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UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
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Scope Inquiry
Public Document
AD/CVD 4: ZP

MEMORANDUM FOR: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

FROM: Abdelali Elouaradia
Office Director
AD/CVD Operations, Office 4

REGARDING: Polyethylene Retail Carrier Bags from the People's Republic of
China, Malaysia, and Thailand

SUBJECT: Final Scope Ruling for DMS Holdings, Inc.

SUMMARY

On June 8, 2007, the Department of Commerce ("the Department") received a scope request from DMS Holdings, Inc. ("DMS"), to determine whether certain "hospital bags" that DMS imports from the People's Republic of China ("PRC") are within the scope of the antidumping duty order on Polyethylene Retail Carrier Bags ("PRCBs") from the PRC. See Antidumping Duty Order: Polyethylene Retail Carrier Bags from the People's Republic of China, 69 FR 48201 (August 9, 2004) ("Order").

We have received comments from DMS, the Polyethylene Retail Carrier Bag Committee ("the petitioners") and Medline Industries, Inc. ("Medline"), an interested party to the proceeding. Upon review of all the submitted comments, the Department has determined that all 43 bags listed in DMS's scope request are outside the scope of the Order.

PROCEDURE

The regulations governing the Department's antidumping scope determinations are found at 19 CFR 351.225. On matters concerning the scope of an antidumping duty order, the Department first examines the application, the descriptions of the merchandise contained in the petition, the initial investigation, the determinations of the Secretary (including prior scope determinations) and the product description in the final determination made by the International Trade Commission ("ITC"). This determination may take place with or without a formal inquiry.



If the Department determines that these descriptions are dispositive of the matter, the Department will issue a final scope ruling as to whether or not the merchandise in question is covered by the order. See 19 CFR 351.225(k)(1). If the Department finds that it cannot make a determination based solely on the application and the descriptions of the merchandise referred to in paragraph (k)(1) of the regulations, the Department will initiate a formal scope inquiry. If the descriptions of the merchandise contained in the petition, investigation, and past determinations made by the Department and the ITC are not dispositive, the Department will consider the five factors set forth at 19 CFR 351.225(k)(2).

In this case, the Department evaluated DMS's request in accordance with section 351.225(k)(1) of the Department's regulations and we find that the criteria contained in section 351.225(k)(1) of the regulations are dispositive with respect to whether DMS's hospital bags are covered by the scope of the Order.¹ We find it unnecessary to consider the additional factors in section 351.225(k)(2) of the Department's regulations.

The scope request submitted by DMS covers 43 different models of plastic bags. In the instant case, and in accordance with 19 CFR 351.225(d) and 351.225(k)(1), we find that the description of the product contained in the language of the Order is dispositive in determining whether the 43 models of plastic bags are within the scope of the Order.

Documents from the underlying proceeding deemed relevant by the Department to the scope of the outstanding Order will be made part of the record of this determination and are referenced herein. Documents that were not presented to the Department or placed on the record by the Department do not constitute part of the administrative record for this scope ruling.

SCOPE OF THE ORDER

The merchandise subject to the Order is PRCBs which may be referred to as t-shirt sacks, merchandise bags, grocery bags, or checkout bags. The subject merchandise is defined as non-sealable sacks and bags with handles (including drawstrings), without zippers or integral extruded closures, with or without gussets, with or without printing, of polyethylene film having a thickness no greater than .035 inch (0.889 mm) and no less than .00035 inch (0.00889 mm), and with no length or width shorter than 6 inches (15.24 cm) or longer than 40 inches (101.6 cm). The depth of the bag may be shorter than 6 inches but not longer than 40 inches (101.6 cm).

PRCBs are typically provided without any consumer packaging and free of charge by retail

¹ In the instant proceeding, the Department requested additional comments and rebuttal comments from interested parties. See "Memorandum To All Interested Parties" (July 19, 2007). Also, the Department requested and received additional information from DMS regarding packaging (November 21, 2007, and December 7, 2007). Additionally, the Department determined that it needed additional time to review all of the filed comments and extended the date of the final scope ruling until January 11, 2008. See "Memorandum To All Interested Parties" (December 19, 2007).

establishments, e.g., grocery, drug, convenience, department, specialty retail, discount stores, and restaurants, to their customers to package and carry their purchased products. The scope of the Order excludes (1) polyethylene bags that are not printed with logos or store names and that are closeable with drawstrings made of polyethylene film and (2) polyethylene bags that are packed in consumer packaging with printing that refers to specific end-uses other than packaging and carrying merchandise from retail establishments, e.g., garbage bags, lawn bags, trash-can liners.

Imports of the subject merchandise are classified under statistical category 3923.21.0085² of the Harmonized Tariff Schedule of the United States (“HTSUS”). This subheading also covers products that are outside the scope of the Order. Furthermore, although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of the Order is dispositive.

BACKGROUND

In its scope request, DMS provided photographs of each of the 43 models of plastic bags it imports as well as their respective packaging. DMS argues that the plastic bags are not within the scope of the Order because they are not sold into the retail trade and they contain certain features which explicitly exclude them from the scope of the Order. Specifically, DMS argues that the second exclusion of the Order, which states that “polyethylene bags that are packed in consumer packaging with printing that refers to specific end-uses other than packaging and carrying merchandise from retail establishments” is applicable to its products. According to DMS, the printing on the bags, with the exception of kit packing bags and isolation bags, refers to either biohazard disposal bags, personal belongings bags, or bags with a name of a medical facility.

The kit packing bags, according to DMS, are interim products imported from the PRC as dust covers to protect procedure kits which are in turn sold to hospitals. DMS claims that once the kit packing bags are used in the procedure kits, they are a component of such kits and should no longer be considered subject merchandise. Additionally, DMS claims that hospitals or other medical facilities are the purchasers of its plastic bags. Once the various bags fulfill their designated function, DMS claims that they are returned to a hospital or a medical facility and discarded. See DMS’s scope submission dated June 8, 2007, at 1-4.

In its scope request, DMS traces the history of the Order and provides summaries of a number of recent scope decisions. See DMS’s scope submission dated June 8, 2007, at 5-11. Based on its analysis of the original antidumping investigation, DMS concludes that the ITC’s original injury determination limited the subject merchandise to PRCBs based on product characteristics and use. PRCBs which do not share the product characteristics and uses enumerated in the Order are, according to DMS, not covered by the ITC’s injury determination and, ultimately, the Order. To

² This HTSUS number was changed effective July 1, 2005. Prior to July 1, 2005, imports of the subject merchandise were classified under statistical category 3923.21.0090 of the HTSUS.

support this conclusion, DMS cites to a recent Court of Appeals for the Federal Circuit (“CAFC”) decision in Sango International L.P. v. United States, 2006-1485, May 2, 2007, Sango International where DMS claims that the CAFC held that to make a scope determination under 19 CFR 351.225(k)(1), the Department must determine, based on substantial evidence in the record, that the paragraph (k)(1) criteria definitely answer the scope question, taking into account both the evidence that supports and detracts from the conclusion reached. In Sango International, according to DMS, the CAFC found that the focus of the antidumping investigation was on what one would consider a traditional pipe fitting while the evidence in that case indicated that the product before the Department differed from traditional pipe fittings. In the instant case, DMS claims that the evidence demonstrates that the antidumping investigation covered bags that are used to package and carry purchased goods from retail establishments. The DMS hospital bags serve, according to DMS, an entirely different purpose. Thus, according to DMS, the standard specified in Sango International applies to the instant proceeding. See DMS’s scope submission dated June 8, 2007, at 11-13.

Additionally, DMS argues that the consumer packaging in which the bags enter the United States is the same packaging in which the product is sold to the ultimate consumer, the hospital. The printing on the packaging refers to a specific end-use (e.g., “personal belongings”) in conjunction with the names of the medical suppliers that will sell the boxes of belongings bags to the hospital.

DMS also cites to a prior PRCBs scope ruling issued by the Department where, according to DMS, the Department determined that medical specimen bags imported by Consolidated Packaging, LLC were outside the scope of the Order.³ In that ruling, the Department found that the provider of diagnostic testing and health services was the ultimate consumer of the specimen bags because the bags were ultimately returned to it for destruction. This, according to DMS, made the packaging in which the specimen bags were sold to the health provider “consumer packaging.” In the instant proceeding, DMS argues that the printing on the packaging stating “For Use in Healthcare Facility” or “For Use in Procedural Kit Manufacturing” refers to a specific end-use other than packaging and carrying merchandise from retail establishments which, DMS claims, satisfies the second exclusion. *Id.* According to DMS, similar to the Consolidated Scope Ruling, its own plastic bags are sold to hospitals, the ultimate consumers, which discard them upon use.

Furthermore, in response to the Department’s supplemental questionnaire dated November 14, 2007, DMS provided evidence whereby various bags imported by DMS from the PRC are identified on the packaging by a product number that corresponds to the item ordered. In some instances, the specific end-use is also spelled out on the carton box but, in all cases, the printing on the carton boxes refers to use limited to a healthcare facility. Thus, DMS argues, just as in the

³ DMS refers to “Final Scope Ruling of the Antidumping Duty Order on Polyethylene Retail Carrier Bags from the PRC; Based on a Request Filed by Consolidated Packaging, LLC” (October 2, 2006) (“Consolidated Scope Ruling”).

Consolidated Scope Ruling, its products satisfy the second exclusion of the Order. See Response to Request for Additional Information, Annex A (November 21, 2007, and December 7, 2007).

Other Interested Parties' Comments

Upon a request for additional comments issued by the Department on July 19, 2007, DMS and the petitioners submitted comments regarding the scope request. In its comments, DMS traces the history of the original investigation and concludes that, unlike its products, the subject merchandise covered by the Order is limited to retail bags provided by merchants to customers in order to transport purchased items out of a store. See DMS Comments dated August 2, 2007, at 1-6.

Additionally, DMS argues that the second exclusion of the Order applies even when only the packaging is printed with the language indicating a non-retail use. DMS refers to the example of merchandise cited in the second exclusion of the Order, claiming that trash or lawn bags mentioned in the language of the Order do not normally bear any printing indicating a specific use. Id.

Further, DMS argues that the Consolidated Scope Ruling supports its contention that its bags are not subject to the Order because a medical facility is the ultimate consumer of plastic bags. DMS claims that, similar to the bags in the Consolidated Scope Ruling, its own hospital bags are distributed to the patients and, when they have served their purpose, are returned back to the purchaser in order to be discarded. Id.

DMS also claims that the printing on the packaging of its bags clearly indicates a non-retail use. Citing again to the Consolidated Scope Ruling, where the Department found that packaging with printing that states "for medical use only" satisfied the printing requirement of the second exclusion, DMS claims that its own cartons carry comparable printing which is consistent with the Consolidated Scope Ruling. As to the petitioners' concerns that the labeling might not be on the cartons when imported, DMS argues that the printing specifying a non-retail use is on the cartons at the time of shipment. Id.

The petitioners submitted comments on DMS's scope request on August 2, 2007. In their comments, the petitioners argue that there is no "use" exception in the Order, citing to the original investigation and a prior scope decision. Specifically, the petitioners cite to the original antidumping investigation, where they claim that the Department rejected the respondents' arguments that certain bags not used in retail should not be included within the scope of the Order. The petitioners also cite to a recent scope ruling, where the Department found that certain "sample bags" were found to be within the scope of the Order despite not being used in retail.⁴

⁴ See the petitioners' August 2, 2007, comments at Exhibit A; referring to the Issues and Decision Memorandum in Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from the People's

Further, DMS's reliance on the Consolidated Scope Ruling is, according to the petitioners, misplaced because, unlike in the Consolidated Scope Ruling, DMS's ultimate customers are patients and not hospitals. Using this argument, the petitioners claim that the containers, in which such bags are shipped to the hospitals, do not constitute "consumer packaging." Thus, according to the petitioners, the Order's second exclusion does not apply. See the Petitioners' Comments dated August 2, 2007, at Exhibit A.

Rebuttal Comments

In its rebuttal comments dated August 8, 2007, DMS reiterates its previous arguments that all its plastic bags are intended for non-retail use and, most importantly, the consumer packaging in which the bags are imported is the original packaging in which the bags entered the country. Citing to its prior submission with regard to a separate scope request dated July 20, 2007, and attached to its August 8, 2007, comments as Annex 1, DMS disagrees with the petitioners' contention that only bags with clearly non-retail printing and consumer packaging stating non-retail use satisfy the second exclusion. DMS argues that the plain reading of the Order's second exclusion refers only to consumer packaging and not whether the bags are printed with any particular design. DMS also claims that, similar to the Consolidated Scope Ruling, its ultimate customers are hospitals and not patients; thus, the second exclusion's conditions are met. See DMS Rebuttal Comments, Annex 1.

With regard to the petitioners' claim that the plastic bags covered by the Order are not limited to bags used in retail, DMS refers to the language contained in the original investigations conducted by the Department and the ITC, concluding that the subject merchandise was defined by retail carrier use. See DMS Rebuttal Comments, Annex 1, at 3-8.

Additionally, DMS claims that the two references to use made by the petitioners (see footnote 4 above) lack precedential value because: (1) the decision memorandum, as interpreted by the petitioners, would unlawfully expand the scope of the Order beyond the scope of the ITC's final injury determination; (2) the Department's Dimensions Trading Scope Ruling does not expand the use to non-retail application, but rather clarifies that plastic bags can be used by many types of retail establishments; and (3) the Department, in the Dimensions Trading Scope Ruling, based its decision strictly on the plain reading of the scope language while the Department should have considered the complete record of the case, including the petition and the ITC's determination.

Finally, DMS claims that the petitioners' attempts to avoid "use" as a criterion for determining scope coverage is contrary to the factors set forth in 19 CFR 351.225(k)(2), where the criterion of "ultimate use of the products" has to be considered. See DMS Rebuttal Comments, Annex 1 at 8-11.

Republic of China, 69 FR 34125 (June 18, 2004), and comments at Exhibit 1, regarding Final Scope Ruling on Whether Polyethylene Sample Bags Are Covered by the Scope of the Antidumping Duty Order on Polyethylene Retail Carrier Bags from the PRC (May 9, 2005) ("Dimensions Trading Scope Ruling").

In its rebuttal comments, Medline argues that DMS's PRCBs do not require printing on the bags themselves to satisfy the requirements of the second exclusion of the Order. Medline cites to the language of the exclusion and claims that "garbage bags, lawn bags {and} trash can-liners" do not usually contain retail printing, yet they are provided as an example of excluded merchandise. See Medline's Rebuttal Comments, dated August 7, 2007, at 1. Medline claims that the box cartons, which DMS uses to import its plastic bags, indicate use in a health care facility or in kit manufacturing, neither of which is a retail activity. Id.

Medline also rejects the petitioners' argument that DMS's plastic bags are indistinguishable from subject merchandise except for the applicant's assurances that the bags will not be used for retail purposes. Medline argues that the second exclusion of the Order is not based on certifications or assurances of end use, but rather the type of packaging in which the bags are imported. Id. at 2. Medline also rejects the petitioners' reliance on the Dimensions Trading Scope Ruling, claiming that the ruling did not address the issue of non-retail packaging. Rather, according to Medline, the scope ruling addressed whether a determination based on end use alone would entail a risk of circumvention. Id.

Finally, Medline traces the history of the original investigation leading to the issuance of the Order and concludes that, unlike DMS's products, the subject merchandise covered by the Order is limited to retail bags provided by merchants to customers in order to transport purchased items out of a store. Id. at 3. Medline concludes its rebuttal arguments by urging the Department to reject the petitioners' arguments and find that DMS's various hospital bags are outside the scope of the Order. Id.

The petitioners did not provide rebuttal comments.

ANALYSIS

We have analyzed the information provided by the petitioners and DMS. The 43 plastic bags at issue meet the physical characteristics of the PRCBs covered by the scope of the Order. However, based on the provisions of 19 CFR 351.225(k)(1), we have been able to determine that the second exclusion in the Order which states that "polyethylene bags that are packed in consumer packaging with printing that refers to specific end-uses other than packaging and carrying merchandise from retail establishments, e.g., garbage bags, lawn bags, trash-can liners," applies in the instant inquiry. Specifically, DMS imports all of its PRCBs from the PRC packaged in carton boxes with printing stating "For Use in Healthcare Facility," which indicates a non-retail use. See Response to Request for Additional Information-Polyethylene Retail Carrier Bags from the People's Republic of China, November 21, 2007, at Annex 1 and Scope Ruling Application of DMS Holdings, Inc.: Additional Photo Information-Polyethylene Retail Carrier Bags from the People's Republic of China, December 7, 2007, at Annex A. Thus, the carton boxes, which represent the packaging for the non-retail consumer of the bags at issue (i.e., a medical facility), meet the requirements of the second exclusion of the Order. In seven instances, where the plastic bags are intended for use in further manufacturing of medical kits, the printing on the packaging states "For Use in Procedural Kit Manufacturing" in addition to the

name of a medical distributor, “Cardinal Health.” There is no additional packaging for these bags other than the cardboard box in which the bags are shipped.

In each of the five categories of bags DMS imports from the PRC, the record indicates that the medical facility, rather than the patient, is the last entity in the distribution chain to purchase the bags.⁵ Further, after the bags are used, they are returned back to the hospital, which in turn disposes of them. Thus, the hospital or medical facility is the consumer of the bags in question. This position is consistent with our prior scope decision where the medical lab and not the patient is the consumer, and just as in the current request, the bags were returned back to the medical establishments after use. See Consolidated Scope Ruling.

The petitioners’ argument that the scope of the Order contains no “use” exception is misplaced in the instant scope ruling. During the PRCBs investigation, the Department declined to adopt respondents’ proposal to exclude certain specific bag types by use. However, as the scope language shows, the Department did not disturb the exclusionary language at issue here, which was present in the petition. Further, the Department’s prior scope decision in the Dimensions Trading Scope Ruling, which the petitioners cite, is distinguishable from this case. The petitioners fail to acknowledge that the Department found that the second exclusion did not apply to Dimensions’ bags because they were not packed in consumer packaging.⁶ In the instant proceeding, the bags in question fall within the second exclusion because they are packed in consumer packaging with printing indicating a non-retail end-use.

With regard to the petitioners’ argument that the consumer packaging indicating medical use may actually be re-packaged in the United States after the entry, we note that there is nothing on the record indicating a basis for such allegations. The record indicates that all 43 models of plastic bags are imported in consumer packaging with printing that refers to a specific end-use other than packaging and carrying merchandise from retail establishments. Based on the record of this case, the printing on consumer packaging in question indicates that the intended end-use is for medical facilities, the consumers of the bags in question.

CONCLUSION

In summary, in accordance with 19 CFR 351.225(k)(1), our analysis indicates that medical facilities are the consumers of the merchandise in question, and that the consumer packaging indicates end-use other than packaging and carrying merchandise from retail establishments. Because all 43 bags in questions are imported in consumer packaging which satisfy the Order’s second exclusion, we conclude that all 43 models of bags should be found outside the scope of the Order.

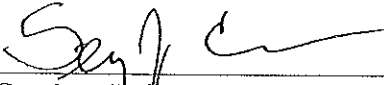
⁵ The five categories of bags imported by DMS are: biohazard bags, isolation bags, patient set-up bags, personal belongings bags and procedural kit manufacturing bags.

⁶ See the Petitioners’ Comments at Exhibit A, referring to the “Dimensions Trading Scope Ruling” at 9.

RECOMMENDATION

Based on the above analysis, we recommend that the Department determine that all 43 models of plastic bags identified in Attachment I and imported by DMS are outside the scope of the antidumping duty order on PRCBs from the PRC because medical facilities are the consumers of the merchandise in question, and the consumer packaging indicates end-use other than packaging and carrying merchandise from retail establishments. Additionally, because the scope language of the orders from Malaysia and Thailand is identical to the scope language on the PRCBs from the PRC, the Department has placed DMS's scope determination on the record of those two countries.

Agree Disagree



Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

1/8/08

Date

