



UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

JUN 25 2004

A-570-831
Scope Inquiry
Public Document
AD/CVD 5: JOF

MEMORANDUM FOR: Jeffrey May
Deputy Assistant Secretary
Import Administration, Group I

FOR PUBLIC FILE

FROM: Mark Ross *MHR*
Acting Office Director
AD/CVD Enforcement 5

SUBJECT: Scope Ruling in the Antidumping Duty Order on Fresh Garlic from
the People's Republic of China

SUMMARY

On May 11, 2004, Coppersmith Inc. and Amexim Inc. (collectively, Amexim) filed an application for a scope ruling pertaining to "garlic cloves in brine." Amexim claimed that its garlic is blanched and pickled, which fundamentally changes the characteristics of the garlic such that it is no longer fresh and, therefore, outside the scope of this order.

Based on our analysis of the information on the record, we recommend that the garlic in question be considered within the scope of this order because there is insufficient information on the record to conclude that Amexim's "garlic cloves in brine" is anything but provisionally preserved. Moreover, even if the garlic were not considered provisionally preserved, we find that Customs Rulings of the U.S. Customs and Border Protection (CBP) indicate that the product in question would be classified under Harmonized Tariff Schedule of the United States (HTSUS) number 2005, consistent with the scope of this order. Finally, the exclusion language pertaining to the further processing of garlic by the addition of heat processing does not apply to Amexim's merchandise.

BACKGROUND

In Antidumping Duty Order: Fresh Garlic From the People's Republic of China, 59 FR 59209 (November 16, 1994), the Department described the scope for this case as follows:

The products subject to this antidumping duty order are all grades of garlic, whole or separated into constituent cloves, whether or not peeled, fresh, chilled, frozen, provisionally preserved, or packed in water or other neutral substance, but not prepared or preserved by the addition of other ingredients or heat processing. The differences between grades are based on color, size, sheathing and level of decay.

The scope of this order does not include: (a) Garlic that has been mechanically harvested and that is primarily, but not exclusively, destined for non-fresh use; or (b) garlic that has



been specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed.

The subject merchandise is used principally as a food product and for seasoning. The subject garlic is currently classifiable under subheadings 0703.20.0000, 0710.80.7060, 0710.80.9750, 0711.90.6000, and 2005.90.9500 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

The order goes on to say:

In order to be excluded from the antidumping duties ordered in this notice, garlic entered under the HTSUS subheadings listed above, that is (1) mechanically harvested and primarily, but not exclusively, destined for non-fresh use; or (2) specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed, must be accompanied by declarations to the Customs Service to that effect.

The petition concerning this order was filed on January 31, 1994, and the Notice of Final Determination of Sales at Less Than Fair Value: Fresh Garlic from the People's Republic of China (Final Determination) in the less-than-fair-value investigation was published in the Federal Register on September 26, 1994, at 59 FR 49058.

On March 1, 2004, the Department of Commerce (the Department) received an application for a scope ruling from Amexim. In its application, Amexim requested that the Department determine that the antidumping duty order on fresh garlic from the People's Republic of China does not apply with respect to "garlic cloves in brine" because the garlic is blanched and pickled. Amexim claimed that its garlic is heat processed by being blanched in boiling water for five minutes. Amexim also claimed that its garlic is pickled in 22-degree salinity brine for two months, which thereby changes the garlic's characteristics from fresh to pickled.

On March 19, 2004, we sent a letter to Amexim stating that, "{i}n order to evaluate your {Amexim's} request and the information presented therein, we require additional information." Our request for additional information focused on the blanching and pickling process. We asked Amexim to explain the blanching process in detail, what happens to the garlic during the blanching process, the purpose of the blanching process, and why it believes that the blanching process classifies as heat processing. We also asked Amexim to explain the pickling process in detail, including what happens to the garlic during the pickling process, and to explain and demonstrate with documentation how its "garlic cloves in brine" can be distinguished from garlic cloves in brine which have not been pickled, with particular attention given to the physical characteristics, the effect of the pickling process on the garlic, and the packaging of the garlic. Finally, we asked whether the garlic used by Amexim was mechanically harvested or harvested by hand.

On March 23, 2004, the Department received a partial response to its request for information. The response consisted of an improperly filed one-page letter from Zhejiang Cereals, Oils and Foodstuffs I/E Co., Ltd., the producer of the merchandise at issue, and did not answer some very important questions we asked in our March 19, 2004, letter. With respect to questions about the blanching process, despite our requests, neither the producer nor Amexim explained the process in detail, nor what happens to the garlic during the blanching process, nor why the blanching process classifies the garlic as heat processed. Amexim only explained that the purpose of the blanching process is to rid the garlic clove's surface of peroxidase and to stop the garlic from sprouting. With respect to questions on the pickling process, they did not explain the pickling process in detail, including what happens to the garlic during the pickling process, nor did they explain and demonstrate with documentation how the "garlic cloves in brine" could be distinguished from garlic cloves in brine which have not been pickled. Amexim did claim that fresh garlic is shipped using "reefer" refrigerated containers and that its "garlic cloves in brine" is shipped using normal containers, but it did not provide documentation to support the claim as we requested. Finally, Amexim did not explain whether its garlic was mechanically harvested or harvested by hand. Amexim did not provide any additional information in its March 23, 2004, submission and did not provide any documentation supporting its claims in either submission.

As a result of all of these deficient responses, on April 15, 2004, the Department sent a letter to Amexim informing it that we could not make a determination on its request because we did not have enough information.

On May 11, 2004, Amexim resubmitted its request for a scope ruling. Its new request contained its previous submissions and provided some additional information. Essentially, the primary new piece of information provided by Amexim was its description of the harvesting process. Although Amexim claimed that it mechanically harvested the garlic, its illustrative description of the harvesting process demonstrated that the garlic was, in fact, harvested by hand.

PROCEDURE

The regulations regarding scope rulings are provided under 19 CFR 351.225. Subsection 351.225(d) states that, if the Department can determine, based solely upon the application and the descriptions of the merchandise referred to under subsection 351.225(k)(1) whether a product is included within the scope of the order, the Department will issue a final ruling as to whether the product is included within the order. Under subsection 351.225(k)(1), the Department is directed to take into account the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the ITC in its consideration of whether a product is included within the scope of an order. If, after initiation of a scope inquiry (see subsection 351.225(e)), the descriptions identified under subsection 351.225(k)(1) are not dispositive, the Department is directed to consider the following criteria: (1) the physical characteristics of the product; (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. See 19 CFR 351.225(k)(2). This determination may take place with or without a formal scope inquiry. See 19 CFR 351.225(d) and (f).

ANALYSIS

In Amexim's application for a scope inquiry, it describes its product as "garlic cloves in brine" entered under the HTSUS number 0711.90.6500 and ultimately used to stuff olives.

In determining whether a product is covered by the scope of an order, the "predicate for the interpretive process is ... the language in the order itself." Duferco Steel, Inc. v. United States, 296 F. 3d 1087, 1097 (Fed. Cir. 2002). Thus, before reviewing the other sources of information listed in 19 CFR 351.225(k)(1), the Department looked to the language of the scope of the Order. The scope of the Order specifically covers fresh garlic as well as garlic that has been "provisionally preserved, or packed in water or other neutral substance." Amexim asserts that its merchandise was preserved during the production process. The question for the agency, however, is whether or not the alleged preservation should be considered "provisional" for purposes of the enforcement of the Order. Also, as stated in the Order, the scope specifically excludes garlic that has been "prepared or preserved by the addition of other ingredients or heat processing." Neither the terms "provisionally preserved" nor "prepared or preserved by the addition of ... heat processing" are defined in the language of the Order.

The Order specifically references the HTSUS numbers 0703, 0710, 0711, and 2005 as describing merchandise covered by the scope of the Order. The Order further explains that the HTSUS subheadings are provided for convenience and Customs purposes, but are not dispositive. Nonetheless, in determining the merchandise covered by the scope of the Order, the language of these provisions is beneficial in determining what the terms "provisionally preserved" and "prepared or preserved by the addition of ... heat processing" mean for purposes of this scope inquiry.

It is clear that a great deal of the language in the scope originated with terms taken straight from the Harmonized Tariff Schedule. The terms "fresh," "chilled," "frozen," and "packed in water or other neutral substance" all originate from the CBP's descriptions of HTSUS numbers 0703, 0710, and 2005. More importantly, the term "provisionally preserved" originated with the HTSUS number 0711. On the other hand, none of these HTSUS numbers refer to preservation specifically "by the addition of ... heat processing."

The scope as offered in the petition did not provide for HTSUS number 0711, nor did it provide for an exclusion for products that included additional ingredients or additional heat processing. However, in the Notice of Preliminary Determination of Sales at Less Than Fair Value: Fresh Garlic from the People's Republic of China, 59 FR 35310, 35311 (July 11, 1994) (Preliminary Determination), the Department included this provision in its description of the subject merchandise and explained that "the scope description provided above differs from the scope description used by the Department in its notice of initiation. Changes to the scope include (a) the addition of more concise language (and additional HTSUS subheadings) related to the packing of the subject merchandise, and (b) additional language to exclude further processed products." The Final Determination retained the scope language from the Preliminary

Determination, and the petition and the International Trade Commission's determination¹ did not address these particular provisions.

Accordingly, because the Department, by its own words, adopted the phrase "provisionally preserved" from HTSUS number 0711, the Department reviewed Customs Rulings addressing this provision in Order to assist in the interpretation of this phrase.

CBP has stated the following in considering whether vegetables are considered "provisionally preserved:"

Heading 0711, HTSUS, covers vegetables provisionally preserved (for example, by sulfur dioxide gas, in brine, in sulfur water or in other preservative solutions), but unsuitable in that state for immediate consumption. The term "provisionally preserved" is not defined. However, to qualify as provisionally preserved, the statutory heading requires that the vegetables must be in a preservative substance, and that they are unsuitable in that state for immediate consumption.

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and General Rules of Interpretation of the HTSUS. The EN for heading 0711 indicate that the vegetables covered by the heading are treated solely to ensure their provisional preservation during transportation or storage provided they remain unsuitable for immediate consumption in that state and are mainly used as raw materials for manufacturing purposes. However, the EN excludes from the heading goods which, in addition to having been provisionally preserved in brine, have also been specially treated such as by soda solution and by lactic fermentation.

See Jalapeno Peppers and Other Vegetables Provisionally Preserved; HQ 957625 (February 8, 1996). In that case, CBP determined that, because the solution which preserved the peppers had a salt content of 10.5 percent and were, therefore, unsuitable for immediate consumption, they were "provisionally preserved" as that term is used in HTSUS 0711.

For purposes of this scope inquiry, the Department does not believe that CBP's interpretation of this provision conflicts in any way with the scope of the Order and, in fact, informs the language of the Order. Amexim advised the Department that its merchandise was classified as subject merchandise by CBP at the time of entry. We agree that Amexim's "garlic cloves in brine" are "provisionally preserved" and are, therefore, covered by the scope of the Order. First, the garlic is in a preservative solution when it enters the United States (brine consisting of salt at 14-16 baume degree). Second, the garlic is in a solution which makes it unsuitable for immediate consumption and has to be processed after importation to make it suitable for consumption. Third, there is no indication on the record that the garlic has been specially treated by soda solution or by lactic fermentation prior to importation. Finally, there is no information on the

¹ Fresh Garlic from The People's Republic of China, Investigation No. 731-TA-683, Publication 2825, Pages II-4-8 (November 1994).

record to suggest that the garlic has not been treated solely to ensure its provisional preservation during transport or storage prior to use. Thus, based on the record in this proceeding, Amexim has failed to show that its garlic cloves should be anything other than classified as “provisionally preserved,” as that term is used in HTSUS 0711 and adopted by the scope of the Order.

In addition, the scope of the Order includes an additional HTSUS number, 2005, that would likely apply in this case if Amexim’s “garlic cloves in brine” were not considered “provisionally preserved” in accordance with HTSUS 0711. CBP has stated that “vegetables, if considered to be prepared or preserved by vinegar or acetic acid, would be classifiable in heading 2001 and, if prepared or preserved by other than vinegar or acetic acid, would be classifiable in heading 2005.” See *Vegetables – Pepperoncini and Giardiniera in Preservative Solution*, Customs Ruling HQ 952738 (January 27, 1993); *Salsa Sauce*, Customs Rulings HQ 085838 (December 21, 1989); *Vegetables – Pepperoncini and Giardiniera, and Olives in Preservative Solution*, HQ 951741 (September 15, 1992); and *Whole Artichokes in Vinegar*, HQ 959313 (February 20, 1997) (each holding that vegetables with acetic acid of less than .5 percent cannot be classified under HTSUS 2001). There is no information on the record which would indicate that Amexim’s “garlic cloves in brine” used vinegar or acetic acid in the “pickling process.” Thus, even if Amexim’s “garlic cloves in brine” were not properly classified as “provisionally preserved” under HTSUS 0711, this merchandise still satisfies the description of the merchandise as reflected by HTSUS 2005. Although, as we have explained, the Department has found that Amexim’s merchandise is “provisionally preserved” pursuant to HTSUS 0711, if such a decision were somehow called into question, the inclusion of HTSUS 2005 in the language of the scope of the Order would still warrant treating this merchandise as subject to the Order.

With respect to the express exclusion from the Order of merchandise which is further processed by the “addition of heat processing,” the Department also does not believe that Amexim’s merchandise meets the requirement of this language. Amexim claims that it peels the garlic in the People’s Republic of China and then boils it for five minutes in water with a temperature higher than 95 degrees before packaging the product and shipping it to the United States. Amexim asserts that the purpose of the blanching process is to stop the garlic from growing and to remove the peroxides from the clove’s surface. Amexim also argues that this blanching process is heat processing because it changes the garlic’s characteristics.

The Department does not contest that the blanching process has a heating element to it. However, as the Department stated in the Preliminary Determination at 59 FR 35311, the purpose of adding the exclusion language was to “exclude further processed products.” The product exported by Amexim to the United States is not merchandise which has been “further processed” by the addition of heat to the garlic. The garlic is cleaner, and perhaps does not grow as a result of the use of blanching, but the garlic is essentially the same product both before and following the blanching process. On the other hand, if this merchandise were roasted before shipment to the United States, then, as a result of the “addition of other ingredients or heat processing,” such a product might be considered excluded from the Order (depending on the facts of the case). In contrast, however, Amexim’s U.S. entries in this cases were not “further processed” by the blanching process which would give any meaning to the terms of the

exclusion. Accordingly, the Department has determined that Amexim's merchandise is not merchandise "prepared or preserved by the addition of heat processing."

Amexim also argues that the garlic should not be included within the scope of this order because its end use is to stuff olives. The Department, however, does not consider the end use of the garlic relevant for purposes of making this scope determination.

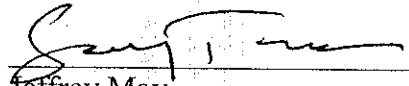
Amexim claims that the garlic is mechanically harvested. Mechanically harvested garlic that is primarily, but not exclusively, destined for non-fresh use is outside the scope of the order. Despite Amexim's claim, however, its description of the harvesting process clearly shows that the garlic is harvested by hand. For example, workers pick the garlic from the ground, remove excess dirt from the garlic cloves, and place the garlic in a truck by hand.

Finally, we have a long history of withholding the benefits of a proceeding when a party does not provide us with necessary information. Amexim has not provided adequate factual information to support its positions and claims, did not answer all the questions contained in the March 19, 2004, letter, provided incomplete responses, and is the only party that controls this information. Therefore, we find that Amexim has not demonstrated that its product is outside the scope of this order.

RECOMMENDATION

For the reasons outlined above, we recommend that you determine that the shipments of "garlic cloves in brine" by Amexim are within the scope of the antidumping duty order on fresh garlic from the People's Republic of China.

Agree Disagree

for 

Jeffrey May
Deputy Assistant Secretary
for Import Administration, Group I

6/25/04

(Date)

