10-1977

Zenith Radio Corp. v. United States

Lewis F. Powell Jr.

Jim — Any unusual problem here? other parties?
"no" [illegible]

Discuss
Could be persuaded to grant

Japan dumping on our market

Japan imposes a "consumption" tax on consumer goods (here, electronic products). If exported, the tax is remitted.

Under 19 USC 1303, when a foreign gov't gives a "bounty" — directly or indirectly — to a mfg'er who exports its goods to us, the U.S. levies an import duty upon the goods. (I suppose this is to prevent "dumping").

Ct. Customs & Patent appeals held that remission of tax by Japan was not a bounty. Thus U.S. imposed no increased customs tax on the entry of Japanese goods. This enables them to undersell U.S. producers.

PRELIMINARY MEMORANDUM

~~Jan. 13~~ Feb 17, 1978 Conference
List 9, Sheet 21

No. 77-539

ZENITH RADIO CORP.

v.

UNITED STATES

Cert to Ct. of Customs and Patent Apps. (Markey; Miller and Baldwin dissenting)

Federal/Civil

Timely

I would grant — See last p. [initials]

1. SUMMARY: 19 U.S.C. §1303 (Supp. V. 1975)* requires that whenever a country bestows directly or indirectly any bounty or grant upon the export of any article manufactured in that country the United States shall levy an import duty equal to the net amout of such bounty or grant in addition to any duties otherwise imposed on that article. The issues presented here are (1) whether the

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* Copy attached

remission of a commodity tax on products exported constitutes the bestowal of a bounty or grant for purposes of §1303 and (2) whether the Ct. of Customs and Patent Apps. (CCPA) properly entered summary judgment for the govt, in this suit on the assumption that the Sec. of the Treasury made a determination that the forgiveness of the tax does not confer a benefit countervailable under §1303?

2. FACTS: Japan's Commodity Tax Law imposes a single-stage consumption tax usually at the manufacturing level on certain consumer goods, including electronic products like those manufactured by Zenith. The rates range from 5 to 40 per cent. Upon exportation of these products from Japan, the tax is either remitted, if previously paid, or the products are exempted from the tax.

Zenith, a domestic manufacturer of consumer electronic products, filed a petition with the Commissioner of Customs under §1303 seeking the assessment of countervailing duties on consumer electronic products from Japan because Japan exempts those products from its commodity tax when they are exported. Six years later the Treasury Dept. determined that no bounty or grant was being paid or bestowed, directly or indirectly within the meaning of §1303.

Pursuant to 19 U.S.C. §1516(d) (Supp. V. 1975) Zenith filed suit in the Customs Court challenging the Sec. of the Treasury's determination. The court granted Zenith's motion for summary judgment. It unanimously held, in an opinion by Richardson J., that the forgiveness of the Japanese Commodity tax constitutes the conferral of a bounty or grant under 1303, as a matter of law, and ordered the Sec. of the Treasury to determine the net amounts of the bounty or grant bestowed and to assess countervailing duties

equal to those amounts. The court based its decision on Downs v. United States, 187 U.S. 496 (1903) where the Court held that an elaborate scheme of the Russian govt. was an indirect bounty under the 1897 Tariff Act, the predecessor of §1303. Under the Russian scheme, exporters of sugar were relieved of the ordinary excise tax on sugar sold domestically. They also received marketable certificates of value upon exporting sugar. The certificates could be sold to other sugar producers who would then be free to have their surplus sugar reclassified as free sugar and sold on the domestic market without the tax burden that would otherwise accompany the sale of surplus sugar.

In granting Zenith's motion for summary judgment the Court quoted the following portion of Downs.

> 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 disquised, it is a bounty upon exportation. Id. at 515.

The court rejected the govt.'s argument that the above language was only dictum. As an indication of the precedential value of the language, it noted that the Board of General Appraisers soon cited Downs for the proposition that tax remission upon exportation constituted the conferral of a bounty under the 1897 Act and that the Notes of Tariff Revision prepared by the assistant counsel to the Treasury Dept. for the use of the House Committee

on Ways and Means in 1908 cited Downs for the same proposition. It said that Congress' reenactment of the language of the 1897 act was a classical example of ratification of the judicial construction put upon that language. It rejected the govt.'s argument that Downs had misinterpreted the intent of Congress as shown by Congressional debates for two reasons. It said that the statute's language was so plain that there was no need to resort to congressional debates and that even if the debates were considered they would not have required a different result. The court also rejected the govt.'s argument that the General Agreement of Tariffs and Trade (GATT) and legislation other than the Tariff Act required the conclusion that the remission of the commodity tax not give rise to a countervailing tariff. The court pointed out that international commitments such as GATT cannot supersede acts of Congress and that the United States entered the pertinent part of GATT to the fullest extent not inconsistent with existing legislation. Finally the court rejected the govt.'s argument that the remission of the commodity tax was not so excessive as to require a countervailing tariff under a long standing administrative interpretation of §1303. It said that the administrative interpretation was in conflict with Downs and must yield. Judges Newman and Boe joined in the opinion but concurred to elaborate on the points made in the court's opinion.

The Court of of Customs and Patent Appeals (CCPA) reversed and remanded with directions to enter summary judgment for the govt. It rejected the lower court's interpretation of Downs.

The CCPA held that the language in Downs stating that the remission of an excise tax is a bounty was only dictum. It insisted that the holding in Downs was based on the conjunctive effect of the remission of excise taxes and the further issuance of a marketable certificate on the export of sugar. The court then turned to the language of §1303. In the court's view the words "bounty" and "grant" were broad but not ambiguous. It said that the "net amount" of the bounty means the true bounty or grant actually conferred as an economic benefit. Although the record was silent regarding the economic result of the Japanese commodity tax, the court assumed that the Sec. had determined that the economic result was not the conferring of a benefit that rose to the level of a bounty or grant under §1303. It asserted that nothing in the language or legislative history of §1303 aided it in determining whether the remission of an excise tax on exports required a countervailing tariff. It rejected the lower court's conclusion that Congress has ratified the language of Downs by maintaining the language of the act in subsequent statutes. It noted the Treasury Dept.'s longstanding interpretation of §1303 requiring that there be a remission in excess of the excise tax due in order to require a countervailing tariff. And it gave the Treasury Dept.'s interpretation great weight since the contradictory language in Downs was, in the (CCPA's) opinion, only dictum. Although it noted that Congress has refused to follow suggestions that it enact the Treasury's practice, the court found it difficult to believe that Congress disapproved the Treasury's interpretation.

CCPA

The/said that the Treasury's longstanding interpretation must stand as a permissible interpretation of §1303 until lawfully changed and held that the Treasury had not erred in its conclusion that the Japanese Commodity Tax is a non-excessive remission of an excise tax which fails to constitute a bounty or grant under the statute. It ordered the lower court to enter summary judgment for the govt.

Judge Miller wrote a dissenting opinion which Judge Baldwin joined. He insisted that the disputed language of Downs was not dictum but that the Court had found that the Russian scheme included two bounties, the remission of the excise tax and the provision of valuable certificates. He said that the finding of either bounty supported the result in that case and that both findings were of equal validity. As further support for his interpretation of Downs he noted that the disputed portion of Downs had been recognized as an example of an indirect bounty in Nicholas & Co. v. United States, 249 U.S. 34, 41 (1919) Judge Miller rejected the Treasury's longstanding interpretation of §1303 as inconsistent with judicial interpretation. He also examined the legislative history of the Tariff Act's revisions since Downs and concluded that "Congress has not acquiesced in the administrative practice of failing to recognize the ordinary remission of excise taxes as a bounty or grant for purposes of section [1303] much less repudiated, or given any signal of its disfavor with, the interpretation of the key language in section [1303] by the Supreme Court."

3. CONTENTIONS: (1) Zenith argues that the disputed portion of Downs was not dictum and that the decision below is in conflict with Downs. As support for its position it repeats the argument of the dissent and the Court of Customs. It notes that Congress responded to complaints about the Treasury's refusal to levy the requested countervailing tariff by providing for the first time in 1975 that American manufacturers can obtain judicial review of decisions not to impose countervailing tariffs. [This case is the first case brought to the CCPA under that right of judicial review].

In response the SG says that Downs did not decide whether a non-excessive remission of a tax, standing alone, constitutes a bounty or grant under the statute and argues that the legislative history of the Tariff Act both before and after Downs as well as Congress' acquiescence in the Treasury's longstanding interpretation of the statute supports the holding below. He contends that the countervailing duty assessed in Downs did not in fact include the amount of the excise tax remission but was based upon the value of the marketable certificates. In response to that contention Zenith notes that the amount of the countervailing duty assessed in Downs was clearly not in issue.

The SG also points out that existing trade agreements, including GATT, to which the U.S. is a party, adopt the principle that countervailing duties shall not be assessed in response to the remission of excise taxes on exports. He warns that adoption of Zenith's construction of §1303 would undermine the flexibility of the United States' position in upcoming negotiations under the

GATT, risk a significant breakdown in international trading agreements, and invite retaliatory actions. He insists that as long as there is a possibility that the CCPA may be reversed, there will be considerable uncertainty in the United States' position and negotiating options.

United States Steel and Bethlehem Steel have filed amicus briefs in support of Zenith. They make the same basic arguments and also urge the Ct. of Cust. and Patent Apps's decision to defer to the Treasury Dept. has subverted the Congressional intent to provide meaningful judicial review of the Treasury's determination to domestic manufacturers. U.S. Steel is currently litigating the same issue regarding the remission of the value added tax on exported steel by six European countries. The Committee to Preserve American Color Television (CAMP) has also filed an amicus brief in support of Zenith. It emphasizes the importance of this case to the domestic consumer electronics industry.

(2) Zenith says that the CCPA should have remanded the case for further evidence since it suggested that the economic result of the tax remission was important and did not decide that remission of an excise tax is not a bounty as a matter of law. This argument seems to be based on the CCPA's statement that it is the economic result of the foreign govt.'s action which controls and on the CCPA's assumption that the Sec. had determined that the economic result here is not the conferring of such a benefit as would rise to the level of a bounty or grant.

The SG replies that there was no need to remand because there was no factual dispute about the economic result of the remission. The only issue, according to the SG, was whether as

a matter of law, the remission of taxes upon export is a grant or bounty giving rise to an obligation to impose a countervailing duty.

4. DISCUSSION: There is nothing certworthy about the second issue. The CCPA's opinion is not entirely clear but, contrary to what Zenith says, the CCPA seems to have accepted the Treasury's interpretation as a permissible one as a matter of law. Since the Treasury has decided that the remission of an excise tax on exports alone does not require a countervailing tariff, there seems no need for further fact finding.

The first issue probably requires the Court's attention. Congress has apparently acquiesced in both the language of Downs and the Treasury's policy of not imposing a countervailing tariff against the remission of an excise tax. The legislative history, as far as it is contained in the briefs, seems inconclusive. The real question is whether the crucial language in Downs is dictum and, if not, whether it should be overruled. Although it is possible to interpret Downs as holding only that the issuance of a valuable certificate upon the export of sugar in addition to remission of excise taxes is a bounty, the more accurate interpretation seems to be that of the Customs Court. Despite the SG's argument that granting cert would create uncertainty in the govt.'s trade negotiations, Congress has clearly placed the issue in the courts by providing judicial review for Zenith's complaint and refusing to settle the issue by amending the statute. Congress is free to amend the statute if it dislikes the uncertainty arising from judicial review.

There is a response.

Grant (OVER)

1/3/78 Parr opns in petn.
BE

It is very difficult to read the statements in the Downs case upon which Zenith relies as dicta, as the court below tried to do. The Downs Court made the same point over and over:

> "A bounty may be direct, as where a certain amount is paid upon the production or exportation of particular articles ... or indirect, by the remission of taxes upon the exportation of articles which are subjected to a tax when sold or consumed in the country of their production, of which our laws, permitting distillers of spirits to export the same without payment of an internal revenue tax or other burden, is an example." 187 U.S., at 502.

> "[I]f a preference be given to merchandise exported over that sold in the home market, by the remission of an excise tax, the effect would be the same as if all such merchandise were taxed, and a drawback repaid to the manufacturer upon so much as he exported. . . . [W]here ... these regulations exempt sugar exported from excise taxation altogether, we think it clearly falls within the definition of an indirect bounty upon exportation." Id., at 513.

> "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." Id., at 515.

In short, I think it is very likely that the court below misread Downs. It may be that the case should be overruled, but I do not think the Court should allow a lower court to make that decision. This case appears to be of general importance, given the amicus support for a grant. I would vote to grant.

JA

ket Part by Title Number
Thus· —— U.S.C.A. § ——

TITLE 19

CUSTOMS DUTIES

CHAPTER 4.—TARIFF ACT OF 1930

SUBTITLE II.—SPECIAL PROVISIONS

PART I.—MISCELLANEOUS

§ 1303. Countervailing duties—Levy of countervailing duties

(a)(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.

(2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there is an

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 77-539

Submitted ....., 19... *Announced* ....., 19...

ZENITH RADIO CORP.

vs.

UNITED STATES

WHR Member
there was a conflict.

Relisted
for
C. J.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Burger, Ch. J.						Passed							
Brennan, J.			✓										
Stewart, J.							Passed						
White, J.			✓										
Marshall, J.			✓										
Blackmun, J.		✓											
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Rehnquist, J.		✓											
Stevens, J.			✓										

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 77-539

Submitted ....., 19... *Announced* ....., 19...

ZENITH RADIO CORP.

vs.

UNITED STATES

Relisted for The Chief Justice.

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for
C. J.

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Burger, Ch. J.					Pass								
Brennan, J.			✓										
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Rehnquist, J.		✓											
Stevens, J.			✓										

Argued ....., 19... *Assigned* ....., 19... No. 77-539

Submitted ....., 19... *Announced* ....., 19...

ZENITH RADIO CORP.

vs.

UNITED STATES

Relisted for the Chief Justice.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Rehnquist, J.		✓											
Stevens, J.			✓										

RDC 4/22/7

BENCH MEMO

Zenith Radio Corp. v. United States

Under the Tariff Act of 1930, as amended by the Trade Act of 1974, 19 U.S.C. § 1303, the Secretary of the Treasury must offset any foreign subsidization of exports with an import duty equal to the net amount of the subsidy. 19 U.S.C. § 1303. The investigation leading to such a determination may be initiated either by the government or by a private party. Ibid. The responsibility to impose a countervailing duty is limited only by exceptions defined in the statute. For example, if the imported good is duty free, a countervailing duty may be imposed only upon a showing of domestic injury.

The issue presented here is whether, under the Act, the Japanese Commodity Tax Law bestows a "bounty or grant" within the terms of the Trade Act, 19 U.S.C. § 1303. The Japanese law imposes an internal tax upon manufacturer's shipments of certain electronic products destined for consumption in Japan, with rates varying from 5 to 20 percent. When such goods are destined for export, however, the tax is rebated or not collected. Zenith alleged that such remissions amount to a "grant or bounty" on exports and requested the imposition of a countervailing duty to offset it.

Japanese Law allows rebate of a tax on electronic products exported to this country

In January 1976, the Acting Commissioner of Customs, after a six-year delay, announced that remission of the Japanese Commodity Tax was not a "bounty or grant" and refused to impose a countervailing duty. Pursuant to § 321(f)(1) of the Act, Zenith contested this determination in the Customs Court. That court unanimously held that remission of the Commodity Tax was a bounty or grant as a matter of law and granted summary judgment for Zenith. 430 F. Supp. 242 (Cust. Ct. 1977). The Court of Customs and Patent Appeals reversed, 3-2. 562 F.2d 1209 (C.C.P.A. 1977).

Customs Ct held this was a "bounty"

CCPA Reversed

The case revolves around two principal issues: (i) the proper interpretation of an old case dealing with

the "bounty or grant" language in a predecessor statute, Downs v. United States, 187 U.S. 496 (1903); and (ii) whether as a matter of "economic reality" the mere remission of an indirect tax can amount to a subsidy. Both issues are extremely murky and close, but I would resolve both in Zenith's favor and reverse. As a matter of foreign policy, the C.C.P.A. result might be desirable, but under the statute and the Downs case, it is difficult to reach.

I

THE MEANING OF DOWNS

Zenith insists that mere remission of an indirect tax is a "bounty or grant" within the meaning of the statute. The Treasury takes the position -- and apparently has done so for 80 years -- that noncollection of an indirect tax is fundamentally neutral; a bounty or grant is made only if the remission is "excessive," that is, if an amount is remitted over and above the amount of the tax. The primary battleground in this dispute is Downs v. United States, 187 U.S. 496 (1903), which involved an elaborate Russian program for controlling sugar production and prices.

The Russian government placed all sugar into

three categories: (i) "free sugar," which could be sold domestically subject to a standard 1.75 ruble excise tax; (ii) "indivertible reserve," which had to be held by the manufacturer in case greater quantities were needed to prevent domestic prices from exceeding a predetermined ceiling; and (iii) "free surplus," which was all sugar left after specifying the amounts in the first two categories. Free surplus could not be sold domestically except upon the payment of a prohibitive double excise of 3.50 rubles. If free surplus was exported, however, the producer received both a remission of the normal excise tax and a certificate he could negotiate to other producers allowing the transfer from the free surplus category (which could be sold domestically only at the prohibitive double excise) to the free sugar category (which could be sold domestically at the standard excise) of an amount of sugar equal to the amount exported. The Court described the results of this arrangement:

> " By this arrangement neither the total amount of free sugar allowed to the two manufacturers nor the total export has been increased, since what the assignor [of the certificate] exports the assignee sells as free sugar. The assignee, however, has secured the large profits of the sale of his sugar at home and saved his freight to the coast, while on the other hand the seaport merchant has sacrificed those profits by exporting sugar at a less remunerative price. It follows that the price received for his export

Downs

> certificate is the difference between what he would have received had he sold his free sugar at home and the price he would have obtained on the foreign market." 187 U.S., at 512.

Although the Court did not discuss the actual prices obtained for the certificates, a Treasury document submitted to the Court explained that the minimum price was 1 ruble. App. 49-51. By some undisclosed process of reasoning, this fact led the Secretary to impose a countervailing duty of .50 ruble, on the theory that a minimum price of 1 ruble permitted export of sugar at a price .50 ruble below cost of production but the earning of .50 ruble profit. This value alone was "countervailed"; although the Court does not mention it, the remitted 1.75 excise tax was not included in the countervailing duty.

The Court upheld the Secretary's imposition of the countervailing duty, holding that the Russian scheme amounted to a "bounty or grant" under the statute. The Customs Court seized repeated phrases in the Downs opinion, such as the following, and concluded that mere remission of a tax is a bounty or grant:

> "The details of this elaborate procedure for the production, sale, taxation, and exportation of Russian sugar are much less important 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 [about 36 pounds], and that sugar exported pays no excise tax at all. The mere imposition of an import duty of three roubles per pood, paid upon foreign sugar, is, like all protective duties, a bounty, but a bounty on production, and not upon exportation. When a tax is imposed on 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." Id., at 515 (emphasis added).

Downs language - on its face - strongly supports Zenith

C.C.P.A. dismissed this language and similar statements in the Downs opinion as dicta. Judge Markey argued that in other portions of the decision, the Court refers to the certificate procedure and the scheme as a whole, rather than to the remission of the tax, as the bounty. Moreover, the actual countervailing duty that the Court upheld did not embrace the value of the excise tax remitted upon export, but was limited to the net value of the certificate. Thus, said C.C.P.A., the actual holding of Downs was limited to an excessive remission of an excise tax -- the bounty was the boost that the cerfificates gave the exporter over and above the remission of the standard excise. Petn 63a, 65a. In Judge Markey's view, Downs' holding mandates the Treasury's position that remission of an indirect tax is a bounty or grant only when it is excessive. This is also the view of the General Agreement on Tariffs and Trade, 61

Stat. A63, to which the United States is a party, and which C.C.P.A. seemed quite anxious to prevent the U.S. from violating.

As an exercise in the reading of cases, Judge Markey's opinion is not completely persuasive. In describing as a bounty the "remission of taxes upon the exportation of articles which are subjected to a tax when sold or consumed in the country of their production," 187 U.S., at 502, the Downs Court cited United States v. Passavant, 169 U.S. 16 (1898). In that case, the German government imposed a duty upon merchandise sold in the domestic market, which was collected when the finished product went into the consumer market. Since the tax was collected upon sale, the price reflected the tax. Upon exportation of the product, however, the tax was not imposed or its payment rebated. The Court nevertheless held that the amount of the tax was to be considered in determining the dutiable value of German goods imported into the United States:

> "[The remission of the tax] is a special advantage extended by the government in aid of manufacturers and trade, having the same effect as a bonus or drawback. To use one of the definitions of drawback, it is 'a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all.'" 169 U.S., at 23.

Citation of Passavant, then, certainly supports the idea that the Downs Court viewed remission of a tax, in itself, as a bounty on exports. In addition, the Court cited the report of a conference in Brussels on the question of sugar duties. That report described as bounties, inter alia, "'the total or partial exemptions from taxation granted to a portion of the manufactured products." 187 U.S., at 502.

Also, contrary to the suggestion in the SG's Brief at 33 & n.25, the Treasury's brief in Downs did appear to argue that the mere remission of a tax would consititute a bounty: " . . .[A]ny special favor, benefit, advantage, or inducement conferred by the government, even if it is not a direct charge upon the Treasury, is fairly included in the idea and meaning of an indirect bounty." Petn 100a n. 15.

Also, the Downs Court appeared to make the determination that the certificates were a bounty on exports turn on the existence of the remission of the tax:

> ". . . [I]f a preference be given to merchandise exported over that sold in the home market, by the remission of an excise tax, the effect would be the same as if all such merchandise were taxed, and a drawback repaid to the manufacturer upon so much as he exported. If the additional bounty [i.e., the certificates] 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 altoghether, we think it clearly falls within the definition of an indirect bounty upon exportation." 187 U.S., at 513.

Thus, the Court's view that the certificate amounted to an additional bounty on exportation was dependent upon the prior finding that remission of the tax was also such a bounty.

As to the fact that the actual countervailing duty before the Court related only to the value of the certificates and did not include the amount of the excise remitted, that was not the Court's fault. It was the Treasury that set the amount of the duty, and the amount was not before the Court. Only the legal issue as to the existence of a bounty, not the factual determination as to its amount, was presented, and the Court resolved that legal issue in a manner that clearly seems to have involved a conclusion that remission of an excise tax upon exportation is a bounty.

This view is supported by G.S. Nicholas & Co. v. United States, 249 U.S. 34 (1919). The controversy in Nicholas involved a British statute that subjected all potable spirits distilled and sold in the United Kingdom

to a tax of 14s. 9d. per gallon. Exporters were not only exempted from the tax, but were paid an allowance from the treasury of 3d. per gallon of pure spirits and 5d. per gallon of compounded spirits. The Treasury Department again countervailed only against the extra allowance, not against the amount of the excise tax remitted. Nevertheless, the Nicholas Court cited the broad language of Downs as the holding of that case and added some broad language of its own:

> "[T]he sale of spirits to other countries is relieved from a burden that their sale in the United Kingdom must bear. There is a benefit, therefore, in exportation, an inducement to seek the foreign market." 249 U.S., at 37.

The only recent case to deal with this issue is American Express Co. v. United States, 332 F. Supp. 191 (Cust. Ct. 1971), aff'd, 472 F.2d 1050 (C.C.P.A. 1973). Italy remitted the full amount of various indirect taxes upon the exportation of electronic transmission tower components. Previously, the same taxes had been cast in the form of a direct tax on the manufacturer's overhead. Hence, in countervailing against the full amount of the indirect taxes, the Treasury may have been motivated by the fact that the taxes strongly resembled the direct tax they had replaced. Specifically, there was a lack of relationship between the value of the goods and the amount

of the taxes remitted that suggested that the taxes were direct. The Treasury treated the taxes according to this underlying nature, rather than their illusory form as indirect taxes. (Direct taxes are countervailable under GATT; indirect taxes are not.) The Customs Court upheld the imposition of the countervailing duty, concluding that the broad language in Downs about remission of indirect taxes was the holding of the Court. C.C.P.A. affirmed without reaching the Downs issue. Instead, it analyzed the nature of the taxes at issue and agreed with the Treasury that they really were direct.

II

THE LEGISLATIVE HISTORY

The operative language of the statute has remained virtually unchanged since 1897. C.C.P.A. reasoned that since Congress repeatedly has re-enacted the statute without change, it must approve of the consistent administrative practice under it. The court cited two documents, submitted to Congress, interpreting Downs as being based on the excessive remission notion (via the certificates). Petn 72a-73a. One was a submission to the House Ways and Means Committee, the other a report of the Tariff Commission.

no change since 1897

The usual presumption that arises from continual statutory re-enactment in the face of a supposedly controlling decision of this Court, however, is that the decision itself controls, not the gloss put upon it by some bureaucrat, upon which Congress does not even purport to take any action. (But cf. United States Steel v. Multistate Tax Commission, --- U.S. ---, --- (White, J., dissenting).) Thus, this line of analysis simply takes us back to interpretation of what the Downs opinion meant.

Another factor cutting against the narrow interpretation of C.C.P.A. is that the 1897 Act was a deliberate expansion of its predecessors. The Tariff Act of 1894 provided for payment of an additional duty on sugar, syrups, and molasses where the exporting country paid a bounty on exportation. The 1890 Tariff Act had a similar provision applying only to sugar. Apparently, these sections were intended to apply only to excessive remissions -- i.e., in excess of the amount of the tax -- but in 1897, different language was used, particularly the addition of the broader word "grant" to supplement "bounty." The Nicholas Court adopted this view of the 1897 Act as broadening the statute from excessive remissions to all remissions. 249 U.S., at 39. I think the SG's argument to the contrary is simply misleading.

Finally, in 1951 and 1952, the Treasury sought amendments that would make the statute conform to the administrative practice of countervailing only against excessive remissions. These proposals were rejected. C.C.P.A. argued that the rejection did not stem from congressional disapproval of the administrative practice, but from objections to other parts of the proposals. Petn 78a. Furthermore, Congress did not adopt the suggestion of some witnesses on the Trade Act of 1974 explicitly to make nonexcessive excise remissions countervailable. The only inference from all of this is that Congress seems to be satisfied with whatever the Act says. And what it says seems to be what Downs says. In short, the legislative history is not very helpful.

Legis. History sheds little light, & Hunt Downs remains the law.

III

POLICY CONSIDERATIONS

Apparently realizing that his position on both the legislative history and the case law is quite weak, the SG relies quite heavily on a sort of economic analysis of the effects of indirect taxes, such as the Japanese Commodity Tax. He attempts to show that failure to collect such taxes does not amount to a subsidization of exports, since the product goes off to the foreign land to

compete at its "actual" cost of production, not at a level below costs of production, as was the case in Downs and Nicholas.

This argument, however, assumes the conclusion: that such taxes are not genuine costs of production, the forgiveness of which amounts to a form of subsidy. In other words, the SG takes issue with the language in Downs and Nicholas to the effect that if exports are excused from a tax that all products are asked to pay, there is an inducement to seek the foreign market and consequently, a subsidy in favor of exports.

The underlying premise of the Treasury's position -- and GATT's -- that remissions of direct taxes are subsidies but remissions of indirect taxes are not, is the notion that direct taxes are not passed through to the purchaser but are partially absorbed and partially shifted backwards to factors of production in the form of lower wages and lower prices for raw materials; indirect taxes, on the other hand are supposed to be passed completely forward to the purchaser, so that forgiveness of a tax does not reflect foregiveness of any cost that the manufacturer would bear in any event. Hence, there is no subsidy.

This premise is now widely regarded as untrue by

economists. "A review of American economists would probably now indicate general acceptance of partial forward shifting of the corporate income tax as well as some backward shifting of the excise tax. The extremes of full shifting in either direction are for the most part rejected." 114 Cong. Rec. 3660 (1968) (extension of remarks of Rep. Curtis, quoting Milton Leontiades). See M. Kryzniak & R. Musgrave, The Incidence of the Corporation Income Tax, chs. 6, 8 (1963). Even the Treasury appears to accept this as an economic truth, App. 80, but adheres to its policy on the statute out of fear of the repercussions that might follow a violation of GATT. (Note that the Treasury is not bound to follow GATT, since a protocol requires the United States to adhere to the provision about countervailing duties only to the extent permitted by the law in existence in 1947. 61 Stat. A2051. Hence, if the statute requires countervailing duties on remissions of indirect taxes, the Treasury would be bound by law to countervail, rather than to follow GATT.)

Where an indirect tax is not fully shifted forward into the price, a remission of the portion of the tax not shifted permits the producer to offset some of his costs. Hence, there is a subsidy to the extent of the tax

not shifted forward, creating a competitive advantage.

Moreover, it might be possible to look at the excise tax in the simpler terms of the Downs and Nicholas Courts. Any time there is a forgiveness of a burden all products are asked to bear at home, there is a subsidy in the amount of the "societal cost" that manufacturers generally are asked to pay. This induces the manufacturer to seek the foreign market, where he is free of the responsibility for recognizing the social costs of his activities at home -- police and fire protection, pollution, employment insurance, etc. -- that were covered by the tax revenues forgiven. Thus, in a sense it may be said that he is selling in the foreign market below his true costs of production.

IV

CONCLUSION

The purpose of Congress does not emerge clearly, but the application of the normal presumption would tell us that constant re-enactment in the face of Downs means that Congress accepted whatever that decision stands for. As indicated above, it seems to stand for the proposition that nonexcessive remission of an indirect tax, like the one at issue here, is a countervailable bounty or grant.

Inconsistent administrative practice cannot override that interpretation, particularly since for the first 76 years of practice under the Act there was no judicial review of decisions not to impose a countervailing duty. See United States v. Hammond Lead Products, Inc., 440 F.2d 1024 (C.C.P.A.), cert. denied, 404 U.S. 1005 (1971) (finding no jurisdiction to review negative countervailing duty determination), overruled by 19 U.S.C. § 1516(d). Hence, there was no effective way to challenge the Treasury practice.

Modern economic analysis indicates that the Downs Court was correct in viewing such remissions as subsidies. Thus, in the absence of any clear directive from Congress, the better course would seem to be to adhere to precedent as supported by economic policy. If Congress wishes to define "bounty or grant" more precisely -- either to fit GATT or to permit more detailed analysis by the Secretary of the actual economic effects of particular taxes, both direct and indirect -- then it may do so.

Bob

77-539 ZENITH v. U.S. Argued 4/25/78

Involves § 303 of Tariff Act re to "bounty or grant" & applicability thereof to the "remission" of a domestic tax by Japan on goods exported.

Court held that remission of a tax is a bounty or grant.

Iknesen (Rets)

The "bounty or grant" provision, enacted in 1897, has been re-enacted five times - including re-enactment after decision in Downe.

Amount of discretion given Sec of Treas is limited. If it is decided there is a bounty or grant, Sec. has no discretion

Downe decided that "remission" of a tax is a "bounty or grant"

The statute does not by its terms confer any discretion on Sec/Treas -

SG emphasizes adverse consequences

McGee (The S.G.)

Relies on Leg. hist.

Argues that a "remission" that was is not excessive or not a bounty or grant. And a remission of a tax is not excessive unless it exceeds that amt. of original tax.

A "remission" may include a forgiveness of tax as well as a rebate of a tax paid.

A "draw-back" is only a "rebate".

Concedes that Downes language is squarely vs Govt.

SG calls this dicta. (PS is not so sure). Argues the tax itself was not remitted..

Relies on Adm. construction by Dept. of the Treasury. But there has been no Rule Making procedure.

Affirm 7-2

77-539 ZENITH v. U.S. Conf. 4/28/78

The Chief Justice Affirm

& Douma can't control in light 75 years of adm. interpretation

Mr. Justice Brennan Affirm

Mr. Justice Stewart Affirm

Sec/Treas is right.

Mr. Justice White Affirm

Brown doesn't control.

Mr. Justice Marshall Affirm.

(No dissent)

Mr. Justice Blackmun Affirm

Close case. Treasury Dept has acted badly.

Brown is hard to get around. There may be some middle ground. Both parties here take extreme positions. Could Remand.

Mr. Justice Powell Reverse (tentative)

Donner is not too easy for me to get.

I may not dissent.

Mr. Justice Rehnquist Reverse

The so-called dicta was necessary to decision in Donner — & Tracy. Dept. can't properly ignore it.

Mr. Justice Stevens Affirm

One could view this as a Rakestraw Q. Could overrule Donner

Zenith Corp

Supreme Court Ponders a Time Bomb

By CLYDE H. FARNSWORTH

In the Zenith case, the Court will decide whether a tax rebate given to foreign companies selling in the U.S. is unfair to U.S. producers. A ruling in favor of Zenith could turn world trade topsy-turvy.

WASHINGTON — In Japan they speak of the Zenith case as the "jigan bakudan" of trade, in Germany as "die Bombe mit Zeitzündung," in France as "une bombe à retardement."

In plain English, these epithets translate as a "trade time bomb," not an exaggerated description of an issue on which the Supreme Court will announce a decision at any moment. Trade experts in the United States as well as abroad compare the potential impact of a ruling in favor of the Zenith Radio Corporation to what occurred after enactment of the Smoot-Hawley Tariff of 1930, the protectionist legislation that many historians believe ushered in the Great Depression.

The Court will determine whether exporters of goods to the United States are getting an unfair advantage when they receive a certain type of tax rebate from their governments. The arguments:

- Zenith says that the rebate constitutes a "bounty or grant" — a subsidy that under countervailing-duty legislation should automatically trigger protective levies by the United States to erase the competitive advantage.
- The Treasury says that the rebate, under the Government's practice of the last 80 years, is not an express subsidy and that if countervailing duties were applied foreign governments would retaliate against the United States, resulting in massive trade disruption.

"We are watching this case like milk on a hot stove," an official of Europe's Common Market said. "An adverse ruling could bring chaos."

Japanese officials see Zenith's position and similar allegations by the United States Steel Corporation as part of a protectionist ferment that threatens economic and political stability in the world. "It's a cloud over the multilateral trade negotiations," warns Alonzo McDonald, this country's deputy trade

low. Right after the Customs Court ruled in favor of Zenith last year, U.S. Steel echoed Zenith's argument by asking for countervailing duties on steel from Western Europe. There the value added tax, an indirect tax borne by consumers throughout the Common Market, is rebated on exports. If Japanese electronics companies are getting a "bounty or grant," U.S. Steel insisted, so are European steel mills.

The permutations and combinations are endless and, for American companies, could cut both ways. In March the Ford Motor Company filed a friend-of-the-court brief in the Zenith case, asking the Supreme Court to narrow the focus of its ruling. Ford imports automobiles and parts from its factories abroad and is afraid that a blanket levying of countervailing duties would raise its costs. But Ford suggested that it would not mind higher duties on cars built overseas by foreign-owned companies.

Zenith is relying heavily on a Supreme Court decision of 1903. In that case a Baltimore importer, Robert E. Downs, contested the imposition of a countervailing duty on sugar from Russia. The Czarist Government relieved the exporters of the excise tax they would have owed if the sugar had been sold at home in Russia.

In its decision, the Supreme Court said: "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." So the sugar duty remained in force.

This passage sounds as if the issue had already been settled. But the Treasury contends that the passage cannot be lifted from its context.

The thrust of the Treasury's legal argument is that the United States in 1903 was imposing a countervailing duty only on the amount of excessive tax remission — on what was identifiable as a bounty or grant. Over 80 years, the ar-

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To soften the blow of a ruling favorable to Zenith's side, the Administration would have to seek special legislation from Congress, opening up a Pandora's box of trade controversy in an election year — a prospect that American officials view with apprehension.

The precise point at issue, argued orally April 25-26 in the ornate Supreme Court chamber, is whether the rebating of an indirect "commodity" tax on Japanese consumer electronic products exported to the United States is, in a legal sense, a "bounty or grant." These words, used in the Tariff Act of 1897, have never been defined.

When people in Japan buy radio, television or phonograph products, a 15 percent consumption tax (something like a sales tax in the United States) is paid. But the 15 percent tax is not imposed on products made in Japan if they are shipped overseas from the factory. And, if the tax is paid on a shipment intended for the domestic market, it is refunded by the Japanese Government should the shipment be exported instead.

Zenith maintains that the refund of the 15 percent tax is a bounty or grant. If it is, the Treasury is required by tariff law to charge a 15 percent countervailing duty on the goods when they enter the United States.

The company asked the Treasury to

Pat Warner

the "mischief" of the appellate court's decision. Otherwise, he asserted, the result would be "judicial cooperation in the executive's refusal to honor the exercise by Congress of its constitutional power and duty to regulate foreign com-

on to American consumers, would mean these price increases: Japanese sporting equipment, 30 percent; Japanese cameras, 16 percent; French luxury merchandise, 33.3 percent; French wines, 17.6 percent; most goods from

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To change the rules now, when nations have established system direct taxation (such as the Co Market's value added tax) and wh port tax rebates have been de legal under the General Agreem Tariffs and Trade, would "significant economic disloactio and abroad," the Treasury declar

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Meanwhile, the United Stat shown its concern over export bates in the forums of economi macy. A sign that the rebates co come an explosive issue came back as 1968 in a Balance of Pa address by President Lyndon B son. "American commerce is at vantage," he said, "because of system of some of our trading pa Some nations give across-the-bo bates on exports which leave th and impose special border tax on our goods entering their count

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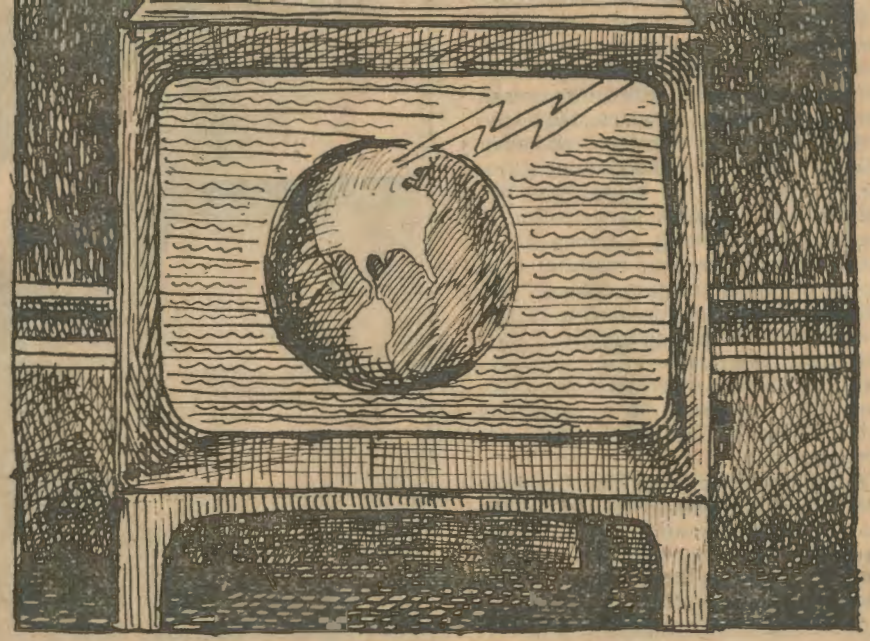
The company asked the Treasury to impose the levy in 1970. The Treasury refused, contending that Japan's tax forgiveness on exports is not legally a bounty or grant. Zenith appealed and won a unanimous ruling in its favor from a three-judge United States Customs Court on April 12, 1977. The Treasury appealed that ruling to the Court of Customs and Patent Appeals, and last July, in a 3-to-2 judgment, it reversed the lower court.

Though no countervailing duties were assessed, the Treasury has required that a 15 percent bond be posted on the Japanese-made consumer electronic goods in question. This is to cover the potential tariff liability on hundreds of millions of dollars of Japanese shipments if the final ruling vindicates Zenith. The duties would be collected back to the date of the Customs Court decision.

The next step in the case was Zenith's appeal to the Supreme Court, and in February it granted a writ of certiorari, signaling its willingness to review the case. All nine Justices were present at the oral arguments last month.

Zenith's lawyer, Frederick L. Ikenson of the Washingtn law firm of Stewart & Ikenson, asked the High Court to correct the "mischief" of the appellate court's decision. Otherwise, he asserted, the result would be "judicial cooperation in the executive's refusal to honor the exercise by Congress of its constitutional power and duty to regulate foreign commerce."



Pat Warner

Solicitor General Wade H. McCree Jr., arguing for the Treasury, warned of the risks of a breakdown in international trade if the lower court's decision were reversed.

In their questioning, the Justices showed an awareness of the wider issues. But there is no way to anticipate what their decision will be. Statistics offer little comfort to the Government: In two-thirds of the cases the Supreme Court has reviewed, it has reversed rulings of the lower court.

What gives the Zenith case far-reaching significance is the fact that other large trading partners of the United States remit similar indirect taxes on goods they export. The Commerce Department estimates that in 1976 the value of United States imports on which indirect taxes were exempted by the country of origin exceeded $50 billion — which represents one-half of American imports.

There would be a significant inflationary, as well as trade, impact if the Supreme Court finds that export tax remission is a bounty or grant. Official figures indicate that imposing countervailing duties on all such imports, if passed on to American consumers, would mean these price increases: Japanese sporting equipment, 30 percent; Japanese cameras, 16 percent; French luxury merchandise, 33.3 percent; French wines, 17.6 percent; most goods from West Germany, 11 percent; most goods from the Netherlands, 18 percent, and most goods from Canada, 12 percent.

Solicitor General McCree likened the impact of added duties such as these to the impact of Smoot-Hawley in the 1930's, when United States duties on imported goods averaged 17 percent. The average duty now is 3.9 percent.

If Zenith wins protection against foreign-made products, other American manufacturers can be expected to follow suit. The Treasury has unswervingly taken the position, ratified repeatedly by Congress, that export tax rebates are not bounties or grants unless they are excessive.

To change the rules now, when many nations have established systems of indirect taxation (such as the Common Market's value added tax) and when export tax rebates have been declared legal under the General Agreement on Tariffs and Trade, would cause "significant economic disloactions here and abroad," the Treasury declares.

"If there ever were a case," says the Government's brief, "in which the Court should defer to the [Treasury] Secretary's interpretation of the statute he administers and leave to Congress the task of changing the governing rules, this is that case."

Meanwhile, the United States has shown its concern over export tax rebates in the forums of economic diplomacy. A sign that the rebates could become an explosive issue came as far back as 1968 in a Balance of Payments address by President Lyndon B. Johnson. "American commerce is at a disadvantage," he said, "because of the tax system of some of our trading partners. Some nations give across-the-board rebates on exports which leave their port and impose special border tax charges on our goods entering their country."

Robert S. Strauss, this country's Special Representative for Trade Negotiations, is pressing for tough standards governing rebates and subsidies at the multilateral trade negotiations being held in Geneva. But the prospects of winning significant concessions are uncertain.

Clyde H. Farnsworth is a reporter in the Washington bureau of The New York Times.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: 31 MAY 1978

Recirculated: Revised 6/1

No. 77-539, Zenith Radio Corp. v. United States

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Under § 303(a) of the Tariff Act of 1930, 46 Stat. 687, as amended, 19 U.S.C. § 1303(a) (Supp. V, 1975), whenever a foreign country pays a "bounty or grant" upon the exportation of a product from that country, the Secretary of the Treasury is required to levy a countervailing duty, "equal to the net amount of such bounty or grant," upon importation of the product into the United States.[1] The issue in this case is whether Japan confers a "bounty" or "grant" on certain consumer electronic products by failing to impose a commodity tax on those products when they are exported, while imposing the tax on the products when they are sold in Japan.

Under the Commodity Tax Law of Japan, Law No. 48 of 1962, see App. 44-48, a variety of consumer goods, including the electronic products at issue here, are subject to an "indirect" tax -- a tax levied on the goods themselves, and computed as a percentage of the manufacturer's sales price rather than the income or wealth of the purchaser or seller. The Japanese tax applies both to products manufactured in Japan and to those imported into Japan.[2] On goods manufactured in Japan, the tax is levied upon shipment from the factory; imported products are taxed when they are withdrawn from the customs warehouse. Only goods destined for consumption in Japan are subject to the tax, however. Products shipped for export are exempt, and any tax paid upon the shipment of a product is refunded if the product is subsequently exported. Thus the tax is "remitted" on exports.[3]

In April 1970 petitioner, an American manufacturer of consumer electronic products, filed a petition with the

Commissioner of Customs,[4] requesting assessment of countervailing duties on a number of consumer electronic products exported from Japan to this country.[5] Petitioner alleged that Japan had bestowed a "bounty or grant" upon exportation of these products by, inter alia, remitting the Japanese Commodity Tax that would have been imposed had the products been sold within Japan. In January 1976, after soliciting the views of interested parties and conducting an investigation pursuant to Treasury Department regulations, see 19 C.F.R. § 159.47(c) (1977), the Acting Commissioner of Customs published a notice of final determination, rejecting petitioner's request. 41 Fed. Reg. 1298 (1976).[6]

Petitioner then filed suit in the Customs Court, claiming that the Treasury Department had erred in concluding that remission of the Japanese Commodity Tax was not a bounty or grant within the purview of the countervailing duty statute.[7] The Department defended on the ground that, since the remission of indirect taxes was "nonexcessive," the statute

did not require assessment of a countervailing duty. In the Department's terminology, a remission of taxes is "nonexcessive" if it does not exceed the amount of tax paid or otherwise due; thus, for example, if a tax of $5 is levied on goods at the factory, the return of the $5 upon exportation would be "nonexcessive," whereas a payment of $8 from the government to the manufacturer upon exportation would be "excessive" by $3. The Department pointed out that the current version of § 303 is in all relevant respects unchanged from the countervailing duty statute enacted by Congress in 1897,[8] and that the Secretary -- in decisions dating back to 1898 -- has always taken the position that the nonexcessive remission of an indirect tax is not a bounty or grant within the meaning of the statute.[9]

On cross-motions for summary judgment, the Customs Court ruled in favor of petitioner and ordered the Secretary to assess countervailing duties on all Japanese consumer electronic products specified in petitioner's complaint. 430 F. Supp. 242 (1977). The court acknowledged the Secretary's

longstanding interpretation of the statute. It concluded, however, that this administrative practice could not be sustained in light of this Court's decision in Downs v. United States, 187 U.S. 496 (1903), which held that an export bounty had been conferred by a complicated Russian scheme for the regulation of sugar production and sale, involving, among other elements, remission of excise taxes in the event of exportation.

On appeal by the Government, the Court of Customs and Patent Appeals, dividing 3-2, reversed the judgment of the Customs Court and remanded for entry of summary judgment in favor of the United States. 562 F.2d 1209 (1977). The majority opinion distinguished Downs on the ground that it did not decide the question of whether nonexcessive remission of an indirect tax, standing alone, constitutes a bounty or grant upon exportation. The court then examined the language of § 303 and the legislative history of the 1897 provision and concluded that, "in determining whether a bounty or grant has been conferred, it is the economic result of the foreign

government's action which controls." 562 F.2d at 1216. Relying primarily on the "long-continued" and "uniform" administrative practice, id. at 1218-1219, 1222-1223, and secondarily on congressional "acquiescence" in this practice through repeated re-enactment of the controlling statutory language, id. at 1220, the court held that interpretation of "bounty or grant" so as not to include a nonexcessive remission of an indirect tax is "a lawfully permissible interpretation of § 303." 562 F.2d at 1223.

We granted certiorari, ___ U.S. ___ (1978), and we now affirm.

II

It is undisputed that the Treasury Department adopted the statutory interpretation at issue here less than a year after passage of the basic countervailing duty statute in 1897, see T.D. 19321, 1 Synopsis of [Treasury] Decisions 696 (1898), and that the Department has uniformly maintained this position for over 80 years.[10] This longstanding and consistent administrative interpretation is entitled to considerable weight.

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain [an agency's] application of [a] statutory term, we 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.'" Udall v. Tallman, 380 U.S. 1, 16 (1965), quoting Unemployment Compensation Commission v. Aragon, 329 U.S. 143, 153 (1946).

Moreover, an administrative "practice has peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933); see, e.g., Power Reactor Co. v. Electricians, 367 U.S. 396, 408 (1961).

The question is thus whether, in light of the normal aids to statutory construction, the Department's interpretation is "sufficiently reasonable" to be accepted by a reviewing court. Train v. Natural Resources Defense Council, 421 U.S. 60, 75 (1975). Our examination of the language, the legislative

history, and the overall purpose of the 1897 provision persuades us that the Department's initial construction of the statute was far from unreasonable; and we are unable to find anything in the events subsequent to that time that convinces us that the Department was required to abandon this interpretation.

A

The language of the 1897 statute evolved out of two earlier countervailing duty provisions that had been applicable only to sugar imports. The first provision was enacted in 1890, apparently for the purpose of protecting domestic sugar refiners from unfair foreign competition; it provided for a fixed countervailing duty on refined sugar imported from countries that "pay . . . , directly or indirectly, a [greater] bounty on the exportation of" refined sugar than on raw sugar. Tariff Act of 1890, ¶ 237, 26 Stat. 584. Although the congressional debates did not focus sharply on the meaning of the word "bounty," what evidence there is suggests that the

term was not intended to encompass the nonexcessive remission of an indirect tax. Thus, one strong supporter of increased protection for American sugar producers heavily criticized the export "bounties" conferred by several European governments, and attached a concise description of "The Bounty Systems in Europe"; both the remarks and the description indicated that the "bounties" consisted of the amounts by which government payments exceeded the excise taxes that had been paid upon the beets from which the sugar was produced. See 21 Cong. Rec. 9529, 9532 (1890) (remarks of Sen. Gibson); id. at 9537 (description). According to the description, for example, French sugar manufacturers paid an "excise tax [of] $97.06 per gross ton[,] [b]ut upon the export of a ton of sugar . . . received back as a drawback $117.60, making a clear bounty of $20.54 per gross ton of sugar exported." Id. at 9537.

This concept of a "net" bounty -- that is, a remission in excess of taxes paid or otherwise due -- as the trigger for a countervailing duty requirement emerged more clearly in the

second sugar provision, enacted in 1894. Tariff Act of 1894, ¶ 182 1/2, 28 Stat. 521. The 1894 statute extended the countervailing duty requirement to all imported sugar, raw as well as refined, and provided for payment of a fixed duty on all sugar coming from a country which "pays, directly or indirectly, a bounty on the export thereof." A proviso to the statute made clear, however, that no duties were to be assessed in the event that the "bounty" did not exceed the amount of taxes already paid.[11] The author of the 1894 provision, Senator Jones, expressly characterized this difference between the amounts received upon exportation and the amounts already paid in taxes as the "net bounty" on exportation. 26 Cong. Rec. 5705 (1894) (discussing German export bounty system).

The 1897 statute greatly expanded upon the coverage of the 1894 provision by making the countervailing duty requirement applicable to all imported products. Tariff Act of 1897, § 5, 30 Stat. 205, quoted in n. 8, supra. There are strong indications, however, that Congress intended to retain the "net

bounty" concept of the 1894 provision as the criterion for determining when a countervailing duty was to be imposed. Although the proviso in the 1894 law was deleted, the 1897 statute did provide for levying of duties equal to the "net amount" of any export bounty or grant. And the legislative history suggests that this language, in addition to establishing a responsive mechanism for determining the appropriate amount of countervailing duty, was intended to incorporate the prior rule that nonexcessive remission of indirect taxes would not trigger the countervailing requirement at all.

There is no question that the prior rule was carried forward in the version of the 1897 statute that originally passed the House. This version did not extend the countervailing duty requirement to all imports. Instead, it merely modified the 1894 sugar provision so that the amount of the countervailing duty, rather than being fixed, would be "equal to [the export] bounty, or so much thereof as may be in

excess of any tax collected by [the foreign] country upon [the] exported [sugar], or upon the beet or cane from which it was produced . . . ." See 30 Cong. Rec. 1634 (1897). The House Report unequivocally stated that the countervailing duty was intended to be "equivalent to the net export bounty paid by any country." H.R. Rep. No. 1, 55th Cong., 1st Sess. 4-5 (1897) (emphasis supplied).

The Senate deleted the House provision from the bill and replaced it with the more general provision that was eventually enacted into law. See 30 Cong. Rec. at 1733 (striking House provision); id. at 2226 (adopting general provision); id. at 2705, 2750 (House agreement to Senate amendment). The debates in the Senate indicate, however, that -- aside from extending the coverage of the House provision -- the Senate did not intend to change its substance. Senator Allison, the sponsor of the Senate amendment, explained that the House provision was being "stricken from the bill," because "the same paragraph in substance [is] being inserted [in] section [5], making this

countervailing duty apply to all articles instead of to [sugar] alone." Id. at 1635. See also id. at 1732 (remarks of Sen. White). Senator Allison twice remarked that the countervailing duty that he was proposing was an "imitation" of the one provided in the 1894 statute, id. at 1719; see id. at 1674, and later in the debates he stated -- in response to a question as to whether the countervailing duty would be equal to "the whole amount of the export bounty" -- that "[the bounty contemplated] is the net bounty, less the taxes and reductions . . . ," id. at 1721 (answering question by Sen. Vest).

An additional indication of the Senate's intent can be found in the extended discussion of the effect that the statute would have with respect to German sugar exports. Time after time the amount of the German "bounty" -- and, correspondingly, the amount of the countervailing duty that would be imposed under the statute -- was stated to be 38¢ per 100 pounds of refined sugar, and 27¢ per 100 pounds of raw sugar. See, e.g., id. at 1650 (remarks of Sens. Allison, Vest, and Caffery), 1658

(Sens. Allison and Jones), 1680 (Sen. Jones), 1719 (Sens. Allison and Lindsay), 1729 (Sen. Caffery), 2823-2824 (Sens. Aldrich and Jones). These figures were supplied by the Treasury Department itself, see id. at 1719 (remarks of Sen. Allison), 1722 (letter from Treasury Department to Sen. Caffery), and were utilized by both proponents and opponents of the measure. And yet it was frequently acknowledged during the debates that Germany exempted sugar exports from its domestic consumption tax of $2.16 per 100 pounds, an amount far in excess of the 38¢ and 27¢ figures. See, e.g., id. at 1646 (remarks of Sen. Vest), 1651 (Sen. Caffery), 1697 (same), 2205 (same). Had the Senators considered the mere remission of an indirect tax to be a "bounty," it seems unlikely that they would have stated that the German "bounties" were only 38¢ and 27¢ per 100 pounds.[12] Especially in light of the strong opposition to countervailing duties even of the magnitude of 38¢ and 27¢, see, e.g., id. at 1719 (remarks of Sen. Lindsay), 2203-2205 (remarks of Sen. Gray), it seems reasonable to infer

that Congress did not intend to impose countervailing duties of many times this magnitude.

B

Regardless of whether this legislative history absolutely compelled the Secretary to interpret "bounty or grant" so as not to encompass any nonexcessive remission of an indirect tax, there can be no doubt that such a construction was reasonable in light of the statutory purpose. Cf. Mourning v. Family Publications Service, Inc., 411 U.S. 356, 374 (1973). This purpose is relatively clear from the face of the statute and is confirmed by the congressional debates: the countervailing duty was intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments. See, e.g., 30 Cong. Rec. at 1674 (remarks of Sen. Allison), 2205 (Sen. Caffery), 2225 (Sen. Lindsay). The Treasury Department was well-positioned to establish rules of decision that would accurately carry out this purpose, particularly since it had contributed the very

figures relied upon by Congress in enacting the statute. See Zuber v. Allen, 396 U.S. 168, 192 (1969).

In deciding in 1898 that a nonexcessive remission of indirect taxes did not result in the type of competitive advantage that Congress intended to counteract, the Department was clearly acting in accordance with the shared assumptions of the day as to the fairness and economic effect of that practice. The theory underlying the Department's position was that a foreign country's remission of indirect taxes did not constitute subsidization of that country's exports. Rather, such remission was viewed as a reasonable measure for avoiding double taxation of exports -- once by the foreign country and once upon sale in this country. As explained in a recent study prepared by the Department for the Senate Committee on Finance,

> "[the Department's construction was] based on the principle that, since exports are not consumed in the country of production, they should not be subject to consumption taxes in that country. The theory has been that the application of countervailing duties to the rebate of consumption [and other indirect] taxes would have the effect of double taxation of the product, since the United States would not

> only impose its own indirect taxes, such as Federal and state excise taxes and state and local sales taxes, but would also collect, through the use of the countervailing duty, the indirect tax imposed by the exporting country on domestically consumed goods." Executive Branch GATT Studies, Senate Comm. on Finance, 93d Cong., 2d Sess. 17-18 (1974).

This intuitively appealing principle regarding double taxation had been widely accepted both in this country and abroad for many years prior to enactment of the 1897 statute. See, e.g., Act of July 4, 1789, § 3, 1 Stat. 26 (remission of import duties upon exportation of products); 4 D. Ricardo, Works and Correspondence 216-217 (P. Sraffa ed. 1951) (first published in 1822); A. Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations, Book Four, ch. IV (1776).

C

The Secretary's interpretation of the countervailing duty statute is as permissible today as it was in 1898. The statute has been re-enacted five times by Congress without any modification of the relevant language, see n. 8 supra, and, whether or not Congress can be said to have "acquiesced" in the

administrative practice, it certainly has not acted to change it. At the same time, the Secretary's position has been incorporated into the General Agreement on Tariffs and Trade (GATT),[13] which is followed by every major trading nation in the world; foreign tax systems as well as private expectations thus have been built on the assumption that countervailing duties would not be imposed on nonexcessive remissions of indirect taxes. In light of these substantial reliance interests, the longstanding administrative construction of the statute should "not be disturbed except for cogent reasons." McLaren v. Fleischer, 256 U.S. 477, 481 (1921); see Udall v. Tallman, supra, 380 U.S. at 18.

Aside from the contention, discussed in Part III, infra, that the Department's construction is inconsistent with this Court's decisions, petitioner's sole argument is that the Department's position is premised on false economic assumptions that should be rejected by the courts. In particular, petitioner points to "modern" economic theory suggesting that

remission of indirect taxes may create an incentive to export in some circumstances, and to recent criticism of the GATT rules as favoring producers in countries that rely more heavily on indirect than on direct taxes.[14] But, even assuming that these arguments are at all relevant in view of the legislative history of the 1897 provision and the longstanding administrative construction of the statute, they do not demonstrate the unreasonableness of the Secretary's current position. Even "modern" economists do not agree on the ultimate economic effect of remitting indirect taxes, and -- given the present state of economic knowledge -- it may be difficult, if not impossible, to measure the precise effect in any particular case. See, e.g., Executive Branch GATT Studies, supra, at 13-14, 17; Marks & Malmgren, supra n. 14, at 351. More fundamentally, as the Senate Committee with responsibility in this area recently stated, "the issues involved in applying the countervailing duty law are complex, and . . . internationally, there is [a] lack of any satisfactory

agreement on what constitutes a fair, as opposed to an 'unfair,' subsidy." S. Rep. No. 93-1298, p. 183 (1974). In this situation, it is not the task of the judiciary to substitute its views as to fairness and economic effect for those of the Secretary.

III

Notwithstanding all of the foregoing considerations, this would be a very different case if, as petitioner contends, the Secretary's practice were contrary to this Court's decision in Downs v. United States, supra, 187 U.S. 496.[15] Upon close examination of the admittedly opaque opinion in that case, however, we do not believe that Downs is controlling on the issue presented here.

The Russian sugar laws at issue in Downs were, as the Court noted, "very complicated." Id. at 502. Much of the Court's

opinion was devoted to an exposition of these provisions, see id. at 502-512, but for present purposes only two features are relevant: (1) excise taxes imposed on sugar sales within Russia were remitted on exports; and (2) the exporter received, in addition, a certificate entitling its bearer to sell an amount of sugar in Russia, equal to the quantity exported, without paying the full excise tax otherwise due. This certificate was transferable and had a substantial market value related to the amount of tax forgiveness that it carried with it.

The Secretary, following the same interpretation of the statute that he followed here, imposed a countervailing duty based on the value of the certificates alone, and not on the excise taxes remitted on the exports themselves.[16] Downs, the importer, sought review claiming that the Russian system did not confer any countervailable bounty or grant within the meaning of the 1897 statute. He did not otherwise challenge the amount of the duty assessed by the Secretary.[17]

The issue as it came before this Court, therefore, was whether a nonexcessive remission of an indirect tax, together with the granting of an additional benefit represented by the value of the certificate, constituted a "bounty or grant." Since the amount of the bounty was not in question, neither the parties nor this Court focused carefully on the distinction between remission of the excise tax and conferral of the certificate. Petitioner argues, however, that certain broad language in the Court's opinion suggests that mere remission of a tax, even if nonexcessive, must be considered a bounty or grant within the meaning of the statute. Petitioner relies in particular on the following language:

> "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." Id. at 515.

This passage is inconsistent with both preceding and subsequent language which suggests that the Court understood the "bounty" to reside in the value of the certificates. At one point the Court stated that "[t]he amount [the exporter] receives for his export certificate [on the market], say, R. 1.25, is the exact amount of the bounty he receives upon exportation . . . ." 187 U.S. at 515.[18] And the Court in conclusion specifically endorsed the Fourth Circuit's holding to the same effect, see n. 17 supra:

> "[T]he Circuit Court of Appeals found: 'That the Russian exporter of sugar obtained from his government a certificate, solely because of such exportation, which is worth in the open market of that country from R. 1.25 to R. 1.64 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.' We all concur in this expression of opinion." 187 U.S. at 516.

Given this other language, we cannot read for its broadest implications the passage on which petitioner relies. In our view the passage does no more than establish the proposition that an excessive remission of taxes -- there, the combination

of the exemption with the certificates -- is an export bounty within the meaning of the statute.

As the court below noted, "'[i]t 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.'" 562 F.2d at 1213, quoting Cohens v. Virginia, 6 Wheat. 264, 398 (1821). No one argued in Downs that a nonexcessive remission of taxes, standing alone, would have constituted a bounty on exportation, and indeed that issue was not presented on the facts of the case. It must also be remembered, of course, that the Court did affirm the Secretary's decision, and that decision rested on the conclusion that a bounty had been paid only to the extent that the remission exceeded the taxes otherwise due. In light of all these circumstances, the isolated statement in Downs relied upon by petitioner cannot be dispositive here.

The judgment of the Court of Customs and Patent Appeals is, accordingly,

Affirmed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 31, 1978

RE: No. 77-539 Zenith Radio Corporation v. United States

Dear Thurgood:

I agree.

Sincerely,

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 31, 1978

Re: 77-539 - Zenith Radio Corp. v. United States

Dear Thurgood:

Please join me.

Respectfully,

Mr. Justice Marshall

Copies to the Conference

rdc 5/1/7?

TO: LFP, Jr.

FROM: Bob

RE: Mr. Justice Marshall's Draft in Zenith Radio v. U.S.

I think that this is a first-rate opinion right up until 20, where the discussion of the Downs case begins. At that point, a fudge begins, since a close of analysis of Downs would seem to indicate that the holding of the case precludes the result Justice Marshall has to reach. Still, Downs is extremely opaque, and this reading is not completely unfair.

If you are willing to swallow this rather facile treatment of a less-than-crystal-clear precedent, you could join. Otherwise, you could dissent along the following lines:

> Although the Court's discussion of the legislative history of the Tariff Act and the administrative practice thereunder is most persuasive, I am constrained to dissent. In my view, a close reading of Downs v. United States, 187 U.S. 496 (1903), precludes us from reaching the result reached by the Court today, the long administrative practice notwithstanding.

Dear Thurgood
Although I continue to have difficulty with Downs, you have written ~~an opinion~~ ~~I can join~~ a persuasive opinion. Please join me.

June 1, 1978

No. 77-539 Zenith Radio v. U.S.

Dear Thurgood:

Although I continue to have difficulty with Downs, you have written a persuasive opinion.

Please join me.

Sincerely,

Mr. Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 1, 1978

Re: No. 77-539, Zenith Radio Corp. v. U.S.

Dear Thurgood,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 7, 1978

Re: No. 77-539 - Zenith Radio Corp. v. United States

Dear Thurgood:

Please join me. I, like Lewis, continue to have some difficulty with Downs. I also was somewhat disturbed by the long administrative delay here and by the Japanese communication distributed shortly before the oral argument.

Your addition to footnote 9 is most helpful.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 2, 1978

Re: No. 77-539 — Zenith Radio Corp. v. United States

Dear Thurgood:

I agree.

Sincerely,

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1978

Re: 77-539 - Zenith Radio Corp. v. United States

Dear Thurgood:

I join.

Regards,

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 13, 1978

Re: No. 77-539 Zenith Radio Corp. v. United States

Dear Thurgood:

Please join me.

Sincerely,

Mr. Justice Marshall

Copies to the Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
				5/2/78				
Join TM 6/10/78	Join TM 5/31/78	Join TM 6/1/78	join TM 6/2/78	Typed draft 5/31/78	Join TM 6/7/78	Join TM 6/1/78	Join TM 6/13/78	Join TM 5/31/78
				1st draft 6/7/78				
				77-539 Zenith v. U.S.				