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Constitutional Law - Import-Export Clause - Power of State to Tax Foreign Imports Supplying Current Operating Needs

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CONSTITUTIONAL LAW—IMPORT-EXPORT CLAUSE—POWER OF STATE TO TAX FOREIGN IMPORTS SUPPLYING CURRENT OPERATING NEEDS—Appellant imported from five countries iron ore which was stored at its processing plant and drawn upon to fill the current operational needs of the plant. When the ore arrived it was originally stored in stock piles containing a three-month supply. As needed, ores were conveyed from the stock piles to "stock bins," holding one or two days' supply and located in close proximity

to the plant, from which the ores were used in the operation of the plant. The State of Ohio collected a personal property tax upon all the imported ore. In a companion case petitioner imported from Canada lumber and wood veneers which were stored at its manufacturing plant in their original packages and similarly drawn upon to fill the daily needs of the plant. The City of Algoma, Wisconsin, collected a general property tax upon the stored lumber and veneers. Both appellant and petitioner challenged the taxes, contending their imported materials were immune from state taxation under the clause of the Constitution which prohibits a state from taxing "imports." The supreme court of each state sustained the respective taxes on the ground that the goods were no longer imports when the tax attached and thus not protected by the federal immunity. On appeal and certiorari to the United States Supreme Court, *held,* affirmed, two justices dissenting.[1] When material is imported for manufacture and indiscriminate portions of it are being used to supply the current operating needs of a processing plant, the whole of such material is subject to state property taxation even though still in its original packages. *Youngstown Sheet and Tube Co. v. Bowers; United States Plywood Corp. v. City of Algoma,* 358 U.S. 534 (1959).

The import-export clause of the Constitution prohibits any state without the consent of Congress from laying "Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws. . . ."[2] In *Brown v. Maryland*[3] Chief Justice Marshall interpreted this clause to prohibit state taxation of foreign imports until the goods had been sold, or used, or the original package in which they were imported had been broken.[4] When imported goods are stored in their original packages awaiting manufacture, they will enjoy immunity for the same reason that imports prior to sale are immune:[5] while remaining the property of the importer in his warehouse, in the original form or package in which they were imported, they have not yet been incorporated into the mass of property in the country and still remain distinct as imports.[6] But the principal cases modify this rule to the extent that the imported goods supply the "current operational needs" of the importing manufacturer. Immunity then ceases because the imports have entered the manufacturing process.[7] The language of this decision is indicative of an increasing awareness by the

[1] Justices Frankfurter and Harlan dissented. Justice Stewart took no part in the consideration or decision of these cases.

[2] U.S. CONST., art. I, §10. For a historical discussion of this clause, see Woodruff v. Parham, 8 Wall. (75 U.S.) 123 at 133-136 (1868).

[3] 12 Wheat. (25 U.S.) 419 (1827).

[4] Id. at 441-442. See comment, 58 HARV. L. REV. 858 at 863 (1945); 89 L. Ed. 1279 (1945).

[5] Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945).

[6] Brown v. Maryland, note 3 supra, at 441.

[7] Principal case at 549.

Supreme Court that import immunity is not an end in itself but must be applied with due regard for the state taxing power and the purposes which the import-export clause seeks to achieve.[8]

It is significant that the Constitution prohibits only "Imposts or Duties" on imports and exports, for a persuasive argument can be made that a state ad valorem property tax does not fall within this prohibition. A property tax is not a tax on imports as such and therefore would still leave the importing process free of state control as the Constitution requires.[9] Moreover, as one writer has indicated, a property tax is usually regarded as the "quid pro quo" for police and fire protection of goods located in the state, and there is no reason to think the Constitution would require that imported goods obtain these benefits at the expense of other property subject to tax by the state.[10] While the Court in the principal cases did not hold that state property taxes can reach "imports," it did move significantly in this direction by narrowing the scope of goods classified as "imports." It has long been held that goods which have entered the process of manufacture lose their import immunity.[11] As the dissent in the principal cases points out, this was generally represented by a physical transformation of the imported goods, which is lacking here.[12] It would seem, however, that this is purely an arbitrary distinction which, while usually present, bears no logical relation to the time when the state's taxing power should attach. Surely if an import sold in its original package without any physical transformation can be said to have become subject to the taxing power of the state, no good

[8] Compare the language of the Court in the principal case at 545, where the problem is said to be the practical one "of reconciling the competing demands of constitutional immunity of imports and of the State's power to tax property within its borders," with that in Low v. Austin, 13 Wall. (80 U.S.) 29 at 34 (1872), where the Court emphasized the absolute prohibition by the Constitution of "any" tax on imports. The principal case seems to indicate a tendency to balance the state and federal interests in this area in much the same manner as under the commerce clause. Cf. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959), note, 57 MICH. L. REV. 903 (1959). But see Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 at 75-76 (1946). Some writers have previously called for a re-examination of Chief Justice Marshall's analysis of import immunity. See Trickett, "The Original Package Ineptitude," 6 COL. L. REV. 161 at 174 (1906); Foster, "What Is Left of the Original Package Doctrine," 1 SOL. L.Q. 303 at 307-312 (1916).

[9] This argument was raised in Low v. Austin, note 8 supra, at 34, but rejected by a unanimous court on the ground that the Constitution prohibits all state imposts or duties on imports, and not just discriminatory taxes. Cf. Brown v. Houston, 114 U.S. 622 (1885).

[10] See comment, 58 HARV. L. REV. 858 at 867 (1945). In the principal case the discrimination which would result in favor of imports over similar goods which were nonimports was given as a reason for denying immunity. Prior to this case such discrimination was accepted as implicit in the Constitution. Hooven & Allison Co. v. Evatt, note 5 supra, at 667. This reversal further illustrates the apparent desire of the present Court to look at all the interests involved in the import immunity area.

[11] Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 (1928).

[12] Principal case, dissenting opinion at 572-573.

reason exists for engrafting such limitation upon goods entering the manufacturing process.[13]

The principal cases do raise the interesting problem of how an importer can determine whether goods which are imported for use in his manufacturing process will enjoy immunity from state taxation. The existence of "original packages" here was deemed immaterial.[14] Nor did the Court consider as controlling the exact distance of the imports from the place of fabrication or the size of the piles of stored imports.[15] Instead, the decision was based on the fact that the total of the imports were being "used" to supply the current operating needs of the manufacturer.[16] In the *Youngstown* case the total of the imported ore used in this manner included only a three-month supply, although this represented all such ore stored at the manufacturing plant.[17] Thus, the position which the Court might be expected to take in the future in this area is to allow state taxation whenever imported materials come to rest at the place of manufacture to be used in the normal operation of the business.[18] It is only after this point has been reached that the imports can reasonably be said to supply the "current operational needs" of the manufacturer.

Stevan Uzelac

[13] The only merit which might be found in using the "physical transformation" test to determine when a state might tax goods imported for manufacture is its relative certainty. But because such test is wholly arbitrary in its application it does not offer a satisfactory solution in reconciling the competing demands of the state and federal governments.

[14] Principal case at 548-549.

[15] Id. at 546-547.

[16] Id. at 549.

[17] Id. at 537.

[18] A tax at this point can also be supported on the ground that the "import stream" has ended, by way of analogy to the "export stream" theory which controls the state taxation of exports. See Empresa Siderurgica v. Merced County, 337 U.S. 154 (1949); comment, 47 COL. L. REV. 490 at 494-495 (1947).