

No. 85068-2

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

American Honda Motor Company, Inc.,

Appellant,

v.

City of Seattle, Department of Executive Administration,

Respondent.

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BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves the City of Seattle's attempt to tax import sales in violation of the Import-Export Clause of the United States Constitution and in direct conflict with controlling U.S. Supreme Court authority.

II. ASSIGNMENT OF ERROR

The trial court erred in upholding Seattle B&O tax on American Honda's import sales to Seattle customers, contrary to the Import-Export Clause, which prohibits state and local governments from imposing imposts or duties on imports or exports.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether the Import-Export Clause prohibits the imposition of state and local excise taxes on the privilege of selling, measured by the gross receipts from import and export sales of goods?

IV. STATEMENT OF THE CASE

American Honda Motor Company, Inc. ("American Honda") is engaged in the business of making wholesale sales of automobiles, including sales to dealerships located in Seattle. CP 5, 12, 26. There is no dispute that a portion of American Honda's sales are import sales. CP 29. Specifically, a portion of American Honda's sales are of vehicles manufactured in, and imported from, Japan and Canada. CP 26. Automobiles imported from Japan are transported by ship, rail, and truck

from a manufacturing plant in Japan to dealerships located in Seattle.

CP 26. Automobiles imported from Canada are transported by rail and truck from a Canadian manufacturing plant to dealerships located in Seattle. CP 26.

During the period January 2003 through March 2007, American Honda reported and paid B&O tax on its sales of automobiles that were *not* import sales (i.e., sales of automobiles that were manufactured in the United States and sales of imported automobiles where there had been a break in the import transportation prior to delivery to the customer).¹

CP 49. On August 28, 2008, the City of Seattle (the "City") assessed \$123,674 in wholesaling B&O tax on American Honda's import sales to Seattle dealerships for the period at issue. CP 46-53. The City has asserted the right to impose B&O tax on American Honda's import sales to Seattle dealerships unimpeded by the Import-Export Clause. CP 30.

Because it is undisputed that at least some of the assessed sales are import sales, the parties filed cross-motions for partial summary judgment to resolve the legal issue of whether the Import-Export Clause limits the City's taxing authority. CP 29. Almost two months after oral argument on the cross motions for summary judgment, the trial court granted the City's

¹ There is no question that American Honda's dealerships are properly subject to B&O tax on their resale of imported vehicles following delivery by American Honda and the termination of import transportation.

motion in an order that contained no reasoning or analysis. CP 154-156.

American Honda timely filed a notice of appeal. CP 157-161.

V. ARGUMENT

The Import-Export Clause of the United States Constitution expressly prohibits state and local governments from imposing imposts or duties on imports or exports. U.S. Const., Art. I, §10, Cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports."). The sole question in this appeal is whether Seattle's B&O tax is an "Impost or Duty" within the meaning of the Import-Export Clause.

A. **The City's B&O Tax Is an Impost or Duty Under the Controlling Decisions of the U.S. Supreme Court.**

The U.S. Supreme Court has construed the Import-Export Clause to prohibit state and local taxes imposed either on goods themselves or on the sale of goods measured by the value of those goods, when the goods are in the import or export stream. *Richfield Oil Corp. v. Board of Equalization*, 329 U.S. 69, 76-85, 67 S.Ct. 156, 91 L.Ed. 80 (1946). In *Richfield*, the Supreme Court held 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" that cannot constitutionally be imposed on sales of goods in the import or export stream. *Id.* at 83, 86.

Seattle's B&O tax is indistinguishable from the excise tax that the Supreme Court concluded was an unconstitutional impost in *Richfield*. The excise tax in *Richfield* was imposed on sellers for "the privilege of conducting a retail business." *Richfield*, 329 U.S. at 83. The City's excise tax is imposed on sellers for the privilege of "engaging ... in the business of ... making sales" SMC § 5.45.040(C). The *Richfield* tax was "measured by the gross receipts from sales;" the City's tax is similarly measured by "the gross proceeds of such sales." *Richfield*, 329 U.S. at 83-84; SMC § 5.45.040(C). The City does not dispute that its wholesaling B&O tax is an excise tax on the privilege of selling, measured by the gross receipts from sales. CP 33, 135.

This case is resolved by the straightforward application of controlling U.S. Supreme Court authority to undisputed facts. There is no legal distinction between the City's B&O tax and the impost in *Richfield*. Further, there is no dispute that Seattle's impost is being applied to import sales. CP 29. Accordingly, the Import-Export Clause bars the City's assessment of B&O tax on American Honda's import sales.

B. Richfield Has Not Been Overruled.

The City does not contend that *Richfield* has been overruled. Instead, the City attempts to avoid the consequences of the U.S. Supreme Court's directly controlling authority by asserting that *Richfield* was

"superseded" by *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S. Ct. 535, 46 L.Ed.2d 496 (1976) and *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978). CP 38.

However, the Washington Supreme Court and the U.S. Supreme Court have been clear that *Michelin* did no such thing. In 1986—ten years after *Michelin*—the Washington Supreme Court expressly concluded that *Michelin* had not overruled *Richfield*. *Coast Pacific Trading, Inc. v. Dep't of Revenue*, 105 Wn.2d 912, 918, 719 P.2d 541 (1986) ("The parties thus correctly point out that *Michelin* 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) ...").

The U.S. Supreme Court's most recent Import-Export Clause decision also reaffirms the Constitution's continued prohibition on the taxation of sales of goods in the import or export stream. *United States v. International Business Machines Corp.*, 517 U.S. 843, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996) ("*IBM*"). Like the City's current argument, the federal government in *IBM* argued that the Supreme Court's decisions in *Michelin* and *Stevedoring* had eliminated the Import-Export Clause's prohibition of taxes on goods in the import or export stream. After

surveying *Richfield* and its other Import-Export Clause jurisprudence, the Court concluded that "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." *IBM*, 517 U.S. at 861. Moreover, 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). And yet again, "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." *Id.*

In *Michelin* the U.S. Supreme Court held that (1) goods held in storage following importation lose their status as imports regardless of whether the stored goods are kept in their original package and (2) an ad valorem *property tax on goods in storage* is not an *impost or duty* subject to Import-Export Clause limitations. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 301-302, 96 S. Ct. 535, 46 L.Ed.2d 496 (1976). Neither holding is relevant to this case, which does not involve either (1) goods held in storage after import transportation is complete or (2) an ad valorem property tax on stored goods.

In *Washington Stevedoring* the U.S. Supreme Court held that a B&O tax on the privilege of conducting stevedoring activities was not an

impost or duty subject to Import-Export Clause limitations. *Dep't of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 98 S. Ct. 1388, 55 L.Ed.2d 682 (1978). However, 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. *Id.* at 756 (n.21). Indeed, the Court specifically distinguished *Richfield*: "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.*

The City's recent perception that *Michelin* and *Washington Stevedoring* "superseded" *Richfield* is also curiously at odds with the understanding of both the Washington Department of Revenue—the prevailing party in *Washington Stevedoring*—and the City, which both—*after Michelin*—adopted or amended administrative rules governing the B&O taxation of import and export sales. The Department of Revenue amended its administrative rule, WAC 458-20-193C ("State Rule 193C"), in 1976 in direct response to *Michelin*. WAC 458-20-193C, *amended by* Order ET 76-3 (Aug. 31, 1976). The City adopted a comparable rule in 1997. Seattle Business Tax Rule 5-44-193C ("City Rule 193C"). State Rule 193C and City Rule 193C address both (a) the status of inbound goods as imports until "completion of importation" and (b) the status of

outbound goods as exports upon commencement of the export journey. State Rule 193C; City Rule 193C(a), (b). Both rules also reflect the holding of *Richfield* that "sales of imports by an importer are not taxable" under the state and city B&O taxes. *Id.*

Richfield remains good law and should be applied to the undisputed facts of this case.

C. This Court Should Reject the City's Speculation that the U.S. Supreme Court Might Overrule *Richfield* in the Future.

The City's argument in this case ultimately boils down to speculation that *if* the U.S. Supreme Court were to re-visit *Richfield*, it would overrule its holding that an excise tax on the privilege of selling measured by the gross receipts of sales is an impost.

As an initial matter, such speculation is highly questionable light of (a) *Michelin's* warning that it would be "premature to state any rule as being universal," 423 U.S. at 299; (b) *Washington Stevedoring's* effort to distinguish a gross receipts tax on the service of stevedoring from *Richfield's* holding that a gross receipts tax on the privilege of selling goods is an impost, 435 U.S. at 756; and (c) *IBM's* citation of *Richfield* in support of its conclusion that "*Michelin* and *Washington Stevedoring* ... do not interpret the Import-Export Clause to permit assessment of nondiscriminatory taxes on imports and exports in transit." *United States*

v. IBM Corp., 517 U.S. 843, 861, 116 S. Ct. 1793, 135 L.Ed.2d 124 (1996).

Finally, even if the City's speculation were reasonable (it is not), the City and lower courts may not disregard controlling U.S. Supreme Court precedent. The U.S. Supreme Court has instructed lower courts to continue to "follow the case which directly controls" even if it "appears to rest on reasons rejected in some other line of decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). The U.S. Supreme Court has emphasized that it alone has the "the prerogative of overruling its own decisions." *Id.* The Washington Supreme Court has similarly warned: "Even if we were inclined to agree ... that it is only a matter of time before that case is overruled, we are certainly not free to overrule or ignore established Supreme Court precedent." *State v. Jones*, 159 Wn.2d 231, 240, 149 P.3d 636 (2006) (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) ("[I]t is [the Supreme] Court's prerogative alone to overrule one of its precedents").

VI. CONCLUSION

For the reasons discussed above, 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: December 20, 2010

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DECLARATION OF SERVICE

I, Jessica Flesner, declare:

1. I am a legal secretary employed by Perkins Coie LLP.
2. On December 20, 2010, I caused a true and correct copy of

the foregoing Brief of Appellant to be served by legal messenger on:

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

DATED: December 20, 2010, at Seattle, Washington.


Jessica Flesner