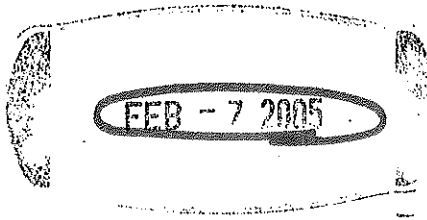




UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230



A-570-882
Scope Review
Public Document
China/NME 8: CPS

FOR PUBLIC FILE

To All Interested Parties:

On July 22, 2004, the Department of Commerce (the Department) received a request from the Cometals Division of Commercial Metals Company (Cometals) to exclude black aluminum oxide, also known as black fused alumina or artificial black emery, from the scope of the antidumping duty order on Brown Aluminum Oxide from the People's Republic of China (the PRC).

Upon review of the record, the Department determined that the descriptions of the merchandise as contained in the petition, the initial investigation, and the determinations of the Department and the International Trade Commission (ITC) are dispositive with respect to the merchandise at issue. Therefore, in accordance with 19 CFR § 351.225(d), the Department has determined that black aluminum oxide is not included in the scope of the antidumping duty order on Brown Aluminum Oxide from the PRC.

Enclosed is a memorandum containing the Department's analysis. We will notify the U.S. Customs and Border Protection of this decision. If you have any questions, please contact Coleen Schoch at (202) 482-4551 or Brian Ledgerwood at (202) 482-3836.

Sincerely,

Laurie Parkhill
Office Director, Office 8
China/NME Group
Import Administration

Enclosure





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

A-570-882
Scope Inquiry
Public Document
China/NME 8:CPS

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

FROM: Laurie Parkhill *LP*
Director
AD/CVD Enforcement, Office 8

SUBJECT: Final Scope Ruling on Whether Black Aluminum Oxide Is
Excluded from the Scope of the Antidumping Duty Order on
Brown Aluminum Oxide from the People's Republic of China

Summary

On July 22, 2004, the Department of Commerce (the Department) received a request from the Cometals Division of Commercial Metals Company (Cometals) to exclude Black Aluminum Oxide, also known as Black Fused Alumina or Black Emery, from the scope of the antidumping duty order on Brown Aluminum Oxide from the People's Republic of China (PRC).¹ On August 9, 2004, the domestic interested parties, Washington Mills Company, Inc., Treibacher Schleifmittel Corporation, and C-E Minerals (collectively, Washington Mills), responded to Cometals' submission. For the reasons set forth below, we recommend that you determine that black aluminum oxide is outside excluded from the scope of this order.

Scope Ruling Request

In its scope ruling request, Cometals describes black aluminum oxide as follows:

...an abrasive material comprised principally of aluminum oxide in a gray, dark gray, or black color. Unlike natural black emery, black fused alumina is produced synthetically rather than derived naturally from the earth. It is produced by mixing and melting bauxite and iron scrap at extremely high temperatures in an electric arc furnace. The resulting material is either ground into powder or sold in blocks and wheels. It is then sold for use in grinding and polishing materials such as stainless steel and optical glass.

¹ See Antidumping Duty Order: Brown Aluminum Oxide From the People's Republic of China, 68 FR 55589 (September 26, 2003) (the Antidumping Duty Order).



As a synthetic product, black fused alumina falls under the tariff classification for artificial corundum, see subheading 2818.10.2000, Harmonized Tariff Schedule of the United States (HTSUS): Artificial corundum, in grains, or ground, pulverized, or refined. See U.S. Customs & Border Protection Ruling NY K83894 (May 5, 2004). This tariff subheading does not distinguish among different colors of artificial corundum (fused alumina).²

Cometals submits that black aluminum oxide is not within the scope of the order because “the petition, the Notice of Initiation, and the Antidumping Duty Order all specify that the product at issue is refined *brown* artificial corundum” (emphasis in original).³ Cometals provides documentation to support its assertion that brown aluminum oxide and black aluminum oxide are two separate and distinct products. Attachment 5 to Cometals’ July 22, 2004, request is a website print-out which describes brown aluminum oxide and artificial emery. Attachment 6 is an excerpt from the online catalog of a U.S.-based glass warehouse that shows brown aluminum oxide and black aluminum oxide listed and priced separately and distinctly. Cometals also observes that the petitioner “expressly excluded artificial corundum in other colors from the scope of this investigation” in its original petition.⁴

Additionally, in the event “the descriptions of the merchandise in the petition in Commerce’s determinations are not dispositive” and its request is not decided according to 19 CFR § 351.225(k)(1), Cometals presents its argument for excluding black aluminum oxide according to the requirements of § 351.225(k)(2). Cometals concludes that “black fused alumina is different from brown aluminum oxide in all five” of the criteria outlined in 351.225(k)(2).⁵ Therefore, Cometals asserts that the black aluminum oxide is outside the scope of the order through either method elected by the Department.

In its October 12, 2004, submission, Cometals asserts that the chemical composition of black and brown aluminum oxide differ “in key respects.” Cometals states that black aluminum oxide contains “approximately 55-80 percent aluminum oxide....the remainder consists of iron oxide and various impurities.”⁶ On the other hand, Cometals continues, brown aluminum oxide contains approximately 93-97 percent aluminum oxide. According to Cometals, this is a result of

² See Cometals’ Request for Scope Ruling Finding that Black Fused Alumina from the PRC is Not Subject to the Antidumping Order on Brown Aluminum Oxide from the PRC (July 22, 2004) (Scope Request) at pages 1-2.

³ Id at pages 2-3.

⁴ Id.

⁵ Id.

⁶ See Cometals’ Request for Scope Ruling Finding that Black Fused Alumina from the PRC is Not Subject to the Antidumping Order on Brown Aluminum Oxide from the PRC (October 12, 2004) at pages 1-2 (Second Scope Request).

the production process that must be used to manufacture brown oxide and it explains that this production process incorporates higher quality bauxite ores and includes “additional steps to remove impurities, such as iron oxide, from the raw material.”⁷ Finally, Cometals submits information demonstrating that it has imported black aluminum oxide from the PRC since 1999.⁸

Domestic Interested Parties’ Comments

In its rebuttal to the Department, Washington Mills requests that the Department “not summarily grant the requested exclusion from the antidumping order” and instead conduct “a detailed and complete scope inquiry.” It asserts that, because there is no evidence “that black aluminum oxide was ever considered by either the Department or the Commission,” then the Department “cannot unambiguously support exclusion of the black product” without further investigation.⁹

Washington Mills also suggests that a full scope inquiry pursuant to 19 CFR § 351.225(j) covering “later developed merchandise” may be necessary if the Department determines that black aluminum oxide is a new product.¹⁰

The domestic interested parties did not submit a rebuttal to Cometals’ October 12, 2004, submission.

Analysis

Pursuant to 19 CFR § 351.225(c)(2), the Department will issue a final ruling or an initiation within 45 days of its receipt of an application for a scope ruling. In order for the Department to issue a final ruling without a formal inquiry, the face of the application must provide the Department with all of the information it needs to make a ruling. *See* 19 CFR § 351.225(d). On matters concerning the scope of an antidumping duty order, the Department 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 ITC). *See* 19 CFR § 351.225(k)(1). If the Department determines that these descriptions are dispositive, it will issue a final scope ruling as to whether or not the subject merchandise is covered by the order. *See* 19 CFR § 351.225(d).

In this case, as provided for under 19 CFR § 351.302(b), the Department delayed taking action on the scope ruling request initially. By extending the deadline, the Department had the

⁷ *Id.*

⁸ *Id.* at Exhibits 1 and 2.

⁹ *See* Letter to the Secretary Re: Scope Inquiry for Black Aluminum Oxide from the PRC (August 9, 2004) at pages 1-3.

¹⁰ *Id.*

opportunity to meet with the parties involved and all parties had the opportunity to clarify their respective submissions. See Memorandum to the File Re: Meeting with Respondent Cometals (September 10, 2004) and Memorandum to the File Re: Meeting with Petitioners (September 10, 2004). After reviewing all the information on the record, the Department can determine, in accordance with 19 CFR § 351.225(d), whether black aluminum oxide is within the scope of the order based on the application and the descriptions of the merchandise in the Antidumping Duty Order. The scope of the antidumping duty order in this case is as follows:

The merchandise covered by this investigation is ground, pulverized or refined brown artificial corundum, also known as refined brown aluminum oxide or brown fused alumina, in grit size of 3/8 inch or less. Excluded from the scope of the investigation is crude artificial corundum in which particles with a diameter greater than 3/8 inch constitute at least 50 percent of the total weight of the entire batch. The scope includes brown artificial corundum in which particles with a diameter greater than 3/8 inch constitute less than 50 percent of the total weight of the batch. The merchandise under investigation is currently classifiable under subheading 2818.10.20.00 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.¹¹

From this scope description, the Department determines that black aluminum oxide is a different product than the merchandise covered by the Antidumping Duty Order. The scope of the antidumping order is specifically limited to “brown aluminum oxide” and, therefore, the Department must find any product that is not brown aluminum oxide to be outside the scope of the order. We have found that there is enough information currently on the record to make this determination.

In addition to the submissions placed on the record, the Department relied upon the petition, the initial investigation, and the determinations of the Secretary for guidance. See Eckstrom Indus., Inc. v. United States, 254 F.3d 1068, 1072 (2001). The petition requested an investigation of brown aluminum oxide, acknowledged the existence of other colors, and requested that the investigation remain limited to the brown product.¹² The petition also excluded white and pink aluminum oxide specifically, both of which are produced domestically by the petitioner.¹³ The

¹¹ See Anti-Dumping Duty Order.

¹² See Petition for the Imposition of Antidumping Duties: Refined Brown Aluminum Oxide from China (November 20, 2002) (Petition) at pages 1-2 and 5-7.

¹³ Id.

determined that each was a separate product, and concluded that brown aluminum oxide was the only included item.¹⁴

The scope of the Antidumping Duty Order states expressly that the product covered by this order is “brown aluminum oxide or brown fused alumina.” According to the United States Court of Appeals for the Federal Circuit, where the language of the scope is clear, the Department cannot interpret an order in a manner that impermissibly modifies it nor can it change the scope of a final order in a way contrary to its terms. *See Duferco Steel, Inc. v. United States et. al.*, 296 F. 3d at 1097 (2002).

The Department does not agree with Washington Mills’s argument that the Department cannot exclude black aluminum oxide from the scope of the order without a full inquiry because the black-colored product was never considered explicitly in the investigative process. In its petition for the investigation, in Section E: “Scope of Commerce Department Investigation of Subject Merchandise, Description, and Physical Characteristics of Merchandise,” the petitioner wrote:

Other colors of artificial aluminum oxide are also imported under the same HTS as brown aluminum oxide, but in much smaller quantities. Other colors of aluminum oxide are not like or directly competitive with refined brown aluminum oxide and are not the subject of this petition.¹⁵

After reviewing the petition and the record of the investigation, the Department finds that the petition did not cover any other colors of aluminum oxide except for brown.

Further, we find that Washington Mills’s request for a full scope inquiry pursuant to either §351.225(j) or §351.225(k)(2) is unnecessary. Contrary to Washington Mills’s assertion, black aluminum oxide is not a newly developed product and has been imported into the United States prior to the investigation.¹⁶ Additionally, as set forth above, when the plain language of the order and the documents in the investigation are clear, it is not necessary for the Department to analyze the five criteria outlined in the Department’s regulations or in Section 781(d) of the Act. *See* 19 CFR § 351.225(c), (j), and (k). Here, it is clear, by their names, that *brown* aluminum oxide and *black* aluminum oxide are two distinct products.

For the above reasons, we have concluded that, consistent with the petition, the anti-dumping duty order, and the ITC determination, black aluminum oxide is not within the scope of the anti-dumping duty order on Brown Aluminum Oxide from the PRC.

¹⁴ *See* U.S. International Trade Commission Report: Refined Brown Aluminum Oxide from China, Investigation No. 731-TA-1022 (Preliminary) (January 2003), at pages 5, I-2, and I-3; U.S. International Trade Commission Report: Refined Brown Aluminum Oxide from China, Investigation No. 731-TA-1022 (Final) (November 2003) at pages 5, I-2, and I-3.

¹⁵ *See* Petition at page 6.

¹⁶ *See* Second Scope Request at exhibits 1-2.

Recommendation

We recommend that the Department determine that black aluminum oxide is outside the scope of the antidumping duty order on Brown Aluminum Oxide from the PRC. In notifying U.S. Customs and Border Protection (CBP) of this decision, we recommend that we describe the product we are finding outside the scope of the order as "ground, pulverized or refined black aluminum oxide, also known as black fused alumina or black emery, with an aluminum oxide content of 55-80 percent."

Agree Disagree



Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

2/7/05
Date

