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No. 85068-2

SUPREME COURT
OF THE STATE OF WASHINGTON

AMERICAN HONDA MOTOR COMPANY, INC.,

Appellant,

v.

CITY OF SEATTLE,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Defendant City of Seattle imposes a business and occupation tax on all companies doing business in Seattle. Plaintiff American Honda is an automaker that sells cars at wholesale to dealers located in Seattle. The City assessed its tax on American Honda and two other automakers, who appealed the tax assessments to King County Superior Court. The superior court granted the City's motion for summary judgment, ruling that the City's tax is permissible under the Import-Export clause of the U.S. Constitution.

II. ISSUE PRESENTED

Whether American Honda's business of making wholesale sales of vehicles imported from outside the United States and delivered directly to purchasers in Seattle is exempt from Seattle's B&O tax under Article I, section 10, clause 2 of the U.S. Constitution (the Import-Export Clause), which states:

> No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such laws shall be subject to the Revision and the Control of the Congress.

American Honda incorrectly stated the assignment of error and the issues pertaining to the assignment of error. This case involves imported goods and, contrary to plaintiff's brief, does not involve sales of exported goods.

III. STATEMENT OF THE CASE

American Honda manufactures vehicles in other countries and sells those vehicles to dealers located in Seattle. CP 5. The City of Seattle ("City") conducted a tax audit of American Honda and two other automakers. The auditor checked each company for compliance with the tax provisions of the Seattle Municipal Code. CP 46-48, 120-121. The tax at issue is the City's B&O tax that is imposed on all persons engaging in business activity within Seattle. Seattle Municipal Code ("SMC") 5.45.050. CP 103.

On August 28, 2008, the City issued an assessment against American Honda in the amount of $154,901.90, consisting of taxes, penalties and interest for the audit period of January 1, 2003 through March 31, 2007. CP 46-49. The City also issued assessments to the two other automakers. CP 54, 63. All three automakers appealed the tax assessments to the King County Superior Court, but only American Honda has appealed the superior court's order.

The basic facts relevant to the summary judgment motion are not in dispute. At least some of the vehicles manufactured by American Honda were manufactured outside the U.S. and imported by American Honda. The parties brought cross-motions for summary judgment limited to the legal issue of whether the Import-Export Clause applies to plaintiff's sale of imported vehicles to Seattle dealers. CP 19-20, 29-30. The superior court ruled in favor of the City, effectively resolving all the issues in the case and dismissing plaintiff's complaint. CP 160. American Honda filed a notice of appeal. The other two plaintiffs did not appeal.

IV. SUMMARY OF ARGUMENT

The City imposes a B&O tax on the privilege of engaging in business in the City, including the business of making sales at wholesale. American Honda sells imported vehicles at wholesale to dealers located in Seattle. The Import-Export Clause does not prevent the City from imposing its tax on American Honda's business activity because the tax is not an impost or duty of the type prohibited by the Import-Export Clause. *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 46 L.Ed. 2d 495, 96 S.Ct. 535 (1976). Rather, the tax is a nondiscriminatory tax imposed on all persons who conduct business in the City. American Honda is improperly interpreting the Import-Export clause to favor foreign over domestic manufacturers. The City's tax merely requires plaintiff to pay the same tax paid by all other sellers of wholesale goods delivered into the City.

V. ARGUMENT

A. The Trial Court Correctly Granted Summary Judgment For The City Because There Are No Issues Of Material Fact And The City's Tax Is Permissible Under The Import-Export Clause As A Matter Of Law.

The case below was decided on cross-motions for summary judgment. Summary judgment is appropriate if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). The appellate court reviews the trial court's decision de novo. *TracFone Wireless, Inc. v. Washington Dep't. of Revenue*, __ Wn.2d __, 242 P.3d 810, 814 (2010); *U.S. Tobacco Sales v. Dep't of Rev.*, 96 Wn. App. 932, 982 P.2d 652 (1999).

Challenges to the City's tax assessments are governed by SMC 5.55.140B, which states that the assessment is prima facie correct and the taxpayer has the burden of establishing the correct amount of tax. SMC 5.55.140B. CP 110. *See also Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 41, 156 P.3d 185, 189 (2007). The trial court correctly ruled that the City's tax is valid under the Import-Export Clause. CP 161.

B. The City's B&O Tax Applies To All Persons Engaged In Business In The City.

The City's B&O tax is a tax on the privilege of engaging in business activities in the City. SMC 5.45.050. CP 103. *City of Seattle v. Paschen Contractors*, 111 Wn.2d 54, 57, 758 P.2d 975 (1988) (B&O tax is an excise tax imposed upon the act or privilege of engaging in business activities); *Ford*, 160 Wn.2d at 39-40. In this case, American Honda is subject to tax under SMC 5.45.050C for "engaging within the City in the business of making . . . sales at wholesale." This is not a sales tax on the transaction, but is an excise tax on engaging in business within the City. SMC 5.45.050C. CP 103. The tax rate is .215 percent of the gross proceeds of wholesale sales. SMC 5.45.050C. An automobile manufacturer's wholesale sales of vehicles delivered to Seattle dealers is subject to Seattle's B&O tax. *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 42, 48, 156 P.3d 185, 189 (2007); *General Motors v. City of Seattle,* 107 Wn. App. 42, 25 P.3d 1022 (2001). The City issued a tax assessment to American Honda in accordance with the City's tax code. CP 46-48.

C. The City's B&O Tax Is Applicable To American Honda's Business Activities Under The Import-Export Clause Test Stated In The *Michelin* Case.

Under the U.S. Supreme Court's interpretation of the Import-Export clause, American Honda's business activities are subject to the City's B&O tax. The tax is not an impost or duty of the type that is prohibited by the Import-Export Clause. American Honda is attempting to avoid the tax based on an analysis that the U.S. Supreme Court abandoned more than thirty years ago. In 1976, the Court significantly altered its analysis of the Import-Export Clause in *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 46 L.Ed. 2d 495, 96 S.Ct. 535 (1976). The Court switched the focus from the nature of the goods as imports and instead focused on the nature of the tax at issue. The *Michelin* case involved application of a state property tax on tires that had arrived in the United States from overseas, but still were stored in a warehouse awaiting distribution. The Court did not apply the "original package" doctrine, which had historically been the test under the Import-Export Clause -- i.e., state taxation was barred while the products were in their "original package." Rather, the Court analyzed whether the tax at issue was an "impost or duty" of the type prohibited by the Import-Export Clause. *Michelin,* 423 U.S. at 279.

The Court noted that the constitutional bar against "imposts or duties" was designed to prohibit "discriminatory state taxation against imported goods as imports," and to prohibit "transit fees on the privilege of moving [goods] through a state." *Michelin*, 423 U.S. at 286, 290. Regarding the scope of these policies, the Court explained:

> The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods, but it cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies.
>
> . . .

> An evil to be prevented by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation of certain States that enabled them to single out goods destined for other States.

Michelin, 423 U.S. at 286, 287-90. The *Michelin* court adopted a three-factor analysis for determining whether the tax in question was the type of an 'impost' or 'duty' prohibited by the Import-Export Clause.

The U.S. Court of Appeals explained the three-factor *Michelin* analysis in *Auto Cargo. Inc. v. Miami Dade County*, 237 F.3d 1289, (11th Cir. 2001):

> Before *Michelin*, assessment of the validity of a state exaction under the Import-Export Clause turned on the question of whether or not the goods retained their status as imports or exports at the time of the exaction. *Low v. Austin*, 13 Wall. 29, 80 U.S. 29, 20 L.Ed. 517 (1871). Thus a state could not tax goods destined for export once they entered the "export stream," and it could not tax an imported item so long as that item remained in its "original package." *Washington Stevedoring*, 435 U.S. at 758; 98 S.Ct. 1388. *Michelin* overruled cases that stressed the nature of the goods as imports or exports and instead focused on the nature of the exaction at issue. *Michelin*, 423 U.S. at 279, 96 S.Ct. 535. The *Michelin* Court determined that the question of a violation of the Import-Export Clause turns on whether the exaction in question was "the type of state exaction which the Framers of the Constitution ... had in mind as being an 'impost' or 'duty'. . . ." *Id.* at 283, 96 S.Ct. 535. <u>According to *Michelin*, an exaction is valid unless it interferes with the three policy concerns that motivated the Framers in adopting the Import-Export Clause: 1) maintaining federal uniformity in foreign commercial relations; 2) preventing the diversion to the states revenue generated by imported goods; and 3) maintaining harmony among the states by preventing states</u>

> from taxing goods flowing through seaboard states' ports to (or from) other states. *Michelin*, 423 U.S. at 285-86, 96 S.Ct. 535.

Auto Cargo, 237 F.3d at 129 (emphasis added).

In *Saudi Refining, Inc. v. Director of Revenue*, 715 A.2d 89 (Del.Super. 1998), the Delaware court applied the three *Michelin* criteria to uphold Delaware's B&O tax on imported oil. The State of Delaware imposed a gross receipts tax on goods delivered into the state. Plaintiff was an oil importer that challenged the tax based on the Import-Export clause. The court upheld the tax assessment:

> Applying the *Michelin Tire* criteria to the gross receipts tax, the Court finds that there is nothing about the tax that prevents or impedes the federal government from speaking with one voice on the regulation of foreign commerce. The gross receipts tax is specifically limited to all transactions conducted by wholesalers within Delaware's borders. It falls just as readily upon crude oil sold and delivered by a wholesaler by way of domestic pipelines, barges, tank trucks or Delaware-based oil fields, if such exist. Nor does the gross receipts tax deprive the federal government of the exclusive right to revenues derived from imports because it is imposed for the commercial privilege of bringing the goods into the United States. Rather, the tax is imposed in a nondiscriminatory manner on all sales and physical deliveries of goods in the State. The tax is reasonably apportioned to the value of the goods without regard to origin and is reasonably related to costs for services and protections provided by the state. To not apply the tax on specifically identified goods of foreign origin would have the negative effect of according "imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the state supplied." Finally, with respect to whether

> the goods are still in transit as imports, the Court notes that the crude oil sold and delivered by SRI to the Star's Delaware refinery is entirely consumed and used at the plant. The oil is not flowing to an interstate destination. Thus, there is no basis to conclude that the Delaware tax offends the Import-Export Clause's purpose of avoiding disharmony among the states by prohibiting the imposition of a transit tax on imported goods merely passing through the State.

Saudi Refining, 715 A.2d at 95 (emphasis added; footnote omitted).

Two years after *Michelin*, the United States Supreme Court decided *Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos.*,435 U.S. 734, 752, 98 S. Ct. 1388, 55 L. Ed. 2d 652 (1978). At issue was a B&O tax imposed by the state of Washington on the privilege of conducting business activities in the state, in this case, the performance of stevedoring services (the loading of goods onto ships destined to foreign destination points and off of ships from foreign origin points).

The Court followed its analysis from *Michelin*, concluding that the same approach should apply to exports. *Id.* at758. As with imports, the test required by *Michelin* for exports looks to the nature of the tax, not merely the status of the goods as an export, to determine whether the Import-Export Clause prohibits the tax at issue. The *Stevedoring* Court upheld Washington's B&O tax, concluding that it did not disturb the policies behind the Import-Export Clause:

> A similar approach demonstrates that the application of the Washington business and occupation tax to stevedoring threatens no Import-Export Clause policy. First, the tax does not restrain the ability of the Federal Government to conduct foreign policy. As a general business tax that applies to virtually all businesses in the State, it has not created any special protective tariff. The assessments in this case are only upon business conducted entirely within Washington. No foreign business or vessel is taxed. Respondents, therefore, have demonstrated no impediment posed by the tax upon the regulation of foreign trade by the United States.
>
> Second, the effect of the Washington tax on federal import revenues is identical to the effect in *Michelin*. The tax merely compensates the State for services and protection extended by Washington to the stevedoring business. . .
>
> Third, the desire to prevent interstate rivalry and friction does not vary significantly from the primary purpose of the Commerce Clause . . . The third Import-Export Clause policy, therefore, is vindicated if the tax falls upon a taxpayer with reasonable nexus to the State, is properly apportioned, does not discriminate, and relates reasonably to services provided by the State.

Stevedoring, 435 U.S. at 754-55 (citation and footnote omitted). The Court concluded that Washington's B&O tax was not an "Impost or Duty subject to the absolute ban of the Clause." *Id.* at 755.

The City's B&O tax, like the Washington state B&O tax at issue in *Stevedoring* and the Delaware tax at issue in *Saudi Refining*, satisfies the three *Michelin* criteria. Because the tax applies only to a taxpayer's business activity within Seattle, it does not impede the federal government from speaking with one voice on the regulation of foreign commerce.

With respect to the second *Michelin* factor, the tax does not deprive the federal government of its exclusive right to revenue from imposts on imports for the "commercial privilege" of bringing the vehicles into the United States because the tax is not a tariff or duty imposed on the vehicles for the privilege of entering either Seattle or the United States. Finally, the tax is not a transit tax assessed for the privilege of "flowing through" the City to another destination. The tax is imposed on the basis of business activity in Seattle relating to vehicles that have come to rest in Seattle. American Honda's vehicles are not in transit to locations outside of Seattle. Therefore, with respect to the third factor, harmony among the states is not disturbed.

American Honda pays the same tax that any other wholesaler pays for selling goods delivered to a customer in Seattle. The Import-Export Clause was not intended to give preferential treatment to a foreign manufacturer or to compel a city to subsidize foreign businesses by exempting them from payment of a nondiscriminatory tax. *Michelin*, 423 U.S. at 287; *Saudi Refining*, 715 A.2d at 95. American Honda's interpretation would create a preference of foreign over domestic manufacturing that is not required by the Constitution.

The City's B&O tax is simply a means by which all companies engaged in business in the City pay their fair share of supporting the market that the City provides. The Court in *Michelin* stated:

> There is no reason why local taxpayers should subsidize the services used by the importer; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods. An evil to be prevented by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation of certain States that enabled them to single out goods destined for other States. In effect, the Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State.

Michelin, 423 U.S. at 288-289 (footnote omitted). American Honda is seeking a tax exemption by incorrectly portraying the City's tax as a prohibited impost or duty under the Import-Export Clause.

D. Plaintiff Is Asking This Court To Disregard The U.S. Supreme Court's Instructions In *Michelin* To Use The Three Stated Factors To Determine Whether A Tax Is An Impermissible Impost Or Duty.

Washington courts are, of course, required to abide by U.S. Supreme Court decisions on constitutional issues. In this case, contrary to American Honda's accusations, it is American Honda, not the City, who wants the court to disregard Supreme Court precedent. The *Michelin* case establishes a method to determine whether the tax is a prohibited impost or duty. American Honda refuses to follow the principle that the Court announced in *Michelin* and reiterated in subsequent cases.

For example, the Court in *Dep't of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 760, 98 S. Ct. 1388, 55 L. Ed. 2d 652 (1978) said, in rejecting the taxpayer's theory, that: "Rather than examining whether the taxes are 'Imposts or Duties' that offend constitutional policies, the [taxpayer's] contention would have the Court explore when the goods lose their status as imports and exports. This is precisely the inquiry the Court abandoned in *Michelin*[.]"

The Court reiterated this point and expressly overruled cases employing the original-package doctrine for imports in *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 360,104 S. Ct. 1837, 80 L. Ed.2d 356 (1994). In *Limbach*, the taxpayer Hooven manufactured cordage products made from natural fibers. *Id.* at 355. Hooven imported the fibers, which were transported by rail and stored in their original packages at Hooven's plant in Ohio, where they were eventually used in Hooven's manufacturing process. *Id.* Hooven objected to paying Ohio's ad valorem personal property tax. Hooven relied on a case decided by the U.S. Supreme Court 30 years earlier in which Hooven's original-package raw materials were ruled exempt from tax under the Import-Export clause ("*Hooven I*"). *Limbach*, 466 U.S. at 355-356.

The Court stated that *Michelin* established a new approach:

> It is apparent, and indeed clear, that Michelin, with its overruling of Low v. Austin, adopted a fundamentally different approach to cases claiming the protection of the Import-Export Clause.

Limbach, 466 U.S. at 359. The Court emphasized this point by stating:

> To repeat: we think it clear that this Court in Michelin specifically abandoned the concept that the Import-Export Clause constituted a broad prohibition against all forms of state taxation that fell on imports. Michelin changed the focus of Import-Export Clause cases from the nature of the goods as imports to the nature of the tax at issue. The new focus is not on whether the goods have lost their status as imports but is, instead, on whether the tax sought to be imposed is an "Impost or Duty."

Limbach, 466 U.S. at 360. Then, to remove all doubt that it had abandoned the original-package test for imports, the Court expressly overruled *Hooven I*, which had relied on the pre-*Michelin* original-package doctrine:

> Although Hooven I was not expressly overruled in Michelin, it must be regarded as retaining no vitality since the Michelin decision. The conclusion of the Supreme Court of Ohio that Hooven I retains current validity in this respect is therefore in error. A contrary ruling would return us to the original-package doctrine. So that there may be no misunderstanding, Hooven I, to the extent it espouses that doctrine, is not to be regarded as authority and is overruled.

Limbach, 466 U.S. at 360-361 (emphasis added). *See also R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 152-153, 107 S.Ct. 499, 93 L.Ed.2d 449 (1986) (*Michelin* "adopted a fundamentally different approach to cases claiming the protection of the Import-Export Clause.") After the Court's decisions in *Michelin* and *Limbach*, there is no question that the validity of a tax involving imports is determined by the *Michelin* factors.

A tax treatise summarizes the change as follows:

> The sticky problems inherent in the "original package" doctrine were alleviated in 1976 by the repudiation of that doctrine in *Michelin Tire Corp v. Wages*. In that litigation, the Court abandoned more than one hundred years of misguided precedent to hold that the Import-Export clause does not bar a state-imposed nondiscriminatory ad valorem property tax on goods imported and held for the purpose of sale. Departing from precedent, the Court adopted a fundamentally different approach to the resolution of the controlling issue of whether imports are taxable.

P. Hartman, *Federal Limitations on State and Local Taxation*, § 5:4, p.198 (1981) (footnote omitted). (Appendix p. A1.)

Another tax treatise reaches the same conclusion:

> In two decisions handed down in the 1970s, the U.S. Supreme Court dramatically shifted the focus of the constitutional inquiry under the Import-Export Clause from the question whether the goods under consideration were "imports" or "exports" to the question whether the levies at issue were "imposts" or "duties."
>
> . . .
>
> In *Michelin Tire Corp. v. Wages,* the Supreme Court abandoned a century of precedent in holding that the Import-Export Clause does not bar a state from imposing a nondiscriminatory ad valorem property tax on imported goods, whether or not they remain in their original packages. In so holding, the Court returned to the purposes

> underlying the Clause and revised the analytical framework for determining when a state tax is a forbidden "impost" or "duty" on "imports."

Hellerstein and Hellerstein, 1 State Taxation ¶ 5.01 at 5-3; ¶ 5.02 at 5-7 (3rd ed 2000) (footnotes omitted). (Appendix pp. A31, A35.)

Accordingly, the precedent that governs Washington courts is found in *Michelin, Limbach,* and *Washington Stevedoring*. Those cases establish that the test for determining the validity of a tax under the Import-Export Clause is to determine whether the tax is a prohibited impost or duty under the *Michelin* criteria.

E. *Richfield Oil* Involved A Tax On Exports And Is Not Applicable To Taxes On Imports.

American Honda's argument is based on a misapplication of the holding in *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 67 S. Ct. 156, 91 L.Ed 80 (1946). American Honda fails to cite a single case in which a court relied on *Richfield Oil* to judge the validity of a tax on a seller of imported goods.

Richfield Oil involved a taxpayer that was selling oil for export. The case does not address the constitutionality of a tax involving imports and is not applicable to this case. The Court in *Richfield Oil* used the export-stream test. Prior to *Michelin*, the Court used the export-stream test for exports and used a different test, the original-package test, for imports.

Both the U.S. Supreme Court and legal treatises acknowledge that the courts used different tests depending on whether the case involved imports or exports. American Honda ignores this division. As explained in *Federal Limitations on State and Local Taxation*:

> While the Import-Export clause limits taxation with respect to both imports and exports, historically the Court has adopted a bifurcated, rather than a uniform approach in dealing with taxation of imports and imposts. Over much of our constitutional history, until 1976, the "original package" doctrine was used to test the validity of most import taxation. However, the "original package" doctrine never had any application to the taxation of exports. Instead, the validity of export taxation turned on whether the export had sufficiently entered the export stream of commerce for its final journey to its predetermined foreign destination.

P. Hartman, *Federal Limitations on State and Local Taxation*, § 5:5, pp. 205-206 (1981) (footnotes omitted). (Appendix pp. A8-A9.) Hartman traces the development of the "final journey" doctrine for exports in cases decided between 1886 and 1978, including *Richfield Oil*. *Id.* Hartman then explains that in *Washington Stevedoring* the Supreme Court extended the *Michelin* test to exports:

> Two years after *Michelin* had taken a substantially different departure from precedent in the taxation of imports, the Court decided *Department of Revenue Washington v Association of Washington Stevedoring Cos.,* which questioned a tax applicable to both imports and exports. Like *Michelin*, it further narrowed the scope of protection of the Import-Export Clause, and applied the same

> fundamentally different *Michelin* approach in resolving the constitutional question to both imports and exports.

P. Hartman, *Federal Limitations on State and Local Taxation*, § 5:6, p. 211 (1981) (footnotes omitted). (App. p. A14.) Hellerstein reaches the same conclusion and cites *Richfield Oil* as an example of a "stream of exportation" case. Hellerstein and Hellerstein, 1 State Taxation ¶ 5.01 at 5-3; ¶ 5.03[1] at 5-1 n. 84. (3rd ed 2000). (App. p. A31.) Prior to *Michelin*, taxes on exports were tested by the export-stream test and imports were examined under the original-package test.

These commentators' analyses reflect the Supreme Court's own description of the two different pre-*Michelin* Import-Export Clause tests. The Court explained the two tests in *Washington Stevedoring*:

> Before *Michelin*, the primary consideration was whether the tax under review reached imports or exports. With respect to imports, the analysis applied the original-package doctrine of *Brown v. Maryland*, 12 Wheat. 419, 6 L.Ed. 678 (1827) . . . So long as the goods retained their status as imports by remaining in their import packages, they enjoyed immunity from state taxation. With respect to exports, the dispositive question was whether the goods had entered the "export stream," the final, continuous journey out of the country. . . As soon as the journey began, tax immunity attached.

Washington Stevedoring, 435 U.S. at 752 (citations omitted); *see also Coast Pacific v. Dep't of Revenue*, 105 Wn.2d 912, 916, 719 P.2d 541 (1986). Thus, prior to *Michelin*, the Court imposed the "export stream" test for exports and the "original package" test for imports. American

Honda is asking this court invalidate the City's tax on the wholesale selling of imports by following *Richfield Oil*, which applied the "export stream" test to invalidate a tax on exports.

However, even prior to *Michelin,* the *Richfield Oil* case, which involved exports, would not have applied to American Honda's sale of imported vehicles. Indeed, in an effort to fit this case into the inapplicable *Richfield Oil* export tax test, American Honda incorrectly paraphrases the Court's holding in *Richfield Oil* by stating that the Court found that the tax could not be imposed on goods "in the import or export stream." (American Honda's Brief, p. 3.) American Honda's description of the holding is incorrect because the *Richfield Oil* case involved only exports and the Court did not rule on the validity of a tax involving imports. *Richfield Oil*, 329 U.S. at 86. American Honda is incorrectly portraying the holding in *Richfield Oil.* American Honda sold only imports and *Richfield Oil* does not apply to this case.

Further, the decision in *Richfield Oil* is not relevant here because the Court in *Richfield Oil* based its decision on the assumption that all taxes on exports are prohibited and did not determine whether the tax was the type of impost or duty prohibited by the Import-Export Clause. *Richfield Oil*, 329 U.S. at 83-84. As the Supreme Court explained in

Washington Stevedoring, the *Richfield Oil* decision did not examine whether the tax was an impost or duty as the Court did in *Michelin*:

> First, respondents contend that the Import-Export Clause effects an absolute prohibition on all taxation of imports and exports. The ban must be absolute, they argue, in order to give the Clause meaning apart from the Commerce Clause. They support this contention primarily with dicta from *Richfield Oil*, 329 U.S., at 75-78, 67 S.Ct., at 159-161, and with the partial dissent in *Carter & Weekes*, 330 U.S., at 444-445, 67 S.Ct., at 827. <u>Neither, however, provides persuasive support because neither recognized that the term "Impost or Duty" is not self-defining and does not necessarily encompass all taxes</u>. The partial dissent in *Carter & Weekes* did not address the term at all. Richfield Oil's discussion was limited to the question whether the tax fell upon the sale or upon the right to retail. 329 U.S., at 83-84, 67 S.Ct., at 163-164. <u>The State apparently conceded that the Clause precluded all taxes on exports and the process of exporting</u>. *Id.*, at 84, 67 S.Ct., at 164. <u>The use of these two cases, therefore, ignores the central holding of Michelin that the absolute ban is only of "Imposts or Duties" and not of all taxes</u>.

Washington Stevedoring, 435 U.S. at 759 (emphasis added). Because the taxpayer in *Richfield Oil* conceded that any tax on an export would be prohibited, the Court did not determine whether the tax was the type prohibited by the Import-Export Clause. In contrast, in the present case, the City contests American Honda's position that the City's tax is a prohibited impost or duty. Thus, the present case raises an issue not addressed in *Richfield Oil*. American Honda's argument is based entirely on the pre-*Michelin* test of first looking at whether a product is an export or import and then at whether the product is taxed. The Supreme Court expressly abandoned this inquiry in *Michelin*. *Washington Stevedoring*, 435 U.S. at 760.[1]

F. <u>American Honda Erroneously Contends That Their Vehicles Are "In Transit" and Therefore Not Subject To The *Michelin* Test.</u>

American Honda mistakenly contends that they are exempt from the tax under *Michelin* because their vehicles are in transit and not in storage. (Plaintiff's Brief, p. 6.) In reality, the vehicles sold by plaintiff are no longer in transit because they are delivered to dealers located in Seattle. The City's tax applies to companies making wholesale sales only if the goods are delivered to and accepted by a customer located in Seattle. *See Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 52, 156 P.3d 185 (2007) *cert. denied*, 552 U.S. 1180, 128 S.Ct. 1224, 170 L.Ed.2d 61 (2008).

The definition of "transit" is: "an act, process, or instance of passing or journeying across, through, or over." Webster's Third New International Dictionary, p. 2428 (1986). The vehicles sold by plaintiff are shipped to Seattle. They do not pass or journey "across, through, or over"

[1] American Honda also cites *United States v. International Business Machines Corp.*, 517 U.S. 843, 116 S.Ct. 1793 (1996). The ruling in that case involved federal taxes and the Import-Export Clause was not at issue. However, the Court there did recognize that the "central holding" of *Michelin* was that the Import-Export Clause prohibited only "Imposts or Duties" and not "all taxes."

Seattle. The City does not tax American Honda on vehicles that are "in-transit."

The decisions of the U.S. Supreme Court show that the "in transit" exception on which plaintiff is attempting to rely applies, if at all, only to goods that are "merely in transit through the State when the tax is assessed." *Michelin,* 423 U.S. at 290. In a case following *Michelin*, the Court upheld a state ad valorem property tax on tobacco imported to North Carolina. *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 107 S.Ct. 499, 93 L.Ed.2d 449 (1986). In *Reynolds*, foreign tobacco was shipped into the United States and placed under customs bond to secure payment of federal import duties. *Id.* at 133. The tobacco remained in warehouses for two years to age before being shipped to Reynolds' manufacturing facilities.

The Court first explained that its decision in *Michelin* "adopted a fundamentally different approach to cases claiming the protection of the Import-Export Clause. *Reynolds*, 479 U.S. at 152-153 (*citing Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 359,104 S. Ct. 1837, 80 L. Ed.2d 356 (1994)). The Court said that the "new focus is not on whether the goods have lost their status as imports but is, instead, on whether the tax sought to be imposed is an 'Impost or Duty.'" *Id.* After finding that the tax was not an impost or duty under the test stated in *Michelin*, the Court rejected Reynolds' contention that the goods "did not fall within the scope of *Michelin*'s holding because the goods were "in transit." *Id.* at 154. The Court stated, "The imported tobacco here, we repeat, has nothing transitory about it: it has reached its State-indeed, its county-of destination." *Reynolds*, 479 U.S. at 155-156. Goods that have reached their destination are not in transit.

The Texas Supreme Court made the same ruling in *Diamond Shamrock Refining and Marketing Co. v. Nueces County Appraisal Dist.*, 876 S.W.2d 298 (1994) *cert. denied* 513 U.S. 995, 115 S.Ct. 500, 130 L.Ed.2d 409, (1994). In *Diamond Shamrock*, the taxpayer imported oil from abroad that was off-loaded in Nueces County and held in tanks until transmitted by pipeline to the taxpayer's refinery in another county. *Id.* at 299. Plaintiff claimed that the oil was "in transit" and was exempt from Nueces County's property tax. The court disagreed and upheld the tax, stating:

> Although still on its foreign import journey and in that sense "in transit," the oil in question here entered *only* the State of Texas and, according to the stipulated 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. *See* Robert C.W. Frantz, Comment, *Constitutional Law--Nondiscriminatory Ad Valorem Tax May Be Applied To Imports*, 30 Rutgers

> L.Rev. 193, 197 (1976) (defining the "transit" discussed by the *Michelin* Court as "i.e., travelling through the importing state en route to another"). Under the Import-Export Clause, the oil is taxable in Texas. Where in Texas--Nueces County, Live Oak County or elsewhere--is not a subject governed by that Clause.

Diamond Shamrock, 876 S.W.2d at 301 (footnote omitted).

Similarly, the Delaware court in *Saudi Refining* upheld a gross receipts tax on the wholesale selling of oil that was off-loaded from a ship by the taxpayer at the buyer's refinery. *Saudi Refining*, 715 A.2d at 95. The Delaware court applied the *Michelin* test to uphold the tax and rejected the taxpayer's "in transit" argument:

> Finally, with respect to whether the goods are still in transit as imports, the Court notes that the crude oil sold and delivered by [the taxpayer] to the Star's Delaware refinery is entirely consumed and used at the plant. The oil is not flowing to an interstate destination. Thus, there is no basis to conclude that the Delaware tax offends the Import-Export Clause's purpose of avoiding disharmony among the states by prohibiting the imposition of a transit tax on imported goods merely passing through the State.

Saudi Refining, 715 A.2d at 95. For purposes of Import-Export Clause analysis, a product arriving at its destination is not in transit. In the present case, the vehicles are shipped to their destination in Seattle and are no longer in transit. Consequently, the test announced by the Court in *Michelin* applies.[2]

[2] American Honda also mentions that *Michelin* involved an ad valorem property tax. This fact is irrelevant because *Michelin's* holding is not restricted to ad valorem property

G. <u>The City's Tax Is Consistent With State And City Regulations And *Coast Pacific*</u>.

American Honda incorrectly contends that WAC 458-20-193C ("Rule 193C"), which governs the State B&O tax, properly states the tax immunity required by the Import-Export clause. American Honda ignores the court's decision in *Coast Pacific v. Dep't of Revenue*, 105 Wn.2d 912, 719 P.2d 541 (1986). The court in *Coast Pacific* recognized that WAC 458-20-193C did not accurately reflect the tax immunity provided by the Import-Export Clause.

The taxpayer in *Coast Pacific* conceded that the tax was valid under *Michelin* and *Stevedoring*, but argued that the tax was invalid under Rule 193C and the pre-*Michelin* cases. *Id.* at 543, 544. The taxpayer argued that Rule 193C offered greater immunity than available under *Michelin* or *Stevedoring*. *Id.* The court rejected this argument, holding that the state statute allowed deductions only to the extent available under the U.S. Constitution. The court stated: "We reject Coast Pacific's argument that Rule 193C increases the deduction available to exporters."

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taxes. *See Arizona Dep't of Revenue v. Robinson's Hardware*, 149 Ariz. 589, 593, 721 P.2d 137 (1986) (no distinction between transaction privilege tax and tax upheld in *Michelin*); *Saudi Refining*, 715 A.2d at 95 (court applies *Michelin* criteria to gross receipts tax); *Washington Stevedoring*, 435 U.S. at 755 (Court applies *Michelin* criteria to uphold state B&O tax).

Id. at 544. The court ruled that the exports were taxable and that Rule 193C could not confer immunity beyond that granted by the Constitution. *Id.* at 543-544.

The Washington Supreme Court subsequently confirmed that Coast Pacific's desired interpretation of Rule 193C went beyond the statutory and constitutional authority. In *Ass'n of Washington Business v. State of Washington, Dep't of Revenue*, 155 Wn.2d 430, 441, 120 P.3d 46 (2005), the court discussed its ruling in *Coast Pacific* with respect to Rule 193C as follows:

> [I]n *Coast Pacific* we disallowed an export exemption from the state business and occupation tax because it was based on a regulation that attempted to expand tax immunity beyond what the underlying statute and constitution required. 105 Wn.2d at 917. Our concern was an agency rule that amended a statute, not one that interpreted it.

Ass'n of Washington Business, 155 Wn.2d at 441 (footnote omitted.) Thus, the language of Rule 193C creates an exemption beyond that required by the constitution.

After *Coast Pacific*, the Washington legislature adopted RCW 82.04.610 to govern the state taxation of companies importing or exporting tangible goods. In enacting the statute, the legislature noted "the uncertainty regarding the constitutional limitations on the taxation of import and export sales of tangible personal property." Laws 2007, ch.

477, § 1. That "uncertainty" is the Washington Supreme Court stating that Rule 193C expands "tax immunity beyond what the underlying statute and constitution" require. *Ass'n of Washington Business*, 155 Wn.2d at 441. Contrary to American Honda's argument, the City's tax assessment in this case conforms to the interpretation of the Import-Export clause by Washington and federal courts.

American Honda also attempts to rely on City Business Tax Rule 193C ("City Rule 193C"). This argument is misplaced because the City repealed the rule on January 1, 2002, prior to the audit period. CP 118-119. Thus, City Rule 193C has no binding effect on American Honda's assessment. Even if City Rule 193C had been in effect, plaintiff's interpretation is contrary to the tax code, which taxes all wholesaling activity. SMC 5.45.050C. An administrative rule cannot expand tax immunity beyond the underlying ordinance. Plaintiff's interpretation of the Rule would contradict the tax code and would not be enforceable.

Furthermore, even while City's Rule 193 was in effect, the City did not interpret the Rule to exempt sales of imports such as plaintiff's vehicles that are delivered to a buyer in Seattle. CP 118. The Rule exempts only goods that are "still in the process of import transportation," which Seattle did not interpret as including goods being delivered into the

City. CP 118. Thus, the City's assessment of American Honda would have been the same even if City Rule 193C had been in effect.

VI. CONCLUSION

The superior court correctly ruled on summary judgment that American Honda is subject to the City's B&O tax. The Import-Export Clause does not prevent Seattle from imposing its B&O tax on plaintiff's activity of selling vehicles at wholesale, even if the vehicles have been imported. The Import-Export Clause was not intended to give preferential treatment to foreign manufacturers. *Michelin*, 423 U.S. at 287. This court should affirm the superior court's grant of summary judgment to the City.

DATED this 19 day of January, 2011.

PETER S. HOLMES
Seattle City Attorney

Kent C. Meyer, WSBA 17245
Attorneys for Respondent
City of Seattle

DECLARATION OF SERVICE

MARISA JOHNSON states and declares as follows:

1. I am competent to testify in this matter, am a Legal Assistant in the Law Department, Civil Division, Seattle City Attorney's Office, and make this declaration based on my personal knowledge.

2. On January 19, 2011, I caused the Brief of Respondent City of Seattle to be filed with the Washington Supreme Court and to be served by U.S. Mail on:

Robert L. Mahon
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

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

DATED this 19 day of January, 2011, at Seattle, Washington.

Marisa Johnson

APPENDIX

Hartman

been committed to current operational needs by the manufacturers. The rationale of the Court is that, when the goods became irrevocably committed to the manufacturing process, they became effectively commingled with the mass of property within the State and lost their distinctive character as imports.[42] The Court was satisfied that the ore in *Youngstown* and bundles of lumber in *Plywood* were so essential to current manufacturing requirements that they could be said to have entered the process of manufacture and hence were already put to the use for which they were imported.[43] When taxed, the goods were actually being used to supply the daily manufacturing requirements of the plants, with some bundles of veneer still in the original package, when used. Putting the goods to the use for which they were imported caused the goods to lose their distinctive character as imports, although some of the goods were in the original package when the tax was assessed.[44]

Up to this point in time, the cases decided by the Court under the Import-Export clause apparently created something of a dichotomy by granting Import-Export clause tax immunity to nondiscriminatory ad valorem property taxes to goods held for local distribution *by resale,* while subjecting imports *used* in manufacturing to such taxes.[45]

§ 5:4. Contemporary change of course in import-export clause tax immunity.

The sticky problems inherent in the "original package" doctrine were alleviated in 1976 by the repudiation of that doctrine in *Michelin Tire Corp. v Wages.*[46] In that litigation, the Court abandoned more than one hundred years of misguided precedent to hold that the Import-Export clause does not bar a state-imposed nondiscriminatory ad valorem property tax on goods imported and held for the purpose of sale. Departing from

42. *Id.*

43. *Id.*

44. *Id.*

45. See Early & Weitzman, *A Century of Dissent: The Immunity of Goods Imported for Resale from Nondiscriminatory State Personal Property Taxes,* 7 Sw U L Rev 247, 265 (1975). For a careful and thoughtful analysis of the cases through *Youngstown* and *Plywood,* see Dakin, *The Protective Cloak of the Export-Import Clause: Immunity for the Goods or for the Process,* 19 La L Rev 747 (1959).

46. 423 US 276, 46 L Ed 2d 495, 96 S Ct 535 (1976), reh den 424 US 935, 47 L Ed 2d 344, 96 S Ct 1151.

precedent, the Court adopted a fundamentally different approach to the resolution of the controlling issue of whether imports are taxable. So different was the approach to taxability, that the Court did not even address the question of whether the taxed goods had lost their status as imports.[47] *Michelin* marked the shrinkage of the scope of freedom from taxation afforded by the Import-Export clause. In the process, the Court expressly overruled the bellwether case of *Low v Austin*,[48] which spawned the first holding that the "original package" doctrine barred a nondiscriminatory ad valorem property tax applied to imported goods held on the shelves of taxpayer for retail sale for local consumption, although the tax also was applied to property generally. The overruling of *Low* was accompanied in the *Michelin* opinion by a penetrating, telling critical analysis of the long-applied and misplaced "original package" doctrine. Not only did *Michelin* overrule the original package doctrine applied in *Low*, but it represents a complete break with over a century of reasoning in the cases invoking that doctrine. Abandoned by *Michelin* was the oft-repeated doctrine that the Import-Export clause constitutes a broad prohibition on every "tax" on imports.[49] *Michelin* gave short shrift to that doctrine, and took the unequivocal position that the Import-Export clause only prevents such taxes as constitute "imposts" or "duties" from being applied to imports. The paramount argument supporting this position is the historical reason for placing that clause in the Constitution. Those reasons already have been noted.[50]

Examining the historical evidence showing the original purpose and scope of the Import-Export clause, the Court made it clear that its prohibition was only against States' laying "Imposts" or "Duties" on "Imports."[51] *Michelin* then distinguishes "imposts" and "duties" from the ordinary tax.[52] By turning to an examination of the original purpose of the Import-Export clause, the Court charted a basically different course for determining when a state tax constitutes a forbidden "impost" or "duty" on imports.

47. *Id.* at 279, 283.

48. Discussed at § 5:2, *supra.*

49. 423 US 276, 46 L Ed 2d 495, 96 S Ct 535 (1976), reh den 424 US 935, 47 L Ed 2d 344, 96 S Ct 1151

50. See § 5:1, *supra.*

51. 423 US 276, 46 L Ed 2d 495, 96 S Ct 535 (1976), reh den 424 US 935, 47 L Ed 2d 344, 96 S Ct 1151.

52. *Id.* at 290–294.

In *Michelin,* taxpayer imported tires and tubes from foreign countries into the taxing State (Georgia) where it stored and wholesaled them. While the tires and tubes were held in taxpayer's wholesale distribution warehouse, a nondiscriminatory ad valorem property tax was assessed against them. The state court sustained the tax as applied to the tires, but held the tax on the tubes contained in the corrugated shipping cartons in which they were imported were tax-free imports. The tires were held to have lost their status as imports because they had been mingled with other tires imported in bulk, sorted and arranged for sale. The state court found the tubes nontaxable because they remained in the original package in which they were imported. On appeal to the Supreme Court, the only question presented was whether the *tires* were subject to the ad valorem property tax. There was no appeal from the state court's holding that the *tubes* were not taxable.[53]

In *Michelin,* the Supreme Court upheld the tax on the tires. Without ever addressing the question whether the imported tires had lost their status as imports, the Court held that the assessment of the nondiscriminatory ad valorem property tax against the imported tires was not within the constitutional prohibition against laying "any Imposts or Duties on Imports."[54] Moreover, *Michelin* held that insofar as *Low v Austin* is to the contrary, that decision was expressly overruled.[55] Instead of directing its attention to whether the taxed tires had lost their character as imports, the *Michelin* Court primarily focused its attention on the purpose for the inclusion in the Constitution of the Import-Export clause, denying to the States the power to impose "Imposts and Duties" on "Imports", without the consent of Congress. After ascertaining the purpose, the Court had no difficulty in deciding that the questioned *Michelin* tax was not a forbidden exaction. The historical argument developed by the Court is cogent. The history of the country at the time of the adopting of the Constitution is most revealing in this regard. As *Michelin* notes, one of the major defects in the Articles of Confederation was the fact that the Articles left the individual States free to burden commerce, both among themselves and with foreign nations, very much as they pleased.[56] Under the governance of

53. *Id.* at 279, n. 2.

54. *Id.* at 279.

55. *Id.* at 279, 301.

56. *Id.* at 283.

the Confederation it was commonplace for seaboard States with strategic port facilities to raise revenue to support the costs of state and local governments by singling out and taxing goods imported from foreign countries and destined for customers in other States.[57] The exactions by the seaboard States were nothing short of tribute charged to the geographically less advantaged inland States. Such discriminatory taxation of foreign commerce severely hampered the commerce.[58] The upshot of the power of the States to levy such taxes was that the Federal Government was powerless effectively to regulate either interstate or foreign commerce. At the same time, the central government had no secure source of revenue, since it depended upon taxation of imports.[59] Thus another objective of the Framers of the Constitution was to preserve import duties as a main source of federal revenue, and to protect such duties from state interference. At the time of the Constitutional Convention in 1787, federal duties on imports constituted the main source of federal revenue. Such discriminatory taxes on imports by the States, of course, discouraged and hobbled foreign trade with the accompanying loss of revenue for the Federal Government.[60]

As already noted,[61] the Framers attempted to eliminate these evils, and one of the tools was the Import-Export clause, which prohibits any State from levying imposts or duties on imports or exports, without the consent of Congress.

The *Michelin* opinion points out that there were three main concerns which the Framers of the Constitution sought to alleviate by committing the exclusive power to lay imposts and duties on imports to the Federal Government, leaving no concurrent state power to do so. The three concerns are well documented in the *Michelin* opinion by use of records from the drafting and adoption of the Constituion.[62] The first concern of the Framers was that the

> Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which

57. *Id.*

58. See 3 Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, 548 (rev. ed. 1937).

59. 423 US 276, 46 L Ed 2d 495, 96 S Ct 535 (1976), reh den 424 US 935, 47 L Ed 2d 344, 96 S Ct 1151.

60. *Id.* at 283, n. 4.

61. See § 5:1, *supra.*

62. 423 US 276, 46 L Ed 2d 495, 96 S Ct 535 (1976), reh den 424 US 935, 47 L Ed 2d 344, 96 S Ct 1151.

> might affect foreign relations, could not be implemented by the States consistently with that exclusive power.[63]

The second concern of the Framers was that

> import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States.[64]

Third, the Framers feared that

> harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.[65]

Viewing the ad valorem property tax questioned in *Michelin* in the light of these expressed concerns of the Framers of the Constitution, the Court concluded that nothing in the history of the Import-Export clause even remotely suggested that a general nondiscriminatory ad valorem property tax, which also is applied to imported goods that are no longer in import transit, was the kind of exaction the Framers regarded as objectionable.[66] Such a tax, unlike state taxation which discriminates against imported goods, was not considered as an impediment that would sharply curtail commerce; nor would such a property tax constitute a form of tribute exacted by seaboard States to the harm of other States, the Court thought.[67] To the *Michelin* Court, it was "obvious that such nondiscriminatory property taxation can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce, probably the most important purpose of the (Import-Export) Clause's prohibition."[68] This is true, said the Court, for the reason that such a general property tax, by very definition does not fall upon imports because of their place of origin.[69] The tax cannot be used to create special protective tariffs, and it cannot be applied selectively to encourage or discourage importation of goods in a manner inconsistent with federal regulation, the Court insisted.[70]

Moreover, the *Michelin* Court concluded that such a general nondiscriminatory ad valorem property tax would not frustrate

63. *Id.* at 285.

64. *Id.*

65. *Id.* at 285–86.

66. *Id.* at 286.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

the second concern of the Framers by depriving the Federal Government of the exclusive rights to all anticipated revenues derived from imposts and duties laid on imports, which are essentially taxes on the commercial privilege of bringing goods into the country; an ad valorem property tax does not fall in that category.[71] The general ad valorem property tax is an exaction used by the States to defray the costs of such services as police and fire protection among the beneficiaries according to their respective wealth. There is no reason, noted the *Michelin* Court, why the importer should not contribute his share of the costs along with his competitors handling only domestically produced goods.[72] To hold otherwise would create the unfair result of discriminating against the domestically produced goods, in favor of comparable competing imported goods. The Import-Export clause clearly bans taxes based on the foreign origin of the imported goods. However, *Michelin* makes it plain that the clause should not be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for compensation for services supplied by the States.[73]

The third concern of the Framers of the Constitution, identified by *Michelin,* was the prevention of taxes that are tantamount to transit fees charged by coastal States with good port facilities, which would prevent the free flow of imported goods among other States.[74] That deplorable situation was one of the chief weaknesses of the Articles of Confederation. The Import-Export clause, in effect, was fashioned to prevent such exactions for the privilege of moving goods through seaboard States.[75] The Court noted that traditional commerce clause analysis would invalidate such taxes on goods which are merely in transit.[76] The general nondiscriminatory ad valorem property tax would not, thought the Court, interfere with the free flow of imported goods among the States, since it is applied across-the-board, and does not single out imports.[77] Again, *Michelin* stressed that the general property tax is but compensation for benefits actually

71. *Id.* at 286–87.

72. *Id.* at 287.

73. *Id.*

74. *Id.* at 290.

75. *Id.*

76. *Id.* at 290, n. 11.

77. *Id.* at 288.

conferred by the States, and there is no reason why the local taxpayer should subsidize the services received by the importer.[78]

Having concluded that a nondiscriminatory ad valorem property tax did not run counter to any of the policies underlying the Import-Export clause, the *Michelin* Court further undergirded its position that the tax under review was constitutionally permissible, by showing that the Founding Fathers probably did not understand the terms "impost" and "duties" to include nondiscriminatory ad valorem property taxes.[79] To support this position, the Court noted that the Import-Export clause does not expressly prohibit every "tax" which falls in some measure on imported goods. Only "Imposts and Duties" on "Imports" are expressly banned by the clause. The Court also noted that, by contrast, Congress is empowered to lay and collect Taxes, Duties, Imposts and Excises. This grant of constitutional power to Congress, thought the Court, was supportive of the conclusion that the Import-Export clause does not prohibit every exaction that falls on imports.[80] "Imposts" as used in the Constitutional Convention, were understood as charges levied on imports at the time and place of importation. "Duties" was a broader term embracing excises as well as customs duties. When the Constitution was adopted, probably only capitation, land and general property exactions were known by the term "tax," rather than the term "duty."[81] In any event, to the *Michelin* Court's way of thinking, there was sufficient ambiguity surrounding the terms "impost" and "duty" so that the Court declined to presume that the Import-Export clause was intended to embrace taxation that does not create the evils the clause was specifically intended to eliminate.[82] A nondiscriminatory ad valorem tax on property seemingly was not included within the meaning of either impost or duty within the intention of the Founding Fathers in 1787.

Michelin concluded that, since the prohibition of the nondiscriminatory ad valorem property tax would not further the objectives of the Import-Export clause, it would not condemn the tax.[83]

Low v Austin[84] was expressly overruled.[85] That case had ex-

78. *Id.* at 289.

79. *Id.* at 290–92.

80. *Id.* at 290.

81. *Id.* at 290–91.

82. *Id.* at 293–94.

83. *Id.*

84. Discussed at § 5:2, *supra*.

85. Michelin Tire Corp. v Wages,

panded the prohibition of the Import-Export clause to include nondiscriminatory ad valorem property taxes although the tax was imposed upon property generally. In *Low,* the property tax was applied to inventory on taxpayer's shelves and held for sale to consumers. The assessment in *Low* applied not only to that taxpayer but also to his competitors, who, of course, were left saddled with the tax. *Brown v Maryland* had been cited by *Low* as controlling authority. The *Michelin* Court thought *Brown* could not properly be read to support such a broad definition of "imposts" or "duties," as *Low* claimed. *Michelin* expressly declared that *Low's* reliance on the *Brown* dicta was "misplaced."[86] The tax levied in *Brown* was imposed under a statute that required the importer of foreign goods, and wholesaling them, to pay a license fee for the privilege of selling his imports. The *Brown* license fee was thus a prerequisite to taxpayer's right to sell articles he had imported. Moreover, the *Brown* tax discriminatorily singled out only imports to pay the tax.[87] In *Brown,* the tax squarely eroded a basic policy underpinning of the Import-Export clause; it was, in effect, a transit fee discriminatorily levied by the coastal State of Maryland, with important port facilities, solely on importers for the privilege of importing and selling their goods. On the other hand, the *Low* ad valorem property tax applied across-the-board; it had no propensities for stifling the business of importing.[88]

§ 5:5. Traditional analysis of state taxation of exports

While the Import-Export clause limits taxation with respect to both imports and exports, historically the Court has adopted a bifurcated, rather than a uniform, approach in dealing with taxation of imports and imposts. Over much of our constitutional history, until 1976, the "original package" doctrine was

423 US 276, 46 L Ed 2d 495, 96 S Ct 535 (1976), reh den 424 US 935, 47 L Ed 2d 344, 96 S Ct 1151.

86. *Id.* at 283.

87. *Id.* at 298. *Brown* is more fully discussed at § 5:2, *supra.* That it was not the property taxes of the States that were criticized as trade barriers under the Articles of Confederation, see Powell, *State Taxation of Imports —When Does an Import Cease To Be an Import?,* 58 Harv L Rev 858, 866 (1945).

88. For an analysis of *Michelin,* see W. Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?,* 75 Mich L Rev 1426, 1427 (1977).

used to test the validity of most import taxation.[89] However, the "original package" doctrine never had had any application to the taxation of exports. Instead, the validity of export taxation turned on whether the export had sufficiently entered the export stream of commerce for its final journey to its predetermined foreign destination.[90]

A case decided in 1886 under the commerce clause, when applied to commerce among the States, laid down principles which, by and large, governed export taxation until 1978. In the case of *Coe v Errol,*[91] the Court evolved the "final journey" rule in a state property tax on logs that were being transported interstate on a river. While the logs were detained because of low water, they were subjected to a property tax. Over commerce clause objections, the Court sustained the tax, explaining that the logs did not come within the protection of that clause "until they have been shipped or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey."[92] The Court rejected the claim that intent to transport interstate or preparation of goods for exportation to another State was sufficient to create commerce clause tax exemption from the tax.[93] Immunity from taxation did not attach under the teaching of *Coe v Errol* until the goods "entered upon their final journey for leaving the State and going into another State."[94]

Subsequent cases involving taxation of exports to a foreign country have focused upon the beginning of the "final journey" test established in *Coe v Errol,* with some varying degrees of rigidity. In *A.G. Spalding & Bros. v Edwards,*[95] the Court invalidated a federal excise tax levied on the sale of baseballs and bats to a foreign purchaser. The sale was consummated when the seller delivered the goods to the carrier. The Court held that the sale and delivery to the carrier constituted the first step in the exportation process, which occurred before the imposition of the

89. For a discussion of the case that discarded that approach, see § 5:4, *supra.*

90. See Tribe, AMERICAN CONSTITUTIONAL LAW 371 (1978).

91. 116 US 517, 29 L Ed 715, 6 S Ct 475 (1886).

92. *Id.* at 527.

93. *Id.*

94. *Id.* at 528.

95. 262 US 66, 67 L Ed 865, 48 S Ct 485 (1923).

tax.[96] *Spalding* arose under the provision of the Constitution prohibiting Congress from laying a tax or duty on an export.[97] However, the Court has said that the meaning of "export" is the same under that provision, as under the Import-Export clause.[98] In light of the physical delivery of goods to the carrier in *Spalding,* it seems to square with the doctrinal declarations for determining taxability found in *Coe v Errol.* However, in *Spalding,* where the Court upset the tax on the exported goods, the goods had not yet commenced physical movement out of the country at the time the tax was imposed, but *Coe v Errol* makes provision for tax immunity where the goods "have been entered with a common carrier for transportation."[99] *Spalding* also seems consistent with the later state case case of *Richfield Oil Corp. v State Board of Equalization,*[1] where the issue was whether the delivery of the goods aboard the ship of a foreign buyer marked the commencement of the movement in the export journey, so as to qualify as a nontaxable export. There the taxpayer (seller of oil) pumped the oil into the hold of the foreign purchaser's ship from taxpayer's tanks located at the dock. The taxing State sought to impose a retail sales tax on the oil. The taxing statute provided that a sale is any delivery of title or possession of personal property to the purchaser.[2] It was determined that, under the taxing statute, the sales tax was an excise for the privilege of conducting a retail business, measured by the gross receipts from the sale. Also, it was determined that the delivery of the oil resulted in the passage of title, which was the event upon which the sales tax was levied.[3] In striking down the sales tax, the *Richfield* Court held that the delivery of the oil into the hold of the foreign purchaser's ship marked the commencement of the movement of the oil abroad.[4] When the oil was pumped into the hold of the ship, the Court said it passed into the control of the foreign purchaser, and there was nothing equivocal about the transaction which created even a probability that

96. *Id.* at 69–70.

97. U.S. CONST. art. 1, sec. 9, cl. 5.

98. See, *e.g.,* Richfield Oil Corp. v State Board of Equalization, 329 US 69, 91 L Ed 80, 67 S Ct 156 (1946), conformed to 29 Cal 2d 560, 176 P2d 372.

99. See text this section, *supra.*

1. 329 US 69, 91 L Ed 80, 67 S Ct 156 (1946), conformed to 29 Cal 2d 560, 176 P2d 372.

2. *Id.* at 83.

3. *Id.* at 84.

4. *Id.* at 83.

the purchaser would direct the oil to domestic use.[5] The Court stressed that the certainty of the foreign destination of the oil was plain.[6] In *Richfield,* the Court thrust down an excise tax imposed upon the seller for the privilege of engaging in the retail sales business; the tax was not levied upon the exported goods themselves. Here the Import-Export clause protected the entire exporting process, not just the goods exported. The Court makes this clear, when it stated: "The prohibition contained in the Import-Export Clause against taxation on exports clearly involves more than a mere exemption from taxes laid specifically upon the exported goods themselves."[7]

Richfield does not seem nearly so insistent on actual physical movement into the export stream as do subsequent cases. Shortly after *Richfield,* the Court made it clear that certainty of export was not sufficient to confer nontaxable export status on goods; more was required. In *Empresa Siderurgica, S.A. v County of Merced,*[8] the Court upheld a state ad valorem property tax levied on a portion of a cement plant which had been sold to a foreign buyer. The plant was awaiting shipment from the taxing State to a predetermined foreign destination. At a stage when 12% of the cement plant had already been shipped out of the country, an ad valorem property tax was applied to the remaining 88%, part of which had been dismantled and crated for shipment.[9] In upholding the tax on the remaining 88% of the plant, including the crated part, the Court explicitly points out that none of this part of the plant had begun its voyage to its foreign destination, although the seller had obtained an export license and the sale had been completely consummated. Again, the Court noted that it is not enough that there is an intent to export. "It is the entrance of the articles into the stream of exportation" that marks the start of the process that will prevent a tax.[10] There must be certainty that the goods are physically headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice.[11] Since 88% of the foreign owned cement plant had not yet commenced physical

5. *Id.* at 82–83.

6. *Id.* at 83.

7. *Id.* at 85.

8. 337 US 154, 93 L Ed 1276, 69 S Ct 995 (1949).

9. *Id.* at 168.

10. *Id.*

11. *Id.*

movement in its out-of-State journey to the foreign destination, the tax was not treated as a forbidden tax on exports. *The Empresa* Court applied a purely mechanical test of actual movement into the export stream, presumably for the fear that the parties might use the exportation process as a tax dodge, while keeping the articles on the domestic market.

Kosydar v National Cash Register Co.[12] nailed down, as well or perhaps better than any other decided case, the proposition that the prospect of eventual exportation, no matter how certain, will not confer export tax immunity on goods; that immunity does not arise until the article "begins its physical entry into the stream of exportation."[13] Seemingly agreeing that the rule is "an overly wooden or mechanistic application of the *Coe* doctrine,"[14] the *Kosydar* Court nevertheless was satisfied that "simplicity has its virtue."[15]

Kosydar involved the validity, under the Import-Export clause, of a state ad valorem property tax applied to inventory of taxpayer's cash registers, accounting machines and electronic data processing systems stored in a warehouse, awaiting shipment to a foreign purchaser. All the machines had been inspected, crated and were stored in a warehouse awaiting shipment abroad when the tax was imposed. Taxpayer maintained no inventory of machines to meet incoming orders from foreign customers. Rather, when an order was received from a foreign customer, the machines were then built to specification, taking into account the commercial peculiarities of the country to which they were to be shipped and the individual needs of the buyer.[16] Taxpayer further offered to show that, because of the unique construction and special adaptation for foreign use of the crated machines, they could not be sold domestically. Moreover, no equipment built for foreign purchasers had ever been sold elsewhere.[17]

This explicit showing by taxpayer was not enough to satisfy the *Kosydar* Court that the machines had acquired an export status under the Import-Export clause. The Court upheld the

12. 417 US 62, 40 L Ed 2d 660, 94 S Ct 2108, 69 Ohio Ops 2d 120 (1974).

13. *Id.* at 71.

14. *Id.*

15. *Id.*

16. *Id.* at 63.

17. *Id.* at 63–64.

tax. Relying especially on *Empresa,*[18] *Kosydar* took the position that, at the time the taxpayer's machines were assessed for ad valorem property taxation, they were sitting in the warehouse awaiting shipment;[19] the machines had not begun their physical entry into the stream of exportation. To the charge that such a rule, as applied to this case was "overly wooden or mechanistic,"[20] the *Kosydar* Court replied that this case "is an instance, however, where we believe that simplicity has its virtues."[21] The Court thought it highly important, both to the shipper and to the State, that the line of demarcation between taxable goods and nontaxable exports should be clearly defined to avoid ambiguity.[22]

Not every actual, physical movement in the stream of exportation to a foreign country is sufficient to confer export immunity from taxation. *Joy Oil Co. v State Tax Com.*[23] held that, despite initial transportation of gasoline in an exportation journey, a fifteen months' interruption of that journey because of apparent shortage of shipping space, subjected the gasoline to an ad valorem property tax. A Michigan refinery sold the gasoline to a Canadian buyer. The oil was shipped by rail on the first leg of its journey to Dearborn, Michigan, where it was placed in tanks awaiting shipment by truck to Canada. While in storage, an ad valorem property tax was assessed against the gasoline by the taxing authorities of Dearborn. The gasoline had been certified as purchased for export, under bills of lading so marked. In holding the tax valid, the Court concluded that the extended delay of fifteen months "was so long as to preclude holding that the first step toward exportation would inevitably be followed by others."[24] The Court expressed the opinion that the stored gasoline might have been diverted to domestic markets without even breach of any contractual commitment to the foreign purchaser.[25] Also, the Court observed that neither the character of the

18. *Id.* at 67–71.

19. *Id.* at 69.

20. *Id.* at 71.

21. *Id.*

22. *Id.* By way of a footnote, the Court indicated that, based upon the lower court's opinion, actually there was no certainty of export in this case. The orders could be cancelled, the export license might never issue, financing may fail to materialize, the machines could be destroyed, dismantled or sold for scrap. *Id.* at 70, n. 7.

23. 337 US 286, 93 L Ed 1366, 69 S Ct 1075 (1949).

24. *Id.* at 288.

25. *Id.*

property nor any event equivalent to its redelivery to a common carrier were enough to make export certain for all practical purposes.[26] The Court somewhat pointedly noted that the Export-Import clause "was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services."[27] Similarly a break in an interstate journey may, under some circumstances, render the commerce clause protection inapplicable for the prevention of a tax.[28]

§ 5:6. Contemporary different approach to taxation of exports.

Two years after *Michelin* had taken a substantially different departure from precedent in the taxation of imports,[29] the Court decided *Department of Revenue Washington v Association of Washington Stevedoring Cos.,*[30] which questioned a tax applicable to both imports and exports. Like *Michelin,* it further narrowed the scope of protection of the Import-Export clause, and applied the same fundamentally different *Michelin* approach in resolving the constitutional question to both imports and exports.

Stevedoring Association applied the *Michelin* analysis to sustain a business and occupation tax applied to stevedoring, with gross receipts from that service measuring the amount of tax. The stevedoring consisted of both loading and unloading cargo in foreign commerce. All of the gross receipts to which the tax applied were attributable to services performed within the State imposing the tax. The tax was resisted on Import-Export clause grounds, as well as by commerce clause objections to the tax. Both prongs of the attack were unsuccessful.[31]

Applying the *Michelin* analysis, the *Stevedoring Association* Court concluded that the tax violated none of the policies announced in *Michelin.* So fundamentally different were the changes involved in the new approach to taxation of imports and exports, that this case, like *Michelin,* did not even address the question whether the tax was imposed for handling goods that

26. *Id.*

27. *Id.*

28. See § 2:18, *supra.*

29. Discussed in § 5:4, *supra.*

30. 435 US 734, 55 L Ed 2d 682, 98 S Ct 1388 (1978).

31. The commerce clause aspects of the case are discussed in § 2:17, *supra.*

were "exports" or "imports." Rather, the Court directed its attention to whether the questioned exaction was an "Impost" or "Duty" laid on "Imports" or "Exports," since the Import-Export Clause only forbids "Imposts or Duties on Imports or Exports" without the consent of Congress. In its analysis to determine whether the questioned tax on gross receipts from stevedoring was a prohibited "impost" or "duty", the *Stevedoring Association* Court employed the same policy consideration analysis as *Michelin.* Looking to the three primary concerns that the *Michelin* Court identified as perplexing the Framers of the Constitution, leading to the inclusion of the Import-Export clause in that instrument of governance, the *Stevedoring Association* Court was satisfied that the tax under review violated none of the three concerns.[32]

The first concern was that, in order effectively to conduct foreign policy, the Federal Government must speak with a single voice. This concern was satisfied for the reason that the tax in question did not interfere with foreign policy. The tax was in no sense discriminatory, and did not create any special tariffs. Moreover, the business that was taxed was conducted entirely within the taxing State. The Court could find no interference by the tax with the power of the Federal Government to regulate political and commercial affairs with foreign governments.[33] Neither did the tax impinge upon the second policy concern of the Framers of the Constitution, as set forth in *Michelin,* which was to insure that impost revenues as a source of revenue of the Federal Government would not be diverted by the States.[34] Again employing the *Michelin* analysis, the *Stevedoring Association* Court thought that any effect on imposts would be indirect and insubstantial, and would deprive the Federal Government of no anticipated revenue to which it reasonably was entitled. The tax in question only amounted to compensation to the State for services and protection afforded the objecting taxpayer.[35] The policy of preservation of revenue for the Federal Government from exports has no application, of course, to exports, since the Constitution prohibits Congress from levying taxes on exports.[36] Nor did the reviewed tax violate the policy underlying the third

32. 435 US 734, 55 L Ed 2d 682, 98 S Ct 1388 (1978).

33. *Id.* at 753–54.

34. *Id.* at 751–61.

35. *Id.* at 753–54.

36. U.S. CONST. art. 1, sec. 9, cl. 5.

concern of the Framers of the Constitution, as announced in *Michelin,* which was the prevention of interstate rivalries and friction, resulting from the unrestrained levying of transit fees by coastal States with important port facilities on imports going to other States. The Articles of Confederation were powerless to prevent such harmful practices. The *Stevedoring Association* opinion notes that the goal of preventing exacerbation of interstate dissensions is not hindered by this tax. The desire to prevent such friction and retaliation under the Import-Export clause, the Court observed, is not significantly different from one of the primary purposes of the commerce clause, which was to prevent hurtful commercial wars and reprisals among the States.[37] Again following *Michelin,* the Court was of the view that, if commerce clause standards are satisfied, then there should be no commercial discord among the State. This third policy was vindicated because the tax fell upon a taxpayer with reasonable nexus to the taxing State; the tax was properly attributable to that State; it did not discriminate; and it related reasonably to services provided by the State to taxpayer.[38] The *Stevedoring Association* Court concluded that interstate friction would not chafe when commerce pays only for the governmental services and benefits it enjoys.[39] Moreover, requiring coastal States, with good port facilities, to subsidize the commerce of the inland consumer might well irritate, rather than diminish, interstate friction and hostility.[40]

Since the *Stevedoring Association* tax did not impinge upon any of the three policy concerns which led the Framers of the Constitution to include the Import-Export clause in the Constitution, the exaction was sustained.[41]

The tax reviewed in this case was a privilege tax imposed on the occupation of stevedoring, measured by the gross receipts. The tax was not levied on the *goods* imported nor exported, but only on the *service* of *handling* the imported and exported goods. Again, it is clear that the purview of the Import-Export clause

37. 435 US 734, 55 L Ed 2d 682, 98 S Ct 1388 (1978).

38. *Id.* at 754–55. These four standards were evolved by the Court in *Complete Auto Transit* to test the validity of a state tax, when challenged on commerce clause grounds. That case is discussed in § 2:17, *supra.*

39. 435 US 734, 55 L Ed 2d 682, 98 S Ct 1388 (1978).

40. *Id.* at 760–61.

41. *Id.* at 761.

protection extends to the entire process of importing and exporting. The *Stevedoring Association* tax was laid on gross receipts for *service* in handling goods while *in transit.* Only future decisions by the Court will reveal whether a State may validly impose a tax 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 an tax could be validly levied on *goods* while in transit.[42]

Where the questioned exaction is one that could qualify as an impost or duty on exports under the *Michelin* and *Stevedoring Association* standards, the threshold inquiry will be whether the exaction was imposed before or after the export items had achieved the status as an export. For resolving this question, there arises the corollary question whether the Court will continue to employ the test whether the items had entered the export stream on their final continuous journey out of the country before the imposition of the reviewed tax. As previously noted, in past decisions the Court has consistently determined that the exported goods do not achieve tax immunity under the Import-Export clause until they physically begin transit in their journey to the predetermined foreign destination.[43]

§ 5:7. Impact of Twenty-first Amendment.

Department of Revenue v James B. Beam Distilling Co.[44] undertook to accommodate the Twenty-first Amendment of the Constitution with the Import-Export Clause. The *Beam* decision substantially limited the Twenty-first Amendment state control over intoxicating liquors. The relevant parts of that Amendment, contained in section 2, provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of

42. For additional treatment of the *Stevedoring Association* case, see § 2:17, *supra.*

43. See § 5:5, *supra.* For an extended analysis of the recent developments of taxation under the Import-Export clause, see Note, Constitutional Law—Import-Export Clause—Nondiscriminatory, Fairly Apportioned Excise Tax as Applied to Stevedoring Companies Loading and Unloading Goods in Import and Export Transit Does Not Constitute an Import or Duty Within the Prohibition of the Import-Export Clause, 9 Ga J Int'l & Comp L 445 (1979).

44. 377 US 341, 12 L Ed 2d 362, 84 S Ct 1247 (1964).

intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

In *Beam,* taxpayer imported and distributed whiskey produced in Scotland. The whiskey was stored in taxpayer's bonded warehouse in Kentucky, which enacted a statute prohibiting the importation into the State of distilled spirits without obtaining a permit, plus the payment of ten cents on each gallon proof of whiskey. The state tax was collected while the whiskey remained in the unbroken packages in which it was imported from Scotland, and while in the hands of the original importer (taxpayer) prior to resale.[45] Claiming the tax violated the Import-Export clause, taxpayer paid the tax and sued to recover it. The dispositive issue was whether the Twenty-first Amendment took priority over the Import-Export clause with respect to this tax imposed on intoxicating liquors.

The Supreme Court granted a tax refund on the ground that the tax was proscribed by the Import-Export clause.[46] The Court was of the opinion that, because of the explicit and precise words of the Import-Export clause, the tax in question was levied on an import from abroad, and was prohibited.[47] The *Beam* Court declared that this "Court has never so much as intimated that the Twenty-first Amendment has operated to permit what the Import-Export Clause precisely and explicitly forbids."[48] Further, the *Beam* Court added that to "sustain the tax which Kentucky has imposed in this case would require nothing short of squarely holding that the Twenty-first Amendment has completely repealed the Export-Import Clause so far as intoxicants are concerned."[49]

To demonstrate the broad sweep of the Twenty-first Amendment, the Court declared that it had "no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders."[50] Further expounding on the powers of the States under the Amendment, *Beam* declared that there "can surely be no doubt, either, of Kentucky's plenary power to

45. *Id.* at 342.

46. *Id.* at 343.

47. *Id.* at 346.

48. *Id.* at 344.

49. *Id.* at 345.

50. *Id.* at 346.

regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported."[51] Nevertheless, the *Beam* Court thrust down the tax under review.

It appears somewhat anomalous that, under the broad *Beam* interpretation of the Twenty-first Amendment, that a State possesses power not only to regulate but also to prohibit the importation of intoxicating liquors from another State or from a foreign country, yet the State lacks power to tax the whiskey in question. Perhaps the answer lies in the fact that the *Beam* tax may have been discriminatory; the statute singled out and taxed only distilled spirits imported from outside the State. The *Beam* decision thus denies the State the power to impose discriminatory taxes on foreign intoxicating liquors. If the taxing State imposed an equivalent tax upon its own distilled spirits, the Court manifested no awareness of any such equivalent tax to which locally produced distilled spirits was subjected. If such local tax did exist, then no forbidden discrimination existed.[52]

One of the foundation cases upon which *Beam* is bottomed has since been relegated to the ash heap of discredited constitutional cases. The *Beam* Court states that the tax in question is of the kind prohibited in *Low v Austin,*[53] which knocked down an ad valorem property tax imposed on champagne imported from France, stored by taxpayer in the original package and held there for sale by the importer-taxpayer. *Low* proclaimed that goods imported do not lose their original character as imports, for tax purposes, until they have passed from the control of the importer, or have been broken up by him from their original cases.[54] When the tax was imposed in *Beam,* the importer-taxpayer still held the whiskey in unbroken packages in which it was imported from Scotland. The later case of *Michelin Tire Corp. v Wages*[55] not only established an entirely different ap-

51. *Id.*

52. That a taxing statute that is discriminatory on its face can be saved from condemnation as a discriminatory exaction by an equivalent tax, see § 2:19, *supra.*

53. 80 US 29, 20 L Ed 517 (1872) (ovrld Michelin Tire Corp. v Wages 423 US 276, 46 L Ed 2d 495, 96 S Ct 535, reh den 424 US 935, 47 L Ed 2d 344, 96 S Ct 1151).

54. Department of Revenue v James B. Beam Distilling Co., 377 US 341, 12 L Ed 2d 362, 84 S Ct 1247 (1964).

55. Low v Austin, 80 US 29, 20 L Ed 517 (1872) (ovrld Michelin Tire Corp. v Wages 423 US 276, 46 L Ed 2d 495, 96 S Ct 535, reh den 424 US 935, 47 L Ed 2d 344, 96 S Ct 1151).

proach to the taxability of imports, but it also expressly overruled *Low v Austin*.[56] Moreover, it completely discarded the "original package" doctrine, which forms the underpinning of *Beam*.[57]

If *Beam* remains a viable legal precedent after *Michelin*, it must look to visible means of support other than *Low* and the "original package" doctrine. Perhaps the discriminatory aspect of the *Beam* tax might preserve the actual narrow holding of the case.[58]

For a more extended critical discussion of *Low*, see § 5:2, *supra*.

56. 423 US 276, 46 L Ed 2d 495, 96 S Ct 535 (1976) reh den 424 US 935, 47 L Ed 2d 344, 96 S Ct 1151.

57. *Id.* at 279, 301.

58. Department of Revenue v James B. Distilling Co., 377 US 341, 12 L Ed 2d 362, 84 S Ct 1247 (1964). For a discussion of the Impact of the Twenty-First Amendment on the Commerce Clause, see § 2:20, *supra*.

Hartman

CHAPTER 5

The Import-Export Clause

New or Changed Section Titles

§5:4. Contemporary change of course in import-export clause tax immunity.

Nondiscriminatory Property Tax on Imported Tobacco Stored in Customs-Bonded Warehouse Not Violative of Import-Export Clause, Where Tobacco Intended for Domestic Use.

In R.J. Reynolds Tobacco Co. v. Durham County[1] the Supreme Court of the United States held that a nondiscriminatory ad valorem property tax imposed on imported tobacco while stored in a customs-bonded warehouse did not violate the Import-Export Clause, where the taxed tobacco was destined for manufacture and sale in the United States.

Taxpayer, R.J. Reynolds Tobacco Company, a New Jersey corporation with its principal office and all of its manufacturing facilities in Winston-Salem, North Carolina, produces finished tobacco products for sale almost exclusively in the United States. Taxpayer imports tobacco into the United States from Bulgaria, Syria, Lebanon, Brazil and a few other places.[2] At the port of entry in the United States, taxpayer has this foreign tobacco placed under customs bond given by taxpayer to secure the payment of federal import duties.[3] This imported tobacco is then transported to several customs-bonded warehouses owned and maintained by taxpayer in Forsyth and Durham Counties in North Carolina. Because nearly all the imported tobacco requires aging, it usually remains in the warehouse for two years, and upon withdrawal of this tobacco from the warehouses, taxpayer

[1] R.J. Reynolds Tobacco Co. v. Durham County, 479 US 130, 93 L Ed 2d 449, 107 S Ct 499 (1986).

[2] 93 L Ed 2d at 457 n 2.

[3] Id.

pays the required customs duties.[4] Taxpayer stores its domestic tobacco in non-bonded warehouses in the same two counties as the stored foreign tobacco. For police, fire and other public services, taxpayer receives identical city and county protection at its customs-bonded and non-bonded warehouses.[5] Taxpayer blends its imported tobacco with domestic tobacco in its manufacturing facilities in Winston-Salem.

"Tobacco present in North Carolina on January 1 of each year is subject to an ad valorem tax in the amount of 60% of the rate generally applicable to other property."[6] Counties and municipalities are authorized by statute to levy and collect property taxes on the tobacco in a manner uniform throughout the State.[7] Taxpayer resisted the ad valorem property tax levied by Durham County on its imported tobacco stored in its customs-bonded warehouses on the ground that the tax violated the Import-Export Clause.[8] The Court disagreed.[9]

As the Reynolds Court notes, Michelin Tire Corp. v. Wages,[10] "adopted a fundamentally different approach to cases claiming the protection of the Import-Export Clause."[11] Prior to Michelin, the Import-Export Clause had given tax clemency to imported goods as long as the goods remained in the hands of the importer in their "original package" in which they were imported.[12] In sustaining an ad valorem property tax on imported goods in Michelin, the Court abandoned more than one hundred years of misguided precedent and held that the Import-Export Clause does not ban a nondiscriminatory ad valorem property tax on

[4] Id. at 457–58.

[5] Id. at 458.

[6] Id.

[7] Id.

[8] Id. at 469. Also taxpayer claimed immunity from the tax on the ground that it was preempted by the federal statutory scheme governing customs-bonded warehouses. That aspect of the case is discussed in section 13:8 of this Supplement.

[9] Id. at 470.

[10] Michelin Tire Corp. v. Wages, 423 US 276, 46 L Ed 2d 495, 96 S Ct 535 (1976).

[11] Reynolds, 93 L Ed 2d at 469, quoting Limbach v. Hooven & Allison Co., 466 US 353, 359, 80 L Ed 2d 356, 104 S Ct 1837 (1984).

[12] E.g., Low v. Austin, 13 Wall (80 US) 29, 20 L Ed 517 (1872). For an extended discussion of the "original package" doctrine and the repudiation of that doctrine by Michelin, see Hartman, "Federal Limitations on State and Local Taxation" (1981), Chapter 5, The Import-Export Clause, §§ 5:1–5:4 & Supplement. For other discussion, see J. Hellerstein, "State Taxation" (1983) ¶ 5.1–4 at 176–90.

goods imported and held by the taxpayer for purpose of sale. In its departure from precedent, Michelin adopted a fundamentally different approach in resolving the dispositive issue of whether imports are subject to taxation by state and local governments. In this new approach, Michelin torpedoed Low v. Austin,[13] the flagship leading the "original package" doctrine fleet. The overruling was accomplished by a penetrating, critical analysis of the long-misapplied "original package" doctrine. Relegated to the dustbin of constitutionally discredited doctrine was the judicial teaching that the Import-Export Clause constitutes a bar to every tax on imports in their "original package." The Reynolds opinion explains this approach by a quotation from Limbach:[14]

> To repeat: we think it clear that this Court in Michelin specifically abandoned the concept that the Import-Export Clause constituted a broad prohibition against all forms of state taxation that fell on imports. Michelin changed the focus of Import-Export Clause cases from the nature of the goods as imports to the nature of the tax at issue. The new focus is not on whether the goods have lost their status as imports, but is, instead, on whether the tax sought to be imposed is an Impost or Duty.[15]

In Michelin, the Court gives rational meaning for the first time in constitutional history to the wording of the Import-Export Clause which expressly condemns only such taxes on imports as constitute "imposts" or "duties." As the Reynolds opinion notes, Michelin turned to the original purpose for embedding the Import-Export Clause in the Constitution. Reynolds repeats the three main concerns of the Import-Export Clause, as explicated in Michelin and used as the benchmark in deciding the validity of taxes challenged as a violation of that Clause.[16] If a tax offended any of the three policies behind that Clause it would be struck down. Those Import-Export Clause concerns noted by Reynolds are:

(1) concern that an impost or duty might interfere with the Federal Government's regulation of commercial relations

[13] Low v. Austin, 13 Wall (80 US) 29, 20 L Ed 517 (1872).

[14] Limbach v. Hooven & Allison Co., 466 US 353, 360, 80 L Ed 2d 356, 104 S Ct 1837 (1984).

[15] Reynolds, 93 L Ed 2d at 469–70.

[16] Reynolds, 93 L Ed 2d at 470.

with foreign governments—the "speaking with one voice" precept;

(2) fear that on account of such taxation the Federal Government might lose an important source of revenue; and

(3) a desire to maintain harmony among the States, which would be disturbed if seaboard States with ports of entry could tax goods "merely flowing through their ports" to other States not so favorably situated geographically.[17]

As seen from the Limbach quotation: "Michelin changed the focus of Import-Export Clause cases from the nature of the goods as imports to the nature of the tax at issue."[18] In short, the Michelin approach to state taxation of imports is not whether the taxed goods have lost their status as imports; but, instead, on whether the questioned tax on imports is an "impost" or "duty" imposed on imports, as determined by Michelin guidelines.[19]

Application of Michelin Doctrine to Reynolds

After explaining the Michelin change of course in Import-Export Clause decisions, the Reynolds Court turned to a resolution of the legality of the Reynolds tax. In upholding the North Carolina ad valorem tax on imported tobacco stored in bonded warehouses for domestic use, the Court concluded that the exaction did not run counter to any of the three concerns of the Import-Export Clause; hence the tax was sustained.

The Reynolds Court is of the view that the tax there in controversy is indistinguishable from the tax sustained in Michelin in terms of the three policies which caused the inclusion of the Import-Export Clause in the Constitution.

The Court gives a seriatim analysis of the application to the Reynolds case tax of those three policies. At the outset, it addressed the question whether the Reynolds tax unconstitutionally encroached upon the first Michelin policy of whether the tax interfered with the Federal Government's regulation of commercial relations with foreign governments. The Reynolds Court found nothing out of constitutional kilter with the first Michelin

[17] Id. at 470, citing Michelin, 423 US at 285–86.

[18] Reynolds, 93 L Ed 2d at 470, quoting Limbach, 466 US at 360.

[19] Adopting the Michelin approach to the taxation of imports is Department of Revenue of Washington v. Association of Washington Stevedoring Cos., 435 US 734, 55 L Ed 2d 682, 98 S Ct 1388 (1978).

policy. The North Carolina tax does not, in the Reynolds Court's opinion, "interfere with the Federal Government's regulation of foreign commerce, for, as we have seen, it falls on imported and domestic goods alike and does not single out imported goods for unfavorable treatment."[20] In essence, the tax does not discriminate against imported goods by placing them at a competitive disadvantage when competing with domestic goods. Noting that the tax did not impede the collection of customs duties, Reynolds was also satisfied that the second Michelin concern of the Import-Export Clause was not offended by the Reynolds tax. The tax on R.J. Reynolds "neither impairs an important source of revenue for the Federal Government nor replaces the federal duty with one of its own."[21] Rather, thinks the Court, the ad valorem property tax called into question in Reynolds is "nothing more than a means 'by which a state apportions the cost of such service as police and fire protection among the beneficiaries according to their respective wealth.' "[22] The Court recognizes that the tax might have the "incidental effect" of discouraging some importaion of foreign goods; but, concludes the Court, this "result is not a function of the Import-Export Clause."[23] The Court then analyzes the application of the questioned Reynolds tax on the third concern of Michelin. It concludes that "in light of the services provided in exchange for this tax, it hardly constitutes the kind of exaction by the seaboard states on goods destined for inland states that the Framers sought to prevent by the Clause."[24] A failure to impose this tax "would shift the tax burden from Reynolds and the ultimate consumers of its tobacco products to the local taxpayers of North Carolina—a result completely at odds with Michelin."[25] As a consequence, the Court concluded that the application of the tax to Reynolds' imported tobacco does not run counter to the Import-Export Clause.

In sustaining a gross receipts tax on stevedores who load and unload imports and exports, Department of Revenue of Washington v. Association of Washington Stevedores Cos.[26] expressed

[20] Reynolds, 93 L Ed 2d at 470.

[21] Id. at 470.

[22] Id., quoting Michelin, 423 US at 287.

[23] Id.

[24] Id. at 470.

[25] Id.

[26] Department of Revenue of Washington v. Association of Washington Stevedoring Cos., 435 US 734, 55 L Ed 2d 682, 98 S Ct 1388 (1978).

some additional thoughts about the application of that tax to imports and exports. There the Court noted that the desire to prevent interstate reprisals and friction under the third Michelin concern under the Import-Export Clause is not significantly different from a primary purpose of the Commerce Clause, which is to prevent harmful commercial wars and reprisals at home among the States. So the Stevedoring Association Court introduced the principles of Complete Auto Transit, Inc. v. Brady[27] into the equation for determining whether a tax such as the Reynolds tax would cause interstate reprisals and friction under the third Michelin concern when resolving the issue of validity of a tax when resisted on Import-Export Clause grounds. Harking back to Complete Auto Transit standards for determining tax validity, Stevedoring Association thought the third Import-Export Clause policy was vindicated because the tax fell upon a taxpayer with reasonable nexus to the taxing State; the tax was properly attributable to that State; it did not discriminate; and it related reasonably to services provided by the State imposing the tax.[28] When these four requirements for a valid tax, challenged on Commerce Clause grounds, are satisfied, the Stevedoring Association Court thinks there should be no legitimate basis for dissention or reprisal among the states. The Stevedoring Association Court emphasized that the triad policy approach to taxation under the Import-Export Clause avoids friction and trade barriers among the states by preventing coastal states from abusing their geographical position. Indeed, if the tax were not upheld, thinks Stevedoring Association, "[r]equiring coastal States to subsidize the commerce of inland consumers [might] well exacerbate, rather than diminish," reprisals and recriminations among the states.[29]

In Michelin the Court had observed that it limited its holding to the imported goods "no longer in transit."[30] Taxpayer in Reynolds took the position that, "because goods stored in customs-bonded warehouses are by definition 'in transit,' " Michelin was

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[27] Complete Auto Transit, Inc. v. Brady, 430 US 274, 51 L Ed 2d 326, 97 S Ct 1076 (1977).

[28] Stevedoring Association, 435 US at 754–55.

[29] Id. at 760–61.

[30] Reynolds, 93 L Ed 2d at 470, quoting Stevedoring Association, 435 US at 755, which, in turn quoted Michelin, 423 US at 302.

not applicable.[31] Reynolds did not agree with this reasoning. The imported tobacco, thought the Reynolds court, "has nothing transitory about it: it has reached its State—indeed, its county—of destination and only the payment of the customs duty, after the appropriate aging, separates it from entrance into the domestic market."[32] More importantly, thinks the Reynolds Court, granting an automatic "in transit" status for goods stored in customs-bonded warehouses can be inferred only if Congress intended to grant that privileged sanctuary to all goods stored in customs-bonded warehouses.[33] Earlier in its opinion, Reynolds had held that this tax does not run counter to the purposes for which Congress established the customs-bonded warehouse scheme; in short, Congress had not preempted this tax.[34]

> It strains reason to think that, although Congress could have directly preempted state taxation in this situation by declaring it to be in conflict with the purposes of customs-bonded warehouses, . . . Congress decided to achieve the same effect in a more roundabout fashion by giving the goods the talismanic 'in transit' status,

concluded Reynolds, in rejecting the Import-Export challenge to the Reynolds tax.[35]

Since the Court found that the application to the imported tobacco stored in customs-bonded warehouses of the ad valorem property tax under review did not transgress any of the three Import-Export Clause policies, it did not qualify as an "Impost or Duty"; hence, it was not barred by the Import-Export Clause, which imposes an absolute ban, except with the consent of Congress.

[31] Reynolds, 93 L Ed 2d at 471.

[32] Id.

[33] Id.

[34] Id. at 469.

[35] Id. at 471. The Court also found no merit in a due process objection to the Reynolds tax in view of the fact that the taxing State furnished the R.J. Reynolds Tobacco Company with benefits, protection and opportunities. Reynolds, 93 L Ed 2d at 471–72.

§5:6. Contemporary different approach to taxation of exports.

§5:6.1. —Congressional preemption of state personal property; taxation of goods stored in federally created bonded warehouse. [New]

At issue in Xerox Corp. v. County of Harris[1] was whether local ad valorem personal property taxes on imported xerox copying machines stored under bond in a customs warehouse, and destined for foreign markets, were preempted by a congressionally established customs system, which created customs controlled and supervised bonded warehouse, where imported goods may be stored duty-free for prescribed periods of time. The Court held that the local property taxes were preempted by the comprehensive customs systems provided by Congress. Justice Powell dissented from the holding of the Court.[2]

Xerox, a New York corporation, with worldwide operations, manufactured parts for copying machines in Colorado and New York; and then shipped them to affiliates in Mexico City where the parts were assembled. The assembled copying machines were then imported into the United States; and the machines in controversy were stored in Houston, Texas under bond in a customs warehouse for periods ranging from a few days to three years, while awaiting sale and shipment to Xerox affiliates in Latin America. The copying machines assembled in Mexico were designed for sale in the Latin American market. While the copiers remained in the warehouse, they were segregated from domestic merchandise until a shipment order was received for the copiers. From the time the copiers entered the bonded warehouse they remained under the control and supervision of the United States Customs Service, pending orders from affiliated Xerox corporations in Latin America. When orders were received for copiers, the machines were removed from the warehouse and transported by customs bonded trucks to either the Port of Houston or Miami, under the control and supervision of United States

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[1] Xerox Corp. v. County of Harris, 459 US 145, 74 L Ed 2d 323, 103 S Ct 523 (1982). For a brief comment on the case, see 31 Vand J Trans'l L (1983) (Case Digest Section).

[2] Xerox Corp., 74 L Ed 2d at 331 (Powell, J., dissenting).

CHAPTER 5

Imports and Exports

¶ 5.01 INTRODUCTION TO THE IMPORT-EXPORT CLAUSE[1]

The Import-Export Clause of the U.S. Constitution provides the following:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's Inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.[2]

The Import-Export Clause, unlike any provision in the Constitution other than the Duty of Tonnage Clause,[3] contains an explicit limitation on the taxing powers of the states. In this respect, it may be contrasted with the Commerce Clause, which grants Congress the power to regulate interstate commerce and authorizes Congress to remove any of the restraints that dormant Commerce Clause jurisprudence otherwise imposes on state taxing authority.[4] Because the Constitution granted no comparable power to Congress under the Import-Export Clause, Congress can do no more than consent to state imposts or duties on imports or exports, except for those that may be absolutely necessary for executing a state's inspection laws. The net produce of such duties and imposts must be for the use of the Treasury of the United states.

In *Woodruff v. Parham*,[5] the Supreme Court held that the Import-Export Clause's ban on state taxation of imports was inapplicable to a tax on goods shipped from one state into another state. In thus limiting the application of the Import-Export Clause to goods shipped into a state from a foreign country,

[1] This chapter draws freely from W. Hellerstein, "*Michelin Tire Corp. v. Wages*, Enhanced State Power to Tax Imports," 1976 Sup. Ct. Rev. 99, by permission of the University of Chicago Press, the copyright owner.

[2] U.S. Const. art. I, § 10, cl. 2.

[3] See infra ¶ 5.08.

[4] See ¶ 4.23.

[5] Woodruff v. Parham, 75 US (8 Wall.) 123 (1868).

the Court repudiated the dictum of Chief Justice Marshall in *Brown v. Maryland*,[6] that "we suppose the principles laid down in this case apply equally to importations from a sister State."[7] The Court recognized the same limitation on the scope of the Import-Export Clause's ban on state taxation of exports in *Coe v. Errol*,[8] declaring that the clause applied only to foreign-bound goods.

Traditionally, the scope of the Import-Export Clause prohibition centered on the question whether the state tax under consideration was imposed on an "import" or an "export." Imported goods that had neither been sold, nor removed from their "original package," nor put to their intended use were deemed to retain their "distinctive character" as imports.[9] Foreign-bound goods that had entered the "stream of exportation" were deemed to be exports.[10] The cases paid scant attention to the nature of the exaction at issue. All taxes were assumed to be "imposts" or "duties" for purposes of Import-Export Clause analysis.

In two decisions handed down in the 1970s, the U.S. Supreme Court dramatically shifted the focus of the constitutional inquiry under the Import-Export Clause from the question whether the goods under consideration were "imports" or "exports" to the question whether the levies at issue were "imposts" or "duties." In *Michelin Tire Corp. v. Wages*,[11] the Court repudiated the earlier view that all taxes levied on imports are "imposts or duties,"[12] and relegated the "original package" doctrine to a position of relative insignificance. Instead, the Court enunciated the view that the bar against "imposts" or "duties" on "imports" was designed to prohibit "discriminatory state taxation against imported goods as imports"[13] and "transit fees on the privilege of moving through a State."[14] In *Department of Revenue v. Association of Washington Stevedoring Cos.*,[15] the Court extended the analysis it had adopted in *Michelin*, which was concerned solely with imports, to taxation of exports. It held in *Washington Stevedoring* that it was the nature of the levy, not merely

[6] Brown v. Maryland, 25 US (12 Wheat.) 419 (1827), discussed infra ¶ 5.02[1].

[7] *Brown*, 25 US (12 Wheat.) 419, 449 (1827). Justice Thomas has revived the view that the Import-Export Clause applies to trade with other states as well as other nations. Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 520 US 564, 117 S. Ct. 1590, 1620–1628 (1997) (Thomas, J., dissenting).

[8] Coe v. Errol, 116 US 517, 6 S. Ct. 475 (1886), discussed infra ¶ 5.03[1].

[9] See, e.g., Youngstown Sheet & Tube Co. v. Bowers, 358 US 534, 79 S. Ct. 383 (1959).

[10] Kosydar v. National Cash Register Co., 417 US 62, 94 S. Ct. 2108 (1974).

[11] Michelin Tire Corp. v. Wages, 423 US 276, 96 S. Ct. 535 (1976).

[12] See Low v. Austin, 80 US (13 Wall.) 29 (1871).

[13] *Michelin*, 423 US 276, 286, 96 S. Ct. 535 (1976).

[14] *Michelin*, 423 US 276, 290, 96 S. Ct. 535 (1976).

[15] Department of Revenue v. Association of Washington Stevedoring Cos., 435 US 734, 98 S. Ct. 1388 (1978).

the status of the goods, that would determine the scope of immunity that exports enjoyed from state taxation.

Michelin and *Washington Stevedoring* mark a fundamental redirection of the inquiry under the Import-Export Clause away from the question whether a particular good is an "import" or an "export" and toward the question whether a particular levy is an "impost" or "duty." Since virtually all of the earlier precedents interpreting the clause were preoccupied exclusively with the former question, they must be viewed with considerable caution today.[16]

¶ 5.02 STATE TAXATION OF IMPORTS

[1] State Taxation of Imports Prior to the *Michelin* Case

The seminal case delineating the limitations that the Import-Export Clause imposes on the states' power to tax imports was Chief Justice Marshall's 1827 opinion in *Brown v. Maryland.*[17] The statute at issue in *Brown* required importers and wholesalers of foreign goods to obtain a license before selling such goods in the state, subject to penalties and forfeitures for failure to comply. In holding that the license fee was prohibited by the Import-Export Clause,[18] the Court considered the characteristics both of "imposts" and "duties" and of "imports." The Court described the former variously as "a custom or a tax levied on articles brought into a country";[19] as a tax that "intercepts the import, as an import, in its way to become incorporated with the general mass of property";[20] and as "a tax on the occupation of an importer," which was deemed to be equivalent to a "direct duty on the article itself."[21] The Court described the latter simply as "'things imported' . . . the articles themselves which are brought into the country."[22]

However, the Court recognized that "if the words of the [Import-Export Clause] be taken in their utmost latitude they will abridge the power of taxation which all admit to be essential to the States, to an extent which has never

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[16] For general analyses of the Import-Export Clause, see W. Hellerstein, "*Michelin Tire Corp. v. Wages*, Enhanced State Power to Tax Imports," 1976 Sup. Ct. Rev. 99; E. Hinds, "State Taxes and the Import-Export Clause," 14 Am. J. of Tax Policy 73 (1997).

[17] Brown v. Maryland, 25 US (12 Wheat.) 419 (1827).

[18] The Court indicated that the statute also violated the Commerce Clause. *Brown,* 25 US (12 Wheat.) 419, 445–459 (1887). See infra note 37.

[19] *Brown,* 25 US (12 Wheat.) 419, 437 (1827).

[20] *Brown,* 25 US (12 Wheat.) 419, 443 (1827).

[21] *Brown,* 25 US (12 Wheat.) 419, 444 (1827).

[22] Brown v. Maryland, 25 US (12 Wheat.) 419, 437 (1827).

yet been suspected."[23] "[T]here must be a point of time," the Court declared, "when the prohibition ceases, and the power to tax commences."[24] In drawing the dividing line, Chief Justice Marshall enunciated the "original package" doctrine:

> It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package, in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.[25]

Since the statute at issue in *Brown* by its terms applied only to those selling imports by bale or package, the Court held that it fell within the prohibition of the Import-Export Clause as thus defined.

For a century and a half following the Supreme Court's decision in *Brown*, the "original package" doctrine was the principal analytical tool the courts employed in delineating the immunity that imports enjoyed from state taxation under the Import-Export Clause. Although some decisions held that imported goods, whether or not in their original packages, had lost their immunity from state taxation because they had been sold[26] or put to their intended use,[27] most of the cases turned on the question whether the goods had retained their "original form or package." Thus, state tax immunity was accorded to French champagne stored in a warehouse in the "original cases, unbroken and unsold,"[28] to Chilean nitrate stored in a warehouse in the original packages until sold,[29] and to bales of Philippine hemp stored in a warehouse awaiting use in manufacturing.[30] On the other hand, tax immunity was denied to European dry goods packed in separate parcels and bundles but exposed for sale in opened shipping boxes,[31] to fish caught in the Gulf of Mexico that had been

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[23] *Brown*, 25 US (12 Wheat.) 419, 440–441 (1827).

[24] *Brown*, 25 US (12 Wheat.) 419, 441 (1827).

[25] *Brown*, 25 US (12 Wheat.) 419, 441–442 (1827).

[26] See, e.g., Waring v. Mayor, 75 US (8 Wall.) 110 (1868).

[27] See, e.g., Youngstown Sheet & Tube Co. v. Bowers, 358 US 534, 79 S. Ct. 383 (1959).

[28] Low v. Austin, 80 US (13 Wall.) 29 (1871).

[29] Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 US 218, 53 S. Ct. 373 (1933).

[30] Hooven & Allison Co. v. Evatt, 324 US 652, 65 S. Ct. 870 (1945). This case was overruled in Limbach v. Hooven & Allison Co., 466 US 353, 104 S. Ct. 1837 (1984), in light of Michelin Tire Corp. v. Wages, 423 US 276, 96 S. Ct. 535 (1976). See infra ¶ 5.02[2]. The *Limbach* case is discussed infra ¶ 5.05[1].

[31] May v. New Orleans, 178 US 496, 20 S. Ct. 976 (1900).

subjected to some processing,[32] and to cattle imported from Mexico that had been placed in "bonded pastures" under joint custody of the owner and U.S. customs officers.[33]

In addition to resolving the frequently problematic question whether imported goods remained in their original packages, the courts had to struggle with related issues bearing on the application of the "original package" doctrine. The courts divided over the question whether sea vans and trailers constituted the "original package";[34] they considered whether unpackaged imports enjoyed an immunity different in scope from packaged imports, and, in any event, whether it was possible to apply the doctrine to an unpackaged import that never changed its "original form";[35] and they addressed the question whether the doctrine applied differently (or at all) to goods that were imported for use rather than for sale.[36]

The cases decided prior to 1976 did not focus on the nature of the tax under consideration. All taxes were treated as if they potentially fell within the scope of the Import-Export Clause and the only serious inquiry was whether the levy was imposed on an import. Indeed, while *Brown* involved a discriminatory tax imposed on importers who sold goods at wholesale,[37] *Low v. Austin*,[38] decided in 1871, did not; rather, it involved a nondiscriminatory property tax on imported goods. Nevertheless, the court struck it down under the Import-Export Clause on the ground that the states may not impose even nondiscriminatory taxes on imported goods until they lose their character as imports and become incorporated into the mass of property in the state. Despite criti-

[32] Gulf Fisheries Co. v. MacInerney, 276 US 124, 48 S. Ct. 227 (1928).

[33] State v. Harper, 188 SW2d 400 (Tex. Civ. Ct. App. 1945), cert. denied, 327 US 805, 66 S. Ct. 964 (1946).

[34] Compare Volkswagen Pac., Inc. v. City of Los Angeles, 7 Cal. 3d 48, 496 P2d 1237, 101 Cal. Rptr. 869 (1972) (sea van constitutes "original package") with Garment Corp. of Am. v. State Tax Comm'n, 32 Mich. App. 715, 189 NW2d 72 (1971) (sea van does not constitute "original package").

[35] See, e.g., EJ Stanton & Sons v. Los Angeles County, 78 Cal. App. 2d 181, 177 P2d 804 (1947).

[36] Youngstown Sheet & Tube Co. v. Bowers, 358 US 534, 79 S. Ct. 383 (1959).

[37] The Court did not dwell on the fact that the tax was discriminatory because it did not apply to wholesalers of goods manufactured in the state, although Chief Justice Marshall did observe in passing: "It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister state. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles." Brown v. Maryland, 25 US (12 Wheat.), 419, 449 (1887). The Court subsequently adverted to this feature of the case in Woodruff v. Parham, 75 US (8 Wall.) 123 (1868), but it later repudiated the dictum in Low v. Austin, 80 US (13 Wall.) 29 (1871), discussed infra ¶ 5.02.

[38] *Low*, 80 US (13 Wall.) 29 (1871).

cism in both judicial opinions[39] and scholarly commentary[40] of the use of the "original package" doctrine as a basis for invalidating even nondiscriminatory taxes, *Low* remained good law until the Supreme Court's decision in *Michelin Tire Corp. v. Wages.*[41]

[2] The *Michelin* Case

In *Michelin Tire Corp. v. Wages,*[42] the Supreme Court abandoned a century of precedent in holding that the Import-Export Clause does not bar a state from imposing a nondiscriminatory ad valorem property tax on imported goods, whether or not they remain in their original packages. In so holding, the Court returned to the purposes underlying the Clause and revised the analytical framework for determining when a state tax is a forbidden "impost" or "duty" on "imports."

Michelin Tire Corporation, an importer and wholesale distributor in the United States of automobile and truck tires manufactured in France and Canada, brought suit in a Georgia state court to contest the constitutionality of ad valorem property taxes levied on Michelin's inventory of imported tires that were stored in a warehouse pending distribution. Michelin argued that the tires were immune from property taxes under the Import-Export Clause. The Georgia Supreme Court analyzed the validity of the tax by addressing the question whether the tires had retained their status as imports when the tax was assessed. After a lengthy discourse on the "original package" doctrine, the court concluded that the tires, which had been sorted by size and style and commingled with other shipments, had lost their status as imports and, thus, were subject to taxation.[43]

In affirming, the U.S. Supreme Court explicitly refrained from addressing the question whether Michelin's tires had lost their status as "imports."[44] Instead, it focused on the nature of the exaction to ascertain whether it constituted a forbidden "impost" or "duty." It concluded that "Georgia's assessment of a nondiscriminatory ad valorem property tax against the imported tires is not within the constitutional prohibition against 'laying any Imposts or Duties

[39] See, e.g., Hooven & Allison Co. v. Evatt, 324 US 652, 690, 65 S. Ct. 870 (1945) (Black, J., dissenting).

[40] See, e.g., A. Early & R. Weitzman, "A Century of Dissent: The Immunity of Goods Imported for Resale From Nondiscriminatory State Personal Property Taxes," 7 SWU L. Rev. 247 (1975).

[41] Michelin Tire Corp. v. Wages, 423 US 276, 96 S. Ct. 535 (1976).

[42] *Michelin,* 423 US 276, 96 S. Ct. 535 (1976).

[43] Wages v. Michelin Tire Corp., 233 Ga. 712, 214 SE2d 349 (1975).

[44] *Michelin,* 423 US 276, 279, 96 S. Ct. 535 (1976).

on Imports' . . . and that insofar as *Low v. Austin* . . . is to the contrary, that decision is overruled."[45]

[a] Purposes of the Imports Clause

The Court identified three principal concerns of the Framers underlying the adoption of the constitutional prohibition against state taxation of imports. First, "the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power."[46] Second, "import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States."[47] Third, "harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the inland States not situated as favorably geographically."[48]

Viewing the tax in the light of these concerns, the Court could perceive nothing objectionable in a nondiscriminatory ad valorem property tax imposed on imports no longer in transit. It was "obvious" to the Court that such a tax could have "no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce":[49] such a tax did not fall on imports "as such," and, therefore, could not be used "to create special protective tariffs or particular preferences for certain domestic goods" and could not be "applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation."[50]

The Court likewise found that imposition of a nondiscriminatory ad valorem property tax would not imperil the federal government's reliance upon duties as a major source of anticipated revenue. The Court's reasoning was in part definitional: because a nondiscriminatory ad valorem property tax was not an "impost" or "duty," "it deprives the federal government of nothing to which it is entitled."[51] Moreover, while recognizing that such state taxation of imports "could diminish federal revenues to the extent its economic burden may discourage purchase or importation of foreign goods," the Court asserted that pre-

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[45] *Michelin*, 423 US 276, 279, 96 S. Ct. 535 (1976).

[46] *Michelin*, 423 US 276, 285, 96 S. Ct. 535 (1976).

[47] *Michelin*, 423 US 276, 285, 96 S. Ct. 535 (1976).

[48] *Michelin*, 423 US 276, 285–286, 96 S. Ct. 535 (1976).

[49] *Michelin*, 423 US 276, 286, 96 S. Ct. 535 (1976).

[50] *Michelin*, 423 US 276, 286, 96 S. Ct. 535 (1976).

[51] *Michelin*, 423 US 276, 286–287, 96 S. Ct 535 (1976).

vention of this "incidental effect was not . . . even remotely an objective of the Framers in enacting the prohibition."[52]

Nor, in the Court's view, would the imposition of nondiscriminatory ad valorem property taxes frustrate the third objective underlying the Import-Export Clause: preserving harmony and maintaining the free flow of imported goods among the states by preventing some states from exploiting their favorable geographic location by taxing goods destined for other states. The Court acknowledged that "allowance of nondiscriminatory ad valorem property taxation may increase the cost of goods purchased by 'inland' consumers."[53] However, because the tax "is the quid pro quo for benefits actually conferred by the taxing State,"[54] to deny the state the power to tax the property would compel it to provide either a subsidy to ultimate consumers or a competitive advantage to distributors and manufacturers dealing with imported goods. Moreover, the Court declared that the purposes of the Import-Export Clause would be fully secured "merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed."[55] The clause would thus forbid a tax that threatened to impose a special burden upon imports, even though the levy did not explicitly discriminate against them.

[b] Language of the Imports Clause

Having demonstrated that the levy of a nondiscriminatory ad valorem property tax on imports would not contravene the objectives of the Import-Export Clause, except to the limited extent noted, the Court turned to an analysis of its language. Conceding that the clause did not by its terms exclude nondiscriminatory taxes from its prohibition, the Court pointed out that it was equally clear that not every tax, but only "imposts or duties," lay within its scope. The Court pointed to the broader language of the grant of power to Congress "to lay and collect Taxes, Duties, Imposts, and Excises,"[56] to support its reading of the Import-Export Clause as not forbidding every tax that falls in some measure on imports, but only "imposts" and "duties." This conclusion was bolstered by Professor William W. Crosskey's "persuasive demonstration"[57] that the words "imposts" and "duties" were understood in 1787 to be exactions

[52] *Michelin*, 423 US 276, 287, 96 S. Ct. 535 (1976).

[53] *Michelin*, 423 US 276, 288, 96 S. Ct. 535 (1976).

[54] *Michelin*, 423 US 276, 289, 96 S. Ct. 535 (1976).

[55] *Michelin*, 423 US 276, 290, 96 S. Ct. 535 (1976).

[56] U.S. Const. art. I, § 8, cl. 1.

[57] *Michelin*, 423 US 276, 290–291, 96 S. Ct. 535 (1976).

upon imports or importation as such.[58] Although these considerations might have supported a definitive interpretation of the clause based on its text, the Court was content to conclude that the language of the Import-Export Clause is sufficiently ambiguous to permit the Justices to reject a construction that would not further the objectives of the clause. Since these objectives were undisturbed by nondiscriminatory property taxation, the Court would not construe the clause as forbidding it.[59]

[c] The Overruling of *Low v. Austin*

It remained only for the Court to explain the error of its previous ways, namely, *Low v. Austin*'s[60] misreading of *Brown v. Maryland*.[61] *Brown* was precisely the type of case to which the Import-Export Clause was directed. It involved a fee levied by a coastal state on importers for a license they were required to obtain before selling in the state. Since the fee was equivalent to a discriminatory tax on the goods themselves, which fell squarely within the clause's prohibition, it could not stand. Although the Court in *Brown* devised the celebrated "original package" test as an evidentiary tool for determining when imported goods had lost their status as imports and thus the protection of the clause, it had indicated that the status of the goods was only one of the determinants of the validity of the tax. The other was the character of the tax: the clause prohibits only "imposts" and "duties," not all exactions regardless of their nature. The *Michelin* Court had taken some pains to make this point, which it was now prepared to find "clearly implied"[62] in *Brown*.

In *Low*, however, the Court had held, with "no analysis,"[63] that the state cannot levy a nondiscriminatory property tax on imported goods so long as they remain "imports."[64] According to *Michelin*, *Low* ignored "the language and objectives of the Import-Export Clause, and . . . the limited nature of the holding in *Brown*,"[65] and it misperceived the scope of the "original package" doctrine. *Low*, it followed, had been "wrongly decided."[66] and was therefore overruled. Once the Court had formulated the governing doctrine, it had little difficulty upholding the levy at issue, since Michelin did not contend that the

[58] W. Crosskey, Politics and the Constitution in the History of the United States 296–297 (1953).

[59] *Michelin*, 423 US 276, 293–294, 96 S. Ct. 535 (1976).

[60] Low v. Austin, 80 US (13 Wall.) 29 (1871).

[61] Brown v. Maryland, 25 US (12 Wheat.) 419 (1827).

[62] *Michelin*, 423 US 276, 298, 96 S. Ct. 535 (1976).

[63] *Michelin*, 423 US 276, 294, 96 S. Ct. 535 (1976).

[64] *Low*, 80 US (13 Wall.) 29, 84 (1871).

[65] *Michelin*, 423 US 276, 298, 96 S. Ct. 535 (1976).

[66] *Michelin*, 423 US 276, 299, 96 S. Ct. 535 (1976).

tax was discriminatory on its face or as applied, and the Court summarily determined that the tires and tubes were not in transit.[67]

In *Department of Revenue v. Association of Washington Stevedoring Cos.*,[68] which is considered in detail in the next two sections in connection with the application of the *Michelin* analysis to state taxation of exports and in the discussion of the "in transit" exemption, the Court reaffirmed the *Michelin* analysis as applied to imports in sustaining the imposition of Washington's business and occupation tax upon receipts from stevedoring activities.

¶ 5.03 STATE TAXATION OF EXPORTS

[1] State Taxation of Exports Prior to *Washington Stevedoring*

Just as the Import-Export Clause's limitation on the states' power to tax imports was delineated during most of our constitutional history by reference to the status of the goods as an "import," so the parallel limitation on the taxation of exports has been delineated for most of our constitutional history by reference to the status of the goods as an "export." Whether goods were an "export" has consistently depended on whether exportation had commenced.[69]

The Court has generally viewed the question whether a good has entered the stream of exportation under the Import-Export Clause and the question whether a good has entered the stream of commerce under the Commerce Clause[70] as identical. Indeed, *Coe v. Errol*,[71] which we characterized as the "seminal case delineating the contours of 'the stream of commerce'" under the Commerce Clause,[72] has likewise been characterized by the Supreme Court as the "seminal case" on the question whether property constitutes an "export"

[67] Justice White concurred in the holding in the *Michelin* case, but on the ground that the goods had lost their character as imports and that "consistent with . . . *Low v. Austin*," they were subject to ad valorem taxation. Michelin Tire Corp. v. Wages, 423 US 276, 302, 96 S. Ct. 535 (1976) (White, J., concurring). He took the position that: "There is little reason and no necessity at this time to overrule *Low v. Austin*. None of the parties has challenged that case here, and the issue of its overruling has not been briefed or argued." *Michelin*, 423 US 276, 302, 96 S. Ct. 535 (1976).

[68] Department of Revenue v. Association of Washington Stevedoring Cos., 435 US 734, 98 S. Ct. 1388 (1978).

[69] See Richfield Oil Corp. v. State Bd. of Equalization, 329 US 69, 67 S. Ct. 156 (1946); L. Abramson, "State Taxation of Exports: The Stream of Constitutionality," 54 NC L. Rev. 59 (1975).

[70] See ¶¶ 4.01-4.04.

[71] Coe v. Errol, 116 US 517, 6 S. Ct. 475 (1886).

[72] See ¶ 4.02[2] at note 31.

under the Import-Export Clause.[73] In *Coe*,[74] the Court sustained a local ad valorem property tax upon timber cut in New Hampshire that was held there awaiting a sufficient level of water in the Androscoggin River so it could be floated to Maine. In articulating the "true rule" for circumscribing state power over goods destined for out-of-state shipment, the Court declared:

> [G]oods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey.[75]

In so holding, the Court rejected the proposition that "the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation."[76]

Cases following *Coe* applied these principles to uphold state taxes imposed on the portion of a partially dismantled cement plant that remained in the state awaiting exportation[77] and on gasoline destined for exportation but placed in temporary storage due to a shortage of ships.[78] At the same, the Court invoked these principles to strike down state taxes on oil in storage tanks awaiting shipment to foreign countries[79] and on the sale of oil delivered to a foreign purchaser on a vessel docked in the state.[80] The Court refused to construe the Import-Export Clause to immunize a railroad from the payment of a franchise tax, measured by its gross receipts, which were largely derived from the transportation of exports.[81] In addition, the Court handed down a number of cases during this period that addressed similar questions in connection with federal taxes allegedly imposed on exports in violation of the constitutional injunction that "[n]o Tax or Duty shall be laid on Articles exported from any State."[82]

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[73] Kosydar v. National Cash Register Co., 417 US 62, 66, 94 S. Ct. 2108 (1974).

[74] *Coe* is discussed in more detail in ¶ 4.02[2].

[75] *Coe*, 116 US 517, 527, 6 S. Ct. 475 (1886).

[76] *Coe*, 116 US 517, 526–527, 6 S. Ct. 475 (1886).

[77] Empresa Siderurgica, SA v. County of Merced, 337 US 154, 69 S. Ct. 995 (1949).

[78] Joy Oil Co. v. State Tax Comm'n, 337 US 286, 69 S. Ct. 1075 (1949).

[79] Carson Petroleum Co. v. Vial, 279 US 95, 49 S. Ct. 292 (1929).

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

[81] Canton RR Co. v. Rogan, 340 US 511, 71 S. Ct. 477 (1935).

[82] U.S. Const. art. I, § 9, cl. 5. See, e.g., Spalding & Bros. v. Edwards, 262 US 66, 43 S. Ct. 485 (1923) (invalidating federal excise tax on sale of baseball equipment to New York agent of Venezuelan company for export to Venezuela); Peck & Co. v. Lowe, 247 US 165, 38 S. Ct. 432 (1918) (sustaining federal income tax as applied to net income derived from exporting and selling goods abroad); United States v. Hvoslet, 237 US 1, 35 S. Ct. 459 (1915) (invalidating federal stamp taxes upon charter parties used exclusively for

While *Coe* and its progeny made it clear that subjective intent to export by itself did not establish immunity from state taxation under the Import-Export Clause, for many years there remained some question regarding the role that objective certainty played as an independent basis for tax immunity. Some of the cases indicated that "the manifest certainty of the destination'"[83] might justify immunity under the Import-Export Clause, even in the absence of the commencement of physical movement into the stream of exportation.[84] However, other cases suggested that physical movement into the stream of exportation was a *sine qua non* of immunity.[85] The Supreme Court resolved this issue in *Kosydar v. National Cash Register Co.*[86]

In *Kosydar*, Ohio had assessed an ad valorem property tax on the taxpayer's "international inventory" of business machines, which were stored in a warehouse awaiting shipment abroad. In support of its contention that the inventory at issue was made up of exports, the taxpayer offered evidence to show that (1) because of their unique construction and special adaptation for foreign use, the machines in question were not saleable domestically; (2) none of the machines built for its international division had ever gone anywhere but into that division; (3) there was no recorded instance of a machine sold to a foreign purchaser being returned; and (4) no exported item ever found its way back into the U.S. market.

In sustaining the tax, the U.S. Supreme Court reaffirmed the "settled doctrine"[87] that the "essential question" in such cases is the "narrow one: is the property upon which a tax has been sought to be imposed an 'export'";[88] that it therefore had to "decide whether a commencement of the process of exportation has occurred so as to immunize the article at issue from state taxation";[89] and that this depends on the factual inquiry whether the article has begun "its physical entry into the stream of exportation."[90]

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carriage of exports); Fairbank v. United States, 181 US 283, 21 S. Ct. 648 (1901) (invalidating federal stamp tax on foreign bill of lading). The Supreme Court has declared that "[a] long line of cases had recognized . . . that the meaning of 'export' is the same under [art. I, § 9, cl. 5] as under the Import-Export Clause." Kosydar v. National Cash Register Co., 417 US 62, 67 n.5, 94 S. Ct. 2108 (1974).

[83] Superior Oil Co. v. Mississippi, 280 US 390, 396, 50 S. Ct. 169 (1930) (interstate commerce).

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

[85] Joy Oil Co. v. State Tax Comm'n, 337 US 286, 69 S. Ct. 1075 (1949); Empresa Siderurgica, SA v. County of Merced, 337 US 154, 69 S. Ct. 995 (1949).

[86] Kosydar v. National Cash Register Co., 417 US 62, 94 S. Ct. 2108 (1974).

[87] *Kosydar*, 417 US 62, 71, 94 S. Ct. 2108 (1974).

[88] *Kosydar*, 417 US 62, 66, 94 S. Ct. 2108 (1974).

[89] *Kosydar*, 417 US 62, 67, 94 S. Ct. 2108 (1974).

[90] *Kosydar*, 417 US 62, 71, 94 S. Ct. 2108 (1974).

[2] The *Washington Stevedoring* Case

In *Department of Revenue v. Association of Washington Stevedoring Cos.*,[91] the U.S. Supreme Court sustained the application of Washington's business and occupation tax, measured by gross receipts, to stevedoring activities that included the handling of goods destined for foreign countries.[92] In so holding, the Court declared that the policy-oriented approach to taxation of imports adopted in *Michelin* was likewise applicable to taxation of exports and that the initial question to be addressed in this context is whether the levy at issue is an "impost" or a "duty," not whether it is imposed upon an "export."

In extending the *Michelin* analysis to taxation of exports, the Court reasoned that despite "formal differences" in the treatment of taxation of imports and of exports under prior law,

> the *Michelin* approach should apply to taxation involving exports as well as imports. The prohibition on the taxation of exports is contained in the same clause as that regarding imports. The export tax ban vindicates two of the three policies identified in *Michelin*. It precludes state disruption of the United States foreign policy. It does not serve to protect federal revenues, however, because the Constitution forbids federal taxation of exports.... But it does avoid friction and trade barriers among the States. As a result, any tax relating to exports can be tested for its conformance with the first and third policies. If the constitutional interests are not disturbed, the tax should not be considered an "Impost or Duty" any more than should a tax related to imports.... The respondents' gross receipts from loading exports, therefore, are as subject to the Washington business and occupation tax as are the receipts from unloading imports.[93]

Because the activity taxed in *Washington Stevedoring* occurred while imports and exports were in transit, the Court had to consider whether the levy might be invalid under the Import-Export Clause notwithstanding the fact that it did not offend the fundamental policies the Court identified in *Michelin*. The Court sustained the tax, concluding that "the *Michelin* policy analysis should not be discarded merely because the goods are in transit, at least where the tax falls upon a service distinct from the goods and their value."[94]

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[91] Department of Revenue v. Association of Washington Stevedoring Cos., 435 US 734, 98 S. Ct. 1388 (1978).

[92] *Washington Stevedoring*, 435 US 734, 98 S. Ct. 1388 (1978).

[93] *Washington Stevedoring*, 435 US 734, 758, 98 S. Ct. 1388 (1978).

[94] *Washington Stevedoring*, 435 US 734, 757, 98 S. Ct. 1388 (1978). The "in transit" issue is explored in more detail infra ¶ 5.04.