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Article 18

Antidumping Act (J.C. Penney Co., v. Treasury Dep't.

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ANTIDUMPING ACT

The Antidumping Act[1] was enacted by Congress to prevent actual or threatened harm to a domestic corporation, caused by the sale of merchandise in the United States at a price lower than that charged in the country of origin.[2]

Proceedings under the Antidumping Act are initiated[3] by issuance of a notice by the Customs Bureau stating that the Commissioner of Customs suspects that imported goods are being sold for less than the price charged in the exporter's domestic market.[4] The Secretary of the Treasury must then decide within the ensuing three month period whether the foreign merchandise is presently, or likely to be, sold at less than its fair market value.[5]

If the Secretary of the Treasury arrives at a "less than fair market value" decision, the matter is remanded to the Tariff Commission, whose obligation is to ascertain whether sale at a "less than fair market value" poses either an actual or threatened injury to a domestic industry.[6] If it is concluded that a domestic industry is so threatened, the Treasury Department is then obligated to publish[7] this conclusion and to assess a special duty based on the price differential[8] between the

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1 Antidumping Act, 1921, § 201, 42 Stat. 11, *as amended*, 19 U.S.C. § 160 (1970).

2 *See* Note, *The Antidumping Act: Problems of Administration and Proposals for Change*, 17 STAN. L. REV. 730 (1965); Baier, *Substantive Interpretations Under the Antidumping Act and the Foreign Trade Policy of the United States*, 17 STAN. L. REV. 409 (1965). *See generally* Coudert, *The Application of the United States Antidumping Law in the Light of a Liberal Trade Policy*, 65 COLUM. L. REV. 189 (1965); Kohn, *The Antidumping Act: Its Administration and Place in American Trade Policy*, 60 MICH. L. REV. 407 (1962).

3 There are two methods of initiating an Antidumping proceeding. First, a domestic manufacturer may make a complaint directly to the Treasury Department. 29 Fed. Reg. 16320, *amending* 19 C.F.R. § 14.6(b) (1964). Or secondly, an official of the Customs Bureau who suspects a "dumping" infraction may notify the Treasury Department. 19 C.F.R. § 14.6(a) (1964). *See generally* Hendrick, *The United States Antidumping Act*, 58 AM. J. INT. L. 914 (1964).

4 19 U.S.C. § 160 (1970).

5 *Id.* § 160(a).

6 The Tariff Commission will also try to determine if a domestic industry has been prevented from being established by the importation of such goods into the United States. *Id.*

7 Under 19 U.S.C. § 160(b) (1958) publication is made by the Treasury Department in the Federal Register. For possibility of waiver as to publication as required by this section see U.S. v. Elof Hansson Inc., 296 F.2d 779 (C.C.P.A. 1960) where an importer waived his right to publication by active participation in the investigation.

8 19 U.S.C. § 161 (Supp. I, 1971), *amending* 19 U.S.C. § 161 (1958). Determination of a sale at less than fair market value is a complex procedure that must take into account the varying levels of trade as well as the different services and conditions given the buyer in the United States as opposed to those provided in the importer's domestic market place.

exporter's domestic and the United States' selling price. The importer may protest the publication and assessment with the Customs Bureau and, if denied, appeal to the customs court.[9]

In *J.C. Penney Co., v. Treasury Dep't.*,[10] the petitioner, J.C. Penney Co., (hereinafter Penney) sought declaratory and injunctive relief in a federal district court to prohibit the Treasury Department from conducting its investigation as to the "dumping" of certain Japanese television sets.[11] Penney alleged the district court's[12] basis of jurisdiction was a general federal question,[13] in that procedures used by the Treasury Department, particularly involving receipt of evidence, constituted a denial of procedural due process, and damages in excess of $10,000 were claimed. The Second Circuit Court of Appeals upheld the district court's dismissal of Penney's suit for lack of subject matter jurisdiction[14] on the ground that jurisdiction of constitutional questions in antidumping cases was vested exclusively in the customs court.[15]

The court acknowledged that Penney, though mounting an attack on the substantive merits of the case, was arguing that since it was being denied procedural due process in the Treasury Department's investigation, an adequate remedy was available only in the federal district court.[16] The court reviewed several prior decisions in point, including *David L. Moss Co., Inc. v. United States*[17] which held that the customs court is the tribunal established by Congress to provide a "complete system" for the administration of customs laws and questions involving

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9 Appeal may also be taken from the Customs Court to the Court of Customs and Patent Appeals. 19 U.S.C. § 169 (1970). *formerly* CH. 488 § 1, 45 STAT. 1475 (1929).

10 439 F.2d 63 (2d Cir. 1971).

11 Penney contended lack of due process in that the Treasury Department is not required to disclose the facts upon which it has made its determination of a sale or potential sale at less than fair market value. *Id.* at 65.

12 Suit was initially brought in the United States District Court for the Southern District of New York. 319 F. Supp. 1023 (S.D.N.Y. 1970).

13 28 U.S.C. § 1331(a) (1958).

14 439 F.2d at 65.

15 In 28 U.S.C. § 1582(a) (1970) *Formerly* CH. 646, 62 STAT. 943 (1948). Congress has provided for the exclusive jurisdiction of the customs court. *See also* 28 U.S.C. § 1340 (1948) which provides,

> The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

16 439 F.2d at 65.

17 103 F.2d 395 (C.C.P.A. 1939). "The court is a court of law, and it is granted full power to relieve against illegality in the assessment or collection of Duties." *Id.* at 397. *See* Cottman Co. v. Dailey, 94 F.2d 85 (4th Cir. 1938) (Congress has provided a complete system of corrective justice with respect to matters arising under the customs laws.) *See generally* Patchogue-Plymouth Mills Corp. v. Durning, 101 F.2d 41 (2d Cir. 1939); Riccomini v. United States, 69 F.2d 480 (9th Cir. 1934).

the validity of official action are exclusively within the jurisdiction of the customs court. The court found that when Congress adopted legislation[18] in 1948 providing for the "exclusive jurisdiction" of the customs court, Congress was aware of the several prior pertinent decisions[19] and thus intended that all litigation regarding customs matters be within the exclusive jurisdiction of the customs court. In addition, the court buttressed its conclusion regarding congressional intent by examining legislation[20] enacted in 1970 which provided that the customs court should determine any civil action which involves *inter alia* broad or significant implications in administering or interpreting customs laws, including all constitutional questions.

The precedents[21] cited by Penney in arguing that the jurisdiction of the customs court is not exclusive, were found to be inapposite because in none of the cases cited were the foreign goods challenged under provisions of the customs law but, instead, under various trademark or criminal statutes.

Penney also argued that the district court had jurisdiction over the subject matter because the customs court was powerless to require the holding of a hearing by the Treasury Department and only the district court was so empowered. The court held that since Penny could pay any amounts assessed and then sue for refund in the customs court, there was in fact an adequate remedy available to Penney in the customs court.[22]

The court also indicated that to permit suit in the district court in this case would contravene section 7421 of the Internal Revenue Code of 1954,[23] which prohibits a suit "for the purpose of restraining the assessment or collection of any tax" because restraint of levy of tax even at the incipient stage of suit must necessarily delay collection of the tax.

It is quite apparent that the result of this decision is to reaffirm that the customs court has exclusive jurisdiction over all disputes involving customs laws, including questions of substantive and procedural due

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18 28 U.S.C. §§ 1582, 1583 (1948). Section 1583 was repealed, effective October 1, 1970. Act of June 2, 1970. Pub. L. No. 91-271, tit. I, § 111, 84 Stat. 278.

19 Patchogue-Plymouth Mills Corp. v. Durning, 101 F.2d 41 (2d Cir. 1939); David L. Moss Co., Inc. v. United States, 103 F.2d 395 (C.C.P.A. 1939); (Both cases made clear that the customs court was to have exclusive jurisdiction over customs matters.)

20 28 U.S.C. § 1582(a) (1970).

21 Croton Watch Co. v. Laughlin, 208 F.2d 93 (2d Cir. 1953) (Suit brought for prohibition of the entrance of goods into the United States because of trademark or name infringement.); Precise Imports Corp. v. Kelly, 218 F. Supp. 494 (S.D.N.Y. 1963), *aff'd* 378 F.2d 1014 (2d Cir. 1967). (Exclusion of switchblade knives based upon criminal statutes).

22 439 F.2d at 65. *Cf.* Eastern States Petroleum Corp. v. Rogers, 280 F.2d 611, 614 (D.C. Cir. 1960).

23 439 F.2d at 68.

process of law. It would seem that an importer will be successful in asserting non-exclusive jurisdiction of the customs court over foreign goods only in cases involving statutes such as trademarks or patent infringement or criminal sanction, that is, statutes which are not part of the customs laws.

CRIMINAL PROCEDURE — RULE 11

Rule 11 of the Federal Rules of Criminal Procedure concerns pleas by criminal defendants and the basis on which they should be accepted. It states, *inter alia*, that

> [t]he court may refuse to accept a plea of guilty, and shall not accept such plea . . . without first addressing the defendant personally or determining that the plea is made voluntarily with understanding of the . . . consequences of the plea.[24]

The majority of courts subscribe to a reading which brings ineligibility for parole within the meaning of Rule 11;[25] *i.e.*, ineligibility for parole is a consequence of a plea of which a defendant must be informed.[26]

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[24] FED. R. CRIM. P. 11. The phrase "understanding of the . . . consequences of the plea" was added by a 1966 Amendment, effective July 1, 1966 "to state what clearly is the law." FED. R. CRIM. P. 11, Notes of Advisory Committee on Criminal Rules. Rule 11 sets no standard by which to determine what is a legitimate "consequence" of which defendant must be informed. However, since the statute was amended to incorporate judicial decision in 1966 it might be assumed that judicial decision can define the term.

[25] *See* Harris v. United States, 426 F.2d 99 (6th Cir. 1970); Jenkins v. United States, 420 F.2d 433 (10th Cir. 1970); Durant v. United States, 410 F.2d 689 (1st Cir. 1969); Berry v. United States, 412 F.2d 189 (3d Cir. 1969); Munich v. United States, 337 F.2d 356 (9th Cir. 1964). *But see* Trujillo v. United States, 377 F.2d 266 (5th Cir.), *cert. denied*, 389 U.S. 899 (1967). This decision was subsequently limited to its specific facts. Spradley v. United States, 421 F.2d 1043 (5th Cir. 1970).

[26] Berry v. United States, 412 F.2d 189 (3d Cir. 1969) has been cited as the leading case. 8 J. MOORE, FEDERAL PRACTICE 11.03[3] n.26 (Supp. 1970).

> [N]ot every result of a plea is a "consequence" . . . . United States v. Cariola, 323 F.2d 180 (3 Cir. 1963) . . . .
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> [S]ome . . . suggest that the ineligibility for parole should be similarly categorized . . . .
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> In any normal sentencing procedure in the federal courts, a sentence prescribing a number of years of imprisonment generally means that the defendant may expect to serve approximately one-third of this term with good conduct. Probation and parole are concepts which our society has come to accept as natural incidents of rehabilitation during imprisonment.
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> This is not true where, as here, because of a Congressional directive tucked away in a relatively obscure section of the Internal Revenue Code, a narcotics offender is faced with the unconditional loss of probation and parole. This loss becomes an inseparable ingredient of the punishment imposed. Its effect is so powerful that it translates the term imposed by the sentencing judge into a mandate of actual imprisonment for a period of time three times as long as that ordinarily expected.
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> The mandate of Rule 11, before and after the 1966 amendment, is designed to insure that the pleader is made aware of the outer limits of punishment. At the very least, this means that he must be apprised of the period of required incarceration. Except for capital punishment, no other consequence can be as significant to an accused as the period of possible confinement. When one enters