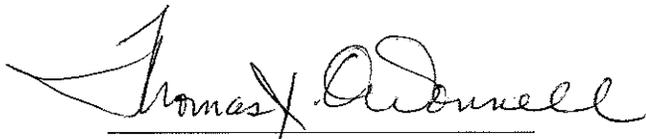


Norman Glassberg
President
Trade Associates Group, Ltd.

September 15 2009

COUNSEL'S CERTIFICATION

I, Lara A. Austrins, counsel to Trade Associates Group, Ltd., hereby certify that (1) I have read the attached submission, and (2) based on the information provided to me by Trade Associates Group, Ltd., I have no reason to believe that this submission contains any material misrepresentation or omission of fact.


Thomas J. O'Donnell

September 15, 2009