

Transport Airplane Directorate, FAA, is authorized to approve alternative methods of compliance for this AD.

Note 4: The subject of this AD is addressed in Brazilian airworthiness directive 97-05-03R3, dated October 2, 2001.

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DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Part 191

RIN 1515-AD32

Merchandise Processing Fees Eligible To Be Claimed as Certain Types of Drawback Based on Substitution of Finished Petroleum Derivatives

AGENCY: Customs and Border Protection, Homeland Security; Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to provide that merchandise processing fees are eligible to be claimed, in limited circumstances, as drawback based on substitution of finished petroleum derivatives. The proposed amendments are consistent with a court decision in which merchandise processing fees were found to be eligible to be claimed as unused merchandise drawback. As drawback based on substitution of finished petroleum derivatives is, in limited circumstances, treated in the same manner as unused merchandise drawback, the amendments to the Customs Regulations proposed in this document reflect that merchandise processing fees are also eligible to be claimed as drawback in these circumstances.

DATES: Comments must be received on or before December 1, 2003.

ADDRESSES: Written comments may be submitted to Bureau of Customs and Border Protection, Office of Regulations & Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue NW., Washington, DC 20229. Submitted comments may be inspected at Bureau of Customs and Border Protection, 799 9th Street, NW., Washington, DC, during regular business hours. Arrangements to

inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

FOR FURTHER INFORMATION CONTACT: William G. Rosoff, Chief, Duty and Refund Determinations Branch, Office of Regulations and Rulings, Bureau of Customs and Border Protection, Tel. (202) 572-8807.

SUPPLEMENTARY INFORMATION:

Background

Merchandise Processing Fees

Merchandise processing fees are fees charged and collected for the processing of merchandise that is formally entered or released into the United States. See 19 U.S.C. 58c(a)(9)(A). Merchandise processing fees are assessed as a percentage of the value of the imported merchandise, as determined under 19 U.S.C. 1401a.

Merchandise Processing Fees Eligible To Be Claimed as Drawback

Section 313 of the Tariff Act of 1930, as amended, (19 U.S.C. 1313), concerns drawback and refunds. Drawback is a refund of certain duties, taxes and fees paid by the importer of record and granted to a drawback claimant under specific conditions.

In *Texport Oil v. United States*, 185 F.3d 1291 (Fed. Cir. 1999), the Court of Appeals for the Federal Circuit (CAFC) held that merchandise processing fees were assessed under Federal law and imposed by reason of importation and therefore eligible to be claimed as unused merchandise drawback pursuant to 19 U.S.C. 1313(j).

Subsection (p) of 19 U.S.C. 1313 authorizes drawback that is based on "substitution of finished petroleum derivatives." Subsection (p)(4)(B) of 19 U.S.C. 1313, in pertinent part, limits the amount of drawback payable under this subsection to the amount of drawback that would be attributable to the article "if imported under [subsection 1313(p)(2)(A)(iii) or (iv)] *had the claim qualified for drawback under subsection (j).*" [emphasis added]

Subsection 1313(p)(2)(A)(iii) requires that the exporter of the exported article had imported the qualified article in a quantity equal to or greater than the quantity of the exported article. Subsection 1313(p)(2)(A)(iv) requires that the exporter of the exported article had purchased or had exchanged, directly or indirectly, an imported qualified article from an importer in a quantity equal to or greater than the quantity of the exported article.

The language "had the claim qualified for drawback under subsection (j)" reflects that drawback is payable under

1313(p)(2)(A)(iii) or (iv) pursuant to the same formula set forth in subsection 1313(j), *i.e.*, the amount of drawback payable under 19 U.S.C. 1313(j) is not to exceed 99 percent of any duty, tax, or fee imposed under Federal law because of the imported article's importation. It is noted that "drawback payable" pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv) includes merchandise processing fees.

It follows, therefore, that as the CAFC has determined that merchandise processing fees are eligible to be claimed as drawback pursuant to 19 U.S.C. 1313(j), such fees are also eligible to be claimed as drawback when drawback is based on substitution of finished petroleum derivatives pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv).

Proposed Amendments to the Customs Regulations

The *Texport Oil* decision is reflected in the Customs Regulations at §§ 191.3 and 191.51. See 67 FR 48547 (July 25, 2002), in which a final rule was published amending the Customs Regulations to reflect that merchandise processing fees are eligible to be claimed as unused merchandise drawback pursuant to 19 U.S.C. 1313(j).

In order to reflect that the court's holding is applicable, in limited circumstances, to drawback based on substitution of finished petroleum derivatives, this document proposes to further amend the Customs Regulations.

Explanation of Amendments

It is proposed to amend §§ 191.3(a)(4), 191.3(b)(2), 191.51(b)(2) and 191.171 of the Customs Regulations (19 CFR 191.3, 191.51 and 191.171) to provide that merchandise processing fees are eligible to be claimed as drawback when the basis for drawback is the substitution of finished petroleum derivatives pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv). A more detailed explanation of the proposed amendments is set forth below.

Amendment to § 191.3 of the Customs Regulations

Section 191.3(a)(4) of the Customs Regulations provides that merchandise processing fees for unused merchandise drawback pursuant to 19 U.S.C. 1313(j) are subject to drawback. As merchandise processing fees are eligible to be claimed as drawback for substitution of finished petroleum derivatives pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv), it is proposed to amend § 191.3(a)(4) accordingly.

Conversely, § 191.3(b)(2) of the Customs Regulations lists the types of duties and fees that are not subject to