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International Trade Administration
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Scope Inquiry

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AD/CVD Operations, Office 8: SAW

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FOR PUBLIC FILE

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

THROUGH: Edward Yang *EW*
Senior Enforcement Coordinator
China/NME Group, AD/CVD Operations

FROM: Steve Williams
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SUBJECT: 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

SUMMARY

On October 13, 2004, a U.S. importer, Dimensions Trading, Inc. ("Dimensions"), requested that the Department of Commerce (the "Department") issue a scope ruling finding that certain polyethylene sample bags are not subject to the antidumping duty order on polyethylene retail carrier bags ("PRCBs") from the People's Republic of China ("PRC"). See Antidumping Duty Order: Polyethylene Retail Carrier Bags from the People's Republic of China, 69 FR 48201 (August 9, 2004) (the "Order").



In its November 18, 2004, submission, the domestic interested parties, the Polyethylene Retail Carrier Bag Committee and its individual members, PCL Packaging, Inc. Hilex Poly Co. LLC, Superbag Corp., Vanguard Plastics, Inc., and Intoplast Group, Ltd., responded to Dimensions' submission. They stated that Dimensions' bags are clearly and unambiguously captured within the language of the scope of the Order, and argued that granting Dimensions' request for an end-use based exclusion would impermissibly change the scope of the Order.

Dimensions submitted a rebuttal on December 6, 2004. In its rebuttal, Dimensions states that (1) end-use is a critical factor in determining whether the sample bags fall within the scope of the Order, (2) the clear language of the Order cannot be ignored, and (3) the classification of an item under HTSUS subheading 3923.21.0090 is not dispositive as to its inclusion within the scope of the Order.

On January 24, 2005, Dimensions resubmitted, at the Department's request, its scope request to include PRCBs from Malaysia and Thailand, as well as the PRC. On February 1, 2005, the petitioners submitted comments arguing that, pursuant to 19 CFR 351.225(c)(1), Dimensions does not have standing to file a scope request with respect to the orders on PRCBs from Malaysia and Thailand. On March 9, 2005, the Department invited interested parties to comment on Dimensions' letter concerning its scope request originally filed in the PRC proceeding. On March 28, 2005, the Department received a response from the petitioners that restated their objections. The Department received no other responses. Because it is the Department's preference, when the scope of an order is identical across several countries, to include all affected countries in the scope ruling, we have placed Dimensions' January 10, 2005, letter on the administrative record of the cases for Malaysia, Thailand, and the PRC.

In accordance with 19 CFR 351.225(d), we recommend making a scope ruling based solely on the application and the descriptions of the merchandise referred to in 19 CFR 351.225(k)(1). Based on the application and the description of the merchandise contained in the petition, the initiation investigation, and the determinations of the Secretary and the International Trade Commission ("ITC"), we recommend that the Department determine that the merchandise in question is within the scope of the antidumping duty orders on PRCBs from the PRC, Malaysia, and Thailand ("the Orders").

APPLICABLE REGULATIONS

The regulations governing the Department's antidumping scope determinations can be found at 19 CFR 351.225. On matters concerning the scope of an antidumping order, our initial basis for determining whether a product is included within the scope of an order are the descriptions of the product contained in the petition, the initial investigation, and the prior determinations of the Secretary (such as prior scope rulings) and the ITC. See 19 CFR 351.225(d) and 351.225(k)(1). Such scope determinations may take place with or without a formal scope inquiry. See 19 CFR 351.225(d) and 351.225(f)(4).

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).

As provided for under 19 CFR 351.302(b), the Department extended the deadline for issuing its decision on this scope ruling in order to provide the parties an opportunity to submit additional comments and to clarify their respective submissions. After reviewing all the information on the record, the Department, in accordance with 19 CFR 351.225(d), has determined that the sample bags are included in the scope of the Orders based on the application and the descriptions of the merchandise contained in the Orders.

Pursuant to 19 CFR 351.225(d), the Department determines that no further inquiry is warranted to decide whether polyethylene sample bags produced in the PRC are covered by the scope of the Orders. We have evaluated Dimensions's application as well as the descriptions of the merchandise contained in the petition, the investigation, and the final determinations of the Secretary and the ITC. Based on this evaluation, we find that the scope of the Orders is dispositive and that polyethylene sample bags are unambiguously included in the Orders.

BACKGROUND

The antidumping order on polyethylene retail carrier bags from the PRC defines the scope as follows:

The merchandise subject to this antidumping order is polyethylene retail carrier bags ("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 0.035 inch (0.889 mm) and no less than 0.00035 inch (0.0089 mm), and with no length or width shorter than 6 inches (15.24 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, speciality, retail, discount stores, and restaurants, to their customers to package and carry their purchased products. The scope of the investigation excludes (1) polyethylene bags that are not printed with logos or stores 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 carrying merchandise from retail establishments, e.g., garbage bags, lawn bags, trash-can liners.

Imports of the subject merchandise are currently classifiable under statistical category 3923.21.0090 of the Harmonized Tariff Schedule of the United States (HTSUS). This subheading also covers products that are outside the scope of this investigation. Furthermore, although the HTSUS subheading is provided for convenience and customs purposes, our written descriptions of the scope of this investigation is dispositive. See Antidumping Duty Order at 48201, 48202.

SCOPE RULING REQUEST AND COMMENTS

In its scope ruling request, Dimensions describes its sample bags as follows:

the sample bags are small plastic bags that are given out by pharmaceutical companies to doctors as promotional items. These bags are used by the doctors to dispense sample pills to their patients. The pills placed in these bags are samples given to the patients free of charge. The sample pills are not sold to the doctors, but are provided to them [sic] free of charge. In turn, the bags containing the free drug samples are provided by the doctors to their patients free of charge. The sample bags are currently classified under subheading 3923.21.0090 of the Harmonized Tariff Schedule of the United States ("HTSUS").

See Scope Ruling Request for Dimensions Trading Inc: Polyethylene Retail Carrier Bags from China, Malaysia, and Thailand ("Scope Ruling Request") at 1-2.

Dimensions states that the sample bags fall within the physical specifications of the subject retail carrier bags and are made from the same materials as the subject retail carrier bags. They contend that the imported sample bags, however, do not serve the same use as the subject retail carrier bags as there is no retail sale of products associated with the use of the sample bags. See Scope Ruling Request at 4. Dimensions asserts that the sample bags do not fall within the scope of the Orders for the following reasons:

- the sample bags are not used as "retail" carrier bags,
- the sample bags are not provided free of charge by retail establishments (e.g., grocery, drug, convenience, department, specialty retail, discount stores, and restaurants),
- the sample bags are not made to the specifications of a retailer,
- the sample bags are not used to advertise a retailer's identity, and
- the sample bags are not provided to customers of retail establishments to package and carry their purchased products from the store. See Scope Ruling Request at 6.

Furthermore, Dimensions states that imported sample bags do not bear the logo or store name of a retail establishment (i.e., are not retail-specific). See Scope Ruling Request at 8.

In its rebuttal to the Department, the petitioners request that the Department deny Dimensions' application for a formal scope inquiry. The petitioners assert that Dimensions' bags are "clearly

and unambiguously captured within the language of the scope of the applicable antidumping duty orders" and that granting Dimensions' request for an end-use based exclusion would "impermissibly change the scope of the orders in a way that is contrary to its terms." See Petitioners' Response to Dimensions Trading, Inc.'s October 12, 2004 Application for Scope Ruling ("Petitioners' Response") at 2. The petitioners state that use in a retail environment is not a definitional and exclusionary requirement. In addition, the petitioners state that Dimensions' assertion that the imported sample bags do not bear the logo or store name of a retail establishment is not supportive of an exclusion since the text of the scope definition of the Orders explicitly states that the subject merchandise may be constructed "with or without printing." See Antidumping Duty Order at 48201, 48202. The petitioners argue that "because polyethylene bags are printed with a limitless array of images, including words such as "Thank You," store and product names and logos, and decorations, it would be nearly impossible to administer the orders if printed images determined whether a particular bag was in or out of the scope." See Petitioners' Response at 5 footnote 6.

The petitioners state that the scope of the Orders provides the only two expressly specified exclusions, including: (1) bags not printed with logos or store names and which are closeable with polyethylene drawstrings, and (2) bags sold in consumer packaging and which are printed with instructions for use (emphasis added). See Petitioners' Response at 7. The petitioners state that:

if the Department (and the petitioners) intended the illustrative phrase 'typically provided without any consumer packaging and free of charge by retail establishments' to be definitional and thus to operate as an exclusion of certain bag types, a third exclusion would have been specified in the scope. Such an exclusion would have clearly and unambiguously stated that bags which are not provided to retail customers, free of charge for purposes of carrying purchases from retail establishment are excluded from the scope of the order. No such exclusion was intended.

See Petitioners' Response at 7.

Thus, the petitioners assert that Dimensions' bags do not meet the criteria of either of the two exclusions stated in the published scope: namely, (1) bags that are not printed with logos or store names and that are closeable with drawstrings made of polyethylene film, or (2) bags 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. In addition, the petitioners note that Dimensions' bags are classified under the same HTS subheading as the subject merchandise defined in the scope of the Orders.

Finally, the petitioners state that end-use is rarely a basis for making scope determinations, and that application of an end-use definition for purposes of identifying merchandise that is included within the scope of these Orders was already rejected by the Department in the final determination of the investigation involving imports from the PRC. Namely, in response to a request to exclude door-knob newspaper bags and 16 other bag types defined only by end-use,

the Department stated: "Excluding a bag type by its use would not assist CBP in the enforcement of an antidumping order because it is not practicable to have determinations based on product use and because such a practice would create a major risk of circumvention." See Final Determination of the Antidumping Dumping Duty Order: Polyethylene Retail Carrier Bags from China, 69 FR 34125 (June 18, 2004) ("PRCB Final Determination"), and accompanying Issues and Decisions Memorandum at Comment 1 ("Issues and Decisions Memo").

In its rebuttal of December 6, Dimensions raises several points:

First, Dimensions states that granting an end-use based exclusion would not change the scope of the Orders. Dimensions asserts that:

granting an end-use exclusion would not change the scope of the antidumping order in this case. This is so because the order in this case, based on the specific request of the petitioners, covers only certain polyethylene bags with a particular end use. The use of the words 'retail' and 'carrier' denote bags for a particular use and, as such, the order does not encompass all polyethylene bags. If the intent were to cover other types of bags, the Department could easily have drafted the order to cover "polyethylene bags" or "certain polyethylene bags" and left out the specific qualifying language limiting the scope to retail carrier bags. This, however, was not the intention of the investigation. Instead, the investigation and order focus on a specific type of polyethylene bag used for a specific purpose. As such, the end use of a polyethylene bag is a critical factor in determining whether it falls within the scope of the order.

See Rebuttal to Petitioners' Submission (December 6, 2004) at 3.

Second, Dimensions reiterates that the bags are not intended for use in carrying goods from retail establishments, do not bear the logo of a retail establishment, are neither blank nor do they have a generic phrase, do not advertise any retailer, nor are they given out by a retailer.

Third, Dimensions asserts that the Department can easily exclude such bags with printing that is not generic and which indicates an end use other than retail. Dimensions states that the sample bags are clearly not intended to be used as retail carrier bags and contends that one of the specific exclusions already listed in the scope language is based upon end use. Dimensions states that if the Department feels that there is a risk of circumvention based upon such an exclusion, it could require an end-use certification. See Rebuttal to Petitioners' Submission at 5.

Fourth, Dimensions states that the petitioners' interpretation of the scope of the Orders completely ignores the Department's use of the word "retail." Dimensions argues that the Department's use of the word "retail" four times in the Orders "clearly indicates that this word has significance with respect to the merchandise covered by this antidumping order." See Rebuttal to Petitioners' Submission at 6.

Fifth, Dimensions states that the petitioners' interpretation of the Orders would impermissibly change the scope of the Orders by ignoring the plain language contained in the Orders. Dimensions states that "Commerce cannot 'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *Eckstrom Industries, Inc. v. United States*, 254 F3d 1068, 1072 (Fed. Cir. 2001). Dimensions asserts that "if the petitioners wanted other types of polyethylene bags (e.g., non-retail or promotional bags such as Dimensions' sample bags) included in the scope of the investigation, they had ample time to convince the Department to broaden the scope of the order. Now that a final determination has been issued in this case, however, the Department may not expand the scope of the antidumping order, it may only clarify the scope of the order." See Rebuttal to Petitioners' Submission at 6-7.

Dimensions asserts that "there is no evidence in the Petition or investigation that the petitioners wanted to include any polyethylene bags others than retail bags within the scope of the investigation, as the Petition is clearly directed to the retail bags, not other types of polyethylene bags. As such, the petitioners either intentionally or erroneously omitted other polyethylene bags from the scope of this investigation. Thus, the failure to include other polyethylene bags in this investigation is the petitioners' error." See Rebuttal to Petitioners' Submission at 7. Dimensions states that "allowing the petitioners to now retreat from this error would itself frustrate the purpose of the antidumping laws because it would allow Commerce to assess antidumping duties on products intentionally omitted from the ITC's injury investigation." See Rebuttal to Petitioners' Submission at 7.

Dimensions states that "assuming arguendo the use of the word 'retail' is subject to interpretation, at best the petitioners' comments indicate that there is an ambiguity in the language of the scope of the order. Thus, based on the competing interpretations set forth by Dimensions and the petitioner, should Commerce determine the language of the order to be ambiguous, then a formal scope inquiry is warranted." *Duferco Steel, Inc. v. United States*, 296 F3d 1087, 1097 (Fed. Cir. 2002). See Rebuttal to Petitioners' Submission at 7, footnote 8.

Dimensions states that the words "retail" and "carrier" refer to the use of polyethylene bags that are subject to the Orders. Dimensions asserts that the "antidumping order in this case cannot be given a broad construction that would include any polyethylene bag falling within the specified dimensions that is not specifically excluded by the scope language. This interpretation is contradicted by the terms of the order itself, which clearly state that it covers only "polyethylene retail carrier bags."

Finally, Dimensions asserts that classification of an item under the HTS subheading is not dispositive as to its inclusion within the scope of the Orders. Dimensions states that the Orders provide that the subject merchandise is currently classifiable under HTSUS subheading 3923.21.0090. The designation of this HTSUS number, however, is not dispositive as to a product's inclusion within the scope. Subheading 3923.21.0090 covers other plastic sacks and bags (including cones), made of polymers of ethylene, for the conveyance or packing of goods. This subheading is a broad basket provision, which covers the subject PRCBs and also includes

many products that are outside of the scope. See Rebuttal to Petitioners' Submission at 10. Dimensions states that "...during the investigation, the petitioners acknowledged that many imports under this HTSUS subheading are not within the scope of this investigation. Finally, Dimensions claims that its sample bags, although classified under HTSUS subheading 3923.21.0090, are not the type of merchandise that fall within the scope of the antidumping order in this case." See Rebuttal to the Petitioners' Submission at 10.

On January 24, 2005, at the Department's request, Dimensions resubmitted its scope request to include PRCBs from the PRC, Malaysia, and Thailand. There was no new information presented, in accordance with the Department's request to limit the submission to a refiling under all three case numbers of Dimensions' past submissions.

On February 1, 2005, the petitioners submitted comments arguing that Dimensions does not have standing to file a scope request with respect to the orders on PRCBs from Malaysia and Thailand because, pursuant to 19 CFR 351.225(c)(1), Dimensions has not demonstrated that it has the required standing for such requests.

On March 9, 2005, the Department issued a letter to interested parties seeking comments on Dimensions' letter concerning its scope request originally filed only on the record of the PRC PRCB proceeding on October 13, 2004. In its March 9, 2005, letter, the Department announced it had placed Dimensions' January 20 letter on the administrative records of the PRC, Malaysian, and Thai proceedings and it invited interested parties to file comments.

On March 28, 2005, the petitioners submitted comments concerning Dimensions' January 20, 2005, submission. The petitioners stated that because no new arguments or sample evidence was presented by Dimensions, all issues raised in Dimensions' scope request were addressed in the petitioners' November 18 letter.

As stated earlier, because it is the Department's preference, when the scope of an order is identical across several countries, to include all affected countries in the scope ruling, we have placed Dimensions' January 10, 2005, letter on the administrative record of the cases for Malaysia, Thailand, and the PRC.

DEPARTMENT'S DETERMINATION/ANALYSIS

Pursuant to 19 CFR 351.225(c), the Department determines that no further inquiry is warranted to decide whether sample bags produced in the PRC are covered by the scope of the Orders. We have evaluated this request in accordance with 19 CFR 351.225(k)(1) because the descriptions of the products contained in the petition, the final determinations of the Secretary and the ITC, and the Orders are dispositive of the issue.

In making its decision, the Department relied upon the language of the scope and referred to the petition, the initial investigation, and the determinations of the Secretary for guidance in the

interpretation of the scope. See Eckstrom Indus., Inc. v. United States, 254 F.3d 1068, 1072 (Fed. Cir. 2001).

We find that Dimensions' bag specifications match the scope specifications for covered merchandise. Dimensions itself states that "the sample bags fall within the dimensions of the subject retail carrier bags. Further, the sample bags are made from the same materials (polyethylene) as the subject retail carrier bags." See Scope Ruling Request at 5.

We find that, in defining the scope of the Orders, the petitioners chose to illustrate the types of polyethylene bags that are captured within the technical description contained in the first paragraph of the scope rather than provide an exhaustive list. The phrase "...typically provided without any consumer packaging and free of charge by retail establishments, e.g., grocery, drug, convenience, department, speciality retail, discount stores, and restaurants..." is illustrative, and serves as a characteristic example of representative bags (emphasis added). See Antidumping Duty Order at 48201, 48202. Furthermore, in describing other "names" of polyethylene bags covered by the Orders, 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.

We note also the description set forth by the ITC of the merchandise covered by these antidumping investigations:

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; patch handle bags; rigid handle bags; soft loop bags; drawstring bags; sine wave bags [sic]; straight up [sic] 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 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).

The scope of the Orders also provides two clear exclusions, namely (1) polyethylene bags that are not printed with logos or stores 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 carrying merchandise from retail

establishments, e.g., garbage bags, lawn bags, trash-can liners. Even if the specific drug name and artwork that is printed on Dimensions' bags were not considered logos, Dimensions' bags still do not have closeable polyethylene drawstrings, and thus, do not meet the criteria for the first exclusion mentioned above. Furthermore, Dimensions' bags are not packed in consumer packaging and, therefore, do not meet the criteria for the second exclusion.

It is the Department's preference, when the scope of an order is identical across several countries, to include all affected countries in the scope ruling. We agree with the petitioners that Dimensions does not have standing to file a request with respect to the orders on PRCBs from Malaysia and Thailand. Therefore, because the scope of the Orders is identical for all three countries, the Department has placed Dimensions' January 24, 2005, scope request on the record of the antidumping orders on PRCBs from Malaysia and Thailand.

RECOMMENDATION

Because the product description provides a sufficient basis for making a determination and the issue can be resolved by reference to the descriptions of the product contained in the petition, the final determinations of the Secretary and the ITC, we recommend determining that no further inquiry is required.

Based on our analysis of the record and the comments submitted by the parties, we recommend making a final ruling that the sample bags produced by Dimensions are within the scope of the antidumping duty orders on PRCBs from Malaysia, Thailand, and the PRC.

Agree Disagree

Barbara E. Tillman

Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

May 6, 2005
Date