

October 20, 2008

By Certified Mail Notification

To All Interested Parties:

On September 24, 2008, the Department of Commerce (“Department”) received a request from Sourcing International, LLC (“Sourcing International”) for a scope ruling to determine whether five of their candles are covered by the scope of the antidumping duty order on petroleum wax candles from the People’s Republic of China (“PRC”): See <http://ia.ita.doc.gov/download/candles-prc-scope/index.html> under “2008 – Sourcing International, LLC - Sample Images.”

In accordance with 19 CFR 351.225(k)(1), the Department has determined that Sourcing International’s novelty candles are outside 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 Alan Ray at (202) 482-5403.

Sincerely,

Alex Villanueva
Program Manager, Office IX
Import Administration

Enclosure

A-570-504
Scope Inquiry
Public Document
IA: AR

October 20, 2008

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

FROM: James C. Doyle
Director, Office 9
Import Administration

SUBJECT: Final Scope Ruling: Antidumping Duty Order on Petroleum Wax
Candles From the People's Republic of China ("PRC")

SUMMARY

On September 24, 2008, the Department of Commerce ("Department") received a request from Sourcing International, LLC ("Sourcing International") for a scope ruling to determine whether five of their candles are outside the scope of the antidumping duty order on petroleum wax candles from the 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), we recommend that the Department find that Sourcing International's candles are excluded from the scope of the Order.¹

Background

On September 24, 2008, the Department received a scope inquiry letter from Sourcing International requesting a scope ruling on five candles. The petitioner, The National Candle Association ("NCA") did not submit comments regarding Sourcing International's scope request.

Sourcing International's Scope Request

Sourcing International submitted pictures and physical samples of the candles for which it is requesting a scope ruling.² Sourcing International explains that the candles are made from 100 percent petroleum wax and feature a 100 percent cotton wick. Sourcing International contends that each candle is three dimensional, easily recognizable from every angle, and sold

¹ The Department has 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.html>, and is updated periodically to include newly issued scope determinations.

² See Sourcing International's Scope Inquiry, (September 24, 2008).

predominantly as home décor. Sourcing International also states that the candles are assembled piece by piece, hand finished and air-brushed to give depth, definition, and color. Finally, Sourcing International notes that all candles are classified under the Harmonized Tariff Schedule for the United States number 3406.00.00.00.

As discussed more fully below, Sourcing International argues that each of its candles is an identifiable object and therefore, should not be included in the scope of the Order.

1. Red Rose - (item number HM65975W-G):

Sourcing International argues that its red roses in a traditional flower pot should not be included within the scope of the Order because the candle is shaped in the form of an identifiable object: a pot containing three rose stems with red rose blooms. Sourcing International claims that the candle is manufactured to look like metal rose stems with three paraffin wax roses in different phases. The candle illustrates an early stage for a rose, and the craftsmanship shows each petal overlapping the next. One rose is opening up and one is in full bloom. Sourcing International claims that one can recognize a rose bloom from the top and side, but from the bottom view it is just as simple to recognize this as a pot of flowers.

2. White and Yellow Poppy - (item number HM65895R):

Sourcing International argues that its white and yellow poppy candle should not be included within the scope of the Order because the candle is shaped in the form of an identifiable object: a white and yellow poppy. Sourcing International describes the yellow stamen above the flower petals and adds that the budding poppy underneath completes the candle. Sourcing International claims that when viewed from the top, sides, and even from the bottom, each separate leaf remains visible.

3. Water Lotus - (item numbers HM52305LB):

Sourcing International argues that its water lotus candle should not be included within the scope of the Order because, this candle is shaped in the form of an identifiable object: a water lotus. The deep cuts in the wax illustrate each petal. The center of the flower is light green showing petals in bloom and is decorated and detailed with pollen. Sourcing International claims that the candle is recognizable from all angles, and when viewed from the bottom, one can see the individually cut six petals.

4. Set of Spotted Orchids - (item number HM9866):

Sourcing International argues that its set of spotted orchid candles should not be included within the scope of the Order because the candles are shaped in the form of an identifiable object: a set of spotted orchids. Sourcing International notes that each of the four flowers contain unique spots and dark pink airbrushed labellum. Sourcing International states from the top these appear to clearly be orchids. From the side, the labellum stands higher than the petals and the pink color is distinguishable beyond the petals. From the bottom one can identify individual orchid petals making it recognizable from many angles.

5. Bouquet of Pom Pom Flowers - (item number HM65833W-G):

Sourcing International argues that its bouquet of pom pom flowers candle should not be included within the scope of the Order because the candle is shaped in the form of an identifiable object: a bouquet of pom poms. Sourcing International indicates the bouquet displays twelve pom pom flowers with concentric colors of yellow, green, and white. The flower stems are carved into the side of the candle and painted green. One can see the individual petals of the pom pom flowers from below clearly showing where the stems meet the flowers. This object is recognizable from all views.

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 this instant case, the Department has evaluated Sourcing International'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 Sourcing International's five candle series. 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); 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), 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, that 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.”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, 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 (“CAFC”) in Duferco Steel, Inc. v. United States, 296 F.3d 1087 (Fed. Cir. 2002), we do not believe that the CAFC’s decision undermines the Department’s decision in the J.C. Penney Ruling. The plain language of the Order clearly states “[c]ertain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks . . . sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers” are included within the scope of the Order. Thus, the Order offers a descriptive list of the shapes of candles included within the Order, but, as the courts have recognized, there is no requirement that every single product covered must be identified in the scope. More specifically, the CAFC has stated

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”) (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).

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.”⁴ 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.”⁵ Thus, as applied to this Order, there is no requirement, nor is it possible, for all the shapes of 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. 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. (February 12, 2001); and Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); Endar Corporation. 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.

Analysis

We find that Sourcing International’s five candles are in the shape of identifiable objects that are viewable from multiple angles, and they are not within the Order pursuant to CBP Notice. See chart below.

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), 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.”).

Pursuant to the Department's change in practice, as described in the J.C. 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. 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. Sourcing International's candles are petroleum wax candles with what appear to be fiber or paper-cored cotton wicks.⁷ Therefore, we must evaluate whether the characteristics of these candles would exclude them from the scope of the Order pursuant to the novelty candle exception detailed in the CBP Notice and our interpretation set forth in the J.C. Penney Ruling. In analyzing Sourcing International's five candles, we first examined whether they had a shape that was specifically enumerated in the scope of the Order (i.e., tapers, spirals, straight-sided dinner candles, rounds columns, pillars, or votives). We find that these candles do not have a shape which was specifically enumerated in the scope of the Order. Moreover, viewed from multiple angles, each of these shapes in all five candles are identifiable objects. Accordingly, these candles meet the definition of an identifiable object pursuant to the CBP Notice and, therefore, should not be included within the Order. See chart below.

⁷ On October 6, 2006, the Department published its final determination of circumvention of the antidumping duty order on petroleum wax candles from the PRC. The Department determined that mixed-wax candles composed of petroleum wax and more than 50 percent or more palm and/or other vegetable oil-based waxes ("mixed-wax candles") are later-developed products of petroleum wax candles. In addition, the Department determined that mixed-wax candles containing any amount of petroleum are covered by the scope of the antidumping duty order on petroleum wax candles from the PRC. See Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order, 71 FR 59075 (October 6, 2006).

<u>Candle Name</u>	<u>Analysis</u>	<u>DOC Position</u>
Red Rose	This product consists of a candle shaped like a flower pot containing three stems and red rose blooms. In addition, green leaves hang over the bowl. Because of this candle's shape, a yellow bowl with green stems supporting three rose blooms, this candle is recognizable from multiple angles.	Identifiable
White and Yellow Poppy	This product consists of a candle shaped like a white and yellow poppy. The poppy plant has a metal stem sitting in a flower pot. Atop the stem is a yellow stamen with petals underneath it. There is a budding poppy off to the side of the main stem. Because of the shape of this candle, the leaf structure and color and the flower, this candle is easily recognizable from multiple angles.	Identifiable
Water Lotus	This product consists of a 1 ½" tall candle shaped to look like a water lotus flower. The wax is cut deeply to illustrate each petal. The center is light green and yellow and decorated with pollen. Because of the shape of this candle, leaf structure, color, and distinction, this candle is recognizable from multiple angles.	Identifiable
Set of Spotted Orchids	The Department has previously made a determination on this same set. <u>See</u> Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504); Eighteen Karat International Product Sourcing, Inc. (January 10, 2006).	Identifiable
Bouquet of Pom Poms	This product consists of a candle shaped like a bouquet of pom pom flowers. The bouquet displays twelve pom pom flowers each with concentric yellow, green, and white circles. The stems are individually carved out and painted green. Because of this candle's shape, flower petal structure, color, and distinction, this candle is recognizable from multiple angles.	Identifiable

Recommendation

Based on the preceding analysis, we recommend that the Department find that Sourcing International's novelty 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
Import Administration

Date