

April 6, 2007

By Electronic Mail Notification

To All Interested Parties:

On January 12, 2007, the Department of Commerce (“the Department”) received a request from Musical Candle Company (“Musical Candle”) for a scope ruling on whether its Musical Pillar candles (item number H98022) are 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 Musical Candle’s Musical Pillar candles are 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 Nicole Bankhead at (202) 482-9068.

Sincerely,

Alex Villanueva  
Program Manager, Office 9  
Import Administration

Enclosure

DATE: April 6, 2007

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

FROM: James C. Doyle  
Office Director  
AD/CVD Operations, Office 9

SUBJECT: Final Scope Ruling: Antidumping Duty Order on Petroleum Wax  
Candles From the People's Republic of China (A-570-504):  
Musical Candle's Musical Pillar Candles

### **Summary**

On January 12, 2007, the Department of Commerce (“the Department”) received a request from Musical Candle Company (“Musical Candle”) for a scope ruling to determine whether its Musical Pillar<sup>1</sup> candles (item number H98022)<sup>2</sup> are 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 Musical Candle's “Musical Pillar” candles are included within the scope of the Order.<sup>3</sup>

### **Musical Candle's Scope Request**

Musical Candle argues that its Musical Pillar candles should not be included within the scope of the Order based on either a) the novelty candle exception or b) section 780 of the Tariff Act of 1930, as amended (“the Act”) (Downstream Product Monitoring).

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<sup>1</sup> Musical Candle Company refers to the items it is requesting a scope ruling on as “holiday musical devices which contain petroleum-based waxed candles as a component thereof.” However, for the sake of this scope ruling, we are referring to the candles as musical pillar candles.

<sup>2</sup> See Memorandum to the File from Nicole Bankhead, Senior Case Analyst; Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504): Musical Candle's Musical Pillar Candles Item Number.

<sup>3</sup> 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.

Musical Candle explains that its Musical Pillar candles are petroleum-based wax pillar candles that are approximately three inches high that sit on a musical base. The stand is constructed in such a way that when the candle wick is lit, heat transfers from the candle to a sensor which then activates a microprocessor chip. After the microprocessor is activated, three different Christmas theme songs are simulated: “What Child is This;” “Silent Night;” or “The Nutcracker.” According to Musical Candle, the musical candles are sold in units of three, with each package containing a red, a green, and a white candle that plays one of the songs listed above.

First, Musical Candle posits that its Musical Pillar candles should be not be included within the scope of the order based on the novelty candle exception. Specifically, Musical Candle asserts that the combination of the candles, microprocessor base, chip, musical selection, and retail packaging create an article sold and used only during the Christmas season. Thus Musical Candle argues that upon the conclusion of the Christmas holiday season, the tunes lose their novelty. In addition, Musical Candle contends that the reasoning behind the creation of the novelty exception should extend beyond articles dominated by their visual characteristics to those dominated by aural characteristics.

Second, Musical Candle argues that its musical pillars should be excluded based on section 780 of the Act. Specifically, Musical Candle states that its musical pillars are a different article of commerce where the candle is merely a component. Musical Candle argues that the candle is firmly fixed to its base and cannot be separated from the base without causing damage to both the candle and the base. Musical Candle explains that the cost of the candle in relation to the total cost of the musical pillar is relatively insignificant. Musical Candle contends that the Department or the Petitioner should invoke the processes set out under section 780 of the Act.

Musical Candle also submitted a sample of its Musical Pillar candles.

### **The Petitioner’s Comments**

The Petitioner, the National Candle Association (“NCA”), submitted comments regarding Musical Candle’s scope ruling request on April 2, 2007. The NCA objects to the exclusion of the “Musical Pillar” candles from the scope of the Order. The NCA retraces the history of this antidumping order and 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. The NCA cites the ITC decision explaining the notion of “like product”:

the requirement that a product be “like” the imported article should not be interpreted in such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not “like” each other. . . the Commission has consistently defined “like product” as one having the same intrinsic qualities and essential characteristics and uses as the subject imports. Candles from the PRC (Final) (ITC Report) USITC Pub. 1888 (August 1986) at 4.

The NCA argues that Musical Candle’s candles are petroleum wax candles which have fiber- or paper- cored wicks that are pillars, which is a shape listed by name in the language of the order’s

scope. The NCA concludes that these candles are subject to the order. The NCA adds that these candles are not in the shape of identifiable objects, and they are not designed for use only in connection with a particular holiday season and, as a result, they fall within the scope of the order.

The NCA states that the Department found that six out of eight of Leader Light's battery-operated pillar "musical" candles were within the scope of the Order. See Final Scope Ruling: Leader Light Inc. (December 12, 2002) at 18 ("Leader Light Ruling"). The NCA explains that two of the musical pillar candles contained the words "Merry Christmas" and thus qualified for the holiday novelty exemption. However, the NCA contends that the Department included six of the musical candles because they did not qualify for the novelty exception. Therefore the NCA concludes that Musical Candle's Musical Pillar candles should also be covered by the scope of the Order.

The NCA also argues that Musical Candle's request is merely an attempt to evade or circumvent the order which, NCA insists, is vital to the survival of the U.S. candle industry. The NCA maintains that Musical Candle is asking the Department to narrow the scope of the order so it excludes everyday candles, and notes the Department does not have the legal authority to narrow the scope of the order.

### **Legal Framework**

The regulations governing the Department's scope determinations are found at 19 CFR 351.225(2006). On matters concerning the scope of an 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 Musical Candle'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 Musical Candle's Musical Pillar 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.

The ITC 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 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 states:

The Department of Commerce has determined that certain novelty candles, such as Christmas novelty candles, are not within the scope of the antidumping duty order on petroleum-wax candles from the People's Republic of China (PRC). Christmas novelty candles are candles specially designed for use only in connection with the

Christmas 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 – 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.”<sup>4</sup> 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, look to the petitioner’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 petitioner’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 (“CAFC”) in *Duferco Steel, Inc. v. United States*, 296 F.3d 1087 (Fed. Cir. 2002) (“*Duferco Steel II*”), we do not believe that the CAFC’s decision

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<sup>4</sup> See, e.g., Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Endar Corp. (January 11, 2000) (“Endar”) (the Department found a “dragonfly” candle, in the shape of a rough-hewn stone with a dragonfly carved on top, to not be 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) (the Department found a sphere or ball-shaped candle to not be within scope because it is a shape not listed by the scope).

undermines the Department's decision in the J.C. Penney Ruling. The plain language of the scope of the Order clearly states “certain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks . . . sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers” are included within the scope of the Order. Thus, the Order offers a descriptive list of the shapes of candles included within the Order, but, as the courts have recognized, there is no requirement that every single product covered must be identified in the scope. More specifically, the CAFC has stated that “the petitions that led to the issuance of the order did not need to specifically identify the {product} in order to cover {it}; our precedent, to say nothing of the regulations, makes clear that neither a petition nor an antidumping or countervailing duty order requires that level of specificity.”<sup>5</sup> 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.”<sup>6</sup> Thus, as applied to this Order, there is no requirement, nor is it possible, for all the shapes of candles to be listed.<sup>7</sup> 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. However, the Department did render the novelty candle exception that offered a narrowly construed exception, leaving all other petroleum wax candles from the PRC covered by the Order.

If the Department determines that 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 the novelty candle 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 Corp. 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) (“SFCC”); 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 fiber or paper-cored wick, the Department will determine that the candle is within the scope of the Order.

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<sup>5</sup> Novosteel SA v. United States, 284 F.3d 1261, 1264 (Fed. Cir. 2002).

<sup>6</sup> Id.

<sup>7</sup> 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

The Musical Pillar candle is a pillar candle made of scented petroleum wax and has a wick. The pillar is a shape specifically within the scope of 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 pillar is one of the shapes listed by name in the inclusive language of the scope of the Order, Musical Candle's Musical Pillar candles are included within the Order.

We disagree with Musical Candle's argument that the combination of the musical base and microprocessor chip, musical selection, and retail packaging supports the exclusion of the Musical Pillar candle from the Order under the novelty candle exception. While the musical base may add a commercially attractive feature to the pillar candle, we find that this product is, essentially, a petroleum wax candle, in the shape of a pillar, with a wick.<sup>8</sup> Thus, we find that Musical Candle's Musical Pillar candles are subject to the Order. We do not agree that the added musical feature alters the fact that these Musical Pillar candles are "scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks." See Order.

Moreover, with respect to Musical Candle's argument that the musical element qualifies its candles for the novelty exception, we find that to qualify for that exception the candle must contain *visual* designs. See CBP Notice. As outlined in the CBP Notice, in order for candles to qualify for the novelty exception, candles must contain Christmas scenes and symbols depicted in the *candle design*. Because the Musical Pillar candles do not possess any of the characteristics outlined in the CBP Notice, the fact that it has aural characteristics that could be associated with Christmas is not relevant for excluding it from the Order. Therefore, because the Musical Pillar candles do not contain any Christmas scenes or symbols nor are they in the shape of an identifiable object, the Musical Pillar candles do not meet the definition of an identifiable object pursuant to the 1987 novelty candle exception and therefore, are included within the Order.

This decision is consistent with our ruling that six of Leader Light's musical candles were included within the scope of the order based on their shape. See Leader Light Ruling. This decision is also consistent with the Department's ruling that Design Idea, Ltd.'s ("Design Idea") "Lounge Light" candles were included within the scope of the order on the basis that these candles were within shapes covered by the scope of the order. The Department did not find that its light-emitting utility changed the fact they were petroleum wax candles of a certain shape and size from the PRC. See Final Scope Ruling: Design Ideas Ltd. (March 21, 2006) at 8.

We also find Musical Candle's argument that its candles should not be included within the scope of the Order based on section 780 of the Act not applicable. Specifically, the statute requires that

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<sup>8</sup> Musical Candle did not specify what type of wick is used in its Musical Pillar candles. However, Musical Candle does not argue exclusion on the basis of the composition of the wick.

a “domestic producer of an article that is like a component part or a downstream product may petition the administering authority...” See section 780 of the Act. Therefore, because Musical Candle does not fulfill the statutory requirements for filing a petition under section 780 of the Act, Musical Candle’s Musical Pillar candles remain within the scope of the antidumping duty order on petroleum wax candles from the PRC.

As discussed above, we find the product descriptions contained in the petition, the initial investigation and the determinations of the Department and the ITC to be dispositive. Musical Candle’s Musical Pillar candles manufactured in the PRC are pillar-shaped petroleum wax candles which are within the scope of the antidumping duty order on petroleum wax candles from the PRC.

**Recommendation**

Based on the preceding analysis, we recommend that the Department find that Musical Candle’s Musical Pillar candles (item number H98022) are within 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

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Stephen J. Claeys  
Deputy Assistant Secretary  
for Import Administration

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Date