

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

By Certified Mail, Return Receipt Requested

To All Interested Parties:

On September 24, 2001, the Department of Commerce (the Department) received a request from Jo-Ann Stores, Inc. (JAS) for scope rulings on whether five 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 three of the five 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 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
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);
Jo-Ann Stores, Inc.

Summary

On September 24, 2001, the Department of Commerce (the Department) received a request from Jo-Ann Stores, Inc. (JAS) for scope rulings on five candles (two "star" candles, one "heart" candle, one "floating flower" candle and one "champagne glass flower" 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 three of these candles are outside, and two are within, the scope of the Order.

Background

JAS filed its request for a scope ruling in proper form on September 24, 2001. On November 7, 2001, the Department determined that more time was necessary to examine the issues in this scope request and to allow the petitioner, the National Candles Association (NCA), to comment. The 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 Brett L. Royce, Petroleum Wax Candles from the People's Republic of China: Scope Inquiries from Jo-Ann Stores, Inc. The National Candles Association's (NCA) comments followed on November 8, 2001.

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 JAS'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).

JAS's Scope Request

JAS argues that all candles subject to this inquiry (two “star” candles, one “heart” candle, one “floating flower” candle and one “champagne glass flower” candle) are in the form of identifiable objects, which are not covered by the scope of the Order. JAS included a sample of each candle with its scope request.

The National Candle Association'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 & Co., Inc. v. United States, 57 F. Supp. 2nd 1184, 1194 (CIT July, 1999) (Russ Berrie). 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 commented on three of the five candles submitted by JAS.

With regard to the “five-point star” candle, the NCA first notes that the candle at issue is made of petroleum wax, with a single wick. The NCA then argues that “[t]he Department has been consistent in requiring that the novelty design or shape of a candle must be capable of being seen from multiple angles” (NCA comments at 4). It cites the Final Scope Ruling: Meijer, Inc. (September 30, 1999) (Meijer) and Final Scope Ruling: Endar Corp. (April 7, 1999) (Endar 1999) to support its assertion that the Department has consistently held that such star candles are columns or pillars, and not identifiable objects, because the star shape could not be discerned from the side. The NCA further argues that “. . . the Department has also consistently held that star symbols or designs are not Christmas designs,” citing Final Scope Ruling: Meijer, Inc. (September 8, 1997) and Final Scope Ruling: Kohl’s Dept. Stores (August 24, 1998). It contends that star candles do not contain scenes or symbols specifically related to Christmas and that their use is not attributed solely to the Christmas season. Thus, the NCA argues that this candle must not be excluded from the scope of the Order.

In addition, the NCA claims that the “heart floater” candle should be included within the scope of the Order. It argues that the Department has consistently ruled that a heart design is ubiquitous in nature and not specifically designed for use solely in connection with a specific holiday or event, citing Russ Berrie. The NCA maintains that a heart-shaped candle must have the complete shape of a heart but that this candle does not meet this requirement because one side is flat. Citing Final Scope Ruling: Endar Corp. (December 24, 1998) (Endar 1998), the NCA further argues that the Department has been consistent in ruling that floating candles are within the Order’s scope.¹

The NCA also argues that the “star floater” candle should be included within the scope of the Order because it is not in the shape of a complete star. It maintains that the back of the candle is flat and inconsistent with the raised relief shape on the candle’s top side and that, when viewed from the side, this candle is merely a small straight-sided pillar. The NCA further argues that a

¹ We note that the petitioner cites “Final Scope Ruling Request by Endar Corp.” (December 24, 1999); however, the cite is correctly dated December 24, 1998.

star design is not specifically designed for use solely in connection with a particular holiday or event and that floater candles have been ruled to be within the scope of the Order.

The NCA notes that JAS' 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 JAS 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.

JAS' Rebuttal

In response to the NCA's comments, JAS contends that its "five point star" candle, instead of measuring 4.5 inches tall and 4.5 inches wide, is actually 2.5 inches tall and 5 inches wide, with a single wick. Further, JAS claims that "[t]he Endar ruling clearly finds a short star shaped candle to be outside the scope of the Order" (JAS comments at 1). JAS claims that this candle is an identifiable object and is marketed and sold for the Christmas holiday season. Thus, JAS feels that its "five point star" candle falls outside the scope of the Order.

Moreover, JAS disagrees with the NCA's assertion that the "heart floater" candle should fall within the scope of the Order due to its flat side. JAS claims that "[r]egardless of the flat side, [the] candle is shaped like a heart and, identifiable from all viewing angles" (JAS comments at 1). JAS further cites the "Meijer ruling," which it claims found small valentine heart-shaped candles to be outside the scope of the Order. Thus, JAS believes that its "heart floater" candle should be excluded as well.

Also, JAS disputes the NCA's claim that its "star floater" candle should be included in the scope of the Order because it is a small straight-sided pillar. JAS maintains that "it is not a pillar, each is shaped like a five point star measuring one inch tall and two inches wide from point to point. . ." (JAS comments at 1). Furthermore, JAS points to the "Endar ruling" in support of its claim that a candle that is shorter than it is wide qualifies for an exclusion from the Order. Therefore, JAS claims that its "star floater" candle belongs outside the scope of the Order.

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."² 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 July 1987

² 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); Endar 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).

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).

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, the following three candles fall outside the scope of the Order.

Floating Flower Candle (Article #557-3114)

This candle, in the shape of an open flower blossom, is approximately 4 inches wide and 2 inches high, and has carved individual petals rising from the base. This candle is shaped as an identifiable object (an open flower blossom) and is identifiable as such from most angles. See JCPenney Ruling. Thus, this candle falls within the July 1987 novelty candle exception as an identifiable object.

Heart Floater Candle (Article #569-5341)

This candle, in the shape of a heart, measures approximately 2 inches wide and 1 inch high. We agree with the NCA that the heart design would not limit the use of the candle to a specific holiday or occasion and that the year-round ubiquity of the heart renders it meaningless as a holiday scene or symbol. See Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Avon (May 4, 2001). However, this candle is clearly identifiable as a heart and is identifiable as such from most angles. See JCPenney Ruling and Final Scope Ruling, Meijer, Inc. (June 11, 1998). Thus, this candle falls within the July 1987 novelty candle exception as an identifiable object.

We do not agree with the NCA’s argument with regard to Endar 1998 (i.e., the floating nature of this candle). In that decision, the Department ruled that Endar’s floating round candle was covered by the scope of the Order due to its petroleum wax composition, its wick, and its identification as a “round,” which is included in the scope of the Order. In this case, the candle at issue is distinct because it is in the shape of a heart (i.e., an identifiable object) and not a “round.” Therefore, Endar 1998 is not applicable.

Champagne Glass Flower Candle (Article #T03-2007CR)

This candle is in the shape of an open flower blossom, placed in a champagne glass, wrapped in mesh and tied at the stem with a red ribbon. The Champagne Glass Flower candle is approximately 3 inches wide and 1½ inches high. This candle is in the form of an identifiable

flower and is identifiable as such from most angles. See JCPenney Ruling. Thus, this candle falls within the July 1987 novelty candle exception as an identifiable object.

Furthermore, we find that for the reasons outlined below, the remaining two candles are within the scope of the Order.

Five Point Star Candle (Article #571-5883)

JAS claims that this candle (5 inches wide and 2.5 inches high) is in the form of an identifiable object. The Department notes that the star shape is unidentifiable when viewed from 10 of its 12 sides. It is only identifiable as a star shape when viewed from the top or bottom. Thus, since the star shape is not identifiable as such from most angles, it cannot be considered a novelty candle. Therefore, the Department finds that this candle does not fall within the July 1987 exception. Also, the Department has previously found that star-shaped candles are within the scope of the Order. See Meijer; and Barthco Trade Consultants, Inc. (April 30, 2001) (Barthco). In these two scope rulings, the Department noted that the star shape was not discernable from most angles and that instead the candles at issue were pillar candles. Similarly, this candle is a pillar candle.³ Therefore, for the aforementioned reasons, this candle is within the scope of the Order.

Star Floater Candle (Article #569-5572)

JAS claims that this candle (2 inches wide and 1 inch high) is in the form of an identifiable object. The Department notes that the star shape is unidentifiable when viewed from 10 of its 12 sides. It is only identifiable as a star shape when viewed from the top or bottom. Thus, since the star shape is not identifiable as such from most angles, it cannot be considered a novelty candle. Therefore, the Department finds that this candle does not fall within the July 1987 exception. Also, as noted above, the Department has previously found that star-shaped candles are within the scope of the Order. See Meijer and Barthco. As previously stated, in Meijer and Barthco, the Department noted that the star shape was not discernable from most angles and that instead the candles at issue were pillar candles. Similarly, this candle is a pillar candle.⁴ Therefore, for the aforementioned reasons, this candle is within the scope of the Order.

Summary

JAS's "floating flower," "heart floater," and "champagne glass flower" 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

³ In previous rulings, the Department has classified certain candles as pillar candles that were greater in width than in height. See Barthco and JCPenney Purchasing Corp.

⁴ Id.

Order, as defined in the petition, as well as the Department's and the Commission's prior determinations.

JAS argues that its "five point star" and "star floater" candles are in the form of identifiable objects, thus exempting them from the Order. For the reasons discussed above, we disagree. Therefore, we find that these candles are 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 the "floating flower," "heart floater," and "champagne glass flower" candles are outside the scope and the "five point star" and "star floater" candles are 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