

and quality merchandise for purposes of manufacturing substitution drawback pursuant to 19 U.S.C. 1313(b). The holding in *DuPont* necessitates apportionment as a necessary method of claiming a drawback entitlement under these circumstances. *DuPont*, 116 F. Supp. 2d at 1348–49.

#### *Amendment to § 191.26(b) of the Customs Regulations*

On July 24, 2002, Customs and Border Protection (CBP), as its predecessor agency, the Customs Service, promulgated interim amendments to the Customs Regulations, published in the **Federal Register** (67 FR 48368) as T.D. 02–38, to implement the courts' holdings in *DuPont* and *ILM*. The interim amendments to the Customs Regulations were made to § 191.26 (19 CFR 191.26), which sets forth the recordkeeping requirements for manufacturing drawback. Paragraph (b) of this section describes the recordkeeping requirements for substitution drawback.

To implement the courts' interpretation of 19 U.S.C. 1313(b), T.D. 02–38 amended § 191.26(b) by adding language that explains how to apportion the duty attributable to same kind and quality chemical elements contained in *ad valorem* duty-paid imported materials for purposes of manufacturing substitution drawback. T.D. 02–38 also amended § 191.26(b) to provide an example of apportionment calculations.

#### *Duty Apportionment Calculation*

In order for a drawback claimant to be able to ascertain what portion of the *ad valorem* duty paid on imported merchandise is attributable to a chemical element contained in the merchandise, an apportionment calculation is necessary. First, if the imported duty-paid material is a compound with other constituents, including impurities, and the purity of the compound in the imported material is shown by satisfactory analysis, that purity, converted to a decimal equivalent of the percentage, is multiplied against the entered amount of the material to establish the amount of pure compound. The amount of the element in the pure compound is to be determined by use of the atomic weights of the constituent elements, converting to the decimal equivalent of their respective percentages, and multiplying that decimal equivalent against the above-determined amount of pure compound. Second, the amount claimed as drawback based on a contained element must be taken into account and deducted from the duty paid on the

imported material that may be claimed on any other drawback claim.

#### **Discussion of Comments**

Five commenters responded to the solicitation of public comment published in T.D. 02–38. A description of the comments received, together with CBP's analyses, is set forth below.

*Comment:* Several commenters disagreed with CBP's interpretation that the court decisions in *DuPont* and *ILM* require an apportionment calculation to determine the proper drawback entitlement.

*CBP's response:* CBP maintains its view that the holdings in *DuPont* and *ILM* necessitate apportionment of the duty attributable to a chemical element contained in an *ad valorem* duty-paid imported material if this chemical element is the designated good in a drawback claim under 19 U.S.C. 1313(b). As noted above, the CAFC in *ILM* and the CIT in *DuPont* examined the scope of the term “same kind and quality” as used in 19 U.S.C. 1313(b) and determined that a chemical element contained in an imported material that is dutiable on its value may be designated as same kind and quality merchandise for purposes of manufacturing substitution drawback. In *ILM*, the CAFC stated that as there was “\* \* \* no dispute as to the amount of titanium that was used in the scrap \* \* \* the amount of drawback to which *ILM* would be entitled based upon the titanium in that scrap and the titanium in the imported sponge could be precisely determined.” Similarly, in *DuPont*, the CIT noted that because the amount of titanium in the feedstocks can be accurately determined, substitution of another feedstock for synthetic rutile is permitted. If either the CAFC or the CIT intended drawback to be permitted on all the titanium-containing raw materials, the courts would not have emphasized that calculation of the amount of titanium contained in the raw materials entitled the claimant to a specific amount of drawback. The courts clearly recognized that apportionment by relative weight was necessary to prevent the overpayment of drawback.

*Comment:* Several commenters noted that if apportionment is required, apportionment by relative value is a more appropriate calculation method than apportionment by relative weight. In a related comment, one commenter suggested that a drawback claimant should have the option to apportion duty using either relative value or relative weight.

*CBP's response:* CBP disagrees. As discussed above, the courts in both *ILM*

and *DuPont* require apportionment by relative weight. Both of these courts held that the quantity, and not the value, of the sought material (the titanium) could be determined and consequently the amount of drawback could be determined. Moreover, there is no authority to apportion duty by relative value for a drawback claim per 19 U.S.C. 1313(b) when only one good results from the processing of the imported merchandise. If the sought material, *i.e.*, the titanium, was divided to make two articles, then relative value apportionment would be required.

*Comment:* One commenter submitted that apportionment by relative weight contradicts the drawback statute (19 U.S.C. 1313) because this section, at paragraph (a), provides drawback upon the “exportation or destruction under custom supervision of articles manufactured or produced in the United States with the use of imported merchandise, \* \* \*.” The commenter noted that the sought element in *DuPont* (the titanium) is neither “used” nor “imported” because it is the feedstock containing the titanium that is “imported” and “used” within the meaning of section 1313(b). Another commenter stated that section 1313(b) provides no legal basis for apportionment under these circumstances.

*CBP's response:* CBP disagrees. The plain language of 19 U.S.C. 1313(b) permits drawback to be paid only on the sought element, and the sought element in both *ILM* and *DuPont* was the titanium. Section 1313(b) provides that an amount of drawback equal to that which would have been allowable had the *merchandise* used therein been imported is payable if imported duty-paid *merchandise* and any other *merchandise* (whether imported or domestic) of the *same kind or quality* are used in the manufacture or production of articles subsequently exported or destroyed. Clearly, per 19 U.S.C. 1313(b), the merchandise upon which drawback may be paid is the merchandise characterized as “same kind and quality.” It cannot be said that the various feedstocks used to provide the sought element in those cases are of the “same kind and quality,” but only that the titanium, as a discrete element contained in the feedstocks, was of the “same kind and quality” as required by section 1313(b). In *ILM*, the CAFC makes clear that the merchandise of the “same kind and quality” required by 19 U.S.C. 1313(b) was the sought element, titanium, and not the various feedstocks. *ILM*, 194 F.3d 1355 at 1367. Additionally, in applying the three