Judicial Decisions

THE UNITED STATES v. ZENITH RADIO CORPORATION,
No. 77-19 (—F.2d—) (C.A.D. 1195)

Before MARKEY, *Chief Judge,* RICH, BALDWIN, LANE and MILLER, *Associate Judges.*

MARKEY, Chief Judge.

[1] Appeal by the United States from a judgment of the United States Customs Court, 78 Cust. Ct. __, C.D. 4691, 430 F. Supp. 242 (1977), holding that remission of a Japanese commodity tax, on electronic products exported from Japan, constitutes a bounty or grant under § 303, Tariff Act of 1930, as amended, 19 U.S.C. 1303 (Supp. V 1975), and granting summary judgment to Zenith Radio Corporation (Zenith). We reverse.

Background

In 1970, Zenith petitioned the Commissioner of Customs,[1] alleging that bounties or grants were being bestowed upon the manufacture and export of certain products[2] from Japan. The Commissioner investigated and, on January 7, 1976, published a "Final Negative Countervailing Duty Determination," announcing that "no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303." 41 Fed. Reg. 1298 (1976). Zenith, pursuant to § 516(d), 19 U.S.C. 1516(d) (Supp. V 1975), contested the determination in the United States Customs Court.

[1]Although § 303 imposes the burden of making countervailing duty determinations upon the Secretary of the Treasury, regulations (19 C.F.R. § 16.24(b) (1970), now 19 C.F.R. § 159.47(b) (1976)), require communication with the Commissioner of Customs.

[2]The products include: television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio/tape recorder combinations, tape players, record players and phonographs complete with amplifiers and speakers, tape recorders, and parts of television receivers; color television picture tubes, resistors, transformers (deflection components), and tuners for receivers with integrated circuits. 37 Fed. Reg. 10,087 (1972), *as amended* 37 Fed. Reg. 11,487 (1972).

The Japanese Tax

The Japanese Commodity Tax Law, Law No. 48 of 1962, as revised and insofar as it appears in the record, imposes a single-stage "commodity tax" upon a manufacturer's shipment of specified electronic products for consumption in Japan. The same products are exempt from the tax when shipped for export.[3] A tax paid on a shipment for home consumption is refunded if that shipment is later exported.[4] It is undisputed that the tax is internal, and that the application of the tax to internal shipments, while refusing to apply it to exports,[5] is the sole governmental action which was adjudged below to have created a countervailable bounty or grant.

The Customs Court

Upon application by the United States, a three-judge panel was convened pursuant to § 108, Customs Court Act of 1970. 28 U.S.C. 225 (1970). Both parties moved for summary judgment. Relying heavily upon *Downs v. United States,* 187 U.S. 496 (1903), the court held that remission of the Japanese Commodity Tax constituted a bounty or grant under § 303, as a matter of law.[6]

Accordingly, the court granted Zenith's motion for summary judgment and ordered the Secretary of the Treasury to determine the net amounts of the bounties or grants and to assess countervailing duties equalling those amounts "on the subject electronic products exported from Japan, entered or withdrawn from warehouse for consumption on or after the day following the date of entry of this Order."

The Issue

The dispositive issue is whether the mere remission of an excise[7] tax must, as

[3]Tax exemption is also accorded certain goods sold at home to educational and welfare institutions, the National Museum, and other specified purchasers.

[4]We employ "remission" to denote both tax exemption and tax refund, which are legally indistinct on this appeal.

[5]A tax on American exports would be unconstitutional. U.S. CONST art. 1, § 9, cl.5. Fairbank v. United States, 181 U.S. 283 (1901). Amicus cites the remission of state taxes upon shipments into other states of the United States. Neither consideration is applicable to a determination under § 303.

[6]Judge Richardson wrote for the court. Judges Newman and Boe filed concurring opinions. The thorough treatment given the issues by the distinguished judges of the panel rests essentially upon an interpretation of *Downs* with which we differ.

[7]The parties have described the tax as a "commodity," "consumption," and "excise" tax. For clarity, we employ "excise" throughout.

a matter of law, be deemed a bounty or grant under 19 U.S.C. 1303 (Supp. V 1975):[8]

§ 1303. Countervailing duties.

(a) Levy of countervailing duties.

(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of 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 any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

OPINION

Prior Cases

The rationale supporting the judgment below begins with the view that the applicable law is to be found in a paragraph from the 1903 Supreme Court opinion in *Downs,* supra.[9] Though the Customs Court remarked the presence of an elaborate certificates-plus-tax remission scheme, it found primary support for its judgment in this paragraph (from which the court quoted the first and last sentences) in the lengthy *Downs* opinion:

> 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. The mere imposition of an import duty of three rubles per pood, paid upon foreign sugar, is, like all protective dutes, a bounty, but is a bounty upon production and not upon exportation. 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. (187 U.S. at 515.)

Opinions must be read in their entireties and in the light of the facts of the case. *Armour & Co. v. Wantock,* 323 U.S. 126, 133 (1944). Though the first and last sentences of the quoted paragraph, considered in vacuo, would sup-

[8]The United States contends on appeal that under § 516(g), 19 U.S.C. 1516(g) (Supp. V 1975), the Customs Court exceeded its subject matter jurisdiction in ordering duties imposed prior to publication of the decision in the Customs Bulletin. We do not reach that issue.

[9]Post *Downs,* the world has seen two World Wars, an industrial revolution, a scientific revolution, and flight from Kitty Hawk to the moon. Customs duties, though large, are not our sole source of government funds, as they virtually were prior to 1916. If, nonetheless, the Supreme Court had established the law in 1903, mere passage of years could not effect our decision, the duty of revising laws to fit a new world having been constitutionally assigned to the Congress.

port the judgment below, their effect as binding precedent depends upon their relationship to the underlying facts and the remainder of the opinion in *Downs*. "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 398 (1821).

The clearest complete explanation of the complex Russian sugar scheme in *Downs* appears in the Board of General Appraisers' opinion, *Downs v. United States,* 4 Treas. Dec. 405, 409-413, T.D. 22984 (1901). The excise tax and certificate elements of the scheme were there described as:

> VI. That, upon the exportation of said sugar . . ., the Russian Government, . . . released said sugar from said tax of 1.75 rubles . . . by a refund . . . a cancellation of indebtedness, or otherwise.
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> VII. That, in addition to remitting said excise tax, the Government issued to the exporter a certificate certifying that he had exported . . . free sugar. That . . . such certificates . . . have a substantial market value. . . .
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> VIII. That said certificates are sold to and used by sugar manufacturers or refiners, who are thereby enabled to transfer from their "free reserve or free surplus" to their "free sugar" an amount of sugar equal to the amount shown by said certificates to have been exported, which amount may then be sold for domestic consumption on paying the ordinary tax of 1.75 rubles per pood (to which free sugar is regularly subject). (4 Treas. Dec. at 411.)

The board recognized that the combination of (1) regular and additional tax rebates, and (2) export certificates, operated to confer a bounty on sugar exports:

> It is manifest . . . that the . . . receives a valuable bonus . . . and that this bonus accrues . . . upon the exportation. . . . The export certificates or vouchers . . . are only the legal evidence of this valuable privilege or grant conferred by the Government, without whose authority such transfers of sugar would be valueless and of no effect.
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> Our conclusion, therefore, is that a bounty or grant . . . has been paid or bestowed . . . so as to work a benefit or advantage . . . as follows:
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> First. . . . the Government remitted or refunded the excise tax . . . or otherwise canceled the indebtedness of the sugar manufacturer, so that he was enabled to place his product upon the market free from the burden of either the regular or additional excise tax.
>
> Second. The certificate . . . had a substantial market value, and was transferable, and operated as a premium, grant, bonus, or reward. (*Id.* at 413.)

The whole Russian scheme, involving import duties, remission of regular and additional excise taxes, export certificates, and sugar transfers, was before the board, which did not decide the matter piecemeal. Hence, the appellate courts were faced with a board decision resting not on either of two independent grounds, but on a single ground having at least two important elements, and there was no call in *Downs* for the board, the Fourth Circuit, or the Supreme Court to decide whether a non-excessive remission of an excise tax constitutes a *per se* bounty or grant.

On appeal, the Fourth Circuit affirmed, *Downs v. United States,* 113 F. 144 (4th Cir. 1902), adopting the board opinion and focusing its own attention on the export certificates:

> We reach the conclusion that the collector of the port of Baltimore, under the provisions of the fifth section of the tariff act of July 25, 1897, properly imposed the duty now complained of by the appellant. We find that the Russian exporter of sugar obtains from his government a certificate, solely because of such exportation, which is worth in the open markets of that country from 1 ruble and 25 kopecks to 1 ruble and 64 kopecks per pood, or from 1.8 to 2.35 cents per pound. Therefore we hold that the government of Russia does secure to the exporter of that country, as the inevitable result of its action, a money reward or gratuity whenever he exports sugar from Russia, and we think it was from such indirect grants as this that the congress of the United States intended to protect the manufacturers of this country, by authorizing the secretary of the treasury to make all proper regulations for the assessment and collection of such additional duties as were imposed by the collector on the sugars imported by the appellant. (*Id.* at 145.)

After devoting over ten pages to the elaborate Russian scheme in *Downs,* the Supreme Court referred to the petitioner's position, 187 U.S. at 512:

> It is practically admitted in this case that a bounty equal to the value of these certificates is paid by the Russian government, and the main argument of the petitioner is addressed to the proposition that this bounty is paid, not upon exportation, but upon production.

The remainder of the paragraph initiated by that sentence explains at length how bounties upon exportation may operate as bounties upon production and vice-versa.[10] The Court then responded to Downs' argument that a Russian exporter received the same amount whether or not he exported:

> But the fact that he receives the same amount, whether the goods are exported or sold at home, is not the proper test whether a bounty is paid upon exportation. If no bounty at all were paid all sugar, or at least all "free sugar," would pay the same tax, whether sold at home or exported abroad; and in this case the free sugar upon which the tax is remitted when exported would go abroad burdened with an excise tax of R. 1.75 per pood, which would prevent the manufacturer from selling it at such a price abroad as would enable him to realize a profit. The amount he receives for his export certificate, say, R. 1.25, is the exact amount of the bounty he receives upon exportation, and this enables him to sell at a profit in a foreign market. All manufacturers would prefer to sell at a profit in a foreign market. All manufacturers would prefer to sell at home if they could realize a greater price than by selling abroad, but if by being paid a drawback, or by a remission of taxes, they can find a profitable market in a foreign country, so much sugar as is not needed at home will be sent abroad. (187 U.S. at 514-515.)

Earlier in its extended opinion, the Court discussed the conjunctive effect of the import tariff and excise tax exemption parts of the scheme:

[10]The Tariff Act of 1922, ch. 356, § 303, 42 Stat. 935, broadened the countervailing duty law to include bounties or grants paid on manufacture and production.

> If the additional bounty paid by Russia upon exported sugar were the result of a high protective tariff upon foreign sugar, and a further enhancement of prices by a limitation of the amount of free sugar put upon the market, we should regard the effect of such regulations as being simply a bounty upon production, although it might incidentally and remotely foster an increased exportation of sugar; *but where in addition to that* these regulations exempt sugar exported from excise taxation altogether, we think it clearly falls within the definition of an indirect bounty upon exportation. (Emphasis added. 187 U.S. at 513.)

In the middle sentence of the paragraph containing the sentences quoted by the Customs Court, the Supreme Court reiterated its view that an import duty is a bounty upon production. Not without some confusion, the court thus bracketed its reference to import duty with comments that sugar sold in Russia was taxed and that exported was not and that a tax on "all sugar produced," but remitted on sugar exported, constituted a bounty upon exportation. The entire paragraph must be read as a whole, including its reference to import duty, and in the context of the entire opinion, including the Court's earlier discussion of import duty, wherein it had found a bounty in the combination of import duty and excise tax remission. We cannot read the sentences quoted above as though they were divorced from all preceding and succeeding discussion, or as establishing a proposition of law to govern a fact (tax remission alone) not before the Court.

The Supreme Court not only considered the Russian scheme as a whole, but listed the actual price differences it created. The Court ended its opinion with the statement (re certificates) of the Fourth Circuit quoted above and stated, "We all concur with this expression of opinion." 187 U.S. at 516. Thus the Court's *decision* was that the scheme bestowed a bounty. The Court did elect to insert in its *opinion* the broad language of the two sentences which served as foundation stones for the judgment now under review, that broad language was not necessary to the Supreme Court's decision and was not, therefore, its ratio decidendi.[11] When it is read, as it must be read, in light of the facts before the Court, that broad language did not constitute a Supreme Court holding that every nonexcessive remission of every excise tax constitutes a bounty or grant as a matter of law.

We are mindful, as was the Customs Court, of subsequent references to broad statements in *Downs*. *See e.g., Nicholas & Co. v. United States,* 249 U.S. 34 (1919); *American Express Co. v. United States,* 67 Cust. Ct. 141, C.D.

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[11]The language has been described as dicta by some commentators, *e.g.,* Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade,* 9 VA. J. INT'L L. 82 (1968-69); Feller, *Muntiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law,* 1 LAW & POL. INT'L BUS. 17 (1969); Note, *The Michelin Decision: A Possible New Direction for U.S. Countervailing Duty Law,* 6 LAW & POL. INT'L BUS. 237 (1974), and by this court, in referring to the Customs Court's reliance on *Downs* and *Nicholas, infra,* in United States v. Hammond Lead Products, Inc., 58 CCPA 129, 137, C.A.D. 1017, 440 F.2d 1024, 1030 (1971), *cert. denied,* 404 U.S. 1005 (1971).

4266, 332 F. Supp. 191 (1971), *aff'd on other ground,* 60 CCPA 86, C.A.D. 1087, 472 F. 2d 1050 (1973); *F. W. Meyers & Co. v. United States,* 6 Treas. Dec. 260, T.D. 24306 (Bd. Gen. App. 1903). Those references cannot, however, require us to disregard the facts in *Downs, Nicholas, American Express, and Meyers.*[12]

The Supreme Court has instructed us, *Kastigar v. United States,* 406 U.S. 441, 454-55 (1972), that broad language unnecessary to the Court's decision in an 80-year-old case is not to be blindly accepted as binding authority, despite its having been quoted in many subsequent cases and even though the language had been described as stating the "principle" of the old case.

There being no prior instance in which any court has been presented with the question of whether, as a matter of law, the remission of an excise tax, without more, bestows a countervailable bounty or grant, we confront a case of first impression.[13]

The Statute

The intent of Congress, as expressed in § 303 itself, is not difficult to fathom. As the predecessor of this court, in *Nicholas & Co. v. United States,* 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), and the Supreme Court in *Nicholas,* 249 U.S. at 39, indicated, the words "bounty" and "grant" are broad but not

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[12][2] A review of the cited and researched cases establishes, as in *Downs,* that bounty or grant in each case was found to reside in, and was measured by, an *excess* over the remission of excise taxes. Nor is that surprising in view of Treasury's practice, discussed infra. Thus, in Franklin Sugar Refining v. United States, 1 Ct. Cust. Appls. 242, T.D. 31276 (1911), a 2.50 mark "export bounty" was countervailed and a remitted 20 mark consumption tax was not. In *Nicholas* a British scheme involved tax remission *and* an "allowance" of 3d and 5d per gallon for exported spirits. On appeal in *American Express, supra,* this court found it unnecessary to review the Customs Court's broad interpretation of *Downs* and *Nicholas* and looked to the many *hidden* taxes which were remitted in excess of any remitted excise tax. United States v. Hills Bros. Co. 107 F. 107 (2d Cir. 1901) involved excess rebates on sugar exports. F. W. Woolworth Co. v. United States, 28 CCPA 239 (1940), involved a bounty created by currency manipulation. In Marion R. Gray v. United States, 70 Treas. Dec. 811, T.D. 48679 (1936), the Customs Court stated, " . . . at least a part of the *excess* of Great Britain's drawback paid to the manufacturer, constitutes a bounty or grant . . . under section 303 of the tariff act involved." [Emphasis added. *Id.* at 813.]

United States v. Passarant, 169 U.S. 16 (1898), involved dutiable value, not countervailing duties. *F. W. Meyers, supra,* involved an export duty governed by ¶ 393, Tariff Act of 1897, not the remission of an excise tax.

[13]Judicial review of negative countervailing duty determinations was not sought before 1971. Congress made it available to manufacturers, producers and wholesalers in 1975, § 516(d), Tariff Act of 1930, *as amended,* 19 U.S.C. § 1516(d) (Supp. V 1975), in response to this court's recognition of its nonavailability to those groups in *Hammond Lead, supra* note 11.

Congress did not, however, require hearings and preparation of a hearing record from which it might be determined, on review, whether the Secretary's action was supported by substantial evidence or was arbitrary or capricious, in the manner practiced, for example, under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* Nor have the regulations, 19 C.F.R. 159.47, Part 175 (1976), prescribed under § 516(h), done so. Congress did require hearings, on request, in antidumping cases, 19 U.S.C. 160(d) (Supp. V 1975).

ambiguous. "Net amount" necessarily means that countervailing duties should equate to the true bounty or grant actually conferred. [3] Congress' intent to provide a wide latitude, within which the Secretary of the Treasury (Secretary) may determine the existence or nonexistence of a bounty or a grant, is clear from the statute itself, and from the congressional refusal to define the words "bounty," "grant," or "net amount," in the statute or anywhere else, for almost eighty years. As affects the present case, and consistent with that broad intent, Congress has not statutorily required that every governmental action distinguishing between products consumed at home and those exported shall be deemed the bestowing of a bounty or grant.

As this court's predecessor said in *Nicholas, supra*, 7 Ct. Cust. Appls. at 106: "It was a *result* Congress was seeking to equalize regardless of whatever name or in whatever manner or form or for whatever purpose it was done." On appeal in *Nicholas,* 249 U.S. at 39, the Supreme Court said: "The statute was addressed to a condition and its words must be considered as intending to define it, and all of them—'grant' as well as 'bounty' must be given effect."

[4] Neither form nor nomenclature being decisive in determining whether a bounty or grant has been conferred, it is the economic result of the foreign government's action which controls. Thus, the language of § 303, "[w]henever any country . . . shall pay or bestow . . . any bounty or grant," requires a factual inquiry. The statute assigns that factual inquiry, in the first instance, to the Secretary. Courts may review a factual record upon which a determination has been based, but are woefully ill-equipped to undertake unaided the complex economic analyses required to determine whether a bounty or grant has in fact been conferred as a result of a particular governmental action. In the present case, the record is silent regarding the economic result of the mere remission of the Japanese Commodity Tax. The Secretary has presumably determined that the economic result here is not the conferring of such a benefit, subsidy, or incentive as would rise to the level of a bounty or grant under § 303.

The factual underpinnings of the Secretary's negative countervailing duty determination in this case are not under attack. On the contrary, the sole question on this appeal is whether the mere remission of the Japanese Commodity Tax must be deemed a bounty or grant as a matter of law. Nothing in the statute itself so requires.

Legislative History

The imposition of countervailing duties, on imports other than sugar, was first provided for in § 5 of the Tariff Act of 1897, 30 Stat. 205. The parties agree that Congress repeatedly reenacted that basic provision without substantial change (§ 6 of the Tariff Act of 1909, 36 Stat. 85; para. E of the Tariff Act

of 1913, 38 Stat. 193; § 303 of the Tariff Act of 1922, 42 Stat. 935; § 303 of the Tariff Act of 1930, 46 Stat. 687; and as § 331(a) of the Trade Act of 1974, 19 USC 1303 (Supp. V 1975)).

The United States says the absence of definitions for "bounty," "grant" and "net amount" creates ambiguity, requiring resort to legislative histories of the Tariff Acts of 1890, 1894, and 1897. Zenith, as did the Customs Court, cites the Supreme Court's indication in *Nicholas, supra*, that "bounty" and "grant" are not ambiguous. Both parties have supplied extensive reviews of legislative history in support of their respective positions.

Respecting the legislative history behind "bounty," "grant," and "net amount," we are convinced, after careful review of the cited floor statements, committee reports, submissions and testimony, and after full consideration of the conflicting inferences drawn therefrom by the parties, that Congresses since 1890 have elected to refrain from stating that any specific condition would constitute a bounty or grant effective to require imposition of countervailing duties under § 303,[14] and to refrain from specifying a method of calculating net amount. Certain it is that nothing in the voluminous citations of record indicates a congressional intent that countervailing duties must be imposed in response to a nonexcessive remission of an excise tax, the condition now before us.

Not without reason has Congress refrained from spelling out either the precise criteria for determining what shall constitute a bounty or grant and what shall not, or the calculations to be followed in determining net amount. As this court said in *Hammond Lead, supra* note 11: "In the assessment of a countervailing duty, the determination that a bounty or grant is paid necessarily involves judgments in the political, legislative or policy spheres," 58 CCPA at 137, 440 F. 2d at 1030, to which the court might well have added the eminently important economic sphere. Our nation's relationships in the world family are particularly sensitive to the assessment of the additional duties known as "countervailing" duties. Such assessment is not just a means of protecting our producers, as Congress has recognized in refusing to require proof of injury before making such assessment; it is also one of the chips in a game played by governments on a world stage. Presumably enacting and reenacting § 303 in this broad light, illuminative of the statute's role in the world, Con-

[14]The United States cites the exclusion of internal taxes remitted on exports from the cost of materials in determining constructed value, § 402(d), Tariff Act of 1930, *as amended,* 19 U.S.C. 1401a(d), and the including of such remitted taxes in determining purchase price under § 203, Antidumping Act of 1921, 19 U.S.C. 162 (Supp. V 1975), as indicating congressional evaluation of such remissions as neither unfair nor prohibitive. The point may be useful in urging consistency on the part of the Congress. It cannot, however, supply a congressional definition of "bounty," "grant" or "net amount" appearing in § 303.

gress in its wisdom has simply refrained from calling all the countervailing duty plays in advance.[15]

Nothing, therefore, in § 303 itself, or in the cited and researched legislative history relating to the terms "bounty," "grant," or "net amount," aids the decisional process in the present appeal.

Congressional Ratification

The Customs Court considered the reenactments of § 5 of the 1897 Act as congressional ratification of the court's interpretation of *Downs.* We disagree.

The basis for the "ratification" view expressed below lies in a paragraph from a 1908 submission to the House Committee on Ways and Means:

> In *Downs v. United States,* 187 U.S. 496 (1903), it was held that the remission of the excise tax imposed on sugar sold in Russia granted to the exporter of sugar, which remission is awarded in the form of a certificate having a substantial market value, and the subject of purchase and sale, is equivalent to a bounty, and such sugar when imported into the United States is subject to an additional duty equal to the amount of such bounty.[16]

An assumption that Congress had the quoted paragraph in mind, when it acted in 1909, would not warrant the further assumption that it thereby ratified a holding that excise tax remission alone is a bounty. The author of the submission said the tax remission was "in the form of a certificate having a substantial market value." We shall never know whether he interpreted *Downs* as merging remission and certificate elements of the Russian scheme or whether he considered the saleable certificates alone an excessive remission. We know only that a committee was told that the Court had held excise tax remission "in the form of" saleable certificates equivalent to a bounty.

Moreover, if Congress must be assumed to have been informed of *Downs* in 1908, it must be equally assumed to have been better informed over the last

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[15]Congress' most recent reference to the international implications of export incentives and countervailing duties, and to the role of the Executive in connection herewith, appears in § 331(a), Trade Act of 1974, 19 U.S.C. 1303(d)(1) (Supp. V. 1975):

> It is the sense of the Congress that the President, to the extent practicable and consistent with United States interests, seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties.

To facilitate negotations, Congress, while continuing to refrain from a definition of "bounty" or "grant," granted authority to the Secretary to suspend during the four years beginning January 3, 1975, and under certain conditions, the imposition of countervailing duties, after having determined that a bounty or grant is in fact being bestowed, 19 U.S.C. 1303(d)(2), and to reinstate such duties, 19 U.S.C. 1303(d)(3). In § 1303(e), Congress provided for reports to it of actions under § 1303(d)(2), and for the undoing thereof upon a resolution of disapproval by the Senate or the House.

[16]*Notes on Tariff Revision* (1908). The quoted paragraph appears on page 834 of the 953-page document. The portions on court interpretation were prepared by an assistant counsel of the Treasury.

half-century. In 1916, Congress established the Tariff Commission. 39 Stat. 796. In reporting to Congress in 1918, the Commission described *Downs:*

> The [Supreme] Court affirmed the decision of the Circuit Court of Appeals. The substance of the decision may be summarized as follows: "When a tax is imposed on all sugar produced but is remitted upon all sugar exported," *and* the exporter obtains from his government, "solely because of such exportation," a certificate which possesses an actual value and is saleable in the open market, the remission of the tax is in effect a bounty upon the exportation. (Emphasis added.)[17]

Thus, Congress was advised in 1918 that the bounty in *Downs* involved more than tax remission, and the Commission's report tends to defeat the notion that Congress, in reenacting § 303, intended to require the imposition of countervailing duties in response to tax remission alone.

In all events, the applicable statute is § 331(a) of the Trade Act of 1974, 88 Stat. 2049 (amending § 303 of the Tariff Act of 1930), 19 USC 1303, and rusted segments of legislative history, generated in other times, under other conditions, may be of limited value when recent segments, touching more current questions are available. As will be seen, the cognizant committees of the 93rd Congress did refer, albeit ambivalently, to the Treasury Department's interpretation of § 303 and its long-standing practice under that interpretation.

Administrative Practice

Since 1898, the Treasury Department has consistently and uniformly interpreted § 303 as requiring that there be an "excessive" remission of an excise tax, i.e., the governmental giving of something above and beyond mere excise tax remission, to have a bounty or grant.[18] Conversely, it has consistently and uniformly, for now almost seventy-nine years, interpreted § 303 as not requiring that the mere remission of an excise tax, i.e., a "nonexcessive" remission of the type now before us, be deemed a bounty or grant.[19]

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[17]United States Tariff Commission, *Reciprocity and Commercial Treaties,* 434 (1919) (available, Department of State Library).

[18]*See* 1 Treas. Dec. 696, T.D. (1898); 2 Treas. Dec. 157, T.D. 19729 (1898); 2 Treas. Dec. 996, T.D. 20107 (1898); 26 Treas. Dec. 825, T.D. 34466 (1914); 54 Treas. Dec. 101, T.D. 42895 (1928); 56 Treas. Dec. 342, T.D. 43634 (1929); 73 Treas. Dec. 107, T.D. 49355 (1938). *See also,* the countervailing duty cases in note 12, *supra.*

[19]Treasury's administrative practice and some of its rationale was described to Congress in EXECUTIVE BRANCH GATT STUDIES, S. COMM. ON FINANCE, 93d Cong., 2d Sess. 11-12 (1974):

> Under administrative precedents dating back to 1897, the Treasury Department has generally not construed the rebate, remission or exemption on exports of ordinary indirect taxes (consumption taxes on goods) to be a "bounty or grant" within the meaning of our countervailing duty statute . . . since exports are not consumed in the country of production, they should not be subject to consumption taxes in that country . . . application of countervailing duties to the rebate of consumption taxes would have the effect of double taxation . . . the United States would . . . impose . . . Federal and state excise taxes and state and local sales taxes, but would also collect, through . . . countervailing duty, the indirect tax imposed by the exporting country on domestically consumed goods.

[5] A long-continued, uniform administrative practice, if not contrary to or inconsistent with law, is entitled to great weight, *Saxbe v. Bustos,* 419 U.S. 65 (1976), particularly where, as here, those charged with its administration adopted that practice contemporaneously with the inception of the statute *Power Reactor Development Co. v. International Union of Electrical Workers,* 367 U.S. 396 (1961), and when Congress has repeatedly reenacted the statute without change,[20] *Saxbe, supra; Massachusetts Mutual Life Insurance Co. v. United States,* 288 U.S. 269, 273 (1933); *Komada v. United States,* 215 U.S. 392 (1910); *C. J. Tower & Sons v. United States,* 44 CCPA 41, 44 C.A.D. 634 (1957); *United States v. Lawrence,* 11 Ct. Cust. Appls. 203, 208, T.D. 38967 (1921), and when Congress has failed to revise the statute in the face of such administrative practice, *United States v. Midwest Oil Co.,* 236 U.S. 459 (1915), and when Congress has refused requests to legislate a change, *United States v. Bergh,* 352 U.S. 40, 46 (1956); *Allstate Construction Co. v. Durkin,* 345 U.S. 13 (1953). [6] Moreover, to sustain an administrative interpretation of a statute, a court "need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Commissioner v. Aragon,* 329 U.S. 143, 153 (1946). Under the Internal Revenue Code, "Treasury regulations and interpretations long continued without substantial change applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Helvering, Commissioner v. Winmill,* 305 U.S. 79, 83 (1938).[21]

The Treasury Department has not applied these precedents to tax "rebates" in excess of taxes collected on the exported product. If, for example, the foreign exporter has paid $1 in excise taxes on a product he exports to the United States but receives a rebate of $1.20 on exportation, under long-established administrative precedents of the Treasury Department the imported merchandise would be subject to a countervailing duty of $0.20.

The Treasury Department has historically assumed that an excise tax is part of the price paid by home consumers. On the present record, that must be assumed true of the Japanese Commodity Tax. Where the tax is "paid" by home consumers, its remission on exports has not been considered a bounty or grant because the remission does not increase the manufacturer's profit margin. In recent years, a dichotomy has grown among economists regarding the possible difference in result when all or part of the tax is either "forward shifted" or "absorbed." *See* the commentaries listed *supra* note 11, and Rosendahl, *Border Tax Adjustments: Problems and Proposals,* 2 LAW POL. INT'L BUS. 85 (1970).

[20]*For example,* in Copper Queen Mining Co. v. Territorial Board of Equalization, 206 U.S. 474, 479 (1907), the Court was faced with an 18-year-old administrative interpretation of the statute. Justice Holmes wrote: "[W]hen for a considerable time a statute notoriously has received a construction in practice from those whose duty it is to carry it out, and afterwards is reenacted in the same words, it may be presumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed."

[21]The United States cites the reasonableness of its practice and numerous cases setting forth guidelines for judicial review of agency action under the Administrative Procedure Act. We are not, however, reviewing a record under that Act in this case. *See, supra* note 13.

The Customs Court dismissed the effect of Treasury's administrative practice because it deemed that practice contrary to the law it had gleaned from *Downs,* and because it found a failure of Congress to codify the practice. As above indicated, there is no judicial precedent contrary to or even inconsistent with the Treasury practice. So too, our study of the applicable legislative history from 1890 to 1975 finds no congressional action contrary to or inconsistent with the administrative practice.

The record does reflect unrequited suggestions to Congress that it enact the Treasury practice. We cannot, however, join the Customs Court in inferring therefrom a rejection or disapproval. At the outset, we find it difficult to believe that Congress would harbor in its breast a disapproval of an administrative practice for almost eighty years, while remaining so supine or irresponsible as not to change it. The suggestions on which the Customs Court focused were not that Congress should legislate a new, unheard-of practice. Though the record shows the first specific notice to Congress in 1949,[22] we cannot assume that Congress had earlier reenacted the statute four times without ever informing itself of Treasury's practice. But whether awareness of the practice has continued for seventy-nine or for twenty-eight years, the inference of acquiescence from Congress' failure to act against the practice over the many years involved, and through many reenactments of the statute, overbalances any inference of rejection from failure to codify it.

In 1950, the Treasury proposed an amendment which would have codified its practice and required injury to domestic industry. Objections were raised only to the injury requirement.[23] Nonadoption of that amendment can hardly be taken as proof of Congress' disapproval of Treasury's practice. The failure to adopt may have been due to concern over the injury requirement, or to any number of reasons. We shall never know. We do know that the proposal fully

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The United States also argues that its long practice coincides with international agreements (e.g., the GATT) and with international practice, that international trade would become a shambles, and that trade wars would erupt, if the Secretary were now required to find that mere remissions of excise taxes bestowed bounties. Such arguments are irrelevant here. No agency practice may, for any reason, repeal a statute or overrule the courts. If the practice were in conflict with the statute, the intent of Congress, or judicial precedent, it could not stand, and such arguments would have to be directed to the Congress. If no conflict or inconsistency exists, the arguments are unnecessary.

[22] *Extension of Reciprocal Trade Agreements Act, Hearings Before the Senate Comm. on Finance,* 81st Cong., 1st Sess., 1195-99 (1949) (memorandum).

[23] *See* H.R. 8304, 81st Cong., 2d Sess. (1951) and *Hearings on H.R. 1535 Before the House Comm. on Ways and Means,* 82d Cong., 1st Sess., 2, 79 (1951). *See Hearings on H.R. 5505 Before the Senate Comm. on Finance,* 82d Cong., 2d Sess., 115, 124-125 (1952).

In 1951, the State Department advised the Senate Finance Committee of the administrative practice under § 303 and that an amendment specifically stating that practice would merely clarify the law and would effect no change in the practice followed since the original enactment in 1897. *See Hearings on H.R. 1612 Before the Senate Comm. on Finance,* 82d Cong., 1st Sess., 1197 (1951).

informed Congress of Treasury's long-practiced interpretation and administration of § 303. Congress' failure to act or even speak against it reflected at least a then-current willingness to allow that administrative practice to continue unabated and unchanged.

In 1968, the Senate Committee on Finance was advised that Treasury considered § 303 inapplicable to nonexcessive remissions of excise taxes.[24] Congress took no action at that time. In 1970, it requested a detailed study on the subject.[25]

In considering the proposed Trade Reform Act of 1973, which evolved into the Trade Act of 1974, the cognizant Committees of Congress were informed, not only of Treasury's long continued practice, *but of the very remission of the Japanese Commodity Tax and of Zenith's countervailing duty petition now before us.* At that time, also, an amendment defining "bounty or grant" as encompassing the remission of an excise tax, the relief sought here,[26] was recommended by a witness but was not adopted.[27]

The Congress did adopt, however, as § 321(b) of the Trade Act of 1974, the administration's proposed amendment to § 203, Antidumping Act of 1921, 19 U.S.C. 162 (Supp. V 1975). The administration said the amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law. In recommending the amendment, the House Ways and Means Committee stated:

> . . . The amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes. However, your committee, in recommending this amend-

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[24]*See* 2 COMPENDIUM OF PAPERS ON LEGISLATIVE OVERSIGHT REVIEW OF U.S. TRADE POLICIES, COMM. ON FINANCE, 90th Cong., 2nd Sess., 475-476, 568-569, 887-889, 918-919 (1968).

[25]*See* S. FINANCE COMM. REP. No. 91-1481 [to accompany H.R. 17550], 91st Cong., 2d Sess., 284-285 (1970).

[26]The growing tendency of those who fail in their objective before the Congress to thereafter submit the same plea to undermanned federal courts is one factor contributing to the current appellate flood, which threatens to drown justice in the thrashings of a litigious sea. *See* D. HOROWITZ, THE COURTS AND SOCIAL POLICY 4-16 (The Brookings Institution, 1977). Sadly, moreover, the crowd can jam the courthouse door against the more deserving and less-advantaged.

[27]*See Hearings on H.R. 6767 Before the House Comm. on Ways and Means,* 93d Cong., 1st Sess., 2169-2171, 2496-2500, 3097, 3292-3293, 3814-3815 (1973). The Senate Committee on Finance Subcommittee on International Trade was so advised in 1971. *See Hearings on World Trade and Investment Issues Before the Subcomm. on International Trade of the Senate Comm. on Finance,* 92d Cong., 1st Sess., 102, 109-111 (1971). Though Congress' current interest in governmental assistance to foreign manufacturers may be assumed to have been occasioned by falling shares of the American market for American manufacturers, an abrupt change in a long-standing practice may have been viewed as both counter-productive in a trading world of increasingly interdependent economies and as injurious to American consumers on whom the countervailing duty might fall in the form of increased prices. However that may be, it is sufficient to our present task that Congress did not make the requested change in Treasury's practice.

ment, does not express approval or disapproval of the standard employed by the Treasury Department in administering the countervailing duty with regard to the treatment under that law of rebates or remissions of direct and indirect taxes.[28]

And the Senate Committee on Finance stated:

. . . The standard in the proposed amendment parallels that standard employed by the Treasury Department under the countervailing duty law in determining whether tax rebates and remissions constitute bounties or grants. However the Committee, in recommending this amendment, does not express approval or disapproval of that Treasury practice.[29]

The effect of the Committees' mutually contradictory approve-disapprove statements is necessarily to leave untouched the status quo with respect to the administrative practice on countervailing duties.[30] Finding no guidance in what the committees said, we look to what the Congress did.

The adopted amendment to the Antidumping Act provides that in determining "purchase price" of imports there shall be added to the price charged the importer:

[a] the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; and [b] *plus* the amount of any taxes rebated or not collected, by reason of the exportation of the merchandise to the United States, *which rebate or noncollection has been determined by the Secretary to be a bounty or grant* within the meaning of section 303 of the Tariff Act of 1930 *(Emphasis added.* P.L. 93-618, § 321(b), 88 Stat. 2045 [amending 19 U.S.C. 162 (1970)])[31]

In so doing, Congress signaled its continuing intent to let the administrative practice under § 303 stand unmolested. Having decreased the number of taxes added to the purchase price in (a), to the disadvantage of the exporting manufacturer, Congress then added to the price, in (b), the amount of taxes

[28]H.R. REP. NO. 93-571, 93d Cong., 1st Sess. 69 (1973).

[29]S. REP. NO. 93-1298, 93d Cong., 2d Sess. 172 (1974).

[30]That the two key committees of the Congress, with Treasury's treatment of the Japanese Commodity Tax law and the fact of Zenith's objections before them, and with full investigative powers and resources available, could not either approve or disapprove the administrative practice on its merits, is a dramatic exemplification of the reasons why a court should avoid entry into that policy thicket. Under appropriate conditions, courts may, as we do here, hold that an administrative practice reflects a permissible interpretation of a statute, while neither approving or disapproving the merits of the practice. Approving or disapproving the wisdom, effectiveness, etc., of an agency practice is a function of the Congress, the shifting of which to the courts conflicts with the fundamental separation of powers doctrine.

[31]The United States argues that the Japanese Commodity Tax would fall within (a), rendering (b) redundant if Congress intended remission of such a tax to constitute a bounty or grant. On the premise that the Japanese tax is "added to or included in the price of such or similar merchandise" when sold in Japan, see note 19, *supra,* the argument has merit. Whether Japanese manufacturers absorb or shift the Japanese Commodity Tax, however, is an economic issue not before us.

"rebated or not collected" *and* "determined by the Secretary" to be a bounty or grant. If Congress intended that all rebates or noncollections by reason of exportation be deemed bounties or grants, no room would have been left for Secretarial determination. In *American Express, supra*, we expressed the view that Congress required the Secretary to impose a countervailing duty when a bounty or grant has been bestowed, but left to the Secretary the determination of whether a bounty or grant had in fact been bestowed. Nothing has occurred since 1973 to require change in that view.[32]

Summary

[7] Nothing in § 303, or in its legislative history, requires that the remission of an excise tax alone must be deemed a bounty or grant as a matter of law. Congress has, through many years and repeated reenactments of § 303, refrained from exercising its power to make such remission a bounty or grant as a matter of law. There is no judicial precedent requiring that under § 303 such remission must be deemed a bounty or grant. The remaining tool in the decision-making inventory—a long-continued administrative practice not inconsistent with law—rests on an interpretation of § 303 as not requiring that such remission be deemed a bounty or grant.

As the Supreme Court said in *Saxbe v. Bustos,* 419 U.S. at 74:

> This long-standing administrative construction is entitled to great weight, particularly when, as here, Congress has revisited the Act and left the practice untouched. Such a history of administrative construction and congressional acquiescence may add a gloss or qualification to what is on its face unqualified statutory language.[33]

Paraphrasing what the Court later said in *Saxbe,* 419 U.S. at 79-80, to fit our case:

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[32]This court expressed the same view in United States v. Hammond Lead, 58 CCPA at 134-139, 440 F.2d at 1027-28, 1031. The prompt congressional provision of judicial review, *supra* note 13, while remaining silent with respect to this court's description of the Secretarial function under the statute, further confirms Congress' acquiescence, in the Treasury's administrative practice.

We do not imply that the Secretary has carte blanche, or the right to be totally arbitrary or inconsistent in applying a long-standing practice. Whether the Secretary could, however, under appropriate conditions, change present practice and begin to deem excise tax remission alone a bounty or grant is not before us. The value and effect of administrative practice, and the Secretary's authority to change it, have acquired statutory recognition in the field of customs. Under 19 U.S.C. 1315(d) (Supp. V 1975), a practice setting a particular duty, and found by the Secretary to have been uniform, can be changed to assess a higher duty, but only as to imports occurring at least 30 days after publication of the higher duty. In the Trade Act of 1974, Congress amended this section to exempt the assessment of countervailing duties from the 30-day delay provision and thus altered Treasury's practice. § 331(c), Tariff Act of 1974, 19 U.S.C. 1315(d) (Supp. V 1975). *See* [1974] U.S. CODE CONG. & AD. NEWS 7320.

[33]Mr. Justice White's dissent in *Saxbe* saw the statute there involved as leaving nothing open to construction, the administrative practice as in conflict with the statute, the Congress as not

> Second, if . . . [a nonexcessive remission of an excise tax alone is now to be deemed a bounty,] the Congress [or the Executive] must do it. The changes suggested implicate so many policies and raise so many problems of a political, economic, and social nature that it is fit that the Judiciary recuse itself. At times judges must legislate "interstitially" to resolve ambiguities in laws, But the problem of . . . [changing a 79-year administrative practice effecting world trade] is not "interstitial" or, as Mr. Justice Holmes once put it, "molecular." It is a massive or "molar" action for which the Judiciary is ill-equipped.

Conclusion

Until lawfully changed, the administrative practice of the Treasury Department, in uniformly considering a nonexcessive remission of an excise tax as failing to constitute a bounty or grant, must stand as a lawfully permissible interpretation of § 303. On this record, that interpretation is fully applicable to the Japanese Commodity Tax Law.

It follows that the Customs Court erred in granting Zenith's motion for summary judgment and in denying that of the United States. There being no issue of fact, the judgment of the Customs Court is reversed and the case is remanded for entry of an order granting the motion for summary judgment of the United States.

MILLER, Judge, dissenting, with whom BALDWIN, Judge, joins.

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having been shown aware of the practice and its silence, which may have been due to unawareness, preoccupation or paralysis, as inadequate proof of acceptance. In the present case, "bounty" and "grant" have remained undefined by Congress; the statute delegates to the Secretary the determination of what is a bounty or grant; the administrative practice is not in conflict with the statute, judicial decisions, or congressional expression; Congress has long and often been aware of the practice; and, concerning customs matters, Congress has in no manner been paralyzed.