



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

A-570-886

Scope Inquiry


Public Document

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

FOR PUBLIC FILE

FROM: Laurie Parkhill   
Office Director  
AD/CVD Enforcement

SUBJECT: Polyethylene Retail Carrier Bags from the People's Republic of  
China - Final Determination on the Scope Request from Rayton  
Produce Packaging Inc.

SUMMARY

On November 5, 2007, a U.S. importer, Rayton Produce Packaging, Inc. (Rayton), requested that the Department of Commerce (the Department) issue a scope ruling that a certain promotional polyethylene bag, identified by Rayton as F-OPPAPEJZLG which is imported from the People's Republic of China (PRC), is outside the scope of the antidumping duty order on polyethylene retail carrier bags (PRCBs) from the PRC (scope request). See Antidumping Duty Order: Polyethylene Retail Carrier Bags from the People's Republic of China, 69 FR 48201 (August 9, 2004) (Order). On November 6, 2007, we requested further information regarding the polyethylene bag subject to this scope request from Rayton. On November 27, 2007, the petitioners<sup>1</sup> submitted comments in response to Rayton's scope request. On December 11, 2007, the Department received comments from an interested party, DMS Holdings, Inc. (DMS), in support of Rayton's scope request. On December 27, 2007, the Department released a letter to all interested parties extending the time period for issuing a decision with respect to Rayton's scope request to May 5, 2008. On April 15, 2008, the Department extended the time period for issuing a decision to November 3, 2008.

Based on a thorough analysis of the comments received from interested parties, as well as a review of information on the record, we recommend determining that the F-OPPAPEJZLG bag is within the scope of the Order.

REGULATORY FRAMEWORK

The regulations governing the Department's antidumping scope determinations can be found at

<sup>1</sup> The Polyethylene Retail Carrier Bag Committee and its individual members, Hilex Poly Co., LLC and Superbag Corporation (the petitioners).



19 CFR 351.225. On matters concerning the scope of an antidumping duty order, the Department first examines the descriptions of the merchandise contained in the petition, the determinations of the Secretary and the International Trade Commission (ITC), and the initial investigation. See 19 CFR 351.225(d) and CFR 351.225 (k)(1). This determination may take place with or without a formal inquiry. See 19 CFR 351.225(d) and 351.225(e). If the Department determines that these descriptions are dispositive of the matter, the Department will issue a final scope ruling as to whether the subject merchandise is covered by the order. See 19 CFR 351.225(d). If the Department finds that it cannot make a determination based on the application and the description of the merchandise referred to in paragraph (k)(1) of the regulations, it will initiate a scope inquiry. See 19 CFR 351.225(e).

In accordance with 19 CFR 351.225(c) and (d), the Department has reviewed the request in light of the descriptions of the merchandise subject to the Order, as those descriptions are set forth in the petition, the initial investigation, and the determinations of the Secretary (including all prior scope determinations) and the ITC. Based on this review, we find that the issue of whether the product in this scope request is within the scope of the Order can be determined solely upon the application and the descriptions of the merchandise referred to in section 351.225(k)(1) of the Department's regulations. See 19 CFR 351.225(d).

#### SCOPE OF THE ORDER

The merchandise subject to the order is as follows:

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 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 3923.21.0085<sup>2</sup>

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<sup>2</sup> This HTS 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 Harmonized Tariff Schedule of the United States. See Harmonized Tariff Schedule of the United States (2005) – Supplement I Annotated for Statistical

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.

See Order.

The scope request submitted by Rayton covers one type of plastic bag identified as the F-OPPAPEJZLG bag. In the instant case, in accordance with 19 CFR 351.225(d) and 351.225(k)(1), we are able to find that the description of the product contained in the scope request, petition, the initial investigation, and the prior determinations of the Department and the ITC are, in fact, dispositive.

### BACKGROUND

Pursuant to 19 CFR 351.225(c)(1)(i), in its request, Rayton provided a description of the bag it requests the Department to find outside the scope of the Order. See scope request, dated November 1, 2007, at 3, and subsequent submission dated November 15, 2007. Rayton describes its bags as high-density, made of polyethylene, and measuring 6.75" in width by 8.75" in depth with two handles heat-welded to the side. See scope request at 3. The bag has the "ENZA" name and logo printed on the side. According to Rayton, the bag is used to carry promotional literature and in some cases a piece of fruit and is given away to potential customers. See scope request at 3.

The dimensions of the F-OPPAPEJZLG bag described in Rayton's request indicate that the bag falls within the parameters of bags covered by the scope of the Order (*i.e.*, no length or width shorter than 6 inches or longer than 40 inches). The F-OPPAPEJZLG bag is non-sealable with handles and is 0.0013 inches in thickness. Non-sealable bags and bags with handles with a thickness no greater than .035 inches and no less than .00035 inches are within the scope of the Order.

Rayton states two reasons why it believes its F-OPPAPEJZLG bag is outside the scope of the Order. First, it states that its bag is not used to carry merchandise from retail establishments and thus its bag does not contain purchased products. Second, Rayton states that the description of its F-OPPAPEJZLG bag falls outside the definition of PRCBs due to its intended use. See scope request at 4.

In response, the petitioners argue that the Department has made clear that there is no "use" exception in the scope, and the scope of the order is not limited to bags actually used in retail. Citing the Final Determination in the Less Than Fair Value Investigation: Polyethylene Retail Carrier Bags From the People's Republic of China, 69 FR 34125 (June 18, 2004), and accompanying Issues and Decision Memorandum at Comment 1, the petitioners argue that the

Department has rejected similar arguments made by other interested parties in this case. The petitioners argue that the issue arose again after issuance of the Order when a U.S. importer requested a scope ruling regarding certain “sample bags” that were given out by pharmaceutical companies to doctors as promotional items. The U.S. importer, like Rayton, argued that such promotional bags were not covered by the Order because they were not used in retail. The petitioners argue that the Department rejected the U.S. importer’s request, reaffirming that there is no “use” exception in the written scope of the order. See the petitioners’ November 27, 2007, submission at 3 and Exhibit 1.

DMS, an interested party in this proceeding, states that it supports Rayton’s request because the ITC made an injury determination with respect to PRCBs only. As a result, according to DMS, the record evidence in the investigation of this case dispositively establishes that PRCBs were defined as bags used to package and carry merchandise from retail establishments and that only PRCBs were covered by the investigation. DMS argues that, because Rayton’s bag is not a PRCB as defined by the scope of the Order, the Department should determine that it is outside the scope. See DMS’s December 11, 2007, submission at 8.

Citing Sango International, L.P. v. U.S., 484 F. 3d 1371 (May 2007) (Sango International), DMS argues that the Court held that the Department may not rely solely on the text of an order but must consider the evidence identified at 19 CFR 351.225(k)(1), which includes the descriptions of the subject merchandise contained in the petition and the record of the ITC’s investigation.

Citing 19 CFR 351.225(k), the ITC’s like-product determination, and the scope standard articulated by the Court of Appeals for the Federal Circuit (CAFC) in Sango International, DMS argues that the Department should determine that the antidumping duty order on PRCBs from the PRC applies only to bags used to package and carry purchased goods from retail establishments and that, accordingly, the bags described in the Rayton scope request are outside the scope of the Order.

## ANALYSIS

With respect to Rayton’s first point, we find that the scope language of the Order illustrates the types of polyethylene bags that are within the technical description contained in the first paragraph of the scope description; it is not an exhaustive list. The phrase “...typically provided without any consumer packaging and free of charge by retail establishments, e.g., grocery, drug, convenience, department, specialty retail, discount stores, and restaurants ...” is illustrative and serves as a characteristic example of representative bags. See Order, 69 FR at 48202. Furthermore, in describing other “names” of polyethylene bags covered by the Order, the scope language indicates such bags “may” also be referred to as “t-shirt sacks, merchandise bags, grocery bags, or checkout bags.” Thus, the term “retail” describes a general kind or type of bag, but is not necessarily restricted to specific retail use. See 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 People’s Republic of China (May 9, 2005) at 9.

With respect to the Rayton's second point, the scope of the Order does not state that end-use *per se* is a basis for exclusion from the Order. We stated during the investigation that “{e}xcluding a bag type by its use would not assist CBP in the enforcement of an antidumping order because it is not practicable to base determinations on product use and because such a practice would create a major risk of circumvention.” See Notice of Final Determination of Sales at Less than Fair Value: Polyethylene Retail Carrier Bags From the People's Republic of China, 69 FR 34125 (June 18, 2004), and the accompanying Issues and Decision Memorandum at Comment 1.

The scope of the Order excludes 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). There is no record evidence indicating that the F-OPPAPEJZLG bag is packed in consumer packaging with printing that refers to specific end-uses other than packaging and carrying merchandise from retail establishments. Cases in which the Department has found PRCBs outside the scope of the Order based on this exclusion include bags which are packed in consumer packaging for hospitals and containing printing that designates them for specific medical uses, *e.g.*, patient-belongings bag. See 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), Final Scope Ruling for DMS Holdings, Inc. (January 8, 2008), Final Scope Ruling for Asia Dynamics, Inc., and Medline Industries, Inc. (November 15, 2007), and Final Scope Ruling for Medline Industries, Inc. (May 8, 2008). Therefore, we find that this exclusion does not apply to the F-OPPAPEJZLG bag.

The scope of the Order also excludes polyethylene bags that are not printed with logos or store names and that are closeable with draw-strings made of polyethylene film. The F-OPPAPEJZLG bag has handles heat-welded to the sides of the bag and has the “ENZA” name and logo printed on its side. See bag sample provided by Rayton in its November 5, 2007, scope request. Therefore, because the bag is not closeable and does not have draw-strings, this exclusion does not apply to the F-OPPAPEJZLG bag.

With regard to DMS's assertions, we find that record evidence indicates overwhelmingly that Rayton's F-OPPAPEJZLG bag is within the scope of the Order and that the physical characteristics outlined by Rayton in its request do not suggest that this particular bag is outside the scope of the Order. In addition, as we indicate above, the scope description does not state that end-use *per se* is a basis for exclusion from the Order. Moreover, the term “retail” found in the Order is illustrative and serves as a characteristic example of representative bags.

The description set forth by the ITC of the subject merchandise covered by these antidumping investigations is as follows:

Retail establishments specify the dimensions, size, shape, strength, handle type, color, and printing of PRCBs as needed to serve their customers. PRCBs may be rectangular bags with an oval, round, or kidney-shaped die-cut handle; t-shirt sacks; drawstring bags; drawtape bags; patch handle bags; rigid handle bags; soft loop bags; sine wave bags; straight top bags; and strap handle bags. PRCBs may be made of either clear or colored polyethylene film and may have no printing or printing on

one or both sides. Printing may be in one or more colors. PRCBs are made from high-density polyethylene film ("HDPE"), low-density polyethylene film ("LDPE"), linear low-density polyethylene film ("LLDPE"), or a combination thereof. They are sold to retail establishments in bulk packaging, since they are not intended for resale.

See Polyethylene Retail Carrier Bags from China, Malaysia and Thailand, Investigation Nos. 731-TA-1043-1045 (Preliminary) USITC Publication No. 3618, August 2003 at 5-6 (internal footnotes omitted).

In addition, in prior scope determinations, the Department has consistently held that bags cannot be excluded from the scope of orders based upon an intended non-retail use, including use as a promotional tool. See the petitioners' November 27, 2007, submission at 3 and Exhibits 1 and 2.

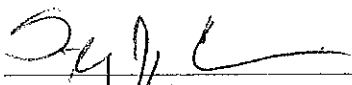
With regard to DMS's reliance on Sango International, the Federal Circuit held that to be dispositive, the section 351.225(k)(1) criteria "must be controlling of the scope inquiry that they definitively answer the scope question." Sango International, L.P. v. U.S., 484 F.3d 1371, 1379 (Fed. Cir. 2007). As indicated above, we considered the factors set forth in section 351.225(k)(1) of the Department's regulations and find them controlling in this scope ruling request.

In accordance with 19 CFR 351.225(k)(1), based on our review of the request, the descriptions of the merchandise subject to the Order on PRCBs from the PRC, previous scope determinations, and the preceding analysis, we find that the F-OPPAPEJZLG bag in Rayton's November 5, 2007, scope request is within the scope of the Order.

#### RECOMMENDATION

Based on the foregoing analysis, we recommend that the Department determine, pursuant to 19 CFR 351.225(d), that the F-OPPAPEJZLG bag is within the scope of the antidumping duty order on polyethylene retail carrier bags from the People's Republic of China.

Agree  Disagree

  
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Stephen J. Claeys  
Deputy Assistant Secretary  
for Import Administration

10/2/08  
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Date