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## DEPARTMENT OF HOMELAND SECURITY

### Customs and Border Protection

## DEPARTMENT OF THE TREASURY

### 19 CFR Part 191

[CBP Dec. 04—33]

RIN 1505-AB44

### 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:** Final rule.

**SUMMARY:** This document amends the Customs and Border Protection (CBP) 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 changes implemented by this document 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, this amendment reflects that merchandise processing fees are also eligible to be claimed as drawback in these circumstances.

**DATES:** Effective November 8, 2004.

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

#### SUPPLEMENTARY INFORMATION:

#### Background

##### *Merchandise Processing Fees*

Merchandise processing fees are fees the Secretary of the Treasury charges and collects 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 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 purchased or 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. The term “drawback payable” under 19 U.S.C. 1313(p)(2)(A)(iii) and (iv) includes the merchandise processing fee.

Consistent with the determination of the CAFC 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).

##### *Amendment to CBP Regulations To Reflect the Texport Oil Decision*

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

On October 2, 2003, CBP published in the **Federal Register** (68 FR 56804) a proposal to amend §§ 191.3, 191.51 and 191.171 to reflect that the *Texport Oil* decision is applicable, in limited circumstances, to drawback based on substitution of finished petroleum derivatives.

Comments were solicited on the proposal.

#### Discussion of Comment

One comment was received in response to the solicitation of public comment in 68 FR 56804. The commenter supported CBP’s proposal to reflect the *Texport Oil* court decision in part 191 of the CBP Regulations as regards drawback based on substitution of finished petroleum derivatives. The commenter noted that the proposed amendments contribute to the goal of offsetting the cost of raw materials.

#### Conclusion

After review of the one comment received, and upon consideration, CBP has decided to adopt as final the proposed rule published in the **Federal Register** (68 FR 56804) on October 2, 2003.

#### The Regulatory Flexibility Act and Executive Order 12866

Because these regulations serve to conform the CBP Regulations to reflect the full scope of a recent decision by the Court of Appeals for the Federal Circuit whereby, in limited circumstances, merchandise processing fees are eligible to be claimed as drawback, it is certified pursuant to the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* that this amendment will not have a significant impact on a substantial number of small entities. Further, this amendment does not meet the criteria for a “significant regulatory action” as specified in Executive Order 12866.

#### Signing Authority

This document is being issued in accordance with 19 CFR 0.1(a)(1).

#### Drafting Information

The principal author of this document was Ms. Suzanne Kingsbury,

Regulations Branch, Office of Regulations and Rulings, U.S. Customs and Border Protection. However, personnel from other offices participated in its development.

#### List of Subjects in 19 CFR Part 191

Claims, Commerce, CBP duties and inspection, Drawback.

#### Amendments to the Regulations

■ For the reasons stated above, part 191 of the CBP Regulations (19 CFR part 191) is amended as follows:

#### PART 191 — DRAWBACK

■ 1. The general authority citation for part 191 continues to read as follows:

**Authority:** 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States), 1313, 1624.

■ 2. Section 191.3(a)(4) and (b)(2) are revised as follows:

#### § 191.3 Duties and fees subject or not subject to drawback.

(a) Duties and fees subject to drawback include:

\* \* \* \* \*

(4) Merchandise processing fees (see § 24.23 of this chapter) for unused merchandise drawback pursuant to 19 U.S.C. 1313(j), and drawback for substitution of finished petroleum derivatives pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv).

(b) \* \* \*

(2) Merchandise processing fees (see § 24.23 of this chapter), except where unused merchandise drawback pursuant to 19 U.S.C. 1313(j) or drawback for substitution of finished petroleum derivatives pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv) is claimed; and

\* \* \* \* \*

■ 3. In § 191.51, paragraph (b)(2) introductory text is revised to read as follows:

#### § 191.51 Completion of drawback claims.

\* \* \* \* \*

(b) \* \* \*

(2) *Merchandise processing fee apportionment calculation.* Where a drawback claimant seeks unused merchandise drawback pursuant to 19 U.S.C. 1313(j), or drawback for substitution of finished petroleum derivatives pursuant to 19 U.S.C. 1313(p)(2)(A)(iii) or (iv), for a merchandise processing fee paid pursuant to 19 U.S.C. 58c(a)(9)(A), the claimant is required to correctly apportion the fee to that merchandise that provides the basis for drawback when calculating the amount of

drawback requested on the drawback entry. This is determined as follows:

\* \* \* \* \*

■ 4. In § 191.171, a new paragraph (c) is added to read as follows:

#### § 191.171 General; drawback allowance.

\* \* \* \* \*

(c) *Merchandise processing fees.* In cases where the requirements of paragraph (b)(1) of this section have been met, merchandise processing fees will be eligible for drawback.

Approved: October 4, 2004.

**Robert C. Bonner,**

*Commissioner, U.S. Customs and Border Protection.*

**Timothy E. Skud,**

*Deputy Assistant Secretary of the Treasury.*  
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#### DEPARTMENT OF VETERANS AFFAIRS

#### 38 CFR Parts 1 and 3

#### RIN 2900-AM09

#### Presumptions of Service Connection for Diseases Associated With Service Involving Detention or Internment as a Prisoner of War

**AGENCY:** Department of Veterans Affairs.  
**ACTION:** Interim final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) is issuing this interim final rule to establish guidelines for establishing presumptions of service connection for diseases associated with service involving detention or internment as a prisoner of war. In accordance with those guidelines, this interim final rule also establishes presumptions of service connection for atherosclerotic and hypertensive heart disease and for stroke disease arising in former prisoners of war. These rules are necessary because claims based on service involving detention or internment as a prisoner of war present unique medical issues and because factors including the lack of contemporaneous medical records during periods of captivity and the relatively small body of available medical information present obstacles to substantiating claims for service-connected benefits based on prisoner-of-war service. By establishing guidelines for identifying diseases associated with service involving detention or internment as a prisoner of war, these rules will help VA to ensure that claims for service-connected benefits for disability or death of former prisoners of

war are decided fairly, consistently, and based on all available medical information concerning the diseases associated with detention or internment as a prisoner of war.

**DATES:** This interim final rule is effective October 7, 2004. Comments must be received on or before November 8, 2004.

**ADDRESSES:** Written comments may be submitted by: mail or hand-delivery to Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; fax to (202) 273-9026; e-mail to [VAregulations@mail.va.gov](mailto:VAregulations@mail.va.gov); or, through <http://www.Regulations.gov>. Comments should indicate that they are submitted in response to "RIN 2900-AM09." All comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 273-9515 for an appointment.

#### FOR FURTHER INFORMATION CONTACT:

David Barrans, Deputy Assistant General Counsel (022D), Office of General Counsel, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-6332.

**SUPPLEMENTARY INFORMATION:** VA is revising its regulations to include a new provision, codified at 38 CFR 1.18, establishing guidelines for determining whether to establish new presumptions of service connection for any disease associated with service involving detention or internment as a prisoner of war. VA is also amending its adjudication regulations at 38 CFR 3.309(c) to add atherosclerotic heart disease or hypertensive vascular disease and stroke to the list of diseases VA will presume to be associated with service involving detention or internment as a prisoner of war (POW), and to reflect statutory changes. These new presumptions of service connection reflect VA's determination that presumptions for heart disease and stroke are warranted by application of the guidelines set forth in § 1.18.

#### Guidelines for Identifying POW Presumptive Conditions

Statutory and regulatory standards currently exist to guide VA in identifying diseases associated with exposure to herbicide agents, hazards of service in the Gulf War, and ionizing radiation. See 38 U.S.C. 1116 and 1118; 38 CFR 1.17. VA has determined that it would be helpful to establish standards to guide VA in identifying diseases