



A Berkshire Hathaway Company



DUTY DRAWBACK

October 2018

- An export incentive provision included in the Tariff Act of 1789 passed by first Congress
- Provides a refund of import duties, taxes and fees on imported merchandise that can be matched to a subsequent export.



- P.L. 114-125 Trade Facilitation & Trade Enforcement Act 2015 (“TFTEA”)
 - Section 906 – Drawback Simplification Bill
- ACE Drawback Programming
- Drawback Regulations
 - Interim Guidance document
 - *Tabacos de Wilson, Inc. et al v. McAleenan et al.*
- NAFTA & USMCA
 - Section 303 repeal
 - USTR Position for Future FTAs
- Temporary Tariffs
 - 232 – Presidential Proclamation “No Drawback”
 - 301 – Drawback Eligible



Simplified Substitution

The Drawback Simplification provisions in HR 644 simplify matching of imports and exports – In most cases, items in the same **8 digit Harmonized Tariff Code (HTS)** can be used to match imports and exports

Old Way

A refund of duties, taxes, and fees on imported merchandise that is **commercially interchangeable** with the exported merchandise

Example: Beer

Old Way

Drawback available through substitution, direct id, or destruction. For direct id and destruction the export or destroyed merchandise had to be the exact merchandise that was imported proved through lot numbers and inventory paperwork. For substitution the merchandise had to be commercially interchangeable. This meant that the SKUs, values, 10 digit classification, etc. had to be the same for the import and the export to be substituted.

HR 644

2203.00.00		Beer made from malt
		In containers each holding not over 4 liters:
	30	In glass containers
	60	Other
	90	In containers each holding over 4 liters
2204		Wine of fresh grapes, including fortified wines; grape must other than that of heading 2009:
2204.10.00		Sparkling wine

Footwear



**Matching Import to Export by Style
Size and Color**



**Matching Import to Export by 8
or 10 digit HTS / SCHEDULE B**

- Eligible for drawback
- Final drawback regulations for new law are not yet published
 - “Lesser of” may impact 301 recoveries
 - Direct ID is not subject to “Lesser of” rule
- Parties can claim under old law until Feb. 23, 2019
- Sec. 232 duties – law & regulations vs. Administration’s position

Key Difference between Old vs. New (HR 644)

While HR 644 greatly expands the opportunity and potential recovery amount, there are other key differences.

	Old Drawback Rules	Simplified Drawback (HR 644)
Identification	➤ Direct identification – matching SKU, size, color, value...	✓ 8 digit HTS ✓ Other: Other
Timing*	➤ Import 3 years prior to the export date, 3 years from export to file claim	✓ 5 years from import to claim
Recovery of taxes and fees	➤ Only for Unused drawback	✓ Unused AND manufacturing drawback
Recovery based on:	➤ Unit of measure – pieces, weights...	✓ Lesser of value calculation between import and export (Note: Regulations required)
Liability	➤ Claimant only	✓ Joint and severable for claimant, importer and exporter

*Claims filed under the new law are subject to the phase in provisions of HR 644 and are eligible for submission on 2/24/2018

“Lesser of” Impact



**Entry
(Day 0)**



**Export
(Day X)**

Company A Imports and Exports

Luxury vehicle imported by Company A

- HTSUS: 8703.2300
- Import value: \$75,000
- Duty rate: 2.5%

Duties Paid to CBP:

$\$75,000 \times 2.5\% = \text{Total duty: } \$1,875$

Economy vehicle exported by Company A

- Eight-digit HTSUS classification code is the same, based on engine size
- Export value: \$35,000 Duty rate: 2.5%

Hypothetical duty limit: $\$35,000 \times 2.5\% = \875

Drawback amount: \$866

**Net impact: Duty liability
reduced by 46%**

**Claim
Drawback
(5 years)**

Is there verbiage in your company's sales / purchasing agreements for drawback rights?

Who gets the money?

Supplier?



Exporter?



How?



CBP Drawback Organization

Office of International Trade

Regulations and Rulings

- Commercial interchangeability rulings
- Application for further review decisions
- Drawback rulings

Trade Policy and Programs

- Drawback policy
- Privilege appeal review

Regulatory Audit

- Drawback audits

Regular, ongoing communication:

- Policy guidance, clarification for uniformity
- Legal advice
- Internal advice decisions

- Feedback on implications of proposed policy changes
- Guidance on drawback process details
- Explanation of "real world" scenarios

Office of Field Operations Headquarters

Trade Operations Division

- Liaison with OT on operational issues
- Input on proposed policy changes
- Personnel, staffing issues

Drawback Offices

Chicago

New York

Houston

San Francisco

- Drawback claims, protests
- Privilege applications
- Claimant visits, reviews

Laboratory Services



U.S. Customs and
Border Protection

What is the impact?

1. The drawback claim is the electronic submission, not the paper filing.
2. ACE drawback required submission of supporting documents via the DIS (ex: exporter waiver, tax claim support, etc.)
3. Accelerated payment privileges are extended to the tax and fee portion of the claims (previously limited to duties only), filed under Core drawback (i.e. non-TFTEA claims).
 - Consider the bond impact.
4. CBP Drawback Centers have a large backlog of non-ACE entries + adding TFTEA entries = likely extensions of liquidation.
5. Drawback Reconciliation Spreadsheet
6. Drawback Issue Tracker for ACE programming

CBP Interim Guidance for Filing TFTEA Drawback Claims

- V1.1 – published Feb 5, 2018
- V3.0 – published March 2018

NPRM published in the Federal Register

August 2, 2018 (Vol. 83, No. 149, pg 37886 to 37990)

- Comments closed on September 17 2018
- 94 comments submitted
- Most of the regulations are non-controversial
- Controversial provisions in the NPRM include:
 1. Excise Tax Provisions
 2. Mixed Use
 3. First Filed



Drawback: Interim Guidance for Filing TFTEA Drawback Claims

Version 1.1

February 5, 2018

Note: The reader should be advised that this guidance document is considered a DRAFT, reflecting CBP's tentative and conditional framework for drawback pending the issuance of a Final Rule to implement the regulatory changes pending for TFTEA-Drawback claims. This document will be revised before a final version is provided. Any decisions a reader makes based on this draft document are taken voluntarily and with the understanding that the policies and procedures might change via the NPRM and Final Rule process. In addition to this note at the footer of each page, this document contains the DRAFT designation as a watermark. Any subsequent revisions will be made, as needed, until the TFTEA-Drawback regulations become effective. The reader is responsible for monitoring the CBP website to ensure awareness of the status of any revisions to this document.



U.S. Customs and
Border Protection

■ Timeline:

- 2006 – 2016 – Joint work by CBP and trade on drawback simplification legislation
- 2/24/2016 – TFTEA passed
- Fall 2016 through summer 2017 – CBP & Trade regulations working group (no mention of CBP decision to suspend accelerated payment (“AP”))
- 2/5/2018 – CBP Issues Interim Guidance document
- 2/24/2018 – No regulations for calculation of claim issued by CBP
- 3/23/2018 – Complaint filed at the CIT in *Tabacos de Wilson, Inc. v. U.S.*
- 3/23/2018 – Case assigned to Judge Restani, who issues an order a scheduling conference for 3/27
- 3/27/2018 – CBP amends Drawback Interim Guidance related to 2 elements of the case (“first filed” and “mixed use”)
- 6/29/2018 – Judge Restani issues opinion, includes possible final regulations publication date of July 5. Parties to meet and advise the Court of action to be taken by July 27th
- 7/20/2018 – Oral Arguments – Government argues the regs are proceeding as expeditiously as possible
- 7/27/2018 – Plaintiff’s file motion to sever calculation of claim portions of regulations as interim final
- 8/2/2018 – NPRM issued
- 8/10/2018 – Defendant files response citing Administrative Procedures Act and administrative burden if the regulations are severed
- 8/23/2018 – Oral Arguments – Same arguments reiterated, parties provide the Court with which provisions are relevant to calculation of claim
- 9/21/2018 – Court issues questions to the parties in preparation for in person conference
- 10/2/2018 – In person Conference – each party is questioned and provides final oral arguments. Judge orders parties to jointly develop a proposed order for the court so that a date certain can be established for issuing the final regulations before the end of 2018
- 10/12/2018 – Parties cannot agree to a consent order, Judge Restani issues Opinion and Order



DRAWBACK VIGILANTE

■ History of AP:

- In 1972, Customs published a new section 19 C.F.R. § 22.20a, titled “Accelerated Payment of Drawback Claims,”:
 - At present a drawback claimant must wait until a claim is liquidated before receiving payment. Although **every effort is made to process claims promptly, for various reasons it is not practical or possible always to do so. The delays which are inevitable have at times had a seriously adverse impact on the working capital of some claimants, usually smaller firms.** It is to alleviate this problem that the present amendment is proposed. The proposed procedure provides for the prompt payment of 90 percent of the drawback claimed and for the subsequent liquidation of the drawback entry with payment of the remainder found to be due or demand for refund of any excessive amount found to have been paid.
- A few years later, Customs increased the amount of the accelerated payment refunds from 90% to 100% because the agency determined the underlying qualifications and presence of the bond sufficiently protected the Government revenue:
 - ... It has been determined that increasing the amount of accelerated payment from 90 percent to 100 percent would be beneficial to the exporting claimants. Furthermore, in view of the bond guaranteeing the refund of any excess payments, **any danger to the revenue would be eliminated.**
- Since AP was implemented, any change in the drawback law (1994, 1999, 2000, 2004, and 2008 etc.) has **never** resulted in the suspension of AP during the period required to issue final regulations

Fast forward 46 years . . .

CBP argued:

1. The “so-called “harm” is merely the result of a business decision made by plaintiffs regarding whether to capitalize their firms with accelerated payment of estimated drawback versus other forms of revenue.”
2. Against AP on TFTEA claims because of the need to “protect the revenue” if the calculation of claim regulations are not final.

Counter:

1. Bonded \$ for \$,
2. AP has always and is currently paid on an estimated basis, with a capacity to adjust prior to or at liquidation
3. Claimant makes certifications at the time of filing to correct the claim based upon changes contained in the final regulations

According to the DOJ argument, businesses should not rely on a program that has been around since 1789.

The calculation of claim methodology has essentially been agreed upon by the trade and CBP, is included in the CATAIR, etc. so any adjustments needed to the underlying claim can be processed prior to or at liquidation. This TFTEA AP process would be identical to normal AP procedures used since 1972.



Key filings:

- Plaintiff filed for a Preliminary Injunction
- Government counter filed a Motion to Dismiss
- Through a series of Oral Hearings, Judge Restani wanted to rule on this as a question of law. Final Hearing Oct. 2, 2018

Key Issue:

Sec 906(g)(2)(A) of TFTEA, amending 1313(l) reads: Not later than 2 years after the date of the enactment . . . the Secretary **shall** prescribe regulations for determining the calculation of amounts refunded as drawback under this section.

Government argued:

- Initial Arguments:
 - This is not a deadline because Congress did not include a “penalty” for not issuing the regulation
 - Since the Interim Guidance are provisional rules, the CIT cannot rule in the case (i.e. ripeness)
- Subsequent Arguments:
 - After issuance of the NPRM, that the regulations for the calculation of claim could not be separated from the entire regulatory package due to administrative burden

Judge Restani ruled on October 12, 2018:

- Treasury / CBP were in violation of the law passed by Congress when they did not issue final regulations by February 24, 2018.
- That the CIT would provide a date certain by which the regulations would be issued and asked the parties to consent to a joint order.
 - No consent could be reached, so . . .
- CIT ordered that the regulations be issued no later than December 17, 2018 and provided Treasury and CBP discretion on whether to issue:
 - (1) the entire set of regulations (i.e. all 455 pages that were contained in the proposed regulations); or
 - (2) a narrower set of regulations related only to the calculation of claim.
 - The Order clarifies that provisions related to excise taxes may become effective sixty (60) days after publication in the Federal Register.
 - The Department of Justice (“DOJ”) reserved the right to appeal.





NAFTA - Article 303

Restrictions on Drawback and Duty Deferral Programs

These restrictions were included in Chile FTA, but removed from all subsequent FTAs, until . . .

USMCA - Article 2.5 restrictions

Drawback and Duty Deferral Programs

USTR Position for Future FTAs (UK, EU, Japan, etc.)



Questions and Answers