

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

To All Interested Parties:

On November 15, 2001, the Department of Commerce (the Department) received a request from For Your Ease Only, Inc. (FYEO) for a scope ruling on whether two 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 both of FYEO's candles should be included 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 United States Bureau of Customs and Border Protection (BCBP) of this decision. If you have any questions, please contact Sally Gannon at (202) 482-0162 or Julio Fernandez at (202) 482-0961.

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);
For Your Ease Only, Inc.

Summary

On November 15, 2001, the Department of Commerce (the Department) received a request from For Your Ease Only, Inc. (FYEO) for a scope ruling on two types of candles (one floating gel candle and one refill gel tea light candle) to determine if they are covered by the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC). See Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China, 51 FR 30686 (August 28, 1986) (Order). In accordance with 19 CFR 351.225(k)(1), we recommend that the Department determine that both of FYEO's candles fall within the scope of the antidumping duty order on petroleum wax candles from the PRC.¹

Background

¹ The Department has developed an internet website that allows interested parties to access prior scope determinations regarding the antidumping duty Order on Petroleum Wax Candles from the People's Republic of China. This website lists all scope determinations from 1991 to the present. It can be accessed at <http://ia.ita.doc.gov/download/candles-prc-scope/>, and will be updated periodically, to include newly-issued scope determinations.

FYEO filed its request for a scope ruling in proper form on November 15, 2001. On November 21, 2001, the Department provided FYEO and other companies with pending scope reviews on candles from the PRC an opportunity to submit further relevant information to the Department, where appropriate, and the due dates for pending determinations were extended accordingly. See Memorandum to the File through Sally C. Gannon from Brett L. Royce, Petroleum Wax Candles from the People's Republic of China: Change in Practice Regarding Scope Reviews as a Result of the JCPenney Purchasing Corporation Ruling, (November 21, 2001).

On December 28, 2001, the Department requested that FYEO submit test results (no later than January 25, 2002), obtained from an independent domestic testing facility, regarding the exact percentage of petroleum wax composition of the subject candles. On January 18, 2002, FYEO requested additional time (up to March 29, 2002) to test its candles. On January 29, 2002, the Department granted a partial extension to FYEO (up to February 25, 2002). On February 13, 2002, FYEO submitted test results, which showed that the subject gel candles consisted of “. . . 86% mineral oil and 14% polymers” and that “[t]here is no evidence of any wax additive to the candle material, as established by the tests conducted.”²

On March 26, 2002, the National Candle Association (NCA), petitioner and an interested party in this proceeding, filed comments on FYEO's request. On April 17, 2002, Russ Berrie and Company, Inc. (Russ Berrie), a United States importer and interested party in this proceeding, submitted a rebuttal to the NCA's comments, in support of FYEO's position, regarding the issue of whether gel candles composed primarily of hydrocarbon mineral oil constitute petroleum wax and are within the scope of the Order. On June 5, 2002, the NCA submitted supplemental comments to its March 26, 2002 submission, and a rebuttal to Russ Berrie's comments, reaffirming its position stated in its November 15, 2002 submission: that gel candles have similar chemical composition and the same range of essential physical characteristics of petroleum wax candles and must be included within the scope of the Order. On June 7, 2002, the NCA submitted corrections to its June 5, 2002 comments.

For Your Ease Only's Scope Request

According to FYEO, the candles involved in this request are comprised of a colored, transparent, rubbery gel and a wick inside a clear glass circular container, which floats on water. FYEO notes that these candles are sold in a set of six differently colored (red, orange, yellow, green, blue and violet) floating gel candles, six correspondingly colored refill gel tea lights, and three floating flower holder

² See FYEO's February 13, 2002 submission containing a laboratory report for the testing methodology used to examine FYEO's candles.

rings.

FYEO argues that its candles should not be included within the scope of the Order because they contain no petroleum wax and are not wax-filled containers or petroleum wax-filled containers. In its November 15, 2001 submission, FYEO argues its candles “. . . are produced in China from a gel base which is produced in the United States. . . .”³ Specifically, FYEO argues that its candles are not subject to the scope of the Order because they are not made from petroleum wax, nor are they wax-filled containers, and further notes that the International Trade Commission (the Commission) defined petroleum wax candles as “. . . those composed of over 50 percent petroleum wax. . . .”⁴ Additionally, FYEO also argues that the Department has, in previous rulings, determined that beeswax candles are not included within the scope of the Order, because they are candles that are not comprised of more than 50 percent petroleum wax. In this respect, FYEO argues that candles consisting of “. . . 80% beeswax/20% petroleum wax, and 81% beeswax/19% petroleum wax respectively were not within the scope of the Order.”⁵ FYEO submitted a sample candle, a sample tea light refill, and a copy of its descriptive brochure, which is enclosed in each candle set.⁶ Additionally, FYEO noted in its November 15, 2001 submission, that its candles are classified under subheading 3406.00.00 of the Harmonized Tariff Schedule of the United States (HTSUS).

As part of its February 13, 2002 comments, FYEO provided the Department with test results from an independent testing facility that analyzed FYEO’s candles. FYEO argues that the testing methodology employed to examine its candles, the Test for Solid Paraffins (as designated by the United States Pharmacopia Official Monograph for Mineral Oil), “. . . provide[s] irrefutable proof that FYEO’s gel candles contain no petroleum wax.” Specifically, the test results submitted by FYEO in its February 13, 2002 submission indicate that FYEO’s gel candles contain 86 percent mineral oil and do not contain petroleum wax.⁷

The National Candle Association’s Comments

In its comments, the NCA retraces the history of this antidumping duty order, including the import

³ See FYEO’s November 15, 2001 comments at page 3.

⁴ Determination of the Commission (Final), USITC Publication 1888, August 1986, at note 5 (Commission Determination).

⁵ See FYEO’s November 15, 2001 comments at page 5.

⁶ See FYEO’s November 15, 2001 comments at Exhibit A.

⁷ See FYEO’s February 13, 2002 comments at page 2.

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 that 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 (CIT) ruling with regard 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, petitioner argues 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 first notes that FYEO’s candles are wax-filled containers made in the PRC and, therefore should be included within the scope of the Order. Further, the NCA states that FYEO does not allege that the subject candles contain any designs which would make these candles specifically designed for use only in connection with a holiday, nor are they in the shape of a distinct identifiable object. In addition, the NCA argues that the sole basis for FYEO’s claim for exclusion is its allegations that its candles are made from mineral oil. According to the petitioner, the test results submitted by FYEO in its February 13, 2002 submission indicate that the candles consist of 86 percent mineral oil.

Moreover, the NCA claims that the patent for the gel used in FYEO’s candles describes the gel candles as being comprised of a “hydrocarbon oil.” According to the NCA, both they and the American Standards for Testing Materials (ASTM) consider wax to be a “solid or semi-solid material consisting of a mixture of hydrocarbons or hydrocarbon derivatives, or both.”⁸ Therefore, the NCA argues that, since FYEO’s candles consist of 86 percent hydrocarbon mineral oil, FYEO’s candles are wax-filled containers, which are specifically included with the scope of the Order. Moreover, the NCA holds that hydrocarbon mineral oil is a paraffin oil, and paraffin is derived from petroleum. The NCA states that the petroleum wax that is subject to the Order is paraffin wax. Thus, the NCA contends that FYEO’s candles are semi-solid paraffin wax candles that are the same or similar to the petroleum wax candles that are subject to the Order.

The NCA believes that the subject carbon mineral oil is derived from a paraffinic crude oil. The NCA maintains that the patent submitted as part of FYEO’s November 15, 2001 submission, indicates that the hydrocarbon oil is a white mineral oil, and that white mineral oil is a paraffinic oil. In addition, the NCA refers to a detailed comparative analysis of gel candles and petroleum wax candles that it submitted in the Burlington Toiletries International, Ltd. scope investigation on February 26, 2001.⁹

⁸ See NCA’s March 26, 2002 comments at page 5 and Exhibit 1.

⁹ See Id. at Exhibit 2. In that February 26, 2001, submission on the record of the Burlington proceeding, the NCA noted 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

The NCA further argues that since the gel used by Burlington is the same gel used by FYEO, the “. . . detailed comparative analysis of gel candles and petroleum wax candles that was submitted in the Burlington Toiletries International Ltd. scope investigation. . . is specific to FYEO’s gel candles as well as Burlington’s,”¹⁰ and, additionally, that FYEO’s gel candles are semi-solid candles that are the same or similar to the petroleum wax candles that are subject to the Order.

The NCA argues that the Commission “has consistently defined ‘like products’ as one having the same intrinsic qualities and essential characteristics and uses as the subject imports,” citing to Commission Determination, at 4, note 4. Further, the NCA claims that any minor differences in the physical characteristics of FYEO’s candles cannot lead to the conclusion that its candles are not like the candles included within the scope of the Order, citing to Final Determination of Sales at Less Than Fair Value: Sulfur Dyes, Including Sulfur Vat Dyes, From the United Kingdom, 58 FR 3253 (January 8, 1993). As such, the NCA contends that FYEO’s candles have the same intrinsic qualities and essential characteristics of petroleum wax candles, and, therefore, are like petroleum wax candles. In addition, the NCA holds that FYEO’s candles are the same class or kind or merchandise as are the candles subject to the Order, and are covered by the same HTSUS tariff provision. The NCA maintains that all of FYEO’s candles fall within the scope of the Order.

The NCA maintains that, in this case, the Department must also consider the factors enumerated in 19 CFR § 351.225(k)(2) of the regulations:

- 1) the physical characteristics of the merchandise;
- 2) the expectations of the ultimate purchasers;
- 3) the ultimate use of the product;
- 4) the channels of trade in which the product is sold; and
- 5) the manner in which the product is advertised and displayed.

The NCA argues that FYEO’s 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

wax molecules in the traditional candles, is in the degree of branching found in the hydrocarbon molecules, themselves. Further, the NCA noted that paraffin wax (linear) and paraffinic oil (isoparaffin or branched paraffin) even share the same chemical formula (C₂₅H₅₂). See Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Burlington Toiletries International, Ltd. (March 31, 2003) (Burlington Ruling) (emphasis added).

¹⁰ See the NCA’s March 26, 2002 comments at page 5.

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 FYEO 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.

Russ Berrie’s Comments

In response to the NCA’s numerous comments submitted with respect to FYEO’s request for a scope ruling, Russ Berrie first argues that the NCA’s petition and the Department’s scope of the investigation both specified candle made from “petroleum wax.” Russ Berrie also argues that while the Department “. . . has inherent authority to define the scope of an antidumping duty order. . . ,” the Department “. . . does not have authority to alter, amend, or expand the scope of an antidumping duty order.”¹¹ Russ Berrie further argues that the Department “. . . commences its scope review when the description of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary and the Commission are examined to determined whether the merchandise is within the class or kind of merchandise described in the antidumping order.”¹² Based on this, Russ Berrie asserts, sufficient information exists with respect to FYEO’s candles for the Department to make a determination without initiating a formal scope inquiry in accordance with 19 C.F.R. § 351.225(e).

According to Russ Berrie, it is clear, therefore, that “petroleum wax” candles have always been the only type of candles targeted by the antidumping order. Russ Berrie argues that to expand the scope of the order to include gel candles primarily composed of hydrocarbon mineral oil should not be allowed. Russ Berrie contends that had the NCA intended to include candles made from materials other than petroleum wax in its petition, it would have included language to describe those other material characteristics. Russ Berrie maintains that the critical issue here is that the Department, in issuing its antidumping order, clearly precluded candles that are not made from petroleum wax. Given that the gel candles at issue do not contain any petroleum wax, Russ Berrie argues that they are prima facie outside the scope of the antidumping duty order. Since the description of the gel candles is dispositive in this case, Russ Berrie contends that the Department should end the scope review without opening a formal inquiry and considering the additional criteria specified under 19 C.F.R. § 351.225(k)(2).

Russ Berrie further argues that the hydrocarbon oil in FYEO’s gel candles is derived from a complicated petrochemical process which results in products that are free from any petroleum wax.

¹¹ See Russ Berrie & Company, Inc. v. United States, 57 F. Supp. 2d 1192-93 (CIT 1993) (citing to Koyo Seiko Co., Ltd v. United States, 834 F. Supp. 1401, 1402 (CIT 1993) and UST, Inc. v. United States, 9 CIT 352 (1985)).

¹² See Russ Berrie’s April 17, 2002 comments at page 2.

Russ Berrie asserts that, although the primary constituents of candles made of this gel and candles from petroleum wax originate from raw petroleum, they are different products, with different properties, created through a different processing technique. According to Russ Berrie, there is no hydrocarbon mineral oil in petroleum wax, and no petroleum wax in hydrocarbon mineral oil, or in the gel candles at issue. In addition, Russ Berrie states that the molecular weight of these two products is substantially different (400 to 600 daltons in petroleum wax versus 200-400 daltons for mineral oil).¹³ Further, Russ Berrie claims that the molecular weight of mineral oil means that it is a liquid at room temperature, whereas petroleum wax is a solid. Russ Berrie adds that the addition of gelling agents to the mineral oil turns it into a gel.

Russ Berrie claims that the NCA's assertion in its comments dated March 26, 2002, that "FYEO's candles are semi-solid paraffin wax" is inaccurate. Russ Berrie argues that, according to the *Materials Handbook* (1971, *Tenth Edition*), pages 580 & 581, paraffin wax and paraffin oil are separate and distinct products. Therefore, Russ Berrie holds that the refining process which separates the petroleum distillate into two different products, paraffin oil and paraffin wax, certifies that candles made from paraffin oil do not contain any paraffin wax. In fact, Russ Berrie argues, FYEO's gel candles do not contain any "wax" at all. Russ Berrie claims that, contrary to the NCA's opinion, which considers wax to include "semi-solid" material, *The Condensed Chemical Dictionary* (1971, *Eight Edition*), page 936, defines "wax," as being "solid at room temperature." Russ Berrie holds that the term "gel" is defined by the same source (page 412) as: "[a] colloid in which the disperse phase has combined with the continuous phase to produce a viscous, jelly-like product [a liquid]." Moreover, Russ Berrie claims that since gel candles are made of a viscous and flowing jelly-like substance which is encapsulated by a somewhat thicker jelly "coating," these candles are not solid. Thus, Russ Berrie believes that this gel is precluded from consideration as a wax of any sort.

Furthermore, Russ Berrie maintains that the Department's investigation which outlined the particular form or shape petroleum wax candles often take i.e., pillars, votives, or various wax-filled containers, is not relevant to this issue, since the gel candles here simply do not qualify as petroleum wax candles. Russ Berrie respectfully requests that a determination be made in accordance with FYEO's position that the subject gel candles should be excluded from the antidumping duty order on petroleum wax candles from the PRC.

NCA's Rebuttal Comments

In its June 5, 2002 comments, the NCA reaffirms its assertion that FYEO's gel candles ". . . have similar chemical composition and the same range of essential physical characteristics of petroleum wax

¹³ A dalton is a unit of mass equal to one-half the mass of the most abundant isotope of carbon, carbon 12, which is assigned a mass of 12. See search results at www.dictionary.com for dalton.

candles and must be included within the scope of the antidumping order. . . ”¹⁴ Additionally, the NCA defends its position that any minor differences between FYEO’s gel

candles and those covered by the Order “. . . cannot lead to the conclusion that its candles are not like the candles covered by the Order.”¹⁵

The NCA also argues that the Department has previously made clear that products developed after the antidumping petition and investigation cannot be specifically excluded from the scope of a formal investigation.¹⁶ Contrary to Russ Berrie’s claim, the NCA argues that it is not attempting to broaden the scope of the Order, but rather is objecting to narrowing the scope of the Order as it claims FYEO is attempting to do. According to the NCA, the ITC stated in its report that “. . . the requirement to be ‘like’ the imported article should not be interpreted in such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not ‘like’ each other. . . ”¹⁷

The NCA contends that Russ Berrie tries to distinguish petroleum wax candles from gel candles based on the process used to substantially transform the mineral oil into a gel candle. The NCA insists that the process used is irrelevant. According to the NCA, this is not the derivation of the gel candle, nor the process used to make it, but whether the gel candle has the same intrinsic qualities and essential characteristics and uses as the subject imports.

The NCA states that Russ Berrie claims that the gel candles do not contain any petroleum wax. The NCA contends that a certain amount of wax would be expected in these candles, citing to a memorandum by its expert, attached to its June 5, 2002 comments.¹⁸ Furthermore, the NCA reiterates that it and the ASTM consider wax to be a “solid or semi-solid material consisting of a mixture of hydrocarbons or hydrocarbon derivatives, or both.” See ASTM Standard Guide. The NCA maintains that gel candles would be considered a semi-solid material and, therefore, a wax under industry standards.

¹⁴ See NCA’s June 5, 2002 comments at page 1.

¹⁵ See Id. at page 2.

¹⁶ See Id. at page 2, citing to Television Receiving Sets, Monochrome and Color, Final Scope Ruling; 56 FR 66841 (December 26, 1991) in support of its assertion.

¹⁷ See Id. at page 4.

¹⁸ See NCA’s June 5, 2002 comments at Exhibit 1.

The NCA disagrees with Russ Berrie's contention that the considerations of physical characteristics under 19 C.F.R. § 351.225(k)(1) are dispositive and that the Department should not open a formal inquiry and consider the additional criteria under subparagraph (k)(2). According to the NCA, with the attempt by FYEO to open a huge hole in the Order and the disagreement over physical characteristics, the Department should investigate the additional criteria under subparagraph (k)(2).

Further, according to the NCA, the Department's reference to candles composed of 50 percent petroleum wax can only apply to candles that are over 50 percent beeswax. The NCA claims that the 50 percent rule was based upon the ITC's beeswax exclusion. Thus, the NCA argues, it does not apply to other waxes that were not excluded and have the same intrinsic qualities and physical characteristics and uses as petroleum wax candles.

Legal Framework

The regulations governing the Department's antidumping scope determinations are found at 19 CFR 351.225(2001). On matters concerning the scope of an antidumping duty order, the Department first examines the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission. 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(k)(1).

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 FYEO'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 initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission are 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.

See Petroleum Wax Candles from the People's Republic of China: Initiation of Antidumping Duty Investigation, 50 FR 39743 (September 30, 1985); Petroleum Wax Candles from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, 51 FR 6016 (February 19, 1986); Petroleum Wax Candles from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 51 FR 25085 (July 10, 1986) (Final Determination); See also Order.

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" (Commission Determination, at 4, note 5, and A-2).

Also of relevance to the present scope inquiry is a notice issued to the BCBP in connection with a July 1987 scope determination concerning an exception to 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).

Petroleum-Wax Candles from the People's Republic of China - Antidumping - A-570-504; C.I.E. –212/85, September 21, 1987; Letter from the Director, Office of Compliance, to Burditt, Bowles & RADIUS, Ltd., July 13, 1987 (Customs Notice) (emphasis added).

With respect to the instant request, we find that, for the reasons outlined below, FYEO's gel candles should be included within the scope of the Order.

Analysis

FYEO alleges that the gel candles in the instant request are substantially similar to the gel candles involved in the scope ruling request of Burlington Toiletries International, Ltd. (Burlington), filed on August 8, 2000, and are produced under a similar patent held by the same individuals that hold the patent, U.S. Patent Number 5,879,694 for the candles involved in Burlington's scope request. See Application for Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China (A-570-504); Burlington Toiletries International, Ltd. (August 8, 2000) (Burlington Ruling) at 2.

With regard to the subject candles, the Department reiterates that in its February 13, 2002 submission, FYEO provided the Department with test results obtained from an independent, domestic testing facility in the United States. These test results illustrate that subject gel candles are composed of the base "Geahlene AB-168," which is primarily composed of white mineral oil (86 percent and 14 percent polymers).

According to Penreco, the manufacturer of the Geahlene AB Series, "white mineral oils are among the most versatile petroleum products and are used in a wide variety of applications," and "...are a highly complex mixture of paraffinic and naphthenic hydrocarbons..." (<http://www.penreco.com/products/whtminoils/whtminoils.asp>). With respect to Penreco's definition of white mineral oil, we note that white mineral oil, a hydrocarbon oil, is ultimately derived from petroleum. In addition, we find that the ASTM's definition of wax, that it is "a solid or semi-solid material consisting of a mixture of hydrocarbons or hydrocarbon derivatives, or both" is dispositive.¹⁹ The

¹⁹ See NCA's March 26, 2002 comments at Exhibit 1

Department notes that the subject petroleum-derived candles are semi-solid and consist of hydrocarbons, thus corresponding to the ASTM's definition of wax.

Based on the information on the record, the Department has determined that the physical description of FYEO's gel candles, as well as the product descriptions contained in the petition, the initial investigation, and the determinations of the Secretary and the Commission, are dispositive as to its inclusion within the scope of the Order. Thus, the Department's ruling with respect to FYEO's gel candles is made pursuant to 19 CFR 351.225(k)(1) and is based on the physical description of the merchandise in question.

As noted in the Order, subject candles are "made from petroleum wax and contain fiber or paper-cored wicks." We find that FYEO's gel candles are 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 FYEO's gel candles falls within a reasonable interpretation of a solid candle. Finally, we note that the basic features, burning and aroma characteristics of FYEO's gel candles are not unique or unlike those of in-scope candles included within the scope of the Order.

The Department finds no meaningful distinction in the actual chemical composition of gel candles and traditional wax candles. In its April 17, 2002 comments, Russ Berrie noted that ". . . the primary constituents of candles made of this gel and candles from petroleum wax originate from raw petroleum. . . ." The NCA also notes that hydrocarbon mineral oil is a paraffin oil, and paraffin is derived from petroleum. In the past, the Department has found that "...the mineral oil substance is the same or similar to that included within the scope of the Order (i.e., petroleum wax), and that the texture of the substance is consistent with the aforementioned definition of wax."²⁰ In addition, FYEO's candles have the same intrinsic qualities and essential characteristics of petroleum wax candles; they burn and emit light and heat and, therefore, are like petroleum wax candles. 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.

Further, with regard to the physical characteristics, we find that the subject gel candles, although of rubbery texture, can reasonably be viewed as solid in nature. A review of FYEO's patent for its gel candles describes them as "stiff" gel candles which "permit the decorative shaping advantages of conventional wax candles."²¹ FYEO'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."²²

²⁰ See Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504); Endar Corporation (January 11, 2000).

²¹ See FYEO's November 15, 2001 comments at Exhibit B.

²² See Id.

We find it inappropriate to equate FYEO's gel candles to a liquid oil candle given the actual texture of the candle itself, as well as the significant use of a copolymer gelling agent within its gel candles, as described in FYEO's patent. Additionally, the Department has previously determined gel candles similar to FYEO's gel candles, having similar physical and chemical characteristics, to be included within the scope of the Order.²³

Summary

FYEO's gel candles should be included within the scope of the Order. This conclusion is consistent with the descriptions of the merchandise included within the scope of the petition, the initial investigation, the determinations of the Secretary (including prior scope determinations), the Commission, and the scope of the Order.

Recommendation

Based on the preceding analysis, we recommend that the Department find that FYEO's gel candles should be included within the scope of the Order.

If you agree, we will send the attached letter to the interested parties, and will notify the BCBP of our determination.

_____ Agree

_____ Disagree

Joseph A. Spetrini
Assistant Secretary

Deputy

²³ See Burlington Ruling.

for Import Administration, Group III

Date

Attachment