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CONSTITUTIONAL LAW--IMPORT-EXPORT CLAUSE--VALIDITY OF A STATE GROSS RECEIPTS TAX ON COMMON CARRIERS TRANSPORTING IMPORTS AND EXPORTS

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CONSTITUTIONAL LAW—IMPORT-EXPORT CLAUSE—VALIDITY OF A STATE GROSS RECEIPTS TAX ON COMMON CARRIERS TRANSPORTING IMPORTS AND EXPORTS—The State of Maryland levied a nondiscriminatory gross receipts tax on revenues of common carriers operating within the state, apportioned on the basis of trackage within Maryland to trackage everywhere. Petitioners, who are common carriers operating within Maryland, objected to this tax to the extent that it constituted a tax on gross receipts derived from transporting imports and exports on the grounds that it violated the import-export clause.[1] The court of appeals of Maryland declared the tax valid. On appeal, *held,* affirmed.[2] Where the tax is on an activity connected with the import or export of goods, rather than on the goods themselves, the constitutional immunity stops at the water's edge.[3] *Canton Railroad Co. v. Rogan,* 340 U.S. 511, 71 S.Ct. 447 (1951); *Western Maryland Railway Co. v. Rogan,* 340 U.S. 520, 71 S.Ct. 450 (1951).

[1] "No State shall, without the consent of the Congress levy any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . ." U.S. CONST., Art. I, §10, cl. 2.

[2] Justice Jackson and Justice Frankfurter reserved judgment.

[3] There is no real question of validity under the commerce clause because the tax is apportioned. Central Greyhound Lines v. Mealey, 334 U.S. 653, 68 S.Ct. 1260 (1948).

The intent of the framers of the Constitution in adopting the import-export clause probably was to keep coastal states with good harbors from utilizing their advantageous location to exact a toll from the products going to or coming from inland states. To be effective, this clause must be construed broadly enough to prevent a state from avoiding the prohibition by placing the tax burden on an indispensable activity connected with the import or export. Recognizing this, the Court at an early date invalidated the exaction of a license fee for the privilege of selling imports within the taxing state.[4] The fee was found to be tantamount to a tax on the imports themselves and therefore invalid. Likewise, sales and excise taxes on the transfer of title or possession have been found to be actually a tax on the goods.[5] Stamp taxes on foreign bills of lading and on policies insuring exports against maritime risks have also been invalidated for the same reason.[6] In the present cases, the Court felt that the tax was not tantamount to a tax on the imports and exports; that it constituted only a tax on an activity connected with them; and that the immunity should stop at the water's edge, for otherwise a zone of tax immunity never before imagined or intended would be created. It is submitted that the decisions cannot be justified on this ground. It has long been recognized for commerce clause purposes that a gross receipts tax on the revenues of an interstate carrier is invalid unless fairly apportioned to business done within the taxing state, because the tax incidence falls as a direct burden on the commerce.[7] If the present tax were not apportioned it would be invalid by virtue of the commerce clause. If this is recognized as a direct tax on the goods for commerce clause purposes, it seems strange that it is not also a direct tax on the goods for purposes of the import-export clause, which does not leave the restrictions on the states to implication, but expressly forbids them to tax imports and exports. Nor can the decisions be justified on the same basis that allows the tax under the commerce clause. The rationale of the scope of the commerce clause is to maintain an area of trade free from state interference, which immunity is implied from giving the control of commerce to Congress, and at the same time to make the commerce pay its own way as long as the purpose of the clause is not defeated. The scope of the import-export clause cannot be limited by this policy of balancing of local and national interests, for it expressly declares that imports and exports are immune from state taxation. Exceptions cannot be validly implied for they would defeat the purpose of the clause. Adopting this view,

[4] Brown v. Maryland, 12 Wheat. (25 U.S.) 419 (1827).

[5] Richfield Oil Corp. v. State Board, 329 U.S. 69, 67 S.Ct. 156 (1946); Spalding & Bros. v. Edwards, 262 U.S. 66, 43 S.Ct. 485 (1923).

[6] Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19, 34 S.Ct. 496 (1915); Fairbank v. United States, 181 U.S. 283, 21 S.Ct. 648 (1901); Almy v. California, 24 How. (65 U.S.) 169 (1860).

[7] Maine v. Grand Trunk Railway Co., 142 U.S. 217, 12 S.Ct. 121 (1891); Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U.S. 326, 7 S.Ct. 1118 (1887); Fargo v. Michigan, 121 U.S. 230, 7 S.Ct. 857 (1887).

the Court has held that a sales tax on exports, though properly allocated to a local event and valid under the commerce clause, cannot be sustained under the import-export clause.[8] The prime motivation for the present decisions is that the tax immunity thus created would be too large to be desirable. However, the tax immunity would be no greater than that recognized in prior decisions, and it is not as if there are no limitations at all. The "original package"[9] and "goods committed to export"[10] doctrines define "import" and "export" so that at the present time the tax immunity is kept within reasonable bounds without the restrictive doctrine of the present cases.

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[8] Richfield Oil Corp. v. State Board, supra note 5.

[9] Hooven & Allison Co. v. Evatt, 324 U.S. 652, 65 S.Ct. 870 (1945); May v. New Orleans, 178 U.S. 496, 29 S.Ct. 976 (1900); Low v. Austin, 13 Wall. (80 U.S.) 29 (1871); Waring v. The Mayor, 8 Wall. (75 U.S.) 110 (1868); Brown v. Maryland, supra note 4.

[10] Empresa Siderurgica v. Merced County, 337 U.S. 154, 69 S.Ct. 995 (1949); Joy Oil Co. v. State Tax Commission, 337 U.S. 286, 69 S.Ct. 1075 (1949); Richfield Oil Corp. v. State Board, supra note 5.