

New TFTEA Customs Duty Drawback Regulations – What You Need to Know

FEBRUARY 4, 2019

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Customs duty drawback has long been recognized as a lawful means by which importers may reduce the realized impact of tariff duties on imported items. United States Customs and Border Protection (“CBP”) published a highly anticipated Final Rule on December 18, 2018, with the effect of modernizing duty drawback as required by the Trade Facilitation and Trade Enforcement Act of 2015 (the “Act”). The Final Rule achieves this modernization by, among other things, liberalizing the merchandise substitution standard, simplifying recordkeeping requirements, and requiring the electronic filing of drawback claims. These advancements command attention of large enterprise shippers as well as their service providers supporting international transportation and logistics operations.

Customs Duty Drawback Primer

The principles of customs duty drawback date to 1789 in the United States. Congress allows importers to essentially seek refunds up to ninety-nine percent (99%) of duties paid on imported goods if those goods are later exported. This system, known as drawback, is intended to advance the interest of domestic production and promote competitive export trade. Drawback claims may be based on circumstances such as the export of the very same imported good, of merchandise manufactured using the imported good, or of merchandise materially similar to the imported good. The recovery of tariff duties through drawback is financially advantageous particularly for importers with high inbound and outbound traffic flows, although the recordkeeping required to support drawback claims can be burdensome.

Trade Facilitation and Trade Enforcement Act of 2015

President Barack Obama signed the Act into law on February 24, 2016. The Act amends Section 313 of the Tariff Act of 1930 (19 USC § 1313), which governs the drawback of customs duties, taxes, and fees, upon the export of imported goods under certain circumstances. This amendment significantly expands the scope and ease of substitute drawback. Specifically, it eliminates the subjective “commercially interchangeable” standard for substitution in favor of allowing drawback for any items classified under the same eight-digit harmonized tariff code. It also extends the period of time within which substitution drawback may occur from three (3) to five (5) years between import and export. These changes are significant for savvy importers. Substitution drawback is not only simplified and rendered more objective due to tariff-level analysis, but the scope of available drawback is arguably expanded due to these changes. Adding two years to the period available for claiming substitution drawback means that greater volumes of imports may be paired exports to

support drawback claims and operations teams are under less pressure to manage inbound and outbound traffic flows to maximize relief.

CBP Final Rule “Modernizing Drawback”

CBP’s Final Rule entitled “Modernizing Drawback” adds 19 CFR Part 190 by the same name. As required by the Act, the new CBP regulations permit substitution drawback based upon imports and exports under common eight-digit harmonized tariff numbers.^[1] Substitution drawback is permitted under the new regulations if “imported, duty-paid merchandise or merchandise classifiable under the same 8-digit HTSUS subheading number as the imported merchandise is used in the manufacture or production of articles within a period not to exceed 5 years from the date of such imported merchandise.”^[2] CBP is thereby adopting the new objective test for determining the interchangeability of a good, its kind, and quality. The regulations further expand and harmonize the time window for all drawback claim types to five (5) years from the date of importation to the filing of the drawback claim related to that import.^[3] Additionally, the new CBP regulations require that all supporting records relating to drawback claims must be maintained for three (3) years from the date of the liquidation of the claim.^[4]

The new regulations also advance the interests of modernization by requiring that all drawback claims must be filed electronically. This modernization is an attempt to reduce both the administrative burden placed on CBP in reviewing paper drawback claims as well as the overall administrative cost incurred by importers. Under the new regulations, the electronic drawback entry must include numerous criteria of information and various certifications, all based on the type of drawback claim.^[5] CBP had previously began accepting electronic drawback claims under the Act upon the effective date of February 24, 2018, based upon interim guidance issued in response to the delay in promulgating regulations.

One area of particular focus during notice and comment was application of substitution drawback to excise tax. The new regulations clarify the prohibition on the filing of substitution drawback claims for internal revenue excise tax in situations where no excise tax was paid upon the substituted merchandise or where the substituted merchandise is the subject of a different claim for refund or drawback of tax. Under the regulations, drawback granted on the export or destruction of substituted merchandise will be limited to the amount of taxes paid (and not returned by refund, credit or drawback) on the substituted merchandise.^[6] This clarification restricts the ability to file substitution drawback claims in circumstances in which internal revenue taxes have not been paid on the substituted (or exported) product, which in the past has resulted in imported products being introduced into commerce with no net payment of excise tax, a “double drawback.” This issue has been of keen interest to the alcohol industry due to the imposition of such excise taxes.

The new regulations additionally set forth various instances in which drawback is not allowed. Specifically, drawback is prohibited: (1) on antidumping and countervailing duties which were imposed on any merchandise entered, or withdrawn from warehouse, for consumption; and (2) when the identified merchandise, the designated imported, or the substitute merchandise consists of an agricultural product which is duty-paid at the over quota rate of duty established under a tariff-rate quote, except that tobacco is eligible for drawback and some agricultural products fitting this description are eligible for drawback under 19 U.S.C. § 1313(j)(1).^[7]

Any person who knowingly and willful files any false or fraudulent entry or claim for the payment of drawback is subject to criminal penalties provided in the regulations.^[8] Furthermore, any person who seeks, induces, or affects the payment of drawback by fraud or negligence, or attempts to do so, is subject to civil penalties.^[9] The potential civil penalties are based on the amount of actual or potential loss of revenue in relation to the drawback claim.^[10]

What You Need to Know

The long awaited Final Rule for customs duty drawback is, in broad strokes, consistent with expectations from industry and those service providers that support the import and export trades. An importer's ability to claim substitute drawback has expanded, the period in which its inbound and outbound traffic must align has likewise expanded, and the opportunity to file electronically for duty drawback has arrived. Savvy importers have already begun updating their import processes and drawback strategies to capture the newly available cost savings. This data-driven analysis is different than before, with tariff-level reviews of historic import and export data dating back a greater number of years in order to pair merchandise based on classifications. Savvy service providers may likewise benefit from recognizing this change on the enterprise shipper's global strategies. The impact may be experienced in the form of interests in documentation, recordkeeping, data management, tariff-level determinations of import and export needs, as well as the cadence of import and export flows. With change there is opportunity, as the saying goes, and knowledgeable conversations of goals and objectives in this "modernized" system of duty drawback will benefit importers and their service providers alike.

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^[1] *Drawback Simplification Newsletter; Trade Facilitation and Trade Enforcement Act of 2015*, U.S. Customs and Border Protection (June 2017).

^[2] 19 CFR § 190.22(a)(1).

^[3] *Supra* note 2.

^[4] 19 CFR § 190.15

^[5] See 19 CFR § 190.51(a)(2).

^[6] See 19 CFR §§ 190.22(a)(1)(ii)(C), 190.32(b)(3), 190.171(c)(3), 191.22(a), 191.32(b)(4), and 191.171(d).

^[7] 19 CFR § 190.3(b) & (c).

^[8] 19 CFR 190.62(a).

^[9] 19 CFR 190.62(b).

^[10] 19 USC § 1593a(c).