

No. 85068-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
FEB 13 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

American Honda Motor Company, Inc.,

Appellant,

v.

City of Seattle, Department of Executive Administration,

Respondent.

REPLY BRIEF OF APPELLANT

Robert L. Mahon, WSBA No. 22523
D. Michael Young, WSBA No. 3391
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Appellant
American Honda Motor Company, Inc.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2011 FEB 18 P 2:54
BY RONALD R. CARPENTER
CLERK

TABLE OF CONTENTS

	Page
I. ARGUMENT.....	1
A. Whether Seattle's B&O Tax Is an "Impost or Duty" Is Controlled by <i>Richfield Oil</i>	1
B. The U.S. Supreme Court Has Reaffirmed <i>Richfield Oil</i>	2
C. The City's Attempts to Distinguish <i>Richfield Oil</i> Are Unsound.....	7
D. The City's Rule 193C Is Consistent with <i>Richfield Oil</i> and <i>IBM</i> and Rebuts the City's Argument.....	10
II. CONCLUSION.....	11
APPENDIX.....	14

TABLE OF AUTHORITIES

	Page
Cases	
<i>Ammex, Inc. v. Department of Treasury</i> , 237 Mich. App. 455, 603 N.W.2d 308 (1999)	4
<i>Coast Pacific Trading, Inc. v. Dep't of Revenue</i> , 105 Wn.2d 912, 719 P.2d 541 (1986).....	4, 10
<i>Dep't of Revenue v. Association of Washington Stevedoring Companies</i> , 435 U.S. 734, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978).....	2, 3, 4, 5
<i>Diamond Shamrock Refining and Marketing Co. v. Nueces County Appraisal Dist.</i> , 876 S.W.2d 298 (Texas 1994), <i>cert. denied</i> , 513 U.S. 995 (1994).....	6
<i>Ford Motor Co. v. City of Seattle</i> , 160 Wn.2d 32, 156 P.3d 185 (2007), <i>cert. denied</i> , 552 U.S. 1180 (2008)	9, 11
<i>Group Health Co-op. of Puget Sound, Inc. v. Washington State Tax Commission</i> , 72 Wn.2d 422, 433 P.2d 201 (1967).....	10
<i>Hansen Baking Co. v. City of Seattle</i> , 48 Wn.2d 737, 296 P.2d 670 (1956).....	10
<i>Limbach v. Hooven & Allison Co.</i> , 466 U.S. 353, 104 S. Ct. 1837, 80 L. Ed. 2d 356 (1994).....	6
<i>Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.</i> , 900 F.2d 816 (5th Cir. 1990), <i>cert. denied</i> , 498 U.S. 897 (1990).....	4
<i>McDonnell Douglas Corp. v. State Bd. of Equalization</i> , 10 Cal. App. 4th 1413, 13 Cal. Rptr. 2d 399 (1992), <i>cert. denied</i> , 510 U.S. 814 (1993)	4, 9
<i>Michelin Tire Corp. v. Wages</i> , 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 496 (1976).....	passim
<i>R.J. Reynolds Tobacco Co. v. Durham County</i> , 479 U.S. 130, 107 S. Ct. 499, 93 L. Ed. 2d 449 (1986).....	6

<i>Richfield Oil Corp. v. Board of Equalization</i> , 329 U.S. 69, 67 S. Ct. 156, 91 L. Ed. 80 (1946).....	passim
<i>Saudi Refining, Inc. v. Director of Revenue</i> , 715 A.2d 89 (Del. Super. Ct. 1998).....	7
<i>United States v. International Business Machines Corp.</i> , 517 U.S. 843, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996).....	passim
<i>Virginia Indonesia Co. v. Harris County Appraisal Dist.</i> , 910 S.W.2d 905 (Texas 1995), <i>cert. denied</i> , 518 U.S. 1004 (1996).....	8

Statutes

SMC § 5.45.040(C).....	2
------------------------	---

Regulations and Rules

Seattle Business Tax Rule 5-44-193C	10, 11
---	--------

Other Authorities

Hellerstein and Hellerstein, 1 State Taxation ¶ 5.05.....	3
P. Hartman, Federal Limitations on State and Local Taxation, § 5:6	3, 6

I. ARGUMENT

A. Whether Seattle's B&O Tax Is an "Impost or Duty" Is Controlled by *Richfield Oil*.

The ultimate issue in this appeal is whether Seattle's B&O tax is an "Impost or Duty" within the meaning of the Import-Export Clause. The issue is a pure question of law whose resolution is controlled by the United States Supreme Court's confirmation of the continuing validity of *Richfield Oil Corp. v. Board of Equalization*, 329 U.S. 69, 76-85, 67 S. Ct. 156, 91 L. Ed. 80 (1946), in *United States v. International Business Machines Corp.*, 517 U.S. 843, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996).

In *Richfield Oil*, the U.S. Supreme Court concluded that "an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales" is an "Impost within the meaning of the Import-Export clause." *Richfield Oil*, 329 U.S. at 83, 86. The City argues that *Richfield Oil* did not examine whether the California tax was an impost because the issue was conceded. City's Br. at 20. However, the *Richfield Oil* Court was clear in framing the issues for decision: "The questions remain whether [i] we have here an export within the meaning of the constitutional provision and [ii], if so, **whether this tax was a prohibited impost** upon it." *Id.* at 78 (numbers and emphasis added). The Supreme Court resolved the issue by concluding that "the tax which California has exacted ... is an impost" *Id.* at 86.

The City makes no attempt to distinguish its B&O tax from the tax the Supreme Court concluded was an unconstitutional impost in *Richfield Oil*. Indeed, the taxes are indistinguishable:

	Incident of Tax	Measure of Tax
California Tax in <i>Richfield Oil</i>	"the privilege of conducting a retail business" <i>Richfield Oil</i> , 329 U.S. 69, 83	"the gross receipts from sales" <i>Richfield Oil</i> , 329 U.S. 69, 83-84
Seattle Tax	the privilege of "engaging ... in the business of ... making sales" SMC § 5.45.040(C)	"the gross proceeds of such sales" SMC § 5.45.040(C)

B. The U.S. Supreme Court Has Reaffirmed *Richfield Oil*.

The City's primary argument is that *Richfield Oil* was "abandoned more than thirty years ago" in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 496 (1976). City's Br. at 5-6. The United States Supreme Court has expressly rejected the City's argument. In its most recent Import-Export Clause decision, *United States v. International Business Machines Corp.*, 517 U.S. 843, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996) ("*IBM*"), the Supreme Court discussed and confirmed the continuing vitality of *Richfield Oil* in the import and export context: "Our holdings in *Michelin* and *Washington Stevedoring* ... do not interpret the Import-Export Clause to permit assessment of nondiscriminatory taxes on

imports and exports in transit." *Id.* at 861. The Court emphasized that it "has *never* upheld a state tax assessed directly on goods in import or export transit." *Id.* at 862 (emphasis added). "[C]ontrary to the Government's contention," the Court continued, "this Court's Import-Export Clause cases have not upheld the validity of generally applicable, nondiscriminatory taxes that fall on imports or exports in transit." *Id.*

The City relies heavily on academic commentators in support of its argument. Although the City quotes extensively from Hellerstein's treatise on state taxation, the City tellingly fails to note or include in its appendix the portions of Hellerstein's treatise discussing *IBM*.¹ See City's Br. at 16, 18. Hellerstein specifically notes the U.S. Supreme Court's "reaffirmation of its bar against 'direct' taxes on goods in import or export transit in *International Business Machines*" and the *IBM* Court's conclusion that such taxes are "still invalid under its contemporary Import-Export Clause doctrine." Hellerstein and Hellerstein, 1 State Taxation ¶ 5.05[2][a] at 5-29 – 5-30 (copy attached in the Appendix).

Not only has the U.S. Supreme Court reaffirmed *Richfield Oil* in *IBM*, the Washington Supreme Court has expressly noted that "*Michelin*

¹ The City also relies on Hartman's *Federal Limitations on State and Local Taxation* (1981). That treatise was published 15 years before the Supreme Court's reaffirmation of *Richfield Oil* in *IBM*.

and *Stevedoring* have not overruled decisions that struck down taxes levied directly on goods that had reached the export stream. These decisions include *Richfield Oil Corp. v. Board of Equalization*, 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80, (1946)" *Coast Pacific Trading, Inc. v. Dep't of Revenue*, 105 Wn.2d 912, 918, 719 P.2d 541 (1986). The Department of Revenue prevailed in *Coast Pacific*, not because *Richfield Oil* was not controlling, but because "the taxable transaction—the sale of the logs—was complete **before** the logs were towed from storage to be loaded aboard ship for their final destination overseas." *Id.* at 919 (emphasis added). In other words, the Court concluded that the taxpayer's sales were **not export sales**.

Other courts have similarly concluded that *Richfield Oil* remains controlling law. *E.g.*, *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir. 1990), *cert. denied*, 498 U.S. 897 (1990) (following *Richfield Oil* and invalidating Alabama excise tax on distributors and retailers of fuel delivered into the tanks of vessels for export transportation); *McDonnell Douglas Corp. v. State Bd. of Equalization*, 10 Cal. App. 4th 1413, 13 Cal. Rptr. 2d 399 (1992), *cert. denied*, 510 U.S. 814 (1993) (following *Richfield Oil* and invalidating a sales tax on aircraft parts sold to a foreign airline); *Ammex, Inc. v. Department of Treasury*, 237 Mich. App. 455, 603 N.W.2d 308 (1999)

(citing *IBM* and rejecting the state's argument that "*Richfield Oil* has been undermined by the post-Michelin approach").

Even in *Washington Stevedoring*—one of the two cases on which the City principally rely for the argument that *Richfield Oil* has been "abandoned"—the Court was clear in distinguishing between an excise tax on the activity of *handling* goods being imported or exported, and a tax on the sale of the goods themselves. *Dep't of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 756, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978) (n.21). The Court specifically distinguished *Richfield Oil*: "In *Richfield*, the tax fell upon the sale of goods and was overturned because the Court had always considered a tax on the sale of goods to be a tax on the goods themselves." *Id.* As in *Richfield Oil* and unlike *Washington Stevedoring*, the tax at issue in this case is a tax on the privilege of selling goods, which the Supreme Court considers a "tax on the goods themselves," and not a tax on the privilege of *handling* the goods.²

² The City's contention that *Washington Stevedoring* has undermined *Richfield Oil* is also rejected by the very treatise cited by the City:

The tax reviewed in Washington [*Stevedoring*] was ... only on the *service of handling* the imported and exported goods. Only future decisions by the Court will reveal whether a State may validly impose a tax

The City cites a handful of ad valorem property tax cases in arguing that *Richfield Oil* is no longer the controlling law. However, like *Michelin*, these cases all involve the application of ad valorem property taxes to goods held ***in storage after import transit*** was complete and, as such, are inapposite. See *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 360, 104 S. Ct. 1837, 80 L. Ed. 2d 356 (1994) (holding that an ad valorem property tax on fibers stored in warehouses after import transit did not violate the Import-Export Clause); *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 152-153, 107 S. Ct. 499, 93 L. Ed. 2d 449 (1986) (holding that an ad valorem property tax on tobacco stored in warehouses after import transit did not violate the Import-Export Clause); *Diamond Shamrock Refining and Marketing Co. v. Nueces County Appraisal Dist.*, 876 S.W.2d 298 (Texas 1994), *cert. denied*, 513 U.S. 995 (1994) (holding that an ad valorem property tax on crude oil stored in storage tanks after import transit did not violate the Import-Export Clause). The *only* excise tax case cited by the City that addresses a direct tax on import or export

on goods while in transit. *Michelin* upheld an ad valorem property tax on imported goods ***after they had come to the end of their import journey***, but it ***did not reach the question whether a tax could be levied on goods while in transit.***

P. Hartman, *Federal Limitations on State and Local Taxation*, § 5:6 at 213-14 (1981) (emphasis added). Hartman reached this conclusion 15 years before *IBM's* reaffirmation of *Richfield Oil*.

sales is a Delaware trial court decision that fails to even discuss *Richfield Oil* or *IBM*. See *Saudi Refining, Inc. v. Director of Revenue*, 715 A.2d 89 (Del. Super. Ct. 1998).

Richfield Oil and *IBM* are controlling and should be applied to the undisputed facts of this case.

C. The City's Attempts to Distinguish *Richfield Oil* Are Unsound.

As an alternative to its primary argument that *Richfield Oil* has been "abandoned," the City attempts distinguish *Richfield Oil*. First, the City notes that *Richfield Oil* was decided in the context of export rather than import sales. See City's Br. at 16. This is a distinction without a difference. Although *Richfield Oil* arose in the context of an export sale, the Court's conclusion that California's tax was an "impost" applies without regard to the import or export context. As the Supreme Court noted in *IBM* (in reaffirming *Richfield Oil*), "contrary to the Government's contention, this Court's Import-Export Clause cases have not upheld the validity of generally applicable, nondiscriminatory taxes that fall on *imports or exports* in transit." *United States v. International Business Machines Corp.*, 517 U.S. 843, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996) (emphasis added).

Michelin was critical in carving back the scope of Import-Export Clause protection for imports to mirror the limitation imposed on export

sales. Prior to *Michelin*, the scope of protection for imports extended beyond the end of import transportation for as long as the goods remained in their "original package." After *Michelin*, import and export sales are on the same footing. As the Texas Supreme Court described, "Abandoning the original package doctrine 'brought IMPORT tax immunity into alignment with EXPORT tax immunity'" *Virginia Indonesia Co. v. Harris County Appraisal Dist.*, 910 S.W.2d 905, 911-12 (Texas 1995), *cert. denied*, 518 U.S. 1004 (1996) (emphasis in original) (invalidating an ad valorem property tax on goods in export transit).

The City also attempts to avoid the application of *Richfield Oil* and *IBM* by asserting that the bar on taxing import and exports in transit applies only to goods that "journey 'across, through, or over'" Seattle. City's Br. at 21. However, *Richfield Oil* and *IBM* concern whether the goods being taxed are in *import or export* transit, not whether the goods are transiting "through" the taxing jurisdiction. The fuel at issue in *Richfield Oil* was not transiting "through" California; it was refined and delivered in California into export transit. *Richfield Oil*, 329 U.S. at 71. The products at issue in *IBM* were not transiting "through" the United States; they were manufactured in the United States. *IBM*, 517 U.S. at 845. *See also, e.g., McDonnell Douglas Corp. v. State Bd. of Equalization*, 10 Cal. App. 4th 1413, 13 Cal. Rptr. 2d 399 (1992), *cert.*

denied, 510 U.S. 814 (1993) (following *Richfield Oil* and invalidating California sales tax on aircraft parts "nearly all" of which were manufactured at the taxpayer's factory in Long Beach, California).

In this case, there is no dispute that the City is attempting to tax "import sales."³ CP 29. As the City itself confirms, the tax at issue is being imposed on vehicles "essentially shipped by the manufacturer directly to the customer in Seattle with no intervening processing, storage, change in ownership or other activity or event that would cause them to be no longer considered imports when delivered to the Seattle customer." CP 29 (City's Motion for Summary Judgment at 3). The City distinguishes the disputed import sales from other sales of vehicles that "had intervening processing, storage, etc. that would prevent them from being considered imports." CP 29. The critical question is whether the sale occurs after the end of import transportation. With respect to the import sales, the answer is clearly no; with respect to vehicles that have been processed or stored prior to delivery, the answer is clearly yes.

³ The *incident* of the City's B&O tax broadly activities of "engaging in the business of wholesaling" and is not limited to delivery or the transfer of title. *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 43, 156 P.3d 185 (2007), *cert. denied*, 552 U.S. 1180 (2008). The *measure* of the City's tax is, however, confined to goods delivered in Seattle. *Id.* at 46.

D. The City's Rule 193C Is Consistent with *Richfield Oil* and *IBM* and Rebutts the City's Argument.

The City's attempt to tax import sales is further undermined by Seattle Business Tax Rule 5-44-193C ("City Rule 193C"). City Rule 193C was adopted in 1997 more than two decades after *Michelin* and a decade after *Coast Pacific*.

The City asserts that City Rule 193C has no binding effect because it was repealed on January 1, 2002. City's Br. at 27. Although City Rule 193C was repealed en mass with all of Seattle's tax rules, it was promptly republished by the City as "guidance as to interpretation." The City continues to hold out City Rule 193C as guidance today. <http://clerk.ci.seattle.wa.us/~finance/btxrtext.htm>. In fact, the City cited and quoted City Rule 193C in the very assessment at issue in this case. CP 47 (City's Assessment of American Honda dated August 28, 2008 at 2). The City cannot hold out a rule or written guidance, apply it selectively against taxpayers, and then disclaim it when taxpayers rely on it. *Hansen Baking Co. v. City of Seattle*, 48 Wn.2d 737, 743-744, 296 P.2d 670 (1956); *Group Health Co-op. of Puget Sound, Inc. v. Washington State Tax Commission*, 72 Wn.2d 422, 428-429, 433 P.2d 201 (1967).

More important than any binding effect, City Rule 193C correctly reflects the constitutional standard in *Richfield Oil* and *IBM*:

Sales of imports by an importer or his or her agent are not taxable and a deduction will be allowed with respect to the sales of such goods, if at the time of sale such goods are still in the process of import transportation. Immunity from tax does not extend ... [t]o the sale of imports to Seattle customers by the importer thereof or by any person after completion of importation whether or not the goods are in the original unbroken package or container.

Seattle Business Tax Rule 5-44-193C(3)(a). City Rule 193C has no application to goods transiting *through* Seattle because the City's tax is measured only by vehicles delivered in Seattle. *See Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 46, 156 P.3d 185 (2007), *cert. denied*, 552 U.S. 1180 (2008). Instead, it addresses the current situation where an importer is selling goods delivered to a Seattle destination without a prior break in the import transportation. There is no dispute that Seattle B&O tax applies to American Honda's sales of vehicles that occurred after the termination of import transit. CP 29. In this case, however, the City is improperly attempting to tax import sales of vehicles for which there has been no break in import transportation. CP 29.

II. CONCLUSION

For the reasons discussed above and in the Brief of Appellant, American Honda respectfully requests that the Court reverse the order of the trial court, and remand the case with instructions to enter partial

summary judgment for American Honda declaring that the Import-Export Clause bars the City from imposing B&O tax on import sales.

DATED: February 18, 2011

PERKINS COIE LLP

By: 

Robert L. Mahon, WSBA No. 26523

RMahon@perkinscoie.com

D. Michael Young, WSBA No. 6391

MikeYoung@perkinscoie.com

1201 Third Avenue, Suite 4800

Seattle, WA 98101-3099

Telephone: 206.359.8000

Facsimile: 206.359.9000

Attorneys for Appellant

American Honda Motor Company, Inc.

DECLARATION OF SERVICE

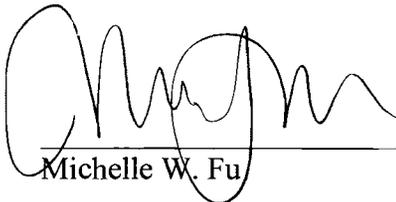
I, Michelle W. Fu, declare:

1. I am employed by Perkins Coie LLP.
2. On February 18, 2011, I caused a true and correct copy of the foregoing Reply Brief of Appellant to be served by legal messenger on:

Kent C. Meyer, WSBA #17245
Assistant City Attorney
Seattle City Attorney's Office
600 Fourth Avenue, 4th Floor
Seattle, WA 98124-4769

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: February 18, 2011, at Seattle, Washington.



Michelle W. Fu

APPENDIX

CHAPTER 5

Imports and Exports

¶ 5.01 Introduction to the Import-Export Clause 5-2

¶ 5.02 State Taxation of Imports 5-4

 (1) State Taxation of Imports Prior to the *Michelin* Case 5-4

 (2) The *Michelin* Case 5-7

 (a) Purposes of the Imports Clause 5-8

 (b) Language of the Imports Clause 5-9

 (c) The Overruling of *Low v. Austin* 5-10

¶ 5.03 State Taxation of Exports 5-11

 (1) State Taxation of Exports Prior to *Washington Stevedoring* 5-11

 (2) The *Washington Stevedoring* Case 5-14

¶ 5.04 The "In Transit" Exception to the *Michelin* Policy Analysis Under the Import-Export Clause 5-15

 (1) Validity of Nondiscriminatory Ad Valorem Taxes on Goods "In Transit" After *Michelin* and *Washington Stevedoring* 5-15

 (2) The Distinction Between a Tax on an Event Distinct From the Goods and a Tax on the "Goods Themselves" 5-19

 (a) Critique of the Distinction Between a Tax on an Event Distinct From the Goods and a Tax on the "Goods Themselves" 5-21

 (3) The "In Transit" Exception as Applied to Goods Stored in a Customs-Bonded Warehouse 5-22

 (4) Imported Goods "In Transit" Between Counties 5-22

¶ 5.05 State Taxation of Imports and Exports After *Michelin* and *Washington Stevedoring* 5-23

 (1) Property Taxes 5-23

 (2) Sales, Use, and Other Excise Taxes 5-24

 (a) The Questionable Force of *Richfield* After *Michelin* and *Washington Stevedoring* 5-25

lated facts, never left Texas in its crude oil form. Thus, there simply was no opportunity for harmony between the states to be disturbed. Read in context, the *Michelin* Court's qualification clearly applies only to goods in transit through the state to or from another state and not to goods merely in transit within the only state the goods ever enter.¹³⁰

¶ 5.05 STATE TAXATION OF IMPORTS AND EXPORTS AFTER *MICHELIN* AND *WASHINGTON* *STEVEDORING*

[1] Property Taxes

In *Limbach v. Hooven & Allison Co.*,¹³¹ the Court overruled its pre-*Michelin* decision in *Hooven & Allison Co. v. Evatt*,¹³² which had held, on the basis of the "original-package" doctrine, that imported hemp and other fibers were immune from taxation while stored in a warehouse awaiting use in manufacturing. Because the later case involved the same issues and same parties as the earlier case, the state court had held that the state was collaterally estopped from relitigating the issue.¹³³ The Supreme Court disagreed, relying on the exception to the doctrine in situations when a "change or development in the controlling legal principles . . . make that [prior] determination obsolete or erroneous, at least for future purposes."¹³⁴ Because Hooven had never been provided with an opportunity to demonstrate that the facts of its case were significantly different from those involved in *Michelin*, the Court declined to rule on the merits of Hooven's contention that, notwithstanding *Michelin*, the Ohio tax was constitutionally infirm. Instead, the Court remanded the case for further proceedings to permit Hooven to pursue its Import-Export Clause and other constitutional claims.

The Supreme Court also applied the *Michelin* analysis to sustain over Import-Export Clause objections a nondiscriminatory ad valorem property tax on imported tobacco stored in a customs-bonded warehouse and destined for domestic consumption.¹³⁵ The Court rejected the argument that goods stored in a

¹³⁰ *Diamond Shamrock Ref. & Mktg. Co. v. Nueces County Appraisal Dist.*, 876 SW2d 298, 300-301 (Tex. 1994), cert. denied, 513 US 995, 115 S. Ct. 500 (1994).

¹³¹ *Limbach v. Hooven & Allison Co.*, 466 US 353, 104 S. Ct. 1837 (1984).

¹³² *Hooven & Allison Co. v. Evatt*, 324 US 652, 65 S. Ct. 870 (1945).

¹³³ *Hooven & Allison Co. v. Lindley*, 4 Ohio St. 3d 169, 447 NE2d 1295 (1983).

¹³⁴ *Commissioner v. Sunnen*, 333 US 591, 599-600, 68 S. Ct. 715 (1948).

¹³⁵ *RJ Reynolds Tobacco Co. v. Durham County*, 479 US 130, 107 S. Ct. 499 (1986), discussed further supra ¶ 5.04[3]. Although the Court had earlier held that federal legisla-

customs-bonded warehouse are by definition "in transit" and thus outside the scope of the holding in *Michelin*.

[2] Sales, Use, and Other Excise Taxes

The Supreme Court applied the *Michelin* and *Washington Stevedoring* analysis in rejecting an Import-Export Clause challenge to a Tennessee sales tax on the transfer of possession in Tennessee of domestically owned cargo containers used exclusively in international commerce.¹³⁶ The levy did not prevent the federal government from "speaking with one voice," because there was no federal policy against sales taxation of container leases.¹³⁷ It did not divert import revenue from the federal government, because the tax was imposed on the leasing of containers, "a service distinct from [import] goods and their value."¹³⁸ Furthermore, it did not create disharmony among the states, because the tax satisfied the Interstate and Foreign Commerce Clause.¹³⁹ According to the Court, "the state harmony component [of the *Michelin* analysis] parallels the four *Complete Auto* requirements of the foreign and domestic commerce clause."¹⁴⁰

State courts have likewise applied *Michelin* and *Washington Stevedoring* in sustaining state sales taxes on imports and exports over Import-Export Clause objections. The Illinois Court of Appeals held that the state's Retailers' Occupation Tax may be applied to a retailer that sold goods it had imported from Switzerland.¹⁴¹ The court there overruled its pre-*Michelin* decision invalidating a tax assessed against an importer-retailer.¹⁴² The California Court of Appeal likewise applied the Supreme Court's *Michelin* analysis to sustain non-

tion preempted a nondiscriminatory ad valorem property tax on imported goods stored in a customs-bonded warehouse pending shipment to foreign destinations, *Xerox Corp. v. Harris County*, 459 US 145, 103 S. Ct. 523 (1982), the Court distinguished the *Xerox* case on the ground that the goods involved in *RJ Reynolds* were destined for domestic consumption. See ¶ 4.24[2][c] for further discussion of *RJ Reynolds* and federal preemption.

¹³⁶ *Intl Containers Int'l Corp. v. Huddleston*, 507 US 60, 113 S. Ct. 1095 (1993).

¹³⁷ See ¶¶ 4.01 et seq.

¹³⁸ *Intl*, 507 US 60, 77-78, 113 S. Ct. 1095 (1993) (quoting *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 US 734, 757, 98 S. Ct. 1388 (1978)).

¹³⁹ See ¶ 4.19.

¹⁴⁰ *Intl*, 507 US 60, 77, 113 S. Ct. 1095 (1993).

¹⁴¹ *Bradford Exch. AG v. Department of Revenue*, 155 Ill. App. 3d 674, 508 NE2d 316 (1987). The Illinois Retailers' Occupation Tax, which is imposed on retailers for the privilege of selling at retail, is in substance a retail sales tax. The court determined that the goods at issue were no longer in transit when they were sold.

¹⁴² *Miehle Printing Press & Mfg. Co. v. Department of Revenue*, 18 Ill. 2d 445, 164 NE2d 261 (1960).

discriminatory gross receipts and payroll taxes as applied to a taxpayer who sold imported beverages and tobacco stored in a customs-bonded warehouse for consumption on ships and aircraft outside the territorial limits of the United States.¹⁴³

On the other hand, the Florida Supreme Court, has held that a lower gasoline tax rate for gasohol "distilled from U.S. agricultural products or by-products" violated the Import-Export Clause.¹⁴⁴ The court observed that "unlike the nondiscriminatory property tax approved in *Michelin*, the tax exemption . . . excludes from its benefits only gasohol containing foreign source ethyl alcohol. This constitutes discriminatory taxation based upon the foreign origin of a product in violation of the import-export clause."¹⁴⁵

[a] *The Questionable Force of Richfield After Michelin and Washington Stevedoring*

In 1946, in *Richfield Oil Corp. v. State Board of Equalization*,¹⁴⁶ the U.S. Supreme Court struck down as repugnant to the Import-Export Clause a California tax on the sale of oil to the government of New Zealand for exportation to that country. Richfield delivered the oil by pipeline from its refinery in California to its storage tanks in the Los Angeles harbor, where it pumped the oil into a vessel hired by the New Zealand government to transport the oil to that country. The tax was an excise tax on "the privilege of conducting a retail business" in California.¹⁴⁷ The tax was measured by the "gross receipts" from sales.¹⁴⁸ The Court invalidated the tax under the then-prevailing Import-Export Clause doctrine on the ground that, at the time of the sale and delivery of the oil to the tanker, "the export had begun,"¹⁴⁹ and the exaction was therefore an invalid levy on an "export."

The parallelism of *Richfield* to *Washington Stevedoring* would lead one to expect the Court to hold that *Richfield* is no longer good law. In both cases, the taxes were general, nondiscriminatory excises: in *Washington Stevedoring*, an excise tax on "loading and unloading of vessels"; in *Richfield*, an excise tax on the "privilege of conducting a retail business" in the state. The mea-

¹⁴³ *City of Los Angeles v. Marine Wholesale/Warehouse Co.*, 15 Cal. App. 4th 1834, 19 Cal. Rptr. 2d 664 (1993); see also *Blue Star Line, Inc. v. City & County of San Francisco*, 77 Cal. App. 3d 429, 143 Cal. Rptr. 647 (1978).

¹⁴⁴ *Miller v. Publicker Indus., Inc.*, 457 So. 2d 1374 (Fla. 1984).

¹⁴⁵ *Miller*, 457 So. 2d 1374, 1376, (Fla. 1984). The court also held the preference invalid under the Commerce Clause.

¹⁴⁶ *Richfield Oil Corp. v. State Bd. of Equalization*, 329 US 69, 67 S. Ct. 156 (1946).

¹⁴⁷ *Richfield*, 329 US 69, 84, 67 S. Ct. 156 (1946).

¹⁴⁸ *Richfield*, 329 US 69, 84, 67 S. Ct. 156 (1946).

¹⁴⁹ *Richfield*, 329 US 69, 81, 67 S. Ct. 156 (1946).

tures of the two taxes were essentially equivalent: in *Washington Stevedoring*, "the gross receipts from the loading and unloading of vessels"; in *Richfield*, the "gross receipts from sales." In both cases, moreover, the goods at issue were "exports" at the time the tax attached.

Nevertheless, the U.S. Court of Appeals for the Fifth Circuit followed *Richfield* in a post-*Michelin* decision in which it struck down an Alabama excise tax on every "distributor . . . retail dealer . . . or user of gasoline sold for use as fuel to propel aircraft" on the ground that it violated the Import-Export Clause.¹⁵⁰ The court stated:

The Alabama excise fuel tax is not an indirect tax like the taxes levied in *Michelin* and *Washington Stevedoring*: it is not an assessment imposed on stored inventory which includes imported or exported products, nor is it a tax on a business or occupation which is related to the importation or exportation process. Rather, the Alabama fuel tax in this case is a tax that is levied on the goods themselves while they are in transit. As in *Richfield*, the fuel was delivered f.o.b. into the tanks of a foreign flagged tanker for export to a foreign country. Without contradiction, the oil was in transit. It was the subject of foreign export at the time of taxation.¹⁵¹

The court's treatment of the Alabama tax as "levied on the goods themselves" derived from Chief Justice Marshall's opinion in *Brown v. Maryland*,¹⁵² in which the Court articulated the "original package" doctrine. The Maryland statute provided that "all importers of foreign articles, or commodities . . . shall, before they are authorized to sell, take out a license . . . for which they shall pay fifty dollars."¹⁵³ In holding that the statute violated the Import-Export Clause, the Chief Justice stated:

¹⁵⁰ *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F2d 816 (5th Cir. 1990), cert. denied sub nom *Alabama Department of Revenue v. Pilot Petroleum Co.*, 498 US 897, 111 S. Ct. 248 (1990). The case arose between parties to a contract for the sale of jet fuel. The tax had been paid by the seller, for which the buyer refused to reimburse the seller on the ground that the tax was unconstitutional.

¹⁵¹ *Louisiana Land*, 900 F2d 816, 821 (5th Cir., 1990). In *McDonnell Douglas Corp. v. State Bd. of Equalization*, 10 Cal. App. 4th 1413, 13 Cal. Rptr. 2d 399 (1992), cert. denied, 510 US 814, 114 S. Ct. 62 (1993), the court invalidated a sales tax on aircraft parts sold to a Mexican airline on the ground that the goods were in the "export stream." The court relied on *Richfield* and dismissed the significance of *Michelin* and *Washington Stevedoring* with the following remark: "While later cases expanded the analysis to include other factors, at least where, as here, the tax is assessed on exported goods and not related services, the export exemption still applies to goods in the 'export stream.'" *McDonnell Douglas*, 10 Cal. App. 4th 1413, 13 Cal. Rptr. 2d 399, 403 n.4 (1992), cert. denied, 510 US 814, 114 S. Ct. 62 (1993).

¹⁵² *Brown v. Maryland*, 25 US (12 Wheat.) 419 (1827). See supra ¶ 5.02[1].

¹⁵³ *Brown*, 25 US (12 Wheat.) 419, 436 (1827) (quoting statute).

But if it should be proved that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article, but on the person. The State, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. *All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself.* It is true, the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a *direct duty on the article itself* would be made. This the State has not a right to do, because it is prohibited by the constitution.¹⁵⁴

This test of a direct tax was an economic test, the test of tax incidence. Under that test, if the tax is included in the price of the article paid by the consumer, the tax is deemed to be "a duty on the article itself."¹⁵⁵

If that test had prevailed in the Supreme Court when it decided *Washington Stevedoring*, the Court presumably would have treated the occupation tax on stevedores as a "direct tax" on the imports being loaded and unloaded, on the assumption that, in the normal course of business, the tax would add to the price of the stevedoring charges.¹⁵⁶ The tax would therefore have fallen directly on goods "in transit" in violation of the Import-Export Clause. Since *Brown v. Maryland's* view of a direct tax on imports and exports is no longer viable in light of *Michelin* and *Washington Stevedoring*, it would appear that the U.S. Court of Appeals for the Fifth Circuit erred in treating the Alabama excise tax as a direct tax on imports in violation of the Import-Export Clause.

¹⁵⁴ *Brown*, 25 US (12 Wheat.) 419, 444 (1827) (emphasis supplied).

¹⁵⁵ In *Washington Stevedoring*, the Court observed that the tax in *Richfield* was "overturned because the Court had always considered a tax on the sale of goods to be a tax on the goods themselves." *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 US 734, 755 n.21, 98 S. Ct. 1388 (1978).

¹⁵⁶ In fact, the question whether a tax is passed on to the consumer is a complex issue, whose answer depends on economic analysis of such questions as cross-elasticities of supply and demand. See Hellerstein, "Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination," 39 *Tax Law*, 405, 438-441 (1986). The statement in the text is based on the premise that the Court would have assumed in *Washington Stevedoring*, as it assumed in *Brown*, that the tax "must add to the price of the article."

Rather, the federal appeals court should have sustained the Alabama tax as being in all material respects equivalent to the tax the U.S. Supreme Court sustained in *Washington Stevedoring*. Just as the Washington tax on the "act or privilege of doing business,"¹⁵⁷ measured by the gross receipts from loading and unloading of oceangoing vessels was not an "impost" or "duty" within the meaning of the Import-Export Clause, so the Alabama excise tax "on every distributor, refiner, retail dealer and others engaged in selling . . . fuel to propel aircraft"¹⁵⁸ was not an impost or duty within the meaning of that clause. The same would be true of the California tax on "the privilege of conducting a retail business," as applied to the oil refiner-distributor in *Richfield*.¹⁵⁹ The finding of the Supreme Court that none of the policies underlying the prohibition of state taxes imposed by the Import-Export Clause was applicable to *Washington Stevedoring* case is equally applicable to the taxes at issue in the Fifth Circuit and the *Richfield* cases:

In particular, the Framers apparently did not include "Excises," such as an exaction on the privilege of doing business, within the scope of "Imposts" or "Duties." See *Michelin*, 423 U.S., at 291-292, n. 12, citing 12 M. Far- rand, *The Records of the Federal Convention of 1787*, p. 305 (1911), and 3 *id.*, at 203-204.¹⁶⁰

The U.S. Supreme Court itself cast doubt on the continuing vitality of *Richfield* in *Itel Containers Int'l Corp. v. Huddleston*,¹⁶¹ which rejected an Import-Export Clause challenge to a sales tax on the transfer of possession in Tennessee of domestically owned cargo containers used exclusively in international commerce.¹⁶² In holding that "the rule we followed in *Richfield Oil*" that the Import-Export Clause prohibited the "direct taxation of imports and exports 'in transit'"¹⁶³ was inapplicable because the Tennessee tax was not a direct tax on the containers or goods being imported in the containers, the Court did so "even assuming that rule has not been altered by the approach we adopted in *Michelin*."¹⁶⁴

¹⁵⁷ *Washington Stevedoring*, 435 US 734, 738, 98 S. Ct. 1388 (1978).

¹⁵⁸ *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F2d 816, 817 n.2 (5th Cir. 1990), cert. denied 498 US 899, 111 S. Ct. 298 (1990).

¹⁵⁹ *Richfield Oil Corp. v. State Bd. of Equalization*, 329 US 69, 81, 67 S. Ct. 156 (1946).

¹⁶⁰ *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 US 734, 759-760, 98 S. Ct. 1388 (1978).

¹⁶¹ *Itel Containers Int'l Corp. v. Huddleston*, 507 US 60, 113 S. Ct. 1095 (1993).

¹⁶² See *supra* ¶ 5.05[2] at notes 136-140 and accompanying text.

¹⁶³ *Itel*, 507 US 60, 77, 113 S. Ct. 1095 (1993).

¹⁶⁴ *Itel*, 507 US 60, 77, 113 S. Ct. 1095 (1993) (emphasis supplied). The *Itel* case is considered further in ¶¶ 4.19[1], 4.19[2], 4.24[2][c], 15.05[2]. However, the Court's dictum in *Itel*, has to be considered in light of the Court's more recent dictum in *United*

State courts have likewise treated *Richfield* with considerable skepticism. An Arizona appellate court sustained Arizona's transaction privilege tax, which in substance is a retail sales tax imposed on the vendor, to the receipts from sales of tools and supplies that were delivered to the purchaser in Arizona but were intended for export to Mexico.¹⁶⁵ The taxpayer had relied on the *Richfield* decision, but the court declared that "the rule enunciated in *Richfield* is no longer the proper standard by which to measure the validity of state taxation of foreign commerce under the Import-Export Clause."¹⁶⁶ The court also held that the tax did not violate the injunction against direct taxes on goods in transit because:

Arizona's transaction privilege tax is not a direct tax upon the goods appellant sells. Rather it is a tax directly and specifically on appellant for the privilege of conducting business within the State of Arizona. . . . [T]he volume of goods sold or receipts taken is merely the measure on which the amount of the privilege tax is based. . . . The fact that appellant's goods are in transit at the time of taxing . . . is irrelevant . . . since no direct tax on the goods is involved.¹⁶⁷

A marine terminal challenged a New Jersey sales tax on machinery purchased for use in the terminal as violative of the Import-Export Clause. The terminal was principally engaged in loading and unloading oceangoing vessels and storing the goods temporarily before shipment. In contending that the tax violated the Import-Export Clause, the taxpayer relied on *Richfield* and pointed out that, in order to recover the tax, it would have to pass the tax on to consumers. The New Jersey Tax Court declared that *Michelin* had rejected such a contention, and it quoted the opinion in that case for the proposition that "to the extent that it may increase the cost of goods purchased by consumers 'such

States v. International Business Machines Corp., 517 US 843, 116 S. Ct. 1793 (1996), considered supra ¶ 5.04[1]. In *International Business Machines*, the Court suggested that a tax imposed directly on goods in import or export transit was still invalid under its contemporary Import-Export Clause doctrine, although it did not delineate what it meant by such a direct tax. If the tax in *Richfield* is viewed as an "indirect" rather than a "direct" tax on exports (in light of *Washington Stevedoring's* treatment of a similar tax as not being "direct"), then the Court's statement in *International Business Machines* does not rehabilitate *Richfield*.

¹⁶⁵ Arizona Dep't of Revenue v. Robinson's Hardware Store, 149 Ariz. 589, 721 P2d 137 (Ct. App. 1986).

¹⁶⁶ Robinson's Hardware, 149 Ariz. 589, 721 P2d 137, 139 (Ct. App. 1986).

¹⁶⁷ Robinson's Hardware, 149 Ariz. 589, 721 P2d 137, 141 (Ct. App. 1986). See also Coast Pac. Trading Co. v. Department of Revenue, 105 Wash. 2d 912, 719 P2d 541 (1986) (sustaining over Import-Export Clause objection application of Washington's business and occupation tax to receipts from sales of logs in temporary storage pending delivery to ocean-bound vessels for export).

taxation is the quid pro quo for benefits actually conferred by the taxing State.¹⁷⁰

In short, the weight of reason and authority support the view that nondiscriminatory sales and use taxes may be imposed on goods in import or export transit and that *Richfield* is no longer good law. Nevertheless, the U.S. Court of Appeals and California decisions discussed above,¹⁶⁹ as well as the U.S. Supreme Court's reaffirmation of its bar against "direct" taxes on goods in import or export transit in *International Business Machines*,¹⁷⁰ are a reminder that it may be premature to give *Richfield* its last rites.¹⁷¹

¶ 5.06 THE IMPORT-EXPORT CLAUSE COMPARED WITH THE FOREIGN COMMERCE CLAUSE

To some extent, the limitations that the Import-Export Clause and the Foreign Commerce Clause¹⁷² impose on the states' taxing powers overlap. Thus, a tax imposed only on imports or exports or both would violate both clauses. The Import-Export Clause prohibits the states from levying discriminatory taxes on imports or exports, since such taxes by definition appear to constitute imposts or duties.¹⁷³ Likewise, the Commerce Clause proscribes taxes that discriminate against foreign commerce.¹⁷⁴ Similarly, a tax that violates the Import-Export Clause because it prevents the federal government from "speaking with one voice"¹⁷⁵ will also violate the Foreign Commerce Clause for the same reason.¹⁷⁶

¹⁶⁹ *Holt Hauling v. Director, Div. of Taxation*, 9 NJ Tax 446, 451 (1987).

¹⁶⁹ See page 5-25.

¹⁷⁰ See supra ¶ 5.04[1].

¹⁷¹ Even prior to *Michelin* and *Washington Stevedoring*, courts sustained state sales taxes on sales of oil used by vessels as fuel in foreign transport over Commerce Clause and Import-Export Clause objections. See *Shell Oil Co. v. State Bd. of Equalization*, 64 Cal. 2d 713, 414 P2d 820, 51 Cal. Rptr. 524 (1966). Courts also sustained state sales taxes on the sale of gasoline used by planes exclusively in interstate or foreign commerce. *Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 US 1, 106 S. Ct. 2369 (1986); *Eastern Air Transp., Inc. v. South Carolina Tax Comm'r*, 285 US 147, 52 S. Ct. 340 (1932); cf. *United Airlines v. Mahin*, 410 US 623, 93 S. Ct. 1186 (1973).

¹⁷² See ¶ 4.19.

¹⁷³ See supra ¶¶ 5.02, 5.03.

¹⁷⁴ See ¶ 4.20.

¹⁷⁵ See supra ¶ 5.02[2][a].

¹⁷⁶ See ¶ 4.19[2].

¶ 5.07 THE IMPORT-EXPORT CLAUSE AND TAXATION OF INTOXICATING LIQUORS

The Twenty-First Amendment provides that "the transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."¹⁷⁷ The "Court made clear in the early years following adoption of the Twenty-First Amendment that by virtue of its provisions a state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."¹⁷⁸ However, when the issue arose under the Import-Export Clause, the Court reached a different conclusion. In *Department of Revenue v. James B. Beam Distilling Co.*,¹⁷⁹ the Court held that the Twenty-first Amendment did not remove the Import-Export Clause limitations on state taxation of intoxicating liquors. The Court reasoned as follows:

What is involved in the present case, however, is not the generalized authority given to Congress by the Commerce Clause, but a constitutional provision which flatly prohibits any State from imposing a tax upon imports from abroad.

"We have often indicated the difference in this respect between the local taxation of imports in the original package and the like taxation of goods, either before or after their shipment in interstate commerce. In the one case the immunity derives from the prohibition upon taxation of the imported merchandise itself. In the other the immunity is only from such local regulation by taxation as interferes with the constitutional power of Congress to regulate the commerce, whether the taxed merchandise is in the original package or not."¹⁸⁰

The Court struck down the tax in *James Beam* because it was an "impost" on "imports." In light of the fact that the Court relied in part on doctrine that *Michelin* has discredited, the contemporary force of the decision on the merits

¹⁷⁷ U.S. Const. amend. XXI.

¹⁷⁸ See *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 US 324, 330, 84 S. Ct. 1293 (1964). The Court revised its view of the relationship between the Commerce Clause and the Twenty-First Amendment in *Bacchus Imports, Ltd. v. Dias*, 468 US 263, 104 S. Ct. 3049 (1984); see ¶ 4.18.

¹⁷⁹ *Department of Revenue v. James B. Beam Distilling Co.*, 377 US 341, 84 S. Ct. 1247 (1964). For comments on the case, see 65 Colum. L. Rev. 153 (1965); 33 Fordham L. Rev. 306 (1964); 78 Harv. L. Rev. 237 (1964).

¹⁸⁰ *James Beam*, 377 US 341, 344, 84 S. Ct. 1247 (1964) (quoting *Hooven & Allison Co. v. Evatt*, 324 US 652, 665-666, 65 S. Ct. 870 (1945)).

in *James Beam* must be reevaluated.¹⁸¹ Nevertheless, the Court should have no difficulty in reaffirming its holding that the Kentucky tax at issue in *James Beam* was an "impost" and, therefore, invalid, since it was a discriminatory levy of ten cents a gallon on the act of transporting or shipping . . . distilled spirits . . . into this State."¹⁸² The case involved a tax on whiskey shipped into the state from Scotland.

¶ 5.08 DUTY OF TONNAGE PROHIBITION

The Constitution provides that "no State shall, without the consent of Congress, lay any Duty on Tonnage."¹⁸³ "It seems clear," the Supreme Court has observed,

that the prohibition against the imposition of any duty of tonnage was due to the desire of the Framers to supplement Art. I, § 10, Clause 2, denying to the States power to lay duties on imports or exports . . . by forbidding a corresponding tax on the privilege of access by vessels to the ports of a State, and to their doubts whether the Commerce Clause would accomplish the purpose.¹⁸⁴

A "Duty of Tonnage" includes "all taxes and duties, regardless of their manner or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in or lying in a port."¹⁸⁵ However, such a duty does not extend to charges made by a state, even if graduated according to tonnage, for services rendered to the vessel, such as pilotage, towage, wharfage, or storage.¹⁸⁶ In one of the rare modern cases invoking the Duty of Tonnage prohibition, the Rhode Island Supreme Court invalidated a registration fee, based on the length of a vessel, for any vessel that spent in excess of ninety days in the state.¹⁸⁷ The court concluded

¹⁸¹ The Court cited and relied in part on *Low v. Austin*, 80 US (13 Wall.) 29 (1872), which the Court overruled in *Michelin*. See ¶ 5.02[2][c].

¹⁸² *James Beam*, 377 US 341, 343, 84 S. Ct. 1247 (1964).

¹⁸³ U.S. Const. art. I, § 10, cl. 3.

¹⁸⁴ *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 US 261, 264-265, 56 S. Ct. 194 (1935).

¹⁸⁵ *Clyde Mallory Lines*, 296 US 261, 265-266, 56 S. Ct. 194 (1935).

¹⁸⁶ *Ouchita Packet Co. v. Aiken*, 121 US 444, 7 S. Ct. 907 (1887); *Transportation Co. v. Parkersburg*, 107 US 691, 2 S. Ct. 732 (1883); *Packet Co. v. Catlettsburg*, 105 US 559 (1882); *City of Vicksburg v. Tobin*, 100 US 430 (1880); *Packet Co. v. St. Louis*, 100 US 423 (1880); *Packet Co. v. Keokuk*, 95 US 80 (1887); *Inman SS Co. v. Tinker*, 94 US 238 (1877); *Ex parte McNiel*, 80 US (13 Wall.) 236 (1872).

¹⁸⁷ *Rhode Island v. Turnbaugh*, 705 A2d 530 (RI 1997).

that the levy was not a tax on ownership but rather a fee on a vessel for the mere entry into, or lying in the water of, the state and therefore a prohibited Duty of Tonnage.

¶ 5.09 STATE EXEMPTION OF IMPORTS AND EXPORTS

In order to attract warehousing in a state, some thirty-five states that impose personal property taxes exempt goods that are temporarily stored in the state for reshipment out of the state.¹⁸⁸ Such exemptions apply to foreign imports.¹⁸⁹

¹⁸⁸ See Chart of Free Port Storage Exemption, RIA All States Guide 265.

¹⁸⁹ See Chart of Free Port Storage Exemption, RIA All States Guide 265.