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Summary Of Changes to Drawback Regulations

The following summarizes the major regulatory changes to the Drawback Regulations published on March 5, 1998, as T.D. 98-16. Unless otherwise stated, all changes are effective April 5, 1998.

Completion of Drawback Claims

In order to better ensure consistency and uniformity of practice, the section of the regulations dealing with the completion of drawback claims (§ 191.51) has been rewritten to clarify what documents constitute a complete drawback claim. Under the revisions, a claim will be considered complete if all the required documentation is present with all the basic information provided.

In regard to certificates of manufacture and delivery (which are a required part of a complete claim when the claim is based on such a certificate), it is recognized that a certificate of manufacture and delivery may relate to articles that are the subject of more than one drawback claim. In such an instance, the regulations specifically provide that certificates of manufacture and delivery applicable to a claim must be filed with the claim, unless previously filed with Customs (if previously filed, the certificates must be referenced in the claim).

In cases in which there is some minor change or addition needed, such as a missing signature, numbers added incorrectly, information placed in the wrong part of the form, etc., the claim will be accepted although the claim must be corrected. However, if documentation is missing or the claim contains major inaccuracies and inconsistencies, the claim will be rejected and returned to the claimant for correction. The claim will not be considered to have been accepted by Customs and the three-year time period will not be considered to have been met by the filing of such an incomplete claim. Proposed rules have also been included to allow Customs to require claimants to restructure drawback claims in order to improve administrative efficiency, as long as the restructuring is not shown to be impossible or impractical for the claimant.

The regulations also differentiate between "perfecting" and "amending" a claim that has been accepted. A claim is "perfected" when the claimant, in response to a request from Customs, makes minor changes to the claim or provides documentation in support of the claim. A claim is "amended" when a major change must be made to the claim such as the designation of a different import entry or the claiming of a different export.

Drawback Privileges

The regulations now provide that **Waiver of Prior Notice to Export or Destroy Unused Merchandise** (WPN) (§ 191.91) and **Accelerated Payment** (AP) (@ 191.92) are *special privileges* that **must** be requested by **formal application**. (The Exporters' Summary Procedure (ESP) is no longer a special privilege because of the changes in the filing requirements. ESP will be available to all claimants as an option for establishing exportation.)

The application requirements for privileges are designed to address key internal controls by providing Customs with: (1) Reasonable assurance of the accuracy of drawback claims; and (2) a sufficient basis to appropriately verify the validity of drawback claims. These key internal controls are applicable when the issue is whether to grant a privilege. Claim sufficiency would be determined on an assessment of past facts.

Customs will allow claimants or exporters who hold existing privileges to continue to utilize these privileges for a period of one year after the effective date of the new drawback regulations (April 5, 1998).

Those who want to continue these privileges must reapply prior to the conclusion of the one-year period under the requirements of the new regulations. Privileges will be revoked unless the claimant reapplies. This revocation would apply to all exportations subsequent to the revocation.

Claimants may continue with their privileges once the new application has been submitted and received by Customs, unless Customs denies the new application. The one-year period provides a reasonable opportunity for applicants to assemble and submit the required material.

Customs will act on the application within 90 days of submission or notify the applicant in writing regarding the reasons for requiring a longer time for acting on the application. Customs' objective is to use the application process as an opportunity to promote informed compliance in the drawback process.

Exporter Notice of Intent to Export or Destroy

Claimants filing a claim under 19 U.S.C. 1313 (j) or (c) must notify Customs prior to exportation or destruction (notice of destruction procedures also are applicable to drawback under 19 U.S.C. 1313 (a) and (b)). Refer to section 191.35 (exportation) and section 191.71 (destruction).

A notice of exportation or destruction must be filed at the port of intended examination or destruction. It must provide the information needed by Customs to determine if the merchandise should be examined.

For exports that occur on or after the effective date of the regulations, a Notice of Intent to Export or Destroy must be filed with Customs, unless the exportation is covered by an existing waiver of prior notice. For destruction, a Notice of Intent to Export or Destroy must continue to be filed with Customs.

Filing Of Notices of Exportation or Destruction

In recognition of the realities of the marketplace, the exporter will now have two working days from the date of intended exportation, within which to file the notice of export, and Customs shall have two days to notify the exporter of its intent to waive or examine the shipment. Unless the claimant is advised by Customs to the contrary during this two-day period, the subject merchandise could thereafter be exported without delay. A drawback entry would later be filed with Customs. **See § 191.35**.

The regulations allow a drawback claim to be filed for qualifying merchandise which has been destroyed under Customs supervision. However, if a drawback claimant has not filed the Notice of Intent to Export/Destroy at least seven working days prior to the intended destruction of the merchandise, the Customs Service will reject the drawback claim. **See § 191.71.**

Once the Notice of Intent to Export or Destroy has been filed, the Customs Service has four working days to advise the party filing the notice as to whether Customs will witness the destruction. If the party is not so notified within four working days, the merchandise may be destroyed without delay and the destruction will be deemed to have occurred under Customs supervision. Evidence of destruction must be included with the drawback claim. For multiple or continuous drawback destruction, other prearranged procedures may be developed with the applicable drawback office to foster administrative efficiency.

Retroactive Waiver of Notice of Intent to Export

The regulations eliminate the retroactive waiver practice. However, the regulations allow a one-time opportunity for drawback claims under 19 U.S.C. 1313(j) on merchandise that a party exported or destroyed without having provided Customs with prior notice**. See § 191.36**.

This provision was retained to: (1) Provide a reasonable method for first time claimants or exporters, who were not aware of the requirement for prior notice of intent to export, to obtain such drawback; and (2) make potential claimants aware of the waiver privilege and how to apply for it.

More than one claim may be included in this one-time opportunity, subject to the time requirements for filing complete claims (three years from the date of export). This would enable claimants to file for unused merchandise drawback on exportations which occurred before the claimant may have known of the requirement for prior notice of intent to export.

Claimants and exporters may apply for a waiver of the requirement. The regulations require that applications include sufficient information about merchandise, export activities and recordkeeping to provide Customs reasonable assurance that merchandise subject to drawback claims will be unused and exported. The information will also give Customs a sufficient basis for verifying unused merchandise drawback claims.

Requesting Waiver of Prior Notice of Exportation

When applying for the waiver or the one-time application to file drawback claims on past exports, a certification by the claimant is required. The claimant must certify the ability to support with business, laboratory or inventory records (prepared in the ordinary course of business) that the imported and exported or substituted merchandise (as applicable) was not used in the United States and, if substituted, was commercially interchangeable with the imported merchandise. The certification must also state that documentary evidence establishing compliance with all other applicable drawback requirements is likewise available. What is generally referred to is evidence (when applicable):

1. Of possession of the substituted merchandise within statutory time periods.
2. That the export and import transactions upon which the claim is based are within statutory time periods.
3. That the exportation is *bonafide*.
4. That Certificates of Delivery, when necessary, are in the possession of the claimant.
5. That any waivers or assignments from one party to another, when necessary, are in the possession of the claimant.
6. That any facts or conditions to complete the claim can be supported, such as those for successorship.

Customs' approval of an application for the waiver of prior notice privilege is conditioned on the agency's right to stay the privilege holder's operation under the privilege, for a specified reasonable period, should the agency desire for any reason to examine the merchandise being exported with drawback for purposes of verification.

According to Customs, the limitation on the grant of approval of the privilege would not be an adverse action, suspension, or other form of sanction against the privilege or privilege holder. Rather, it is a restriction on the grant of the privilege itself, and therefore, possibily not subject to judicial review. The Customs Service believes this limited privilege structure would best protect the revenue and the public interest in sound administration of the drawback program. Accordingly, the agency will provide the privilege holder a letter notifying it of any stay, specifying the reason(s) therefor, and the period in which the stay will remain in effect. The stay would expire at the end of the period specified in the agency's letter, or such earlier date as the agency notifies the privilege holder in writing that the reason for the stay has been satisfied. After the stay is lifted, operation under the privilege could resume. The mere lifting of a stay is not tantamount to a certification of compliance; it simply reactivates the agency's predictive judgment in granting the privilege in the first place.

Accelerated Payment of Drawback

Accelerated (i.e., before liquidation) payment of drawback claims is will continue to be available for drawback claims filed under the manufacturing, rejected, or unused merchandise law. **Because of significant changes in the application process and conditions for granting accelerated payment privileges, existing rights to accelerated payment terminate in April 6, 1999, unless a new application is filed**.

The regulations now require that applications for this privilege include sufficient information about the applicant and its drawback program, including specific information about it bond coverage, to provide Customs reasonable assurance against losses to the revenue when accelerated payments of drawback are made.

The regulations also require a certification by the applicant that all applicable statutory and regulatory requirements for drawback will be met and a description (with sample documents) of how the applicant will ensure compliance with these requirements. According to Customs, the detail required in this description will vary, depending on the size and complexity of the applicant's accelerated drawback program.

Customs will review and verify the information and, based on that information (and any additional information relating to the application requested by Customs), as well as the applicant's record of transactions with Customs, approve or deny the application. Criteria for Customs action, including the presence or absence of unresolved Customs charges, the accuracy of the claimant's past claims, and whether any previously approved drawback privilege was revoked or suspended, are specifically set forth in the proposed regulation.

If an application for accelerated payment of drawback is approved, the applicant will be required to furnish a properly executed bond in an amount sufficient to cover the estimated amount of drawback to be claimed during the term of the bond.

Drawback claims for which accelerated payment of drawback was requested and approved would be certified for payment within three weeks after filing, if a component for electronic filing of drawback claims, records, or entries which has been implemented under the National Customs Automation Program (NCAP) is used, and within three months after filing otherwise.

Harmonized Tariff Schedule or Schedule B Numbers

The regulations now require claimants to identify for the designated imported merchandise the six-digit level HTSUS number. When such claimants are importers of record, the HTSUS number would be provided from the entry summary(s) and other entry documentation under which the merchandise originally entered the country. When a claimant is not the importer of record (and, thus, would have received a Certificate of Delivery or a Certificate of Manufacture and Delivery for the imported merchandise (or substituted merchandise in certain cases; see below)), the HTSUS number would be provided from such certificate.

The requirement for the HTSUS number on the Certificates of Delivery and Certificates of Manufacture and Delivery is necessary because these certificates are no longer a part of the drawback entry form. In the case of Certificates of Delivery, those certificates will not be filed with a claim; they will be required to be in the possession of the claimant at the time that a claim is filed.

In addition, in the case of the transfer of merchandise substituted for the imported merchandise under 19 U.S.C. 1313(j)(2) or 19 U.S.C. 1313(p), the regulations require the claim and any Certificate of Delivery or Certificate of Manufacture and Delivery (see above) to bear the tariff numbers, to the six-digit level, for the substituted merchandise. This additional information proposed to be required for substituted merchandise is necessary to establish compliance with the drawback statute.

In regard to exports, the regulations require all drawback claims to include the Schedule B or HTS numbers for the exported merchandise or articles upon which the claims are based. These numbers would be provided from the SED(s) for such exported merchandise or articles, when an SED is required. If no SED is required (e.g., for certain exports to Canada (15 CFR 30.58)), the claimant is required to

provide the Schedule B commodity number(s) or HTSUS number(s), to the 6-digit level, that the exporter would have set forth on the SED, but for the exemption from the requirement for an SED.

For imports, the requirement will go into effect for merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the regulations. For exports, the proposed requirement will go into effect for exported merchandise or articles exported one year after the effective date of the regulations.

Procedures to Evidence Exportation

As noted above, the Exporter's Summary Procedure (ESP) is no longer a special privilege, but would be available to all claimants as an option for establishing exportation.

Section 191.72 of the regulations list the alternative procedures for establishing exportation (actual evidence of exportation, export summary, certified export invoice for mail shipments, notice of lading for supplies for certain vessels or aircraft, and notice of transfer for articles manufactured or produced in the United States which are transferred to a foreign trade zone).

The actual evidence of exportation alternative is modified to make it clear that the documentary evidence listed therein consists of originals of the listed documents, or copies of these documents certified by the exporter as true copies of the originals.

In addition, the "Chronological Summary of Exports," provided for in the ESP regulations, has been simplified to list only necessary information (date of export, unique export identifier (explained in a footnote) description, net quantity, Schedule B number or HTSUS number (see discussion of Harmonized Tariff Schedule or Schedule B Numbers in this background), and destination).

Recordkeeping

Records must be kept to establish compliance with the requirements of the drawback law and regulations.

Records supporting the information contained in any document required for filing a drawback claim must be maintained by the claimant or by the responsible party (e.g., importer, exporter, possessor). If deficiencies are found in the underlying records upon which a drawback claim is based, the payment of the claim will be adversely affected, notwithstanding that such records were generated and maintained by persons other than the claimant.

For most claimants on accelerated payment, payment is received shortly after the claims are filed. Even if the claimant receives accelerated payment, the time frames for drawback, from importation to 3 years after payment of the claim, can be quite extended. The maximum time frame for unused merchandise can be up to 9 years, and for manufacturing claims, up to 11 years, if accelerated payment is involved (if accelerated payment is not involved, the time frame may be virtually indefinite, depending on when drawback is paid). It is therefore imperative that each claimant review its record retention policy in light of these time frames, to ensure that key records, many of which cannot be duplicated, are not destroyed.

Although the recordkeeping retention period for drawback is 3 years from the date of payment of drawback, the same records may be subject to a different retention period. For example, import entry records are required to be retained for 5 years from the date of entry or filing of a reconciliation. Thus, import entry records could be required to be kept for just over 3 years for drawback purposes (if the export were immediately after the import and a drawback claim was promptly filed and paid), but for 5 years for other purposes (19 U.S.C. 1508).

If drawback records exist and more than 3 years has elapsed since payment of the underlying drawback claim, access to them may not be refused on the basis that 19 U.S.C. 1313(t) and 1508 only require retention for 3 years after the date of payment of drawback. Those statutes provide relief when the time period expires and the records no longer exist. If Customs starts the verification of a drawback claim before the expiration of the time period, the records must be maintained until completion of the verification.

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