

October 2, 2006

By Electronic Mail Notification

To All Interested Parties:

On August 16, 2006, the Department of Commerce (the Department) received a request from Avon Products, Inc., (Avon) for a scope ruling on whether its “Cupcake” candle (Product Profile number 1041846) is covered by the antidumping duty order on petroleum wax candles from the People’s Republic of China (PRC). In accordance with 19 CFR 351.225(k)(1), the Department has determined that Avon’s “Cupcake” candle is 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 Mark Flessner at (202) 482-6312 or the undersigned at (202) 482-0649.

Sincerely,

Robert James
Program Manager
AD/CVD Enforcement Office 7
Import Administration

Enclosure

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

FROM: Richard Weible
Office Director
AD/CVD Enforcement Office 7

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

Summary

On August 16, 2006, the Department of Commerce (the Department) received a request from Avon Products, Inc., (Avon) for a scope ruling on whether its "Cupcake" candle (Product Profile number 1041846) is covered by the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC). See *Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China*, 51 FR 30686 (August 28, 1986) (Order). In accordance with 19 CFR 351.225(k)(1), the Department finds that Avon's "Cupcake" candle is not within the scope of the Order.¹

Background

On August 16, 2006, the Department received a letter from Avon requesting a scope ruling on its "Cupcake" candle, which the company describes by use of the term "Product Profile;" the Product Profile number of the "Cupcake" candle is 1041846. The National Candle Association (the NCA), the petitioner in this proceeding, did not submit comments on Avon's scope ruling request.

Avon's Scope Request

Avon maintains that its "Cupcake" candle is outside the scope of the Order pursuant to 19 CFR 351.225(k)(1) and the novelty candle exception of the Customs Information

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/index>, and will be updated periodically to include newly issued scope determinations.

Exchange (CIE) scope determination issued by the Department on September 21, 1987.² According to Avon, the “Cupcake” candle is an identifiable object that, consistent with the Department’s past scope rulings, is recognizable from a majority of angles. Avon provided a sample of the candle for the Department’s review.

According to Avon, its candle is a novelty candle which does not fall within the shapes described in the Order (tapers, columns, spirals, straight-sided dinner candles, votives, and various wax-filled containers). Specifically, Avon claims that its candle is in the shape of a cupcake, an identifiable object which is recognizable from multiple angles. Avon further asserts that the “...classic cupcake shape is plainly evident from the familiar fluted ‘cupcake’ form with the ‘vanilla cake’ peaking out from beneath the white icing that is covered with ‘butter cream flowers’ of yellow, pink and purple with leaves of pale green.”

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 Avon’s request in accordance with 19 CFR 351.225(k)(1) and finds that the descriptions of the products contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the ITC are dispositive with respect to Avon’s “Cupcake” candle. Therefore, for this candle, the Department finds it unnecessary to consider the additional factors set forth at 19 CFR 351.225(k)(2).

² In CIE, the Department narrowly limited the novelty candle exception to figurine candles, candles shaped in the form of identifiable objects, and candles specifically designed for and used only in connection with the holiday season. *See Customs Information Exchange*, CIE N212/85, September 21, 1987.

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."³ In the J.C. 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

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 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).

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 for 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 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 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.”⁴ 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.”⁵ 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.⁶ 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 J.C. Penney Ruling; see also Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People's*

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

⁵ *Id.*

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.”).

Republic of China (A-570-504); San Francisco Candle Co. (Feb. 12, 2001) (San Francisco Candle); and Endar Ruling. 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

With respect to the instant request, we find that, for the reasons discussed below, Avon's "Cupcake" candle is not within the scope of Order. This candle is an identifiable object in the shape of a cupcake when viewed from most angles, which would qualify this candle for exclusion from the scope of the Order pursuant to the novelty candle exception.

We agree with the argument presented by Avon that its 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 practice to date, as described in the 2001 J.C. Penney Ruling, the Department will not automatically rule that a candle is excluded from the Order simply because it is in a shape other than those specifically listed in the scope of the Order. *See* J.C. Penney 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. Based upon the foregoing, we have evaluated whether the characteristics of this candle would qualify it to not be included within the scope of the Order pursuant to the novelty candle exception detailed in the CBP Notice and our interpretation as set forth in the J.C. Penney Ruling. We have determined that when viewed from most angles, Avon's "Cupcake" candle is in the shape of a recognizable object. Thus, we find that this candle is not within the Order.

We first examined whether this candle is in the shape of an identifiable object: a cupcake. We find that this candle is in the shape of a cupcake, as characterized by the very realistic flowered toppings, frosting, cake, and fluted cupcake shape of the base, all of which are readily apparent when viewed from most angles. This candle is identifiable as a cupcake when viewed from most angles. In previous scope rulings the Department has excluded a candle shaped in the form of a bundt cake where the Department has determined that that candle was recognizable from multiple angles. *See, e.g.,* Endar Ruling. This is consistent with previous scope rulings, in which the Department has also determined that ducks, a snail, a bunny, a gold dragon, frogs, and chickens were not included within the Order when the candles were recognized as identifiable objects pursuant to the novelty candle exception. *See, e.g., "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*, January 10, 2006 "*Final Scope Ruling- Antidumping Duty Order on Petroleum Wax Candles; Kohl's Department Stores, Inc.*" (finding the "Americana Chicken" to not be included in the Order). In each of these scope rulings, the candle in question was found to be an identifiable object when viewed from most angles and was not included within the scope of the Order pursuant to the July 1987 novelty exception. Consequently,

Avon's "Cupcake" candle qualifies for the July 1987 novelty candle exception because it represents an identifiable object (*i.e.*, a cupcake) when viewed from multiple angles. *See* J.C. Penney Ruling. Based upon the forgoing, Avon's "Cupcake" candle is not included within the scope of the Order.

Recommendation

Based on the preceding analysis, we recommend that the Department find that Avon's "Cupcake" candle falls 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