

July 6, 2006

By Electronic Mail Notification

To All Interested Parties:

On April 18, 2006, the Department of Commerce (the Department) received a request from Atico International, Inc. (Atico) for a scope ruling concerning whether the following nine candles are covered by the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC): "Halloween Novelty Ghost" (item number CO79HA00700), "Halloween Novelty JOL" (item number CO79HA00700), "Halloween Novelty Frankenstein" (item number CO79HA06700), "Halloween Novelty Pumpkin" (item number CO79H0756), "Halloween Bloody Skull" (item number CO79HA00722), "Halloween Witch Shoe" (item number CO79HA00726), "Halloween Novelty Tombstone" (item number CO79HA00731), "Santa's Boot" (item number CO72LA00827), and "Christmas Stocking Tealight" (item number CO72LA00970). 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), the Department finds that Atico's "Halloween Novelty Pumpkin," "Halloween Bloody Skull," "Halloween Witch Shoe," "Halloween Novelty Tombstone," and "Santa's Boot" are not within the scope of the antidumping duty order on petroleum wax candles from the PRC. The Department has also determined that Atico's "Halloween Novelty JOL," "Halloween Novelty Ghost," "Halloween Novelty Frankenstein," and "Christmas Stocking Tealight" candles are 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 of this decision. If you have any questions, please contact Mark Flessner at (202) 482-6312.

Sincerely,

Robert James
Program Manager
AD/CVD Operations, Office 7
Import Administration

Enclosure

MEMORANDUM FOR: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

FROM: Richard Weible
Office Director
AD/CVD Operations, Office 7

SUBJECT: Final Scope Ruling: Antidumping Duty Order on Petroleum Wax
Candles From the People's Republic of China (A-570-504);
Atico International, Inc.

Summary

On April 18, 2006, the Department of Commerce (the Department) received a request from Atico International, Inc. (Atico) for a scope ruling concerning whether the following nine candles are covered by the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC): "Halloween Novelty Ghost" (item number CO79HA00700), "Halloween Novelty JOL" (item number CO79HA00700), "Halloween Novelty Frankenstein" (item number CO79HA06700), "Halloween Novelty Pumpkin" (item number CO79H0756), "Halloween Bloody Skull" (item number CO79HA00722), "Halloween Witch Shoe" (item number CO79HA00726), "Halloween Novelty Tombstone" (item number CO79HA00731), "Santa's Boot" (item number CO72LA00827), and "Christmas Stocking Tealight" (item number CO72LA00970). 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), the Department finds that Atico's "Halloween Novelty Pumpkin," "Halloween Bloody Skull," "Halloween Witch Shoe," "Halloween Novelty Tombstone," and "Santa's Boot" are not within the scope of the antidumping duty order on petroleum wax candles from the PRC. The Department has also determined that Atico's "Halloween Novelty JOL," "Halloween Novelty Ghost," "Halloween Novelty Frankenstein," and "Christmas Stocking Tealight," candles are within the scope of the antidumping duty order on petroleum wax candles from the PRC.¹

¹ The Department has developed an internet web site that allows interested parties to access prior scope determinations regarding the Order. This web site lists all scope determinations from 1991 to the present. It can be accessed at <http://ia.ita.doc.gov/download/candles-prc-scope/index>, and will be updated periodically to include newly issued scope determinations.

Background

On April 18, 2006, the Department received a letter from Atico requesting a scope ruling on the nine types of candles mentioned above. The National Candle Association (the NCA) did not submit comments on Atico's scope ruling request.

Atico Scope Request

a. Product Descriptions

Atico states all nine of its candles are novelty candles designed specifically for use "in connection" with either Halloween or Christmas (Atico April 18, 2006, letter (Atico Request) at 2). Atico has provided the following descriptions of its candles:

"Halloween Novelty JOL", "Halloween Novelty Ghost", and "Halloween Novelty Frankenstein" (item number CO79HA00700)

Atico describes the "Halloween Novelty JOL" as an "orange pumpkin with a black jack o' lantern face cut out." (Atico Request at 2.) The "Halloween Novelty Ghost" is described by Atico as a "2 1/8 inch object identifiable as a ghost." Id. Atico further describes the "Halloween Novelty Frankenstein" as "a 1 3/4 inch Frankenstein monster with scratches on his forehead, reminiscent of the lightening that struck him and turned him into a monster." Id. (The "Halloween Novelty JOL", "Halloween Novelty Ghost", and "Halloween Novelty Frankenstein" candles are all designated under the same item number.) Atico argues that "[t]he design and shape" of the ghost, jack o' lantern or frankenstein combined with its coloring scheme specifically associate these candles with Halloween." Id., at 2-3.

"Halloween Novelty Pumpkin" (item number CO79H0756)

Atico describes this candle as a "3 1/8 by 3 by 3.5 inch orange pumpkin with a black jack o' lantern face cut out." (Atico Request at 6.) Atico argues that the orange and black colors are "specifically associated with Halloween," and that this candle is only "sold and intended to be used in conjunction with the Halloween holiday." Id.

"Halloween Bloody Skull" Candle (item number CO79HA00722)

Atico describes this candle as a "4 by 5.75 by 5 inch" candle shaped in the form of a human skull. Id. When lit, Atico indicates that "red wax drops down the skull, which is reminiscent of a bloody skull." Id.

"Halloween Witch Shoe" (item number Co79HA00726)

Atico describes this candle as "a 1 7/8 by 1 3/8 inch orange and black shoe, with yellow stars, typically worn by a witch and therefore specifically associated with the festivities of Halloween." (Atico Request at 7.)

"Halloween Tombstone" Candle (item number Co79HA00731)

Atico describes this candle as 3.75 by 1.5 x 5 inch in dimension "with a flying bat over the letters R.I.P." Id. Atico asserts that "the tombstone is recognizable from all angles, and the bat and R.I.P. combined with the tombstone are associated with the festivities of Halloween." Id.

“Santa’s Boot Candle” (item number C072LA00827)

Atico describes this candle as “a 4 by 6 by 7 inch red boot typically worn by Santa during the Christmas holiday.” (Atico Request at 7.) Atico asserts that “the candle is reminiscent of Santa and specifically associated with the Christmas holiday.” Id.

“Christmas Stocking Tealight” (item number C072LA00970)

Atico describes this four piece set of candles as “red green gold and silver Christmas stocking candles.” Id. Atico asserts that the “colors and shape specifically resemble the Christmas holiday.”

b. Scope Request

Atico argues that all nine of its candles fall outside the scope of the order because they are in the shape of identifiable objects and because the candles are designed for use specifically during the Halloween or Christmas season. Atico presented samples and photographs to the Department of each of the nine candles that are the subject to its scope-ruling request.

Atico cites to the “Final Scope Ruling, JC Penney Purchasing Corp,” November 9, 2001, (JC Penny Ruling) which notes that the Department in the past has determined that “ghost and witch designs are specific to Halloween.” Moreover, Atico notes that in Final Scope Ruling, Meijer Inc., October 14, 1999, the Department indicated that orange and black are typically colors associated with Halloween.

Legal Framework

The regulations governing the Department’s antidumping scope determinations are found at 19 CFR 351.225. On matters concerning the scope of an antidumping duty order, the Department first examines the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the U.S. International Trade Commission (ITC). 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: (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 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 Atico’s request in accordance with 19 CFR 351.225(k)(1) and finds the descriptions of the products contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and

the ITC are dispositive with respect to all of the candles referenced in Atico's April 18, 2006, scope request. 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 that the Department deemed relevant to this scope ruling were made part of the record of this determination and are referenced herein. Documents that neither the Department nor the parties placed on the record do not constitute part of the administrative record for this scope determination.

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 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); and Order, 51 FR 30686 (August 28, 1986).

The ITC adopted a similar definition of the "like product" subject to its determinations, noting the investigations did not include "birthday, birthday numeral and figurine type candles." See Candles from the People's Republic of China: Determination of the Commission in Investigation No. 731-TA-282 (Final), Publication 1888 (August 1986) (ITC Determination), at 4, note 5, and A-2.

Also of relevance to the present scope inquiry are the Department's instructions to the U.S. Customs Service (now renamed U.S. Customs and Border Protection (CBP)) (see Letter from the Director, Office of Compliance, to Burditt, Bowles & Radzius, Ltd., July 13, 1987) (CBP Notice) issued in connection with a July 1987 scope determination concerning an exception from the Order for novelty candles, which state:

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 CBP Notice (emphasis added).

In November 2001, the Department changed its practice on the issue of candle shapes. (See JC Penny Ruling.) In this ruling, the Department reviewed the text of the scope of the Order, beginning with 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.”² In the JC Penny Ruling, the Department determined to revise this practice because it had the effect of narrowing the broad coverage of the first sentence of the Order's scope. The list of shapes in the second sentence of the Order's scope does not provide a textual basis for such a narrowing of the coverage of the first sentence of the Order's scope. Accordingly, to give full effect to the first sentence of the inclusive language of the scope, the Department now will normally evaluate whether candles of a shape not listed by the inclusive language of the Order's scope are scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks.

This approach of evaluating such candles in light of the entire text of the Order's scope is in keeping with the opinion of the Court of International Trade (CIT), noting that a better approach in scope rulings is to avoid subjective issues of intent and, instead, to look to the petition's language to determine whether the class or kind of merchandise at issue was expressly included. Duferco Steel, Inc. v. United States, 146 F. Supp. 2d 913 (May 29, 2001) (Duferco Steel). Such an approach is a departure from past CIT precedent that required the Department to give ample deference to the petitioner's intent when examining a petition's description of the subject merchandise. See, e.g., Torrington Co. v. United States, 995 F. Supp. 117, 121 (CIT 1998).

Although the specific scope decision in Duferco Steel has been overturned by the United States Court of Appeals of the Federal Circuit (Federal Circuit) in Duferco Steel, Inc. v. United States,

² 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 Ruling) (where the Department found a “dragonfly” candle, in the shape of a rough-hewn stone with a dragonfly carved on top, not within scope because it is of a shape not listed by 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) (where the Department found a sphere or ball-shaped candle not within scope because it is a shape not listed by the scope).

296 F.3d 1087 (Fed. Cir. 2002) (Duferco Steel II), we do not believe that the Federal Circuit’s decision undermines the Department’s decision in the JC 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 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 product covered must be identified in the scope. More specifically, the Federal Circuit has stated “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.”³ The Federal Circuit 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.”⁴ Thus, as applied to this Order, there is no requirement, nor is it possible, for the shapes of all of the candles to be listed.⁵ In fact, if the list were exhaustive, there would have been no need for the Department to determine whether any other candle that was not explicitly listed as a shape in the scope of the Order is subject to the Order. However, the Department did render the narrowly constructed novelty candle exception, leaving all other petroleum wax candles from the PRC covered by the Order.

If the Department determines the candle is made from petroleum wax and has a fiber or paper-cored wick, but the candle possesses characteristics set out in the CBP Notice, it will not fall within the scope of the Order. In order 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 is included within the scope of the Order. See JC Penney Ruling; “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) (San Francisco Candle); and Endar. If a candle does not possess the characteristics set out in the July 1987 novelty candle exception, and it is a scented or unscented candle having a fiber or paper-cored wick, the Department will determine that the candle is within the scope of the Order.

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

⁴ Id.

⁵ 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 Atico's Candles

With respect to the instant scope request, the Department finds, for the reasons outlined below, that Atico's "Halloween Novelty Pumpkin," "Halloween Bloody Skull," "Halloween Witch Shoe," "Halloween Novelty Tombstone," and "Santa's Boot" are not within the scope of the antidumping duty order on petroleum wax candles from the PRC. The Department finds these candles to be identifiable objects when viewed from most angles, thereby qualifying these candles to not be included within the scope of the order pursuant to the CBP Notice. With respect to Atico's "Halloween Novelty JOL," "Halloween Novelty Ghost," "Halloween Novelty Frankenstein," and "Christmas Stocking Tealight" candles, the Department finds that when viewed from most angles the candles fail to qualify as identifiable objects pursuant to the CBP Notice. Thus, we determine Atico's "Halloween Novelty JOL," "Halloween Novelty Ghost," "Halloween Novelty Frankenstein," and "Christmas Stocking Tealight" candles are within the scope of the order. Our analysis is further described below.

"Halloween Novelty Pumpkin" (item number CO79H0756)

The Department agrees with Atico that when viewed from most angles the candle is identifiable as a pumpkin and is not within the scope of the order. We examined the candle and found it to be round, orange in color, and bearing the features and shape of a pumpkin, including vertical ridges and a stem.

"Halloween Bloody Skull" (item number CO79HA00722)

The Department agrees with Atico that when viewed from most angles the candle is identifiable as a human skull and is not within the scope of the order. We examined the candle and found it to be bone-colored and in the shape of a human skull, including orbital and nasal cavities. Additionally, the candle includes a mandible, teeth, and cranial sutures. The center of the candle features red wax to produce the gory effects as advertised.

"Halloween Witch Shoe" (item number CO79HA00726)

The Department agrees with Atico that when viewed from most angles the candle is identifiable as a shoe and is not within the scope of the order. The candle has a sole, tongue and is recognizable as a shoe from many angles.

"Halloween Novelty Tombstone" (item number CO79HA00731)

The Department agrees with Atico that when viewed from most angles the candle is identifiable as a three-dimensional tombstone and is not within the scope of the order. The candle bears a shape characteristic of a tombstone and is gray in color. Additionally, the candle features "R.I.P." in black letters. Finally, above the letters, a bat is featured in bas relief.

"Santa's Boot" (item number CO72LA00827)

The Department agrees with Atico that when viewed from most angles the candle is identifiable as a red boot. White wax, presumably representing fur, adorns the top of the boot, which has a

black sole. As this candle is identifiable as a boot when viewed from many angles, it qualifies as an “identifiable object.”

As discussed further below, the Department finds the following candles do not qualify for the novelty exception because these candles are not identifiable from multiple angles. Therefore, these candles are included within the scope of the order.

“Halloween Novelty JOL”, “Halloween Novelty Ghost”, “Halloween Novelty Frankenstein” (item number CO79HA00700)

We disagree with Atico’s assertion that the “Halloween Novelty JOL,” “Halloween Novelty Ghost,” or “Halloween Novelty Frankenstein” candles meet the Department’s long-standing definition of “identifiable objects” for purposes of this order. See, e.g., JC Penney Ruling; “Final Scope Ruling - Paperproducts Design, Inc.,” November 22, 2004; and “Final Scope Ruling - Kohl’s Department Stores, Inc.,” January 10, 2006. With respect to all three candles, the specific features which make the candles identifiable are visible only from the front. All three candles, when viewed from the side, rear or top, are not recognizable as a jack-o’-lantern, ghost or Frankenstein monster, as claimed by Atico.

The “Halloween Novelty JOL,” when viewed from the rear, is simply an orange sphere, a candle shape previously found to be included within the scope of the order. See, e.g., “Final Scope Ruling - Avon Products, Inc.” at 7, n. 2 (“We would not consider a ball or sphere shape to be an identifiable object eligible for exclusion from the Order within the standards set forth in the July 1987 novelty candle exception.”). Similarly, the “Halloween Novelty Ghost” is only identifiable as a ghost when viewed from the front. From the sides, the candle presents only the appearance of a white rounded form. Along similar lines, the “Halloween Novelty Frankenstein” candle bears identifiable markings only on the front (i.e., the facial features as described by Atico). From the top or rear the candle is a green and black candle of indeterminate form. Based on the foregoing, we find that each of these three candles is not recognizable as an identifiable object when viewed from most angles and, thus, these candles are included in the scope of the order.

“Christmas Stocking Tealight” (item number C072LA00970)

We disagree with Atico’s assertion that the “Christmas Stocking Tealight” candles represent identifiable objects for purposes of the scope of this order. The shape of these candles is ambiguous, and the product is not readily identifiable as a stocking, let alone a Christmas stocking, when viewed from any angle. Furthermore, the base of the candles precludes identifying the overall shape of the candle as any identifiable object.

Pursuant to the Department’s change in practice, as described in the JC Penney Scope Ruling, if a candle is not in a shape specifically listed in the scope of the order, it will not automatically be excluded from the scope of the Order. See JC Penney Scope Ruling and note 5 supra. Instead, the Department will normally evaluate whether the candle possesses characteristics set out in the CBP Notice. We have evaluated whether the characteristics of the “Christmas Stocking Teaset” candle would exclude it from the scope of the order pursuant to the novelty candle exception detailed in the CBP Notice and our interpretation set forth in the JC Penney Scope Ruling. We

find this candle does not represent an “identifiable object” as defined in our prior ruling. Thus we determine the “Christmas Stocking Tealight” candles are within the scope of the order.

Recommendation

Based on the preceding analysis, we recommend that the Department find that Atico’s “Halloween Novelty Pumpkin,” “Halloween Bloody Skull,” “Halloween Witch Shoe,” “Halloween Novelty Tombstone,” and “Santa’s Boot” candles to be outside the scope of the order. We further recommend that the Department find Atico’s “Halloween Novelty JOL,” “Halloween Novelty Ghost,” “Halloween Novelty Frankenstein,” and “Christmas Stocking Tealight” candles are within the scope of the order.

_____ Agree

_____ Disagree

Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

Date