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Scope Ruling

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April 26, 2011

MEMORANDUM TO:

Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
Import Administration

FROM:

for Barbara E. Tillman *BT*
Director
AD/CVD Operations, Office 6
Import Administration

SUBJECT:

Antidumping Duty and Countervailing Duty Orders on
Certain New Pneumatic Off-The-Road Tires from the
People's Republic of China: Final Scope Ruling -- OTR
Wheel Engineering, Inc.

Summary

On September 4, 2008, the Department of Commerce (the Department) published in the Federal Register the antidumping duty (AD) and countervailing duty (CVD) orders on certain new pneumatic off-the-road tires from the People's Republic of China (PRC).¹ On February 11, 2011, OTR Wheel Engineering, Inc. (OTR Wheel) filed a submission with the Department requesting a scope clarification on whether certain tires that it imports are excluded from the scope of the Orders.

Pursuant to an analysis under 19 CFR 351.225(k)(1), we recommend that the Department determine that OTR Wheel's "Trac Master" and "Traction Master" brand tires are within the scope of the Orders.

Background

OTR Wheel filed its scope ruling request on February 11, 2011, and submitted supplementary information on February 16th. On March 3, 2011, Bridgestone Americas, Inc. and Bridgestone Americas Tire Operations, LLC (collectively, Bridgestone) filed comments, arguing that the Department should find that OTR Wheel's Trac Master and Traction Master tires are subject to the Orders. On March 18, 2011, OTR Wheel responded to Bridgestone's comments. On

¹ See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order, 73 FR 51624 (September 4, 2008) and Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Countervailing Duty Order, 73 FR 51627 (September 4, 2008) (collectively, Orders).



March 25, 2011, the Department extended the deadline until April 27, 2011 to either issue a final scope ruling, or to open a scope inquiry.

Scope of the Orders

The products covered by the Orders are new pneumatic tires designed for off-the-road (OTR) and off-highway use, subject to exceptions identified below. Certain OTR tires are generally designed, manufactured and offered for sale for use on off-road or off-highway surfaces, including but not limited to, agricultural fields, forests, construction sites, factory and warehouse interiors, airport tarmacs, ports and harbors, mines, quarries, gravel yards, and steel mills. The vehicles and equipment for which certain OTR tires are designed for use include, but are not limited to: (1) agricultural and forestry vehicles and equipment, including agricultural tractors,² combine harvesters,³ agricultural high clearance sprayers,⁴ industrial tractors,⁵ log-skidders,⁶ agricultural implements, highway-towed implements, agricultural logging, and agricultural, industrial, skid-steers/mini-loaders;⁷ (2) construction vehicles and equipment, including earthmover articulated dump products, rigid frame haul trucks,⁸ front end loaders,⁹ dozers,¹⁰ lift trucks, straddle carriers,¹¹ graders,¹² mobile cranes,¹³ compactors; and (3) industrial vehicles and

² Agricultural tractors are dual-axle vehicles that typically are designed to pull farming equipment in the field and that may have front tires of a different size than the rear tires.

³ Combine harvesters are used to harvest crops such as corn or wheat.

⁴ Agricultural sprayers are used to irrigate agricultural fields

⁵ Industrial tractors are dual-axle vehicles that typically are designed to pull industrial equipment and that may have front tires of a different size than the rear tires.

⁶ A log-skidder has a grappling lift arm that is used to grasp, lift and move trees that have been cut down to a truck or trailer for transport to a mill or other destination.

⁷ Skid-steer loaders are four-wheel drive vehicles with the left-side drive wheels independent of the right-side drive wheels and lift arms that lie alongside the driver with the major pivot points behind the driver's shoulders. Skid-steer loaders are used in agricultural, construction and industrial settings.

⁸ Haul trucks, which may be either rigid frame or articulated (*i.e.*, able to bend in the middle) are typically used in mines, quarries and construction sites to haul soil, aggregate, mined ore, or debris.

⁹ Front loaders have lift arms in front of the vehicle. They can scrape material from one location to another, carry material in their buckets, or load material into a truck or trailer.

¹⁰ A dozer is a large four-wheeled vehicle with a dozer blade that is used to push large quantities of soil, sand, rubble, *etc.*, typically around construction sites. They can also be used to perform "rough grading" in road construction.

¹¹ A straddle carrier is a rigid frame, engine-powered machine that is used to load and offload containers from container vessels and load them onto (or-off of) tractor trailers.

equipment, including smooth floor, industrial, mining, counterbalanced lift trucks, industrial and mining vehicles other than smooth floor, skid-steers/mini-loaders, and smooth floor off-the-road counterbalanced lift trucks.¹⁴ The foregoing list of vehicles and equipment generally have in common that they are used for hauling, towing, lifting, and/or loading a wide variety of equipment and materials in agricultural, construction and industrial settings. Such vehicles and equipment, and the descriptions contained in the footnotes are illustrative of the types of vehicles and equipment that use certain OTR tires, but are not necessarily all-inclusive. While the physical characteristics of certain OTR tires will vary depending on the specific applications and conditions for which the tires are designed (e.g., tread pattern and depth), all of the tires within the scope have in common that they are designed for off-road and off-highway use. Except as discussed below, OTR tires included in the scope of the Orders range in size (rim diameter) generally but not exclusively from 8 inches to 54 inches. The tires may be either tube-type¹⁵ or tubeless, radial or non-radial, and intended for sale either to original equipment manufacturers or the replacement market. The subject merchandise is currently classifiable under Harmonized Tariff Schedule of the United States ("HTSUS") subheadings: 4011.20.10.25, 4011.20.10.35, 4011.20.50.30, 4011.20.50.50, 4011.61.00.00, 4011.62.00.00, 4011.63.00.00, 4011.69.00.00, 4011.92.00.00, 4011.93.40.00, 4011.93.80.00, 4011.94.40.00, and 4011.94.80.00. While HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope is dispositive.

Specifically excluded from the scope are new pneumatic tires designed, manufactured and offered for sale primarily for on-highway or on-road use, including passenger cars, race cars, station wagons, sport utility vehicles, minivans, mobile homes, motorcycles, bicycles, on-road or on-highway trailers, light trucks, and trucks and buses. Such tires generally have in common that the symbol "DOT" must appear on the sidewall, certifying that the tire conforms to applicable motor vehicle safety standards. Such excluded tires may also have the following designations that are used by the Tire and Rim Association:

¹² A grader is a vehicle with a large blade used to create a flat surface. Graders are typically used to perform "finish grading." Graders are commonly used in maintenance of unpaved roads and road construction to prepare the base course onto which asphalt or other paving material will be laid.

¹³ *i.e.*, "on-site" mobile cranes designed for off-highway use.

¹⁴ A counterbalanced lift truck is a rigid framed, engine-powered machine with lift arms that has additional weight incorporated into the back of the machine to offset or counterbalance the weight of loads that it lifts so as to prevent the vehicle from overturning. An example of a counterbalanced lift truck is a counterbalanced fork lift truck. Counterbalanced lift trucks may be designed for use on smooth floor surfaces, such as a factory or warehouse, or other surfaces, such as construction sites, mines, *etc.*

¹⁵ While tube-type tires are subject to the scope of this proceeding, tubes and flaps are not subject merchandise and therefore are not covered by the scope of this proceeding, regardless of the manner in which they are sold (e.g., sold with or separately from subject merchandise).

Prefix letter designations:

- P - Identifies a tire intended primarily for service on passenger cars;
- LT - Identifies a tire intended primarily for service on light trucks; and,
- ST - Identifies a special tire for trailers in highway service.

Suffix letter designations:

- TR - Identifies a tire for service on trucks, buses, and other vehicles with rims having specified rim diameter of nominal plus 0.156" or plus 0.250";
- MH - Identifies tires for Mobile Homes;
- HC - Identifies a heavy duty tire designated for use on "HC" 15" tapered rims used on trucks, buses, and other vehicles. This suffix is intended to differentiate among tires for light trucks, and other vehicles or other services, which use a similar designation.
- Example: 8R17.5 LT, 8R17.5 HC;
- LT - Identifies light truck tires for service on trucks, buses, trailers, and multipurpose passenger vehicles used in nominal highway service; and
- MC - Identifies tires and rims for motorcycles.

The following types of tires are also excluded from the scope: pneumatic tires that are not new, including recycled or retreaded tires and used tires; non-pneumatic tires, including solid rubber tires; tires of a kind designed for use on aircraft, all-terrain vehicles, and vehicles for turf, lawn and garden, golf and trailer applications. Also excluded from the scope are radial and bias tires of a kind designed for use in mining and construction vehicles and equipment that have a rim diameter equal to or exceeding 39 inches. Such tires may be distinguished from other tires of similar size by the number of plies that the construction and mining tires contain (minimum of 16) and the weight of such tires (minimum 1500 pounds).

Legal Framework

The Department's authority to clarify the scope of its orders is well-established.¹⁶ The Department examines scope requests in accordance with our regulations at 19 CFR 351.225. Pursuant to 19 CFR 351.225(k)(1), in evaluating scope requests, the Department examines the description of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary and the U.S. International Trade Commission (ITC). A determination under 19 CFR 351.225(k)(1) may take place with or without a formal inquiry.

Where the descriptions of the subject merchandise are not dispositive, the Department will consider the following factors, as provided by 19 CFR 351.225(k)(2): 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 for any given scope request is made on a case-by-case basis after consideration of all evidence before the Department. In the instant case, we find that the information in OTR Wheel's application and the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary and the ITC are

¹⁶ See, e.g., *Mitsubishi Elec. Corp. v. United States*, 16 CIT 730, 733, 802 F. Supp. 455, 458 (1992).

dispositive. Therefore, the Department finds it unnecessary to consider the additional factors under 19 CFR 351.225(k)(2).

Record Information

In its scope ruling request, OTR Wheel argues that its Trac Master and Traction Master tires are specially designed and marketed for use on vehicles with turf, lawn, and garden applications.¹⁷ OTR Wheel also argues that its tires cannot be classified as tires used on agricultural or forestry vehicles or machines.¹⁸ Citing U.S. Customs and Border Protection (CBP) ruling HQ 956372 (March 14, 1995), OTR Wheel contends that the Court of Customs Appeals has held that the term “agriculture” refers only to that which leads to the production of necessities, *i.e.*, food and clothing, and not to that which is essentially pleasurable or ornamental, such as, *e.g.*, the grooming and caring for lawns.¹⁹ In addition, OTR Wheel cites CBP ruling NY A81065 (April 3, 1996), which states that for tires to qualify as being “designed for” agricultural or forestry uses, the tires must be designed for such purposes from inception to the moment they leave the production line.²⁰ Finally, OTR Wheel contends that the scope of the Orders specifically excludes tires that are designed for turf, lawn, and garden applications, and argues that its Trac Master and Traction Master tires qualify for this exclusion.²¹

In its rebuttal response,²² Bridgestone contends that OTR Wheel’s Trac Master and Traction Master tires are subject to the Orders, as they are “herringbone”, *i.e.*, angled bar, tread-type tires that are not used for traditional lawn mowing vehicles. According to Bridgestone, these tread-types are designed for traction in fields and for rocky conditions, can dig into the ground in a manner that can damage lawns and soft soil, and are contrary to the shallow-tread tires that are used for turf, lawn, and garden applications.²³ Bridgestone claims that tread pattern is identified as one of the physical characteristics that aid in defining the application for which tires are designed, and notes that the Trac Master and Traction Master tires have R-1 and R-4 tread types, respectively.²⁴ Bridgestone states that the Tire and Rim Association (TRA), the standard-setting body in the United States for tires, rims, and associated parts, designates R-1 and R-4 tires for use on agricultural tractors, combine harvesters, agriculture high clearance sprayers, and industrial tractors.²⁵ Additionally, Bridgestone notes that the questionnaire in the Department’s current review of the companion AD order shows R-1 and R-4 among the tread types for agricultural tires, indicating that these are among the physical specifications for classifying reportable sales of subject merchandise.²⁶

¹⁷ In its February 16, 2011 submission, OTR Wheel stated that its Traction Master tires can be used on agricultural or forestry vehicles and machines.

¹⁸ See OTR Wheel’s February 11, 2011 submission at 3.

¹⁹ See *id.*

²⁰ See *id.*

²¹ See OTR Wheel’s February 18, 2011 submission at 2-5.

²² See Bridgestone’s March 3, 2011 submission.

²³ See *id.* at 2.

²⁴ See *id.* at 4; see also OTR Wheel’s February 11, 2011 submission at Attachment 1.

²⁵ See Bridgestone’s March 3, 2011 submission at 7-8, and at Exhibit 2.

²⁶ See Bridgestone’s March 3, 2011 submission at 4, and at Exhibit 1.

In its response to Bridgestone's comments,²⁷ OTR Wheel contends that there is no requirement that tires may not have a herringbone tread to qualify for the scope's exclusion regarding turf, lawn, and garden tires.²⁸ According to OTR Wheel, a determination of whether a tire is covered by the scope of the Orders depends on whether the tire was designed for off-road and off-highway use, and not on tread pattern alone, which is a physical characteristic that can have crossover between various vehicle applications.²⁹ OTR Wheel contends that tires with deeper treads, such as herringbone, are preferable for lawn and turf maintenance jobs where traction is important. According to OTR Wheel, these types of tires are more adaptable for use in areas with steeper grades, rolling expanses, or in snow and in wet conditions.³⁰ OTR Wheel argues that these types of tires are advertised, marketed, and sold as turf, lawn, and garden tires by some of the major suppliers in the industry, which indicates that these tires were designed for such purposes.³¹

Analysis

The Department has evaluated the information submitted by OTR Wheel and by Bridgestone in accordance with 19 CFR 351.225(k)(1), as we find that the descriptions of subject merchandise contained in the petition, the initial investigation, the determinations of the Secretary (including prior scope determinations), and the determinations of the ITC are dispositive with respect to OTR Wheel's Trac Master and Traction Master tires. Therefore, the Department finds it unnecessary to consider the additional factors as described under 19 CFR 351.225(k)(2).

On May 14, 2008, the Department issued a preliminary determination on the scope of the investigation, addressing certain aspects of the scope as it had appeared in the initiation notice.³² Among other things, the Department clarified that the scope was based not on the end-use of subject merchandise but, rather, on the use for which the merchandise was designed. Accordingly, the Department also made certain alterations to the scope language, which were adopted in the final determination. Specifically, with regard to the exclusionary language for turf, lawn, and garden tires, the Department replaced the word "use" with the phrase "designed for use," thus indicating more clearly that this exclusion would apply only to tires that are designed for turf, lawn, and garden applications.³³

OTR Wheel contends that its Trac Master and Traction Master tires are specifically designed for turf, lawn, and garden applications, and therefore qualify for the scope exclusion referenced above. However, record information demonstrates otherwise. In its February 11, 2011 submission at Attachment 1, OTR Wheel submitted technical specifications of these tires,

²⁷ See OTR Wheel's March 18, 2011 submission.

²⁸ See *id.* at 2-3.

²⁹ See *id.* at 3.

³⁰ See *id.* at 5.

³¹ See *id.*

³² See the May 14, 2008 Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, "Certain New Pneumatic Off-The-Road Tires ("OTR Tires") from the People's Republic of China ("PRC"); Preliminary Determination: Comments on the Scope of the Investigation" (unchanged in the final determination) (Preliminary Scope Determination).

³³ See Preliminary Scope Determination at 13.

including information such as available tire sizes, tread types, and ply ratings, inter alia.³⁴ With respect to tread types, these technical specifications state that the Trac Master and Traction Master tires have “R1” and “R4” treads, respectively. According to the TRA, R-1 and R-4 tire types are designated for service on agricultural tractors, combine harvesters, industrial tractors, and agricultural high clearance sprayers.³⁵ Our review of the record indicates that the TRA has not assigned the R-1 and R-4 designations for turf, lawn, and garden applications in addition to the agricultural and industrial applications stated above. Specifically, we reviewed Section 5 (regarding service for agricultural applications) and Section 6 (which includes service for lawn and garden applications) of the TRA’s 2011 Yearbook regarding agricultural and industrial tires, and lawn and garden tires, and found no instance where the TRA designated R-1 and R-4 tires for service for lawn and garden applications.³⁶ We note that the Department relied on the TRA’s designations in the scope of the Orders with respect to identifying certain tires that are designed for on-highway or on-road use, and are, therefore, excluded from the scope.³⁷

Moreover, in the ITC’s injury investigation, the ITC referenced R-1 and R-4 type tires as subject merchandise. According to the ITC, R-1 tires are identified as:

... a typical farm tractor rear wheel having a regular depth “lug-type” R-1 tread used for general farming, as defined by the Tire Rim Association “TRA.” A farm tractor tire of this nature would typically have a herringbone (criss-cross) tread design of medium depth. The tread types for rear wheels of agricultural tractors are variable by the industry as “lug” or “bar tread.” The “bar tread” is a lug tread usually running at an approximate 23 degree angle around the tire [sic] directional circumference which helps power the equipment through the soil.³⁸

With respect to R-4 tire types, the ITC stated:

An R-4 herringbone-type lug tread has an intermediate tread depth. Tires of this type are commonly found on the rear wheel of “backhoe loaders” which, for example, may be used in a stationary, braced position to dig holes and trenches with the backhoe; for example, to tie into an underground water main or power supply in light construction areas. The front blade attachment may be used to scoop up and lift dirt. TRA recommends this type tire for light industrial service and highway mowing.³⁹

³⁴ Regarding tire size, the scope of the Orders includes tires ranging generally from 8 to 54 inches in diameter. OTR Wheel’s Trac Master and Traction Master tires range from 8 to 12 inches, so they are within the scope in this respect. Regarding ply ratings, the record does not indicate that either agricultural/industrial use tires or lawn and garden tires are limited to a range of ply ratings. However, as discussed elsewhere, the tread types at issue are designated for agricultural and industrial applications.

³⁵ See Bridgestone’s March 3, 2011 submission at Exhibit 2.

³⁶ See the Department’s April 26, 2011 Memorandum to the File, “Placement of Certain Sections of the Tire and Rim Association’s 2011 Yearbook on the Record of the Instant Scope Ruling Proceeding,” on file at the Department’s Central Records Unit, Room 7046 of the main Commerce Building.

³⁷ See the section “Scope of the Orders,” above.

³⁸ See Certain Off-the-Road Tires from China, USITC Publication No. 3943, Investigation Nos. 701-TA-448 and 731-TA-1117 (Preliminary) (August 2007) (unchanged in final determination) at V-3.

³⁹ See id.

Finally, in the companion AD administrative review of subject merchandise for the period covering September 1, 2009, through August 31, 2010, the Department's initial questionnaire requests that the responding companies provide information regarding "Tread Code" as part of the model matching criteria.⁴⁰ Under the section "Agricultural Tires," the Department provided a list of possible tread codes, including R-1 and R-4.⁴¹ The inclusion of the R-1 and R-4 tread codes in the Department's model matching criteria demonstrates that the Department considers tires with these types of tread to be subject merchandise.

OTR Wheel has stated that its Trac Master and Traction Master tires are specially designed for use on vehicles with turf, lawn, and garden applications, but it has not provided information to substantiate that claim (e.g., designs, schematics, internal memoranda, etc.). Moreover, while OTR Wheel may be selling these tires for turf, lawn and garden use, that in itself does not provide a basis to find that the tires are excludable within the meaning of the scope language. In the prior scope determination in the investigation, the Department clearly stated that the scope is not defined according to the end-use of the product. A finding based on the type of application for which the tires are being sold, without a showing that the tires were actually designed for such application, would be contrary to the Department's earlier scope determination. And while OTR Wheel has referenced CBP rulings to argue that the tires in question cannot be considered to be agricultural tires, its reliance on those rulings is misplaced, as those rulings did not address these particular tires and, most importantly, the authority to clarify the scope of the Department's orders rests solely with the Department. In the Department's analysis, based on the TRA standards, we find that these tires are designed for agricultural and industrial service. More to the point, we find that these tires are not designed for turf, lawn, and garden use within the meaning of the scope language, as clarified in the investigation and, thus, do not fall under the scope exclusion for turf, lawn, and garden use.

Recommendation

Based on the Department's prior scope determination in the investigation and the TRA's authoritative standards, as well as the ITC's findings and the Department's model matching criteria, we find that the tread types of the tires in question are designed for agricultural and industrial service, and not for turf, lawn and garden service. Because the facts regarding this issue demonstrate that OTR Wheel's Trac Master and Traction Master tires are designed for agricultural and industrial applications, we recommend finding that these tires do not qualify under the scope's exclusion for tires designed for use on turf, lawn, and garden applications and, thus, are within the scope of the Orders.

If this recommendation is accepted, we will publish this ruling in the Department's quarterly notice of scope rulings in the Federal Register. We will also instruct CBP to continue to suspend

⁴⁰ See, e.g., the Department's January 19, 2011 Letter to Tianjin United Tire & Rubber International Co., Ltd., "Antidumping Duty Administrative Review of Certain New Pneumatic Off-The-Road Tires ("OTR Tires") from the People's Republic of China ("PRC"): Questionnaire" at C-14. We note that Bridgestone placed excerpts from this questionnaire on to the record of this scope ruling in its March 3, 2011 submission at Exhibit 1.

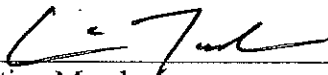
⁴¹ See id.

liquidation of entries regarding OTR Wheel's Trac Master and Traction Master brand tires that are imported from the PRC.

✓

Agree

Disagree



Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

4/26/11

Date

