

A-570-504
Scope Inquiry
Public Document
Office VII: SMC

By Certified Mail, Return Receipt Requested

To All Interested Parties:

On August 8, 2000, the Department of Commerce (the Department) received a request from Burlington Toiletries International, Ltd. (Burlington) for a scope ruling on whether its gel candles are covered by the antidumping duty order on petroleum wax candles from the People's Republic of China (Order). Since the Department was unable initially to make a finding under 19 CFR 351.225(c)(2), we initiated a formal scope inquiry under 19 CFR 351.225(k)(1) of the Department's regulations on September 22, 2000, and requested that all interested parties submit comments in order to consider whether Burlington's gel candles are within the scope of the Order.

On January 29, 2001, the Department issued a questionnaire and also placed information on the record for comment. On May 25, 2001, the Department initially determined that the descriptions of the merchandise as contained in the petition, the initial investigations, and determinations of the Department and the International Trade Commission (ITC) were *not* dispositive. Therefore, in accordance with 19 CFR 351.225(k)(2), the Department subsequently considered the additional Diversified Products factors in order to determine whether Burlington's gel candle is within the scope of the Order. See also Diversified Products Corp. v. United States, 572 F Supp. 883, 889 (CIT 1983).

However, after further examination of the record evidence, and our review of the arguments and information submitted by the interested parties in this proceeding, the Department has rendered its decision in accordance with 19 CFR 351.225(k)(1) based on the description of the merchandise contained in the petition, the initial investigation, and prior scope determinations. Accordingly, the Department has determined that Burlington's gel candle is within the scope of the Order. 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 Sean Carey at (202) 482-3964.

Sincerely,

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

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MEMORANDUM FOR: Joseph A. Spetrini
Deputy Assistant Secretary
AD/CVD 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); Burlington Toiletries International, Limited Gel Candle

I. SUMMARY

On May 25, 2001, the Department of Commerce (the Department) initially determined in accordance with 19 CFR 351.225(k)(1) of the Department's regulations, that it could not make a scope ruling based on the descriptions of the merchandise as contained in the petition, the initial investigations, and the determinations of the Secretary (including prior scope determinations) and the International Trade Commission (ITC). Since the information on the record at that time concerning the physical description of Burlington Toiletries International, Ltd.'s (Burlington's) gel candle was ambiguous as to whether to include it within the scope of the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC) (Order), the Department decided to initiate a scope inquiry under 19 CFR 351.225(k)(2) of the Department's regulations to consider the additional Diversified Products factors. See also Diversified Products Corp. v. United States, 572 F Supp. 883, 889 (CIT 1983).

In light of the additional information submitted by interested parties since May 25, 2001 concerning the physical characteristics and description of Burlington's gel candle, and the test results obtained by Burlington using U.S. Customs Laboratory test method 34-07, we find that there is sufficient information on the record of this proceeding to reconsider and render a decision in accordance with 19 CFR 351.225(k)(1). Accordingly, we recommend that the Department determine that Burlington's gel candle is within the scope of the order because gel candles contain a petroleum-based substance that is wax-like and solid in nature. In addition, the Department and U.S. Customs Service (Customs) have consistently determined in prior rulings that gel candles fall within the scope of the Order. See Final Scope Ruling- Antidumping Duty on Petroleum Wax Candles from the People's Republic of China:

Endar Corp. (“Endar Ruling”) dated January 11, 2000; also U.S. Customs Service Port of Los Angeles Public Bulletin 02-005 dated March 8, 2002.

II. BACKGROUND

On August 8, 2000, the Department of Commerce received a request from Burlington for a scope ruling on whether its “stiff gel candles that are transparent” and circular in shape, are covered by the Order. In response to Burlington’s submission, the National Candle Association (NCA), the petitioner in this case, submitted comments on September 21, 2000.

The Department initiated a formal scope inquiry on September 22, 2000, and requested that all interested parties submit comments in accordance with 19 CFR 351.225(k)(1) in order to consider whether Burlington’s gel candle made from hydrocarbon oils are within the scope of the order based upon the descriptions of the merchandise. The NCA, Burlington and Russ Berrie and Company, Inc. (Russ Berrie), provided comments and rebuttal comments as requested by the Department.

On January 29, 2001, the Department issued a questionnaire to Burlington and the NCA requesting that they further elaborate on the information on the record of this inquiry. The Department also placed information on the record for comment. All other interested parties were invited to place comments on the record which were relevant to the issues addressed in the questionnaire. The NCA and Burlington both submitted their questionnaire responses on February 26, 2001, and comments regarding the questionnaire responses were submitted by Burlington on March 5, 2001. The Department did not receive any rebuttal comments from the NCA with regard to Burlington’s questionnaire response.

On May 25, 2001, the Department found that the descriptions of the merchandise as contained in the petition, the initial investigations, and determinations of the Department and the ITC are *not* dispositive and initiated a scope inquiry to consider the additional Diversified Products factors set forth at 19 CFR 351.225(k)(2). On June 28, 2001, the NCA, Burlington and Russ Berrie provided comments that addressed these factors. The NCA and Burlington submitted rebuttal comments to the Department on July 5, 2001.

The NCA requested, on January 29, 2002, that the Department require Burlington to have its gel candle tested by an independent laboratory in order to determine the amount of petroleum wax in its gel candle. On April 29, 2002, the Department requested that Burlington submit test results obtained by using U.S. Customs Laboratory test methods 34-07 or 34-08, from an independent testing facility located in the United States. On May 28, 2002, Burlington submitted the results of the laboratory test conducted by ACTS Testing Labs of Buffalo, New York using test method 34-07.

In its petition of September 4, 1985, the National Candle Association requested that the investigation cover:

candles [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 (“Petition”), September 4, 1985 at 7 (emphasis added).

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), (emphasis added); see also Preliminary Determination of Sales at Less Than Fair Value, 51 FR 6016 (February 19, 1986); Final Determination, 51 FR 25085 (July 10, 1986) 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”, noting that the investigation did not include “birthday, birthday numeral and figurine type candles.” See Determination of the Commission (ITC Final), USITC Publication 1888, August 1986, at 4, note 5, and A-2. The ITC also defined a candle as being “made of solid, fusible, combustible waxes or fatty substances surrounding and saturating a combustible wick.” See Staff Report of August 6, 1986, pages A-3 through A-12 for the ITC’s complete description and uses of all types of candles.

Where the descriptions of the merchandise are *not* dispositive, the Department will consider the Diversified Products 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 purchaser; 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 Department applies these criteria when the product descriptions contained in the petition, the determinations of the Secretary and the Commission, the investigation, and the order are ambiguous or unclear. Even though all of the five factors were addressed by interested parties, we only reviewed and analyzed the factor pertaining to the physical characteristics of the merchandise in the instant proceeding as a result of our determination that sufficient information is available to render a decision in accordance with 19 CFR 351.225(k)(1).

Documents and other information from the underlying investigation deemed relevant by the Department to the scope of the outstanding order 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.

III. COMMENTS

The Physical Characteristics of the Product

In its comments submitted to the Department on September 21, 2000, October 16, 2000, October 23, 2000, and February 26, 2001, the NCA argues that Burlington's gel candle falls within the scope of the antidumping order. These comments were summarized by the Department and placed on the record of this scope inquiry. See summarization and analysis of all previously submitted comments and questionnaire responses by the NCA, Burlington, and Russ Berrie in the Department's letter to all interested parties dated May 25, 2001 (Department's May 2001 Summary). Ultimately, according to the NCA, Burlington's gel candle is a scented candle with a wick, that burns and emits light and heat like other candles within the scope of the order. The NCA also states that Burlington's gel candle is manufactured in a wide range of colors, decorative features, and fragrances, and could be produced in a variety of shapes, such as a pillar, or placed within a filled container, as in the case of the subject candle in question.

Burlington contends that the NCA failed to account for the significant differences between gel candles and petroleum wax candles, and instead, emphasized only the general characteristics included in the scope that are found in both gel and petroleum wax candles: they have wicks, burn, and create light. According to Burlington, the NCA failed to point out that citronella and beeswax candles, which are excluded from the scope, share these same characteristics. In addition, Burlington states that other non-scope products, such as oil lamps and lanterns, use wicks that burn and emit light and heat.

Burlington argues that the NCA does not discuss the singular physical characteristic stated in the scope of the order that subject candles be made from "petroleum wax." According to Burlington, the presence of petroleum wax as the predominant ingredient found in petroleum wax candles has been used throughout the history of this order to define whether products are within the scope of the order. Furthermore, Burlington notes that the NCA itself has stated in a prior scope ruling that gel candles "are not within the scope of the order if {they are} a gel or a mineral-oil based product." See Final Scope Ruling- Antidumping Duty on Petroleum Wax Candles from the People's Republic of China; Endar Corp. ("Endar Ruling") dated January 11, 2000.

According to Burlington, gel candles do not share the same physical characteristics as petroleum wax candles. Specifically, Burlington notes that gel candles are clear and transparent, and have a rubbery gelatin texture that contains trace amounts of wax, whereas wax candles are solid and opaque, have a hard and waxy texture, and are made predominantly of wax. The NCA counters that Burlington's

patent for its gel candle, found in Burlington's August 1, 2000 submission in Exhibit A ("patent"), indicates that its gel candles can range from "completely colorless and transparent to having a deep color," and are therefore, not limited to being clear. See Patent at 9. The NCA also notes that wax candles can also be clear and translucent, with embedded objects within. Furthermore, the NCA states that Burlington's patent also indicates the capability to provide "stiff gel candles" that could "substitute for the conventional wax pillar or jar candle." Id. at 4, 5, 8 and 11.

Burlington notes that gel candles frequently have complex scenes and designs, and other ornamental features such as beads, glitter, and a diversity of objects that can be suspended in the gel. Burlington adds that these features would disappear if they were embedded in wax candles. The NCA argues that the Department has found similar wax candles with embedded objects that did not disappear, such as Meijer's translucent candle, to be within the scope of the order. See Department's Final Scope Ruling of Meijer Inc. dated September 30, 1999 at 3 and 7; see also the NCA's July 5, 2001 Rebuttal Comments ("NCA Rebuttal") at 2, footnote 4, for a list of similar scope rulings.

The NCA notes that Burlington makes no claims that its gel candle is either a Christmas or novelty candle, or that it contains any decorative characteristics that symbolize any religious holiday or special event that would justify its exclusion from the order. Accordingly, the NCA concludes that Burlington's gel candle is the same as or similar in physical characteristics to the candles covered by the scope of the order.

Burlington states that gel candles have superior burning characteristics with regard to the length of illumination because they have a slower burn rate, and can last approximately twice as long as petroleum wax candles. In addition, Burlington notes that gel candles have a higher melting point than petroleum wax candles. The NCA, however, cites to a catalog included in Exhibit 2 of its NCA Rebuttal submission that indicates that in-scope candles can burn from 60 to 200 hours, and suggests that wax candles can burn twice as long as Burlington's gel candles, as indicated in Exhibit C of the NCA's June 27, 2001 submission. Furthermore, the NCA asserts that a slower burn rate is not specific to gel candles, and that wax candles can also be designed to have a slow burn rate since the burn rate is primarily a function of wick size and "fuel" viscosity at wick temperature.

According to Burlington, gel candles also have a higher concentration of fragrances than wax candles based on their ability to dissolve fragrances into the gel base, unlike wax candles. The NCA claims that its members in the candle industry created the market for aroma therapy and other scent-related uses of in-scope candles, and provides examples in Exhibit 3 of its NCA Rebuttal submission.

Burlington adds that the dissimilarities of gel candles and wax candles are reflected in a report issued by the U.S. Environmental Protection Agency ("EPA Report") which states that the primary fuel in petroleum wax candles is petroleum wax, whereas gel candles use "mineral oil, terpene-type chemicals, or modified hydrocarbons as their primary fuel." See EPA Report, Exhibit A at 2-3 submitted in Burlington's June 28, 2001 Comments. Burlington also notes that the American Society for Testing and Materials (ASTM) makes this distinction as well.

Burlington points to the preliminary injury determination by the ITC as evidence that the industry from which protection was sought was the Chinese candle industry that used paraffin wax as the principal ingredient in petroleum wax candles. According to Burlington, this is reflected in the ITC's preliminary determination which stated that "Chinese petroleum is high in paraffin content, yielding significant amounts of paraffin wax, the principal ingredient in the production of candles." See Preliminary Determination of the Commission (ITC Prelim), USITC Publication 1768, 1985.

According to Burlington, the singular physical characteristic that the Department uses to determine whether a candle is within the scope of the case is the presence of significantly high levels of petroleum wax. Burlington argues that petroleum wax is absent in gel candles.

According to Russ Berrie, paraffin wax and paraffin oil are separate and distinct products. Russ Berrie describes paraffin oil as being a "drip oil from the wax presses in the process of extracting paraffin wax from the wax-bearing distillate...{"}, whereas, paraffin wax is "put through a filter press and {is} separated from the oils." Therefore, Russ Berrie asserts that the refining process separates the petroleum distillate into two different products, paraffin oil and paraffin wax, removing any paraffin wax from paraffin oil.

Russ Berrie claims that, according to the definitions below, gel candles are not solid and do not contain any petroleum wax and therefore, should be excluded from the Order. Citing to the *McGraw-Hill Dictionary of Scientific and Technical Terms (2d Edition 1978)* at page 1194, petroleum wax is defined as a "wax occurring naturally in various fractions of crude petroleum; there are two groups: paraffin wax and microcrystalline wax." Russ Berrie also references *The Condensed Chemical Dictionary (8th Edition 1971)* at page 936, which defines wax as a "low-melting organic mixture or compound of high molecular weight, solid at room temperature and generally similar in composition to fats and oils, except that it contains glycerides." Gel is defined by the same source as a "colloid in which the disperse phase has combined with the continuous phase to produce a viscous, jelly-like product{...}Gels are usually transparent but may become opalescent."

Although gel and petroleum wax candles both originate from raw petroleum, Russ Berrie argues that they are different products with different properties created through a different processing technique. According to Russ Berrie, there is no hydrocarbon mineral oil or triblock copolymers in petroleum wax. Likewise, there is no petroleum wax in hydrocarbon mineral oil, triblock copolymers, or gel candles.

Finally, Russ Berrie notes that gel candles, unlike petroleum wax candles, do not hold their shape. In addition, they are transparent, which allows for the insertion of various decorative or ornamental pieces to be placed within the gel itself.

IV. TEST RESULTS

On May 28, 2002, Burlington, as directed by the Department, submitted the results of a laboratory test analyzed according to U.S. Customs Method 34-07. See Burlington's Gel Candle Laboratory Analysis dated May 29, 2002. The results of this test indicated that Burlington's gel candle contained less than 21.4 percent paraffin wax, and an undetermined "presence of mineral oil." Given the results of this test, Burlington noted that the Department has consistently ruled that candles containing less than 50 percent of petroleum wax are outside the scope of the Order. Likewise, Burlington states that the ITC found the domestic "like product" to be candles composed of over 50 percent petroleum wax. Id. at 2. Therefore, Burlington contends that the Department should find its gel candle not within the scope of the Order.

V. ANALYSIS

The Department has determined, after reviewing the totality of information on record concerning Burlington's gel candle, that the physical description alone of Burlington's gel candle is dispositive as to its inclusion within the scope of the order. Accordingly, we will not be examining the Diversified Products criteria as set forth at 19 CFR 351.225(k)(2) since the product descriptions contained in the petition, the initial investigation, and the determinations of the Secretary and the Commission, are dispositive in rendering a determination under 19 CFR 351.225(k)(1) based on the physical description of the merchandise in question.

As noted above in the *Background* section, subject candles are "made from petroleum wax and contain fiber or paper-cored wicks." We agree with Burlington that the single defining issue to be considered in the instant scope ruling is what constitutes "petroleum wax." As discussed further below, we find that Burlington's gel candle is composed of the same petroleum-based substance as candles subject to the scope of the Order. In addition, we determine that the rubbery texture of Burlington's gel candle falls within a reasonable interpretation of a solid candle. Finally, we note that the basic features, ornamentation, burning and aroma characteristics of Burlington's gel candle are not unique or unlike those of in-scope candles covered by the Order.

First, we find no distinction in the actual chemical composition of gel candles and traditional wax candles. Russ Berrie noted above in the *Comments* section that gel and wax candles both originate from raw petroleum and are both petroleum distillates. Likewise, Burlington noted that the refining process used to produce the subject gel candle involves the distillation of paraffinic crude oil from which the "same continuum" of hydrocarbons are either changed or concentrated into oil and wax products. See Burlington's Questionnaire Response dated February 26, 2001 at 9-10; see also Department's May 2001 Summary at 10. Burlington states that its gel candle consists primarily of oil and contains only trace amounts of wax. The NCA also notes that gel candles are part of the "same continuum" of products derived from this paraffinic crude oil, and that the only difference between the oil molecules in the gel candle and the wax molecules in the traditional candles, is in the degree of branching found in the hydrocarbon molecules, themselves. See NCA's Questionnaire Response dated February 26, 2001 at 2; see also Department's May 2001 Summary at 11.

Specifically, the NCA notes that paraffin wax (linear) and paraffinic oil (isoparffin or branched paraffin) even share the same chemical formula (C₂₅H₅₂). See NCA's Questionnaire Response dated February 26, 2001 at 3; see also Department's May 2001 Summary at 12. Finally, the results of the Customs Test indicate a significant amount of paraffin wax (21.4 percent) and the presence of mineral oil, and provide no indication of any other substances outside this continuum of petroleum distillates noted above (unlike beeswax and palm oil candles which are excluded from the scope of the order when the respective beeswax and palm oil contents are over 50 percent of the candle's composition). Therefore, given the almost identical chemical nature of the oil and wax as described in the record of this proceeding, we find them to be essentially the same petroleum-based substance.

Second, with regard to the physical characteristics, we find that the subject gel candle, although of rubbery texture, can reasonably be viewed as solid in nature. A review of Burlington's patent for its gel candles describes them as "stiff" gel candles which "permit the decorative shaping advantages of conventional wax candles." See Burlington's Application for Scope Ruling, Attachment A at 4. Burlington's patent further distinguishes its gel candle from liquid oil jar candles because liquid oil candles "do not permit the shaping of, for example, a pillar candle." Id at 3. Therefore, we find it inappropriate to equate Burlington's gel candle to a liquid oil candle given the actual texture of the candle itself, the amount of paraffin wax found in the test results noted above, and, the significant use of a copolymer gelling agent within its gel candle, as described in Burlington's patent. Furthermore, we find that the physical characteristics of Burlington's gel candles are consistent with the description of wax elucidated in the Endar Ruling as being "any of various natural unctuous, viscous, or solid heat-sensitive substances."

We disagree with Burlington's argument that the ITC's preliminary injury investigation is evidence that the U.S. industry sought protection from Chinese candles made principally of paraffin wax. Both the ITC's definition of the domestic "like product" and the scope description adopted by the Department to cover this Order use language and references to "petroleum wax" candles which include, but are not limited to, "paraffin wax" candles. Furthermore, the CIT has allowed the Department room to interpret the relevant products covered under the scope of any order, and has noted that "the very reason Commerce has provided for regulations governing the conduct of scope inquiries is because the descriptions of subject merchandise contained in the Department's determinations must be written in general terms. See Novosteel S.A. v. United States, 128 F. Supp. 720, 739- 740 (CIT 2001), citing, American NTN Bearing Mfg. Corp. v. United States, 739 F. Supp. 1555, 1562 (CIT 1990); see also Makita Corp. v. United States, 974 F. Supp. 770, 777 (CIT 1997).

Finally, we note that even if Burlington claims that gel candles can burn longer, hold higher concentrations of fragrances, and contain more complex scenes, designs, and ornamental features, none of these characteristics are unique or unlike those of subject candles covered by the Order. The NCA correctly notes that in-scope petroleum wax candles can also be translucent and contain embedded objects; can be designed to have a slow burn rate; and, have aroma-therapy and other scent-related uses like gel candles. Therefore, gel candles essentially share the same features and characteristics that are also found in candles subject to the scope of the order.

IV. CONCLUSION

Based on the physical description on record of Burlington's gel candle, we find that it is within the scope of the order on petroleum wax candles from the PRC because it is composed of the same petroleum-based distillates as candles subject to the scope of the order. We also determine that the rubbery texture of Burlington's gel candle is solid in nature. Finally, we note that the basic features, ornamentation, burning and aroma characteristics of Burlington's gel candle are not unique or unlike those of subject candles covered by the scope of the order.

V. RECOMMENDATION

We recommend the Department find Burlington's gel candle within the scope of the antidumping duty order on petroleum wax candles from the PRC. 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

Barbara E. Tillman
Acting Deputy Assistant Secretary
AD/CVD Enforcement Group III

Date