



Case Western Reserve Journal of International Law

Volume 10 | Issue 2

1978

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Recommended Citation

Jeffrey Hyman, *Export Subsidies: Countervailing Duties*, 10 Case W. Res. J. Int'l L. 577 (1978)

Available at: <https://scholarlycommons.law.case.edu/jil/vol10/iss2/13>

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EXPORT SUBSIDIES: COUNTERVAILING DUTIES—*The United States v. Zenith Radio Corporation*, 430 F. Supp. 242 (1977).

In an opinion discussing the political and economic concerns relative to countervailing duties on foreign government subsidized imports, the United States Court of Customs and Patent Appeals has reversed a lower Customs Court decision, by holding that the nonexcessive remission of a Japanese commodity tax¹ does not, as a matter of law, constitute a bounty or grant under §303 Tariff Act of 1930 as amended, 19 U.S.C. §1303 (Supp. V 1975). As a result of this determination, the appellate court ruled that electronic products imported from Japan, the manufacture and export of which resulted in the remission of a Japanese excise tax to the manufacturer, ought not be subject to countervailing duties upon importation to the United States.

The controversy arose as one of a series of "dumping" violations allegedly committed by several Japanese manufacturers in selling their wares abroad at prices which reflect the lower cost of production at home plus the government subsidy in the form of a tax remission. As long as production costs remain higher in the United States than in Japan, the Japanese manufactured items are in a position to be sold to American consumers at a lower price than similar items produced domestically in the United States.

It was one such situation that led Zenith Radio Corporation to institute an action to enforce the levy of countervailing duties on Japanese imports in order to increase the total cost of Japanese products. This increase would be passed on to consumers in the form of price increases for the affected items, and, as a result, Zenith's position in the American market would be protected.

Zenith claimed that authority for imposing such countervailing duties could be found in 19 U.S.C. §1303 which authorizes the levy of these duties on all imported goods, the manufacture of which induces the payment of a bounty or grant to the manufacturer of such imported items. At issue was the question of whether the remission of the Japanese Commodity Tax was sufficient to constitute a bounty or grant within the meaning of §1303.

The Customs Court based its decision in favor of Zenith on dictum found in a 1903 Supreme Court opinion, *Downs v. United States*,² in

¹ Commodity Tax Law, Law No. 48 of 1962.

² 187 U.S. 496 (1903).

which the Court suggested that the simple remission by a foreign government of an excise tax on produced goods when such goods are exported for sale ought to be sufficient to constitute a bounty as a matter of law. However, the Court of Appeals distinguished the *Downs* case on the basis of an additional award granted the manufacturer, in that case, in the form of a marketable certificate in excess of the mere excise tax remission. The appellate court noted that since the enactment of the Tariff Act of 1930, in no instance had it been called upon to consider the bounty-like nature of the remission of a foreign excise tax alone; rather, each prior case involved the payment of excessive remissions, grants or bounties of a value above and beyond the amount of the tax itself. *Zenith*, therefore, became a case of first impression in the Customs Court.

In view of the first impression status, and with respect to the political implications incident to any tampering with trade tariffs, the Court of Appeals was hesitant to invade the province of the legislature by assuming responsibility for the imposition of countervailing duties on the basis of the grant of an excise tax remission alone. The court noted that since the turn of the century the Treasury Department had been unwavering in its interpretation of the Tariff Act as requiring that a bounty or grant constitute more than a simple excise tax remission. It was suggested that prior legislative history indicated Congress' satisfaction with this reading of the statute since all proposals to define more clearly the words "bounty" and "grant" have been defeated.

The court further noted that Congress purposely refused to clearly define "bounty" and "grant" as used in the Tariff Act because it was their intent to establish that the economic effect on American commerce of a foreign governmental action dictates whether a countervailing duty ought be imposed. Therefore, neither form nor nomenclature was to be dispositive of the issue as to whether a bounty or grant had been conferred. The court considered it undeniable that Congress intended any factual assessment of economic activity to be undertaken by the Secretary of the Treasury. It realized that the complex economic analysis necessary for a determination of whether a governmental action had the effect of a bounty or grant was beyond the court's means, and since the record in *Zenith* was devoid of any administrative analysis suggesting that remission of the Japanese Commodity Tax had the effect of a bounty or grant, the Secretary must have determined otherwise. Such reasoning served as additional incentive for the court to rule in favor of the United States by determining

that a nonexcessive tax remission does not constitute a bounty or grant within the meaning of the Tariff Act.

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