

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

To All Interested Parties:

On November 19, 2001, the Department of Commerce (the Department) received a request from Endar Corporation (Endar) 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 Julio A. Fernandez at (202) 482-0190.

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);
Endar Corporation

Summary

On November 19, 2001, the Department of Commerce (the Department) received a request from Endar Corporation (Endar) for a scope ruling on one candle (a “floating pumpkin lantern 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). See 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 falls within the scope of the Order.

Background

Endar filed its request for a scope ruling in proper form on November 19, 2001. On January 7, 2002, the National Candle Association (NCA), an interested party in this proceeding, filed comments on Endar’s request.

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 Endar's request 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).

Endar's Scope Request

Endar argues that the candle subject to this inquiry (a “floating pumpkin lantern candle”) is in the form of a definable object (a pumpkin), both from above and from any other perspective, and is, thus, not covered by the scope of the Order. Endar included a color photograph of the 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.

Turning specifically to Endar's request, the NCA first notes that the candle at issue is made of petroleum wax, and contains a single wick. The NCA then argues that the "[c]andle is a fluted round candle," adding that "Round candles are specifically defined as being within the scope of the Order" (NCA comments at 4). It cites the Final Scope Ruling: Endar Corp. (December 24, 1998) (Endar 1998) to support its assertion that the Department has previously determined that Endar's floating round candles are within the Order's scope, and also cites to Final Scope Ruling: Endar Corp. (May 11, 2000) (Endar 2000), where the Department determined that various "round Chinese lantern" candles were round-shaped candles, and, therefore, were within the scope of the Order (NCA comments at 4-5). The NCA also notes that a pumpkin is not flat on the top and bottom and that a pumpkin has a large lopped-off vine protruding from the top.

The NCA further argues that "Endar cannot convert a round candle into an identifiable object by adding a fluted or straight grooves design on the sides of the round candle." It contends that in Final Scope Ruling: American Greetings Corporation (May 11, 2000) (American Greetings) "the Department concluded that molded decoration depicting multicolored flowers to a taper does not change a taper into an out-of-scope candle." Additionally, the NCA asserts that "The addition of a fluted or straight grooves design to this round candle does not sufficiently alter the fundamental shape of the candle as a round to make it a candle in the shape of an identifiable object," and this candle, thus, must not be excluded from the scope of the Order (NCA comments at 5).

The NCA notes that Endar's candle competes 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 Endar 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 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

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); 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).

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, Endar’s “floating pumpkin lantern candle” falls within the scope of the Order.

“Floating Pumpkin Lantern Candle”

This candle, which Endar alleges to be in the shape of a pumpkin, is approximately 2 3/4 inches high and 1 3/4 inches in diameter. We agree with the NCA that the shape of this item falls within one of the delineated shapes outlined in the Order, a “round,” and should, therefore, be included within the Order’s scope. Further, we agree with the NCA’s argument with regard to Endar 1998 and Endar 2000. In Endar 1998, the Department ruled that Endar’s floating round candle was covered by the Order’s scope due to its petroleum wax composition, its wick, and its identification as a round, which is included in the scope of the Order. In Endar 2000, the Department ruled that Endar’s round Chinese lantern candles were rounds. The candles at issue in Endar 2000 were round, with a hollowed-out center area containing a single wick, a beehive-shaped outer surface, and a series of concentric circles creating a pattern Endar considered identifiable as a Chinese lantern.

In the instant case, as in Endar 1998, Endar’s “floating pumpkin lantern candle” is a petroleum wax candle, with a single wick and in the shape of a round, a shape clearly identified in the Order’s scope. As in Endar 2000, the instant candle is a round, with a hollowed-out center containing a single wick, and has a repeating pattern of vertical grooves on the outer surface which presumably renders the candle an identifiable object in Endar’s view.² We determine that, as in Endar 2000, nothing in the candle’s outer surface, containing vertical grooves, renders the candle identifiable as a pumpkin. Further, the top is sliced off and absent a cut-off vine, which typically protrudes from the top of a pumpkin. Thus, this candle does not fall within the July 1987 novelty candle exception as an identifiable object.

Notwithstanding the above argument, we note that, based on the color picture submitted of this candle, it appears to be a wax-filled container, which would be included within the scope of the Order.

² We note that Endar’s argument did not specifically address this repeating pattern.

Summary

Endar’s “floating pumpkin lantern candle” is not in the shape of an identifiable object, but is a round, a shape clearly identified in the scope of the Order. Thus, this candle does not fall within the July 1987 novelty candle exception as an identifiable object. This conclusion is consistent with the scope of the investigation and the Order, as defined in the petition, as well as the Department’s prior determinations.

Recommendation

Based on the preceding analysis, we recommend that the Department find that the “floating pumpkin lantern candle” falls 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