

factors promulgated by the CAFC in *ILM*, the CIT in *Dupont* stated:

* * * the [ILM] court reasoned that the phrase "same kind and quality" should be applied only to the sought element contained in a source material, and not to the source material as a whole or the impurities contained therein * * *. Thus, although different ores may be made up of a number of elements, the "same kind and quality" standard applies only to the element used in manufacturing the exported article.

Dupont, at 1348. Therefore, the court held that the titanium is the designated merchandise. Since titanium is an element, and an element is measured by its weight, apportionment by relative weight is required. Consequently, the apportionment of the duty attributable to a chemical element contained in *ad valorem* duty-paid imported merchandise must be calculated by the relative weights of the sought element and the feedstock used.

Comment: One commenter stated that since T.D. 82-36 (16 Cust. B. & Dec. 97, February 26, 1982) is specific as to "how to determine the quantity of imported merchandise to be designated, and therefore, the basis for the allowance of drawback," apportionment by weight is not mandated by the court decisions.

CBP's response: CBP disagrees. The CAFC in *ILM* stated:

* * * we find little assistance in the facts of T.D. 82-36. That ruling dealt with a substitution of copper ores, in which each ore contained impurities and a single sought element, copper * * *. In this case, the scrap contains several sought elements, and no impurities have been identified as such.

ILM at 1363.

It is additionally noted that the *ILM* and the *Dupont* Courts found that the designated material was titanium, an element. The amount of an element is calculated by its weight.

Comment: One commenter suggested that since the drawback claimant does not separate the sought element from the feedstock, then it is the feedstock and not the sought element that must be the imported merchandise designated for drawback.

CBP response: CBP disagrees. The courts in *ILM* and *Dupont* held that the element was the material that met the same kind and quality requirement and therefore the element was the designated merchandise. The CAFC in *ILM* noted that it was not necessary to extract the sought element from the feedstock, and stated " * * * we see no reason why *ILM* should be required to undertake such an additional step [of extracting the titanium from the scrap] * * *". Both the *ILM* and *Dupont* Courts determined that since the amount of the

sought element (the titanium) could be precisely determined, it was unnecessary to require that it be extracted as a discrete element before drawback was payable.

Comment: One commenter stated that CBP was incorrectly using the "same kind and quality" test to apportion the duties because this standard is only used for determining whether imported goods may be substituted for other goods.

CBP response: CBP disagrees. As discussed above, the only merchandise upon which drawback may be paid as per 19 U.S.C. 1313(b) is the imported duty-paid and designated merchandise characterized as "same kind and quality." In *ILM*, the CAFC unequivocally stated that the merchandise of the "same kind and quality" required by section 1313(b) is the sought element—not the various feedstocks. *ILM* at 1367. Therefore, the CAFC found that the sought element, the titanium, was of the same kind and quality and thus only the titanium could be the designated merchandise.

Comment: One commenter stated that CBP's example of the apportionment calculation set forth in § 191.26(b)(4) is incorrect, and noted that CBP applies the \$0.011 factor to each pound of titanium. The commenter submits that, in fact, each pound of material in the imported synthetic rutile, be it titanium, oxygen, or impurities, bears the same \$0.02 duty.

CBP response: CBP agrees. The example in the interim amendments to § 191.26(b)(4), set forth in T.D. 02-38, is inconsistent with the liquidation instructions on which it was to have been based. Since the total duty on the imported synthetic rutile includes duty on its titanium content, the calculation should be \$600 duty paid divided by 30,000 pounds synthetic rutile (\$600 ÷ 30,000 = .02) duty per pound of imported rutile. Therefore, the example set forth in § 191.26(b)(4) is amended accordingly and set forth below in the regulatory text section of this document.

Comment: One commenter suggested that apportioning duty based on weight "encourages uneconomical activities, such as the export of waste and impurities in order to obtain drawback that would be due under value based methodologies." The same commenter noted that this exportation of waste would result in an overpayment of duty and a doubling of drawback claims because each drawback claimant would file an additional claim for waste.

CBP response: CBP disagrees. No waste is generated from the designated merchandise, *i.e.*, the titanium. Additionally, even if waste were

generated, it has been CBP's position based on long-standing court decisions that drawback is not allowable on the exportation of waste. In *United States v. Dean Linseed-Oil Co.*, 87 Fed. 453, 456 (2nd Cir. 1898), *cert. den.*, 172 U.S. 647 (1898), the court implicitly accepted the government's position that drawback was unavailable on the exportation of waste. CBP has continuously followed this position. See *Precision Specialty Metals, Inc. v. United States*, 116 F.Supp. 2d 1350 (Ct. Int'l Trade (2001)).

Comment: One commenter stated that apportioning the duty by weight will be administratively difficult and burdensome. Another commenter stated that all the information necessary to perform the duty calculation required by § 191.26(b), as amended by T.D. 02-38, is not on the manufacturing certificate.

CBP response: The court instructed CBP to make the calculation to properly administer the statute. Therefore, CBP must follow the court's decision regardless of whether the requisite calculation is burdensome.

Conclusion

After analysis of the comments and further review of the matter, CBP has determined to adopt as a final rule, with the changes mentioned in the comment discussion and with additional non-substantive editorial changes, the interim rule published in the **Federal Register** (67 FR 48368) on July 24, 2002, as T.D. 02-38.

Inapplicability of Delayed Effective Date

These regulations serve to add apportionment language to the Customs Regulations necessitated by recent decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit, and to finalize an interim rule that is already in effect. In addition, the regulatory changes serve to benefit the public by providing specific information as to how a drawback claimant is to correctly make the requisite duty apportionment calculations when claiming manufacturing substitution drawback for a chemical element contained in *ad valorem* duty-paid imported merchandise. For these reasons, pursuant to the provisions of 5 U.S.C. 553(d)(1) and (3), CBP finds that there is good cause for dispensing with a delayed effective date.

The Regulatory Flexibility Act and Executive Order 12866

Because no notice of proposed rulemaking was required, the provisions of the Regulatory Flexibility Act (5