

A-570-504
Scope Review
Public Document
IA/NME/9: SQW

By Electronic Mail Notification

To All Interested Parties:

On May 18, 2004, the Department of Commerce (“the Department”) received a request from Paperproducts Design, Inc. (“PPD”), for a scope ruling on whether two types of candles it plans to import 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)(2002), the Department has determined that both of PPD’s two models of candles fall 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 the U.S. Customs and Border Protection (“CBP”) of this decision. If you have any questions, please contact Steve Winkates at (202) 482-1904.

Sincerely,

Brian C. Smith
Program Manager
AD/CVD Enforcement NME, Office 9
Import Administration

Enclosure

MEMORANDUM FOR: Barbara E. Tillman
Acting Deputy Assistant Secretary
for 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 (A-570-504);
Paperproducts Design, Inc.

Summary

On May 18, 2004, the Department of Commerce (“the Department”) received a request from Paperproducts Design, Inc. (“PPD”), for a scope ruling to determine whether two types of candles are included within the scope of the antidumping duty order on petroleum wax candles from the People’s Republic of China (“PRC”). 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 determine that both PPD’s “Wine Cork” and “Champagne Cork” candle types fall outside the scope of the Order.¹

Background

On May 18, 2004, the Department received a letter from PPD, dated May 14, 2004, requesting a scope ruling on the two types of candles. On October 25, 2004, we provided counsel for the National Candle Association (“NCA”), petitioner and the domestic producer in this proceeding, with an opportunity to examine the samples PPD provided in its scope ruling request (see October 25, 2004,

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.

memorandum to the file entitled “Meeting with Petitioner’s Counsel and Viewing of Samples”). NCA did not submit comments on PPD’s scope ruling requests.

PPD’s Scope Request

PPD argues that both of its candles (item code or vendor style numbers 800347 and 800384) are easily identifiable as corks from either a wine or champagne bottle and are thus eligible for the novelty exception as novelty candles in the form of identifiable objects.

a. Product Descriptions

“Wine Cork”

The “Wine Cork” candle (#800347) comes in a set of four identical candles, which are painted a light beige color and made to appear uneven to imitate the rough texture and discoloration common to wine corks. It appears to have been cut with a knife to facilitate insertion into a bottle, and it is marked with darkened French inscriptions to simulate those that a vintner would burn on a cork.

“Champagne Cork”

The “Champagne Cork” candle (#800384) is similar to the “Wine Cork” candle except that it is designed to appear as a cork for a champagne bottle. It also features writing designed to simulate lettering, and features indentations and coloring similar to those found on a real champagne cork.

b. Scope Request

To support its argument that its candles qualify for the novelty exception, PPD quotes from the notice which the Department issued to the U.S. Customs Service (now renamed U.S. Customs and Border Protection (“CBP”)) 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 Petroleum-Wax Candles from the People's Republic of China - Antidumping - A-570-504; C.I.E. -212/85, September 21, 1987; Letter from the Director, Office of Compliance, to Burditt, Bowles & Radzius, Ltd., July 13, 1987 ("CBP Notice").

PPD included a sample of each candle with its scope request as well as photographs in response to a subsequent request from the Department (see October 15, 2004, Letter from the Department to Kuehne & Nagel, Inc.).

Legal Framework

The regulations governing the Department's antidumping scope determinations are found at 19 CFR 351.225 (2002). 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 PPD's requests in accordance with 19 CFR 351.225(k)(1) and the Department 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 both the "Wine Cork" (#800347) and the "Champagne Cork" (#800384) candles. 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 the Department did not present, or place 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 is the CBP Notice issued to CBP 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).

When determining whether or not a particular product claimed as a novelty candle is within the scope of the Order, the Department's first line of inquiry is whether the shape of the candle falls within those shapes listed by the inclusive language of the Order's scope, i.e., "tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers." If a candle falls within one of the above-delineated shapes, it will be determined to be within the Order's scope. Candles of a shape not listed by the inclusive language of the Order's scope will then be evaluated to determine whether they are "scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks."

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); JCPenney (November 9, 2001) ("JCPenney 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 JCPenney Ruling, the Department determined to revise this practice because such practice 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. See Duferco Steel, Inc. v.

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") ("dragonfly" candle, in the shape of a rough-hewn stone with a dragon fly carved on top, is 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) (sphere or ball-shaped candle is not within scope because it is a shape not listed by the scope).

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 NCA’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. July 12, 2002) (“Duferco Steel II”), we do not believe that the CAFC’s decision undermines the Department’s decision in the JCPenney Ruling. The plain language of the scope of the Order clearly states that “{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 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.”³ 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.”⁴ Thus, as applied to this Order, there is no requirement, nor is it possible, for all the shapes of candles to be listed.⁵ In fact, if the list were exhaustive, there would have been no need for the Department to render a decision on novelty candles or 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 fall outside 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

³ Novosteel SA v. United States, 284 F.3d 1261, 1264 (March 26, 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.”).

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 Final Scope Ruling – Antidumping Duty Order on Petroleum Wax Candles From the People’s Republic of China (A-570-504); JCPenney Purchasing Corp. (May 21, 2001) (“JCPenney 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 petroleum wax candle made from petroleum wax and having 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 outlined below, both PPD’s “Wine Cork” and “Champagne Cork” candle types fall outside the scope of the Order because they are in the shape of identifiable objects (i.e., corks).

“Wine Cork” (#800347)

PPD contends that the subject “Wine Cork” petroleum wax candle, with a fiber or paper-cored wick, is a novelty candle that, due to its shape, size, and markings, is easily identifiable as a real wine cork. PPD also maintains that the subject candle would be difficult to distinguish from a real wine cork unless it is closely examined. We agree that PPD’s “Wine Cork” candle represents an identifiable object. Although the candle is of similar shape and size to most real wine corks (which would not be sufficient to qualify it under the identifiable object exception), the fact that it additionally contains similar markings to most real wine corks allows this candle to be identifiable as a wine cork. That is, the candle is not identifiable as a wine cork simply because of its shape; it is the markings that encircle the candle that allow it to be identifiable as a wine cork. In addition, the “Wine Cork” candle can also be identified as a real wine cork when the candle is viewed from the top, bottom, and the sides. See San Francisco Candle Co. v. United States, 206 F. Supp. 2d 1304 (May 30, 2002) (“SFCC Ruling”) (where the CIT upheld the Department’s examination of whether a candle’s design is visible from multiple angles in determining whether it qualifies for the novelty candle exception). Thus, the Department finds that this candle does fall within the July 1987 novelty candle exception. Therefore, we find that this candle falls outside the scope of the Order because it is identifiable from all angles as a cork from a wine bottle.

“Champagne Cork” (#800384)

PPD contends that the subject “Champagne Cork” petroleum wax candle, with a fiber or paper-cored wick, is a novelty candle that, due to its shape, size, and markings, is easily identifiable as a real champagne cork. PPD also maintains that the subject candle would be difficult to distinguish from a

real champagne cork unless it is closely examined. We agree that PPD’s “Champagne Cork” candle represents an identifiable object. Although the candle is of similar shape and size to most real champagne corks (which would not be sufficient to qualify it under the identifiable object exception), the fact that it additionally contains similar markings to most real champagne corks allows this candle to be identifiable as a champagne cork. That is, the candle is not identifiable as a champagne cork simply because of its shape; it is the markings that encircle the candle that allow it to be identifiable as a champagne cork. In addition, the “Champagne Cork” candle can also be identified as a champagne cork when the candle is viewed from the top, bottom, and the sides. See SFCC Ruling. Thus, the Department finds that this candle does fall within the July 1987 novelty candle exception. Therefore, we find that this candle falls outside the scope of the Order because it is identifiable from all angles as a cork from a champagne bottle.

Summary

PPD argues that the “Wine Cork” and “Champagne Cork” candles are in the shapes of identifiable objects and thus should not be included within the Order. For the reasons discussed above, we agree and find that these candles fall outside the scope of the Order. These conclusions are consistent with the scope of the petition, the initial investigation, the determinations of the Secretary (including prior scope determinations), and the ITC.

Recommendation

We recommend that the Department find that PPD’s “Wine Cork” and “Champagne Cork” 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

Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

Date

Attachment