New Duty Drawback Regulations: Understanding the New Rules of the Game

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The Path to TFTEA

- TFTEA statute signed 2/24/16, effective 2/24/18
- Development of core drawback in ACE
- Development of TFTEA drawback in ACE
- Regulations delayed- Interim Guidance issued February 2018
- Deployment of core and TFTEA drawback in ACE on same day, 2/24/18 (hard copy claims limited)
- Interim Period: Can file under Core or TFTEA
- Proposed regulations issued August 2018- new Part 190
- Final regulations issued December 14, 2018 (effective immediately)
- TFTEA transition period ends, as does core drawback-2/24/19
Key Features of TFTEA Drawback

- HTSUS-Based substitution standards
- Calculation of substitution drawback based upon average per unit duty for line item - Per Unit Average (PUA)
- Substitution drawback limited by value of exported item or component used in manufacturing
- Streamlined statutory time frame for filing drawback claims
- Merchandise processing fee and harbor maintenance fee extended to manufacturing drawback
- Electronic submission of drawback claims in ACE
- Joint and several liability in multi-party drawback
TFTEA Substitution Unused Merchandise Drawback 1313(j)(2)

- Standard for substitution is 8-digit HTS, not commercial interchangeability
- Limitations if your 8-digit HTS starts with “other”
- 5 years import to claim
- No more Certificates of Delivery
- New rules for calculating drawback amount- PUA and Lesser Of
- Consider value of exported/destroyed items
- Drawback for recovered materials
Direct Identification Drawback, 1313(j)(1), Under TFTEA

- Same 5-year time frame
- Calculate drawback using invoice value, not PUA
- CDs are eliminated
- Will be claimed by (1) those with 8-digit HTS numbers that fail the “other” rule, (2) same condition under NAFTA, USMCA and US-Chile
TFTEA Manufacturing Substitution Drawback- 1313(b)

- Substitute components used in manufacturing at 8-digit HTSUS
  - No limitation for basket provisions
- Same kind and quality rulings are no longer required, but you do need a ruling: General 190.7 or Specific 190.8
- Unified time frame- 5 years from date of import to date of claim with no tracking of receipt date
- No more Certificates of Manufacture and Delivery
- New rules for calculating drawback amount- PUA and Lesser Of
- Consider value of exported/destroyed items
Substitution and 8-digit Classification

- Unused Merchandise- same 8-digit HTS in and out
  - 190.51(c)- export HTSUS based upon EEI or what would have been on EEI
- Schedule B can be used at export, and it could be broader- “without regard to whether the Schedule B number corresponds to more than one 8-digit HTS subheading”
- Manufacturing Drawback- same 8-digit HTSUS import/substitute
  - 190.51(c)- If substitute imported, use import HTSUS applicable at time of entry
  - 190.51(c)- If not imported, HTSUS that would have been reported
- Your Entry Summary could have an incorrect HTS, but still qualify for drawback (PEAs, Protests, Disclosures, Rulings, Court Cases)
  - Look for CATAIR update
- No need for CIDs - obtain a classification ruling
TFTEA 1313(j)(2) Drawback and the “Other” Categories

- Applies only to Unused Merchandise
- What is this about? Basket Provisions
- You may not be able to use j2 if your 8-digit HTS starts with the word “other”
  - However, you can use j2 if your 8-digit HTS has 10 digit breakouts and your product’s breakout doesn’t start with the word “other.”
- If your 10 digit HTS begins with “other,” then you can only claim drawback under 1313(j) using j1.
- No definition in regulations
- DBPI Indicator in ACE
“Other” categories

- Example, 8509 “Electromechanical Domestic Appliances”

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
<th>No.</th>
<th>Free</th>
</tr>
</thead>
<tbody>
<tr>
<td>8509.80</td>
<td>Floor polishers</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8509.80.10</td>
<td>Kitchen waste disposers (disposals)</td>
<td></td>
<td>Free</td>
</tr>
<tr>
<td>8509.80.20</td>
<td>Other</td>
<td>No.</td>
<td>Free</td>
</tr>
<tr>
<td>8509.80.50</td>
<td>Can openers (including combination units)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8509.80.60</td>
<td>Electric toothbrushes</td>
<td>No.</td>
<td></td>
</tr>
<tr>
<td>8509.80.70</td>
<td>Humidifiers</td>
<td>No.</td>
<td></td>
</tr>
<tr>
<td>8509.80.80</td>
<td>Evaporative</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8509.80.90</td>
<td>Ultrasonic</td>
<td>No.</td>
<td></td>
</tr>
<tr>
<td>8509.80.100</td>
<td>Other</td>
<td>No.</td>
<td></td>
</tr>
</tbody>
</table>

(j)(1)
Per Unit Average

• **Definition (§190.2):**
  • Equal apportionment of the amount of duties, taxes and fees eligible for drawback for all units covered by a single line item on an entry summary to each unit of merchandise.
  • This method of refund calculation is required for substitution drawback claims.

<table>
<thead>
<tr>
<th>Per Unit Average Calculation: 9205.90.4020 (4.9%)</th>
<th>Drawback claimed on per unit average of duty value of imported item once exported</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clarinet, basic, $200 each</td>
<td>$350 average on line</td>
</tr>
<tr>
<td>Clarinet, upgraded, $500 each</td>
<td></td>
</tr>
</tbody>
</table>
Valuation of Merchandise
§ 190.11

- **Unused Merchandise:** Differences for Direct Identification and Substitution
  - Direct ID: Customs value upon entry into U.S. or pursuant to applicable accounting method
  - Substitution: Based on per unit average value per each unit on the line item
- **Manufacturing:** Cost of acquisition or production based on Generally Accepted Accounting Principals (GAAP); no variation of method for at least 1 year
- **Exports:** Selling price per EEI (if no selling price, then market price if for consignment, for example, per 15 CFR 30.6(a))
- **Destruction:** Value at time of destruction
### Valuation of Merchandise

#### § 190.11

**Unused Direct Identification Example**

<table>
<thead>
<tr>
<th>Tariff</th>
<th>Import Value (ea)</th>
<th>Import Duty Paid (ea)</th>
<th>Export Value (ea.)</th>
<th>Duty Rate</th>
<th>Duty for Exported Item (ea.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>87032401</td>
<td>$1,000</td>
<td>$25.00</td>
<td>$1,100</td>
<td>2.5%</td>
<td>n/a</td>
</tr>
</tbody>
</table>

- 1 unit at $1,000, 1 unit at $100 on import entry summary line
- Customs value utilized for entry into U.S.
- No average necessary
- Export more expensive item, claiming drawback on $1,000 item calculated from import invoice
Valuation of Merchandise

§ 190.11

Unused Substitution Example

<table>
<thead>
<tr>
<th>Tariff</th>
<th>Import Value Avg. (ea)</th>
<th>Import Duty Paid (ea)</th>
<th>Export Value (ea.)</th>
<th>Duty Rate</th>
<th>Duty for Exported Item (ea.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>87032401</td>
<td>$550</td>
<td>$27.50</td>
<td>$1,100</td>
<td>2.5%</td>
<td>$27.50</td>
</tr>
</tbody>
</table>

- 1 unit at $1,000, 1 unit at $100 on import entry summary line
- Per Unit Average value utilized, $550
- Export more expensive item, claiming drawback on lower of two, $550 average, **99% of $13.75**
- Changes business practice on imports

Selling price per the EEI
Valuation of Merchandise
§ 190.11
Manufacturing Substitution Example

<table>
<thead>
<tr>
<th>Tariff</th>
<th>Import Value for Component (ea)</th>
<th>Import Duty Paid (ea)</th>
<th>Value at Production (ea.)</th>
<th>Duty Rate</th>
<th>Duty for Exported Article (ea)</th>
</tr>
</thead>
<tbody>
<tr>
<td>87032401</td>
<td>$1,000</td>
<td>$25.00</td>
<td>$1,100</td>
<td>2.5%</td>
<td>n/a</td>
</tr>
</tbody>
</table>

- 1 unit at $1,000 on import entry summary line
- Cost of acquisition per GAAP of $1,100. Per Unit Average, only one unit at $1,000, compare to $1,100 and take lesser of two
- Manufacture and designate substituted part for imported part
- Export finished article
Unit of Measure Requirements

• Unit of measure (UOM) refers to the standard used to quantify the amount of the good that is the subject of a drawback claim.
  – i.g. kilograms (KG), pieces (PCS), each (EA)
• If your designated merchandise is a “sought chemical” as defined in § 190.2 that was contained in imported material and a substitution drawback claim is made
  – The claim on the chemical element that is the designated merchandise must be limited to the duty apportioned to that element on a unit-for-unit attribution using the unit of measure from the HTSUS
Unit of Measure Requirements

• Per § 190.51 Completion of drawback claims
  • Using the Unit(s) of measure is required under the HTSUS for substitution manufacturing and substitution unused merchandise drawback claims
    • 1313(j)(2) substitution unused merchandise
    • 1313(b) manufacturing substitution
  • § 190.51(a)(2)(ix)
    • The 10-digit HTSUS classification for the imported merchandise and would be applicable for the substitute merchandise along with the unit of measure must be reported

Harmonized Tariff Schedule of the United States (2019) Revision 9
Annotated for Statistical Reporting Purposes

<table>
<thead>
<tr>
<th>Heading/ Subheading</th>
<th>Article Description</th>
<th>Unit of Quantity</th>
<th>Rates of Duty</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>General</td>
<td>Special</td>
</tr>
<tr>
<td>6401</td>
<td>Waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes; Footwear incorporating a protective metal toe-cap.</td>
<td>prs</td>
<td>37.5%</td>
<td></td>
</tr>
</tbody>
</table>
## Unit of Measure Requirements

- The unit of measure specified must be the same that was required under the HTSUS for the designated imported merchandise.
- Per § 190.72 Proof of Exportation
  - § 190.72 (a)(4) Required export data shows proof of exportation that includes the quantity and unit of measure.

### Harmonized Tariff Schedule of the United States (2019) Revision 9

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<tr>
<td>6401</td>
<td>Waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes: Footwear incorporating a protective metal toe-cap.</td>
<td>lbs</td>
<td>37.5%</td>
</tr>
<tr>
<td>6401.10.00 00</td>
<td></td>
<td>prs</td>
<td>Free (AU, BH, CA, CL, D, IL, JO, MA, MX, OM, P, PE, R, SG) 0.9% (PA) 7.5% (CO) 37.5% (KR)(a)</td>
</tr>
</tbody>
</table>
Mixed Use

- **Definition**: Import entry that is used for both invoice level calculation (Core) and TFTEA substitution calculation.
- NPRM suggested not allowing these entries to be utilized for TFTEA drawback; final rule reversed CBP’s position.
- Per §190.51(a)(4), claimant must provide information to CBP upon request: import entry, import entry summary, commercial invoices and copies of all drawback claims where lines from entry summary were claimed previously for pre-TFTEA drawback claim.
- Allows utilization for reach-back for TFTEA.
- Eventually phased out over time.
First-Filed Rule § 190.51(a)(3)

• **Definition:** “Merchandise on a specific line on an entry summary may be designated for either direct identification or substitution claims but a single line on an entry summary may not be split for purposes of claiming drawback under both direct identification and substitution claims. The first complete drawback claim accepted by CBP which designates merchandise on a line on an entry summary establishes this designation for any remaining merchandise on that same line.”
First-Filed Rule § 190.51(a)(3)

- **Simplified Definition:** The first claim filed with respect to the merchandise designated on a given entry summary line limits the type of claim that can be filed for that entry summary line

  - **Direct identification**
  - **Substitution**
First-Filed Rule Example

<table>
<thead>
<tr>
<th>Import HTS</th>
<th>Qty ES Line Item</th>
<th>Line Item Value</th>
<th>Ad Valorem</th>
<th>Duty Available</th>
</tr>
</thead>
<tbody>
<tr>
<td>8511300080</td>
<td>500 Pieces</td>
<td>$100.00 Each</td>
<td>2.5%</td>
<td>$1,250</td>
</tr>
</tbody>
</table>

- ABC Supplier files claim for 100 pieces for TFTEA direct identification
- The remaining 400 pieces from the entry summary line:

  - **Can** be claimed for: TFTEA direct identification unused merchandise, TFTEA direct identification manufacturing
  - **Cannot** be claimed for: TFTEA substitution unused merchandise, TFTEA substitution manufacturing
Transfer Under the New Regulations

- Multi-Party drawback, where the importer and exporter are different parties. Company A imports goods and transfers to Company B, the exporter of the goods.
- Intermediate parties can also be involved. Company A imports goods and transfers goods to Company C, who transfers the goods to the exporter Company B.
- Can apply to direct identification drawback, although seen more often with substitution drawback.
TFTEA Transfer Requirements

• “Transfers of merchandise may be evidenced by business records kept in the normal course of business and no additional certificates of transfer shall be required.”
• New regulation on transfers, 190.10
• Must be received “directly” or “indirectly” (intermediate transfers) from the importer- Remember no double substitution
• Review transfer requirements in 190.10- Records
• Consider First Filed Rule
• With joint and several liability, some importers may feel more comfortable with agreements and some type of transfer records (a private CD?)
Accounting Methods - § 190.14

- Largely unchanged in Part 190
- Applicable to instances where you commingle and must directly identify merchandise that is fungible:
  - 1313(j)(1)
  - Transfers from importer to party substituting
- For most methods, inventory records must capture all receipts and all disbursements from inventory
- Specific methods:
  - FIFO
  - LIFO
  - Low to High (Blanket and Longest Avg Inv turnover)
Updates to TFTEA Existing Privileges

• Per § 190.91(a)(2) claimants who have existing waiver of prior notice approvals prior to February 24, 2019 and under 19CFR191;

• Waiver of prior notice will remain in effect if;
  • Certification must be provided as part of each completed claim filed on or after 2.24.19

190.51(a)(2)(xvi): “The undersigned acknowledges the current statutory requirements under 19 U.S.C. 1313 and the regulatory requirements in 19 CFR part 190, and hereby certifies continuing eligibility for the waiver of prior notice (granted prior to February 24, 2019) in compliance therewith.” This certification may only be made for waiver of prior notice for the specific type of drawback claim for which the application was previously approved under 19 CFR 191, except that applications approved under 19 U.S.C. 1313(j)(1) will also be applicable to claims for the same type of merchandise if made under 19 U.S.C. 1313(j)(2).
Updates to TFTEA Existing Privileges

- Per § 190.91(a)(2) claimants who have accelerated payment approvals prior to February 24, 2019 and under 19CFR191;
- Accelerated Payment will remain in effect if;
  - Certification must be provided as part of each completed claim filed on or after 2.24.19

190.51(a)(2)(xvi): “The undersigned acknowledges the current statutory requirements under 19 U.S.C. 1313 and the regulatory requirements in 19 CFR part 190, and hereby certifies continuing eligibility for accelerated payment (granted prior to February 24, 2019) in compliance therewith.” This certification may only be made for accelerated payment for the specific type of drawback claim for which the application was previously approved under 19 CFR 191, except that applications approved under 19 U.S.C. 1313(j)(1) will also be applicable to claims for the same type of merchandise if made under 19 U.S.C. 1313(j)(2).
Updates to TFTEA Existing Privileges

- Manufacturing rulings previously approved under part 191 must be amended and modified in accordance with part 190 to ensure compliance.
  - When ruling is modified and approved under 190; privileges must also be certified
TFTEA Application Changes

• All applications must be sent to uniformly change from 19CFR191 to 19CFR190
  • Rough samples available on CBP website only show 19CFR191 and all adjoining 191 regulations. Read throughs and amendments need to be made to reflect 190 updated TFTEA changes.

• Showing substitution based on HTSUS eliminates the uncertainty as to whether the standard for substitution has been met.
  • Essentially eliminating the need for “Same Kind & Quality” and proving “Commercial Interchangeability”

• All drawback claim type filing timelines are moved to 5-year period from the date of importation of the merchandise.
Questions and Contact Information

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