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.

BRIEF FOR DEFENDANTS-APPELLANTS

ETHAN P. DAVIS
Acting Assistant Attorney General

DAVID M. MORRELL
Deputy Assistant Attorney General

JEANNE E. DAVIDSON
Director

CLAUDIA BURKE
Assistant Director

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

ALEXANDER VANDERWEIDE
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

DATED: July 23, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

STATEMENT PURSUANT TO RULE 47.5

In accordance with Rule 47.5 of the Rules of this Court, counsel for the appellant makes the following statements:

1. No other appeal in or from the same civil action or proceeding in the United States Court of International Trade was previously before this or any other appellate court.

2. To our knowledge, there are no other cases pending before this Court that may affect or be affected by this Court's decision in this appeal.

STATEMENT OF JURISDICTION PURSUANT TO RULE 28(a)(5)

a. The United States Court of International Trade exercised jurisdiction over this action pursuant to 28 U.S.C. § 1581(i).

b. This Court possesses jurisdiction to entertain this appeal from a final decision of the United States Court of International Trade, pursuant to 28 U.S.C. § 1295(a)(5).

c. The United States Court of International Trade issued an opinion and order on January 24, 2020. *Nat'l Ass'n of Manufacturers v. United States Dep't of Treasury*, 427 F. Supp. 3d 1362 (Ct. Int'l Trade 2020). Appx1-21. Judgment was entered on February 18, 2020. Appx22. Defendants-Appellants, United States Department of the Treasury, United States Customs and Border Protection, Steven T. Mnuchin, and John Sanders,* filed their notice of appeal on April 17, 2020. The notice of appeal was timely under 28 U.S.C. §§ 2107 and 2645(c), and Fed. R. App. P. 4(a)(1)(B).

d. This appeal is from a final judgment that disposed of all parties' claims.

* Mark Morgan, not John Sanders, is currently performing the functions and duties of U.S. Customs and Border Protection's Commissioner.

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

BRIEF FOR DEFENDANTS-APPELLANTS

INTRODUCTION

This case concerns a privilege known as "drawback." Drawback is the refund of—or cancellation of liability for—duties, taxes, or fees. Drawbacks allow those who export from the United States the chance to compete fairly with overseas competitors by refunding certain tax burdens when products are exported.

Both the Internal Revenue Code and the Tariff Act of 1930, and the agencies responsible for enforcing them, recognize the drawback privilege and have long guarded against its abuse by prohibiting double recovery of the same tax, duty, or fee. This appeal concerns one such set of regulations (the Rule), promulgated in 2018 by the Department of the Treasury (Treasury) in conjunction with U.S. Customs and Border Protection (CBP) (collectively, the agencies).

The Rule interprets 19 U.S.C. § 1313(v), which states in relevant part: "Merchandise that is exported or destroyed to satisfy any claim for drawback shall not be the basis of any other claim for drawback . . . ." The dispute here is whether the agencies could reasonably interpret "claim for drawback" to include not just *refunds* of already-paid excise taxes on *imports* under the Tariff Act but also refunds and the *cancellation* of excise-tax liability on *exports* under the Internal Revenue Code. With refunds, excise tax is paid and later refunded; with cancellations, tax liability is imposed by operation of law, but forgiven before payment is actually made. The economic substance and effect of both is identical.

The practical upshot, and the central controversy, is the Rule's prohibition of what has been called "double drawback" in the specific context of "substitution drawback." Substitution drawback allows drawback of duties, taxes, and fees paid on an import based on the export of a sufficiently similar (or "substitute") product. *See, e.g.*, 19 U.S.C. § 1313(j)(2). For example, if a taxpayer imports a case of wine

from France, and exports a comparable case of California wine, the taxpayer can use the exported wine to recover the assessments paid on the imported wine. Double drawback occurs when the taxpayer uses the same California wine to recover excise taxes twice—first on the exported California wine under the Internal Revenue Code and a second time on the imported French wine under the Tariff Act. The result would be not only tax-free exports abroad (a proper aim of drawback), but imports circulating in domestic commerce virtually excise tax-free[1] with a significant competitive advantage against fully taxed domestic products (undermining the excise-tax regime's goal to tax domestic consumption of wine).

The agencies promulgated the Rule to clarify that double drawback is not permitted under the statute. The U.S. Court of International Trade invalidated the Rule in its entirety, as it applies to both refunds and cancellations on exported merchandise. In doing so, the trial court struck down the Rule even in those clear instances where the Internal Revenue Code has expressly provided for the "drawback" of taxes paid and later refunded on an export. The court also rejected the idea that drawback includes cancellation of excise-tax liability on exports because, in the court's reading, the Internal Revenue Code does not always expressly label such transactions as "drawbacks." The trial court's conclusion is

[1] Claimants of substitution drawback under section 1313(j)(2) are entitled to recover all but one percent of eligible assessments. *See* 19 U.S.C. § 1313(*l*)(2)(B).

incorrect. What matters is what the term "drawback" means and whether the agencies' interpretation is reasonable, not whether the interpretation reaches only things that are expressly labeled as such. Here, the text, structure, history, and purpose of the statutes confirm that the Rule is lawful.

STATEMENT OF THE ISSUES

Section 1313(v) of Title 19 prohibits an exported product from serving as the basis for more than one drawback claim. Notwithstanding this provision, in 2004, CBP inadvertently processed certain drawback claims that resulted in wine producers (but no other commodity-producers) improperly receiving two drawbacks of federal excise tax on the basis of one exported product. To end this practice, the agencies promulgated the Rule through notice-and-comment procedures, confirming the prohibition in the statute. The issue in the case is whether the U.S. Court of International Trade erred when it held the Rule invalid.

STATEMENT OF THE CASE

I. Nature Of The Case

The United States appeals the judgment in *Nat'l Ass'n of Manufacturers v. United States Dep't of Treasury*, 427 F. Supp. 3d 1362 (Ct. Int'l Trade 2020), invalidating the following: 19 C.F.R. §§ 190.171(c)(3), 190.22(a)(1)(ii)(C), 190.32(b)(3), 191.171(d), 191.32(b)(4), the final sentence of 19 C.F.R. § 191.22(a),

and the final sentence in the definition of "drawback" and "drawback claim" in 19 C.F.R. § 190.2 (together, the Rule).

II. Legal and Factual Background

A. Statutory And Regulatory Language At Issue

19 U.S.C. § 1313(v)

> 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 Rule

> (C) Federal excise tax. For purposes of drawback of internal revenue tax imposed under Chapters 32, 38 (with the exception of Subchapter A of Chapter 38), 51, and 52 of the Internal Revenue Code of 1986, as amended (IRC), drawback granted on the export or destruction of substituted merchandise will be limited to the amount of taxes paid (and not returned by refund, credit, or drawback) on the substituted merchandise.[2]
>
> *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 imported merchandise, which were imposed under Federal law upon 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*.

[2] This portion of the Rule quotes 19 C.F.R. § 190.22(a)(1)(ii)(C). We note that this regulatory provision is virtually identical (but not identical) to the other regulatory provisions that constitute the Rule. *See* 19 C.F.R. §§ 190.171(c)(3), 190.32(b)(3), 191.171(d), 191.32(b)(4), and the final sentence of 19 C.F.R. § 191.22(a).

> *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*.

See also Appx89, Appx99, Appx102 (italics added to emphasize the portion of the definitions of "drawback" and "drawback claim" at issue).

B. Internal Revenue Code

The Internal Revenue Code imposes federal excise taxes on certain commodities consumed in the United States, such as beverage alcohol, petroleum, and tobacco. *See* I.R.C. § 5001 *et seq*. Excise taxes are intended to limit consumption and to regulate consumer behavior, in addition to raising revenue. *See* S. Rep. 89-324, at 14 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1690.

Because they are designed to tax domestic consumption, excise taxes are assessed on both imports and domestic production. Excise-tax liability attaches at the time of importation (for imports) or at the time of production (for domestic products). *See, e.g.*, I.R.C. § 5001(a)(1) ("There is hereby imposed on all distilled spirits produced in or imported into the United States a tax …."); I.R.C. § 5041(a) ("There is hereby imposed on all wines … produced in, or imported into, the United States, taxes at the rates shown …."). And because domestic production is subject to excise-tax liability immediately upon production, domestic producers

must hold products in bonded facilities until the tax liability is paid or otherwise extinguished. *See* I.R.C. §§ 5053, 5175, 5362. This bond requirement serves to protect the revenue by guarding against non-payment of tax. *See, e.g.*, *Erie R. Co. v. United States*, 156 F. Supp. 908, 912 (Ct. Cl. 1957) (stating that "the bond is given to secure payment of the tax that has already accrued on the spirits, and when the tax is paid the bond is discharged").

Consistent with the focus on taxing domestic consumption, the Internal Revenue Code *removes* the tax burden when excise-taxed commodities are exported. Where the excise tax has been "paid or determined," the tax is refunded, if paid, and the liability extinguished. *See, e.g.*, I.R.C. §§ 5062(b) (wine and spirits), 5055 (beer), 5706 (tobacco). Products may also be withdrawn from a bonded facility "without payment of tax" for exportation, and though such products are still subject to bond and still carry a determined excise-tax liability until exportation, the tax liability is extinguished once exportation occurs. *See, e.g.*, I.R.C. §§ 5214(a), 5362(c), 5053(a); *see also* 16 Op. Att'y Gen. 634, 636 (1879). In both cases, the economic result is identical—zero excise tax on exported products.

The mechanics under both sets of export provisions are similar. In either case, the producer files a form with Treasury's Alcohol and Tobacco Tax and Trade Bureau (TTB) upon exportation. The forms, both for refund or for export

without payment of tax, require information including the export destination and the type, quantity, size, and serial numbers of the products to be exported. *Compare* TTB F 5110.30 (spirits) and TTB F 5120.24 (wine); *with* TTB F 5100.11 (wine and spirits). Appx278-286. The forms also require a determination—or calculation—of the excise-tax liability due on the products being exported. *See, e.g.*, TTB F 5100.11 at ¶ 11(h). Appx283. This calculated excise-tax liability is refunded or extinguished only after the producer furnishes proof to TTB that the products were in fact exported. *See* 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).

C. Tariff Act of 1930

Similar to the Internal Revenue Code, the Tariff Act of 1930, as amended, contains various drawback provisions. For example, the Tariff Act provides that where certain domestic products (like perfume or medicine) are manufactured using domestic alcohol and exported, the tax paid on the domestic alcohol may be refunded as "drawback." 19 U.S.C. § 1313(d). The same provision separately allows "drawback" of taxes "paid or determined" (*i.e.*, paid or not yet paid) on "bottled distilled spirits and wines" that are "manufactured or produced in the United States" and exported. *Id.*

The Tariff Act also authorizes under defined circumstances the drawback of taxes, duties, and fees on imports. For example, drawback is available where imported merchandise that is not used domestically is later exported, 19 U.S.C. § 1313(j)(1), or where the imported goods are incorporated into a finished product that is manufactured in the United States and then exported, 19 U.S.C. § 1313(a), (*l*)(2)(C).

In 1984, Congress authorized a novel form of drawback—which is central to this case—known as substitution drawback of unused merchandise.[3] *See* 19 U.S.C. § 1313(j)(2). While the Tariff Act had since 1980 authorized the refund or remission of taxes, duties, and fees paid on an imported product when the *same* product was later exported, *see* 19 U.S.C. § 1313(j)(1), substitution drawback expanded the concept by allowing *substitute* products that are exported to trigger this benefit as well. In particular, as originally enacted, section 1313(j)(2) authorized the drawback of duties, taxes, or fees imposed "because of … importation" on imported merchandise "upon the exportation or destruction" of substitute merchandise that was "fungible with such imported merchandise." Pub. L. No. 98–573, 98 Stat. 2948 (1984). In 1993, Congress replaced the original

[3] Other forms of substitution drawback include the substitution of articles incorporated into domestically manufactured articles (§ 1313(b)) and finished petroleum derivatives (§ 1313(p)). Unless otherwise noted, however, our discussion of "substitution drawback" focuses on the substitution of unused merchandise under section 1313(j)(2).

substitution standard ("fungible with such imported merchandise") to allow "commercially interchangeable" exported products to serve as substitutes for the imported merchandise. Pub. L. No. 103–182, 107 Stat. 2057 (1993) § 632. This may have allowed, for instance, an importer to drawback the duties on a case of French wine based on the export of a "commercially interchangeable" case of California wine.

The 1993 amendments also enacted the limitation at the heart of this case—namely, that "[m]erchandise that is exported or destroyed to satisfy any claim for drawback shall not be the basis of any other claim for drawback . . . ." 19 U.S.C. § 1313(v). This provision made express the fundamental principle embodied in longstanding drawback regulations—that a claimant cannot drawback more than is necessary to ensure that exported products may compete abroad on an equal footing.

The clearest embodiment of this principle in the regulatory scheme dates back to at least 1944, when Treasury promulgated regulations prohibiting the double recovery of taxes despite two distinct statutory provisions administered by two different agencies—one in the Internal Revenue Code, the other in the Tariff Act—that both purport to authorize recovery of the same excise taxes imposed on alcohol products that are exported. *See, e.g.*, Treasury Decision 51154 (Nov. 30, 1944) (providing that if "a claim has been, or will be, made … for domestic

drawback … under the … Internal Revenue Code, … the allowance of drawback under the provisions of section 313(d) [of the Tariff Act] … shall be limited to the difference between the amount of tax paid and the amount of domestic drawback claimed."); 19 C.F.R. §§ 190.103(a), 190.104, 190.106(a), 191.103(a), 191.104, 191.106(a). Without this common-sense, anti-abuse limitation, a producer could, for example, export a domestically produced alcohol product and recover the same excise taxes paid on it twice. *Compare* I.R.C. § 5062(b) *with* 19 U.S.C. § 1313(d)[2]. The taxpayer would reap a windfall far exceeding what is necessary to "place those who export from the United States on an equal footing with overseas competitors." *Texport v. United States*, 185 F.3d 1291, 1296-97 (Fed. Cir. 1999).

As for substitution drawback under section 1313(j)(2), following the 1993 amendments, Customs rulings held that internal revenue taxes collected on imports—such as the Harbor Maintenance Tax (HMT) (I.R.C. § 4461)—were not recoverable as drawback under that provision, *see, e.g.*, HQ 227347 (Apr. 18, 1997); HQ 227916 (Jan. 6, 1999); HQ 229320 (Jul. 29, 2002); HQ 231068 (Aug. 30, 2005)—a conclusion this Court affirmed in *Texport*, 185 F.3d 1291. The Court reasoned that the "because of … importation" language required "a nexus between the assessed charges and the act of importation." And because "generalized Federal charges" lacked this nexus, HMT was not recoverable as substitution drawback. *Id.* at 1296–97. The Court later extended this holding to another

internal revenue tax known as the Oil Spill Liability Tax (OSLT) (I.R.C. § 4611). *See George E. Warren Corp. v. United States*, 341 F.3d 1348 (Fed. Cir. 2003).

In 2004, Congress overruled *Texport* by again amending section 1313(j)(2). Congress replaced "because of … importation" with "upon entry or importation" and provided that drawback was available "notwithstanding any other provision of law." Pub. L. No. 108–429, § 1557(b), 118 Stat. 2434, 2579 (2004). The Senate Finance Committee Report explained that the amendments were intended "to clarify that the Harbor Maintenance Tax (HMT) is a fee eligible for drawback under [section 1313(j)(2)]," as "the Committee believe[d] that the U.S. Court of Appeals for the Federal Circuit erred in overturning [*Texport*]" and that "allowing for drawback of the Harbor Maintenance Tax is consistent with original Congressional intent." S. Rep. No. 108-28, at 173 (2003). The Committee did not identify any other reason for the changes. *See id.* While Congress's focus in passing the 2004 amendment was thus solely on HMT, the language made OSLT eligible for drawback as well. This is because, like HMT, OSLT is a tax imposed "upon entry or importation."

Thus, as amended in 2004, section 1313(j)(2) authorized a taxpayer to recover as "drawback" most duties, fees, and taxes paid on imported merchandise upon the exportation of "commercially interchangeable" merchandise. Pub. L. No. 108–429, 118 Stat 2434 (2004). This was the first time HMT and OSLT were

eligible for drawback under any provision of law. Unlike excise taxes on beverage alcohol—which the Internal Revenue Code imposes but has also long refunded as "drawback" upon exportation—the Internal Revenue Code imposes HMT and OSLT but contains no provision authorizing refunds (or drawback) upon exportation. *See* I.R.C. §§ 4461, 4611. It was thus only after the 2004 amendments to section 1313(j)(2) overruling *Texport* and *George E. Warren Corp.* that any provision of law authorized drawback of these two taxes.

D. The Double Drawback Anomaly For Wine

While the 2004 amendments to 19 U.S.C. § 1313(j)(2) were addressed solely to *Texport* and HMT, a novel and unintended windfall for the wine industry followed in their wake. Shortly after the 2004 amendments, a lone CBP drawback center unwittingly, and without reasoned consideration or endorsement, began processing substitution-drawback claims under section 1313(j)(2) on imported wine that resulted in the "double drawback" of excise taxes.[4] Appx169. Although

[4] Before the modernization of the drawback law by the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), Pub. L. No. 114–125, 130 Stat. 122 (2016), all drawback claims were entirely paper-based, necessitating manual review. Given CBP's limited resources, and the high volume of drawback claims, not all claims could be exhaustively reviewed in granular detail, and the agency had to rely instead on an extensive verification of only a targeted subset of claims. Moreover, the major controversy at the time with respect to wine, which was also CBP's focus in claim review, concerned the substitution standard for purposes of duty drawback, not the drawback of certain taxes, which the 2004 legislative amendments had only recently provided for. In this context, claims involving

never authorized by statute, regulation, ruling, or other guidance, this processing error can be understood as the result of sophisticated drawback claimants exploiting two unique features of excise taxation.

First, excise taxes are imposed on both imports and domestic production (which, as noted, ensures that any commodities consumed in the United States are taxed). Second, the Tariff Act and the Internal Revenue Code—which are administered by different agencies—both independently purport to authorize drawback of excise taxes on certain products and under certain circumstances that overlap in the context of substitution drawback under section 1313(j)(2). Together, these features combine to create a unique risk of double drawback for commodities subject to excise tax, but materialized on account of, and for (and only for), the wine industry in 2004. In contrast, HMT and OSLT are not susceptible to double drawback because these taxes, though imposed under the Internal Revenue Code, are available for drawback only under the Tariff Act.

An example illustrates the point. Assume a claimant imports a case of French wine and pays all applicable assessments, including excise taxes imposed by I.R.C. § 5041(a). The claimant then produces a case of comparable California wine and exports it. Absent some limitation, the claimant could use the single case

---

double drawback of excise taxes for wine were inadvertently approved as part of larger claims for the drawback of duties, taxes, and fees more generally.

of California wine to make two claims for drawback of excise taxes—first on the exported case itself under the Internal Revenue Code and second on the imported case under the Tariff Act. In particular, under the Internal Revenue Code, the excise-tax liability on the case of California wine can be cancelled upon exportation. I.R.C. § 5362(c). And the Tariff Act authorizes, as relevant here, a drawback of "any duty, tax, or fee imposed under Federal law upon entry or importation" of "imported merchandise" upon the exportation of sufficiently similar substitute merchandise. 19 U.S.C. § 1313(j)(2). Using the single case of California wine to obtain a drawback under both provisions would result in a case of French wine circulating in U.S. commerce virtually free of excise taxes, placing fully taxed domestic wine at a significant competitive disadvantage. Yet this is the kind of treatment wine began receiving in 2004.

To its knowledge and to this day, CBP has never afforded this treatment to any other commodity subject to the same excise-tax framework as wine (*e.g.*, beer, spirits, tobacco, and fuels). Nor has CBP made an express decision to authorize this practice, even for wine. As noted above, the approval of claims resulting in double drawback was inadvertent and due in part to the complexity of the drawback review process in place at the time. The payments on wine are, in short, an anomaly. Nevertheless, because Customs law requires notice-and-comment

proceedings to modify treatment previously accorded by CBP to substantially identical transactions, *see* 19 U.S.C. § 1625(c)(2), the anomaly persisted.

To bring wine in line with all other commodities, in 2009, TTB and CBP published notices of proposed rulemaking (NPRMs) to remedy the double-drawback anomaly for wine and end the significant revenue losses associated with it. Appx264-272. However, after individual members of Congress requested that the agencies not proceed with the rulemaking due to then-pending legislation, *see* Appx273-275, the agencies withdrew the notices. Appx276-277. Congress did not, however, amend 19 U.S.C. § 1313 at that time.

Nor did Congress take up the issue in 2016, when it enacted TFTEA. While TFTEA liberalized the product-substitution standards for drawback claims under section 1313(j)(2), Congress did not speak to—much less authorize—double drawback of excise taxes on wine or any other products subject to excise taxes. Consequently, as part of the regulations promulgated to implement TFTEA, the agencies renewed their efforts to clarify that the prohibition on double drawback for all other products subject to excise taxes applies equally to wine.

To this end, the Rule, which took effect on February 19, 2019, *see* Appx33, specified that the drawback of excise taxes on the basis of a substituted export is "limited to the amount of taxes paid (and not returned by refund, credit, or drawback) on the substituted merchandise." Appx99, Appx102. It also amended

the regulatory definitions of the terms "drawback" and "drawback claim" in 19 C.F.R. § 190.2 to clarify that the terms encompassed "the refund or remission" (and "claims for refund or remission") "of other excise taxes pursuant to other provisions of law," including the Internal Revenue Code. Appx89. With these amendments, the Rule thus clarified that the terms "drawback" and "drawback claim" apply not only to filing claims for (and receiving) refunds of duties, taxes, or fees paid on imported articles under the Tariff Act, but include refunds or cancellation of excise taxes on exports under the Internal Revenue Code as well. So defined, the terms "drawback" and "claim for drawback" in section 1313(v) are thus implicated when, as relevant here, a taxpayer exports a commodity like wine, beer, or spirits and obtains either a refund of excise taxes already paid or a cancellation of excise-tax liability upon exportation. Although the Internal Revenue Code does not always use the term "drawback" in provisions addressing these latter cancellations, the Rule treats all such economically identical transactions (including removals for export "without payment of tax") as drawbacks. The broad language of the statute mandates this approach. "Merchandise that is exported or destroyed to satisfy *any* claim for drawback shall not be the basis of *any other* claim for drawback[.]" 19 U.S.C. § 1313(v) (emphasis added).

The agencies estimated that the Rule would avoid losses of excise-tax revenues on wine alone of between $51 million and $69 million per year over the next ten years. Appx171. They further estimated that, if the treatment of wine were extended to other similarly taxed commodities (as the Court of International Trade's decision does), these losses would balloon to between $674 million and $3.3 billion per year. Appx171. Tobacco, which did not enjoy double-drawback benefits before the Court of International Trade's decision, will be the principal beneficiary of these tax-revenue losses, alone accounting for between $332 million and $2.2 billion in projected losses per year. Appx172.

E. Procedural History

Plaintiff, the National Association of Manufacturers (NAM), challenged the Rule under the Administrative Procedure Act (APA). NAM contended that the Rule violates 19 U.S.C. § 1313—specifically, that substitution drawback under 19 U.S.C. § 1313(j)(2) is available "notwithstanding any other provision of law"—and contradicts the meaning, scope, and history of the phrase a "claim for drawback" in 19 U.S.C. § 1313(v). NAM also argued that the Rule is arbitrary and capricious and has an unlawful retroactive effect.

The trial court held that the Rule was invalid. The court invoked the familiar two-step *Chevron* framework and concluded that "the inquiry ends at step one because the Rule conflicts with the unambiguous text of the statute." Appx9. The

court rested this conclusion on three principal findings—that the term "drawback" does not encompass cancellation of taxes upon exportation, that the Government's interpretation produced "irreconcilable conflicts" within the statute, and that the legislative history evinced congressional approval of the wine anomaly. Appx11-20.

On the first point, the court noted that "[t]he statute does not provide a definition of drawback." Appx10. The court thus consulted a variety of dictionary sources to conclude that "drawback" encompasses both "refunds" and "cancellations" of import duties, as well as "refunds" of excise taxes paid on exported articles. Appx10-11. The court acknowledged that 19 U.S.C. § 1313 itself uses "drawback" in both ways. Appx11. Nevertheless, the court rejected the agencies' interpretation because the Rule also treats removal for export "without payment of tax" under the Internal Revenue Code as a drawback. In the court's view, the Internal Revenue Code uses the term "drawback" to describe only those instances in which excise tax is "paid or determined" and, thus, the term could not describe transactions in which excise tax liability is extinguished under provisions where products are withdrawn for export "without payment of tax." Appx12-13.

The court also concluded that defining removal "without payment of tax" as a "drawback" would create "irreconcilable conflicts" within the statute. Appx13. One such supposed conflict would be between section 1313(v) and section

1313(j)(2), the latter of which authorizes substitution drawback "notwithstanding any other provision of law." Appx14. Because section 1313(v) would preclude an excise-tax refund under section 1313(j)(2) where the taxpayer had already received a refund or cancellation of excise taxes on the export, the court concluded that the Rule rendered the "notwithstanding" clause "meaningless." Appx14. For similar reasons, the court also found a conflict between section 1313(v) and section 1313(*l*)(2), which sets forth the methodology for calculating the amount of drawback due under section 1313(j)(2). In its view, interpreting section 1313(v) "to disallow exports on which excise tax was not paid from serving as substituted merchandise largely nullifies" the calculation methodology, which ties the refund amount not to taxes actually paid on the export but to the "fees that would apply to the exported article if the exported article were imported." Appx15-16.

The trial court also concluded that the Rule leads to an "absurd result" on the theory that it "would, by its text, prevent an untaxed export from serving as substituted merchandise in a drawback claim on a corresponding import in any capacity." Appx17. In the court's view, the agencies' interpretation of section 1313(v) leads to a scenario where "a company both importing and exporting merchandise would be liable not just for the excise tax on its imports, but for all non-excise tax charges assessed at import." Appx17. The court rejected the agencies' position that the Rule prohibits only double recovery of a particular fee,

tax, or duty, because, in its view, "this reads into section 1313(v) a restriction that does not exist." Appx17.

The trial court also emphasized the legislative history of drawback—despite stating that recourse to legislative history was unnecessary—to further support its holding, concluding that Congress made a policy choice not to enact legislation similar to that promulgated by the agencies in the Rule. Appx18-20.

The court did not address in detail NAM's and Plaintiff-Intervenor Beer Institute's arguments that the Rule was impermissibly retroactive. The court noted only that "[a]s to the retroactivity challenge, the agencies' attempt to apply the Final Rule to claims filed before its effective date runs afoul of fair notice." Appx20.

SUMMARY OF THE ARGUMENT

Section 1313(v) precludes exported or destroyed merchandise for which drawback has already been claimed from being used as the basis for any other drawback claim. The statute does not define "drawback" or "any claim for drawback" in this provision. The Rule reasonably interprets section 1313(v) to prohibit a claim for the drawback of excise tax on the basis of a substituted export where no or insufficient excise tax was paid, or where the excise-tax liability was cancelled. Thus, the Rule reasonably defines the term "drawback" to encompass both the refund and cancellation of an excise tax that was paid, determined, or

otherwise imposed by federal law on an import or export. The trial court erred in limiting the term "drawback" to only those paid and refunded assessments expressly called drawback, and in otherwise holding the Rule to be invalid. Cancellation of a tax liability, including when an export is removed without payment of tax, has the same economic effect as a refund of taxes paid, and in various provisions is explicitly called "drawback." *See* 19 U.S.C. § 1313(d); I.R.C. § 5062(b). Both are operationally drawbacks and the trial court erred in holding that the term "drawback" unambiguously excludes such transactions.

The Rule's interpretation does not conflict with the unambiguous meaning of 19 U.S.C. § 1313, as the court concluded, but is a reasonable construction of the phrase "any claim for drawback" as it operates in relation to the Tariff Act and Internal Revenue Code. It is also the only interpretation that avoids massive distortions of the drawback and excise-tax regimes that Congress never intended. And because "drawbacks are a privilege, not a right," any residual doubt must be resolved in the government's favor. *Shell Oil Co. v. United States,* 688 F.3d 1376, 1382 (Fed. Cir. 2012) ("Being a governmental grant of a privilege or benefit it is to be construed in favor of the government and against the party claiming the grant.") (quoting *Swan & Finch Co. v. United States*, 190 U.S. 143, 146 (1903)).

The trial court's finding that the Rule produces irreconcilable statutory conflicts is not supportable, let alone sufficient grounds to set aside the Rule.

Indeed, the opposite is true—the court's decision throws section 1313(v) into needless tension with sections 1313(j)(2) and 1313(*l*)(2). The court's reading of the "notwithstanding" clause in section 1313(j)(2), which sets forth the criteria for eligible unused merchandise substitution-drawback claims, disables the core application of section 1313(v) and renders its anti-abuse effect toothless.

Similarly, the court held that the agencies' view of section 1313(v) impermissibly imposes upon the operation of section 1313(*l*)(2)(B), which itself is an anti-abuse provision that limits how substitution drawback amounts are to be calculated. To the contrary, section 1313(*l*)(2)(B) not only does not limit the application of section 1313(v), its effect is limited by section 1313(*l*)(1), which mandates that "allowance of the privileges provided for in this section shall be subject to the rules and regulations that the Secretary of the Treasury shall prescribe." Section 1313(*l*)(1), thus, provides an independent basis for the Rule. Only in the court's flawed analysis does this provision regarding the methodology for substitution drawback calculation supersede, let alone speak to, the critical anti-abuse reach of 1313(v).

The court declares that the Rule, in interpreting section 1313(v), produces an irrational result that the text of the statute cannot support. Yet the supposed irrational result the court identified arises even under the trial court's own interpretation of "drawback." And, in any event, the Rule, which prohibits the

double recovery of excise tax, is the only interpretation of section 1313(v) that comports with the text and structure of 19 U.S.C. § 1313 and reasonably effectuates the aims of both the excise-tax and drawback regimes.

The trial court attempts to enshroud its conclusion that the Rule runs afoul of the unambiguous meaning of the statute in questionable legislative history. Even then, the court misreads that history. At most, the relevant legislative history suggests that Congress was aware of but failed to correct the erroneous double-drawback allowance for wine. But this also means that Congress was aware that no other commodity subject to excise taxes enjoyed such treatment yet it never extended the anomalous treatment of wine to those products.

The trial court's suggestion that the Rule is impermissibly retroactive is without merit. The Rule merely reaffirms that the longstanding prohibition on double drawback for products subject to excise taxes applies equally to wine. Fair notice by statute was provided to claimants for this change in practice.

STANDARD OF REVIEW

The interpretation of statutes and regulations is reviewed *de novo*. *See Facebook, Inc. v. Windy City Innovations, LLC*, 953 F.3d 1313, 1321 (Fed. Cir. 2020); *Abbott Labs. v. United States,* 573 F.3d 1327, 1330 (Fed. Cir. 2009).

ARGUMENT

I. The Rule Reasonably Interprets "Drawback" In 19 U.S.C. § 1313(v) To Encompass Refunds And Cancellations Of Excise Taxes

Though important, the aspect of the Rule at issue in this litigation is narrow. It presents parties wishing to claim substitution drawback of excise taxes under section 1313 with a choice. Where the claimant exports a commodity, the claimant can use one export to recover (or avoid) excise taxes once—either through a refund or cancellation of excise taxes on the export under the Internal Revenue Code or through a refund of excise taxes on the corresponding import under section 1313. It cannot, however, do both.

This prohibition on double drawback stems from 19 U.S.C. § 1313(v), which provides in relevant part that "[m]erchandise that is exported or destroyed to satisfy any claim for drawback shall not be the basis of any other claim for drawback[.]" On its face, this provision precludes exported or destroyed merchandise for which drawback has already been claimed from being used as the basis for any other drawback claim. But the statute does not define "drawback" or the phrase "any claim for drawback," or clarify how the prohibition applies when excise taxes are subject to drawback under both the Tariff Act and the Internal Revenue Code. The Rule reasonably fills this gap by providing that an exported product for which excise-tax liability has been cancelled, or has already been refunded, has been subject to a "claim for drawback" of excise taxes and thus

cannot be used for a second "claim for drawback" in the form of a refund of excise taxes on an imported product. This interpretation not only reasonably follows from the text, but is consistent with the overall statutory drawback and excise-tax schemes. These schemes respectively aim to "'enable[] a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all,'" *United States v. Passavant*, 169 U.S. 16, 23 (1898), while ensuring that every excise-taxable product consumed in the United States is taxed. Because section 1313(v) does not unambiguously preclude this interpretation, and because the interpretation is reasonable, it must be upheld under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *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).

A. Section 1313(v)'s Reference To "any claim for drawback" Includes Cancellation Of Excise-Tax Liability On Exports

Although the term "drawback" is not defined by statute, the statutory scheme makes clear that the term encompasses both the refund and cancellation of an excise tax that was paid, determined, or otherwise imposed by federal law. Under the Tariff Act, for example, drawback expressly includes not only the refund of taxes that have been paid previously, *see, e.g.*, 19 U.S.C. §§ 1313(a),

(c)(1), (j)(1), (j)(2) (providing for taxes to be "refunded as drawback"), but also an unpaid tax liability that is extinguished. *See, e.g.*, 19 U.S.C. § 1313(d) ("there shall be allowed . . . a drawback equal in amount to the tax found to have been paid *or determined*") (emphasis added); 19 U.S.C. §§ 1313(n)(2), (n)(4), (o)(3) (using the phrase "refunded, waived, or reduced" to refer to the extinguishing of tax liability under subsections (a), (b), (f), (h), (p), and (q), each of which uses the phrase "drawback").

The statute also makes clear that the term applies regardless of whether the tax was imposed on imports or domestic products. *See, e.g.*, 19 U.S.C. § 1313(d) (allowing "drawback" of taxes on exportation of certain domestic products). The Tariff Act itself thus confirms that "drawback" encompasses not only the refund of excise taxes paid on imports, but also the refund or cancellation of excise taxes imposed on domestic products that are exported.

"Drawback" in the Internal Revenue Code is used similarly. As in the Tariff Act, "drawback" here expressly includes not only the refund of taxes that have been paid, but also an unpaid tax liability that is extinguished. *See* I.R.C. § 5062(b) ("there shall be allowed…a drawback equal in amount to the tax found to have been paid *or determined*….") (emphasis added).

Where the tax liability has not been paid, the Internal Revenue Code in some instances authorizes products to be withdrawn from bond "without payment of tax"

for exportation. *See, e.g.*, I.R.C. §§ 5214(a), 5362(c), 5053(a). The Rule reasonably interprets "drawback" in the Tariff Act to encompass such instances, regardless of whether the applicable provision of the Internal Revenue Code expressly uses the term. The trial court itself acknowledged that "drawback" encompasses "the refund *or cancellation*" of import duties, and "the refund of domestic taxes" on exports. Appx10-11 (emphasis added). Withdrawals "without payment of tax" simply combine these two aspects of the court's own definition: such transactions involve the "cancellation" of "domestic taxes" on exported products. Indeed, even where products are withdrawn without payment of tax for export, they are not withdrawn "free of tax," *see* 26 U.S.C. § 5214(a)(1)-(3), as tax liability attaches at the time of production and is covered by bond and cancelled only upon proof of exportation. *See supra*, pp. 6-7. And these transactions, even if not expressly labeled "drawbacks" in the particular Internal Revenue Code provision, are materially indistinguishable from transactions that are. Both presuppose a tax liability, both require submissions to TTB to obtain the benefit, and both entail the same economic result—zero excise taxes on exported products. *See supra*, pp. 7-8. If all agree "drawback" may describe (i) refunds on imports, (ii) refunds on exports, and (iii) cancellations on imports, there is no plausible basis for claiming it *unambiguously* cannot also include cancellations on exports.

That "drawback" may reasonably be interpreted to include the cancellation of tax liability, not just refunds, follows from other authorities as well. CBP regulations have long understood "drawback" to include both refunds and remissions. *See, e.g.*, 19 C.F.R. § 191.2(i) (1999). Moreover, Black's Law Dictionary defines "drawback" as "a government *allowance* or refund on import duties when the importer reexports imported products rather than selling them domestically." 10th ed. 2014, citing 19 U.S.C. § 1313 (emphasis added).

Further, the Supreme Court recognized that one definition of drawback is "'a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all.'" *Passavant*, 169 U.S. at 23. One such device used in Germany was "called 'bonification of tax,'" whereby when goods were "'purchased in bond, or consigned while in bond, for exportation to a foreign country, th[e] duty [was] remitted by the German government . . . as distinguished from being refunded as a rebate.'" *Id.* (citation omitted). In the Court's view, the "use of the word 'bonification' d[id] not change the character of this remission," which "ha[d] the same effect as a bonus or *drawback*." *Id.* (emphasis added). As the Court recognized, regardless of whether it is labelled as such, drawback includes a variety of "device[s]" designed to relieve exports of their domestic-tax liability. *Id.*

Below, the court criticized the government's reliance on this case because of its age (decided in 1898). Appx9. But the "drawback" concept in U.S. law dates back to 1789, the Tariff Act was enacted only 32 years after *Passavant*, and this Court itself has found Supreme Court guidance of similar vintage authoritative in the drawback context. *See Shell Oil Co.*, 688 F.3d at 1382, quoting *Swan & Finch,* 190 U.S. at 146 (1903). And while the court below also dismissed *Passavant* on the ground that it concerned "foreign law," this ignores the whole point of the Supreme Court's discussion of drawback in that case: to translate foreign-law concepts (like Germany's "bonification of tax") into domestic-law concepts (like "drawback"). In doing that, the Court looked not to Germany's labels, but to the economic substance of its law, to conclude that "bonification of tax" under German law was, in essence, a remission "having the same effect as a bonus or drawback," which had direct implications for valuing imports under U.S. law. *Passavant*, 169 U.S. at 23. And, regardless, neither its age nor the discrete legal issue before the Court warrants ignoring the Supreme Court's unequivocal statement about one valid definition of "drawback."

Applying this longstanding understanding of the term "drawback" to the phrase "any claim for drawback" in 19 U.S.C. § 1313(v), it is clear (or at least reasonable to conclude) that the term "drawback" encompasses both refunds and cancellations, applies to excise taxes as well as other duties and fees, and covers

both exports and imports. Any doubt is removed by the expansive language ("*any* claim for drawback") that Congress used in this provision, which contrasts with the limiting language elsewhere in section 1313. *See, e.g.*, 19 U.S.C. §§ 1313(j), (k)(1), and (*l*)(2)(A)–(C) (referring to drawback "under this section"); 19 U.S.C. § 1313(n)(2) (referring to "NAFTA drawback"); 19 U.S.C. § 1313(n)(4) (referring to "Chile FTA drawback"). Thus read, section 1313(v) operates to prevent an export for which excise taxes have been cancelled (and thus subject to a "claim for drawback") from serving as the basis for a second "claim for drawback" of excise taxes on the corresponding import. Or, as the Rule puts it, the drawback of excise taxes on an import is limited "to the amount of taxes paid (and not returned by refund, credit, or drawback) on the substituted merchandise." Appx99, Appx102.

B. The Trial Court Erred In Narrowing "Drawback"

The trial court admitted that neither the Tariff Act nor the Internal Revenue Code defines "drawback." Appx10-12. After canvassing various dictionaries, the court even acknowledged that the term is not limited to "refunds," but encompasses "cancellations" as well. Appx10-11. The court nevertheless invalidated the Rule because it covers cancellations of excise-tax liability when products are removed "without payment of tax" for export. Appx12-13. Based on section 1313(d)'s specific reference to a tax on exported alcohol that is "paid or determined," the court inferred that any extinguishment of liability that occurs

without payment or determination is not a "drawback" under section 1313(v). Appx12. The court also believed that "[a] tax that has never been paid cannot naturally be said to have been 'drawn back.'" Appx13.

Contrary to the court's assumption, however, removals "without payment of tax" do entail a "determination." *See supra*, pp. 7-8, 26-27. This is significant, because all agree that a "determined" tax that is cancelled qualifies as a "drawback."

But more fundamentally, the phrase "paid *or determined*" makes clear that a "drawback" can occur when a tax liability is extinguished without any money changing hands. Once that principle is accepted, there is no compelling legal, economic, or policy reason to distinguish between situations involving a determination and those without one. Neither the parties nor the court disputed below that products exported "without payment of tax" carry a tax liability—indeed, a tax liability secured by a bond—and that this tax liability is extinguished only after proof of exportation. *See* I.R.C. §§ 5175(c), 5362(b)(3); *supra*, pp. 6-8. And the court further acknowledged that "drawback" (i) can include "cancellations," and (ii) can concern excise taxes on exports. Removals "without payment of tax" combine both of those features—*i.e.,* cancellation of excise taxes on exports—and thus fit comfortably within the meaning of the term.

This conclusion is reinforced by the nature of the transactions themselves. Those transactions expressly labeled as "drawbacks" and removals "without payment of tax" are economically indistinguishable. And while the court rejected this argument on the ground that Congress's selective use of the term *in the Internal Revenue Code* was significant, the variation was not meaningful in context. For one thing, the drawback statute itself, 19 U.S.C. § 1313, selectively uses the term "drawback," though various provisions of the statute surely authorize a drawback without expressly using the term. *See, e.g.*, *id.* § 1313(e), (f), (h). Moreover, by using the "paid or determined" formulation in the Internal Revenue Code, Congress made clear that a producer's subsequent decision to export particular goods provides a basis for tax relief *even if* the excise tax has already been paid or determined by the time the goods are exported. Regardless, the provision that precludes "[m]ultiple drawback claims" (section 1313(v)) does not use the phrase "paid or determined." For purposes of that provision, the only relevant question is whether excise-tax relief conditioned on exportation can be considered a "drawback." As explained above, there is ample basis to conclude that the agencies reasonably interpreted the term "drawback" to cover cancellations of excise-tax liability. *See Chevron*, 467 U.S. 837.

C. The Rule's Interpretation Of 19 U.S.C. § 1313(v) Harmonizes The Statutory Drawback And Excise-Tax Schemes

While the prohibition on double drawback represents a valid interpretation of 19 U.S.C. § 1313(v), the reasonableness of this interpretation is reinforced by the fact that it best harmonizes the various statutory provisions at issue. As both the Supreme Court and this Court have recognized, the principal goal of drawback is to relieve tax burdens so that U.S. exports may compete abroad on an equal footing. *See Shell Oil Co.*, 688 F.3d at 1376 ("drawbacks" are generally designed to "help enforce the United States' policy of encouraging domestic manufacture of articles for export and allowing those articles to compete fairly in the world marketplace." (cleaned up; citation omitted); *Texport*, 185 F.3d at 1296–97 ("[T]he purpose of drawback is to place those who export from the United States on an equal footing with overseas competitors."). And the principal objective of the excise-tax regime is to ensure that commodities *consumed in the United States* are taxed. This is evident in the fact that excise taxes fall on both imports and domestic products, but are available for drawback if such products are later exported (and thus not consumed domestically).

The Rule's interpretation of 19 U.S.C. § 1313(v) best harmonizes these two statutory schemes. On one hand, the Rule allows affected commodities, such as wine, spirits, and beer, to be exported and sold abroad as if they had not been

taxed at all. For example, if a case of California wine is exported, drawback ensures that the taxes imposed are recovered. So too if a case of French wine is imported and a substitute case of California wine is exported. In that case, the exported California wine may be used to drawback excise taxes on the California wine itself, and also most of the duties, other non-excise taxes, and fees imposed on the imported French wine. This ensures that the California wine competes abroad as if it had not been taxed at all and that the French wine circulates in U.S. commerce under the same tax treatment as domestically produced wine (*i.e.*, free of essentially all but excise taxes).

At the same time, the Government's interpretation prevents the availability of substitution drawback from distorting the excise-tax regime. An example from the 2018 NPRM illustrates the point:

> A domestic winery imports 100 liters of wine, pays Federal excise tax on the wine, and sells the imported wine in the United States. The domestic winery then exports 100 liters of its domestically-produced wine from TTB-bonded premises without payment of Federal excise tax. The domestic winery files a § 1313(j)(2) drawback claim with CBP on the basis that the 100 liters of domestically-produced wine are commercially interchangeable with the to the 100 liters of imported wine. The domestic winery receives a refund of 99 percent of the Federal excise taxes that it paid on the 100 liters of imported wine.

Appx167. In this example, which reflects the treatment of wine since 2004, imported wine is consumed in the United States virtually excise-tax-free, while domestic wine consumed in the United States is taxed in full. This puts domestically produced wine at a significant disadvantage when competing with imports of wine in the U.S. market. Appx167. Until the trial court set aside the Rule, no other products subject to excise taxation enjoyed such treatment.

Accordingly, the Rule merely brought wine back into the fold of goods subject to the statutory prohibition on the double drawback of excise taxes. Without the prohibition on double drawback, the goals of the U.S. excise tax regime would be thwarted, as an untold number of imported goods would be consumed domestically virtually excise-tax-free, resulting in massive federal revenue loss and injury to domestic producers. Any reading of 19 U.S.C. § 1313(v) that allows such mischief could not have been what Congress intended. *See*, *e.g.*, *Sunoco, Inc. v. United States*, 908 F.3d 710, 719 (Fed. Cir. 2018) (rejecting taxpayer's attempt to claim a "windfall," observing that "Congress does not generally allow taxpayers to receive a tax benefit twice").

Below, the court rejected this analysis on the ground that these two regimes are inherently in tension with each other and resolving the tension is a policy judgment for Congress, not the agencies. Appx17-18. In particular, the court assumed that the only purpose of the excise-tax regime was "revenue-raising,"

which it found to be in necessary tension with the policy to encourage exports through the drawback privilege. Appx17. But excise taxes are intended to tax *domestic consumption*. *See supra*, pp. 3, 6-7. And, as all agree, the drawback privilege is designed to encourage exports. There is thus no inherent tension: if products are exported (a goal of drawback), they are not consumed domestically (and thus not within the excise-tax regime's purview). Yet the net effect of the court's decision is to allow *imports* to circulate in domestic commerce virtually excise-tax free, while there is good evidence that such a policy will not in any event encourage exports. Appx169-170.

With that said, the point of the foregoing discussion is not that the agencies should be free to disregard Congressional policy choices. Congress was certainly free to enact the policy choice embodied in the court's judgment—that a single export may fetch excise-tax refunds on two products. The critical point is just that there is no evidence—much less clear evidence—that it did. That is good reason not to read the undefined statutory terms as the court did in this case. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

II. The Court of International Trade Erred In Invalidating The Rule

In addition to relying on an unlawfully restrictive notion of drawback, the court also erred when it concluded that the agencies' interpretation created statutory conflicts and was at odds with the legislative history.

A. The Trial Court Erroneously Read The Rule To Create Statutory Conflicts

The court concluded that the Rule creates "irreconcilable" statutory conflicts and "irrational results." Appx13. While the court is wrong on both counts, it was doubly wrong to suggest these points present a reason to set aside the Rule. This is because even the court's own interpretation of "drawback" implicates the identical issues the court identified. Rather than address this fact, however, the court simply ignored it. This was error.

1. **"Notwithstanding" clause**

The first supposed conflict relates to section 1313(j)(2), which establishes the criteria for unused merchandise substitution-drawback claims. In the court's view, the Rule could not interpret section 1313(v) to limit the availability of drawback under section 1313(j)(2) because the latter applies "notwithstanding any other provision of law." Appx14-15. But the whole point of Section 1313(v) is to direct that, even when each of two (or more) "claim[s] for drawback" would be permissible if viewed in isolation, a single act of exportation cannot support more than one such claim. Section 1313(v)'s prohibition on multiple drawbacks can serve its intended purpose only if it supersedes the rules used to determine whether a *particular* drawback claim will be allowed. Sections 1313(j)(2) and (v) thus should (and can) be harmonized in a way that takes account of their distinct roles in the statutory scheme. The phrase "notwithstanding any other provision of law"

in section 1313(j)(2) makes clear that the rules governing refunds based on exports of substituted goods supersede the rules that generally prescribe taxes and duties for imported products. But section 1313(j)(2) does not address the propriety of multiple drawback claims based on the same act of exportation, and should not be read to supersede section 1313(v)'s directive on that subject.

The Supreme Court has also repeatedly rejected reliance on "notwithstanding" clauses for drawing more general inferences about the meaning of statutes. *See, e.g.*, *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1351 (2020); *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017). It has also cautioned against unreasonably 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). Yet that is precisely what the court did here. It concluded that the "notwithstanding" clause of section 1313(j)(2) "overrides conflicting provisions of any other section," including section 1313(v). Appx14. That cannot be right. If it were, nothing would prevent the payment of two or more substitution drawback claims based on the same act of exportation—a result NAM expressly disclaimed below, and for good reason. Such a reading of the "notwithstanding" clause would disable the core application of section 1313(v) and

render the provision pointless, at least so far as substitution drawback under section 1313(j)(2) is concerned.

Even worse, if section 1313(j)(2)'s "notwithstanding" clause overrides section 1313(v), then it would also by the same logic override a host of other anti-abuse provisions in the drawback scheme. For instance, the built-in limitations of section 1313(n) (which limits drawback claims based on exports to Mexico or Canada), section 1313(r) (which limits claims for drawback to within five years of importation), and section 1313(u) (which prohibits exports from customs bonded warehouses and foreign trade zones from serving as the basis for drawback claims) would all be negated when drawback is based on the export of unused substitute goods. The logic of the court's reasoning would also mean ignoring in this context 19 U.S.C. § 1677h's clear and undisputed prohibition on the drawback of antidumping duties and countervailing duties, as well as the prohibition on granting drawback of any of the duties or fees listed in 19 C.F.R. §§ 191.3(b) and (c) for pre-TFTEA claims and in 19 C.F.R. §§ 190.3(b) and (c) for post-TFTEA claims.

The court did not grapple with the implications of its reasoning—much like NAM, which advised below that its argument on the "notwithstanding" clause "need not be taken to its logical extreme." Motion for Judgment Reply p. 6. Nor did the court explain how the "notwithstanding" clause uniquely undermined the

Rule's interpretation of "drawback," when the need to harmonize sections 1313(j)(2) and (v) arises under *any* definition of the term "drawback." After all, even if "drawback" only included refunds, the question would still arise whether section 1313(v) would prohibit multiple refunds based on the same act of exportation. On that question, the court baldly asserted that section 1313(v) *would* "prohibit a single export from serving as a basis for multiple drawback claims." Appx14. But the court's *ipse dixit* cannot save its decision, as this say-so contradicts the logic of its opinion and its interpretation of the "notwithstanding" clause. Section 1313(j)(2) purports to authorize drawback "notwithstanding any other provision of law." Section 1313(v) is a "provision of law." Thus, section 1313(v) either limits multiple claims under section 1313(j)(2) or it doesn't. There is no third way. The court's contrary suggestion was error.

2. **Calculation methodology**

The court also concluded that the Rule was inconsistent with section 1313(*l*). Appx15-16. That provision requires the Secretary of the Treasury to "prescribe regulations for determining the calculation of amounts refunded as drawback under [§ 1313]" and sets forth various parameters for such regulations. As relevant here, section 1313(*l*) states that the amount of drawback available based on substituted merchandise shall be "equal to 99 percent of 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 [substituted] exported article if the exported article were imported[.]" 19 U.S.C. § 1313(*l*)(2)(B)-(C). In the court's view, the Rule "largely nullifies" this calculation methodology by "disallow[ing] exports on which excise tax was not paid from serving as substituted merchandise." Appx15. This assertion is wrong for at least three reasons.

First, the Rule does not "disallow exports on which excise tax was not paid from serving as substituted merchandise." Under the Rule, even a product exported "without payment of tax" can serve as "substituted merchandise" for the recovery of duties, fees, and other non-excise taxes under section 1313; it just cannot be used for a *second* refund (or remission) of *excise taxes*. Appx99, Appx102.

Second, as amended by TFTEA, eligible substitution-drawback claims under section 1313(j)(2) are predicated on Harmonized Tariff Schedule of the United States (HTSUS) classification, rather than commercial interchangeability. Because goods that are classified in the same 8-digit HTSUS provision may not be the same product, or may have vastly different values, section 1313(*l*)(2)'s "lesser of" calculation methodology is necessary to prevent a low-value substituted good from serving as the basis for drawback of the *ad valorem* assessments levied on a high-value good classifiable under the same HTSUS subheading. Like section 1313(v), section 1313(*l*)(2) is an essential anti-abuse provision of the drawback scheme.

The Rule neither speaks to the operation of section 1313(*l*)(2), nor limits or undermines its reach.

Third, the supposed conflict the court identified would arise virtually anytime an anti-abuse provision in the Tariff Act applies. As noted, for instance, 19 U.S.C. § 1677h categorically prohibits the drawback of antidumping and countervailing duties. But antidumping and countervailing duties would, under the court's reading of the calculation methodology, be recoverable, since such duties would be "paid with respect to the imported merchandise" or "would apply to the [substituted] exported article if the exported article were imported[.]" The same is true of the other critical drawback limitations discussed above, including section 1313(n) (which limits drawback claims based on exports to Mexico or Canada), section 1313(r) (which limits claims for drawback to within five years of importation), and section 1313(u) (which prohibits exports from customs bonded warehouses and foreign trade zones from serving as the basis for drawback claims). Yet the court's reading of the calculation methodology would nullify all of these provisions. The government doubts either the court or the plaintiffs would defend such a result, but that is where the logic of the court's reasoning necessarily leads.

The more sensible (and less destructive) reading of the statute is the obvious one—section 1313(*l*) *presupposes* that a valid drawback claim already exists. As

this Court has explained, "[t]he rulemaking authority vested in the agency by subsection (*l*) explicitly conditions allowance of the benefits of section 1313 on compliance with regulations Customs has prescribed," *Graham Engineering Corp. v. United States*, 510 F.3d 1385, 1389 (Fed. Cir. 2007)—a point that applies *a fortiori* to *statutory* limitations on the drawback privilege. It is thus only after a substitution-drawback claim is perfected—including by complying with relevant limitations in section 1313(v) and elsewhere—that section 1313(*l*)(2)'s "lesser of" calculation formula becomes relevant.

Moreover, section 1313(*l*)(1), which mandates that "allowance of the privileges provided for in this section shall be subject to the rules and regulations that the Secretary of the Treasury shall prescribe," may limit section 1313(*l*)(2)(B), in no way limits section 1313(v), and provides an independent basis for the Rule.

3. **"Irrational results"**

The court asserted that the Rule would lead to "irrational results" because the agencies' interpretation "would, by its text, prevent an untaxed export from serving as substituted merchandise in a drawback claim on a corresponding import in any capacity." Appx17. As noted, however, the Rule does not produce this result. The Rule merely prohibits double recovery of the *same* tax.

The court acknowledged as much, but claimed that "this reads into section 1313(v) a restriction that does not exist." Appx17. While this is wrong for reasons

explained below, the court's own reading of the term "claim for drawback" would not eliminate the need to address this interpretative issue. In particular, the court did not dispute below that where an excise tax has been paid before domestically produced goods are exported, the producer's request for a refund constitutes a "claim for drawback." *See, e.g.*, I.R.C. §§ 5062(b), 5055. If the exporter in that circumstance also imported comparable merchandise, the agencies (and potentially the courts) would thus need to determine whether section 1313(v) precludes the taxpayer from obtaining a drawback of duties, taxes, and fees on those imported goods. In other words, the court failed to acknowledge, much less address, that the question how section 1313(v) operates in the substitution-drawback context arises even if the *court's own* interpretation of "drawback" is accepted. Thus, whatever the merits of the agencies' view that section 1313(v) precludes only multiple drawbacks of the same type of tax, whether that construction is valid is essentially independent of the issue the court resolved (i.e., whether "drawback" encompasses exports "without payment of tax"). This interpretative issue was thus an improper basis for the setting aside the Rule.

The court's reliance on how section 1313(v) operates in the context of substitution drawback was improper for another reason as well. If a refund or cancellation of tax on an export constitutes a "claim for drawback," then section 1313(v) would necessarily limit, to *some* extent, drawback on the corresponding

import. The agencies limited that prohibition to the same type of tax; NAM and the court apparently believed that the prohibition would have to broadly preclude any drawback on the import whatsoever. But NAM is not injured by the agencies' failure to adopt a more sweeping multiple-drawback ban. On the contrary, they would benefit from it by retaining the ability to drawback all but excise taxes on the import (i.e., duties and fees). And the suggestion that the agencies logically should have gone further is not a ground for rejecting the step the agencies actually took—namely, limiting the prohibition in section 1313(v) to double recovery of the same type of tax.

In any event, the line the agencies drew is reasonable. Under the agencies' approach, an entity that produces and exports one bottle of wine and imports a comparable bottle must pay a single excise tax (on the imported bottle) and virtually no import duties, just as it would be required to pay a single excise tax and no import duties if it had sold the domestically produced bottle for consumption within the United States without importing anything. Under the court's decision, by contrast, use of an offsetting export and import gives the entity more favorable tax treatment than it would receive if it simply sold the domestically produced bottle for U.S. consumption. Such a result is not only not required by the text, but is at odds with the logic of the drawback scheme.

The proviso clause in section 1313(v), for example, itself contemplates that multiple manufacturing-drawback claims may be submitted based on a single export, but simply requires that the total amount of drawback be, through "appropriate credit and deductions," no greater than the amount of duties, taxes, and fees actually imposed. *See* 19 U.S.C. § 1313(v) ("… except that appropriate credit and deductions for claims covering components or ingredients of such merchandise shall be made in computing drawback payments."). The immediately preceding subsection is also instructive: "[i]mported merchandise that has not been regularly entered or withdrawn for consumption shall not satisfy any requirement for use, exportation, or destruction under this section." 19 U.S.C. § 1313(u). In other words, if nothing has been paid on an import because it was subject to a duty-deferral program (*e.g.,* bonded warehouse, free-trade zone, in-bond transportation), then it is not eligible to be used as the basis for drawback.

And CBP regulations, which (to our knowledge) have never been challenged, have long prohibited the double recovery of the same tax under section 1313(d) and the Internal Revenue Code, even though the statutes independently purport to authorize double recovery of the same tax under certain circumstances. *See* Treasury Decision 51154 (Nov. 30, 1944); *supra*, pp. 10-11. The authority embodied in these regulations—to protect the revenue and to guard against windfalls—would alone likely justify the double-drawback prohibition in the Rule.

See 19 U.S.C. § 1484(a)(2)(C) (requiring CBP to "provide, to the maximum extent practicable, for the protection of the revenue"); 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."); *Graham Engineering*, 510 F.3d at 1389 (noting that in 19 U.S.C. 1313(*l*) "Congress anticipated the need for specific rules and regulations to be devised in order to assure proper entitlement to statutory benefits"). Section 1313(v) thus makes this an *a fortiori* case.

At the very least, the anti-abuse principle reflected in the 1944 Treasury regulation and in other provisions of section 1313 supports interpreting section 1313(v) to ensure that eligible claimants recover no more than is necessary to "'enabl[e] a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all,'" *Passavant*, 169 U.S. at 23—or, as this Court put it more recently, to "place those who export from the United States on an equal footing with overseas competitors," *Texport*, 185 F.3d at 1296–97. That is the common denominator in all of these anti-abuse provisions—and that is precisely what the Rule ensures here.

With that said, the contrary position—that a refund or cancellation of tax on the export should preclude any drawback on the corresponding import—would not be an "absurd" result. An entity that produces wine domestically and then

exports it is not *required* to obtain a refund or cancellation of excise taxes on the export. It could simply choose to pay the excise tax and use the act of exportation to avoid duties, taxes, and fees on the corresponding imported merchandise. Thus, under either the agencies' actual approach or the more expansive view of section 1313(v) implied by NAM's and the trial court's reasoning, an entity that engaged in offsetting exports and imports would ultimately pay one set of excise taxes and virtually no import duties. The difference between the positions, in short, is narrow—and hardly justifies rejecting the agencies' reasonable interpretation of this provision.

B. Legislative History Does Not Support Invalidating The Rule

The final basis for the court's decision was legislative history. In the court's telling, the agencies' view must fail because "Congress has acted." Appx2. For the reasons set forth below, the court's interpretation of the legislative history is deeply flawed. But even if the court's analysis were credited in full, it at most suggests that Congress was aware of but failed to correct the erroneous treatment of wine. By the same token, that necessarily means that Congress was also aware of but never extended the anomalous treatment of wine to any other products subject to the same drawback regime. This includes products like spirits, tobacco, beer, and fuel, which, to our knowledge and to this day, have never enjoyed similar treatment yet involve substantially larger trade flows and tax dollars. The agencies

have estimated annual revenue loss of $674 million to $3.3 billion if double drawback were permitted on other commodities in addition to wine. Appx171. In contrast, the agencies estimate that any future allowance of double drawback on wine would cause between $51 million and $69 million in annual revenue loss over the next ten years. Appx171. Congress's inaction over the last decade thus lends much more support to the government's position (that no commodity may enjoy double drawback) than to the court's (that every commodity may now enjoy double drawback).

But even setting this aside, the court's tour through the legislative history is unpersuasive. The court relied almost exclusively on the most unreliable forms of legislative history. This includes congressional inaction, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015, (2017) ("congressional inaction lacks persuasive significance in most circumstances") (cleaned up); congressional contemplation of action, *United States v. Craft*, 535 U.S. 274, 287 (2002) ("failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute"); and even member statements, *In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988) (citing cases) ("Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill."); *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1262 (4th Cir. 1989) ("It is axiomatic that if

motivation is pertinent, it is the motivation of the entire legislature, not the motivation of a handful of voluble members, that is relevant."). And the court's interpretation of these particular items here confirms the wisdom of the judiciary's skepticism towards such sources of legislative history.

For instance, the court noted that limits similar to the Rule's were proposed in 2007 for excise taxes on imported ethanol but not enacted. Appx19. This is irrelevant. The proposal was part of two large energy-tax amendments that were themselves not adopted in the final legislation; the proposal related to imported ethanol; there is no evidence the issue was debated; and Congress's failure to enact the proposal may very well have signaled its view that it was unnecessary given section 1313(v). *See* 153 Cong. Rec. S7909, § 832(b). The proposal thus sheds no interpretive light on the question at issue. *See Verizon v. FCC*, 740 F.3d 623, 639 (D.C. Cir. 2014) (failed legislation is "an unreliable guide to legislative intent").

The court also looked to 2008, when Congress liberalized the substitution standard for wine (*i.e.,* the standard by which an export is judged to be a valid substitute for the import). Appx19. But that amendment merely suggests a desire to make substitution drawback easier to use and more administrable for the wine industry. Neither the legislation nor the legislative history said anything about excise taxes or double drawback, much less about the meaning of section 1313(v)

or its application to substitution-drawback claims. *See* H.R. Rep. No. 110-627, at 1094-95 (2008) (Conf. Rep.).

Nor does the 2009 proposed regulation that the agencies withdrew following comments from individual members of Congress shed any light on the question. Appx19. After the agencies proposed a regulation similar to the Rule at issue here, eighteen members of Congress requested that the agencies not proceed with the proposed regulation due to then-pending legislation. Appx273-275. An eighteen-member letter is hardly a substitute for the formally expressed views of Congress. *See In re Kelly*, 841 F.2d at 912 n.3; *South Carolina Educ. Ass'n*, 883 F.2d at 1262. But even if it were, the only industry the letter mentions was the "American wine industry," which underscores that no other product enjoyed such treatment and, more importantly, that Congress did nothing to change that. Appx273. Again, if Congressional inaction is meaningful at all, it undermines the court's decision, which extends for the first time the treatment of wine to every other excise-taxed commodity.

Finally, the court asserted that in TFTEA, passed in 2016, Congress "did not address" wine double drawback, yet "appears to have at least indirectly sanctioned the practice." Appx20. But the assertion in the legislative history, on which the court relied,—that "the existing treatment of wine under section 313(j)(2) … is preserved"—referred not to double drawback for wine, but to preserving the wine-

specific substitution standard added in 2008 (*i.e.*, the color-and-price standard). H.R. Rep. No. 114-376, at 221 (2016), *reprinted in* 2016 U.S.C.C.A.N. at 112. Congress did not mention, much less sanction, the double-drawback treatment of wine.

Yet even crediting the court's inference, the court missed the bigger story. Congress's supposed approval of the treatment of wine is, by the same logic, equally an approval of the treatment of every other excised-tax commodity that did not enjoy the same treatment. Yet the effect of the court's ruling is to extend to those commodities their first-ever experience of what wine has enjoyed since 2004. That result finds *no* support in the legislative history, even as interpreted by the court.

C. The Rule Does Not Have Retroactive Effect

The trial court noted, without providing further detail, that "[a]s to the retroactivity challenge, the agencies' attempt to apply the Final Rule to claims filed before its effective date runs afoul of fair notice." Appx20.

The Rule does not have retroactive effect. Section 1313(v) has been the law for more than 25 years, when it was enacted in 1993. Consistent with that provision, CBP has never granted any claims resulting in the double drawback of excise taxes for alcoholic spirits, beer, tobacco, and taxable fuels, so the Rule does not reflect a change in CBP's treatment of these products.

It is only for wine that the Rule effects a change in practice. Consistent with the notice-and-comment requirements of 5 U.S.C. § 553 and 19 U.S.C. § 1625(c), the Rule corrected this error and took effect for substitution claims for the drawback of excise taxes on wine made 60 days after the publication of the Rule. Because the Rule was finalized and published on December 18, 2018, the prohibition on the double drawback of excise taxes on wine took effect for claims filed on or after February 19, 2019. The trade community was, therefore, afforded the requisite statutory notice necessary to effect the double drawback prohibition on wine. The Rule does not have retroactive effect.

CONCLUSION

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

Respectfully submitted,

ETHAN P. DAVIS
Acting Assistant Attorney General

DAVID M. MORRELL
Deputy 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
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

DATED: July 23, 2020

Slip Op. 20-9

UNITED STATES COURT OF INTERNATIONAL TRADE

THE NATIONAL ASSOCIATION OF MANUFACTURERS,

Plaintiff,

THE BEER INSTITUTE,

Intervenor-Plaintiff

v.

UNITED STATES DEPARTMENT OF THE TREASURY,

UNITED STATES CUSTOMS AND BORDER PROTECTION,

STEVEN T. MNUCHIN, in his official capacity as Secretary of the Treasury,

and

JOHN SANDERS, in his official capacity as Acting Commissioner of United States Customs and Border Protection,

Defendants.

Before: Jane A. Restani, Judge

Court No. 19-00053

OPINION AND ORDER

[The court holds unlawful the challenged aspects of the agencies' Final Rule]

Dated: January 24, 2020

Peter D. Keisler, Virginia A. Seitz, Tobias S. Loss-Eaton, and Barbara G. Broussard, Sidley Austin, LLP, of Washington, D.C., Catherine E. Stetson and Susan M. Cook, Hogan Lovells US LLP, of Washington, D.C., Peter C. Tolsdorf and Leland P. Frost, Manufacturers' Center for Legal Action, of Washington, D.C., for Plaintiff The National Association of Manufacturers.

James E. Tysse, Lars-Erik A. Hjelm, Raymond P. Tolentino, and Devin S. Sikes, Akin, Gump, Strauss, Hauer & Feld LLP, of Washington, D.C., for Intervenor-Plaintiff The Beer Institute.

Justin R. Miller, Attorney-in-Charge, International Trade Field Office, National Courts Section, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., and Alexander J. Vanderweide, Trial Attorney, Commercial Litigation Branch, Civil Division,

U.S. Department of Justice, of Washington, D.C., for Defendants United States Department of the Treasury, United States Customs and Border Protection, Steven T. Mnuchin, and John Sanders. With them on the brief were Joseph H. Hunt, Assistant Attorney General, Civil Division, U.S. Department of Justice, of Washington, D.C., David M. Morrell, Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice, of Washington, D.C., Jeanne E. Davidson, Director, National Courts Section, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., Claudia Burke, Assistant Director, National Courts Section, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C. Of counsel on the brief were Daniel J. Paisley, U.S. Department of the Treasury, of Washington, D.C., and Alexandra Khrebtukova, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

John M. Peterson, Richard F. O'Neill, and Patrick B. Klein, Neville Peterson, LLP, of New York, N.Y., for Amicus Curiae Customs Advisory Services, Inc.

Restani, Judge: The question before the court is how far should it go in interpreting statutory provisions so that they are not inconsistent with regulations that appear to address valid administrative and economic concerns of the agencies responsible for the implementation and operation of the statute. The answer is not very far from the actual words of the statute, particularly where Congress acts with presumed knowledge of the problem the agencies attempt to address in their regulations. In other words, Congress has acted. If the agencies wish a different result, they must seek it from Congress, not a court.

I. BACKGROUND

This case involves the interaction of federal excise taxes and duty drawback under the Tariff Act of 1930. Federal excise taxes are imposed on certain domestically consumed goods, regardless of origin, such as wine, beer, spirits, tobacco, and petroleum products.[1] Before the changes at issue, the regulations defined drawback as "the refund or remission, in whole or in

[1] Federal excise taxes, however, generally are not paid on exported goods if exported from a bonded facility or are refunded if paid and then exported. See, e.g. 26 U.S.C. § 5001(a)(1) (imposing a tax on all "distilled spirits produced in or imported into the United States"); 26 U.S.C. § 5214(a)(4) (noting that spirits withdrawn from a bonded premise and exported shall be withdrawn "without payment of tax"); 26 U.S.C. § 5062(b) (authorizing a drawback of excise tax paid or determined on exported distilled spirits or wine).

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).” 19 C.F.R. § 191.2(i) (2015). Although drawback can occur in multiple ways, the iteration most relevant to this case is “substitution drawback.” See 19 U.S.C. § 1313(j)(2) (2018)[2] (substitution for unused merchandise).[3] Simply put, a party[4] is entitled to substitution drawback on the taxes, fees, and duties (collectively “charges”) paid on imports when other merchandise is exported[5] under the same Harmonized Tariff Schedule of the United States (“HTSUS”) subheading in a one-to-one fashion.[6] See 19 U.S.C. § 1313(j)(2); 19 C.F.R. § 191.22(a) (2019).[7] This may occur whether or not certain taxes were paid on the corresponding exported merchandise. See 19 U.S.C. §§ 1313(j)(2), (l)(2). The resulting non-collection of these taxes is what the agencies attempted to address.

For several years, companies that both export and import wine have been claiming drawback on charges paid on the imported wine on the basis of their substituted exports, due in

[2] All further citations to the U.S. Code are to the 2018 edition unless otherwise indicated.

[3] Substitution drawback can also occur under 19 U.S.C. §§ 1313(b) (manufacturing substitution drawback) and 1313(p) (finished petroleum derivatives), but it is drawback under 19 U.S.C. § 1313(j)(2) that is of primary interest to this case.

[4] Although a party is often both exporter and importer, a party can transfer its right to drawback. See, e.g., 19 U.S.C. §§ 1313(b)(2)(A–C); 1313(j)(2).

[5] In the case of a drawback claim made under 19 U.S.C. § 1313(j)(2), rather than exporting the substituted good, it can be destroyed under the supervision of Customs and Border Protection (“Customs”). See 19 U.S.C. § 1313(j)(2).

[6] As described below, the substitution standard has changed over the years and wine has been afforded special treatment.

[7] All further citations to the Code of Federal Regulations are to the 2019 edition unless otherwise indicated.

part to a relaxed substitution standard.[8] For example, if a company imported 100 bottles of red wine and then exported 100 bottles of red wine, that company could claim drawback for nearly all charges assessed on the imported merchandise. The wine substitution exception has resulted in a near total refund of the excise taxes paid on the imported wine. This has occurred even though the substituted exported wine was either not subjected to any excise tax or had received a complete refund of any previously paid excise taxes. Customs and Border Protection ("Customs") claims that this treatment of wine was a mistake that began occurring at the Port of San Francisco in 2004. See Modernized Drawback, 83 Fed. Reg. 37,886, 37,896 (Aug. 2, 2018) ("Proposed Regulation"). Although Customs identified the issue and expressed concern on multiple occasions to Congress, as detailed infra, no statute was passed to curtail the practice. After repeated Congressional inaction, Customs and the Department of the Treasury ("Treasury") (collectively "the agencies") passed regulations to stop the wine industry from continuing to benefit from what the agencies refer to as "double drawback"[9] and to ensure that other industries would not attempt to benefit from the same scheme following the liberalization of the substitution drawback requirements by the Trade Facilitation & Enforcement Act of 2015

[8] Since 2008, drawback has been allowed for wine in situations where the imported wine and the exported wine are the same color and the price variation between the imported wine and the exported wine does not exceed 50 percent. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234 §15421, 122 Stat. 923, 1547 (2008) codified as amended (19 U.S.C. § 1313 (j)(2) (2008)). In contrast, before the passage of the Trade Facilitation & Enforcement Act of 2015 ("TFTEA"), in the case of substitution for unused merchandise drawback, goods had to be "commercially interchangeable." See 19 U.S.C. § 1313(j)(2) (2008). For manufacturing substitution drawback, goods had to be of the "same kind and quality." See 19 U.S.C. § 1313(b) (2008).

[9] The court will instead refer to what is occurring as "zeroed excise tax," although it recognizes that this is slightly inaccurate given that one percent of the excise tax is ultimately paid on the imported good.

("TFTEA") . Modernized Drawback, 83 Fed. Reg. 64,942, 64,960–61 (Dec. 18, 2018) ("Final Rule").

The Final Rule makes two fundamental changes to the drawback regime. First, the agencies amended the regulations to "clarify" that "drawback" and "drawback claim" includes a "refund or remission of other excise taxes pursuant to other provisions of law." 19 C.F.R. § 190.2. With this definition, the agencies characterize the export of merchandise even without excise tax "paid or determined" as a claim for drawback. Second, the agencies amended various provisions to limit drawback to the amount of taxes paid and not previously refunded. 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 Final Rule prevents a domestically produced exported good, that would have been subject to the excise tax if made available for domestic use, from satisfying a claim for substitution drawback under the language of 19 U.S.C. § 1313(j)(2).

Plaintiff, the National Association of Manufacturers ("NAM"), challenges these aspects of the Final Rule as violative of the governing statute, arbitrary and capricious, and impermissibly retroactive. Pl. Nat'l Ass'n of Mfrs. Br. in Supp. of its Mot. for J. on the Agency R., at 14–54, ECF. No. 20-1 (June 24, 2019) ("NAM Br."). NAM and Amicus Curiae, Customs Advisory Services Inc. ("CASI"), state that the language of 19 U.S.C. § 1313(j)(2) forecloses the agencies' interpretation of 19 U.S.C. § 1313(v)[10] as section 1313(j)(2) states that if certain conditions are met then drawback shall be refunded "notwithstanding any other provision of law." NAM Br. at 20–23; Br. of Amicus Curiae, Customs Advisory Servs. Inc., at 5–7, 23–24,

[10] "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." 19 U.S.C. § 1313(v).

ECF No. 21-2 (June 24, 2019) ("CASI Br."). CASI also notes that the agencies' understanding of 19 U.S.C. § 1313(v) conflicts with section 1313(l)(2), which provides for the calculation of substitution drawback. See CASI Br. at 6–9. Further, NAM argues that the agencies overread 19 U.S.C. § 1313(v) to prohibit substitution drawback of excise taxes paid on imported goods when the substituted exported goods were exempt from excise tax. NAM Br. at 24–39. At base, NAM and CASI argue that an untaxed export is not a claim for drawback, even though, as NAM notes, in some situations Title 26, the Internal Revenue Code, refers to drawback in regard to taxes that have already been paid or determined prior to exportation. NAM Br. at 25–32; CASI Br. at 13–17. CASI further notes that Congress is familiar with the issue identified by the agencies and has considered statutory amendments that would have restricted drawback in some situations in the same way as the Final Rule, but that these amendments were not passed. CASI Br. at 17–21.

NAM also argues that agencies' Final Rule "would prevent the use of untaxed exports as the basis for drawback of any taxes, duties, or fees at all," which the agencies do not intend. NAM Br. at 32; Defs. Mem. in Resp. to the Mots. for J. on the Agency R., at 14–15, ECF No. 30 (Aug. 28, 2019) ("Def. Br."). NAM claims that even if this court evaluates the Final Rule under Chevron step two, the Final Rule is not reasonable and is arbitrary and capricious because it is unsupported by record evidence.[11] NAM Br. at 39–52 (citing Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984)). Finally, should the court find the Final Rule valid, NAM, CASI, and Plaintiff-Intervenor, the Beer Institute, contend that it is impermissibly

[11] Specifically, NAM claims that defendants' export incentive and revenue-loss rationales are unsupported. NAM Br. at 41–52.

retroactive. NAM Br. at 52–54; CASI Br. at 24–29; The Beer Inst. Mem. In Supp. of Rule 56.1 Mot. for J. on the Agency R., at 15–40, ECF No. 27-2 (June 25, 2019) ("Beer Br.").[12]

The defendants argue that the interpretation of 19 U.S.C. § 1313(v) is reasonable, historically supported, and necessary to reconcile the purpose of federal excise tax with the drawback regime. Def. Br. at 9–31. They aver that the understanding of "drawback" to include "unpaid tax liability that is extinguished" finds support in several statutory provisions and dictionary definitions. Id. at 13–15. Further, defendants' understanding as codified in the new Final Rule "preserves the integrity of both [the excise tax and drawback] regimes by vindicating the animating principle of each of them." Id. 15–18. They reject that the Final Rule conflicts with 19 U.S.C. §§ 1313(j)(2) and (l)(2), claiming that a contrary reading prevents 19 U.S.C.§ 1313(v) from acting as a necessary safeguard against abuse. Id. at 19–23. The defendants state that drawback is not limited to taxes paid, but extends to tax exemptions in order to prevent improper "piggybacking" of exemption benefits onto drawback benefits. Id. at 23–31; see also H.R. Rep. No. 103-361 at 130 (1993), reprinted in 1993 U.S.C.C.A.N. 2552, 2680 (stating that 19 U.S.C. § 1313 "codifies current Customs practice against 'piggybacking' other duty exemption benefits (foreign-trade zones, bonded warehouses and duty-free temporary importation) onto the drawback benefits."). Finally, defendants argue that the Final Rule was reasonably supported such that it is not arbitrary and capricious and that it does not apply retroactively. Def. Br. at 31–44.

NAM replies that the agencies are trying to revert to Customs' pre-2004 regime, when Congress clarified the law to allow for drawback of excise taxes among other consequences.

[12] Plaintiff-Intervenor, The Beer Institute, submitted a brief that is concerned solely with the retroactive application of the Regulation. Because the court invalidates the Regulation sections at issue, these arguments are moot and are not discussed in detail.

NAM Reply in Supp. of its Mot. for J. on the Agency R., at 4–6, ECF No. 31 (Sep. 23, 2019) ("NAM Reply"). NAM further defends its assertion that an untaxed exportation is not a claim for drawback, which is "a claim to recover charges on imports" and "does not include any tax exemption, remittance or refund for charges on exports." Id. at 6–13. In particular, NAM notes that if defendants' claim that the new definition of drawback was long-understood to include refunds and remissions, then the agencies would not have needed to amend the definitions of "drawback" and "drawback claim" between the notice of proposed rulemaking and the Final Rule to include the phrase "[m]ore broadly drawback also includes the refund and remission of other excise taxes pursuant to other provisions of law." See id. at 9; compare Proposed Regulation, 83 Fed. Reg. at 37,922 with Final Rule, 83 Fed. Reg. at 64,998.

II. JURISDICTION AND STANDARD OF REVIEW

Petitioners bring a challenge under 28 U.S.C. § 1581(i), which the court reviews under the Administrative Procedure Act ("APA"). 28 U.S.C. § 2640(e); see also Quiedan Co. v. United States, 927 F.3d 1328, 1331 (Fed. Cir. 2019). An agency final rule must be set aside if the court holds it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (citations omitted).

III. DISCUSSION

In determining whether the Final Rule conflicts with the statute, the court applies the two-step framework established in Chevron, 467 U.S. at 842–43. First, the court must ascertain whether Congress has "directly spoken to the precise question at issue." Id. at 842. If Congress's intent is clear then "that is the end of the matter," as the agency and the court must "give effect to the unambiguously expressed intent of Congress." Id. at 842–43. If the statute is "silent or ambiguous with respect to the specific issue" then the court must determine whether the agency's

interpretation is "based on a permissible construction of the statute." Id. at 843. For the reasons stated below, the court finds that the inquiry ends at step one because the Final Rule conflicts with the unambiguous text of the statute.

A. The Definition of Drawback

To prevail, the agencies must succeed in both their redefinition of drawback, particularly for the purposes of the "double drawback" prohibition of 19 U.S.C. § 1313(v), and in their interpretation of numerous subsections of 19 U.S.C. § 1313. They fail in both.

Defendants claim that "drawback" includes instances in which "an unpaid tax liability has been extinguished." Def. Br. at 10. Support for this proposition is found primarily in certain provisions of Title 19 and 26 that use the phrase "drawback equal in amount to the tax found to have been paid or determined." Id. at 11–12.[13] Defendants assert that "it is clear the term 'drawback' encompasses both remissions and refunds, applies to excise taxes as well as other duties and fees, and covers both exports and imports." Id. at 14.

The agencies amended the applicable regulations to reflect this understanding of drawback. Prior to the changes at issue, the applicable regulation defined drawback as:

> 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).

19 C.F.R. § 191.2(i) (2015). The new regulation reads:

> Drawback, as authorized for payment by CBP, means the refund, in whole or in part, of the duties, taxes, and/or fees paid on imported merchandise, which were imposed under Federal law upon entry or importation, and the refund of internal

[13] The government also cites a definition of drawback contained in a case regarding remission of duties by the German government. See United States v. Passavant, 169 U.S. 16 (1898). The court does not find this case instructive, as it interprets foreign law and was issued long-before the Tariff Act of 1930.

> 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.

19 C.F.R. § 190.2. Although most of the changes to the definition are cosmetic, the addition of the final sentence substantially expands the definition of drawback. Under the new definition, Customs treats the "refund or remission" of excise taxes that occurs when merchandise is exported as a drawback, which functionally prevents a company from then filing a claim for drawback of charges assessed on a substitutable import.

The statute does not provide a definition of drawback, so the court must ascertain the ordinary meaning of the term. See Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1140 (2018) (when a term is undefined in a statute, "we give the term its ordinary meaning.") (citations omitted). The court "assume[s] that the terms have their ordinary, established meaning, for which we may consult dictionaries." Info. Tech. & Applications Corp. v. United States, 316 F.3d 1312, 1320 (Fed. Cir. 2003) (citations omitted). Generally, "drawback" is understood to mean the refund or cancellation of import duties, but can also mean the refund of domestic taxes, such as excise taxes. See Drawback, 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"); 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."); 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.");

Dictionary of Tariff Information (1924) (defining drawback as a "(1) a repayment in whole or in part of customs duties paid on imported merchandise that is reexported . . . or (2) the refund upon the exportation of an article of a domestic tax to which is has been subjected).

The question then becomes which definition or definitions Congress intended to be applicable to Title 19. The agencies' new understanding is not supported by the statute, which almost exclusively uses the term drawback in relation to duties and fees imposed upon importation and then recovered. See generally 19 U.S.C. § 1313;[14] see also Ardestani v. I.N.S., 502 U.S. 129, 135 (1991) (noting that a word "must draw its meaning from its context"). The exception is 19 U.S.C. § 1313(d), which makes it clear that Congress intended excise taxes on certain alcohol to be recovered as long as the product was not for sale or consumption in the domestic market.

> Upon the exportation of flavoring extracts, medicinal or toilet preparations (including perfumery) manufactured or produced in the United States in part from domestic alcohol on which an internal-revenue tax has been paid, there shall be allowed a drawback equal in amount to the tax found to have been paid on the alcohol so used.
>
> Upon the exportation of bottled distilled spirits and wines manufactured or produced in the United States on which an internal revenue tax has been paid or determined, there shall be allowed, under regulations to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, a drawback equal in amount to the tax found to have been paid or determined on such bottled distilled spirits and wines. In the case of distilled spirits, the preceding sentence shall not apply unless the claim for drawback is filed by the bottler or packager of the spirits and unless such spirits have been stamped or restamped, and marked, especially for export, under regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

[14] See, e.g., 19 U.S.C. §§ 1313(b)(1) (using drawback as to "imported duty-paid merchandise"); 1313(j) (unused merchandise drawback of charges import "upon entry of importation"); 1313(k) (liability for drawback claims referring to charges on imported merchandise); 1313(l)(2) (drawback used in reference to charges paid on imported merchandise); 1313(y) (drawback of duties paid on merchandise upon importation from United States insular possessions).

19 U.S.C. § 1313(d) (emphasis added). This section does refer to the refund of "paid or determined" internal revenue tax as "drawback," but this section notably does not call internal revenue taxes never paid or determined "drawback," as the agencies attempt to apply the term.

26 U.S.C. § 5062(b) (using "drawback to refer to a refund of "tax found to have been paid or determined"), on which the government relies, is similarly structured and suffers from the same limitation. In Title 26, the term "drawback" consistently is used only with reference to taxes paid or determined,[15] and is not applied to all of the scenarios to which the agencies now attempt to apply the term. 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). Title 26 does not use drawback to refer to instances in which excise tax is never paid or determined. The government's argument for "substance over form" in regard to this glaring discrepancy is not well-taken. See Def. Br. at 12. Had Congress intended "drawback" to describe all the instances in Title 26 to which the agencies attempt to apply the term, it would not have selectively used the terms in some sections, but not others. See Russello v. United States, 464 U.S. 16, 23 (1983) ("It is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of language.).

In addition to lacking statutory support in either Title 19 or Title 26, the agencies' expanded definition makes no logical sense. Excise tax is often never paid on exported alcohol.

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

See 26 U.S.C. §§ 5053(a), 5214(a)(4), 5362(c)(1).[16] Although some companies under Title 26 receive a refund of excise taxes previously paid on goods that are then exported, in order for Customs' prohibition on "double drawback" to have the reach it intends with the Final Rule, "drawback" must also include instances in which excise tax is never "paid or determined"[17] on exported merchandise. See 26 U.S.C. §§ 5704(b), 5214(a), 5362(c). This latter situation is nonsensical. A tax that has never been paid cannot naturally be said to have been "drawn back."

Accordingly, there is no statutory support for the expansive definition in the Final Rule that extends drawback to situations in which tax is never paid or determined. Further, as noted in the following section, the statute unambiguously forecloses the agencies' definition.

B. Resulting Statutory Conflicts

Without the benefit of the expanded definition of drawback, the agencies' argument unravels. Even if, however, the court were to attempt to apply the new definition, the Final Rule creates irreconcilable conflicts with statutory provisions that evince that the agencies' Final Rule is not a valid interpretation of the statute. After referring to the non-payment of excise tax on exports as a "drawback," the agencies then evoke 19 U.S.C. § 1313(v), which prohibits a single export from serving as a basis for multiple drawback claims, so as to prevent a company from filing a substitution drawback claim on the basis of an export on which no excise tax was paid. In addition, the Final Rule limits drawback claims on exported or destroyed substituted

[16] Each of these sections notes conditions, such as removal from bonded facilities, when exported beer (26 U.S.C. §§ 5053(a)), distilled spirits (26 U.S.C. § 5214(a)(4)), or wine (26 U.S.C. § 5362(c)(1)), can be removed without payment of tax.

[17] NAM cites legislative history to state: "[w]ith respect to the tax on distilled spirits [determined] is used in instances where the tax is determined and paid at the time the spirits are withdrawn from bond, as well as in instances where the amount of the tax to be paid is computed and fixed at the time the spirits are withdrawn from bond." See NAM Br. at 29 (citing S. Rep. No. 85-2090, § 5006 (1958) reprinted in 1958 U.S.C.C.A.N. 4395, 4492).

merchandise "to the amount of taxes paid (and not returned by refund, credit, or drawback) on the substituted merchandise." Final Rule, 84 Fed. Reg. at 65,008, 65,012, 65,029,65,064, 65,066; see also 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). These understandings directly conflict with other statutory provisions, most notably 19 U.S.C. § 1313(j)(2) and 19 U.S.C. § 1313(l)(2).

Section 1313(j)(2) (unused merchandise drawback) is categorical in stating 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). The Supreme Court held that a "notwithstanding" section "override[s] conflicting provisions of any other section." Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 18 (1993); see also Nat'l Labor Relations Bd. v. SW General, Inc., 137 S. Ct. 929, 940 (2017) (noting that "'notwithstanding' clauses show that one provision prevails over another in the event of a conflict."). For this court to hold otherwise would be to render the word "notwithstanding" meaningless. Drawback is simply not conditioned on the tax status of the substituted merchandise. That consideration finds no basis in the statute. Defendants argue that an interpretation contrary to its new understanding of section 1313(v) would "override § 1313(v)'s prohibition on double drawback," Def. Br. at 23, but in fact a contrary reading would maintain the consistent interpretation of section 1313(v) to prohibit a single export from serving as a basis for multiple drawback claims, as the term "drawback" in this context has long been understood. See, e.g. HQ 229892, 2003 WL 22408906, at *5 (July 3, 2003) (noting that section 1313(v) "prevents multiple drawback claims on the same exported or destroyed merchandise.").

Section (j)(2) is unequivocal and mandates that drawback "shall" issue so long as the enumerated preconditions are met. These preconditions do not include a requirement that a company paid tax on its exports in order to claim drawback on charges assessed on its imports.

The agencies' interpretation of section 1313(v) also creates a conflict between sections 1313(d) and 1313(j)(2). As noted above, 1313(d) uses the term drawback in reference to the refund of internal revenue taxes paid on exported distilled spirits and wine. The TFTEA added to section 1313(j)(2), that "drawback shall be allowed under this paragraph with respect to wine if the imported wine and exported wine are of the same color and the price variation between the imported and exported wine does not exceed 50 percent." See TFTEA, 130 Stat. at 228; see also 19 U.S.C. § 1313(j)(2). For this provision to have any effect, drawback under section 1313(v) cannot be understood to prevent drawback from occurring under section 1313(j)(2) because of a refund of taxes under section 1313(d). To do so would further undermine the "notwithstanding and other provision of law" language in section 1313(j)(2). The agencies' interpretation of section 1313(v) creates an irreconcilable conflict with the clear and superseding language of section 1313(j)(2) and thus cannot withstand scrutiny under Chevron step one.

Additionally, in promulgating section 1313(l)(2) Congress introduced limiting language on the agencies' previously broad-reaching ability to simply "prescribe regulations for determining the calculation of amounts refunded as drawback under [§ 1313]." 19 U.S.C. § 1313(1)(2)(A). The new subsection entitled "[c]alculation of drawback" delineates a clear calculation procedure. Id. In doing so, Congress set limits on how to determine the amount to be refunded and made clear that refunds were 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). Defendants' interpretation of 19 U.S.C. § 1313(v) to disallow exports on which excise tax was not paid from serving as substituted merchandise largely nullifies the alternative calculation methodology described in 19 U.S.C. § 1313(1)(2)(B)(i)(II) and cannot stand. See 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."). It is not a rational reading of the statute to interpret Congress' intent to liberalize drawback to impose a restriction on drawback that did not previously exist. Section 1313(l) clearly envisions taxes that "would apply" not taxes that did apply. 19 U.S.C. § 1313(l)(2).

Defendants attempt to support their reading of section 1313(v) in part by citing section 1313(u), which states that "[i]mported merchandise that has not been regularly entered or withdrawn for consumption shall not satisfy any requirement for use, exportation, or destruction under this section." Def. Br. at 15 (citing 19 U.S.C. § 1313(u)). But section 1313(u) only applies to merchandise that was imported (and then exported or destroyed),[18] this provision simply does not apply to domestic merchandise. See 19 U.S.C. § 1313(u). Customs' own guidance confirms that 1313(u) does not apply to domestic merchandise:

> As stated above § 1313(u) was enacted to codify the prohibition against paying duty drawback on, among other things, the exportation of foreign merchandise upon which no duty had been paid. However, there is no similar rule against paying drawback on exported domestic goods that are substituted for imported duty-paid goods. The language of § 1313(u) states that "imported merchandise that has not been regularly entered . . ." (emphasis added) will not support a claim for drawback. Thus, this section only applies to imported goods and has no application to . . .domestic merchandise.

[18] Re-exportation without duty may occur as a result of various duty deferral or avoidance programs (foreign trade zones, temporary importation under bond, etc.). See 19 C.F.R. § 181.53. Obviously, section 1313(u), which is concerned with imports, applies to duty drawback and not excise tax refunds. See 19 U.S.C. § 1313(u).

HQ 230591, 2005 WL 1230799, at *3 (Feb. 17, 2005). Accordingly, section 1313(u) does not support defendant's understanding of section 1313(v).

Additionally, the Final Rule's limitation on drawback leads to what NAM refers to as an "absurd result." NAM Br. at 17, 25, 32–35; see also CASI Br. at 12–13. The agencies' interpretation of section 1313(v) would, by its text, prevent an untaxed export from serving as substituted merchandise in a drawback claim on a corresponding import in any capacity. 19 U.S.C. § 1313(v) ("[M]erchandise that is exported or destroyed to satisfy any claim for drawback shall not be the basis of any other claim for drawback.") (emphases added). This means that a company both importing and exporting merchandise would be liable not just for the excise tax on its imports, but for all non-excise tax charges assessed at import. Defendants argue that "[t]he Rule merely prohibits double recovery of any particular assessment," but this reads into section 1313(v) a restriction that does not exist. Def. Br. at 14. The court cannot uphold a regulation that produces irrational results simply because an agency does not intend such a result, and it will not read into a statute limiting language to save an agency's interpretation.

Finally, Defendants argue that their interpretation of the statute is required to "vindicat[e] the animating principle[s]" of both the federal excise tax and drawback regimes. Def. Br. 15–18. These regimes are necessarily in tension with one another. Whereas the federal excise tax is a revenue-raising tax, drawback is meant to encourage exports by allowing a refund of taxes paid on imports. See S. Rep. No. 85-2165 § 313(h) (1958), reprinted in 1958 U.S.C.C.A.N. 3576, 3577 (noting that drawback is "designed to relieve domestic processors and fabricators of imported dutiable merchandise, in competing for export markets, of the disadvantages which the duties on the imported merchandise would otherwise impose upon them."); see also H.R. Rep. No. 114-114(I) (2015); S. Rep. No. 114-45 (2015). Because these two regimes necessarily

cannot both operate with full force, a policy decision must be made regarding which to privilege when they collide. As the legislative history of the drawback regime demonstrates, it appears that Congress has repeatedly chosen to expand access to drawback at the expense of lost excise tax revenue. The agencies cannot now attempt to alter this policy choice by way of a regulation that does not comport with the animating statute.

The agencies' Final Rule runs afoul of the ordinary meaning of drawback and results in irreconcilable statutory conflicts. See 19 U.S.C. § 1313(j)(2) (notwithstanding clause undermined by agencies' interpretation of 19 U.S.C. § 1313(v)); 19 U.S.C. § 1313(l)(2)(B)(i)(ii) (agencies' interpretation renders this calculation of drawback section a nullity); 19 U.S.C. § 1313(v) (agencies' interpretation renders this provision unlawfully restrictive in a way even the agencies do not intend). The Final Rule is contrary to the clear intent of Congress as expressed in the language and structure of the statute. Accordingly, the court must hold the Final Rule unlawful.

C. Legislative History

Because the statutory text and structure forecloses defendants' interpretation, the court need not review the relevant legislative history. Nonetheless, the court's decision is well-supported by the legislative history of drawback. See Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 371–72 (1986) (holding that the plain reading of a statute foreclosed the Federal Reserve Board's regulation, but finding that the legislative history supported the plain reading).

Congress has several times addressed the issue of drawback since enacting the substitution drawback provision, 19 U.S.C. § 1313(j)(2), in 1984. In 1993, Congress added a provision that prevented merchandise exported or destroyed from satisfying multiple claims for drawback. See 19 U.S.C. § 1313(v). Then in 2004, Congress amended 19 U.S.C. § 1313(j)(2) to

require that drawback be paid "notwithstanding any other provision of law."[19] Although Congress considered statutory amendments in 2007 that would have reduced drawback on certain imported ethanol "by an amount equal to any Federal tax credit or refund of any Federal tax paid on the merchandise with respect to which the drawback is claimed," those amendments were not passed. 153 Cong. Rec. S7909, S7941, § 832(b) (June 19, 2007); 153 Cong. Rec. S13774, S13927, § 12318(b) (Nov. 5, 2007). Further, in 2008, Congress liberalized substitution drawback with regard to wine by allowing substitution for wine of the same color that is also within 50 percent of the same price. See Pub. L. No. 110-234 §15421, 122 Stat. at 1547, codified as amended 19 U.S.C. § 1313 (j)(2)(2008). Following Congress's inaction to address the issue at hand, Customs and Treasury proposed the following regulation change:

> For purposes of drawback of internal revenue tax imposed under Chapters 32, 38, 51, and 52 of the Internal Revenue Code of 1986, as amended (IRC), drawback granted on the export or destruction of substituted merchandise will be limited to the amount of taxes paid (and not returned by refund, credit, or drawback) on the substitute merchandise.

Drawback of Internal Revenue Excise Tax, 74 Fed. Reg. 52,928, 52,931 (Oct. 15, 2009) ("2009 Proposed Rule"). Many commenters, including several members of Congress, opposed the new regulations. See A.R. 10–11, 83–84, 99–100. While statements of individual members of Congress are by no means dispositive on the question of legislative intent, they do support the court's conclusion. Eighteen legislators stated as follows:

---

[19] The 2004 amendments were in part a reaction to the Court of Appeals for the Federal Circuit's decision in Texport Oil Co. v. United States, which found that certain non-import-specific taxes, were not eligible for substitution drawback. See 185 F.3d 1291 (Fed. Cir. 1999). In amending the statute, Congress made clear its intention to override Texport and to allow drawback on any duty, tax, or fee imposed upon entry. See Shell Oil Co. v. United States, 688 F.3d 1376, 1380 (Fed. Cir. 2012) (describing the impetus for the amendments). The amendment replaced the phrase "because of its importation" with "upon entry or importation" regarding circumstances in which drawback was permissible. See 19 U.S.C. § 1313(j). This amendment clarified that excise taxes were eligible for drawback under Title 19.

> The agencies have been heard many times on this issue and can continue to comment as Drawback Simplification makes its way through Congress. Noticing the proposed rules at this time amounts to challenging Congress by initiating a rulemaking that will run concurrently with Congressional action on the same subject in the context of pending [Customs] reauthorization legislation. We view these proposed rules as an attempt by the administering agencies to change existing law via rulemaking, pre-empting and negating the role of Congress.

A.R. 9–11. The agencies then withdrew the proposed regulations. See Drawback of Internal Revenue Excise Tax, 75 Fed. Reg. 9,359–60 (Mar. 2, 2010) (Withdrawal of Notice of Proposed Rulemaking). Congress took no action to pass any legislation that would address the agencies' concerns as expressed in the 2009 Proposed Rule.

This history demonstrates that Congress made a policy choice to encourage exports by expanding the ability to claim drawback, even with the knowledge that industries may then avoid some payment of excise tax. Congress is presumed to know that the wine industry was filing substitution drawback claims in situations where no excise tax had been paid and yet did not address the issue, and, in fact, appears to have at least indirectly sanctioned the practice. See 19 U.S.C. § 1313(l)(2)(D) (section added in the TFTEA that maintained the treatment of wine); 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"). It is not the court's role to undermine Congressional policy decisions. Ultimately, the defendants' Final Rule is unsupported by both the statute and the legislative history.

D. Alternative Arguments

Because the court holds the challenged portions of the Final Rule to be an unlawful interpretation of the statute, it will not address in detail arguments that the Final Rule was both arbitrary and capricious and impermissibly retroactive. As to the retroactivity challenge, the agencies' attempt to apply the Final Rule to claims filed before its effective date runs afoul of fair notice. The regulatory quandary in which the agencies found themselves, whereby a period

during which no path for operation of the new statute existed, was one of the agencies' own making as they delayed publishing regulations to implement the TFTEA until well after the statutory deadline had lapsed. See Tabacos de Wilson, Inc. v. United States, Slip Op. 18-138, 2018 WL 4961917 (CIT Oct. 12, 2018). On the other hand, the court notes that defendants made seemingly valid policy arguments for why the "zeroed excise tax" scheme should not be permitted. But statutes cannot be constructively amended through agency action; such power lies with Congress. If the public fisc does suffer ultimately from uncollected excise tax, then it is up to Congress to decide whether to remedy the situation.

CONCLUSION

For the foregoing reasons the Final Rule is held unlawful as to the challenged provisions. Plaintiff shall propose a form of judgment by February 7, 2020. Defendant may respond by February 18, 2020.

/s/Jane A. Restani
Jane A. Restani, Judge

Dated: January 24, 2020
New York, New York

UNITED STATES COURT OF INTERNATIONAL TRADE

THE NATIONAL ASSOCIATION OF MANUFACTURERS,

Plaintiff,

THE BEER INSTITUTE,

Plaintiff-Intervenor,

v.

UNITED STATES DEPARTMENT OF THE TREASURY, ET AL.,

Defendants.

Before: Jane A. Restani, Judge

Consol. Court No. 19-00053

JUDGMENT

This case having been duly submitted for decision; and the court, after due deliberation, having rendered a decision herein; now therefore, in conformity with said decision.

1. Holds unlawful and sets aside 19 C.F.R. §§ 190.171(c)(3), 190.22(a)(1)(ii)(C), 190.32(b)(3), 191.171(d), 191.32(b)(4), and the final sentence of 19 C.F.R. § 191.22(a);

2. Holds unlawful and sets aside the final sentence in the definition of "drawback" and the final sentence of the definition of "drawback claim" in 19 C.F.R. § 190.2;

3. Declares that Defendants must process and pay substitution drawback claims that comply with the governing statutory and regulatory requirements;

4. Enters Judgment in favor of Plaintiff

/s/ Jane A. Restani
Jane A. Restani, Judge

Dated: February 18, 2020
New York, New York

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July 2020, a copy of the foregoing Brief for Defendants-Appellants was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Alexander Vanderweide
ALEXANDER VANDERWEIDE

CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 32(g)

I, Alexander Vanderweide, a 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 12,726 words.

/s/ Alexander Vanderweide
ALEXANDER VANDERWEIDE