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Docket Number USCBP – 2009 – 0021

Trade and Commercial Regulations Branch,

Regulations and Rulings,

Office of International Trade,

U.S. Customs and Border Protection

799 9th Street, NW (Mint Annex)

Washington, D.C. 20229-1179

Attn: William Rosoff, Entry Process and Duty Refunds,
Regulations and Rulings, Office of International Trade

Re: Comments on Notice of Proposed Rulemaking: Drawback of Internal Revenue Excise Tax, Document Number USCBP – 2009 – 0021

Dear Mr. Rosoff:

The Joint Industry Group (JIG) is pleased to offer comments on U.S. Customs and Border Protection's ("CBP") Notice of Proposed Rulemaking ("NPRM"), Drawback of Internal Revenue Excise Tax (the "Proposed Rule"). See, 74 Fed.Reg. 52928 (October 15, 2009). The time period for making comments was extended by a second 30-day extension period until January 12, 2010. See, 74 Fed.Reg. 61585 (November 25, 2009).

JIG is a coalition of firms actively involved in international trade. Members include manufacturers, customs brokers, importers, exporters, trade associations, law firms, and accounting firms. Many of these firms are small businesses seeking to import from and export to foreign markets. JIG engages federal agencies and the Obama Administration on a variety of international trade-related issues. We work closely with U.S. Customs and Border Protection and Congress to promote trade policy that supports both border enforcement and trade facilitation.

JIG strongly believes that the Proposed Rule is contrary to the drawback statute, and, if implemented, will result in a fundamental change in a long standing Congressional trade policy seriously affecting the ability of U.S. Industry to compete worldwide.

I. THE PROPOSED RULE WOULD HAVE AN ADVERSE IMPACT ON JOBS AND MANUFACTURING

CBP claims that the Proposed Rule would be economically insignificant to small entities. JIG strongly disagrees. Drawback allows exporters to be more competitive with foreign producers, many of them allowed to claim drawback on all domestic taxes, including VAT and excise. With pressure from exchange rates, lower labor and health costs, and often substantial promotional funding from their governments, foreign producers can sell into foreign markets at a more competitive price than U.S. producers. With such small margins, every few cents can make the difference in being able to sell. The revenue lost to the U.S. Government “is” insignificant compared to the benefit the Government will receive from increasing or maintaining exports resulting in viable companies that can pay U.S. income taxes.

II. CBP HAS NO AUTHORITY TO PROMULGATE OR ADOPT THE PROPOSED RULE

The Proposed Rule, justified by CBP and the Alcohol and Tobacco Tax and Trade Bureau (TTB) as conforming the regulations to the statute, does nothing of the sort. Rather, CBP’s Proposed Rule is an unlawful use of Customs’ authority to administer the drawback laws.

Congress has been unambiguous regarding its intent in promulgating and expanding the drawback statute. In 1980, Congress expanded drawback to include imported merchandise not used in the United States that is exported in the same condition as when it was imported (“unused merchandise drawback”). See, §1313(j)(1) (1980). In doing so, Congress codified the right to claim drawback of “any duty, tax, or fee imposed under Federal law because of its importation.” *Id* (emphasis added). In 1984, Congress expanded the concept of substitution drawback to include “same-condition drawback” to allow for drawback when exported merchandise is substituted for fungible imported merchandise, on which a duty, tax or fee was paid. Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984) (emphasis added).

In 2004, Congress further amended section 1313(j)(2) principally to reverse the U.S. Court of Appeals for the Federal Circuit's (CAFC) decision in Texport Oil Co. v. United States, 1999 U.S. App. LEXIS 17394; 99-2 U.S. Tax Cas. (CCH) P70, 124 (Fed. Cir. 1999), in which the Court had sustained an interpretation of § 1313(j)(2) as limiting drawback to only those duties, taxes, and fees which "discriminate" against imports. In rejecting this interpretation, Congress sought to insure that the statute and Congressional intent were unambiguous – that drawback can be claimed by an exporter for all duties, taxes, and fees imposed under Federal law on an imported article upon entry or importation rather than "because of ... importation."¹

As the drawback statute at 19 USC §1313(j)(2) is unambiguous in providing for drawback of duties, taxes, and fees imposed upon entry or importation of foreign merchandise when commercially interchangeable merchandise is exported, CBP must administer the statute as Congress intended. See, Board of Governors, FRS v. Dimension Financial Corp., 474 U.S. 361, 368, (U.S. 1986), *quoting* Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843 (U.S. 1984).

Furthermore, CBP's claims that the Proposed Rule is necessary to comport with 19 USC §1313 are contrary to law. CBP and Treasury do not have the right to *interpret* the drawback statute - that right is reserved to the Judiciary.² Additionally, CBP's decision to ignore the statute and to propose the elimination of drawback of federal excise taxes is a violation of Section 706(2)(c) of the Administrative Procedure Act. Under the APA, while CBP may be allowed to administer the statute, it is not allowed to do so in a manner that is "arbitrary, capricious, . . . manifestly contrary to the statute," or outside of its administrative authority. Chevron, 467 U.S. 843-44.

Simply put, CBP and Treasury cannot simply ignore Congress, congressional intent, and the APA by noticing or implementing an unlawful rule.

¹ The 2004 changes to section 1313(j) were discussed in 2002 at a meeting of the Drawback Coalition. The U.S. Treasury Department and Customs were represented at this meeting, but voiced no dissenting opinions on the section 1313(j) amendments. Meeting Involving Industry, Customs and Congressional Staff regarding H.R. 1756 and H.R. 1838 (February 15, 2002).

² Marbury v. Madison, 5 US 137, 176; 2 L. Ed. 60; 1803 U.S. LEXIS 352; 1 Cranch 137 (U.S. 1803) ("It is emphatically the province and duty of the judiciary department to say what the law is."); Park B. Smith v. United States, 215 CIT 506, 508 (Ct. Int'l Trade 2001) ("The Court reminds Customs that it is the purview of the courts, not executive branch agencies, to interpret the law.")

III. CBP MISCONSTRUES THE LEGISLATIVE HISTORY OF §1313(U) AND (V)

In the NPRM, CBP misconstrues the legislative history of the Mod Act, to extend procedural concepts that are irrelevant to excise tax drawback and somehow use it as justification to issue the NPRM. See, NPRM, 74 Fed. Reg. 52929-52930. These provisions cannot be basis for the Proposed Rule changes.

CBP ignored the very existence of the 2004 amendments to 19 USC §1313(j)(2) in the NPRM. CBP did so in spite of the fact that the 2004 Trade Act reinforces the Congressional intent to allow drawback of duties, federal taxes and fees when it enacted the language of (j)(2): “any duty, tax, or fee imposed under Federal law upon entry or importation.” CBP relied instead on legislative history from the Mod Act to justify its Proposed Rule.

In addition, CBP misapplies the legislative history and language of 19 USC §1313(u) and (v) to achieve an outcome not previously contemplated by Congress. As expressly stated therein, 19 U.S.C. §1313(u) restricts drawback eligibility to *imported* merchandise that has been regularly entered or withdrawn for consumption, while § 1313(v) prohibits the use of a single exportation to satisfy multiple drawback claims – a procedural element that was added to facilitate the required drawback paperwork.

Although §1313(u) is intended to prohibit “piggybacking” (the exemptions afforded *imported* merchandise under the *customs* law), CBP misstates the scope of §1313(u) by conveniently ignoring the introductory qualifying phrase “Imported merchandise” therein. See, e.g., USCBP’s Headquarters Ruling Letter Number 230591 (February 17, 2005), wherein Customs Headquarters correctly held that the limiting language in §1313(u) “only applies to **imported** goods.”

Similarly, there is no applicability of §1313(v) either to the Internal Revenue Code or to prevent drawback claims for goods subject to the IRC. As stated in its informed compliance publication,³ “Subsection 1313(v) provides that exported or destroyed merchandise may not be claimed in more than 1 drawback claim (unless proportionately attributed to different claims).” Additionally, in USCBP Headquarters Ruling Letter Number 227627 (July 20, 1999), Headquarters correctly held that “[t]he liquidation of a drawback claim with no drawback allowed, does not preclude a subsequent drawback

³ “What Every Member of the Trade Community Should Know About: Drawback”. (December 2004).

claim in which the basis of drawback is the same exported merchandise as for the previously liquidated drawback claim for which no drawback was allowed.”

IV. CONCLUSION

JIG appreciates the opportunity to comment on the NPRM and Proposed Rule. We would be happy to meet with CBP to discuss our comments in further detail.

Respectfully Submitted,

A handwritten signature in black ink that reads "James B. Clawson". The signature is written in a cursive style with a large, stylized initial "J" and "C".

James B. Clawson
Secretariat