

## CLIENT ALERT

### Treasury and CBP Must Allow Drawback Refunds of Excise Taxes Pending Government Appeal

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The government has lost another battle in its fight to prevent refunds of certain excise taxes paid by importers. Earlier this year, the U.S. Court of International Trade (CIT) struck down a regulation issued by the Department of the Treasury and U.S. Customs and Border Protection (Treasury and CBP, collectively the agencies) designed to limit the scope of those refunds. *Nat'l Ass'n of Mfrs. v. United States Dep't of Treasury*, No. 19-00053, [slip op. at 20-09](#) (Ct. Int'l Trade Jan. 24, 2020). Although the CIT ruled the regulation invalid, the government sought permission to continue to apply the regulation while it appealed the court's decision. This would have allowed the government to deny refunds for the excise taxes at issue. Last week, the CIT denied the government's request. *Nat'l Ass'n of Mfrs. v. United States Dep't of Treasury*, No. 19-00053, [slip op. at 20-67](#) (Ct. Int'l Trade May 15, 2020)

#### Regulations at Issue

The United States imposes federal excise taxes on certain domestically consumed goods (e.g., wine, beer, spirits, tobacco, petroleum products). However, U.S. companies may be eligible for a "drawback." A drawback is a refund of certain duties, fees, or taxes collected on imports. A common drawback is the "substitution drawback," which allows for a refund of taxes, fees, and duties collected on imports when the importer exports similar goods classified under the same Harmonized System (HS) tariff classification code. The excise tax is meant to raise revenue, whereas the drawback encourages exports by allowing a refund of taxes paid on imports.

Treasury and CBP said that under the current legal framework, the drawback rules led to a double drawback from some importers. That is, some U.S. companies could receive a refund of excise taxes paid on imported products even though the substitute exported product was never subject to any excise tax. To address this concern, Treasury and CBP promulgated a regulation to stop the "double drawback." The regulation limited the drawback to the amount of taxes paid and not previously refunded.

#### Court of International Trade Strikes Down the Regulation

In January 2020, the CIT struck down the "double drawback" regulation. The court held that the regulation conflicted with the governing drawback statute (Trade Facilitation and Trade Enforcement Act of 2015). The court said that there are two competing regimes: the federal excise tax, which raises revenue, and the drawback statute, which encourages exports by refunding excise taxes. When choosing between these regimes, the court said Congress has repeatedly chosen to encourage exports at the expense of lost excise tax revenue.

Accordingly, the CIT invalidated the regulation and U.S. companies can continue to seek refunds of excise tax they paid on imported goods when they have exported similar goods, even if they did not pay excise tax on the exported goods.

## The Agencies Attempt To Apply Invalidated Regulation

After it lost, Treasury and CBP appealed the case and requested that the CIT stay the case pending appeal. If granted, the stay would have allowed Treasury and CBP to operate as if the struck-down regulation was valid (and not have to issue excise tax refunds for “double drawbacks”). The court denied Treasury and CBP’s request. The CIT said a stay was not appropriate because the government was likely to lose on appeal, the government would not suffer irreparable injury absent a stay, and the stay would injure the complainants because drawback payments do not include interest.

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