2020-1734

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,
No. 19-cv-00053, Judge Jane A. Restani

CORRECTED BRIEF OF *AMICUS CURIAE*, CUSTOMS ADVISORY SERVICES, INC. IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE OF THE COURT OF INTERNATIONAL TRADE

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October 28, 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-1734

Short Case Caption National Association v. Treasury

Filing Party/Entity Customs Advisory Services, Inc.

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 10/28/2020

Signature: /s/ John M. Peterson

Name: John M. Peterson

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Customs Advisory Services, Inc.		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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BRIEF OF *AMICUS CURIAE*, CUSTOMS ADVISORY SERVICES, INC.

Customs Advisory Services, Inc. ("CASI"), hereby submits, pursuant to Federal Rule of Appellate Procedure ("FRAP") 29(a), its *amicus curiae* brief in support of Plaintiffs-Appellees, the National Association of Manufacturers ("NAM"), and the Beer Institute ("Beer Institute"), seeking affirmance of the U.S. Court of International Trade's judgment invalidating the Treasury Departments regulations respecting the payment of substitution drawback of excise taxes as unambiguously conflicting with the drawback laws.

INTEREST OF *AMICUS CURIAE*

Pursuant to FRAP 29(c), Plaintiffs-Appellees and Defendants-Appellants have indicated their consent to the filing of the instant *amicus curiae* brief.

CASI, based in Atlanta, Georgia, is a licensed customs brokerage firm and drawback services provider which assists claimants in the preparation and submission of requests for drawback of duties, taxes (including Federal excise taxes ("FET")) and fees in respect of exported and destroyed goods.

CASI has decades-long involvement in the drawback industry and was one of the plaintiffs in the case of *Tabacos de Wilson et al. v. United States*, 324 F. Supp. 3d 1304 (Ct. Int'l Tr. 2018), which directly contributed to the issuance of the regulations under consideration here. CASI also appeared as *amicus curie* before the CIT in this case. CASI offers a drawback filer's perspective on the major issues in this case, which include (i) regulations linking FET drawback payments to FET paid on exported, substituted goods; (ii) unlawful expansion of the definition of the regulatory term "drawback claim"; and (iii) the application of these regulations to transactions made before their stated effective dates.

STATEMENT OF AUTHORSHIP

In accordance with FRAP 29(c)(5), *amicus curiae* CASI confirms that its management has authorized the filing of this brief. No other party contributed to the drafting of the brief or contributed any money to the effort. The brief was drafted entirely by undersigned counsel for CASI.

STATEMENT OF THE CASE

CASI incorporates herein by reference the statements of the case presented in the principal briefs of NAM, at pages 4-18, and the Beer Institute, at pages 4-19.

ARGUMENT

The Drawback Restrictions Defendant-Appellants Imposed in the Rule are Invalid and the Court of International Trade's Decision Should be Affirmed.

I. The CIT Correctly Invalidated the Rule Under *Chevron* Step One.

A. The Legislative History of Substitution Drawback Standard Demonstrates that the Defendants' Final Rule is Invalid and the Arguments Advanced in Their Principal Brief are Unsupported

Duty drawback laws have been a feature of United States customs law since 1789. *See e.g.*, Ruth F. Sturm, Customs Law & Administration, at § 18.1 (3d ed. 2011); *see also*, Act of July 4, 1789, ch. 2, Sec. 3, 1 Stat. 24, 26–27; *Central Soya Co., Inc. v. United States*, 761 F. Supp. 133, 135 (Ct. Int'l Tr. 1991), *aff'd*, 953 F.2d 630 (Fed. Cir. 1992). In the more than 230 years since, Congress has consistently

amended the drawback law (currently codified at Section 313 of the Tariff Act of 1930, 19 U.S.C. § 1313) to provide greater drawback opportunities for claimants. Recent history demonstrates that this is especially true with regard to substitution drawback.

In the 21st Century alone, we have witnessed an ongoing tug-of-war between Congress and the Defendants over the proper scope, interpretation and administration of substitution drawback, as demonstrated by the following events:

- In 2004, Congress amended the substitution unused merchandise drawback statute, 19 U.S.C. §1313(j)(2), to require that substitution-drawback claims thereunder be paid "notwithstanding any other provision of law." Pub. L. No. 108-429, § 1557(a), 118 Stat. at 2579.
- In 2007, Congress rejected proposed amendments seeking to reduce substitution-drawback payments "by an amount equal to any Federal tax credit or refund of any Federal tax" on the substituted merchandise. 153 Cong. Rec. S7909, S7941, § 832(b) (daily ed. June 19, 2007); 153 Cong. Rec. S13774, S13927, § 12318(b) (daily ed. Nov. 5, 2007).
- In 2008, Congress further liberalized substitution drawback by codifying a 2001 CBP drawback ruling which had expanded the substitution standard for wine after CBP revoked the ruling in 2007, so that substitution drawback would be paid on wine of "the same color" where the imported and exported

products were within 50% of the same price. H.R. Rep. No. 110-627, at 1094-95 (2008) (Conf. Rep.), *reprinted in* 2008 U.S.C.C.A.N. 536, 514-515.

- In 2009, Defendants proposed a rule seeking to bar substitution drawback of excise taxes "paid on imported merchandise … where no excise tax was paid upon the substituted merchandise or where the substituted merchandise is the subject of a different claim for refund or drawback of a tax" under the tax code. *See* Drawback of Internal Revenue Excise Tax, 74 Fed. Reg. 52,928, 52,931 (Oct. 15, 2009) ("2009 Proposed Rule"). The 2009 Proposed Rule was vigorously opposed, and ultimately withdrawn. *See* Drawback of Internal Revenue Excise Tax, 75 Fed. Reg. 9,359–60 (Mar. 2, 2010).
- In 2016, Congress significantly expanded and simplified substitution drawback in the Trade Facilitation & Enforcement Act of 2015 ("TFTEA*"), see e.g.*, 83 Fed. Reg. at 64,942, so that all commodities—regardless of the tax exempt status of the substituted merchandise—could use an HTS-based substitution drawback standard (aside from wine, where Congress sanctioned the continued use of the color-and-value-added standard). *See* 19 U.S.C. § 1313(*l*)(2)(D); *see also* H.R. Rep. No. 114-376, at 221 (2016), reprinted in 2016 U.S.C.C.A.N. at 112 (noting that "the existing treatment of wine under section 313(j)(2) of the Tariff Act of 1930 is preserved"). TFTEA requires that CBP to pay substitution drawback when three criteria are satisfied:

(i) there is "imported merchandise on which was paid any duty, tax, or fee imposed under Federal law upon entry or importation"; (ii) there is "any other merchandise" with "the same 8-digit HTS subheading"; and (iii) the other merchandise is exported or destroyed within five years, is not used in the United States and is within the claimant's control. 19 U.S.C. § 1313(j)(2).

- This case involves regulations promulgated in 2018 by defendants-appellees Treasury and CBP which seek to stop the wine industry from continuing to benefit from the liberalized substitution requirements of the TFTEA, Modernized Drawback, 83 Fed. Reg. 64,942, 64,960–61 (Dep't Treasury Dec. 18, 2018) ("Final Rule") (Appx033-158), by altering the drawback regulations in two meaningful ways: (i) to "clarify" that "drawback" and "drawback claim" includes a "refund or remission of other excise taxes pursuant to other provisions of law[,]" *see* 19 C.F.R. § 190.2; and (ii) to limit drawback of excise taxes to the amount of tax paid and not previously refunded on the "substituted" goods, *see* 19 C.F.R. §§ 190.171(c)(3), 190.22(a)(1)(ii)(C), 190.32(b)(3), 191.171(d), 191.22(a), and 191.32(b)(4).
- The Court of International Trade set aside the regulations as not in accordance with law, pursuant to the Administrative Procedure Act ("APA"). This Court should affirm that determination.

B. The Challenged Regulations Undermine the Statute and the Clearly-Expressed Congressional Intent to Expand Substitution Drawback.

In TFTEA, Congress spoke with crystal clarity that drawback was to be paid in an amount equal to the lesser of "(I) the amount of duties, taxes, and fees paid with respect to the imported merchandise; or ''(II) **the amount of duties, taxes, and fees that would apply to the exported article if the exported article were imported**." 19 U.S.C. § 1313(*l*)(2)(B) and (C) (2016) (emphasis added). In contrast to prior iterations of the drawback statute, which focused only on the amount of duties, taxes and fees paid in respect of the imported merchandise, TFTEA for the first time looks to the exported merchandise in connection with the calculation. Congress did not, in any way, shape or form, look to the question of whether the exported merchandise had themselves borne a duty, tax or fee. Rather, Congress used a legal construct in which it looked to the exported substituted goods and asked how much duty, tax or fee *would have been imposed* on those goods had they been imported.

It is not for CBP to set aside, or create exceptions to, Congress' clear statutory choice. Defendants enacted a Final Rule imposing new, non-statutory restrictions on substitution drawback. 19 C.F.R. Part 190 (2018); *Modernized Drawback*, 83 Fed. Reg. 64,942 (Dep't Treasury 2018). The Final Rule limits drawback of FET paid on *imported* merchandise to the amount of FET paid (and not refunded or credited) on the *substitute* merchandise that is exported. The regulations conflict directly with

TFTEA, and the Trade Court rightly struck them down as unreasonable and contrary to law.

The TFTEA provides an expanded substitution drawback standard which allows drawback claimants to obtain a refund of federal customs duties or taxes paid on imported merchandise if substitute merchandise classifiable under the same HTSUS classification is exported (or destroyed under CBP supervision) within five years. 19 U.S.C. § 1313(j)(2).[1] Section 313(*l*)(2) of the statute, 19 U.S.C. § 1313(*l*)(2), as added by TFTEA, contains both a command that Treasury issue rules for calculating FET drawback, and a limitation that the calculation regulations "shall" provide for substitution drawback "equal to 99 percent of the lesser of" the charges paid for the imported merchandise or the charges that would apply to the exported merchandise if it were imported." Subsection 1313(*l*) therefore forbids the Defendants from restricting or altering the amount of drawback to be paid under the Rule when paragraph (j)(2) is satisfied. The challenged regulations do not meet this statutory requirement.

Because the Final Rule eschews the statutory formulation, it is unlawful, and the Trade Court properly set it aside, noting that it did not pass "step one" of the test

[1] Substitution drawback for wine is allowed if the imported and exported product are "of the same color" and within fifty percent of the same price. 19 U.S.C. § 1313(j)(2). Petroleum products rely on HTS-based substitution standards. *Id.* § 1313(p).

for evaluating rulemaking under *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

C. Exemptions from Taxation Do Not Constitute "Drawbacks"

Defendants submit that a "claim for drawback" includes any "excise-tax relief conditioned on exportation." Appellants' Br. 33. Section 1313 and the tax code provide that a "claim for drawback" only exists where there has been a (i) refund of a tax that has already been paid; or (ii) the cancellation of a tax liability that has already been determined. An exportation "without payment of tax" is not a "claim for drawback" and Defendants proposed interpretation is unsupported by any existing or prior law or regulation. "Drawback" does not encompass merchandise exported "without payment of tax," rather it is a term referring only to the refund or cancellation of taxes that have already been paid or determined.

Congress, in enacting TFTEA, must be presumed to have acted with full knowledge of existing Internal Revenue Service ("IRS") and Alcohol and Tobacco Tax and Trade Bureau ("TTB") laws and regulations, as well as with full knowledge of prior laws, regulations and case law consistently interpreting "claim for drawback." *See United States v. Hayes*, 555 U.S. 415 (2009).[2] Under Internal Revenue

[2] This presumption has been extended in this Circuit to interpretations of the Customs laws, *see United States v. Douglas Aircraft Co.*, 62 C.C.P.A. 53, 510 F.2d 1387 (1975), and to the duty drawback statute in particular, *see Precision Specialty Metals Inc. v. United States*, 24 C.I.T. 1016 (2000).

Code ("IRC") Chapter 51, excise taxes are imposed on all wines, distilled spirits and beer produced in or imported into the United States. However, domestically produced wine, distilled spirits and beer are exempt from such taxes if removed from bonded premises for export, 26 U.S.C. § 5362(c), 5214(a), 5043 or, in the case of products exported with payment of tax, drawback is allowed in an amount equal to the tax paid. *See* 26 U.S.C. §§ 5062, 5055. The IRC similarly allows the removal for export of tobacco products from bonded warehouse without payment as authorized by the TTB pursuant to 26 U.S.C. § 5704, and permits the drawback of such taxes upon the exportation of such products on which tax has been paid, 26 U.S.C. § 5706.[3] Motor fuel taxes under IRC Chapter 32 are imposed on the manufacture of gasoline, diesel fuel, and kerosene (*i.e.*, taxable fuels) and on the entry of such products into the United States for consumption, use and warehousing. *See e.g.*, 26 U.S.C. § 4081. Upon exportation of such fuels, a drawback refund may be granted to the taxpayer or exporter. Neither the tax code nor section 1313 ever uses "drawback" to refer to an exportation "without payment of tax."

[3] Various products are subject to excise taxes including alcohol and petroleum products, but those taxes do not attach to exported goods. U.S. Const. Art. I, § 9, cl. 5. In furtherance of this Constitutional principle, excise taxes paid on imported products can be refunded if those products are later re-exported. 26 U.S.C. § 5062(c).

Moreover, merchandise exported "without payment of tax" involves no "claim for drawback." Defendants' position stretches credulity well beyond the ordinary or historical meaning that Congress advanced in the liberalized drawback laws of TFTEA.

D. The Final Rule Improperly Applies the "Double Drawback" Prohibition of 19 U.S.C, § 1313(v).

Having issued regulations limiting FET drawback claims in a manner plainly contrary to the clear statutory language, Treasury next sought to cover its tracks by adopting regulations, *see* 19 C.F.R. § 190.2, expanding the definitions of "drawback" and "drawback claim" so as to capture entirely distinct tax exemptions and remissions applicable on the goods, which are simply not drawbacks. Treasury reasoned that, where an exported good is subject to a tax exemption or remission, the payment of drawback under Section 313 of the Tariff Act would constitute an impermissible "double drawback" prohibited by 19 U.S.C. § 1313(v).[4]

[4] Section 313(v) of the Tariff Act, 19 U.S.C. § 1313(v), provides:

(v) Multiple drawback claims

> Merchandise that is exported or destroyed to satisfy any claim for drawback shall not be the basis of any other claim for drawback; except that appropriate credit and deductions for claims covering components or ingredients of such merchandise shall be made in computing drawback payments.

The regulations in existence at the time TFTEA was enacted, and of which Congress is presumed to have been aware, have long defined the terms "drawback," "drawback claim," and "drawback entry" (which is part of a drawback claim),[5] as follows:

> (i) Drawback. Drawback means the refund or remission, in whole or in part, of a customs duty, fee or internal revenue tax which was imposed on imported merchandise under Federal law because of its importation, and the refund of internal revenue taxes paid on domestic alcohol as prescribed in 19 U.S.C. § 1313(d) (*see also* § 191.3 of this subpart).
>
> (j) Drawback claim. Drawback claim means the drawback entry and related documents required by regulation which together constitute the request for drawback payment.
>
> (k) Drawback entry. Drawback entry means the document containing a description of, and other required information concerning, the exported or destroyed article on which drawback is claimed. Drawback entries are filed on Customs Form 7551.

19 C.F.R. §§ 191.2(i)-(k).[6]

In promulgating Part 190 of the Customs Regulations, however Treasury purported to expand the definitions of "drawback" and "drawback claim." Thus, 19 C.F.R. § 190.2, provides the following new definitional provisions:

> *Drawback.* Drawback, as authorized for payment by CBP, means the refund, in whole or in part, of the duties, taxes and/or fees paid on

[5] *Echostar Technologies Inc. v. United States*, 391 F. Supp. 3d 1316 (Ct. Int'l Tr. 2019).

[6] These regulations remain in force, and govern not only pre-TFTEA ("core") drawback claims, but also TFTEA drawback claims filed before the effective date of the provisions of 19 C.F.R. Part 190.

> imported merchandise, which were imposed under Federal law upon the entry or importation, and the refund of internal revenue taxes paid on domestic alcohol as prescribed in 19 U.S.C. §1313(d). **More broadly, drawback also includes the refund or remission of other excise taxes pursuant to other provisions of law.**
>
> *Drawback claim. Drawback claim*, as authorized for payment by CBP, means the drawback entry and related documents required by regulation which together constitute the request for drawback payment. All drawback claims must be filed electronically through a CBP-authorized Electronic Data Interchange system. **More broadly, drawback claim also includes claims for refund or remission of other excise taxes pursuant to other provisions of law.**

Final Rule (bold-emphasis added). As the lower court correctly noted, however, these expanded definitions lack statutory foundation and conflict with other parts of the drawback statute, as well as with provisions of the Internal Revenue Code.

The lower court noted that "drawback" is traditionally defined to be "an amount paid back from a charge previously made,"[7] and a refund by Customs authorities of duties previously tendered based on the exportation of merchandise[8].

[7] *See* Appx010 (citing *Black's Law Dictionary* (11th ed. 2019) ("a government allowance or refund on import duties when the importer reexports imported products rather than selling them domestically"); *Oxford English Dictionary* (2d ed. 1989) ("[a]n amount paid back from a charge previously made; esp. a certain amount of excise or import duty paid back or remitted when the commodities on which it has been paid are exported")).

[8] Appx010 (citing *Barron's Dictionary of Int'l Business Terms* (3d ed. 2004) ("a rebate by a government, in whole or in part, of customs duties assessed on imported merchandise that is subsequently exported."); and *Ballentine's Law Dictionary* (3d ed. 1969) ("The refund of duties paid upon the importation of materials used in the manufacture or production of articles in the United States, when such articles are exported.")).

This comports with judicial understanding of the term.[9] Over time, Congress has continually expanded the drawback statute to allow for refunds of duties, taxes and fees paid on imported materials based upon the exportation of goods made with materials of the "same kind and quality," 19 U.S.C. § 1313(b), imported goods exported without having been used in the United States, 19 U.S.C. § 1313(j)(1), imported goods when substitutable goods are exported, 19 U.S.C. § 1313(j)(2), and on the exportation of qualified petroleum derivatives, 19 U.S.C. § 1313(p). In all cases, however, "drawback" has been understood as a refund of duties, taxes and fees paid upon imported goods at the time of importation. Where the term "drawback" is used in the Internal Revenue Code, it uniformly denotes a refund of taxes previously paid or determined[10]. This is distinguished from situations where goods are exempt from tax or non-taxable, and no taxes are ever paid or determined[11]. So it is under the drawback law. As the lower court correctly noted, Treasury's expanded definition of "drawback" in 19 C.F.R. § 190.2 stretches the term beyond its acknowledged meaning, whereas words in a statute must draw their meaning from their statutory

[9] *See e.g.*, *Nicholas & Co. v. United States*, 7 Ct. Cust. 97, 110 (1916), *aff'd*, 249 U.S. 34 (1919).

[10] *See* 26 U.S.C. §§ 5055 (drawback for taxes paid on exported beer), 5062(b), and 5114 (drawback on taxes paid or determined on wine or distilled spirits), 5706 (drawback for taxes paid on exported tobacco and certain related products).

[11] *See e.g.*, 26 U.S.C. §§ 5053(a) (beer is exported without payment of tax), 5214(a) (exported spirits are removed from bond free of tax), 5362(c) (wine exported without tax having been paid or determined does so without payment of tax).

context.[12] Had Congress intended the term "drawback" to be so broadly defined, it would not have used the term selectively in legislation to describe refunds of sums collected or determined, and declining to use it to describe tax exemptions. *Russello v. United States*, 464 U.S. 16, 23 (1983).

Treasury's definition of "drawback" for purposes of 19 U.S.C. § 1313(v) also creates inconsistencies within the drawback statute itself, as the lower court correctly noted. It creates a clear conflict between 19 U.S.C. § 1313(d), providing for drawback of excise taxes on imported alcohol used to make wines, and 19 U.S.C. § 1313(j)(2), which specifically allows for substitution drawback of wines if the substituted wine is of the same color as the imported wine, and is within 50% of the value of the import.

Treasury's expanded definition of "drawback" also conflicts with the language of 19 U.S.C. § 1313(j)(2), which states that, with respect to "imported merchandise on which was paid any duty, tax, or fee imposed under Federal law upon entry or importation" that "*notwithstanding any other provision of law*, upon the exportation or destruction of such other merchandise an amount calculated pursuant to regulations prescribed by the Secretary of the Treasury under subsection (*l*) shall be refunded as drawback." 19 U.S.C. § 1313(j)(2). Treasury's interpretation would

[12] *See* Appx011 (citing *Ardestani v. INS*, 502 U.S. 129, 135 (1991)).

improperly ignore the "notwithstanding" clause of §1313(j)(2), which must be construed to "override conflicting provisions of any other section." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). In *Nat'l Labor Relations Bd. v. SW General, Inc.*, 137 S. Ct. 929, 940 (2017), the Supreme Court noted that "'notwithstanding' clauses show that one provision prevails over another in the event of a conflict." The Trade Court properly declined to adopt a regulation which would "render the word 'notwithstanding' meaningless." Appx014.

Treasury's proposed definitions also exceed its rulemaking authority under 19 U.S.C. § 1313(*l*)(s) which limits Treasury's previously broad powers to prescribe regulations for determining the calculation of drawback amounts. New subsection 19 U.S.C. § 1313(1)(2)(A), entitled "[c]alculation of drawback" expressly prescribes a calculation procedure under which drawback of excise taxes is not limited to the charges actually paid on the imported or exported merchandise, but are based on the "fees that would apply to the exported article if the exported article were imported." 19 U.S.C. § 1313(1)(2)(B)(i)(II). Congress' intent could not be more clear from this carefully-chosen wording, yet Treasury's interpretation of 19 U.S.C. § 1313(v) to disallow exports on which excise tax was not paid nullifies this language. As the Supreme Court noted in *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*,

297 U.S. 129, 134 (1936), "[a] regulation which does not [effect the will of Congress], but operates to create a rule out of harmony with the statute, is a mere nullity."[13]

Indeed, the right to claim substitution drawback, and the amount of drawback paid, has *never* been conditioned on the tax status of the exported good.

Nor does the remission or exemption of tax comport with the concept of a "drawback claim" as set out in 19 C.F.R. § 190.2. A "claim" generally denotes an affirmative act by a party to request a refund of an amount already paid, rather than an exemption or remission, which is granted to all qualifying goods and involves neither the affirmative request for a refund of sums paid, nor refunds. The Trade Court confirmed in *Echostar Technologies Inc. v. United States*, 391 F. Supp. 3d 1313 (Ct. Int'l Tr. 2019), that drawback requires the timely filing with Customs of a complete "drawback claim" (of which a "drawback entry" is an essential part). Even 19 C.F.R. § 190.2 recognizes "drawback" to be something which is "authorized for payment by CBP" and which consists of "the refund, in whole or in part, of the duties, taxes and fees paid on imported merchandise ... "

[13] Treasury's interpretation of 19 U.S.C. § 1313(v) also produces absurd results, as it would result in the denial of duty drawback as well as of excise tax drawback.

"[C]laims for refund or remission of other excise taxes pursuant to other provisions of law" are simply not "drawbacks," for purposes of 19 U.S.C. § 1313. The term "refund" requires the payment of an existing obligation; while "remission" refers to the act of eliminating or canceling a debt that is owed. *Black's Law Dictionary* (10th ed. 2014). Tax exemption status and remissions are conferred by statute, and neither refunds monies nor cancels debts—rather, a refund or remission provides that no assessment or debt has arisen in the first place. Drawback has always been understood as a refund of monies already paid, which must be claimed by an eligible party upon filing a drawback application with CBP and satisfaction of statutory preconditions.[14] Excise tax exemptions and remissions are simply not "drawbacks" in any sense of the word.

Nor is the "double drawback" prohibition contained in 19 U.S.C. § 1313(v) as broad as Treasury supposes. Enacted into law as part of Section 632 of the Customs Informed Compliance and Modernization Act, North American Free Trade

[14] *See e.g.*, *United States v. Allen*, 166 U.S. 499, 504 (1896); *Swan & Finch, supra note 7*; *see also Hartog Foods Int'l v. United States*, 291 F.3d 789, 793 (Fed. Cir. 2002). Thus, 19 C.F.R. § 191.2(i) defines "drawback" as the remission or refund, in whole or in part, of a customs duty, free or internal revenue tax. *See e.g.*, *Shell Oil Co. v. United States*, 688 F.3d 1326 (Fed. Cir. 2012); *Cargill Citro-America Inc. v. United States*, 395 F. Supp. 2d 1222 (Ct. Int'l Tr. 2005); *United States v. Champion Coated Paper Co.*, 22 C.C.P.A. 414 (1934).

Agreement Implementation Act, Title VI, Pub. L. 103-182, 107 Stat. 2057 (December 8, 1993), the "double drawback" concept "provides that only one drawback claim per exportation or destruction of goods would be allowed," subject to "appropriate credit and deductions for claims covering components or ingredients." H. Rep. 103-361, at 113 (1993). The language of Section 313(v) tracks the legislative history's description precisely, prohibiting the filing of more than one *drawback claim* based upon an exportation or destruction of the same merchandise. It does not contemplate a situation where an exemption or remission of tax is conferred by statute without regard to exportation or destruction. In those situations, Section 1313(v) simply does not operate.

Drawback has been a part of United States law continuously since 1789; it must be presumed that Congress is well aware of what "drawback" or a "drawback claim" is.

Indeed, Congress previously considered, and rejected, Customs' notion that an exemption or remission of FETs constitutes a "drawback claim." In 2007, legislators twice tried and failed to amend § 1313 to impose the same sort of restriction which Customs now seeks to impose by regulations. In June 2007, several Senators proposed a new Section 313(z) to the drawback statute, which would have provided that "[f]or purposes of subsections (b), (j)(2) and (p) of this section, the amount of refund as drawback under this section shall be reduced by an amount equal to any

Federal tax credit or refund of any Federal tax paid on the merchandise with respect to which drawback is claimed." 153 Cong. Rec. S7909, S7941, § 832(b); *accord* 153 Cong. Rec. S13774, S13927, § 12318(b). In November 2007, four Senators offered an amendment containing the same proposed provision. 153 Cong. Rec. S13774, S13972, § 12318(b). The final legislation ultimately omitted this proposed change and instead liberalized the drawback substitution standard for wine, making it easier for wine exporters to claim drawback of both duties and excise taxes. Pub. L. No. 110–234, § 15421, 122 Stat. 923 (2008).

As the Supreme Court observed in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987), "few principles of statutory construction are more compelling than the notion that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language"

Congress is also presumed to be aware of administrative practices. In October 2009, Customs and Treasury proposed coordinated amendment to the drawback and TTB regulations designed to deny claimants substitution drawback where the exported merchandise was exempt from tax. Customs noted that it had received **and approved** numerous claims for drawback under 19 U.S.C. § 1313(j)(2) for bulk and bottled domestically produced wine. *See e.g., Drawback of Internal Revenue Excise Tax*, 74 Fed. Reg. 52,928 (Dep't Treasury October 15, 2009); and *Drawback of Internal Revenue Taxes*, 74 Fed. Reg. 52,937 (Dep't Treasury October 15, 2009). In

response to objections received from over 40 legislators, CBP and TTB withdrew their regulatory proposals.

Congress knew of all of these events when it enacted TFTEA in 2016. Likewise, Congress is presumed to have been aware of Customs' practice of granting drawback upon the exportation of domestically produced goods not assessed with FET. Congress must also be presumed to have been aware of Customs' regulatory definitions of "drawback," "drawback claim," and "drawback entry" contained in 19 C.F.R. §§ 191.2(i)-(k), and the agency's conception of "double drawback" for purposes of 19 U.S.C. § 1313(v).

By amending 19 U.S.C. § 1313 without adopting the proposed restrictions set out in the regulations challenged herein, Congress must be presumed to have ratified the prior administrative treatment. *Creekstone Farms Premium Beef, L.L.C. v. Dept. of Agriculture*, 539 F.3d 492, 500 (D.C. Cir. 2008) ("When Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."). Congress is presumed to know long standing agency interpretation and practice, and to enact statutory revisions with the expectation that established practice will continue if the relevant statutory language is unchanged. *Lorillard v. Pons*, 434 U.S. 575 (1978); *see also, NLRB v. Gullet Gin Co.*, 340 U.S. 361 (1951); *National Lead Co.*

v. United States, 252 U.S. 140 (1920). The rule is especially strong where, as here, there is "congressional familiarity with the administrative interpretation at issue." *Public Citizen Inc. v. United States Dept. of Health & Human Servs*., 332 F.3d 654, 669 (D.C. Cir. 2003); *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 599 (1983) (Congress "acutely aware" of a debate over agency interpretation). So, too here, Congress must be presumed to have been aware of Customs' prior regulatory conceptions of "drawback," and "drawback claim," and to have ratified the same. Had Congress sought to make the type of changes contained in the new regulations, it would have legislated them. It did not.

As noted *supra*, Congress, in enacting and amending the drawback statute has never focused on the tax or duty status of exported goods designated as the basis of a substitution drawback claim. Thus, when the concept of substitution drawback was introduced into the drawback law in 1984, Congress made it abundantly clear that "fungible" substituted merchandise which would support a claim for drawback could be either imported duty-paid merchandise, imported duty-free merchandise, or domestic merchandise. This remained the case when, in the Mod Act of 1993, *supra*, the substitution standard was expanded to one of "commercial interchangeability." All that was required was the exportation of "commercially interchangeable" merchandise, regardless of its origins or the tax burdens borne.

In enacting TFTEA, Congress once again—and most emphatically—rejected any notion that the allowance of a substitution drawback was conditioned on the tax status of the exported good, provided for a drawback of "duties, taxes and fees" which were "imposed under Federal law upon entry or importation of the imported merchandise" in an amount equal to the lesser of "(I) the amount of duties, taxes, and fees paid with respect to the imported merchandise; or ''(II) the amount of duties, taxes, and fees that **would apply to the exported article if the exported article were imported.**" *See* 19 U.S.C. §§ 1313(*l*)(2)(B)(i) and (ii) (emphasis added). Congress did not, in any way, shape or form, look to the question of whether the exported articles had themselves borne a duty, tax or fee. Rather, Congress used a legal construct in which it looked to the exported substituted goods and asked how much duty, tax or fee would have been imposed on those goods *had they been imported. Id.* Regulations may not set aside, or create exceptions to, Congress' clear statutory choice.

Customs' new regulatory definitions of "drawback" and "drawback claim" are contrary to law and the Trade Court correctly so ruled. An agency cannot do by regulation that which Congress has declined to do.

This is but the latest episode in an arc covering more than a century, in which the courts have repeatedly struck down attempts by the Treasury Department and its

constituent agencies to limit drawback regulations contrary to law.[15] However, Congress has consistently resolved that conflict in favor of encouraging manufactures and exports through drawback, and both Treasury and the Courts must respect that choice.

As the CIT noted below, there is a tension between the excise tax statute, which seeks to raise revenue, and the drawback law, which pays money from the fisc to qualified claimants. However, Congress has consistently resolved that conflict in favor of encouraging manufactures and exports through drawback, and both Treasury and the Courts must respect that choice.

II. Even if *Arguendo* the Statutes Were Ambiguous, the Rule is Unreasonable; and Even if *Arguendo* the Rule is Otherwise Valid, it Cannot Apply Retroactively.

CASI agrees with, and incorporates herein by reference, the arguments of NAM in its principal brief at Sections II and III, pages 71-74, and by the Beer Institute in its principal brief at Section II, pages 23-38.

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[15] *See e.g.*, *Campbell v. United States*, 107 U.S. 407 (1883) (overturning Treasury's effort to block drawback payments as a "gratuity"); *R.H. Comey Brooklyn Co. v. United States*, 16 U.S. Cust. 248 (Ct. Cust. App. 1928)(striking down regulation which purported to set time limits for filing drawback claims); *Central Soya Co., Inc. v. United States*, 761 F. Supp. at 138 (invalidated regulation imposing a "dual possession" requirement for substitution unused merchandise drawback claims); *B.F. Goodrich Co. v. United States*, 16 C.I.T. 333, 341 (1992) (invalidating same regulation); *B.F. Goodrich Co. v. United States*, 18 C.I.T. 35, 38–39 (1994) (enjoining application of same regulation); *Pillsbury Co. v. United States*, 18 F. Supp.2d 1034 (1998) (overturning revocation of drawback privileges without required process).

CONCLUSION

For these reasons, *Amicus Curiae,* Customs Advisory Services, Inc., respectfully submits that the CIT correctly invalidated the Rule at *Chevron* step one and that this Court should affirm the CIT's opinion and judgment.

Respectfully submitted,

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2020-1734

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.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for *Amicus Curiae,* Customs Advisory Services, Inc., was served on the parties by electronic means (CM/ECF) this 28th day of October, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 32(a)(7)(C)

I, Richard F. O'Neill, attorney with Neville Peterson LLP, and counsel to *Amicus Curiae,* Customs Advisory Services, Inc., who is responsible for the foregoing brief, relying upon the 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 5,641 words.

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October 28, 2020