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Scope Inquiry
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DATE: February 14, 2011

TO: Christian Marsh
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for Antidumping and Countervailing Duty Operations

THROUGH: Susan Kuhbach
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RE: Citric Acid and Certain Citrate Salts: Scope Ruling for Calcium Citrate USP

SUMMARY:

On November 2, 2010, Aceto Corporation ("Aceto") requested that the Department find its calcium citrate USP to be outside the scope of the antidumping and countervailing duty orders on citric acid and certain citrate salts from the People's Republic of China ("PRC") and Canada ("the Orders"). See Citric Acid and Certain Citrate Salts from Canada and the People's Republic of China: Antidumping Duty Orders, 74 FR 25703 (May 29, 2009); see also Citric Acid and Certain Citrate Salts From the People's Republic of China: Notice of Countervailing Duty Order, 74 FR 25705 (May 29, 2009). Aceto asserts that its calcium citrate USP should be excluded from the scope of the Orders because it is materially different from the "crude calcium citrate… {which is an} intermediate product in the production of citric acid" contemplated by the scope of the Orders. Upon consideration of Aceto's request, we recommend that the Department find that Aceto's product is within the scope of the Orders.

BACKGROUND:

In the original petition in this case, Archer Daniels Midland Company, Cargill, Incorporated and Tate & Lyle Americas (collectively, "Petitioners") requested that unrefined calcium citrate ("UCC") be included in the scope of the Orders because it is an intermediate product in the production of citric acid. See the Petition for the Imposition of Antidumping and Countervailing Duties regarding Citric Acid and Certain Citrate Salts from Canada and the People's Republic of China (April 14, 2008) ("petition"). This language was changed to "crude calcium citrate" based on comments submitted by L. Perrigo Company ("Perrigo") as an interested party. [1] See Perrigo's Comments on Scope of Investigation in Case of Citric Acid and Certain Citrate Salts from Canada and the People's Republic of China (June 3, 2008) ("Perrigo's Comments on Scope"), and the Department's Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, "Whether to Amend the Scope of these Investigations to Exclude Monosodium Citrate and to Further Define the Product Referred to as 'Unrefined Calcium Citrate'" (September 10, 2008). Perrigo is an importer of calcium citrate USP for use in dietary supplements. It expressed concern that the term "unrefined calcium citrate" was too vague and that its calcium citrate would be inadvertently included in the scope of the Orders.

In addition to the substitution of the word "crude" for "unrefined," Perrigo's comments resulted in a two-pronged test for determining which calcium citrate products would be excluded from the antidumping and countervailing duty orders. The Department incorporated this test into the language of the final Orders. To be excluded from the scope, calcium citrate products must meet the following two conditions:

1) They must be refined and tested so that they meet or exceed the standards of the United States Pharmacopeia ("USP") for products used in dietary supplements; and,
2) They must have been mixed with an excipient, such as dextrose or other starch that makes up at least 2% of the product by weight.

On November 2, 2010, Aceto submitted a written request to the Department for a scope ruling with respect to the calcium citrate that it imports from the PRC. Aceto's product satisfies the USP standard but does not contain an excipient. Aceto states that its product is used exclusively in dietary supplements, and has been refined so as to satisfy the standards of the USP for purity and consistency. As a result, Aceto argues that its calcium citrate should not be considered crude for the purposes of the Orders.

On November 16, 2010, Aceto confirmed that it had served all necessary parties. The Department considers this to be the date of the proper filing of Aceto's request.

On December 3, 2010, Petitioners submitted comments in response to Aceto's request.

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1 The actual phrase "crude calcium citrate" was suggested by U.S. Customs and Border Protection, which noted that it appears in the Explanatory Notes to Section 2918 of the Harmonized Tariff Schedule. See Exhibit 8 of Aceto's Request for Scope Ruling (November 2, 2010).

Petitioners oppose Aceto's request, citing Aceto's own admission that its calcium citrate USP does not meet both of the scope's requirements for calcium citrate products to be excluded from the Orders (namely, that products must be both USP-grade and contain an excipient of at least 2% by weight), and assert that the record clearly demonstrates that any calcium citrate product not satisfying both of the exclusion criteria was intended to be subject to the Orders.

On January 3, 2011, the Department extended the deadline for either issuing a scope ruling according to 19 CFR 351.225(d) or initiating a scope inquiry according to 19 CFR 351.225(k)(2) to February 17, 2011, in order to gather more information from parties. The Department subsequently sent questionnaires to both parties on January 6, 2011, seeking to clarify the relationship between Aceto's product and the "crude calcium citrate" described in the scope.

On January 11, 2011, the Department issued a correction to the deadline for either issuing a scope ruling or initiating a scope inquiry on Aceto's product. The correct deadline is February 14, 2011.

SCOPE:

The scope of the orders includes all grades and granulation sizes of citric acid, sodium citrate, and potassium citrate in their unblended forms, whether dry or in solution, and regardless of packaging type. The scope also includes blends of citric acid, sodium citrate, and potassium citrate; as well as blends with other ingredients, such as sugar, where the unblended form(s) of citric acid, sodium citrate, and potassium citrate constitute 40 percent or more, by weight, of the blend. The scope of the orders also includes all forms of crude calcium citrate, including dicalcium citrate monohydrate, and tricalcium citrate tetrahydrate, which are intermediate products in the production of citric acid, sodium citrate, and potassium citrate. The scope of the orders does not include calcium citrate that satisfies the standards set forth in the United States Pharmacopeia and has been mixed with a functional excipient, such as dextrose or starch, where the excipient constitutes at least 2 percent, by weight, of the product. The scope of the orders includes the hydrous and anhydrous forms of citric acid, the dihydrate and anhydrous forms of sodium citrate, otherwise known as citric acid sodium salt, and the monohydrate and monopotassium forms of potassium citrate. Sodium citrate also includes both trisodium citrate and monosodium citrate, which are also known as citric acid trisodium salt and citric acid monosodium salt, respectively. Citric acid and sodium citrate are classifiable under 2918.14.0000 and 2918.15.1000 of the Harmonized Tariff Schedule of the United States (HTSUS), respectively. Potassium citrate and crude calcium citrate are classifiable under 2918.15.5000 and 3824.90.9290 of the HTSUS, respectively. Blends that include citric acid, sodium citrate, and potassium citrate are classifiable under 3824.90.9290 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

REGULATORY FRAMEWORK:

The regulations governing the Department's antidumping and countervailing duty scope

determinations can be found at 19 CFR 351.225. On matters concerning the scope of an order, the Department's initial basis for determining whether a product is included within the scope of an order is the descriptions of the product contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the International Trade Commission. See 19 CFR 351.225(d) and 351.225(k)(1). Such scope determinations 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, it will issue a final scope ruling as to whether or not the merchandise is covered by the order. See 19 CFR 351.225(d).

Conversely, when the descriptions of the merchandise are not dispositive, the Department will consider the following additional critera set forth in 19 CFR 351.225(k)(2): i) the physical characteristics of the product; 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. These factors are known commonly as the Diversified Products criteria. See Diversified Products v. United States, 572 F. Supp. 883 (CIT 1983). The determination as to which analytical framework is most appropriate in any given scope inquiry is made on a case-by-case basis after consideration of all record evidence before the Department.

ANALYSIS:

This is not the first time that the Department has considered whether refined calcium citrate products should be within the scope of the Orders. While the petition mentions that the calcium citrate being contemplated for inclusion at that time had no other use apart from producing citric acid, the record shows that before the end of the investigation, Petitioners had faced the issue of whether the Orders could be circumvented by other forms of imported calcium citrate, and they had addressed it by seeking to include a wider range of products. The Department noted in Cellular Mobile Telephones and Subassemblies From Japan; Final Determination of Sales at Less Than Fair Value, that it has "inherent power to establish the parameters of the investigation," so that it would not "be tied to an initial scope definition that... may not make sense in light of the information available to {the Department} or subsequently obtained in the investigation." See 50 FR 45447, 45449 (October 31, 1985). See also Duferco Steel, Inc. v. United States, 296 F.3d 1087 (Fed. Cir. 2002). In this case, additional information obtained from Perrigo following the filing of the petition made it apparent that calcium citrate products other than those explicitly described in the petition needed to be considered for inclusion in the scope of the Orders. See Perrigo's Comments on Scope.

In the process of clarifying whether its calcium citrate was meant to be included in the Orders, Perrigo offered a number of scope revisions to clarify the meaning of crude calcium citrate (at that point, known as "unrefined calcium citrate"). These included limiting the scope to intermediate products "which have been subjected to no further processing beyond filtering and washing to remove any soluble impurities," and to products that have "been mixed with material to aid in further processing (e.g. excipients) or that is refined to a specific size, grade or granulation." See Perrigo's Comments on Scope, at page 7. In their June 16, 2008 letter to the

Department, Petitioners expressed concern that both of these revisions would narrow the scope to exclude a wide range of calcium citrate products and would allow for easy circumvention of the Orders at minimal expense. Petitioners finally proposed, and the Department adopted, a specific exclusion clause that both clarified the nature of what calcium citrate products were included, and helped ensure that calcium citrate products purportedly being imported for use in pharmaceuticals could not be reprocessed into citric acid in order to avoid antidumping and countervailing duties. This second result was accomplished by requiring that calcium citrate products contain an excipient in order to be excluded from the Orders. If Petitioners had envisioned including fewer calcium citrate products in the scope, they had the option of seeking a less specific exclusion, or adopting Perrigo's suggested language. The fact that they did not demonstrates that the exclusion language in the scope describes the only calcium citrate product that was intended to be excluded from the Orders, and that the term "crude calcium citrate" was intended to include all forms of calcium citrate that do not fall within the specific exclusion.

Based on the above, we agree with Petitioners' argument that by the completion of the investigation, Petitioners envisioned that any calcium citrate product not satisfying both conditions of the exclusion would be subject to the Orders. Even if this evidence were disregarded, however, the language of the scope itself is dispositive. According to the ruling in Duferco, "review of the petition and the investigation may provide valuable guidance as to the interpretation of the final order. But they cannot substitute for language in the order itself... Thus, a predicate for the interpretive process is language in the order that is subject to interpretation." See Duferco, 296 F.3d at 1097. See also Ericsson GE Mobile Commc'ns, Inc. v. United States, 60 F.3d 778, 782 (Fed. Cir. 1995). Furthermore, the Court of International Trade has found that "...if the terms of the order are dispositive then the order governs." See Laminated Woven Slacks Cmte. v. United States, Slip Op. 10-81, at 8-9 (July 23, 2010). In this case, the scope language regarding calcium citrate, taken as a whole, is dispositive and is capable of standing on its own without further interpretation according to 19 CFR 351.225(k)(1).

The scope of the Orders makes two references to calcium citrate. It first specifies that "crude calcium citrate," which it describes as an intermediate product in the production of citric acid, is included. It next states that "calcium citrate that satisfies the standards set forth in the United States Pharmacopeia and has been mixed with a functional excipient" of at least two percent by weight is not included in the scope of the Orders.

The scope's two statements regarding calcium citrate must be viewed in light of each other. On one hand, the scope language is vague with respect to the nature of crude calcium citrate, beyond identifying it as an intermediate product in the production of citric acid - a use for which many calcium citrate products of many grades or levels of refinement could be employed. At the same time, the language of the exclusion is quite specific in its terms: any calcium citrate product that does not satisfy both conditions does not qualify for exclusion from the Orders. When viewed together, it follows that the crude calcium citrate mentioned by the scope includes any calcium citrate product that does not satisfy both criteria in the exclusion clause. While Aceto's calcium citrate satisfies the USP standard, Aceto has admitted that its product does not contain an excipient. Accordingly, because the scope is dispositive in this regard, we find that Aceto's

calcium citrate is included in the scope of the Orders.

Agree ✓ Disagree _____

Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

2/14/11
Date