Judicial Decisions

United States Customs Court, No. 76-3-00637.
Decided April 12, 1977

Zenith Radio Corporation v. The United States.

Before RICHARDSON, NEWMAN and BOE, Judges.

RICHARDSON, Judge: Plaintiff, a domestic manufacturer of various consumer electronic products,[1] has instituted this action under 19 U.S.C.A., section 1303, for judicial review of the decision of the Secretary of the Treasury, and has moved for summary judgment pursuant to rules 4.12 and 8.2 of the rules of this court; and defendant has cross-moved for summary judgment. Plaintiff contends that the Government of Japan pays or bestows directly or indirectly a bounty or grant upon the exportation from that country of the aforesaid consumer electronic products in the form of the remission of, or exemption from, payment of a consumption tax to which these products would have been subjected had they not been exported. Defendant contends that the Japanese tax remission or exemption does not constitute a bounty or grant within the meaning of section 1303.

The essential facts of the controversy are not in dispute. The Japanese Commodity Tax Law, cited as Commodity Tax Law (March 31, 1962, Law No. 48) as revised, is a single-stage consumption tax which is levied usually at the manufacturing level on a fairly extensive list of consumer goods, inclusive of electronic products of the types manufactured by plaintiff. Rates of tax range generally from 5 to 40 percent. Upon exportation of these products from Japan, the tax is either remitted, if previously paid, or the products are exempted from the payment of the tax.

Plaintiff petitioned the Secretary of the Treasury in 1970, alleging that

[1]Television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes.

the exemptions from or refund of the so-called commodity tax under the aforementioned Japanese Commodity Tax Law when the said electronic products were exported from Japan amounted to the payment or bestowal of bounties or grants directly or indirectly, upon the manufacture, or production in, or exportation from, Japan of said consumer electronic products. The petition asked the Secretary of the Treasury to impose countervailing duties on these imported products in accordance with section 1303. On January 7, 1976, a "Final Negative Countervailing Duty Determination" in the case of "Certain Consumer Electronic Products From Japan" was published in the Federal Register [41 Fed. Reg. 1298] at the instance of the Acting Commissioner of Customs upon the approval of the Acting Assistant Secretary of the Treasury. This determination stated that "a final determination is hereby made in this proceeding, that . . . no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacturer [*sic*], production, or exportation of certain consumer electronic products from Japan."

Plaintiff after giving notice to the Secretary of the Treasury of its intention to contest this determination, which notice was duly published in the Federal Register [41 Fed. Reg. 10235], then instituted this action for a review of this determination in accordance with the provisions of 19 U.S.C.A., section 1516(d), as amended by the Trade Act of 1974. Section 1516(d), as amended, empowers this court to review, at the instance of American manufacturers, producers, or wholesalers, negative countervailing duty determinations made by the Secretary of the Treasury under 19 U.S.C.A., section 1303, relative to the existence of a bounty or grant on merchandise exported to the United States. The motions for summary judgment follow the joining of issue in said action. There is no question here but that the Japanese commodity tax in issue is either remitted when merchandise is exported from Japan if previously paid thereon, or the exported merchandise is not subject to the payment of tax. Plaintiff contends that the forgiveness of the commodity tax on exportation from Japan of the subject electronic products confers a direct or indirect benefit on the exportation of such products. Plaintiff argues:

> . . . The Supreme Court and the special customs tribunals have repeatedly held that the remission of taxes on exportation constitutes the conferral of a bounty or grant within the scope of our countervailing duty law. The legislative history of section 303 of the Tariff Act of 1930, as amended, provides ample support for that position . . ., and the Secretary of the Treasury should be required to direct the assessment of countervailing duties to offset the bounty or grant so bestowed . . . [Brief in support of plaintiff's motion for summary judgment p. 5.]

Defendant contends that the Japanese commodity tax is not a bounty or grant within the meaning of section 1303. Defendant argues among other things:

> The historical and legislative background of the countervailing duty statute demonstrates that the countervailing duty provision was intended to cover only the excessive

remission of taxes directly related to the imported product. For over 75 years the Treasury Department construed the provision as applying only to such excessive remissions. Since at least 1951, Congress has been well informed of the Treasury's practice . . . Thus, Congress must be deemed to have approved the administrative interpretation. [Brief in opposition to plaintiff's motion for summary judgment and in support of defendant's cross-motion for summary judgment p. 4.]

* * *

The court agrees with the plaintiff in this case, and concludes that as a matter of law the Japanese commodity tax remission or exemption in issue here constitutes a bounty or grant within the meaning of section 1303. As such, plaintiff's motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied.

Section 1303 has its genesis in section 5 of the Tariff Act of 1897 which reads:

That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed . . . .

In *Downs v. United States,* 187 U.S. 496 (1903), the Supreme Court of the United States held that tax remission is a form of indirect bounty within the meaning of section 5 of the 1897 Act. The *Downs* case involved an elaborate scheme of the Russian government to control the production and price of sugar. Exporters of sugar were relieved of the ordinary excise tax which would have been payable had the sugar been sold domestically, and additionally, they received marketable certificates of value for their exports. These certificates could be sold to other sugar producers who would then be free to have their surplus sugar reclassified as free sugar and sold in the domestic market without the prohibitive tax burden that would otherwise have accompanied the sale of surplus. The Supreme Court, addressing itself to this scheme stated (p. 515):

The details of this elaborate procedure for the production, sale, taxation, and exportation of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, viz.: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood and that sugar exported pays no tax at all. . . .When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name, it is disguised, it is a bounty upon exportation.

The *Downs* case was cited almost immediately by the Board of General Appraisers for the proposition that tax remission upon exportation constitutes the conferral of a bounty or grant under the 1897 Act. See *F. W. Myers & Co. v. United States,* 6 Treas. Dec. 260, 264-65, T.D. 24306 (1903). It was also cited

for the same proposition in *Notes on Tariff Revision* (1908), a 953-page document prepared for the use of the Committee on Ways and Means, U.S. House of Representatives.

* * *

Section 5 of the 1897 Act was reenacted essentially unchanged as section 6 of the 1909 Tariff Act. The words "province or other political subdivision of government" were added, by the 1909 Act, thus broadening the scope of the statute. Hence, reenactment by Congress of the same language in the aftermath of the *Downs* decision and on the representation made to Congress by so eminent an authority on judicial construction as the assistant counsel of the Treasury Department, represents a classical example of congressional ratification of the judicial construction put upon this statutory language. Indeed, this court said as much in *American Express Company v. United States,* 67 Cust. Ct. 141, 150-51, C.D. 4266 (1971), affirmed without reaching this issue, 60 CCPA 86, C.A.D. 1087 (1973), a case involving the construction of section 1303 [prior to amendment by the Trade Act of 1974] as applied to the practice of the Italian Government in its remission of certain internal taxes upon the exportation of transmission tower units to the United States. And inasmuch as this language has been a part of every United States countervailing duty statute dating from 1897, the argument advanced by the Treasury Department that the teachings in *Downs* as to the countervailability of tax remission is *dicta,* is without support.

In this connection, the court notes that defendant advances the argument that Congress did not intend that the scope of section 5 of the 1897 Act should be any different than the predecessor statute was under the 1894 Act when nonexcessive tax remission was expressly excluded from the countervailing duty measure applied to bounty-fed sugar importations (paragraph 1821/2, Tariff Act of 1894), and that the legislative history indicative of such congressional intent "apparently had not been brought to the attention of the courts in prior cases." [See footnote 12, defendant's brief p. 13.] In other words defendant implies that the courts in *Downs* overlooked congressional limitations on the countervailing duty statute preserved for the 1897 Act from the 1894 Act as manifest in congressional debates.

* * *

But even if congressional debates could have been considered in *Downs,* they would not have changed the results reached by the courts in that case. Paragraph 182 1/2 of the 1894 Act had expressly excepted nonexcessive tax remissions from the specific countervailing duty applicable to bounty-fed sugar imports while recognizing tax remission to be a form of indirect bounty. And of course, the term "net bounty" as used in the congressional debates on the measure by the 54th Congress clearly referred to the excess over the actual tax remitted. But the term "net amount of . . . bounty or grant" introduced into

section 5 of the 1897 Act by the 55th Congress is another matter. Even in the House version of the countervailing duty measure which was passed and sent to the Senate it is to be seen that the House moved significantly away from the strictures of the countervailing duty provision as passed by the 54th Congress, in proposing alternative measures which, if enacted into law, would have given the United States the option of countervailing the full bounty or just the excess bounty above the tax remitted. The House version provided that bounty-fed sugar "shall pay, in addition to the foregoing rates, a duty *equal to such bounty, or so much thereof* as may be in excess of any tax collected by such country upon such article, or upon the beet or cane from which it was produced." (Emphasis added.) 30 CONG. REC. 316 (1897).

* * *

The Senate substituted language for the House version which later became section 5 following the House accession to the Senate amendment. And after the Senate version was introduced through the Senate Finance Committee, the term "net bounty" was never used in the debates that followed in reference to the Senate proposal. . . .

Since it is clear that the Senate debates indicate an intention on the part of that body of Congress to reach the full amount of the bounty paid under the language it proposed, the term "net amount of . . . bounty . . ." was obviously intended to apply to nothing less than the full amount of the benefit foreign exporters derived from their governments. But the Senate didn't stop here. In addition, it introduced the words "grant" and "bestow" for the first time in the countervailing duty measure. The Senate was fully aware of the new German sugar tax law which was enacted in 1896, and of its increased bounties and burdensome consumption tax which it imposed upon the consumption of sugar by the German people—a burden which drew reactions of disapproval and adverse comment by various senators who participated in the debates. The new consumption tax amounted to approximately $2.16 per pound. However, sugar exported under sugar control was expressly exempt from this tax. Consequently, one need not have been a sugar expert to appreciate that exemption from the consumption tax alone (disproportionately higher than the bounties paid) would continue to stimulate exportation of sugar surplus from Germany *even if the bounties were not paid,* and thus continue to imperil the then incipient U.S. cane sugar production, unless checked by a countervailing duty measure.

Hence, it would appear that the new sugar tax levied by Germany against its people when sugar was consumed in Germany but excused when sugar was exported from Germany became the catalyst which triggered the employment of such sweeping language in the Senate countervailing duty proposal. And the words chosen were eminently appropriate to reach such tax abatement. . . . as the Supreme Court said in *Nicholas & Co. v. United States,* 249 U.S. 34 (1919) at page 39: "If the word 'bounty' has a limited sense the word 'grant'

has not. A word of broader significance than 'grant' could not have been used."

There can be no question then, but that the 55th Congress was faced with a different challenge than that which confronted the 54th Congress, and as a consequence, responded to it with equally different legislation. As stated by the former clerk of the House Committee on Ways and Means in *Notes on Tariff Revision, supra* at page 834 with respect to section 5 of the 1897 Act, "This section was a new departure in tariff legislation. . . ."

There are other contentions advanced by the Government in connection with additional legislation enacted by Congress and international commitments of the United States involving policy decisions which do not supersede the acts of Congress. The court finds that the matters dealt with in these contentions do not temper the mandatory character of the countervailing duty statute in issue or illuminate the congressional intent underlying its enactment.

With respect to the Government's contention concerning the United States' commitment under Article VI(4) of Part II of the GATT,[2] it must be pointed out here that this contention has previously been considered and rejected by the courts. In *American Express Company v. United States, supra* at page 152, this court said with respect to this argument:

> . . . GATT is a trade agreement, which if in conflict with a law of Congress [19 U.S.C.A. § 1303], must yield to the latter.

And our appeals court went even further in that case in regard to this argument when it said [60 CCPA at page 97, footnote 14]:

> That holding finds support not only in the reasoning of the Customs Court that a law of Congress prevails over a trade agreement but also in the fact that the United States undertook Part II of the GATT, which includes Article VI(4), ". . . to the fullest extent not inconsistent with existing legislation." *Protocol of Provisional Application of the GATT,* 61 Stat. A2051 (1947).

Thus, it becomes readily apparent that although our countervailing duty statute [section 1303] speaks in more general terms of *bounties* and *grants* whereas the countervailing duty provision contained in Article VI(4) of Part II of the GATT refers specifically to exemption from or refund of taxes, the GATT's inconsistency "with existing legislation" has been determined by the construction put upon the statutory terms "bounty" and "grant" by the Supreme Court of the United States in *Downs v. United States, supra,* in holding that tax abatement or remission comes within the meaning of those terms.

The court does find it somewhat incongruous for defendant, while insisting that Congress did not intend that tax remission be countervailed under section 5

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[2]This provision expressly prohibits contracting parties from levying countervailing duties against each other's products to offset export bounties aiding their exportation where the bounties are in the form of tax remissions or tax exemptions; and the Government maintains that such contractual obligation is binding on the United States.

of the 1897 Act and that the Supreme Court did not so construe that statute in *Downs,* to assert in its brief (p. 15): "Of course, when the taxes are not directly related to the imported product . . . their remission constitutes the bestowal of a bounty or grant upon the exportation of the product."

The defendant represents that it has had a long-standing administrative interpretation of the countervailing duty statute which permits it to determine when in its judgment a bounty or grant is excessive and thus should be countervailed. This administrative interpretation is in conflict with the decisions of the Supreme Court of the United States construing the countervailing statute, and must yield.

The Secretary of the Treasury, in administering the countervailing duty statute, must discharge his responsibility in accord with the congressional intent in that statute as interpreted by the Supreme Court of the United States.

The language of section 1303 is abundantly clear, having been construed by the courts in decisions which in turn have been approved by Congress. Generally, the scope of the statute has been held by the courts to be extremely broad; specifically, the statute has been held to embrace remissions of indirect taxes on exportation.

> It is a familiar rule that long-established administrative practice is determinative only when the meaning of the statute is doubtful. *Pittsburgh Plate Glass Co. v. United States,* 2 Ct. Cust. Appls. 389, T.D. 32162. . . .Therefore, an administrative practice in plain violation of the terms of the statute cannot be urged as determining the construction that should be given to it. [*United States v. Jules Raunheim (Inc.) et al.,* 17 CCPA 425, 431 (1930).]

The Japanese commodity tax involves the remission of an indirect tax and, as such, is countervailed under section 1303.

Judgment will be entered in accordance with this opinion.

J. RICHARDSON