

July 21, 2006

By Electronic Mail Notification

To All Interested Parties:

On May 17, 2006, the Department of Commerce (the Department) received a request from Freight Expeditors for a scope ruling concerning whether the following six candles are covered by the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC): Small Artichoke (item number 1781), Large Artichoke (item number 1782), Small Pinecone (item number 3121), Large Pinecone (item number 3120), Cabbage (item number SH-50054) and Radishes (item number SH-50017). In accordance with 19 CFR 351.225(k)(1), the Department has determined that all six of the above referenced candles are not 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 Maryanne Burke at (202) 482-5604.

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);
Freight Expeditors.

Summary

On May 17, 2006, the Department of Commerce (the Department) received a request from Freight Expeditors for a scope ruling concerning whether the following six candles are covered by the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC): Small Artichoke (item number 1781), Large Artichoke (item number 1782), Small Pinecone (item number 3121), Large Pinecone (item number 3120), Cabbage (item number SH-50054) and Radishes (item number SH-50017) 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 all six of Freight Expeditors candles fall outside the scope of the order.¹

Background

On May 17, 2006, the Department received a letter from Freight Expeditors requesting a scope ruling on its six styles of candles mentioned above. The National Candle Association (the NCA), the petitioners in the original investigation, did not submit comments on Freight Expeditors scope ruling request.

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.

Freight Expediter's Scope Request

a. Product Descriptions

Freight Expeditors states all six of its candles are three-dimensional novelty candles, composed primarily of paraffin wax. Each candle has a flat bottom, which Freight Expeditors claims is to prevent the candle from toppling over. Freight Expeditors has provided the following descriptions of its candles:

Small Artichoke (item number 1781)

This candle is round and tapers at the top, similar to an actual artichoke. The candle's design is of overlapping leaves with reddish tips. The leaves are tightly packed towards the center and textured resembling a real artichoke.

Large Artichoke (item number 1782)

This candle is similar to the Small Artichoke (item number 1781), only it is larger in size.

Small Pinecone (item number 3121)

This white candle gives the appearance of a snow-covered pinecone comprised of individually molded pine cone stubs emanating from the center, extending upward, and tapered toward the top. The artificial snow on the pinecone is a powdery substance resembling real snow.

Large Pinecone (item number 3120)

This candle is similar to the Small Pinecone (item number 3121), only it is larger in size.

Cabbage (item number SH-50054)

This candle is primarily green in color and has a purple trim around each leaf. The leaves are detailed with "veins" which run from the base through the tip of each leaf. The candle comprises large outer leaves with smaller inside leaves at the center of the candle, similar to an actual cabbage.

Radishes (item number SH-50019)

This candle has green stalks with leaves and red radishes at the base. This candle has small green leaves at the top of the candle and larger green leaves at its lower portion. The leaves are detailed with "veins" from the bottom to the tip of each leaf, while at the base the candle has a bunch of red radishes with white tips.

Freight Expeditors provided samples and pictures of all six candles.

b. Scope Request

Freight Expeditors argues all six of its candles fall outside the scope of the order because they are in the shape of identifiable objects when viewed from every angle, and therefore qualify under the Department's novelty candle exclusion. In photographs presented to the Department, Freight Expeditors offered a side-by-side comparison of each of its six candles alongside the actual respective object (*i.e.*, artichoke, white pinecone, cabbage, radishes). Freight Expeditors maintains its candles very closely resemble the real object from all angles.

Freight Expeditors cites to the “Final Scope Ruling– Antidumping Duty Order on Petroleum Wax Candles from the People’s Republic of China- New Spectrum (New Spectrum)” dated May 12, 2005, in which other vegetable shaped candles were found to be outside the scope of the antidumping duty order because they were identifiable shapes when viewed from most angles. Freight Expeditors notes the New Spectrum candles also had flat bottoms as do its candles.

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 Freight Expeditors 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 Freight Expeditors’ Small Artichoke, Large Artichoke, Small Pinecone, Large Pinecone, Cabbage, and Radishes candles. Therefore, for these candles, 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 “Final Scope Ruling, J.C. Penney Purchasing Corp,” November 9, 2001 (JC Penny 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.”² In the JC Penney 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, 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 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 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

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); 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) (where the Department found a sphere or ball-shaped candle not within scope because it is a shape not listed by the scope).

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

⁴ Id.

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.

Analysis of Freight Expediter’s Candles

With respect to the instant scope request, the Department finds, for the reasons outlined below, that all six types of Freight Expediters candles (Small Artichoke (item number 1781), Large Artichoke (item number 1782), Small Pinecone (item number 3121), Large Pinecone (item number 3120), Cabbage (item number SH-50054) and Radishes (item number SH-50017)) are not within the scope of the order. The Department finds each of these six candles to be identifiable objects when viewed from most angles, which qualifies these candles for exclusion from the order pursuant to the novelty candle exception.

Small Artichoke (item number 1781) and Large Artichoke (item number 1782)

The Department agrees with Freight Expediters that when viewed from most angles both the large and small artichoke candles are identifiable as an artichoke, and should not be included within the scope of the order. We examined the candles and find them to be round-shaped at the base and gradually tapered at the top. The candle is green in color, containing a fiber or paper cored wick. The candles design is of ridge-detailed leaves which go around the candle, similar to an actual artichoke. The leaves point upwards with wide tips, comprising the entire candle just as real artichokes have leaves encasing the artichoke heart.

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.”).

Small Pinecone (item number 3121) and Large Pinecone (item number 3120)

We agree with Freight Expeditors that when viewed from multiple angles these candles are identifiable as pinecones. Containing a fiber or paper-cored wick, these candles are round-shaped which taper at the top. The candles have thick needle ridges on all sides and are covered in a white powdery-like substance, resembling a snow-covered pinecone.

Cabbage (item number SH-50054)

We find this candle to be an identifiable object: a cabbage when viewed from multiple angles. The candle is an irregular round-shaped object green in color with purple trim containing a fiber or paper cored wick. Its shape is that of densely packed large and small leaves which extend from the base and middle of the candle, resembling an actual head of cabbage. Each leaf on the candle is detailed with grooves and “veins” which run the length of the leaf, indicative of real cabbage leaves.

Radishes (item number SH-50019)

We agree with Freight Expeditors that when viewed from multiple angles, the candle is identifiable as a bundle of radishes. The base is bulbous, consisting of numerous small red sphere-shaped objects with white tips, identifiable as a bundle of radishes. Extending vertically from the radish bulbs at the base of the candle is a leafy top of long green stems tightly compacted, resembling actual radish stems.

Pursuant to the Department’s change in practice, as described in the JC Penney 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 Ruling and note 5 supra. 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. We have evaluated whether the characteristics of this 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 Ruling.

We also note that in previous scope rulings, the Department has excluded similar pinecone and vegetable candles (e.g., carrot, onion and asparagus) which were recognized as identifiable objects pursuant to the novelty exclusion of the order. See “Final Scope Ruling–Antidumping Duty Order on Petroleum Wax Candles from the People’s Republic of China (A-570-504); New Spectrum Gift Gallery Inc.” (May 10, 2005) (New Spectrum Scope Ruling). See also, “Final Scope Ruling–Antidumping Duty Order on Petroleum Wax Candles from the People’s Republic of China (A-570-504); Avon Products Inc.” (May 21, 2001). In each of these scope rulings, the candle in question was found to be an identifiable object from most angles and excluded from the order under the July 1987 novelty exclusion. Consequently, Freight Expeditors’ Small Artichoke and Large Artichoke, Small Pinecone and Large Pinecone, Cabbage and Radishes candles qualify for the July 1987 novelty candle exception because they also represent identifiable objects and should not be included within the scope of the order.

Recomendation

Based on the preceding analysis, we recommend that the Department find that all six types of Freight Expeditors candles fall outside 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

Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

Date