APPENDIX

APPENDIX A

OPINION OF THE SUPREME COURT OF VIRGINIA, DATED AUGUST 24, 2017

PRESENT: All the Justices

DULLES DUTY FREE, LLC

v.

COUNTY OF LOUDOUN

Record No. 160939

FROM THE CIRCUIT COURT OF LOUDOUN COUNTY

Burke F. McCahill, Judge

OPINION BY JUSTICE STEPHEN R. McCULLOUGH

August 24, 2017

Dulles Duty Free, LLC, challenges Loudoun County's imposition of a Business, Professional, and Occupational License ("BPOL") tax on a substantial portion of its sales. It argues that the Import-Export Clause of the Constitution of the United States, U.S. Const. art. I, § 10, cl. 2, bars the County from imposing the tax. The circuit court ruled in favor of the County.

For the reasons noted below, we reverse the judgment of the circuit court and remand this action for a computation of the refunds for the relevant tax years that are due to the taxpayer.

BACKGROUND

Duty Free is a retailer of duty free merchandise at Dulles Airport in Loudoun County, where it operates several stores.[1] Every aspect of the duty free business is highly regulated. As required by federal law, Duty Free holds the alcohol, tobacco, fragrances, luxury goods, bags, watches, and other products it sells in bonded warehouses in Florida and Texas. Bonded carriers transport the goods to a secure warehouse at Dulles Airport which, in turn, distributes the merchandise to retail stores inside the airport.

The merchandise is sold in a restricted area of the airport. Only passengers with boarding passes may enter and these passengers must first go through security. Duty Free can sell items to both domestic and international passengers. For domestic travelers, Duty Free charges a Virginia sales tax and the purchaser takes immediate possession of the item. When the sale involves a bonded imported item, the domestic passenger pays an import duty. Duty Free does not challenge the imposition of the BPOL tax to such domestic sales.

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[1] 19 U.S.C. § 1555 authorizes bonded duty free sales of merchandise for export.

International travelers, on the other hand, must present a passport and boarding pass to the cashier in the Duty Free shop. The cashier will swipe the boarding pass on the register to record the information that is on the boarding pass. Duty Free does not charge a Virginia sales tax for international export sales and does not collect any import duty, i.e. the sales are "duty free." Instead of receiving the item immediately, the traveler is given a receipt or ticket. A duty free runner delivers the item to the buyer at the jetway immediately prior to boarding and the customer hands the ticket to the runner. See 19 U.S.C. § 1555(b)(3)(F)(i)(II). If a passenger does not appear to collect the item, Duty Free voids the sale and returns the merchandise to the store.

Duty Free is able to track which sales are domestic and which sales are international. International sales represent over ninety percent of Duty Free's sales. Duty Free established that the following gross receipts were attributable to international travelers: for tax year 2009, $18,827,494; for tax year 2010, $13,747,954; for tax year 2011, $15,162,747; for tax year 2012, $18,203,469; and for tax year 2013, $20,151,691.

Duty Free does not dispute that it owns inventory and other personal property in Loudoun County. There is also no question that it employs a large number of personnel in the County to run its retail operations. Duty Free uses County roads, and benefits from the protection of County fire and rescue, law enforcement, the court system, and other County services.

Appendix A

Loudoun County requires every person "engag[ed] in a business" in Loudoun County to obtain a business license. Loudoun County Ordinance § 840.03(a). Accordingly, Duty Free has obtained a business license to operate in Loudoun County. Code § 58.1-3702 permits "the governing body of every county, city and town" to impose a "tax on the gross receipts or the Virginia taxable income of the business." Code § 58.1-3703.1(A)(3)(a) provides that "[w]henever the tax imposed by this ordinance is measured by gross receipts, the gross receipts included in the taxable measure shall be only those gross receipts attributed to the exercise of a privilege subject to licensure." The tax does not target imports or exports; it applies across the board to all sales.

Loudoun County has chosen to collect the tax based on the measure of gross receipts. See Loudoun County Ordinance § 840.14(o). Loudoun County defines "gross receipts" as "the whole, entire, total receipts attributable to the licensed privilege, without deduction." *Id.*; Loudoun County Ordinance § 840.01(k). The tax is calculated based on the prior year's gross receipts. *Id.*; see also Loudoun County Ordinance §§ 840.01(m); 840.03(d); 840.04(a); 840.14(o). For businesses with sales not more than $200,000 per year, the County levies a flat $30 fee. Loudoun County Ordinance § 840.13(c). For businesses with sales above the $200,000 threshold, the County collects 17 cents for every $100 in retail sales for all sales, not just those above $200,000. Loudoun County Ordinance § 840.14(o).

In 2014, Duty Free filed an application for correction of its BPOL taxes for the years 2009, 2010, 2011, 2012, and 2013. Duty Free does not challenge the imposition of the BPOL tax on its domestic sales. It argues, however, that applying the BPOL tax on the gross receipts of its international sales violates the Import-Export Clause of the Constitution of the United States.

Following a hearing, the circuit court issued a detailed memorandum opinion. The court canvassed the cases from the United States Supreme Court and concluded that "[t]he BPOL tax of Loudoun County does not violate the Import Export Clause of the U.S. Constitution." Consequently, the court held that Duty Free "is not entitled to relief from the assessments complained of in its Application." Duty Free appeals from this ruling.

ANALYSIS

"Arguments challenging the constitutionality of a statute or regulation are questions of law that this Court reviews de novo on appeal." *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 133, 704 S.E.2d 365, 368 (2011).

This case presents an "as applied" challenge rather than a challenge to the facial constitutionality of the BPOL tax. *Volkswagen of Am., Inc. v. Smit*, 279 Va. 327, 336, 689 S.E.2d 679, 684 (2010) ("Because our jurisprudence favors upholding the constitutionality of properly enacted laws, we have recognized that it is possible for a statute or ordinance to be facially valid, and yet unconstitutional as applied in a particular case."). We accord every legislative act a presumption of constitutionality, including laws subject to an as applied challenge. *Id.* A party which alleges a statute is being unconstitutionally applied bears the burden of proving that the statute is unconstitutional under a particular set of facts. See *FFW Enters. v. Fairfax County*, 280 Va. 583, 590, 701 S.E.2d 795, 800 (2010).

The Import-Export Clause provides, in relevant part, that "[n]o 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 its inspection Laws." U.S. Const. art. I, § 10, cl. 2.

The problems that led to the inclusion of this Clause in the Constitution are well known. "One of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased." *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283 (1976). In an introduction to the Debates of the Constitutional Convention, James Madison noted that New Jersey was likened to a "cask tapped at both ends" by New York and Philadelphia; and North Carolina as the "patient bleeding at both arms" – with Virginia and South Carolina happily serving as phlebotomists. 2 The Papers of James Madison 691-92 (Henry D. Gilpin, ed., Washington, D.C.: Langtree & O'Sullivan, 1840). These taxes on imported and exported goods "nourish[ed] unceasing animosities" and, if left unchecked, Madison thought, would likely end "in serious interruptions of the public tranquility." The Federalist No. 42, at 264 (J. Madison) (Clinton Rossiter ed., 2003). The Import-Export Clause, along with the Commerce Clause and the Export Clause, was designed to suppress fratricidal trade policies and thus "provide for the harmony and proper intercourse among the States." *Id.* at 263.

I. OVERVIEW OF THE UNITED STATES SUPREME COURT'S IMPORT-EXPORT CLAUSE JURISPRUDENCE.

Resolution of the constitutional propriety of the BPOL tax to Duty Free's in-transit export sales hinges on the applicability, and ongoing validity, of the decision in *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69 (1946). Duty Free argues that *Richfield Oil* controls. The County asserts that the case is distinguishable or superseded by later decisions.

A. The decision in *Richfield Oil*.

Richfield Oil entered into a contract with the government of New Zealand for the sale of oil. *Id.* at 71. None of the oil was to be used or consumed in the

United States; all of it was for export.[2] *Id.* California assessed a retail sales tax against Richfield Oil that was "measured by the gross receipts from the transaction." *Id.* at 71-72. Richfield Oil argued that the tax violated the Import-Export Clause and the Supreme Court agreed.

The Court examined whether the oil was an "export." *Id.* at 78. Surveying its precedent, the Court noted that goods intended for export were not exempt from the "ordinary burdens of taxation." *Id.* at 78-80. But once goods have been placed with a common carrier for export, "or have been started upon such transportation in a continuous route or journey" (i.e. the goods are in transit), they are exports for purposes of the Import-Export Clause and may not be taxed. *Id.* at 79. The Court concluded that the oil was an export because it had been delivered "into the hold of the vessel," and this delivery "marked the commencement of the movement of the oil abroad." *Id.* at 82-83.

The Court found unpersuasive California's argument that the tax in question was "not an impost

[2] Richfield Oil carried the oil by pipeline from its refinery in California to storage tanks at the Los Angeles harbor, where a New Zealand naval vessel appeared to receive it. The price was free on board ("F.O.B.") Los Angeles, with payment made in London, England, and delivery was "to the order of the Naval Secretary" of New Zealand. When the vessel had docked, Richfield Oil pumped the oil from the storage tanks into the vessel. Customary shipping documents were given to the master, including a bill of lading which designated Richfield Oil as the shipper and consigned the oil to a designated Naval-Officer-In Charge in Auckland, New Zealand. 329 U.S. at 71.

within the meaning of the Import-Export Clause." *Id.* at 83. The Court accepted the California Supreme Court's characterization of the tax as "an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales; that it is not laid upon the consumer and does not become a tax on the sale or because of the sale." *Id.* at 83-84. California pointed out that the tax did not directly target exports, that it instead was "measured by the gross receipts of retail sales" and was "levied on retailers 'For the privilege of selling tangible personal property at retail.'" *Id.* at 83. "[W]hether the tax deprives the taxpayer of a federal right," the Court reasoned, turns not on the characterization of the tax under state law but, rather, on "its operation and effect." *Id.* at 84. The Court explained that the Import-Export Clause prohibits more than "taxes laid specifically upon the exported goods themselves." *Id.* at 85. Were it otherwise, the Court observed, states would easily impose taxes "nominally conforming to the constitutional restriction but in effect overriding it." *Id.* The Court noted, quoting Chief Justice John Marshall, that a tax measured by the gross receipts of sales is effectively a tax on the article itself. *Id.* at 84 ("[A] tax on the sale of an article . . . is a tax on the article itself.") (quoting *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 444 (1827)). A tax that effectively "add[s] to the price of the article, and [is] paid by the consumer, or by the importer himself," such as a tax "on the occupation of an importer" is in practical effect no different from "a direct duty on the article itself." *Id.* at 85. The Court concluded that California's tax was "an impost upon an export within the meaning of Article I, Section 10, Clause 2, and is therefore unconstitutional." *Id.* at 86.

B. Developments since *Richfield Oil*.

In *Low v. Austin*, 80 U.S. 29 (1872), the Supreme Court interpreted the Import-Export Clause to prohibit a State "from imposing a nondiscriminatory ad valorem property tax on imported goods until they lose their character as imports and become incorporated into the mass of property in the State." *Michelin*, 423 U.S. at 282 (describing the test in *Low v. Austin*). This test was known as the "original package doctrine." Boris I. Bittker & Brannon P. Denning, *The Import-Export Clause*, 68 Miss. L.J. 521, 531 (1998). Following extensive scholarly criticism of *Low v. Au*stin, the Court revisited its approach in 1976 in *Michelin*, where the tax at issue was an ad valorem inventory tax Georgia imposed on automobile and truck tires and tubes that were imported from France and Nova Scotia. 423 U.S. at 279. The tax was "nondiscriminatory" – it did not single out imports for taxation. *Id.* at 281.

The Court surveyed the history that led to the adoption of the Import-Export Clause and identified "three main concerns" the Clause sought to alleviate:

> [1] 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;

> [2] import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and
>
> [3] 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.

Id. at 285-86.

The Court observed that "[n]othing in the history of the Import-Export Clause even remotely suggests that a nondiscriminatory ad valorem property tax which is also imposed on imported goods *that are no longer in import transit* was the type of exaction that was regarded as objectionable by the Framers of the Constitution." *Id.* at 286 (emphasis added). The Court overruled *Low v. Austin* and fashioned a new three-part test based on the three goals that led to the adoption of the Import-Export Clause. *Id.* at 301, 286-89.

Applying the three-part test, the Court held that the Georgia ad valorem tax at issue did not violate the Import-Export Clause. *Id.* at 286-89. The Court found that the tax had no impact on the Federal Government's exclusive regulation of foreign commerce because, "[b]y definition, such a tax does not fall on imports as such because of their place of origin." *Id.* at 286. In addition, a non-discriminatory ad valorem tax does not "deprive the Federal Government of the exclusive right to all revenues from imposts and duties on imports and exports." *Id.* Finally, such a tax does "not interfere with the free flow of imported goods among the States." *Id.* at 288. On this point, the Court explained that "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." *Id.* at 290. The Court suggested that "to the extent there is any conflict whatsoever with this purpose of the Clause, it may be 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." *Id.*

In holding that Georgia's ad valorem tax was not an "impost" or "duty" under the Import-Export Clause, the Court stressed its "nondiscriminatory" nature. *Id.* at 279, 281, 282, 283, 286, 287, 288. The Court observed that

> [u]nlike imposts and duties, which are essentially taxes on the commercial privilege of bringing goods into a country, [nondiscriminatory ad valorem taxes] are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth; there is no reason why an importer should not bear his share of these costs along with his competitors handling only domestic goods.

Id. at 287.

The Court summarized the new approach in *Department of Revenue of Wash. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734 (1978). It explained that "[p]revious cases had assumed that all taxes on imports and exports and on the importing and exporting processes were banned by the Clause." *Id.* at 752. "Before *Michelin*, the primary consideration was whether the tax under review reached imports or exports." *Id.* For imports, "the analysis applied the original-package doctrine." *Id.* "So long as the goods retained their status as imports by remaining in their import packages, they enjoyed immunity from state taxation." *Id.* "With respect to exports, the dispositive question was whether the goods had entered the 'export stream,' the final, continuous journey out of the country." *Id.* "As soon as the journey began, tax immunity attached." *Id.* "*Michelin* initiated a different approach to Import-Export Clause cases." *Id.* at 752. Rather than focus on whether the goods were imports, the Court "analyzed the nature of the tax to determine whether it was an 'Impost or Duty,'" and it did so by applying the three-part test mentioned above. *Id.*

Michelin dealt with *imports*. *Washington Stevedoring Cos.*, decided two years after *Michelin*, examined whether *Michelin*'s three-part test for assessing the constitutionality of non-discriminatory taxes on imports should also apply to *exports*. Washington State imposed a business and occupation tax upon stevedoring, "the business of loading and unloading cargo from ships." *Id.* at 737. After its overview of the change wrought by the *Michelin* decision, the Court adopted what it described as a "similar" approach to exports. *Id.* at 754. With respect to the second policy identified in *Michelin*, protecting the Federal Government's revenue from taxes on imports, the Court noted that, in contrast to imports, the Constitution forbids the Federal Government from taxing exports. *Id.* at 758. *See* U.S. Const., Art. I § 9, cl. 5. Despite this difference, a "tax relating to exports can be tested for its conformance with the first and third policies" identified in Michelin. *Id.*

Applying this test, the Court concluded, first, that the tax did not "restrain the ability of the Federal Government to conduct foreign policy." *Id.* at 754. The tax applies "to virtually all businesses in the State," and it is not a "special protective tariff. . . . No foreign business or vessel is taxed." *Id.* As in *Michelin*, "[t]he tax merely compensates the State for services and protection" it provides to businesses. *Id.* Second, the tax "falls upon a taxpayer with [a] reasonable nexus to the State, is properly apportioned, does not discriminate, and relates reasonably to services provided by the State." *Id.* at 754-55.

The Court added a caveat: "Because the goods [in *Michelin*] were no longer in transit, however, the Court did not have to face the question whether a tax relating to goods in transit would be an 'Impost or Duty' even if it offended none of the policies behind the Clause." *Id.* at 755. In *Washington Stevedoring*, "the tax [did] not fall on the goods themselves." *Id.* Instead, the tax fell on the activity of moving the goods. *Id.* Thus, although the tax related to goods in transit, the fact that it did not fall upon the goods themselves "leads to the conclusion that the Washington tax is not a prohibited

'Impost or Duty' when it violates none of the policies" animating the Clause. *Id.* The Court expressly declined to reach the question of whether the *Michelin* approach should be employed "when a State directly taxes imports or exports in transit." *Id.* at 757 n.23.

The Court also repudiated what it characterized as dicta in *Richfield Oil*, the proposition "that the Import-Export Clause effects an absolute prohibition on all taxation of imports and exports." *Id.* at 759. The Court reaffirmed "the central holding of *Michelin* that the absolute ban is only of 'Imposts or Duties' and not of all taxes." *Id.*

The Court concluded as follows:

> The Washington business and occupation tax, as applied to stevedoring, reaches services provided wholly within the State of Washington to imports, exports, and other goods. The application violates none of the constitutional policies identified in Michelin. It is, therefore, not among the "Imposts or Duties" within the prohibition of the Import-Export Clause.

Id. at 761.

Later, in *United States v. International Bus. Mach. Corp.*, 517 U.S. 843, 862 (1996), the Court indicated in dicta that it has not overruled the core holding in *Richfield Oil* with respect to a state tax that is assessed directly on goods in import or export transit. Although that case addressed the Export Clause rather than the Import-Export Clause, the Court stated that it had "never upheld a state tax assessed directly on goods in import or export transit." *Id.* The Court further indicated that compliance with the Import-Export Clause may be secured "'by prohibiting the assessment of even nondiscriminatory property taxes on [import or export] goods which are merely in transit through the State when the tax is assessed.'" *Id.* (alteration in original) (quoting *Michelin*, 423 U.S. at 290).

Finally, in *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 78 (1993), the Court upheld a sales tax on leases of containers used in international shipping. The Court rejected the argument that *Richfield Oil* was controlling, noting with regard to the prohibition on direct taxation of imports and exports "in transit" that "[e]ven assuming that rule has not been altered by the approach we adopted in *Michelin*, it is inapplicable here." Id. at 77. As in *Washington Stevedoring*, the tax at issue in *Itel* fell "upon a service distinct from [import] goods and their value." *Id.* at 78 (alteration in original) (quoting *Washington Stevedoring*, 435 U.S. at 757).

C. The bright line *Richfield Oil* test, rather than the policy based *Michelin* test, supplies the rule of decision on the present facts.

It is fair to say that courts have struggled to determine which test to apply when it comes to assessing the constitutionality of taxes that fall on export goods in transit. In *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir. 1990), the United States Court of Appeals for the Fifth Circuit invalidated a state tax on jet fuel sold for export to a foreign country. *Id.* at 821. While noting that *Richfield Oil* has "never been overruled by the United States Supreme Court," *id.* at 819, that court relied on both *Richfield Oil* and *Michelin* to conclude that the Alabama tax at issue violated the Import-Export Clause. *Id.* at 820-21.

In *Virginia Indonesia Co. v. Harris Cnty. Appraisal Dist.*, 910 S.W.2d 905 (Tex. 1995), the majority of a divided Texas Supreme Court observed that "[t]he United States Supreme Court has yet to announce whether the new approach set forth in *Michelin* should be applied to a direct tax on imports or exports in transit." *Id.* at 910. The Court noted that "[a]lthough the *Michelin* court rejected the original package doctrine, it did not overrule . . . any of the stream of export cases, and the two doctrines are different enough that the rejection of one does not, of itself, signify the demise of the other." *Id.* at 910-11. The Court concluded that a county's ad valorem tax on goods in "the export stream" violated the Import-Export Clause. *Id.* at 915. Two justices dissented, arguing that the *Michelin* test was the right one to apply and that the tax was valid under that test. *Id.* at 915-16, 925.

Similarly, in *U.S. Steel Mining Co. v. Helton*, 631 S.E.2d 559 (W. Va. 2005), a divided Supreme Court of Appeals of West Virginia accepted *Richfield Oil* as binding, but held that the goods were not placed in export at the time a coal severance tax applied (when the coal was extracted from the natural resources of the state) and, therefore, there was no violation of the Import-Export Clause. *Id.* at 567. *See also Ammex, Inc.*

v. Dep't of Treasury, 603 N.W.2d 308, 313 (Mich. Ct. App. 1999) (concluding that *Richfield Oil* retains "precedential value," but that the tax in question did not fall upon oil that was an "export" within the intendment of the Import-Export Clause, since it was sold at retail on the United States side of a bridge connecting to Canada, and would have been at least partly used in the United States, even by customers who drove directly over the bridge.[3]

In contrast, a United States District Court in Guam applied the *Michelin* test to a direct tax on goods in export. *See Duty Free Shoppers, Ltd. v. Tax Commissioner*, 464 F. Supp. 730, 735-36 (D. Guam 1979) (finding that duty free goods as sold only to passengers leaving the Territory for foreign countries have clearly embarked on their final, continuous

[3] The court in *Ammex, Inc.* summarized the exportation concept, 603 N.W.2d at 463-64, as follows:

> The word "export" means the transportation of goods from the United States to a foreign country. *Swan & Finch Co. v. United States*, 190 U.S. 143, 145 (1903). "Exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country." *Id.* Thus, an article does not constitute an "export" if there exists a practical possibility of diversion to domestic markets. *See Joy Oil Co. v. State Tax Comm'n of Michigan*, 337 U.S. 286, 288 (1949) (citing *Richfield Oil*, [329 U.S.] at 82). Similarly, an article cannot be considered an "export" within the meaning of the Import-Export Clause if "it will be used in this country for its designed purpose, before being shipped abroad." See *Itel Containers*, 507 U.S. at 82 (Scalia, J., concurring).

journey out of the country, since their movement to foreign shores has "started (or) been committed," and commenting that "[a]pplying either phraseology, we are satisfied that when liquor and tobacco products are delivered to a departing passenger en route to foreign shores in the 'sterile area' of the airport, such goods, having entered the export stream, constitute exports;" concluding, however, that no policy of the Import-Export Clause is thereby violated).

Our review of this mass of precedent yields two conclusions that guide our resolution of this case. First, the Supreme Court has not overruled *Richfield Oil* and, while it has significantly revised its Import-Export Clause jurisprudence, the Court has carefully carved out for future disposition the issue whether the *Michelin* test would apply to a non-discriminatory tax that falls on export goods in transit. *See Itel Containers*, 507 U.S. at 77; *Washington Stevedoring*, 435 U.S. at 757 n.23; *Michelin*, 423 U.S. at 290. We cannot ignore the Court's repeated signals to that effect. Consequently, we conclude that *Richfield Oil* supplies the rule of decision. As the Supreme Court has noted

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

Second, the Court has not retreated from its method of assessing the constitutionality of a state tax based on its operation and effect. *Richfield Oil*, 329 U.S. at 84. A State's characterization of the tax does not control. *Id.*

II. THE BPOL TAX IS INDISTINGUISHABLE FROM THE PROHIBITED GROSS RECEIPTS TAX IN *RICHFIELD OIL*.

The County attempts to distinguish the BPOL tax from the tax the Court invalidated in *Richfield Oil*. We find the County's arguments unpersuasive. As a threshold matter, we need not confront the often vexatious problem of whether the goods are in export transit. There is no dispute that the merchandise Duty Free sells to international travelers constitutes export goods in transit: these travelers, who are leaving the country, have passed through security checks and they must present their passports and an airline boarding pass to complete the purchase.

The County argues that the BPOL tax is not a "direct tax" and does not resemble the tax the Court invalidated in *Richfield Oil*. The County takes the view that the tax is placed on "the privilege to engage in a business activity, and that is not the same as a tax on goods." We disagree. The characterization of the tax for purposes of state law does not control whether the tax violates the Import-Export Clause. *Richfield Oil*, 329 U.S. at 84 (state's characterization of a tax "is not determinative of the question whether the tax deprives the taxpayer of a federal right."). Under *Richfield Oil*, a tax that falls directly on export goods in transit violates the Clause. *Id.* (constitutionality of a tax on export goods in transit hinges on "its operation and effect."). The BPOL tax is imposed on a percentage of gross sales, just like California's tax in *Richfield Oil*. For every $100 worth of sales, Duty Free must pay 17 cents in tax. Although the tax is imposed on the gross receipts of a business, it is in its "operation and effect" a direct tax on the export goods in transit. *Richfield Oil*, 329 U.S. at 84; *see also Crew Levick Co. v. Pennsylvania*, 245 U.S. 292, 295-96 (1917) ("[I]mposition of a percentage upon each dollar of the gross transactions in foreign commerce … [is] in effect an impost or duty upon exports.").

The BPOL tax is imposed on "the gross receipts . . . of the business." Code § 58.1-3702. The California tax invalidated in *Richfield Oil* was based on "the gross receipts of retail sales and is levied on retailers '[f]or the privilege of selling tangible personal property at retail.'" *Richfield Oil*, 329 U.S. at 83. We are hard pressed to see a difference of constitutional magnitude between the BPOL tax and the tax at issue in *Richfield Oil*. Indeed, the parallels between the BPOL tax and the tax under review in *Richfield Oil* are striking.

We also perceive no constitutional significance in the fact that retailers in California were authorized to collect the tax from the consumers, as opposed to the BPOL tax, for which liability lies with the business. The California tax at issue in *Richfield Oil* was ultimately the responsibility of retailers. *See Richfield Oil*, 329 U.S. at 84 ("[The tax] is not laid upon the consumer."); *see also Western Lithograph Co. v. State Bd. of Equalization*, 78 P.2d 731, 734-35 (Cal. 1938)

("The provisions of the [retail sales tax] act itself specifically are that the tax is laid upon and is a direct obligation of the retailer" and the tax should not be "considered as a tax on the consumer.").

It may be that the Supreme Court will provide additional guidance concerning the applicability of the Import-Export Clause to nondiscriminatory taxes like the BPOL tax that would be imposed upon on export goods in transit. Until then, *Richfield Oil* compels the conclusion that the BPOL tax is unconstitutionally applied to Duty Free's international export sales.

CONCLUSION

The BPOL tax as applied to Duty Free's export goods in transit constitutes an impermissible impost upon an export in violation of the Import-Export Clause of the Constitution of the United States. Consequently, we will reverse the judgment of the circuit court and remand this matter for a determination of the refund due to Duty Free.

Reversed and remanded.

APPENDIX B

OPINION OF THE CIRCUIT COURT OF LOUDOUN COUNTY, DATED APRIL 26, 2016

TWENTIETH JUDICIAL CIRCUIT OF VIRGINIA
Loudoun, Fauquier and Rappahannock Counties

April 26, 2016

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Re: Dulles Duty Free, LLC v. County of Loudoun
Civil No. 90613

Dear Counsel:

This matter was heard on April 6 and 7, 2016 on the application for correction of erroneous assessment of business professional and occupational license tax

(BPOL tax) for the years 2009 through 2013. The applicant is Dulles Duty Free, LLC and the defendant is the County of Loudoun. Most of the facts were not in dispute. Each side submitted written briefs. Duty Free maintains that the tax attributable to gross receipts derived from retail sales of goods in foreign commerce violates Article 1, Section 10, Clause 2 of the United States Constitution, commonly referred to as the Import Export Clause[1]. The County denies this.

Background

Duty Free is a duty free retailer that operates in many locations throughout the United States. Duty Free conducted retail operations in five locations within Dulles International Airport in Loudoun County for the years 2009 through 2011. A sixth location opened in 2012 and was operated for the years 2012 and 2013. Duty Free paid to the County BPOL taxes for the years 2009 through 2013 and seeks a refund.

The duty free shops sell millions of dollars of merchandise to travelers at the airport. 19 U.S.C. § 1555 authorizes bonded duty free sales of merchandise for export from the country. Duty Free is highly regulated with significant federal oversight primarily through United States Customs and Border Protection.

Duty Free sells alcohol, tobacco, luxury gifts, fragrances and other goods in their stores. Duty Free assembles imported and domestic goods in bonded

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[1] Duty Free originally included a challenge under the Commerce Clause but has abandoned that claim.

warehouses in Florida and Texas. Bonded carriers transport the goods to a bonded warehouse at Dulles Airport where they are eventually delivered to the retail stores within the airport. This process is highly regulated, scrutinized and controlled. For example, a bonded carrier arriving at the airport warehouse is unable to unload his sealed container until a customs official is present to verify the delivery, and to break the customs seal and cut the bolts sealing the container. Once in the warehouse, items are first delivered to a staging area where they must again be inspected before they can be warehoused. The process of delivery to the retail stores is also highly controlled.

Once in the retail stores the goods are available for sale in the "sterile" area of the airport. This is the area where only passengers who have boarding passes and have gone through security may enter. Both domestic and international passengers may make purchases at Duty Free's stores. The evidence showed that Duty Free is able to identify whether a sale is for import or export. If a domestic passenger purchases an item, a Virginia sales tax is charged and the customer is able to take possession of the item. If the sale involves a bonded imported item, an import duty is paid by the domestic passenger.

International sales are handled differently. An international traveler must show his or her passport and boarding pass, which is verified by Duty Free's cashier. The international traveler purchases the goods for export. No Virginia sales tax is collected nor is any duty collected. The merchandise is not delivered to the traveler at the point of sale. The traveler obtains a receipt and a duty free cartman meets the traveler at the jet way just prior to boarding the plane, where the traveler surrenders his receipt to the cartman in exchange for the goods. In this way, Duty Free ensures that items are in fact for export.[2] These procedures are to ensure actual export. Duty Free receives favorable federal tax treatment under the law. Duty Free is able to demonstrate through record keeping the percentage of sales attributable to domestic travelers and international travelers. Duty Free has a business license to operate in Loudoun County. As a result, Duty Free is obligated to pay the BPOL tax measured by gross receipts. Duty Free does not challenge the BPOL taxes attributable to its domestic sales. However, Duty Free maintains that the BPOL tax arising from gross receipts attributable to international sales (which is over ninety percent of its sales) violates the United States Constitution.

Under the existing law, if a retail location has gross receipts less than $200,000, a flat BPOL rate of $30 is paid. Duty Free paid several $30 fees to Loudoun County during the years in question. While Duty Free states that the $30 BPOL flat rate charged does not distinguish between domestic and export sales, it has chosen not to challenge this particular taxing structure. Accordingly, at issue are the retail stores that had gross sales in excess of $200,000. These claims are set forth below:

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[2] Duty Free also explained the procedure for the return of goods and voiding of sales if, for example, a passenger fails to show up at the gate for boarding.

Gross Receipts from Export 2009:	$18,827,494
Gross Receipts from Export 2010:	$13,747,954
Gross Receipts from Export 2011:	$15,162,747
Gross Receipts from Export 2012:	$18,203,469
Gross Receipts from Export 2013:	$20,151,691

Duty Free admits that it owns inventory and tangible personal property in Loudoun County. Further, it admits that it employs a large number of individuals (in excess of 100) in Loudoun County to staff its operation. The stores are open from 7:00 a.m. to 10:00 p.m. each day. These employees, as well as customers, use Loudoun County roads to get to the airport. Duty Free's operation benefits from the protection of the Sheriff's Department, Fire and Rescue, the court system and other County laws and ordinances. All of the merchandise is delivered to a warehouse in Loudoun County, and eventually is sold in retail in Loudoun County.

Discussion

The Code of Virginia authorizes an administrative appeal of a determination of a Commissioner of Revenue, and a judicial review of that determination under § 58.1-3703.1. Duty Free did pursue an administrative appeal on different grounds, but did not seek judicial review when it did not prevail. This application is filed pursuant to Va. Code § 58.1-3984(A). This authorizes application to the court to correct erroneous assessment of local levies. In such a proceeding "...the burden of proof shall be upon the taxpayer to show ... that the assessment is otherwise invalid or illegal". Here, Duty Free contends that the BPOL tax based on gross receipts for exports for the years 2009 through 2013 should not be imposed because it violates the Import Export Clause of the United States Constitution (Article 1, Section 10, Clause 2).

The Import Export Clause bars states and localities from exacting "...any Imposts or Duties on Imports or Exports..." Duty Free argues that under the law, the BPOL tax based on gross receipts is imposed on sales of exports, and therefore qualifies as a "direct" tax on the goods sold. Further, Duty Free maintains that the export goods being sold and delivered to those preparing imminently to go abroad are "in export transit" and cannot be taxed.

The County argues that its BPOL tax is not a sales, property or income tax. It is not a tax on a particular transaction. Rather, it is an "indirect" tax for the privilege to engage in a business in Loudoun County. Tax liability is triggered by the decision to operate a business in Loudoun County. It is a means to collect revenue from a business using the roads and variety of protections and services that are afforded by the County. While gross receipts above $200,000 are utilized in determining the tax, this is only a measure of the overall business activity.

Section 58.1-3702 creates the authority for the County to levy this license tax. It authorizes the County to levy such license tax either on gross receipts or the Virginia taxable income of the business. Loudoun County has elected to use gross receipts.

Section 58.1-3703 provides: "Such governing body may levy and provide for the assessment and collection of county, city or town license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms, and corporations engaged therein within the county ..."

Section 58.1-3703.1A.3 provides:

> (a) General rule. Whenever the tax imposed by this ordinance is measured by gross receipts, the gross receipts included in the taxable measure shall be only those gross receipts attributable to the exercise of a privilege subject to licensure at a definite place of business within this jurisdiction.

The Loudoun County Ordinance defines gross receipts as the "... whole, entire, total receipts attributable to the licensed privilege ... Section 840.01(K). Section 840.05 adopts the same general rule as found in Va. Code § 58.1-3703.1, quoted above. Under Section 840.14 (o) the rate is fixed at seventeen cents ($0.17) per one hundred dollars ($100) of gross receipts.

In determining whether Duty Free has met its burden of proof to show that the assessment is invalid or illegal based on a constitutional challenge the Court must start with the presumption:

> There is a strong presumption in favor of the constitutionality of statutes. *Town of Ashland v. Board of Supervisors,* 202 Va. 409, 416, 117 S.E.2d 679, 684 (1961); *Hunton v.*

> *Commonwealth,* 166 Va. 229, 236, 183 S.E.2d 873, 876 (1936). Indeed "[t]here is no stronger presumption known to the law than that which is made by the courts with respect to the constitutionality of an act of Legislature." *Whitlock v. Hawkins,* 105 Va. 242, 248, 53 S.E. 401, 403 (1906). Any reasonable doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality, and "[o]nly where it is plainly in violation of the Constitution may the court so decide." *Almond v. Gilmer,* 188 Va. 822, 834, 51 S.E.2d 272, 276 (1949). The General Assembly may enact any law or take any action "unless it is prohibited by the state or federal constitution in express terms or by necessary implication." *Dean v. Paolicelli,* 194 Va. 219, 227, 72 S.E.2d 506, 511 (1952); see also *Kirkpatrick v. Board of Supervisors,* 146 Va. 113, 126, 136 S.E. 186, 190 (1926).
>
> "We will not invalidate a statute unless that statute clearly violates a provision of the United States or Virginia Constitutions." *Marshall v. Northern Virginia Transportation Authority,* 275 Va. 419, 427, 657 S.E.2d 71, 75 (2008) (citing In re *Phillips,* 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003); *City Council of Emporia v. Newsome,* 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984)).

The Court assumes the "legislature chose, with care, the words it used" when it enacted Va. Code § 58.1-3703.1. *Simon v. Forrer,* 265 Va. 483, 490 (2003). The statute uses gross receipts as a measure but attributes the tax to the exercise of a privilege. This demonstrates the legislative intent that these taxes are not a direct tax on the sales (whether for domestic consumption or export) but rather a tax on the privilege of operating within the County. However, Duty Free maintains that the BPOL tax in fact operates as a direct tax and therefore is unconstitutional.

It is reasonable to assume that the legislature recognized that a business engaged in an activity within a county will utilize the services and privileges afforded them, and that the level of use requires a means of measurement. While there are two options, the gross receipts selected by Loudoun County is a legitimate means authorized by the General Assembly to measure the level of business activity.

It is also reasonable to assume that the legislature was aware that there are businesses such as this particular business that engage in the sale of goods including the sale of goods for export.

Established case law in Virginia addresses the distinction between a direct tax on property and a license tax. In *Town of Ashland v. Board of Supervisors,* 202 Va. 409, 117 S.E. 2d 679 (1961), the Court heard a constitutional challenge to a license tax on motor vehicles. The town argued the distinction between a direct tax on property and a license tax. The Court cited with approval language from *Hunton v. Commonwealth:*

> "We think the fundamental weakness in petitioner's case is his theory that any tax which affects property in any way, directly or indirectly, is a tax on that property. This

> argument is not sound and has been expressly repudiated by this court.
>
> "The owner of an automobile in Virginia pays a tax for the privilege of operating his car. In a sense this tax affects the car, but it is universally conceded that this is a license or privilege tax and not a tax on the property concerned, to-wit, the automobile."
>
> Certainly it cannot be successfully contended that an owner is required to obtain a license for his vehicle if it is stored in a garage and not operated upon the streets and highways. Such a vehicle is subject to a personal property tax, but not a license tax, unless he exercises the privilege of operating it upon the streets and highways. Since the tax in question is a license or privilege tax and not a tax on the property itself, it is not violative of Section 168 of the Virginia Constitution.

Town of Ashland, 202 Va. at 413, 117 S.E. 2d 639 (citing *Hunton v. Commonwealth,* 166 Va. 229, 244, 183 S.E. 873, 879 (1936)).

Duty Free relies on precedent from the Supreme Court of the United States to conclude that because these goods enter the stream of transport for export, the tax based on gross receipts directly burdens the goods and therefore is a direct tax that violates the United States Constitution. Duty Free relies heavily on *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69 (1946).

It is challenging to try to reconcile the Import Export Clause jurisprudence. Many of the cases that discuss this area of the law also involve challenges under the Commerce Clause or the Export Clause, Article 1, Section 9, Clause 5 ("No tax or duty shall be laid on articles exported from any state"). It appears that different criteria are involved for these challenges.

The *Richfield* case does involve a challenge under Article 1, Section 10, Clause 2 (the Import Export Clause). A retail sales tax was assessed measured by gross receipts of oil shipped from a California refinery to storage tanks, and eventually to a ship destined for New Zealand. The oil was clearly for export. The California court allowed the tax "... because the delivery of the oil which resulted in the passage of title occurred prior to the commencement of the exportation" *Richfield,* 329 U.S. at 74.

The oil was for shipment abroad but the question remained as to whether at the time the tax accrued, the oil was an export. The Court discussed the Commerce Clause and the Article 1, Section 9, Clause 5 cases as a part of its analysis. Although the Court discussed a number of cases involving, for example, shipment by a common carrier for export, it appears that the actual holding is based upon the conclusion that the delivery into the hold of the vessel marked the commencement of the movement of the oil abroad. *Id.* at 83. At that point, it passed into the control of a foreign purchaser and there was nothing that created the probability the oil would be diverted to domestic use. There was a certainty of the foreign destination at that point.

The California court found the tax measured by gross receipts of retail sales was an excise tax for the privilege of conducting a business measured by gross receipts. The Supreme Court noted that the case could not be decided on the characterization of the tax, but had to turn on its operation and effect. "The incident which gave rise to the accrual of the tax was a step in the export process" *Richfield,* 329 U.S. at 84. The Supreme Court concluded this was an impost upon an export and was unconstitutional. *Id* at 86. This is the point advanced by Duty Free.

Duty Free notes the emphasis in this case on two points: being "in export transit", and the operation and effect on the goods themselves. In other words, once the good has been shipped or started upon a continuous route, it has entered the stream of exportation. There was no chance that the foreign exports would be thwarted. In addition, because it is a tax on gross receipts, it acts as a tax on the goods themselves.

Obviously there are significant distinctions between the facts of this case and the facts in *Richfield. Richfield* involved a sales tax, which is by all definitions a direct tax on goods. Like the BPOL tax here, it was measured by gross receipts. In the case at bar, the BPOL tax obligation accrues not at a point of sale, but rather when the entity begins any business activity. If the business has gross receipts under $200,000, a flat fee is paid. If gross receipts are greater than $200,000, the tax amount is measured by the gross receipts. Although not dispositive, the BPOL tax is denominated a tax on the privilege of operating, with the level of activity measured by the gross receipts. But the issue remains whether a tax on gross receipts acts as a tax on the goods themselves. The current jurisprudence on the Import Export Clause must be considered. Both sides have argued the holdings in *Michelin Tire Corp. v. Wages,* 423 U.S. 276 (1976) and *Dept. of Revenue v. Assoc. of Washington Stevedoring, Cos.,* 435 U.S. 734 (1978) are instructive.

In *Michelin,* Georgia imposed an *ad valorem* property tax on tires and tubes that had been imported and warehoused at a distribution center. The Georgia court found that the tires lost their status as imports once they were removed from the original shipping cartons and mingled with other tires. The Supreme Court affirmed the tax without deciding the issue of whether the goods had lost their status as imports. The Georgia court relied upon *Low v. Austin,* 80 U.S. 29 (1872), which held states are prohibited from imposing a non-discriminatory *ad valorem* tax on imported goods until they lose their character as imports and became incorporated into the mass of property in the state. The Supreme Court acknowledged its incorrect analysis of the case of *Brown v. Maryland,* 12 Wheat. 419 (1827) in adopting its rationale in *Low*. The Court specifically pointed out that the *Brown* Court did not include non-discriminatory *ad valorem* property taxes among the prohibited imposts and duties. In other words, the Court used this opportunity to question its holding in *Low* that as long as the items retained their character as an import, a tax upon them in any form is constitutionally prohibited. *Michelin,* 423 U.S. at 282. The Court stated:

> Our independent study persuades us that a nondiscriminatory *ad valorem* property tax is not the type of state exaction which the Framers of the Constitution or the Court in *Brown* had in mind as being an "impost" or "duty" and that *Low v. Austin's* reliance upon the *Brown* dictum to reach the contrary conclusion was misplaced.

Michelin, 423 U.S. at 283.

In reaching this conclusion, the Supreme Court reviewed the rationale for the Import Export Clause, and concluded that there are three main concerns that the Framers of the Constitution sought to alleviate: (i) ensuring that the federal government speaks with one voice when regulating foreign commerce; (ii) preserving import revenues as a major source of federal revenue; and (iii) preventing disharmony likely to be caused if seaboard states taxed goods coming through their ports. *Id.* at 285-86. In export cases, only the first and third concerns apply. *Washington Stevedoring,* 435 U.S. at 758. These three concerns are not addressed here as there is no suggestion by Duty Free that they are in any way implicated in this case. I also find that the County has correctly argued that the concerns that are addressed in *Michelin* are not applicable to the facts in this case.

The Supreme Court pointed out that a non-discriminatory *ad valorem* property tax that also is imposed on imported goods that are no longer in import transit is not the type of exaction that was objectionable to the Framers of the Constitution. *Id.* at

286. The *Michelin* Court took the opportunity to discuss the distinction between imposts and duties:

> Unlike imposts and duties, which are essentially taxes on the commercial privilege of bringing goods into a country, such property taxes are taxes by which a state apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth; there is no reason why an importer should not bear his share of these costs along with his competitors handling only domestic goods. 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.

Id. at 287.

In this case, the County is attempting to apportion the cost of its services to the intended beneficiaries without regard to the origin or ultimate destination of the good: "...[s]uch taxation is the *quid pro quo* for benefits actually conferred by the taxing state" *Michelin,* 423 U.S. at 289.

The *Michelin* case is important because the Supreme Court concluded that the Import Export Clause is not a broad prohibition of every "tax" that falls in some measure on imported goods. The Clause prohibits imposts or duties that had well understood meanings. *Id.* at 290. 'Imposts' were like custom duties, that is, charges levied on imports at the time and place of importation. 'Duties' was a broader term embracing excises as well as custom duties ... and general property exactions were known by the term 'tax' rather than the term 'duty'." *Id.* at 292 (quotation omitted). The Court acknowledged that a tax could have an incidental effect on federal revenues by creating an economic burden on importation of foreign goods, but preventing or avoiding this incidental effect was not an objective of the Framers of the Constitution. *Michelin,* 423 U.S. at 287. The Court carefully drew a distinction between imposts, duties and taxes that had not been drawn in *Richfield:*

> The terminology employed in the Clause – "Imposts or Duties" – is sufficiently ambiguous that we decline to presume it was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate.

Michelin, 423 U.S. at 293-94.

In addition, the Court overturned the use of the "original package" test in *Low* to determine if imported goods are still in transport. That test created an opportunity for a state or locality to levy a tax if it could show that the importer had so acted upon the thing imported such as taking it out of its original package, for example, that it had lost its character. If it was in its original package, however, it could not be taxed. *Michelin* 423 U.S. at 297-98. The Court also observed that even with the original package test that allowed taxation if the item lost its character and was co-mingled, it was never intended that in the absence of such action (co-mingling), no tax could be imposed. *Id.*

In *Michelin,* the Court concluded that the tires were no longer in transit. They were stored in a distribution warehouse from which a wholesale operation was conducted. The non-discriminatory property tax did not violate the Import Export Clause. *Id.* at 302.

It would have been preferable had the Court directly addressed its holding in *Richfield.* The impact of *Michelin* is the subject of considerable disagreement between the parties in this case. Duty Free asserts that *Richfield* has not been overruled and the case does not address the concept of goods in transit. Duty Free also argues that a tax on gross receipts still acts as a tax on the goods themselves. In fact, the *Michelin* Court did conclude the tires were no longer in transit when they were stored in the warehouse. Of course, the real distinction here is that in *Michelin* the goods had been imported and had reached a destination (a warehouse) where they would be fully distributed. In this case, the goods also reached a warehouse awaiting further distribution for a retail operation, and the ultimate export of the majority of the goods. Duty Free maintains their goods are in continuous transit, and the nature of their business is such a continuous journey and stream of commerce that it ensures an export for the majority of their goods. *Michelin* does clarify that not all taxes are violative of the Clause. Without determining if *Richfield* was explicitly or implicitly overruled, it is safe to conclude that the legal landscape as it relates to the Import Export Clause changed significantly with *Michelin*. In *Michelin,* the Court reached the conclusion that the imported tires stored in the warehouse from which a wholesale operation was run were no longer in transit. The Court found that the warehouse was operated no differently than a distribution warehouse utilized by wholesalers who are dealing in domestic goods. Beyond this, the Court did not establish any criteria for a trial court to make a determination of when goods are in transit. Nor did the *Michelin* Court create a test for determining when a tax is "direct", or acts as a direct tax.

The parties also have argued the impact of *Dept. of Revenue of Washington v. Assoc. of Washington Stevedoring Companies, et al.,* 435 U.S. 734 (1978). Washington State imposed a business and occupation tax based on stevedoring activities in loading and unloading ships. The Court held that this tax was not an "impost or duty" and thus did not violate the Import Export Clause.

The *Washington Stevedoring* Court discussed *Michelin* and noted the *Michelin* Court determined for the first time which taxes fell within the absolute ban on imposts and duties. *Washington Stevedoring,* 435 U.S. at 751. I believe it is also significant that the Court noted that: "Previous cases had assumed that all taxes on imports and exports and on the importing and exporting processes were banned by the Clause". *Id.* at 752. Specifically, the Court cited the *Richfield* case. The Supreme Court then discussed the status of the law before *Michelin:*

> "Before *Michelin,* the primary consideration was whether the tax under review reached imports or exports.
>
> ***
>
> With respect to exports, the dispositive question was whether the goods had entered the "export stream" the final continuous journey out of the country.
>
> ***
>
> *Michelin* initiated a different approach to Import-Export Clause cases. It ignored the simple question whether the tires and tubes were imports. Instead, it analyzed the nature of the tax to determine whether it was an "Impost or Duty". Specifically, the analysis examined whether the exaction offended any of the three policy considerations leading tothe presence of the Clause ...

Washington Stevedoring, 435 U.S. at 752 (citations omitted).

This case clarifies the impact of *Michelin.* While not expressly overruling *Richfield,* there is a new calculus that is to be applied to import-export cases. The Court also addressed the fact that the *Michelin* Court, by finding the goods were no longer "in transit", did not face the question of whether a tax relating to a good in transit would be an impost or duty.

In *Washington Stevedoring,* the Court held that the activity taxed occurred while imports and exports were in transit, but the tax does not fall upon the goods because the tax reaches the business of loading and unloading ships in the State of Washington. Therefore, despite the existence of the first distinction (the activity occurred while imports and exports were in transit), the presence of the second (the tax reaches only activity in the State of Washington) leads to the conclusion that the tax is not an impost or duty when it violates none of the import-export policy concerns. Because the case involved exports only, the first and third policy concerns announced in *Michelin* have to be examined. *Washington Stevedoring,* 435 U.S. at 755.

In *Limbock v. Hoven & Allison Co.,* 466 U.S. 353 (1984), a case involving imports, the Court discussed the Import Export Clause cases:

> 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. We said precisely as much in *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.,* 435 U.S. 734.
>
> ***
>
> 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 the 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".

Limbock, 466 U.S. at 359-360.

Washington Stevedoring relied on *Canton R. Co. v. Rogan,* 340 U.S. 511 (1951), which involved a gross receipts tax on railroad operating in the Port of Baltimore. The company argued that since just under half of its gross receipts were derived from the transport of imports or exports, they were therefore immune from state tax. In *Canton,* the Court rejected this claim, finding that the immunity of services incidental to importing and exporting was not as broad as the immunity of the goods themselves. *Canton R. Co.,* 340 U.S. at 514-15.

In *United States v. International Business Machines Corp.,* 517 U.S. 843 (1996), the Court dealt with a challenge under Article 1, Section 9, Clause 5 (Export Clause) of the Constitution and discussed the Import Export Clause cases. Specifically, the Court noted that following *Michelin, Washington Stevedoring* did involve goods that were deemed to be in transit. This fact was not dispositive because the tax did not "fall on the goods themselves" and therefore was not an Impost or Duty:

> "In both Michelin and Washington Stevedoring, we left open the possibility that a particular state assessment might not be properly be called an impost or duty, and this would be beyond the reach of the Import-Export Clause ... Though we found in *Michelin* that a non discriminatory state property tax does not transgress the policy

> dictates of the Import-Export Clause, we also recognized that the Import-Export Clause is "not written in terms of a broad prohibition of every 'tax', and that impost and duty are narrower terms then tax. In *Washington Stevedoring,* we likewise rejected the assertion that the Import-Export Clause absolutely prohibits all taxation of imports and exports. We said that the term 'Impost or Duty' is not self-defining and does not necessarily encompass all taxes" and that the respondent's argument to the contrary ignored "the central holding of *Michelin* that the absolute ban is only of Imposts or Duties and not of all taxes".

IBM, 517 U.S. at 857 (citations omitted).

Conclusion

At trial, Duty Free established it deals in goods that are sold for domestic consumption but that over ninety percent of its sales were goods destined for export. As the goods move from warehouses in Florida and Texas to the Loudoun County warehouse and ultimately, to Duty Free's retail stores at Dulles International Airport, and are sold, Duty Free asserts the goods for export are "in transit". Although Duty Free is able to show, through its record keeping, the percentage of goods sold for export on any given day, the ultimate disposition of each good in Duty Free's retail stores is unknown until the moment of sale. Because of its ability to track sales and the fact that historically most items are sold for export, Duty Free can legitimately claim that a majority of the goods they sell are in the stream of commerce for export. But this determination is not dispositive, as there is no longer a broad prohibition against all forms of state taxation that may affect an export. The absolute ban is on imposts and duties, and not all taxes. The fact that a tax may indirectly affect an import or export is not dispositive because every tax could be said to affect the value of goods sold as a cost of business.

There is no suggestion that this tax would be prohibited by any of the *Michelin* policy considerations (first and third) relating to exports. The BPOL tax itself is determined by the State and County as a tax on the privilege of operating within the County. It is clear that under Virginia case law, it is deemed an indirect tax. This tax is not a property tax on inventory nor is it a sales tax exacted at the point of sale. It is not identified with any particular good. It is triggered by the decision to engage in business activity in Loudoun. The level of activity is measured by gross receipts. The business activity that it reaches is significant, and it impacts the County. The activity extends throughout the process of the transport in Loudoun County to the warehouse and distribution to the retailer for the ultimate sale. The BPOL tax cannot be viewed as a tax on the commercial privilege of exporting, but rather a tax designed to allow the County to apportion the cost among the businesses for the services provided. It is not an impost or duty. It is an indirect tax that does not "fall" upon the export.

To the extent that Duty Free maintains that *Richfield* still controls because a tax on gross receipts acts as a tax on the goods themselves, I find that this broad proposition is no longer applicable. Under *Michelin* and *Washington Stevedoring,* this BPOL tax is not an impost or duty, and does not transgress any of the policy dictates behind the Import Export Clause. The BPOL tax does not fall upon the goods themselves. The fact that it can have some impact on exports because the business activity is measured in gross receipts does not alter this conclusion. The BPOL tax of Loudoun County does not violate the Import Export Clause of the U.S. Constitution. Mr. Jackson should draft an order that may incorporate by reference this opinion and each side may note their respective objections. I will place the matter on the docket for May 6, 2016 at 2:00 p.m. for entry. Neither side is required to appear provided an endorsed order has been submitted prior to that date.

Very truly yours,

/s/

Burke F. McCahill
Judge

BFM/gpt

APPENDIX C

CONSTITUTIONAL & STATUTORY PROVISIONS

Article I, Section 10 of the United States Constitution provides, in relevant part:

> 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 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 Controul of the Congress.

U.S. Const. art. I, § 10, cl. 2.

* * *

Virginia Code § 58.1-3702 provides, in relevant part, that "the governing body of every county, city and town that levies [a] license tax may impose the tax on the gross receipts or the Virginia taxable income of the business." Va. Code Ann. § 58.1-3702.

* * *

Virginia Code § 58.1-3703.1(A)(3)(a) provides, in relevant part, that "[w]henever the tax imposed by this ordinance is measured by gross receipts, the gross receipts included in the taxable measure shall be only those gross receipts attributed to the exercise of a privilege subject to licensure at a definite place of business within this jurisdiction." Va. Code Ann. § 58.1-3703.1(A)(3)(a).

Appendix C

* * *

Loudoun County Ordinance § 840.01(k) provides: "'Gross receipts' means the whole, entire, total receipts attributable to the licensed privilege, without deduction, except as may be limited by the provisions of Chapter 37, Title 58.1, of the Code of Virginia, as amended." Loudoun County Ordinance § 840.01(k).

* * *

Loudoun County Ordinance § 840.03 provides, in relevant part:

> (a) License Required. Every person shall apply for a license for each business or profession when engaging in a business in this jurisdiction if:
>
> (1) The person has a definite place of business in this jurisdiction . . . .
>
> . . .
>
> (f) Licensing Basis. As to businesses, professions, trades or occupations for which a gross receipts license tax is levied on persons having a definite place of business in the County, all gross receipts derived from the business, profession, trade or occupation shall be included in their licensing basis . . . .

Loudoun County Ordinance § 840.03(a), (f).

Appendix C

* * *

Loudoun County Ordinance § 840.14 provides, in relevant part:

> In addition to the fee specified in Section 840.13(c), any person engaged in a business, profession, trade or occupation with gross receipts of more than two hundred thousand dollars ($200,000.00) shall be assessed and required to pay annually a license tax on gross receipts or a flat tax at the rate established for the particular enterprise as set forth below:
>
> . . .
>
> (o) Retail Merchants. Every person engaged in the business, profession, trade or occupation of selling goods, wares or merchandise, for use or consumption by the purchaser, at retail only and not for resale, shall pay for the privilege an annual license tax of seventeen cents ($0.17) per one hundred dollars ($100.00) of gross receipts.

Loudoun County Ordinance § 840.14(o).