Appeal No. 2020-1734

In The United States Court of Appeals For The Federal Circuit

THE NATIONAL ASSOCIATION OF MANUFACTURERS,
THE BEER INSTITUTE,

Plaintiffs-Appellees,

—v.—

DEPARTMENT OF THE TREASURY, UNITED STATES CUSTOMS AND BORDER PROTECTION, STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, JOHN SANDERS, in his official capacity as Acting Commissioner of United States Customs and Border Protection,

Defendants-Appellants.

Appeal from the United States Court of International Trade
In Case No. 19-00053, Judge Jane A. Restani.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

AUGUST FLENTJE
Special Counsel to
the Assistant Attorney General

JEANNE E. DAVIDSON
Director

CLAUDIA BURKE
Assistant Director

JUSTIN R. MILLER
Attorney-In-Charge
International Trade Field Office

ALEXANDER VANDERWEIDE
Senior Trial Attorney
Civil Division, U.S. Dept. of Justice
Commercial Litigation Branch
26 Federal Plaza, Room 346
New York, New York 10278
Tel. No. (212) 264-9230 or 0482

Attorneys for Defendants

Of Counsel:

DANIEL J. PAISLEY
U.S. Department of the Treasury

ALEXANDRA KHREBTUKOVA
Office of the Assistant Chief Counsel
International Trade Litigation
U.S. Customs and Border Protection

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REPLY BRIEF FOR DEFENDANTS-APPELLANTS

Excise taxes are imposed on both imports and domestic products to ensure that commodities such as alcohol and tobacco are taxed when consumed domestically. Although excise taxes can be drawn back when commodities are exported so that U.S. goods may compete abroad on an equal footing, the Tariff Act only allows one drawback per export. "Double drawback" occurs when a single substituted export is used to claim drawback of excise taxes twice—first on

the export under the Internal Revenue Code and second on the corresponding import under the Tariff Act. If permitted, double drawback grants importers a windfall by allowing them to avoid excise taxes twice on the basis of a single exportation. The regulation in this appeal (the Rule) promulgated by the Department of the Treasury (Treasury) and U.S. Customs and Border Protection (CBP) (together, the agencies), alongside regulations to implement The Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), Pub. L. No. 114-125, 130 Stat. 122 (2016), clarifies the statutory prohibition on double drawback by ensuring that all imported commodities consumed in the United States are properly taxed. The Rule offers the only interpretation of the Tariff Act that effectuates the overall purpose of the statutory scheme governing excise-tax drawback.

Before 2004, exporters could receive a drawback of excise tax under the Internal Revenue Code, but generally not under the Tariff Act. In 2004, Congress amended 19 U.S.C. § 1313(j) to specifically overrule this Court's decision in *Texport v. United States*, 185 F.3d 1291 (Fed. Cir. 1999), and make the Harbor Maintenance Tax available for substitution drawback. As a result of this change, the drawback of any eligible duty, fee, or tax (including excise tax) was made available under the Tariff Act.

What did not change, however, was the existing statutory prohibition on double drawback. Since 1993, 19 U.S.C. § 1313(v) has prohibited "[m]erchandise

that is exported or destroyed to satisfy any claim for drawback" from serving as the "basis of any other claim for drawback[.]" This means that, following the 2004 amendments, a claim for the drawback of excise tax on the basis of a substituted export is permitted under either the tax code or the Tariff Act, but not both. The Rule reinforced the statutory prohibition on double drawback that applies to all commodities.

When it invalidated the Rule, the trial court minimized the prohibition on double drawback to the point of insignificance, which not only violates the rules of statutory construction, but also creates substantial windfalls for importers and introduces inconsistencies into the statutory scheme governing excise tax drawback. The Rule reasonably resolved the tension inherent in statutory provisions allowing for and constraining excise tax drawback, and, critically, precluded reliance on novel transaction structures to evade the provision barring double drawbacks. Specifically, because "drawback" is not defined by statute, the Rule defines the term to encompass the refund or cancellation of an excise tax liability that was paid, determined, or otherwise imposed by law on an import or export.

In its response brief, the National Association of Manufacturers (NAM) contends that the 2004 amendments to section 1313(j) supersede section 1313(v). NAM 24-32. In NAM's view, substitution drawback claimants may draw back

excise tax on an import under subsection (j)(2), even if excise tax on the corresponding export was remitted or never paid. This reads the double drawback prohibition out of the statute, and creates a loophole that allows non-taxed exports to offset the excise tax that should be collected on imports. In contrast, the Rule reasonably interprets subsection (v) to safeguard against section 1313(j)(2)'s risk of excise-tax double drawback, while also allowing claimants to draw back all other eligible duties, taxes, and fees.

NAM also rejects the agencies' interpretation of "any claim for drawback," contending that tax cancellations upon exportation are not claims for drawback. NAM 42-54. NAM's rejection is self-servingly one-sided. It seeks unfettered excise tax drawback on exports under the tax code and on imports under the Tariff Act, but it ignores section 1313(v)'s application to excise tax drawback on exports under either statute. In contrast, the Rule safeguards all tax liabilities from double drawback, including tax liabilities on exports that have been cancelled under the Tariff Act and the Internal Revenue Code.

Lastly, NAM argues that the government's interpretation of section 1313(v) produces absurd results and is not supported by the statute's history. NAM 54-68. But NAM wants it both ways. NAM decries that the Rule impermissibly reads limiting language into subsection (v)'s broad double drawback prohibition. Yet

NAM eviscerates the double drawback prohibition by excluding all drawback on exports from the provision, which applies to "any claim for drawback."

Customs Advisory Services, Inc.'s (CASI) *amicus curiae* brief in support of plaintiffs-appellees largely retreads the trial court's conclusions that the Rule's application of section 1313(v) creates impermissible conflicts between sections 1313(j)(2), 1313(*l*), and 1313(d). The Beer Institute (BI) asks the Court to allow double drawback claims for all commodities—not just wine—made before the Rule became effective (the period of February 2018 through February 2019).

The Court should reverse the trial court's judgment because the Rule enforces the statutory prohibition on double drawback by reasonably interpreting section 1313(v) to reach all tax cancellations and refunds on exports. As explained below, the Rule allows both sections 1313(v) and 1313(j)(2) to meaningfully operate, and has no retroactive effect.

ARGUMENT

I. The Rule Reasonably Harmonizes Sections 1313(v) And 1313(j)(2)

19 U.S.C. § 1313(v) prohibits "[m]erchandise that is exported or destroyed to satisfy any claim for drawback" from serving as the "basis of any other claim for drawback[.]" Since 2004, section 1313(j)(2) authorizes substitution drawback of "any duty, tax, or fee imposed under Federal law upon entry or importation," and provides that valid substitution drawback claims shall be paid "notwithstanding

any other provision of law." The Rule recognizes that sections 1313(j)(2) and 1313(v) operate together to authorize a valid claim for the drawback of any tax—including excise tax—so long as the claim does not hinge on a substituted export where the excise tax has already been drawn back or its liability cancelled.

NAM maintains that the notwithstanding clause of subsection (j)(2) supersedes subsection (v) if the two provisions conflict, and as a consequence, Congress has effectively mandated a substantial loophole in which double drawback is to be paid on all eligible claims. NAM 24-32. But the notwithstanding clause does not command this result, nor is it a reasonable interpretation of the statutory scheme. NAM's interpretation leads to windfalls that Congress could not have intended.

NAM insists that section 1313(j)(2) overrides all other provisions, yet at the same time NAM recognizes that section 1313(v) must necessarily limit the operation of section 1313(j)(2) in some manner. "Everyone agrees that the 'notwithstanding' clause need not be taken to its logical extreme, and that both subsection (v) and other provisions in section 1313 can appropriately limit substitution drawback in other ways." NAM 31.

Because the notwithstanding clause could be taken to its logical extreme absent an appropriate limitation, we must ask: what is an appropriate limitation? The obvious one is the limitation identified by the agencies charged by Congress

with implementing the statute—the clause prevents double taxation, but it does not permit double drawback to avoid all taxation. In NAM's erroneous view—and the trial court's as well—that limitation is a restrictive application of section 1313(v) to only prohibit more than one formal drawback claim on the basis of a substituted export. But this view is not the strict letter of the law. Indeed, the logical extreme of the "notwithstanding" clause removes every anti-abuse constraint on subsection (j)(2) substitution claims. *See*, *e.g.*, 19 U.S.C. §§ 1313(n), (r), (u), (v); 19 U.S.C. § 1677h; 19 C.F.R. §§ 190.3(b), (c); 19 C.F.R. §§ 191.3(b), (c).

That the notwithstanding clause has some limits highlights the inherent tension when attempting to harmonize statutory provisions that, by their terms, circumscribe one another. *Compare* section 1313(j)(2) (permitting tax drawback with the imperative of a notwithstanding clause) *with* section 1313(v) (limiting double recovery of those tax payments). A statute such as 19 U.S.C. § 1313 that requires unspecified line-drawing for its provisions to coexist and operate is necessarily open to interpretation; yet a court must ensure that its interpretation allows every provision to meaningfully function. *See Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) (courts have an "obligation to give effect to every provision of [a] statute"); *United States v. Gordon*, 961 F.2d 426, 431 (3d Cir. 1992) ("Courts should attempt to reconcile two seemingly conflicting statutory provisions

whenever possible, instead of allowing one provision effectively to nullify the other provision.").

Indeed, the Supreme Court has cautioned against expansive constructions of "notwithstanding" clauses that "narrow so dramatically an important provision that [Congress] inserted in the same statute." *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 386 (2009). That is what the trial court did here, and what NAM advocates: a reading of sections 1313(j)(2) and 1313(v) that unacceptably narrows the importance and application of subsection (v). In doing so, the lower court created a substantial import tax loophole that is contrary to the overall excise-tax scheme and substantially harms domestic producers by placing them at a significant competitive disadvantage.

In contrast, permitting a claim for the drawback of excise tax so long as the tax on the substituted export has been paid is a reasonable interpretation of section 1313(v) that balances and limits an otherwise unchecked section 1313(j)(2). The Rule allows the provisions to meaningfully operate without neutering one another or creating the import tax windfall that NAM seeks.

At the least, the Rule is a reasonable interpretation of section 1313(v) because it operates in tandem with subsection (j)(2) and the rest of the drawback statute, which is sufficient for the Government to prevail. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 & n. 4 (2009) (under *Chevron*, the agency

"view governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts.") (emphasis in original) (citation omitted); *see also Shell Oil Co. v. United States*, 688 F.3d 1376, 1382 (Fed. Cir. 2012) (declaring that "drawbacks are a privilege, not a right," and that "[ ] a governmental grant of a privilege or benefit [ ] is to be construed in favor of the government and against the party claiming the grant.") (quotes omitted).[1]

The Rule's reasonableness is made even clearer in light of Congress's decision to condition drawback privileges under section 1313(j) on compliance with agency regulations. *See* 19 U.S.C. §§ 1313(*l*)(1) ("Allowance of the privileges provided for in this section shall be subject to compliance with such rules and regulations as the Secretary of the Treasury shall prescribe."), 1313(j)(1) and (j)(2) ("… an amount calculated pursuant to regulations prescribed by the Secretary of the Treasury under subsection (*l*) shall be refunded as drawback …").

* * *

[1] NAM maintains that our citation to *Shell Oil* and the proposition it supports in our opening brief was waived because we did not raise it before the trial court in our merits briefing. NAM 68. Although we did not cite *Shell Oil* in our merits briefing, we have consistently argued that courts must defer to the Government's reasonable interpretation of the drawback statute, a point that we have not waived and that *Shell Oil* supports. NAM offers no support—nor could it—for the contention that relevant precedent can be waived by a party.

NAM spills much ink on our purported "concession" before the trial court that the addition of the "notwithstanding" clause to 19 U.S.C § 1313(j)(2) in 2004, Pub. L. No. 108–429, § 1557(b), 118 Stat. 2434, 2579 (2004), made all excise taxes eligible for drawback under the Tariff Act, and not just the Harbor Maintenance Tax (HMT). NAM 18-19, 27-30. Despite NAM's phrasing, our position on appeal does not diverge from that below. Throughout this litigation, we have consistently recognized that the 2004 amendments effectively overruled CBP rulings that held that all internal revenue taxes—including HMT and excise taxes—were ineligible for substitution drawback under section 1313(j)(2).

Between 1984, when substitution drawback of unused merchandise was first made available, Pub. L. No. 98-573, § 202, 98 Stat. 2948, 2973 (1984), and the 2004 amendments, CBP denied substitution drawback claims for excise tax under section 1313(j)(2) on the theory that Internal Revenue Code drawback provisions established the narrow, precise, and exclusive mechanism to refund excise taxes. *See, e.g.*, HQ 229320 (July 29, 2002) (denying drawback claims for excise taxes on beer under subsections (j)(1) and (2)).

Although there is no indication that the 2004 amendments were specifically legislated to repudiate CBP rulings and make all excise taxes eligible for substitution drawback under the Tariff Act, as NAM maintains, that was the result of Congress's action. As explained in our opening brief, Br. 12, the Senate

Finance Committee Report made clear that the 2004 amendments were intended for the sole purpose of overruling *Texport*, 185 F.3d 1291, which held that HMT could not be recovered as substitution drawback under the Tariff Act. *See* S. Rep. No. 108-28, at 173 (2003) (explaining that the amendments to section 1313(j) were intended to allow drawback of HMT and overrule *Texport*).

Whether or not Congress sought to overrule CBP's rulings as well, the result of the 2004 legislation was clear: excise tax could be drawn back under the Tariff Act. But substitution drawback under 19 U.S.C § 1313(j)(2) is not limitless. It remains bound by the safeguards that apply to all drawback claims, including the longstanding double-drawback prohibition in section 1313(v), which is the statutory basis for the Rule and a core protection to avoid a tax windfall.[2] NAM is, therefore, incorrect that the Rule seeks to return substitution drawback claimants to a pre-2004 landscape that Congress specifically legislated away. NAM 18, 27-28. Congress never legislated subsection (v) away. In 2004, Congress made all eligible taxes, duties, and fees on substituted merchandise available for drawback under section 1313(j)(2) for the first time, regardless of otherwise available

[2] NAM asserts that we have forfeited arguments that 19 U.S.C. §§ 1313(*l*)(1) and 1484(a)(2)(C) also provide a basis for the Rule by not raising them below. NAM 69-70. But as our opening brief made clear, Br. 47-48, we do not rely on these provisions as specific, independent bases for the Rule; section 1313(v) alone is sufficient to support the Rule. Rather, we cited sections 1313(*l*)(1) and 1484(a)(2)(C) to highlight that the prohibition on double drawback comports with other statutory safeguards and directives.

drawback under the Internal Revenue Code, but it also left section 1313(v) intact to prohibit the windfall NAM seeks: double recovery of any tax, duty, or fee. The 2004 amendments may have allowed for substitution drawback of excise tax, but they did not authorize double drawback.

Further, prior to the 2004 amendments, claimants could only receive tax drawback on imported alcohol under I.R.C. § 5062(c), which permitted refund only if tax-paid imported alcohol was not merchantable or did not conform to sample or specifications after entry. Additionally, the imported alcohol was required to be in CBP's custody for exportation, without any type of substitution allowed. In comparison, in a post-2004 regime where the Rule and section 1313(j)(2) operate to allow substitution drawback of tax subject to the anti-abuse constraints of subsection (v), the restrictions on tax drawback under I.R.C. § 5062(c) do not apply to tax drawback under the Tariff Act. Such a regime greatly expands the scope of imported alcohol eligible for tax drawback and allows drawback claimants to freely substitute imported alcohol with eligible domestic alcohol and receive refunds of the excise taxes paid on the imports so long as the substituted alcohol is tax paid. And this regime rightly rejects the abusive theory of substitution drawback advanced by NAM by not permitting drawback on imported alcohol when no excise tax was paid on the substituted product.

II. 19 U.S.C. § 1313(v) Applies To All Tax Liability Cancellations On Exports

The trial court held that an exportation made without payment of tax under the Internal Revenue Code is not a claim for drawback under 19 U.S.C. § 1313(v). Appx12-13. NAM agrees. NAM 33-42. But this analysis oversimplifies a complex drawback system, treats substantively identical transactions differently for tax purposes, and generates an unsanctioned tax windfall for importers. NAM points out that express drawback provisions in the Internal Revenue Code and Tariff Act refer to taxes that have been paid or determined, whereas tax code provisions for goods removed for export without payment of tax are not described as drawback and specifically allow goods to be exported when tax has not been paid or determined. NAM reasons that the contrasting terms of the different provisions evinces Congress's conscious choice to call only certain transactions "drawback."

NAM is correct that the Internal Revenue Code does not expressly describe all tax liability cancellations on exports as drawback. But that does not mean that goods that are removed from bond without payment of tax for exportation under I.R.C. §§ 5214(a), 5362(c), or 5053(a) are categorically excluded from the Rule. While these products may be removed without payment of tax for export, the products are not removed *free of tax*. Rather, they remain subject to bond and

carry a tax liability up until the products are actually exported. I.R.C. §§ 5053, 5175, 5362. Only upon the product's exportation is the tax liability cancelled.

Similarly, Congress expressly uses the term "drawback" to describe the cancellation of a determined, but not paid, tax liability upon export. *See*, *e.g.*, I.R.C. § 5062(b); 19 U.S.C. § 1313(d). Exports made without payment of tax are functionally drawbacks of determined, but not paid, tax liabilities upon export. Both provisions presuppose a tax liability that has not been paid, both require filing forms with Treasury's Alcohol and Tobacco Tax and Trade Bureau (TTB) to obtain tax benefits, and both result in zero excise taxes on exports. *Compare* I.R.C. § 5062(b) (using the term "drawback" to describe cancellation upon export of a tax liability determined but not yet paid for wine and distilled spirits) *with* I.R.C. § 5704(b), 27 C.F.R. §§ 44.61, 44.66 (describing similar process for the cancellation of a tax liability for tobacco upon export without using the term "drawback") *and* I.R.C. §§ 5051(a)(1)(A), 5053(a), 5054(a)(1), 27 C.F.R. §§ 25.93, Subparts G, L, N (describing similar process for the cancellation of a tax liability on beer upon its removal by export without using the term "drawback").

The parallel structure of these provisions confirms that the transactions are nearly identical in substance, if not in name. Thus, all tax liability cancellations on exports, whether that liability was determined or not, are reasonably construed as drawback (a term that Congress often deploys, but never defines). In the

administration and interpretation of tax law, artificial distinctions are to be rejected. *See, e.g.*, *United States v. Williams*, 514 U.S. 527, 535-36 (1995) (stating the Court's "preference for commonsense inquiries over formalism" when broadly reading the term "taxpayer"); *PPL Corp. v. C.I.R.*, 569 U.S. 329, 340-41 (2013) (noting that the Court "follow[s] substance over form" to discern the nature of a U.K. "windfall tax"). Congress may not have consistently labelled all tax liability cancellations drawback, but all tax liability cancellations conditioned upon exportation function as drawback.

* * *

NAM contends that express drawbacks and other tax cancellations on exports are not materially indistinguishable—at least with respect to beer—because no tax is actually imposed when beer is removed for export without payment of tax. NAM 45-46; *see also* BI 31-33. According to NAM, the tax code's unique treatment of exported beer undermines our position that drawback encompasses the cancellation of otherwise imposed tax liabilities.

Tax on domestically-produced beer is determined and imposed when removed from the brewery for consumption or sale in the United States. I.R.C. §§ 5051(a)(1)(A), 5052(c), 5054(a)(1). Yet beer may only be removed from bond without payment of tax for export if it is properly documented, bonded, securitized, and in accordance with applicable regulations. I.R.C. § 5053(a). Because

compliance with all statutory and regulatory requirements is necessary for removal from the brewery for export without payment of tax, beer remains subject to an imposable tax liability until exportation. Indeed, the tax liability on beer intended for export must be tallied on export forms. Appx351-52. So even though tax may never be collected on a case of beer that is exported, it does not mean that tax is never imposed on all beer intended for export. Whether the tax on a case of beer removed for export is ultimately cancelled depends on compliance with the regulatory requirements.

NAM counters that a tax liability is only realized when tax has been paid or determined, whereas all withdrawals and removals from bond for export without payment of tax (not just beer) are subject to an inchoate, potential tax liability only. NAM 46. This distinction is contradicted by the TTB forms that allow for "drawback" and withdrawal or removal for exportation, all of which require a computation of the excise tax liability on exported alcohol at the time of withdrawal or removal. *Compare* TTB F 5110.30 (spirits drawback) and TTB F 5120.24 (wine drawback) *with* TTB F 5100.11 (wine and spirits withdrawals) and TTB F 5130.12 (beer removals). Appx278-286, Appx351-52; *see also* I.R.C. § 5006 (tax on distilled spirits is determined when the spirits are withdrawn from bond). Both types of forms require nearly identical information: a determined but

not yet paid tax liability on an exported product and a calculated tax liability on a product withdrawn or removed from bond for export without payment of tax.

NAM posits that because only the TTB forms for express drawbacks refer to a claim being made, withdrawing or removing a good without payment of tax for export does not constitute a "claim for drawback." NAM 38-40. NAM is correct that withdrawals and removals are not identified as claims on TTB forms, yet the forms are all materially similar. All require the export destination and the type, quantity, size, and serial numbers of the products to be exported, and all require a calculation of the excise-tax liability due on the products being exported. Appx278-286, Appx351-52. This calculated excise-tax liability is refunded or cancelled only after the producer furnishes proof to TTB that the products were exported. I.R.C. § 5175 (spirits); 27 C.F.R. Part 28, Subpart D & TTB G 2010-14 (wine); 27 C.F.R. § 44.66-.67 (tobacco); TTB G 2010-8 (beer).

The act of documenting and reporting an export made without payment of tax to TTB operates as a "claim" just as much as a formal request for a refund of taxes already paid. In the former scenario, a tax liability is being cancelled, or drawn back, upon exportation and the requisite paper filings; in the latter scenario, an already paid tax liability is eligible for refund upon demand. In both cases, the economic result is the same, both are "claims" for purposes of section 1313(v), and both are covered by the Rule.

The Rule's treatment of both types of transactions as drawback does not render provisions for exports made without payment of tax a "dead letter," as NAM contends at 51-52. Express drawback provisions establish a mechanism for claimants to recoup taxes paid on goods that are exported or to cancel a determined tax liability scheduled for future payment on an exported product. In contrast, provisions for exports made without payment of tax create a mechanism for claimants to cancel the tax liability on an export without having to pay tax or schedule a future tax payment. Both provisions operate to refund or cancel tax liabilities in specific circumstances. Yet because the end-result is the same—the refund or cancellation of a known tax liability on an export—both are necessarily construed as drawbacks under the measures of section 1313(v) and the Rule. If treated differently, importers could reap a tax windfall under any provision not expressly labelled "drawback."

Finally, NAM asserts that, because the Government Accountability Office's (GAO) report on drawback "does not include a category for excise-tax drawback or cancellation on exports under the tax code," the Government is "telling this Court something different from what [it] told the GAO." NAM 41-42. This is not so. The GAO report that NAM cites relates to TFTEA's amendments to 19 U.S.C. § 1313 only and how those amendments affect CBP's workload; drawback under the Internal Revenue Code is outside the scope of the report, as is TTB's

administration of drawback. Moreover, due to the present litigation, CBP had instructed its drawback offices to suspend the processing of all claims subject to the Rule. As a result, suspended double drawback claims were absent from the report. Thus, the GAO report illuminates little, if anything, about the dispute.

III. 19 U.S.C. § 1313(v) Reaches All Drawback

The trial court incorrectly held that the phrase "any claim for drawback" in 19 U.S.C. § 1313(v) applies only to drawbacks on imported goods. Appx11-14. As a practical matter, this removes every express drawback provision on exports—whether under the tax code or the Tariff Act—from the ambit of section 1313(v), a result that Congress could not have intended. The trial court reasoned that section 1313(v) must be limited to imports to avoid the "irrational" scenario of excise-tax drawback on a substituted export prohibiting the drawback of any other tax, duty, or fee on the corresponding import. Appx17. But this scenario is easily avoided if claimants simply choose to forego drawback of excise tax on a substituted export in order to drawback all eligible taxes, duties, and fees on an import.

In effect, the trial court interprets the term "drawback" under the Internal Revenue Code and the Tariff Act differently, despite no indication that "any claim for drawback" in section 1313(v) does not include what is *expressly* called "drawback" in the Internal Revenue Code. This is particularly problematic since the Internal Revenue Code imposes excise taxes for which the Tariff Act, as

amended in 2004, expressly authorizes for drawback. In other words, because 19 U.S.C. § 1313 permits the drawback of excise taxes levied on goods under the Internal Revenue Code, then "drawback" in section 1313(v) must surely encompass the drawback of tax imposed by the Internal Revenue Code. But the trial court's interpretation of "any claim for drawback" does not permit section 1313(v) to reach express drawbacks under the tax code; instead, by limiting the provision to imports under the Tariff Act only, claimants may drawback an excise tax imposed by the Internal Revenue Code under the Tariff Act, but the agencies may not deploy the Tariff Act's measures to prevent a second recovery of that same tax. In this new landscape, taxes for *two* cases of wine may be drawn back on the basis of a *single* case of wine under both the Tariff Act and the Internal Revenue Code, resulting in an unauthorized tax windfall for claimants.

Restricting section 1313(v) to imports excludes not only the tax code from the anti-abuse ambit of the provision, but also 19 U.S.C. § 1313(d), which provides for the "drawback" of "internal-revenue tax" imposed on domestically-produced spirits and wine that are then exported. CASI and the court below are more concerned that subsection (v) not create any inconsistencies between sections 1313(d) and (j)(2) so that the wine industry can continue to benefit from the liberalized substitution standards authorized by TFTEA. CASI 15; Appx15. But the trial court shows no concern that, by limiting section 1313(v) to imports only,

the provision no longer safeguards against multiple drawback claims for tax on subsection (d) exports. In any event, the trial court's concern is not well-founded. Nothing in the Rule or the Government's application of section 1313(v) prohibits an export of wine, where the excise tax has been drawn back under section 1313(d), from serving as the basis to draw back all eligible non-excise taxes, fees, and duties on the corresponding import under section 1313(j)(2).

NAM and the trial court reason that if section 1313(v) must reach all drawback, then the plain language of subsection (v) dictates that a drawback of excise tax on an export bars any other drawback of duties, taxes, or fees on the corresponding import and not just the import's excise-tax (as the Rule provides). Appx17; NAM 56-58. This argument, however, is not a valid reason to limit a provision that reaches "any claim for drawback"—including, at the least, all express drawback of exports—in order to avoid a result the lower court does not favor. As acknowledged in our opening brief, Br. 48-49, subsection (v) can be read to prohibit the drawback of tax on a substituted export from serving as the basis for any other drawback on the corresponding import. But that does not mean that an importer is foreclosed by section 1313(v) or the Rule to recoup all eligible duties, taxes, and fees on a substituted import. It may do so as long as the tax on the corresponding export has not previously been drawn back. Section 1313(v)

offers a choice to claimants: excise tax can be drawn back on the substituted export *or* the import, but not on both.

NAM argues that this is a false choice because the availability of duty drawback on an import should not "depend on exporters forfeiting a separate tax benefit that is (at least sometimes) constitutionally mandated." NAM 59. This argument rests on a faulty premise. As the trial court has explained, "[t]he constitutional prohibition of duties on exports 'does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation.'" *Nufarm America's, Inc. v. United States*, 477 F. Supp. 2d 1290, 1296 (Ct. Int'l Trade 2007), quoting *Cornell v. Coyne*, 192 U.S. 418, 427 (1904); *see also* U.S. Const. art. I, § 9, cl. 5. "Clearly there is a distinction between charges imposed for reasons independent of the export process and those in place due to an item's export." *Nufarm*, 477 F. Supp. 2d at 1297.

Because excise-tax liability on domestic products typically arises at the time of production, *see* I.R.C. §§ 5001(a)(1), 5041(a), drawback of excise taxes on domestic products upon their export is not constitutionally required. But even if it were, the Rule would not violate such a mandate. Section 1313(v)'s prohibition on double drawback does not foreclose exporters from taking drawback of excise tax on their exports; it merely forecloses a second drawback of the same tax on a

substituted import. Thus, even if the Constitution required drawback of excise taxes on exports, it would not also require Congress to forgive excise taxes paid on the corresponding import.

IV. The History Of The Tax Drawback Regime Does Not Support Invalidating The Rule Or Limiting Its Application

In our opening brief, Br. 49-53, we explained that the legislative history invoked by the trial court to support invalidating the Rule was of little value. Appx18-20. NAM rejects our criticism, and in doing so, misconstrues our view of the historical operation of 19 U.S.C. § 1313(v):

> According to the now-abrogated Customs rulings, excise taxes were ineligible for substitution drawback from 1984 to 2004. Yet in 1993, Congress supposedly adopted subsection (v) in part to bar a practice that was already prohibited. Thus, when Congress made excise taxes eligible for drawback in 2004, subsection (v)'s dormant "double drawback" prohibition purportedly sprung to life, reinstating essentially the same regime Congress had just rejected. That does not follow.

NAM 62.

NAM fails to grasp that subsection (v) operates, since its inception, on all drawbacks, and that Congress has amended the provisions allowing for drawback over time. From 1993, when section 1313(v) was first enacted, through the present, the provision has prohibited an exported good from serving as the basis for multiple drawback claims for duties. And since the 2004 amendments to the Tariff Act through the present day, section 1313(v) has performed in the same manner,

but it has also barred tax from being drawn back twice on the basis of the same substituted export. Subsection (v) could not have performed in the latter capacity until the drawback of excise tax became eligible under both the Tariff Act and the Internal Revenue Code for the first time in 2004. Section 1313(v) operates broadly upon "*any* claim for drawback"; thus, its present reach within the drawback scheme depends on the provisions in effect at that time providing for the privileges of drawback.

Therefore, it is no surprise, as NAM points out, that between 1993 and 2009, CBP did not describe 19 U.S.C. § 1313(v) as specifically prohibiting the double drawback of excise tax. NAM 61. There was no need to describe the provision in this manner during this period as the hypothetical risk of double drawback of excise tax first materialized with the 2004 amendments, but the actual payment of double drawback claims only came to light years later. As explained in our opening brief, Br. 13-16, in 2004 a CBP drawback center inadvertently processed claims on wine resulting in double drawback, in part, due to the complexity of the drawback review process in place at the time. This unsanctioned practice continued until 2009, when TTB and CBP published notices of proposed rulemaking (NPRMs) to formally correct the impermissible double-drawback allowance for wine in accordance with section 1313(v). Appx264-272.

NAM and the BI maintain that the 2009 NPRM was not necessarily intended to codify section 1313(v)'s prohibition on double drawback, but instead, was an acknowledgment by the agencies that commodities other than wine may also be subject to double drawback. NAM 66; BI 26-27. Based on this erroneous premise, the BI concludes that "until recently, Defendants' official position was that distilled spirits and beer—no less than wine—would be entitled to [double] drawback for excise taxes." BI 27. This is not correct.

The relevant portion of the 2009 NRPM states:

> In addition to the claims processed by CBP involving (j)(2) substitution drawback on wine, given the present statutory and regulatory structure within which these claims are administered, other products that are subject to excise tax under the IRC may also be the subject of such drawback claims where the excise taxes on the good have been refunded, remitted, or not paid (*e.g.*, distilled spirits and beer (IRC chapters 51 and 52; 26 U.S.C. 5001; 5051); tobacco products and cigarette papers and tubes (IRC chapter 52; 26 U.S.C. 5701); imported taxable fuel (IRC chapter 32; 26 U.S.C. 4081); petroleum products (IRC chapter 38; 26 U.S.C. 4611)).

Appx265. This statement, which plaintiffs-appellees cite in part, BI 26-27, NAM 66, does not support the sweeping conclusion that CBP has long acknowledged that commodities other than wine are entitled to double drawback. The statement merely reflects that, because of CBP's difficulty administering the post-2004 excise tax drawback regime, the agency was at risk of granting complex drawback claims on commodities other than wine resulting in erroneous double drawback

payments of excise tax. As explained in our opening brief, Br. 13-14, n. 4, claims involving the double drawback of excise tax for wine were inadvertently approved as part of larger claims for the drawback of duties, taxes, and fees more generally due to the high-volume, limited-resource, paper-based nature of CBP's review. Absent a clarifying regulation to enforce section 1313(v)'s prohibition on double drawback, CBP could not guarantee that double drawback claims for commodities other than wine would not also inadvertently be approved, like they were with wine. A regulation was required, therefore, to not only bring wine into the fold of commodities subject to subsection (v)'s prohibition on double drawback, but also to make clear that prohibition on all other commodities.

NAM surmises that the only reason commodities subject to excise taxes other than wine were denied double drawback payments was because of the narrow commercial interchangeability standard in effect at the time, as opposed to the more liberal substitution standard available for wine. NAM 67-68. NAM is mistaken. As explained, prior to the 2004 amendments, CBP denied *all* 19 U.S.C. § 1313(j) claims for the drawback of excise taxes levied by the Internal Revenue Code. This practice was first established when drawback claimants sought a refund of tobacco excise taxes under section 1313(j), *see* HQ 227916 (January 6, 1999), and was later extended to the drawback of excise taxes on beer, *see* HQ 229320 (July 29, 2002). CBP's denial of double drawback claims for excise tax

did not hinge on whether a substituted beer or tobacco product was commercially interchangeable or not. Indeed, CBP routinely held that the duties on any commodity subject to excise taxes are eligible for refund under subsection (j)(2) so long as the substituted products are commercially interchangeable.

For example, CBP has refunded duties for tobacco products under section 1313(j) on the basis of commercial interchangeability. *See* HQ 229192 (May 8, 2002). As for beer, in HQ 229320, the claimant sought to substitute consumable beer with beer deemed un-merchantable. CBP concluded that imported "fresh" (consumable) beer and destroyed "un-merchantable" (expired) beer were not commercially interchangeable. But this ruling evinces no support for the assertion that CBP "generally deemed other alcohol beverages not to be 'commercially interchangeable.'" NAM 9. In HQ 229320, CBP highlights that the imported beer had a zero percent duty rate, unlike wine. CBP, therefore, *would* have allowed a section 1313(j)(2) claim to refund *duties* (but not taxes) for commercially interchangeable beer—if there were any duties to refund.

CBP's treatment of commodities other than wine in the pre-TFTEA era has been consistent: duties may be drawn back on the basis of commercially interchangeable products, but excise tax may not be drawn back twice. Wine is the anomaly, and the sole commodity for which CBP inadvertently processed double drawback payments. There is no support, therefore, for the BI's assertion that the

Rule is a marked change in the government's prior treatment of beer and distilled spirit claims. BI 24-28. CBP has consistently denied all claims for double drawback of excise tax on these commodities. Should the Court uphold the Rule, double drawback claims should not be allowed for commodities other than wine for any period of time, as the BI requests, because these claims have never been allowed. BI 38. In no way does the Rule have a retroactive effect on any commodity warranting anything other than a total double drawback prohibition.

CONCLUSION

For these reasons, this Court should reverse the trial court's decision, uphold the Rule, and enter judgment for the Government.

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

AUGUST FLENTJE
Special Counsel to the Assistant Attorney General

JEANNE E. DAVIDSON
Director

By: /s/ Claudia Burke
CLAUDIA BURKE
Assistant Director

/s/ Justin R. Miller
JUSTIN R. MILLER
Attorney-In-Charge
International Trade Field Office

Of Counsel:

Daniel J. Paisley
U.S. Department of the Treasury

Alexandra Khrebtukova
Office of the Assistant Chief Counsel
International Trade Litigation
U.S. Customs and Border Protection

/s/ Alexander Vanderweide
ALEXANDER VANDERWEIDE
Senior Trial Attorney
Civil Division, U.S. Dept. of Justice
Commercial Litigation Branch
26 Federal Plaza, Room 346
New York, New York 10278
Tel. (212) 264-9230 or 0482
Attorneys for Defendants

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CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 32(g)

I, Alexander Vanderweide, a Senior Trial Attorney in the Office of the Assistant Attorney General, Civil Division, Commercial Litigation Branch, International Trade Field Office, who is responsible for the foregoing brief, relying upon the Microsoft Word count feature of the word processing program used to prepare the brief, certify that this brief complies with the type-volume limitation under Rule 32(a)(7)(B), and contains 6532 words.

/s/ Alexander Vanderweide
ALEXANDER VANDERWEIDE