

A-570-504
Scope Review
PUBLIC DOCUMENT
Operations (6): JB/JA

By Electronic Mail Notification

To All Interested Parties:

On August 1, 2002, the Department of Commerce (the Department) received a request from Dollar Tree Stores, Inc. (Dollar Tree) for a scope ruling on whether three types of gel 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 all three of these 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 United States Customs and Border Protection (CBP) of this decision. If you have any questions, please contact Jacqueline Arrowsmith at (202) 482-5255.

Sincerely,

Dana S. Mermelstein
Acting Office Director
AD/CVD Operations, Office 6
Import Administration

Enclosure

A-570-504
Scope Review
PUBLIC DOCUMENT
Operations (6):JB/JA

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

FROM: Dana S. Mermelstein
Acting Director
AD/CVD Operations, Office 6

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

Summary

On August 1, 2002, the Department of Commerce (the Department) received a request from Dollar Tree Stores, Inc. (Dollar Tree) for a scope ruling on three types of gel candles in containers to determine whether the candles are covered by the scope of 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 PRC, 51 FR 30686 (August 28, 1986) (Order). In accordance with 19 CFR 351.225(k)(1), we recommend that the Department determine that all three of Dollar Tree's gel candles are included within the scope of the antidumping duty order on petroleum wax candles from the PRC.¹

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.

Background

Dollar Tree filed its request for a scope ruling in proper form on August 1, 2002.² On November 22, 2002, the National Candle Association (NCA), petitioner and an interested party in this proceeding, filed comments on Dollar Tree's request. On December 19, 2002, Russ Berrie and Company, Inc. (Russ Berrie), a United States importer and interested party in this proceeding, submitted a rebuttal to the NCA's comments, in support of Dollar Tree.

a. Product Descriptions

Dollar Tree's August 1, 2002, request involved three gel candles (with SKU 162394) in glass containers. We reviewed the samples that Dollar Tree provided in June 2002, when it first attempted to file this scope request. The first gel candle is comprised of clear gel in a clear glass container with a wick. The candle has silver-colored gravel on the bottom and three singularly placed items inside the glass container. The first item is a "snowman" with an orange scarf and a black top hat. The other two items are not clearly discernible. While Dollar Tree did not identify these items, it appears that the first item is a gingerbread house, and the second item is a tree with orange and white decorations.

The second gel candle is comprised of a blue gel with a wick in the middle. The candle is housed in a container with blue, yellow, red, and green mosaic-like tiles. The third gel candle is similar to the second, but it is a light-green gel with a wick in the middle. This candle is housed in a container with white and green triangular- and miscellaneous angular-shaped mosaic-like tiles.

b. Dollar Tree's Scope Request

Dollar Tree alleges that its three gel candles, made from white oil, a derivative of crude oil, should not be included within the scope of the Order. Dollar Tree describes the gel in these three candles as being composed of five percent powder substance, which makes the white oil solidify from its liquid state, and 95 percent white oil. Specifically, Dollar Tree argues that although the white oil in its candles is derived from crude oil, it undergoes several processes which sever a relation between white oil and petroleum. Dollar Tree further argues that one of the subject candles (its candle containing a "snowman" and two other items that appear to resemble a "Christmas tree" and a gingerbread house) incorporate "symbolic motifs" of Christmas. Dollar Tree notes that these representations are made of wax and will melt as the candle evaporates during burning.

With respect to the testing information submitted by Dollar Tree as part of its August 1, 2002,

² Dollar Tree's initial scope request covering its gel candles, dated June 17, 2002, was not filed in accordance with the Department's regulations.

submission, the testing certificate provided by Dollar Tree indicates that the “gel composition of the submitted gel candle sample was found to be 4.8% of the powder substance,” with the remaining component being “95% white oil” (see Dollar Tree’s August 1, 2002, submission).

c. 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 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. In support of its assertion, the NCA cites a Court of International Trade conclusion, with regard to the novelty exception, 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.” See Russ Berrie & Co., Inc. v. United States, 57 F. Supp. 2d. 1184, 1194 (CIT July 1999)(Russ Berrie). 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.

The NCA first argues that Dollar Tree’s gel candles are wax-filled containers made in the PRC and, therefore, should be included within the scope of the Order. Regarding Dollar Tree’s gel candle purportedly containing a “snowman,” a house, and a tree, the NCA argues that, while these symbols are symbols of the winter season, this candle is not specifically designed for use only in connection with the Christmas season. See the NCA’s November 22, 2002, submission at 5. Further, the NCA also argues that such designs are ubiquitous and that the candle containing such “symbolic motifs” can be used throughout the winter season.

In addition, the NCA argues that the primary basis for Dollar Tree’s claim that its candles should not be included in the scope of the Order is its allegation that its candles are made from white mineral oil. According to the NCA, the test results submitted by Dollar Tree in its August 1, 2002, submission are not acceptable because the test results do not indicate whether testing methods dictated by United States Customs and Border Protection (CBP) were employed to examine Dollar Tree’s candles, nor do they indicate whether a United States laboratory was used to conduct the tests.

According to the NCA, both the American Standards for Testing Materials (ASTM) and the NCA itself consider wax to be a “solid or semi-solid material consisting of a mixture of hydrocarbons or hydrocarbon derivatives, or both.” See the NCA’s November 22, 2002, submission at 5. Therefore, the NCA argues that, since Dollar Tree’s candles consist of white mineral oil, Dollar Tree’s candles are comprised of hydrocarbon mineral oil. Moreover, the NCA holds that hydrocarbon mineral oil is a paraffin oil, and paraffin is derived from petroleum. The NCA argues that the petroleum wax that is subject to the Order is paraffin wax. Thus, the NCA contends that Dollar Tree’s candles are semi-

solid paraffin wax candles that are the same or similar to the petroleum wax candles that are subject to the Order.

The NCA contends that the subject carbon mineral oil is derived from a paraffinic crude oil. In support of this argument, the NCA cites the scope request submitted by For Your Ease Only (FYEO), on November 15, 2001, which indicates that the hydrocarbon oil is a white mineral oil, and that white mineral oil is a paraffinic oil. See Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China (A-570-504), For Your Ease Only, (June 11, 2003) (FYEO Ruling). In addition, the NCA refers to a detailed comparative analysis of gel candles and petroleum wax candles that it submitted in the Burlington Toiletries International, Ltd. (Burlington) scope investigation on February 26, 2001.³ The NCA further argues that since the gel used by Burlington is the same gel used by Dollar Tree, the analysis is specific to Dollar Tree's gel candles as well as Burlington's, and additionally, that Dollar Tree's gel candles are semi-solid candles that are the same or similar to the petroleum wax candles that are subject to the Order.

The NCA argues that the United States International Trade Commission (ITC), has consistently defined "like products" as one having the same intrinsic qualities and essential characteristics and uses as the subject imports, citing Determination of the Commission (Final), USITC Publication 1888, August 1986, at 4, note 4 (Commission Determination). Further, the NCA claims that any minor differences in the physical characteristics of Dollar Tree's candles cannot lead to the conclusion that its candles are not like the candles covered by the Order. The NCA contends that Dollar Tree's candles have the same intrinsic qualities and essential characteristics of petroleum wax candles, and, therefore, are like petroleum wax candles. In addition, the NCA holds that Dollar Tree's candles are the same class or kind of merchandise as are the candles subject to the Order, and are covered by the same Harmonized Tariff Schedule of the United States (HTSUS) tariff provision. The NCA maintains that all of Dollar Tree's candles should be included within the scope of the Order.

The NCA maintains that in this case, the Department must also consider the factors enumerated in 19 CFR 351.225(k)(2) of the regulations in making its scope determinations. The NCA provides arguments for each factor, which support its conclusion that Dollar Tree's candles are within the scope of the Order. The NCA argues that the physical and chemical attributes of Dollar Tree's candles, and the applications for which the candles are used, are the same as the class or kind subject to the Order. See Bohler-Uddeholm Corporation v. United States, 1999 U.S. App. LEXIS 34552 (Fed. Cir. 1999) (Bohler). The NCA further argues that beeswax candles were the only candles, other than novelty candles, excluded from the Order because the Commission determined they had different characteristics and uses. See Commission Determination.

³ See Id. at page 6; see also Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China (A-570-504), Burlington Toiletries International, Ltd., (March 31, 2003)(Burlington Ruling).

The NCA notes that Dollar Tree’s candles compete in the same channels of trade as the candles subject to the Order, and that their sale without the antidumping duty will severely injure the U.S. candle producers. It further notes what it characterizes as the long-standing efforts of candle importers to “expand the ‘novelty candle’ loophole in the Order through a continuing stream of scope requests, causing the Order on PRC candles to be subjected to over seventy Final Scope Rulings and many more requests.” The NCA maintains that the success of the scope requests in eroding the Order has resulted in geometric increases in the volume of PRC candles coming into the United States. The NCA concludes by stating that Dollar Tree is now asking the Department to narrow the scope of the Order so that it excludes everyday candles, claiming that they are novelty candles, and that the Department does not have such legal authority.

d. Russ Berrie’s Comments

In response to the NCA’s numerous comments submitted with respect to Dollar Tree’s request for a scope ruling, Russ Berrie first argues that the NCA’s petition and the Department’s scope of the investigation both specified candles made from “petroleum wax.” Russ Berrie also argues that while the Department has inherent authority to define the scope of an antidumping duty order, the Department does not have authority to alter, amend, or expand the scope of an antidumping duty order.⁴ Russ Berrie further argues that when the Department considers whether a particular product should be included within the scope of an order, the Secretary takes into account the description of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary and the Commission.⁵ Based on this, Russ Berrie asserts, sufficient information exists with respect to Dollar Tree’s candles for the Department to make a determination without initiating a formal scope inquiry in accordance with 19 CFR section 351.225(k)(1).

According to Russ Berrie, it is clear that “petroleum wax” candles have always been the only type of candles included within the antidumping order. Russ Berrie argues that to expand the scope of the Order to include gel candles primarily composed of hydrocarbon mineral oil should not be allowed. Russ Berrie contends that had the NCA intended to include candles made from materials other than petroleum wax in its petition, the NCA should have included language to describe those other material characteristics. Russ Berrie maintains that the critical issue here is that the Department, in issuing its antidumping order, precluded candles that are not made from petroleum wax from being included within the scope of the Order. Given that the gel candles at issue do not contain any petroleum wax, Russ Berrie argues that they are *prima facie* outside the scope of the Order. Since the description of the gel candles is dispositive in this case, Russ Berrie contends that the Department should end the scope

⁴ See Russ Berrie & Company, Inc. v. United States, 57 F. Supp. 2d 1192-93 (CIT 1993) (citing Koyo Seiko Co., Ltd v. United States, 834 F. Supp. 1401, 1402 (CIT 1993) and UST Inc. v. United States, 9 CIT 352 (1985)).

⁵ See Russ Berrie’s December 19, 2002, comments at 2.

review without opening a formal inquiry and considering the additional criteria specified under 19 CFR section 351.225(k)(2).

Russ Berrie further argues that the hydrocarbon mineral oil in Dollar Tree's gel candles is derived from a complicated petrochemical process which results in products that are free from any petroleum wax. Russ Berrie asserts that, although the primary constituents of candles made of this gel and candles from petroleum wax originate from raw petroleum, these constituents are different products, with different properties, created through a different processing technique. According to Russ Berrie, there is no hydrocarbon mineral oil in petroleum wax, and no petroleum wax in hydrocarbon mineral oil or in the gel candles at issue. In addition, Russ Berrie states that the molecular weight of these two products is substantially different (400 to 600 daltons in petroleum wax versus 200-400 daltons for mineral oil).⁶ Further, Russ Berrie claims that the molecular weight of mineral oil means that it is a liquid at room temperature; whereas, petroleum wax is a solid. Russ Berrie notes that the addition of gelling agents to the mineral oil turns it into a gel.

Russ Berrie claims that the NCA's assertion in its comments dated November 22, 2002, that Dollar Tree's candles are semi-solid paraffin wax is inaccurate. Russ Berrie argues that, according to the *Materials Handbook* (1971, *Tenth Edition*), pages 580 and 581, paraffin wax and paraffin oil are separate and distinct products. Russ Berrie contends that the refining process which separates the petroleum distillate into two different products, paraffin oil and paraffin wax, means that candles made from paraffin oil do not contain any paraffin wax. Russ Berrie argues that Dollar Tree's gel candles do not contain any "wax" at all. Russ Berrie claims that, contrary to the NCA's opinion, which considers wax to include "semi-solid" material, *The Condensed Chemical Dictionary* (1971, *Eighth Edition*), page 936, defines "wax," as being "solid at room temperature." Russ Berrie holds that the term "gel" is defined by the same source (page 412) as: "{a} colloid in which the disperse phase has combined with the continuous phase to produce a viscous, jelly-like product {a liquid}." Moreover, Russ Berrie claims that since gel candles are made of a viscous and flowing jelly-like substance which is encapsulated by a somewhat thicker jelly "coating," these candles are not solid. Thus, Russ Berrie argues that this gel should not be considered as a wax of any sort. Therefore, Russ Berrie argues that the three involved candles should not be included within the scope of the Order.

Legal Framework

The Department examines scope requests in accordance with the Department's scope regulations, which may be 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,

⁶ A "dalton" is a unit of mass equal to one-half the mass of the most abundant isotope of carbon, carbon 12, which is assigned a mass of 12. See search results at www.dictionary.com for "dalton."

the initial investigation, and the determinations of the Secretary (including prior scope determinations) and 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 after consideration of all the 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.

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

The Department clarified the scope of the Order in relation to certain novelty candles. See Russ Berrie Ruling at 1194. In 1987, the Department issued a notice to the United States Customs Service (since renamed 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.

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.”⁷ 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.”⁸ 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

⁷ 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).

⁸ Novosteel SA v. United States, 284 F.3d 1261, 1264 (Fed. Cir. 2002).

products.”⁹ Thus, as applied to this Order, there is no requirement, nor is it possible, for all the shapes of candles to be listed.¹⁰ 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.

However, 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 July 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.

⁹ Id.

¹⁰ 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 of Dollar Tree's Candles

With respect to the involved request, we find that for the reasons outlined below, Dollar Tree's gel candles are included within the scope of the Order.

Dollar Tree argues that its three gel candles (with SKU 162394) should not be included within the scope of the Order because they are derived from white oil and do not contain petroleum wax. With respect to one of these three gel candles, Dollar Tree also argues that this candle incorporates "symbolic motifs of Christmas," and should, therefore, not be included within the Order's scope.

With respect to the novelty candle argument, we find that the involved candle does not qualify for the holiday exception. The Department has ruled in the past that candles not containing "scenes or symbols specifically related to a holiday or other special event" are within the scope of the Order, because their use is not attributable solely to the Christmas holiday. See e.g., Russ Berrie Scope Ruling; see also Final Scope Ruling - Petroleum Wax Candles from the PRC; Star Merchandise Inc. (Star)(July 27, 1994)(the Department determined not to include a "snowman" candle within the scope of the Order where the candle was in the shape of a snowman with a red Santa hat, cradling a small gift in one arm, and a small Christmas tree in the other.) Nothing about the candle provides any indication that the candle is a Christmas candle. There are no scenes or symbols or motifs that are clearly limited to the Christmas holiday. Dollar Tree's clear gel candle in the clear glass container, with three singularly placed items and silver-colored gravel on the bottom, does not qualify for the holiday exception. While the "snowman" is discernible, the other two items that Dollar Tree argues are "symbolic motifs" of Christmas are not clearly discernible. For example, one appears to be a ginger bread house and the other item appears to be an evergreen tree with orange and white decorations. However, in order to qualify for the holiday novelty exception, the candles scenes, symbols, or motifs need to be specific to the Christmas holiday, not merely an evocation of the winter season. Thus, we find that the involved candle does not qualify for the 1987 novelty candle exception, and thus is included within the scope of the Order.

More broadly Dollar Tree argues that all three of the gel candles (with SKU 162394) should not be included within the scope of the Order because they are derived from white oil and do not contain petroleum wax.

The test results submitted by Dollar Tree indicate that these candles are composed of 95.2 percent white oil; however, the testing laboratory does not indicate in its results what testing method the testing laboratory used to analyze Dollar Tree's candles.¹¹ The NCA argues in its comments that the test results submitted by Dollar Tree are not acceptable because there is no indication that the tests were conducted in the United States and using appropriate Customs testing methods. In past rulings, the Customs testing methods, 34-07 and 34-08, were considered acceptable testing methods by the

¹¹ See the testing certificate which is included as part of Dollar Tree's August 1, 2002, request.

Department. See Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China (A-570-504), Leader Light, (December 12, 2002) (Leader Light); see also Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China (A-570-504), Atico International, Inc., (November 1, 2002). According to the NCA, and unrebutted by other parties in these scope proceedings, only laboratory tests conducted in the United States and using Customs test methods that are acceptable for determining these candles' components can be used to determine whether a candle is subject to the Order.

The test certificate submitted as part of Dollar Tree's August 1, 2002, scope request does not indicate the testing methodology employed, nor does it make clear whether a U.S. laboratory conducted the testing. It has been the Department's practice to require that parties filing a scope request submit test results from an independent testing facility in the United States in order to establish that an acceptable testing methodology was used. See FYEO Ruling; see also Leader Light. We agree with the NCA that the test results submitted by Dollar Tree in its scope request do not fulfill this requirement. In addition, the test certificate does not indicate the test methods employed such that we are able to determine whether an acceptable test methodology (e.g., Customs Methods 34-07 or 34-08) was utilized to determine the candles' composition.

Even if the "Janco Test" report that Dollar Tree submitted with its request had used an acceptable test methodology, we would find that Dollar Tree's gel candles are within the scope of the Order because we have found, contrary to Russ Berrie's rebuttal comments, that there is no distinction in the actual chemical composition of gel candles and traditional wax candles. See Final Scope Ruling - Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China (A-570-504); Burlington Toiletries International, Limited Gel Candle (March 25, 2003)(Burlington Scope Ruling). In the Burlington Scope Ruling, we stated:

In addition, we determine that the rubbery texture of Burlington's gel candle falls within a reasonable interpretation of a solid candle. Finally, we note that the basic features, ornamentation, burning, and aroma characteristics of Burlington's gel candle are not unique or unlike those of in-scope candles covered by the Order.

See Burlington Scope Ruling at 7.

Accordingly, the Department has determined that it is appropriate to include Dollar Tree's candles within the scope of the Order, because we have found that there is no distinction in the actual composition of gel candles and traditional wax candles.

Recommendation

We recommend finding that Dollar Tree’s three gel candles (all with SKU 162394) in the involved request should be included within the scope of the Order, because we find that there is no distinction between petroleum wax and gel candles. Thus, we find that Dollar Tree’s three gel candles (all with SKU 162394) should be included within the scope of the Order. Furthermore, Dollar Tree’s gel candle containing a “snowman” and two other singularly placed objects does not qualify for the novelty exception as a holiday candle, because its use is not limited to the Christmas holiday.

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