

By: E-mail Notification

To All Interested Parties:

On April 22, 2004, the Department of Commerce (the Department) received a request from Rokeach Foods (Rokeach) for a scope ruling on whether a “Yahrzeit” candle is 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)(2004), the Department has determined that Rokeach’s candle is 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 U.S. Customs and Border Protection (CBP) of this decision. If you have any questions, please contact Jacqueline Arrowsmith at (202) 482-5255.

Sincerely,

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

Enclosure

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);
Rokeach Foods

Summary

On April 22, 2004, the Department of Commerce (the Department) received a request from All-Ways Forwarding International Inc. (All-Ways) on behalf of Rokeach Foods (Rokeach) for a “Yahrzeit”¹ candle to determine whether this type of candle is covered by the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC). Petroleum Wax Candles from the PRC: Final Determination of Sales at Less Than Fair Value, 51 FR 25085 (July 10, 1986) (Final Determination); 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), the Department finds that Rokeach's “Yahrzeit” candles are within the scope of the Order.²

Background

All-Ways filed Rokeach's request for a scope ruling in proper form on April 21, 2004. On November 5, 2004, the National Candle Association (NCA), the domestic interested party in this proceeding, filed comments opposing the request filed by All-Ways on behalf of Rokeach. No additional comments were filed.

¹ All-Ways stated that the term “Yahrzeit” translates as “day of memory.” The candles are also called memorial or prayer candles. See letter from All-Ways Forwarding, on behalf of Rokeach requesting a scope ruling, dated April 21, 2004.

² 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 scopes.

a. Product Description

The request filed by All-Ways, on behalf of Rokeach, concerns a white paraffin wax (also known as petroleum wax)³ candle in a clear glass container with an open top. According to the All-Ways submission, the candles are 2 inches tall with a diameter of 1 ¾ inches. With its request, All-Ways submitted a sample of this candle for review.

b. Rokeach's Request

All-Ways states that the involved candle is a “Yahrzeit” candle. According to the All-Ways submission, this type of candle is used during prayer services at Jewish cemeteries to remember the “dearly departed.” All-Ways also explains in its submission on behalf of Rokeach that it is customary in the Jewish religion to burn a candle on the death of a loved one for 24 hours and that its “Yahrzeit” candle fulfills this requirement.

All-Ways, on behalf of Rokeach, argues that its “Yahrzeit” candle should be considered a “household candle,” which All-Ways claims will be clearly listed on the commercial import invoice and on the labels of the candle itself. It is for this reason that All-Ways alleges its “Yahrzeit” candle is not within the scope of the Order according to the Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China: Simcha Candle Co. (February 12, 1993) (Simcha Scope Ruling).

In addition, All-Ways, on behalf of Rokeach, suggests that this candle should not be included within the scope of the Order because it is a religious candle. Therefore, All-Ways argues that the “Yahrzeit” candle, which is used for religious purposes, should qualify for the novelty exception.

In addition, All-Ways, on behalf of Rokeach, included a copy of a Customs Information Exchange (CIE) –N212/85, dated March 20, 1989, which states that “party candles,” which are used on cakes and desserts are not included within the scope of the Order.⁴

³ While Rokeach refers to its “Yahrzeit” candle as “paraffin,” the Department’s practice has been to treat “paraffin” and “petroleum” as synonymous. See, e.g., 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 25, 2003) (Burlington) at page 9 (“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.”)

⁴ CIE –N212/85, which is a letter from the Department of Commerce to the U.S. Customs Service (now known as U.S. Customs and Border Protection (CBP)):

The Department of Commerce has determined that candles which are 6 and 5/8 inches long and 1/8 inches wide are not within the scope of the antidumping duty order on petroleum wax candles from the People’s Republic of China (PRC). These “party candles” are used on cakes and desserts. This merchandise is used in the same manner as birthday candles. Such candles were excluded from the original investigation (3/20/86 telex to Customs). Therefore, these “party candles” are not within the scope of the

The National Candle Association's Comments

The NCA argues that Rokeach's alleged "Yahrzeit" candle is a petroleum wax candle made in the PRC, having a fiber or paper-cored wick and is in the shape of a pillar, which is specifically included within the shape of the Order. The NCA also argues that the "Yahrzeit" candle is a small pillar candle that can be removed from the jar and used separately throughout the year. The NCA states that the label appears only on one side of the jar and cannot be observed from multiple angles. The NCA further states the label can be removed. The NCA then states that there is nothing about this candle which limits its use only to a religious occasion. Finally, the NCA concludes that "Rokeach's column candle can be used by anyone throughout the year and falls specifically within the scope of the Order."

In its comments, the NCA retraces the history of this 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 on petroleum wax candles from the PRC. 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 July 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 solely in connection with a specified holiday.

The NCA notes that Rokeach's "Yahrzeit" 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 on PRC candles to be subjected to over seventy 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" (the NCA's November 5, 2004, comments at page 6). The NCA concludes by stating that Rokeach is now requesting that the Department narrow the scope of the Order to exclude everyday candles by claiming that this candle is a novelty candle. The NCA contends that the Department does not have such legal authority. With respect to CIE-B212/85, September 21, 1987 Letter from the Director, Office of Compliance, to Burditt, Bowles & Radzius, Ltd., July 13, 1987 (Customs Notice),⁵ the NCA

antidumping duty order.

⁵ The Customs Notice was a notice issued by the Department to the U.S. Customs Service (now known as 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

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 solely in connection with a specified holiday (NCA's comments at 4).

Legal Framework

The Department examines scope requests in accordance with the Department's scope regulations, which may be found at 19 CFR 351.225 (2004). 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 International Trade Commission (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

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, figurines candles, and candles shaped in the form of identifiable objects (i.e., animals or numerals).

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 Determinations 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 Commission Determination, 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 Commission Determination, at 4-5.

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.

The Department clarified the scope of the Order in relation to certain novelty candles. See Russ Berrie, 57 F. Supp. 2d at 1194. In July 1987, the Department issued a notice to the United States Customs Service (since renamed 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.

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 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.⁶ In the J.C. Penney Ruling, the Department revised this practice because the old 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, where the Court ruled 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 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

⁶See, 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 Scope Ruling) (the Department determined 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 a shape not specifically listed by the language of the scope); see also 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 could not be included within the scope because it is a shape not specifically listed by the language of the scope).

countervailing duty order requires that level of specificity.”⁷ 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.”⁸ Thus, as applied to this Order, there is no requirement, nor is it possible, for all the shapes of candles to be listed.⁹ 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 one of the shapes explicitly listed, it is within the scope of the Order.

However, if the Department finds that a candle is not shaped like 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.

⁷ Novosteel SA v. United States, 284 F.3d 1261, 1264 (Fed. Cir. 2002).

⁸ Id.

⁹ 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”).

Analysis of Rokeach's Candles

With respect to the involved scope request, the Department finds that, for the reasons outlined below, the “Yahrzeit” candle in the All-Ways request, filed on behalf of Rokeach, is included within the scope of the Order. Our analysis of this candle is provided below.

The request filed by All-Ways, on behalf of Rokeach, concerns an open-topped glass container filled with paraffin wax (also known as petroleum wax). According to the All-Ways submission, the candles are 2 inches tall with a diameter of 1 ¾ inches. We reviewed All-Ways’ letter on behalf of Rokeach and the NCA’s arguments as well as the sample “Yahrzeit” candle provided.

As an initial matter, we find that the involved “Yahrzeit” candle is a wax-filled container, which is a shape described within the scope of the Order. Thus, this type of candle is included in the Order. The language of the Order includes tapers, spirals, straight-sided dinner candles, rounds, columns, pillars, and votives and “various wax-filled containers.” Because a wax-filled container is a shape listed by the inclusive language of the Order’s scope, Rokeach’s “Yahrzeit” candle is included within the explicit language of the scope.

To support its argument that the “Yahrzeit” candle should be considered a “household/utility”¹⁰ candle and therefore not included within the scope the Order, All-Ways attached a copy of the Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles from the People’s Republic of China: Simcha Candle (February 12, 1993) (Simcha Scope Ruling). In the Simcha Scope Ruling, the Department determined that two of Simcha’s candles were considered “household/utility” candles. All-Ways reasoned that because the Department determined that Simcha’s candle #2 and #3 were not included within the scope of the Order because they were “household/utility” candles, its subject Yahrzeit candle is also properly not included within the scope of the Order. All-Ways referenced the Simcha Scope Ruling in which “household/utility” candles were defined by the Department as “white candles made of petroleum wax with cotton wicks; these candles are below 6 inches in height and approximately ¾ inches in diameter.” See Simcha Scope Ruling. The candles that the Department determined were not included within the Order in the Simcha Scope Ruling were 5 inches in height and 11/16 inches in diameter (for candle #2) and 3 ½ inches in height and 5/8 inches in diameter (for candle #3).

Under the Department’s new practice, the intent of the requestor, the alleged use of the candle—in this case the use of the candle as a “household/utility” candle—is no longer an appropriate basis for evaluating whether a particular candle is properly 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); TS Group, Inc. (May 21, 2002) (TS Group Scope Ruling); see also J.C. Penney Ruling. As such, we first examine whether the subject candle is a shape listed by the inclusive language of the Order’s scope: tapers, spirals, and straight-sided dinner candles; round, columns, pillars; votives; and various wax-filled containers.

All-Ways also explained how Rokeach’s “Yahrzeit” candles are used. However, even if this explanation is construed as an argument that the “Yahrzeit” candles should not be included

¹⁰ The terms “household” candles and “utility” candles are used interchangeably by the candle industry. See Simcha Scope Ruling at page 2, footnote 1.

within the scope of the Order because these are used in connection with religious observance, the “Yahrzeit” candle is still within the scope of the Order. For a candle to qualify for the novelty candle exception, the candle must be either a holiday candle, with scenes or symbols of other occasions (e.g., religious holidays) depicted in the candle design, or be an identifiable object that is recognizable from multiple angles. The involved “Yahrzeit” candle does not contain any such scenes, symbols, or designs, nor is it an identifiable object other than a wax-filled container. Because the “Yahrzeit” candle is white without any other identifying characteristics, it can be used all year round for any purpose. There is no feature of this candle that would preclude its use for a non-religious purpose whether or not the label on the “Yahrzeit” candle container were removed.

All-Ways’ argument that Rokeach’s “Yahrzeit” candle should not be included within the scope of the Order based on the fact that Rokeach’s “Yahrzeit” candles are listed as “household” candles on its commercial invoice is unavailing. In this analysis, we are not considering the requestor’s packaging or distribution networks, because we are making this determination, as discussed in the Legal Background section, based on 19 CFR 351.225(d), and not on 351.225(k)(2), which provides for the consideration of additional factors.

We note that All-Ways provided the Department with copies of CIE 212-85, which states that “party candles” used on cakes and desserts and measuring 6 ⁵/₈ inches and ¹/₈ inches wide are not within the scope of the Order. Given the fact that we no longer consider the alleged use of the candle, as noted above, there no longer exists a “party candles” exception. See TS Group Scope Ruling; see also J.C. Penney Ruling.

As discussed above, we find that the “Yahrzeit” candle is a wax-filled container, a shape specifically mentioned by the Order’s scope. Moreover, the “Yahrzeit” candle does not qualify for any recognized exception. Therefore, we find that Rokeach’s “Yahrzeit” candle should be included within the scope of the Order.

Recommendation

We recommend finding that Rokeach’s “Yahrzeit” candle is included within the scope of the Order because this candle is a wax-filled container, which is specifically listed in the express language of the scope of the Order.

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