

A-570-504
Scope Review
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By Certified Mail, Return Receipt Requested

To All Interested Parties:

On July 27, 2001 the Department of Commerce (the Department) received requests from JCPenney Purchasing Corporation (JCPPC) for scope rulings on whether three types of candles it plans to import 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 these candles are outside 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 Matthew Renkey at (202) 482-2312.

Sincerely,

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

Enclosure

MEMORANDUM FOR: Joseph A. Spetrini
Deputy Assistant Secretary
Enforcement 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);
JCPenney Purchasing Corporation

Summary

On July 27, 2001, the Department of Commerce (the Department) received a request from JCPenney Purchasing Corporation (JCPPC) for scope rulings on three candles (two “rose blossom” candles and one “autumn leaf” candle) to determine if they are 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 these candles are outside the scope of the Order.

Background

JCPPC filed its request for a scope ruling in proper form on July 27, 2001. On September 10, 2001, the National Candle Association (NCA), petitioner in this proceeding, filed comments on JCPPC's request. On September 19, 2001, JCPPC filed a rebuttal to the NCA's comments. A memo regarding the Department's decision to extend the 45-day deadline for this scope inquiry has been placed on the record. See, Memo to the File through Sally C. Gannon from Matthew Renkey, Petroleum Wax Candles from the People's Republic of China: Scope Inquiries from Avon Products, Inc., JCPenney Purchasing Corporation, and Premier Candle Corp..

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 JCPPC'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).

JCPPC's Scope Request

JCPPC argues that all candles subject to this inquiry, the rose blossom and leaf candles, are in the form of identifiable objects, which are not covered by the scope of the Order. JCPPC also contends that the “autumn leaf candle” should also be excluded from the Order's scope under the holiday novelty exclusion since it meets U.S. Customs' criteria to be classified as a festive article. JCPPC included a sample of each candle with its scope request.

NCA's Comments

The NCA contends that JCPPC's candles lack the characteristics necessary to exclude them from the scope of the Order. The NCA argues that JCPPC's rose candles are in fact rounds, a type of candle within the scope of the Order, and are not in the shape of roses since the candles have flat bottoms. The NCA concludes that the decorative effect of a rose on these round candles is not grounds for excluding a candle from the Order's scope. The NCA also states that JCPPC's leaf

candle is not in the form of an identifiable object, since it too has a flat bottom, and also lacks leaf veins or other designs on the bottom to make it look like a leaf. The NCA concludes that JCPPC's leaf candle is simply a column candle possessing the decorative effect of a leaf.

JCPPC's Rebuttal

JCPPC argues that the scope of the Order is limited to the shapes specifically named therein. JCPPC states that its two rose-shaped candles are in the shape of three-dimensional large open pink rose blossoms with clearly defined petals, and that its maple leaf-shaped candle is in the form of a three-dimensional maple leaf with leaf veins imprinted on clearly defined leaf segments. JCPPC cites a prior scope ruling by the Department for a previous request it filed which stated that certain candles in the shapes of pinecones, apples, pumpkins, gourds, Christmas ornaments, houses and churches are outside the scope of the Order (Final Scope Determination, JCPPC, May 21, 2001). Given these facts, JCPPC concludes that its rose blossom and leaf candles should be found outside the scope of the Order as identifiable objects.

As an additional basis for determining that its leaf candle should be outside the scope of the Order, JCPPC contends that it is a festive article pertaining to the autumn season and should thus be considered under the holiday novelty exemption.

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 is within the Order's scope. Candles of a shape not listed by the inclusive language of the Order's scope normally will 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 it possesses

¹ The Department is changing 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); Endar Corp. (Jan. 11, 2000) ("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); 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

characteristics set out in the July 1987 exception, a candle falls outside the scope of the Order. In order for a candle to be found outside the Order's scope as a novelty candle under the July 1987 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 Rulings – 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).

With respect to the instant request, we find that for the reasons outlined below, these candles fall outside the scope of the Order.

Floating Pink Rose Blossom (Style D3201P)

This candle, in the shape of an open rose blossom, is approximately 4 inches wide and 1¾ inches high, and has carved individual petals rising from the base. This candle is shaped as an identifiable object (an open rose blossom) and is identifiable as such from most angles. Thus, this candle falls within the July 1987 novelty candle exception.

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 now determine 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 in this and future cases 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.

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 petitioner'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).

Floating Pink Rose Blossom (Style C-1013A)

This item is similar to the Floating Pink Rose Blossom above, but measures approximately 2½ inches wide and 1 inch high, with the same style of petals rising from the base. This candle is shaped as an identifiable object (an open rose blossom) and is identifiable as such from most angles. Thus, this candle falls within the July 1987 novelty candle exception.

Autumn Leaf (Lot #3035)

This candle is in the shape of a leaf, with clear delineation of the leaf edges and points, and with veins imprinted on the leaf surface. When viewed from above, the candle is easily identifiable as a leaf. From the sides and bottom, one can still distinguish the leaf edges and points. Thus, like the rose blossom candles discussed above, this candle is in the form of an identifiable object and is identifiable as such from most angles.

In its request, JCPPC argues that this item should also be outside the Order's scope because it is a festive article associated with the fall season. The Department does not consider this a valid argument for excluding this candle from the Order's scope. Whether or not a candle can be classified as a festive article is immaterial to the Department's scope determination. The festive article classification pertains only to the Harmonized Tariff Schedule of the United States (HTSUS) number assigned to merchandise entered into the United States. The holiday novelty concept embodied in the July 1987 novelty exception is separate and distinct from a festive article HTSUS classification. To qualify for the July 1987 novelty exception, a candle must contain designs, inter alia, specific to a particular holiday (emphasis added). There is no basis within the July 1987 novelty exception for determining candles to be outside the Order's scope based on generic seasonal characteristics, such as an HTSUS classification as a festive article associated with the fall season.

Summary

JCPPC's "rose blossom" and "autumn leaf" candles are in the shape of identifiable objects. Thus, these candles fall within the July 1987 novelty candle exception as identifiable objects. This conclusion is consistent with the scope of the investigation and the Order, as defined in the petition, as well as the Department's and the Commission's prior determinations.

Recommendation

Based on the preceding analysis, we recommend that the Department find that the “rose blossom” and “autumn leaf” candles are outside 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
AD/CVD Enforcement Group III

Date

Attachment