Organization	Executive Order	Date
* * * * *	*	*
Council of Europe in Respect of the Group of States Against Corruption (GRECO)	13240	Dec. 18, 2001.
* * * * *	*	*
Hong Kong Economic and Trade Offices	13052	June 30, 1997.
* * * * *	*	*
International Union for Conservation of Nature and Natural Resources—Limited privileges	12986	Jan. 18, 1996.
* * * * *	*	*
Interparliamentary Union	13097	Aug. 7, 1998.
Israel-United States Binational Industrial Research and Development Foundation	12956	Mar. 13, 1995.
Korean Peninsula Energy Development Organization	12997	Apr. 1, 1996.
* * * * *	*	*
Organization for the Prohibition of Chemical Weapons.	13049	June 11, 1997.
* * * * *	*	*
World Trade Organization	13042	Apr. 9, 1997.

Dated: August 18, 2003.

Robert C. Bonner,

Commissioner, Customs and Border Protection.

Timothy E. Skud,

Deputy Assistant Secretary of the Treasury.

[FR Doc. 03–21577 Filed 8–21–03; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

19 CFR Part 191

[CBP Dec. 03–23]

RIN 1515–AD02

Manufacturing Substitution Drawback: Duty Apportionment

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, with changes, the interim rule amending the Customs Regulations that was published in the **Federal Register** on July 24, 2002, as T.D. 02–38. The interim rule amended the regulations to provide the method for calculating manufacturing substitution drawback where imported merchandise, which is dutiable on its value, contains a chemical element and amounts of that chemical element are used in the manufacture or production of articles which are either exported or destroyed under Customs supervision. Recent court decisions have held that a chemical element that is contained in an imported material that is subject to an *ad valorem* rate of duty may be designated as same kind and quality merchandise for drawback purposes. The amendment provides the method by which the duty attributable to the chemical element can be apportioned and requires a drawback claimant, where applicable, to make this apportionment calculation.

EFFECTIVE DATE: August 22, 2003.

FOR FURTHER INFORMATION CONTACT: William G. Rosoff, Chief, Duty and Refund Determinations Branch, Office of Regulations and Rulings, Bureau of Customs and Border Protection, Tel. (202) 572–8807.

SUPPLEMENTARY INFORMATION:

Background

Drawback—19 U.S.C. 1313

Section 313 of the Tariff Act of 1930, as amended, (19 U.S.C. 1313), concerns drawback and refunds. Drawback is a refund of certain duties, taxes and fees paid by the importer of record and granted to a drawback claimant upon the exportation, or destruction under Customs supervision, of eligible articles. The purpose of drawback is to place U.S. exporters on equal footing with foreign competitors by refunding most of the duties paid on imports used in domestic manufactures intended for export.

Substitution for Drawback Purposes—19 U.S.C. 1313(b)

There are several types of drawback. Under section 1313(b), a manufacturer can recoup duties paid for imported merchandise if it uses merchandise of the same kind and quality to produce exported articles pursuant to the terms of the statute. Section 1313(b) reads, in pertinent part:

> (b) *Substitution for drawback purposes.* If imported duty-paid merchandise and any other merchandise (whether imported or domestic) of the same kind and quality are used in the manufacture or production of articles within a period not to exceed three years from the receipt of such imported merchandise by the manufacturer or producer of such articles, there shall be allowed upon the exportation, or destruction under customs supervision, of any such articles, notwithstanding the fact that none of the imported merchandise may actually have been used in the manufacture or production of the exported or destroyed articles, an amount of drawback equal to that which would have been allowable had the merchandise used therein been imported * * *.

Manufacturing substitution drawback is intended to alleviate some of the difficulties in accounting for whether imported merchandise has, in fact, been used in a domestic manufacture. Section 1313(b) permits domestic or other imported merchandise to be used to make the export article, instead of the actual imported merchandise, so long as the domestic or other imported merchandise is of the ‘‘same kind and quality’’ as the actual imported merchandise.

Several recent court cases have examined the scope of the term ‘‘same kind and quality’’ as used in 19 U.S.C. 1313(b). *See E.I. DuPont De Nemours and Co.* v. *United States,* 116 F. Supp. 2d 1343 (Ct. Int’l Trade 2000). *See also International Light Metals* v. *United States,* 194 F.3d 1355 (Fed. Cir. 1999). In these cases, the courts held that a chemical element that is contained in an imported material that is dutiable on its value may be designated as same kind and quality merchandise for purposes of manufacturing substitution drawback pursuant to 19 U.S.C. 1313(b). The holding in *DuPont* necessitates apportionment as a necessary method of claiming a drawback entitlement under these circumstances. *DuPont,* 116 F. Supp. 2d at 1348–49.

Amendment to § 191.26(b) of the Customs Regulations

On July 24, 2002, Customs and Border Protection (CBP), as its predecessor agency, the Customs Service, promulgated interim amendments to the Customs Regulations, published in the **Federal Register** (67 FR 48368) as T.D. 02–38, to implement the courts' holdings in *DuPont* and *ILM.* The interim amendments to the Customs Regulations were made to § 191.26 (19 CFR 191.26), which sets forth the recordkeeping requirements for manufacturing drawback. Paragraph (b) of this section describes the recordkeeping requirements for substitution drawback.

To implement the courts' interpretation of 19 U.S.C. 1313(b), T.D. 02–38 amended § 191.26(b) by adding language that explains how to apportion the duty attributable to same kind and quality chemical elements contained in *ad valorem* duty-paid imported materials for purposes of manufacturing substitution drawback. T.D. 02–38 also amended § 191.26(b) to provide an example of apportionment calculations.

Duty Apportionment Calculation

In order for a drawback claimant to be able to ascertain what portion of the *ad valorem* duty paid on imported merchandise is attributable to a chemical element contained in the merchandise, an apportionment calculation is necessary. First, if the imported duty-paid material is a compound with other constituents, including impurities, and the purity of the compound in the imported material is shown by satisfactory analysis, that purity, converted to a decimal equivalent of the percentage, is multiplied against the entered amount of the material to establish the amount of pure compound. The amount of the element in the pure compound is to be determined by use of the atomic weights of the constituent elements, converting to the decimal equivalent of their respective percentages, and multiplying that decimal equivalent against the above-determined amount of pure compound. Second, the amount claimed as drawback based on a contained element must be taken into account and deducted from the duty paid on the imported material that may be claimed on any other drawback claim.

Discussion of Comments

Five commenters responded to the solicitation of public comment published in T.D. 02–38. A description of the comments received, together with CBP's analyses, is set forth below.

Comment: Several commenters disagreed with CBP's interpretation that the court decisions in *DuPont* and *ILM* require an apportionment calculation to determine the proper drawback entitlement.

CBP's response: CBP maintains its view that the holdings in *DuPont* and *ILM* necessitate apportionment of the duty attributable to a chemical element contained in an *ad valorem* duty-paid imported material if this chemical element is the designated good in a drawback claim under 19 U.S.C. 1313(b). As noted above, the CAFC in *ILM* and the CIT in *DuPont* examined the scope of the term ''same kind and quality'' as used in 19 U.S.C. 1313(b) and determined that a chemical element contained in an imported material that is dutiable on its value may be designated as same kind and quality merchandise for purposes of manufacturing substitution drawback. In *ILM,* the CAFC stated that as there was ''* * * no dispute as to the amount of titanium that was used in the scrap * * * the amount of drawback to which ILM would be entitled based upon the titanium in that scrap and the titanium in the imported sponge could be precisely determined.'' Similarly, in *DuPont,* the CIT noted that because the amount of titanium in the feedstocks can be accurately determined, substitution of another feedstock for synthetic rutile is permitted. If either the CAFC or the CIT intended drawback to be permitted on all the titanium-containing raw materials, the courts would not have emphasized that calculation of the amount of titanium contained in the raw materials entitled the claimant to a specific amount of drawback. The courts clearly recognized that apportionment by relative weight was necessary to prevent the overpayment of drawback.

Comment: Several commenters noted that if apportionment is required, apportionment by relative value is a more appropriate calculation method than apportionment by relative weight. In a related comment, one commenter suggested that a drawback claimant should have the option to apportion duty using either relative value or relative weight.

CBP's response: CBP disagrees. As discussed above, the courts in both *ILM* and *DuPont* require apportionment by relative weight. Both of these courts held that the quantity, and not the value, of the sought material (the titanium) could be determined and consequently the amount of drawback could be determined. Moreover, there is no authority to apportion duty by relative value for a drawback claim per 19 U.S.C. 1313(b) when only one good results from the processing of the imported merchandise. If the sought material, *i.e.*, the titanium, was divided to make two articles, then relative value apportionment would be required.

Comment: One commenter submitted that apportionment by relative weight contradicts the drawback statute (19 U.S.C. 1313) because this section, at paragraph (a), provides drawback upon the ''exportation or destruction under custom supervision of articles manufactured or produced in the United States with the use of imported merchandise, * * *.'' The commenter noted that the sought element in *DuPont* (the titanium) is neither ''used'' nor ''imported'' because it is the feedstock containing the titanium that is ''imported'' and ''used'' within the meaning of section 1313(b). Another commenter stated that section 1313(b) provides no legal basis for apportionment under these circumstances.

CBP's response: CBP disagrees. The plain language of 19 U.S.C. 1313(b) permits drawback to be paid only on the sought element, and the sought element in both *ILM* and *DuPont* was the titanium. Section 1313(b) provides that an amount of drawback equal to that which would have been allowable had the *merchandise* used therein been imported is payable if imported duty-paid *merchandise* and any other *merchandise* (whether imported or domestic) of the *same kind or quality* are used in the manufacture or production of articles subsequently exported or destroyed. Clearly, per 19 U.S.C. 1313(b), the merchandise upon which drawback may be paid is the merchandise characterized as ''same kind and quality.'' It cannot be said that the various feedstocks used to provide the sought element in those cases are of the ''same kind and quality,'' but only that the titanium, as a discrete element contained in the feedstocks, was of the ''same kind and quality'' as required by section 1313(b). In *ILM*, the CAFC makes clear that the merchandise of the ''same kind and quality'' required by 19 U.S.C. 1313(b) was the sought element, titanium, and not the various feedstocks. *ILM*, 194 F.3d 1355 at 1367. Additionally, in applying the three factors promulgated by the CAFC in *ILM*, the CIT in *Dupont* stated:

> * * * the [ILM] court reasoned that the phrase ''same kind and quality'' should be applied only to the sought element contained in a source material, and not to the source material as a whole or the impurities contained therein * * *. Thus, although different ores may be made up of a number of elements, the ''same kind and quality'' standard applies only to the element used in manufacturing the exported article.

Dupont, at 1348. Therefore, the court held that the titanium is the designated merchandise. Since titanium is an element, and an element is measured by its weight, apportionment by relative weight is required. Consequently, the apportionment of the duty attributable to a chemical element contained in *ad valorem* duty-paid imported merchandise must be calculated by the relative weights of the sought element and the feedstock used.

Comment: One commenter stated that since T.D. 82–36 (16 Cust. B. & Dec. 97, February 26, 1982) is specific as to ''how to determine the quantity of imported merchandise to be designated, and therefore, the basis for the allowance of drawback,'' apportionment by weight is not mandated by the court decisions.

CBP's response: CBP disagrees. The CAFC in *ILM* stated:

> * * * we find little assistance in the facts of T.D. 82–36. That ruling dealt with a substitution of copper ores, in which each ore contained impurities and a single sought element, copper * * * In this case, the scrap contains several sought elements, and no impurities have been identified as such.

ILM at 1363.

It is additionally noted that the *ILM* and the *Dupont* Courts found that the designated material was titanium, an element. The amount of an element is calculated by its weight.

Comment: One commenter suggested that since the drawback claimant does not separate the sought element from the feedstock, then it is the feedstock and not the sought element that must be the imported merchandise designated for drawback.

CBP response: CBP disagrees. The courts in *ILM* and *Dupont* held that the element was the material that met the same kind and quality requirement and therefore the element was the designated merchandise. The CAFC in *ILM* noted that it was not necessary to extract the sought element from the feedstock, and stated ''* * * we see no reason why ILM should be required to undertake such an additional step [of extracting the titanium from the scrap] * * *'' Both the *ILM* and *Dupont* Courts determined that since the amount of the sought element (the titanium) could be precisely determined, it was unnecessary to require that it be extracted as a discrete element before drawback was payable.

Comment: One commenter stated that CBP was incorrectly using the ''same kind and quality'' test to apportion the duties because this standard is only used for determining whether imported goods may be substituted for other goods.

CBP response: CBP disagrees. As discussed above, the only merchandise upon which drawback may be paid as per 19 U.S.C. 1313(b) is the imported duty-paid and designated merchandise characterized as ''same kind and quality.'' In *ILM*, the CAFC unequivocally stated that the merchandise of the ''same kind and quality'' required by section 1313(b) is the sought element—not the various feedstocks. *ILM* at 1367. Therefore, the CAFC found that the sought element, the titanium, was of the same kind and quality and thus only the titanium could be the designated merchandise.

Comment: One commenter stated that CBP's example of the apportionment calculation set forth in § 191.26(b)(4) is incorrect, and noted that CBP applies the $0.011 factor to each pound of titanium. The commenter submits that, in fact, each pound of material in the imported synthetic rutile, be it titanium, oxygen, or impurities, bears the same $0.02 duty.

CBP response: CBP agrees. The example in the interim amendments to § 191.26(b)(4), set forth in T.D. 02–38, is inconsistent with the liquidation instructions on which it was to have been based. Since the total duty on the imported synthetic rutile includes duty on its titanium content, the calculation should be $600 duty paid divided by 30,000 pounds synthetic rutile ($600 ÷ 30,000 = .02) duty per pound of imported rutile. Therefore, the example set forth in § 191.26(b)(4) is amended accordingly and set forth below in the regulatory text section of this document.

Comment: One commenter suggested that apportioning duty based on weight ''encourages uneconomical activities, such as the export of waste and impurities in order to obtain drawback that would be due under value based methodologies.'' The same commenter noted that this exportation of waste would result in an overpayment of duty and a doubling of drawback claims because each drawback claimant would file an additional claim for waste.

CBP response: CBP disagrees. No waste is generated from the designated merchandise, *i.e.*, the titanium. Additionally, even if waste were generated, it has been CBP's position based on long-standing court decisions that drawback is not allowable on the exportation of waste. In *United States* v. *Dean Linseed-Oil Co.,* 87 Fed. 453, 456 (2nd Cir. 1898), *cert. den.,* 172 U.S. 647 (1898), the court implicitly accepted the government's position that drawback was unavailable on the exportation of waste. CBP has continuously followed this position. *See Precision Specialty Metals, Inc.* v. *United States,* 116 F.Supp. 2d 1350 (Ct. Int'l Trade (2001).

Comment: One commenter stated that apportioning the duty by weight will be administratively difficult and burdensome. Another commenter stated that all the information necessary to perform the duty calculation required by § 191.26(b), as amended by T.D. 02–38, is not on the manufacturing certificate.

CBP response: The court instructed CBP to make the calculation to properly administer the statute. Therefore, CBP must follow the court's decision regardless of whether the requisite calculation is burdensome.

Conclusion

After analysis of the comments and further review of the matter, CBP has determined to adopt as a final rule, with the changes mentioned in the comment discussion and with additional non-substantive editorial changes, the interim rule published in the **Federal Register** (67 FR 48368) on July 24, 2002, as T.D. 02–38.

Inapplicability of Delayed Effective Date

These regulations serve to add apportionment language to the Customs Regulations necessitated by recent decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit, and to finalize an interim rule that is already in effect. In addition, the regulatory changes serve to benefit the public by providing specific information as to how a drawback claimant is to correctly make the requisite duty apportionment calculations when claiming manufacturing substitution drawback for a chemical element contained in *ad valorem* duty-paid imported merchandise. For these reasons, pursuant to the provisions of 5 U.S.C. 553(d)(1) and (3), CBP finds that there is good cause for dispensing with a delayed effective date.

The Regulatory Flexibility Act and Executive Order 12866

Because no notice of proposed rulemaking was required, the provisions of the Regulatory Flexibility Act (5

U.S.C. 601 *et seq.*) do not apply. Further, these amendments do not meet the criteria for a ''significant regulatory action'' as specified in Executive Order 12866.

Drafting Information

The principal author of this document was Ms. Suzanne Kingsbury, Regulations Branch, Office of Regulations and Rulings, Bureau of Customs and Border Protection. However, personnel from other offices participated in its development.

List of Subjects 19 CFR Part 191

Claims, Commerce, Customs duties and inspection, Drawback, Reporting and recordkeeping requirements.

Amendment to the Regulations

■ For the reasons stated above, the interim rule amending part 191 of the Customs Regulations (19 CFR part 191), which was published at 67 FR 48368–48370 on July 24, 2002, is adopted as a final rule with the change set forth below.

PART 191—DRAWBACK

■ 1. The general authority citation for part 191 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States), 1313, 1624.

* * * * *

■ 2. In § 191.26, the example to paragraph (b)(4) is amended to read as follows:

§ 191.26 Recordkeeping for manufacturing drawback.

* * * * *

(b) *Substitution manufacturing.* * * *
(4) * * *

Example to paragraph (b)(4).

Synthetic rutile that is shown by appropriate analysis in the entry papers to be 91.7% pure titanium dioxide is imported and dutiable at a 5% *ad valorem* duty rate. The amount of imported synthetic rutile is 30,000 pounds with an entered value of $12,000. The total duty paid is $600. Titanium in the synthetic rutile is designated as the basis for a drawback claim under 19 U.S.C. 1313(b). The amount of titanium dioxide in the synthetic rutile is determined by converting the purity percentage (91.7%) to its decimal equivalent (.917) and multiplying the entered amount of synthetic rutile (30,000 pounds) by that decimal equivalent (.917 × 30,000 = 27,510 pounds of titanium dioxide contained in the 30,000 pounds of imported synthetic rutile). The titanium, based on atomic weight, represents 59.93% of the constituents in titanium dioxide. Multiplying that percentage, converted to its decimal equivalent, by the amount of titanium dioxide determines the titanium content of the imported synthetic rutile (.5993 × 27,510 pounds of titanium dioxide = 16,486.7 pounds of titanium contained in the imported synthetic rutile). Therefore, up to 16,486.7 pounds of titanium is available to be designated as the basis for drawback. As the per-unit duty paid on the synthetic rutile is calculated by dividing the duty paid ($600) by the amount of imported synthetic rutile (30,000 pounds), the per-unit duty is two cents of duty per pound of the imported synthetic rutile ($600 ÷ 30,000 = $0.02). The duty on the titanium is calculated by multiplying the amount of titanium contained in the imported synthetic rutile by two cents of duty per pound (16,486.7 × $0.02 = $329.73 duty apportioned to the titanium). The product is then multiplied by 99% to determine the maximum amount of drawback available ($329.73 × .99=$326.44). If an exported titanium alloy ingot weighs 17,000 pounds, in which 16,000 pounds of titanium was used to make the ingot, drawback is determined by multiplying the duty per pound ($0.02) by the weight of the titanium contained in the ingot (16,000 pounds) to calculate the duty available for drawback ($0.02 × 16,000 = $320.00). Because only 99% of the duty can be claimed, drawback is determined by multiplying this available duty amount by 99% (.99 × $320.00 = $316.80). As the oxygen content of the titanium dioxide is 45% of the synthetic rutile, if oxygen is the designated merchandise on another drawback claim, 45% of the duty claimed on the synthetic rutile would be available for drawback based on the substitution of oxygen.

Robert C. Bonner,

Commissioner, Customs and Border Protection.

Approved: August 19, 2003.

Timothy E. Skud,

Deputy Assistant Secretary of the Treasury.

[FR Doc. 03–21575 Filed 8–21–03; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Federal Highway Administration

23 CFR Part 1225

[Docket No. NHTSA–2002–13680]

RIN 2127–AI44

Operation of Motor Vehicles by Intoxicated Persons

AGENCY: National Highway Traffic Safety Administration (NHTSA) and Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule implements a program enacted by the Department of Transportation and Related Agencies Appropriations Act, 2001 (DOT Appropriations Act of FY 2001), which requires the withholding of Federal-aid highway funds, beginning in fiscal year (FY) 2004, from any State that has not enacted and is not enforcing a law that provides that any person with a blood or breath alcohol concentration (BAC) of 0.08 percent or greater while operating a motor vehicle in the State shall be deemed to have committed a *per se* offense of driving while intoxicated or an equivalent *per se* offense. This final rule defines what constitutes a conforming 0.08 BAC law for purposes of this statute.

DATES: *Effective Date:* This final rule becomes effective on October 21, 2003.

Compliance Date: To meet the requirements of the 0.08 BAC sanction program, States must enact and enforce a conforming Section 163 law on or before September 30, 2003.

FOR FURTHER INFORMATION CONTACT: In NHTSA: Ms. Jo Ann Moore, Office of Injury Control Operations & Resources, NTI–200, telephone (202) 366–2121, fax (202) 366–7394; Ms. Carmen Hayes, Office of Injury Control Operations & Resources, NTI–200, telephone (202) 366–2121; Ms. Tyler Bolden, Office of Chief Counsel, NCC–113, telephone (202) 366–1834, fax (202) 366–3820.

In FHWA: Mr. Rudy Umbs, Office of Safety, HSA–1, telephone (202) 366–2177, fax (202) 366–3222; Mr. Raymond W. Cuprill, Office of Chief Counsel, HCC–30, telephone (202) 366–0791, fax (202) 366–7499; or Mr. Byron E. Dover, Office of Safety, HSA–10, telephone (202) 366–2161, fax (202) 366–2249.

SUPPLEMENTARY INFORMATION: