

By Electronic Mail Notification

To All Interested Parties:

On September 30, 2002, the Department of Commerce (the Department) received a request from Avon Products, Inc. (Avon) for a scope ruling on whether a “rose bloom” candle with product profile number (PPN) 250246 is included within the scope of 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 Avon’s candle is included within the scope of the 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 (formerly the United States Customs Service) of this decision. If you have any questions, please contact Kimberley Hunt at (202) 482-1272 or Jacqueline Arrowsmith at (202) 482-5255.

Sincerely,

Dana S. Mermelstein
Acting Office Director
AD/CVD Operations, Office VI
Import Administration

Enclosure

MEMORANDUM FOR: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

FROM: Dana S. Mermelstein
Acting Office Director
AD/CVD Operations, Office VI

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 September 30, 2002, the Department of Commerce (the Department) received a request from Avon Products, Inc. (Avon) for a scope ruling on a candle with the Product Profile Number (PPN) 250246 to determine whether this candle is covered by the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC). (Petroleum Wax Candles from the PRC: Final Determination of Sales at Less Than Fair Value, 51 FR 25085 (July 10, 1986) (Final Determination)); 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 candle is within the scope of the antidumping duty order on petroleum wax candles from the PRC.¹

Background

Avon filed its request for a scope ruling in proper form on September 30, 2002. On November 22, 2002, the National Candle Association (NCA), an interested party in this proceeding, filed comments opposing Avon's request. On December 13, 2002, Avon filed rebuttal comments to

¹ The Department has developed an internet website that allows interested parties to access prior scope determinations regarding the antidumping duty order on petroleum wax candles from the PRC. 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/>. The Department will update the website periodically to include newly issued scope rulings.

the NCA's November 22, 2002, submission.

Product Description

Avon's request concerns a molded petroleum wax candle with a rounded "rose bloom" shape (PPN 250246). According to Avon, the candle resembles a molded rose-bloom-shaped flower. Avon's September 30, 2002, submission contains top, bottom and side view photographs of the candle. Avon also submitted a sample of the candle.

The "rose bloom" candle is approximately one inch tall and approximately two inches wide. The "rose bloom" is light lavender in color.

Avon Products, Inc.'s Request

Avon argues that its "rose bloom" candle is molded in the identifiable shape of a blooming rose with carved wax petals. See Avon's September 30, 2002, submission at 1. Specifically, Avon argues that the Department should determine that its "rose bloom" candle is not included within the Order because it is an identifiable object, based on information in the 1987 Customs Notice.² Avon argues that the Department has determined that "novelty" candles in the shape of such identifiable objects as morning glories, lilies, sunflowers, and rose blooms are not included within the Order. See e.g., Final Scope Ruling Atico International, Inc. (February 19, 2002) (Atico Scope Ruling).

Avon further argues that the subject "rose bloom" candle clearly evidences physical characteristics materially different from candles which are included within the Order because it is shaped as an identifiable object, namely a "rose bloom."

The National Candle Association's Comments

In its comments, the NCA retraces the history of this antidumping duty order, including the import surges and resultant injury suffered by domestic manufacturers, which prompted the original September

²The Customs Notice was a notice issued by the Department to the Bureau of Customs and Border Protection (BCBP) in connection with a July 1987 scope determination concerning an exception to 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).

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 on petroleum wax candles from the PRC. In support of its assertion, the NCA cites a Court of International Trade (CIT) decision, with regard to the novelty exception, in which the CIT noted that “a candle must be specifically designed for use only in connection with a religious holiday or special event to fall within the novelty candle exception.” Russ Berrie, 57 F. Supp. 2d at 1194-1195. Thus, the NCA argues that the Department narrowly limited the novelty candle exception to figurine candles, candles shaped in the form of identifiable objects, and candles specifically designed for use only in connection with the holiday season.

With respect to Avon’s “rose bloom” candle, the NCA argues that this candle is in the shape of a round, which is one of the shapes listed by the inclusive language of the Order’s scope. The NCA claims that Avon’s “rose bloom” is not in the shape of an identifiable object. NCA further states that the “rose bloom” shape cannot be identified from most angles and is only discernible when viewed from above the candle.

The NCA distinguished Atico Scope Ruling based on the fact that the candles, which were found not to be included within the scope, had petals on the top and the sides of the candles so that the flower shape could be identified from most angles. NCA further states that Avon’s “rose bloom” is more similar to the “tulip lantern” in the Final Scope Ruling for Premier Candle Corp. (Feb. 25, 2002), which was determined to be included within the Order because the Department found that it was not recognizable as a tulip from multiple angles. The NCA argues that the “rose bloom” is a round and is not an identifiable object, and thus, does not fall under the novelty exception.

Avon Products, Inc.’s Rebuttal

In a December 16, 2002, rebuttal brief, Avon rebuts the NCA’s argument that the “rose bloom” is a round by citing definitions of the word “round” as found in various dictionaries. Avon contends that the word “round” has a definition which suggests a ball or globe-shape; whereas the instant candle is not completely spherical and has the shape of a rose. Avon contends that the etchings on the side of the candle delineate the “side petals,” which according to Avon, is the criteria the Department used to in determining that Atico’s flower candles were outside the scope of the Order. See Atico Scope Ruling. Furthermore, Avon explains that the “tulip lantern” candle, which NCA claims is similar to Avon’s “rose bloom,” was a wax-filled container which was not recognizable as a tulip from any angle, and therefore cannot be compared to Avon’s “rose bloom” candle. Finally, Avon claims it is not trying to narrow the scope of the Order as the NCA contends, but instead it is the NCA that is attempting to broaden the scope.

Legal Framework

The Department examines scope requests in accordance with the Department's scope regulations, which may be found at 19 CFR 351.225 (2003). 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 International Trade Commission (the Commission). See 19 CFR 351.225(k)(1). 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 product is covered by the order. See 19 CFR 351.225(d).

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: i) the physical characteristics of the merchandise; ii) the expectations of the ultimate purchasers; iii) the ultimate use of the product; iv) the channels of trade in which the product is sold; and v) 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, with or without formal inquiry, after consideration of all evidence before the Department.

Pursuant to 19 CFR 351.225(k)(1), the Department will examine the description of the subject merchandise from the petition, the initial investigation, and the Commission's determinations. 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 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); Final Determination; and Order.

The Commission 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 Determinations of the Commission (Final), USITC Publication 1888, August 1986, at 4, note 5, and A-2 (Commission Determination). The Commission stated that “we determine that the domestic like product shall consist only of petroleum wax candles.” See Commission Determination, at 9. In its discussion of like product, the Commission also stated:

Petroleum wax candles are those composed of over 50 percent petroleum wax, and may contain other waxes in varying amounts, depending on the size and shape of the candle, to enhance the melt-point, viscosity, and burning power.

See Commission Determination, at 4-5.

The Department clarified the scope of the Order in relation to certain novelty candles. See Russ Berrie Ruling 57 F.Supp. 2d at 1194. In July 1987, the Department issued a notice to the United States Customs Service (now known as Customs and Border Protection (CBP)) in connection with a scope ruling which provides:

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 Customs Notice.

Documents and parts thereof from the underlying investigation deemed relevant by the Department to this scope ruling were made part of the record of this determination and are referenced herein. Documents that were not presented to the Department, or placed by it on the record, do not constitute part of the administrative record for this scope determination.

In November 2001, the Department changed its interpretation of 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); 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 revised this practice because the former 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.

This approach of evaluating candles in light of the entire text of the Order’s scope is in keeping with Duferco Steel, 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. United States, 146 F. Supp. 2d 913 (CIT 2001) (Duferco Steel).

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), the Court’s ruling does not undermine the Department’s scope determination 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 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.”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

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 determines that a “dragonfly” candle, in the shape of a rough-hewn stone with a dragonfly carved on top, should not be included within the scope because it is of a shape not specifically listed by the language of 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 determined that a sphere or ball-shaped candle should not be included within scope because it is a shape not specifically listed by the language of the scope).

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

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 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 issue the novelty candle exception, which offered a narrowly construed exception and left all other petroleum wax candles from the PRC covered by the Order.

When determining whether a particular novelty candle is within the scope of the Order, the Department will first determine whether the candle is made of petroleum wax. If the candle is made of petroleum wax, the Department will look to see whether the shape of the candle falls within those shapes listed in the second sentence of the scope as defined in the Order, i.e., “tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers.” If the Department determines that a candle is one of these shapes, it is within the scope of the Order.

If the Department finds that a candle’s shape is not among the shapes listed in the second sentence of the scope as defined in the Order, i.e., taper, spiral, straight-sided dinner candle, round, column, pillar, votive, and various wax-filled containers, then the candle will be evaluated to determine whether it is a novelty candle. 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 should be 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); J.C. Penney Purchasing Corp. (May 21, 2001); 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 Ruling); San Francisco Candle Company, Inc. v. United States, 265 F. Supp. 2d 1374, 1379 (CIT 2003) (SFCC); and Endar. If the candle does not possess characteristics set out in the 1987 novelty candle exception, and it is a scented or unscented petroleum wax candle made from petroleum wax and having a fiber or paper-cored wick, the Department will determine that the candle is within the scope of the Order.

Analysis of Avon’s Candle

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”).

With respect to the involved scope request, the Department finds that for the reasons outlined below, Avon's "rose bloom" candle (PPN 250246) is included within the scope of the Order. We find that this candle is included within the scope of the Order because this candle is not an identifiable object (*i.e.*, a rose bloom). We find that this candle is not readily recognizable and identifiable as a "rose bloom" from multiple angles. Specifically, the candle does not appear as a "rose bloom" from the sides. Our analysis of the "rose bloom" candle is provided below.

Avon describes its "rose bloom" candle as approximately one inch tall and approximately two inches wide, and states that the candle is in the shape of a rose in bloom. The candle is light lavender with individual molded petals that are visible from above the candle. The candle resembles a bowl when viewed from all sides of the candle, and thus, is not identifiable from a majority of angles. From above, the candle is obviously a rose with distinguishable petals which overlap and increase in number as they near the center of the candle, giving the appearance of a rose in full bloom.

We disagree with Avon's argument that the "rose bloom" candle is in the shape of an identifiable object, and therefore, should not be included within the scope of the order on petroleum wax candles from the PRC. Pursuant to the Department's change in practice stated in J.C. Penney Scope Ruling, if a candle is not in a shape specifically listed in the Order's scope, it will not automatically be excluded from the scope of the Order. See J.C. Penney Scope 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. In the involved case, the "rose bloom" candle (PPN 250246) is a petroleum wax candle with a fiber-cored wick. Therefore, we must evaluate whether the characteristics of this candle bring it outside of the scope of the Order pursuant to the novelty candle exception detailed in the Customs Notice and our interpretation set forth in the J.C. Penney Scope Ruling.

Based on Avon's comments, we examined whether the "rose bloom" candle is in the shape of an identifiable object, namely, a rose. We found that this candle contains rudimentarily molded petals, which are only visible when viewing the candle from above. However, when the candle is viewed from the sides, the petals, and thus, the shape of the flower are not discernible. When viewed from any side, the candle does not show any identifiable flower motif, much less a resemblance to a rose. Given that the flower design is only discernible when viewed from above, we find that the "rose bloom" candle (PPN 250246) is not identifiable as a flower from a majority of angles. See San Francisco Candle Co. v. United States, 265 F.Supp. 2d 1274 (May 14, 2003). Because this candle is not readily recognizable and identifiable as a rose from multiple angles, we find that it is not an identifiable object and, therefore, it does not qualify for the novelty exception as an identifiable object. Thus, the Department finds that Avon's "rose bloom" candle (PPN 250246) does not fall under any exception, and is therefore included within the scope of the Order.

Recommendation

We recommend finding that Avon’s “rose bloom” candle (PPN 250246) is included within the scope of the order on petroleum wax candles from the PRC, because this candle is not in the shape of an identifiable object because the rose shape is not readily recognizable and identifiable from multiple angles, and thus, it does not fall within the novelty exception. Therefore, it should be included within 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