

A-570-504
Scope Review
PUBLIC DOCUMENT
Operations (6): JB

By Electronic Mail Notification

To All Interested Parties:

On January 22, 2003, the Department of Commerce (the Department) received a request from J.C. Penney Purchasing Corporation for a scope ruling on whether the "wicker lamp shade" candle it plans to import (temporary lot number 778-A) should be included within the scope of 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)(2002), the Department has determined that J.C. Penney 's 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 U.S. Customs and Border Protection (CBP)(formerly the United States Customs Service) of this decision. If you have any questions, please contact Jeff Boord at (202) 482-6345 or Jacqueline Arrowsmith at (202) 482-5255.

Sincerely,

Dana S. Mermelstein
Acting Director
AD/CVD Operations, Office 6
Import Administration

Enclosure

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MEMORANDUM FOR: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

FROM: Dana S. Mermelstein
Acting Director
AD/CVD Operations, Office 6

SUBJECT: Final Scope Ruling: Antidumping Duty Order on Petroleum Wax
Candles From the People's Republic of China (A-570-504);
J.C. Penney Purchasing Corporation.

Summary

On January 22, 2003, the Department of Commerce (the Department) received a request from J. C. Penney Purchasing Corporation (J.C. Penney) for a scope ruling on a "wicker lamp shade" type of candle (temporary lot number 778-A) to determine whether this candle should be included within the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC). 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 J.C. Penney's "wicker lamp shade" candle is included within the scope of the Order.¹

¹ The Department has developed an internet website that allows interested parties to access prior scope determinations regarding the Order. 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/>. The Department will update the website periodically to include newly issued scope determinations.

Background

J.C. Penney filed its request for a scope ruling in proper form on January 22, 2003. On February 26, 2003, the National Candle Association (NCA), petitioner and an interested party in this proceeding, filed comments on J.C. Penney's request. On March 31, 2003, J.C. Penney filed rebuttal comments to the NCA's March 19, 2003, submission.

Product Description

J.C. Penney's request concerned a molded petroleum wax candle with a pillar shape and a resin base candle holder (temporary lot number 778-A). The candle and resin base are reported to resemble a wicker and metal lamp base, and a wicker-patterned lamp shade. J.C. Penney's submission contains copies of photographs showing the candle and the resin base.

See Exhibit A of J.C. Penney's January 22, 2003, submission. J.C. Penney also provided a sample of its "wicker lamp shade candle" (temporary lot number 778-A).

The candle is a pillar shape with gradually sloping sides and a larger diameter at the base than at the top. We measured the candle and found it to be 4 3/4 inches in overall height, and to have a top diameter of 3 3/4 inches and a 5 1/8 inch diameter bottom. The bottom has a 3 3/4 inch diameter recess that is 3/4 of an inch deep, creating a lip for the candle to hang below and outside the top of the resin base. The top of the candle has a 3 1/4 inch diameter recess that is 7/8 of an inch deep with a single wick in the center. The wick is low enough so it does not disrupt the overall image and shape of the candle.

Although the candle and the base are sold as a set, the candle is not permanently attached to the resin base. The candle is molded with an exterior texture that represents woven wicker. The candle has a simulated wicker frame, including a wicker rim at the top and bottom, individual ribs, and wickerwork patterned sides. The candle from many angles has the appearance and texture of woven wicker.

J.C. Penney's Request

In its January 22, 2003, submission, J.C. Penney argues that its "wicker lamp shade" candle is molded in a "lamp shade" shape with a simulated wicker frame with wickerwork-patterned sides. See J.C. Penney's January 22, 2003, submission at 2. Specifically, J.C. Penney argues that the Department should determine that its "wicker lamp shade" candle is not included within the candles Order as an identifiable object, based on information contained in the 1987 Customs Notice.² J.C. Penney alleges that, in the Customs Notice, the Department clarified the exclusion

² The Customs Notice was a notice issued by the Department of Commerce to U.S. Customs and Border Protection (CBP) 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

of certain novelty 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 numbers). J.C. Penney maintains that the candle at issue should be excluded from the Order because the Order is limited and does not include all petroleum wax candles manufactured in the PRC. See J.C. Penney's January 22, 2003 submission at 3. Additionally, J.C. Penney further argues that its candle is clearly identifiable as a lamp shade, noting that the "wicker lamp shade" candle meets the Department's test for identifiable shaped objects, e.g., whether the candle when viewed from the majority of angles is an identifiable object. See id. at 5.

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. The NCA 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, the NCA cites a Court of International Trade (CIT) decision, with regard to the novelty exception, in which the Court noted 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. 2d 1184, 1194 (CIT 1999) (Russ Berrie). Thus, the NCA 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.

With respect to J.C. Penney's request, the NCA argues that the alleged "wicker lamp shade" candle is in the shape of a column (a shape delineated by the Order's scope) with tapered sides. Furthermore, the NCA argues that the subject candle is a petroleum wax candle made in China, having a fiber or paper-cored wick, and one which burns to emit light and heat. As such, the NCA maintains that the candle falls specifically within the scope of the Order. With respect to the Customs Notice, the NCA 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. See NCA's February 26, 2003, comments at 4.

The NCA also argues that J.C. Penney's candle is not in the shape of an identifiable object, noting that "{n}either the shape nor the decoration of the candle resemble a lamp shade." See the NCA's February 26, 2003, comments at 4. Furthermore, the NCA maintains that J.C. Penney's "wicker lamp shade" candle is similar to Avon Products, Inc.'s (Avon's) "floral lamp

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).

shade” candle, which the Department previously determined was not recognizable as a lamp shade and, therefore, was found to be included within the scope of the Order. See Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Avon Products, Inc. (July 30, 2001) (Avon Scope Ruling). The NCA also argues that J.C. Penney’s candle, like Avon’s “floral lamp shade” candle, contains a candle holder which is not an integral part of the candle. “With or without the candle holder,” the NCA argues, the instant candle “is not recognizable as a lamp shade.” See id.

The NCA notes that J.C. Penney’s candle competes in the same channels of trade as the candles subject to the Order, and that its sale without the antidumping duty will severely injure the U.S. candle producers. The NCA 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 to be subjected to over 70 Final Scope Rulings and many more requests.” The NCA maintains that “[t]he 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.” See NCA’s February 26, 2003, comments at 5. The NCA concludes by stating that J.C. Penney 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.

J. C. Penney’s Rebuttal Comments

In its March 31, 2003, rebuttal comments, J.C. Penney argues that the Department has, on several previous occasions, determined that candles in the shape of identifiable objects do not fall within the scope of the Order. J.C. Penney argues that the determinations of the International Trade Commission (the Commission) support the argument that the scope of the Order is limited. See J.C. Penney’s March 31, 2003, rebuttal comments at 3.

Further, J.C. Penney argues that although the Department’s practice with respect to how the Department analyzes non-enumerated shapes recently changed, previous determinations are “illustrative of the breadth of the identifiable shape exclusion from the Candles Order.” See Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); JCPenney (November 9, 2001) (JCPenney Ruling) (the Department reaffirmed that candles in identifiable shapes are excluded from the scope of the Order) and 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) (JCPenney Corp) (where the Department determined that a candle should not be included within the Order based on whether the candle when viewed from the majority of angles was an identifiable object). J.C. Penney further argues that the NCA’s reliance on Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Avon (July 20, 2001) (Avon Scope Ruling) is misplaced because Avon, in that request, addressed the candle’s eligibility for exclusion as a novelty candle and an identifiable object. However, Avon provided nothing in the Scope Ruling Request that substantiates the claim of an identifiable shape. See id. at 5.

Legal Framework

The Department examines scope requests in accordance with the Department's scope regulations, which may be found at 19 CFR 351.225 (2002). 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. See 19 CFR 351.225(k)(1). 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 product 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, with or without formal inquiry, after consideration of all evidence before the Department.

Pursuant to 19 CFR 351.225(k)(1), the Department will examine the description of the subject merchandise from the petition, the initial investigation, and the Commission's determinations. In its petition of September 4, 1985, the NCA 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.

See 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 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); Final Determination; and 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.” See Determination of the Commission (Final), USITC Publication 1888, August 1986, at 4, note 5, and A-2 (Commission Determination). The Commission stated that “we determine that the domestic like product shall consist only of petroleum wax candles.” See id., at 9. In its discussion of like product, the Commission also stated:

Petroleum wax candles are those composed of over 50 percent petroleum wax, and may contain other waxes in varying amounts, depending on the size and shape of the candle, to enhance the melt-point, viscosity, and burning power.

See id., at 4-5.

The Department clarified the scope of the Order in relation to certain novelty candles. See Russ Berrie Ruling 57 F.Supp 2d at 1194. In 1987, the Department issued a notice to CBP in connection with a scope ruling which provides:

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).

See Customs Notice.

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 November 2001, the Department changed its interpretation of the scope of the Order. 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) (J.C. Penney Scope Ruling). In this ruling, the Department reviewed the text of the scope of the Order, beginning with the text of the first sentence of the scope which covers “[c]ertain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks.” See Order. The text following this broad, inclusive sentence provides a list of shapes; this list is not modified by any express words of exclusivity. The result of our prior practice of not including within the scope of the Order candles of a shape other than those specifically listed in the Order was inconsistent

with the fact that the candles were “scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks.”³ In the J.C. Penney Scope Ruling, the Department revised this practice because the former practice 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.

This approach of evaluating candles in light of the entire text of the Order’s scope is in keeping with Duferco Steel, 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. See Duferco Steel, Inc. v. United States, 146 F. Supp. 2d 913 (CIT 2001) (Duferco Steel).

Although the specific scope decision in Duferco Steel has been overturned by the United States Court of Appeals of the Federal Circuit (CAFC) in Duferco Steel, Inc. v. United States, 296 F.3d 1087 (Fed. Cir. 2002) (Duferco Steel II), the Court’s ruling does not undermine the Department’s scope determination in the J.C. Penney Scope Ruling. The plain language of the scope of the Order clearly states “{c}ertain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks . . . sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers” are included within the scope of the Order. Thus, the Order offers a descriptive list of the shapes of candles included within the Order; but, as the courts have recognized, there is no requirement that every single product covered must be identified in the scope. More specifically, the CAFC has stated that “the petitions that led to the issuance of the order did not need to specifically identify the {product} in order to cover {it}; our precedent, to say nothing of the regulations, makes clear that neither a petition nor an antidumping or countervailing duty order requires that level of specificity.”⁴ The CAFC further stated “{a}s a matter of law, a petition need not list the entire universe of products . . . in order {for the petition} to cover those products.”⁵ Thus, as applied to this Order, there is no requirement, nor is

³ 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. (January 11, 2000) (Endar) (the Department determines that a “dragonfly” candle, in the shape of a rough-hewn stone with a dragonfly carved on top, should not be included within the scope because it is of a shape not specifically listed by the language of the scope), and Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); American Drug Stores, Inc. (March 16, 1998) (the Department determined that a sphere or ball-shaped candle should not be included within scope because it is a shape not specifically listed by the language of the scope).

⁴ Novosteel SA v. United States, 284 F.3d 1261, 1264 (Fed. Cir. 2002).

⁵ Id.

it possible, for all the shapes of candles to be listed.⁶ In fact, if the list were exhaustive, there would have been no need for the Department to render a decision on novelty candles or any other candle that was not explicitly listed as a shape in the scope of the Order. However, the Department did issue the novelty candle exception, which offered a narrowly construed exception and left all other petroleum wax candles from the PRC covered by the Order.

When determining whether a particular novelty candle is within the scope of the Order, the Department will first determine whether the candle is made of petroleum wax. If the candle is made of petroleum wax, the Department will look to see whether the shape of the candle falls within those shapes listed in the second sentence of the scope as defined in the Order, i.e., “tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers.” If the Department determines that a candle is in or of one of these shapes, it is within the scope of the Order.

If the Department finds that a candle’s shape is not among the shapes listed in the second sentence of the scope as defined in the Order, i.e., taper, spiral, straight-sided dinner candle, round, column, pillar, votive, and various wax-filled containers, then the candle will be evaluated to determine whether it is a novelty candle. For a candle to qualify for this exception, the characteristic which is claimed to render it a novelty candle (i.e., the shape of an identifiable object or a holiday-specific design), should be easily recognizable in order for the candle to merit not being included within the scope of the Order. Specifically, among other determining factors, the Department will examine whether the characteristic is identifiable from most angles and whether or not it is minimally decorative, e.g., small and/or singularly placed on the candle. If the identifiable object or holiday-specific design is not identifiable from most angles, or if the design or characteristic is minimally decorative, the Department may determine that the candle should be included within the scope of the Order. See Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); J.C. Penney Purchasing Corp. (May 21, 2001); Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); San Francisco Candle Co. (Feb. 12, 2001) (SFCC Ruling); San Francisco Candle Company, Inc. v. United States, 265 F. Supp. 2d 1374, 1379 (CIT 2003) (SFCC); and Endar. If the 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 a fiber or paper-cored wick, the Department will determine that the candle is within the scope of the Order.

Analysis of J.C. Penney’s Candle

With respect to the involved scope request, the Department finds that, for the reasons outlined below, J.C. Penney’s “wicker lamp shade” candle is included within the scope of the Order, because the candle is not recognizable as an identifiable object.

⁶ See Petroleum Wax Candles from China, USITC Pub. No. 3226 Investigation No. 731-TA-282 (Review) (August 1999) (USITC Pub. No. 3226), at 18 (“Candles come in a wide variety of shapes and sizes. Major U.S. candle manufacturers reportedly will offer 1,000 to 2,000 varieties of candles in their product lines”).

“Wicker Lamp Shade” Candle (Temporary Lot 778-A)

J.C. Penney describes its “wicker lamp shade” candle as a lamp-shade-shaped candle with a simulated wicker frame and wickerwork patterned sides forming the look of an antique wicker lamp when the candle rests upon its resin base.

Based on J.C. Penney’s comments, as well as the sample candle J.C. Penney provided, we examined whether the candle is in the shape of a lamp shade. We found that when this candle is resting upon the resin base, it gives the overall appearance of an antique wicker lamp with a metal base. However, when the candle is removed from the top of the base, for which there is no permanent attachment, the candle is not discernible as a lamp shade. When viewed from all sides this candle is pillar-shaped with a wicker texture outer finish. Given that the antique lamp motif is only identifiable when the candle is resting upon the base, and when the candle is removed from the base it is not discernible as a lamp shade from any angle, we find that the molded candle is not identifiable as a lamp shade from multiple angles.

We disagree with J.C. Penney’s arguments that the candle is in the shape of an identifiable object, and therefore, should not be included within the scope of the Order. Pursuant to the Department’s change in practice stated in the J.C. Penney Scope Ruling, if a candle is not in a shape specifically listed in the Order’s scope, it will not automatically be excluded from the scope of the Order. See J.C. Penney Scope Ruling. Instead, the Department will normally evaluate whether the candle is a scented or unscented petroleum wax candle made from petroleum wax and having a fiber or paper-cored wick. In the involved case, the candle is molded from petroleum wax. See J.C. Penney’s Scope Request at 1. Therefore, we must evaluate whether the characteristics of this candle brings it outside of the scope of the Order pursuant to the novelty candle exception detailed in the Customs Notice. We find that this candle is in a shape of a pillar, a shape expressly included within the language of the scope of the 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); Final Determination; and Order. Thus, we find that the “wicker lamp shade candle” (temporary lot 778-A) is included within the scope of the Order.

Recommendation

We recommend finding that the "wicker lamp shade" (temporary lot number 778-A) candle should be included within the scope of the Order because the candle, with a "wicker lamp shade" shape, is a pillar candle. Pillars are one of the shapes which are specifically listed in the explicit language of the Order's scope, and therefore, this candle is not considered an identifiable object.

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

Agree Disagree

Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

Date