ORIGINAL

In the

# Supreme Court of the United States



DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,

PETITIONER,

V.

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, ET AL.,

RESPONDENTS.

No. 76-1706

January 16, 1978
January 17, 1978
Washington, D. C.

Pages 1 thru 48



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| DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON, Petitioner, | |
| v. | No. 76-1706 |
| ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, ET AL., Respondents. | |

Washington, D. C.

Monday, January 16, 1978.

The above-entitled matter came on for argument at 2:48 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

SLADE GORTON, ESQ., Attorney General of Washington, Temple of Justice, Olympia, Washington 98504; on behalf of the Petitioner.

JOHN T. PIPER, ESQ., Bogle & Gates, The Bank of California Center, Seattle, Washington 98164; on behalf of the Respondents.

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# C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in 76-1706, Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies, Et Al.

Mr. Attorney General, I think you can reasonably begin.

ORAL ARGUMENT OF SLADE GORTON, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GORTON: Mr. Chief Justice, and may it please the Court:

The State of Washington imposes a general gross receipts tax on practically all services performed within the state, together with a similar tax on other business activities. It is the principal form of taxation on business imposed for the support of state institutions and services.

The source of any goods upon which taxable services are performed is irrelevant, there is therefore no discrimination against goods originating at or destined to points outside of the state.

In Puget Sound Stevedoring Co. v. Tax Commission, in 1937, this Court found that tax to be invalid insofar as it was imposed upon a stevedore's bueinss of loading and unloading ships in interstate and foreign commerce. The basis of that decision was that stevedoring "is interstate or foreign

commerce," the privilege of engaging in which was not subject to what you then characterized as a direct tax by the state.

Ten years later, in Carter & Weekes, you adhered to that decision. The Court held that the tax was not properly apportioned and that the risk of multiple taxation was present because both the state of the loading and that of the unloading might tax the stevedoring activities in their respective jurisdictions.

Stevedoring was not considered to be distinct enough from the transit by ship to be taxable. At that time, of course, to characterize the tax as being directly on interstate commerce was sufficient to invalidate it. Four Justices dissented.

You have agreed to review the soundness of Carter & Weekes and Puget Sound Stevedoring, perhaps in the light of your recent decisions in Michelin Tire and Complete Auto Transit.

We submit, however, that the vitality of those two stevedoring precedents ended as long ago as 1951 when you decided Canton Railroad v. Rogan and Western Maryland Railway v. Rogan.

Roughly half of the Canton Railroad's receipts were for wharfage services, the privilege of using Canton's piers for the transfer of cargo to lighters and to trucks, and for

switching freight cars loaded with imports and exports between the piers and the trunkline railroads. Maryland nevertheless imposed a gross receipts tax on all of Canton's income, including that from these services for imports and exports. You found that tax not to violate Article I, section 10, as it was not levied against the articles of import and export because "the tax is not on the goods but on the handling of them at the port; an article may be an export and immune from a tax long before or long after it reaches the port, but when the tax is on activities connected with the export or import, the range of immunity cannot be so wide."

It is true that the Court expressly reserved the question of whether stevedoring fell within its holding. Stevedoring, of course, was not before you. But a tax on stevedoring is as clearly one on the handling of goods at the port and not on the goods themselves as was the tax in Canton.

Just two years ago, in Michelin Tire, you took the opportunity even more carefully to examine the import-export clause. You decided there that a nondiscriminatory property tax on imported tires in storage was not an impost or a duty prohibited by Article I, section 10. I note, however, that unlike the activities here and in Canton, the tax in Michelin Tire was levied directly on the goods and not merely on the

activity of handling them.

In Michelin Tire, you examined the concerns of the framers of the Constitution in drafting the import-export clause. You found three such concerns. First, the necessity that the United States speak with one voice in regulating of foreign relations and international trade; second, import duties were to be the major source of the federal government's revenues and should not be diverted to the states; and, third, harmony among the states was to be preserved by preventing seaboard states from taxing goods merely passing through on their way to interior states.

The respondents here do not suggest that Washington's tax has any impact on the first two concerns. They do, however, accuse us of a tollgate mentality, of trying to get something for nothing from the citizens of other states whose goods use our ports. They are in error.

First, it is somewhat odd that respondent's should so castigate tolls. Perhaps they hope that the Court would prohibit the State of Maryland from charging a truck a toll for crossing the Chesapeake Bay Bridge simply because the truck was carrying exports bound for a ship at the dock in Baltimore. But a nondiscriminatory toll in return for a service provided is clearly constitutional.

The validity of a tax or toll or levy is not determined by the label which those who pay it attach to it.

The characterizations or assertions upon which respondents' argument rests are found on pages 21 and 22 of its brief. First, respondents claim that by their nature imports and exports passing through seaports involve stevedores. Next, they assert that all must admit that a tax on the mover of imports is a tax on the goods themselves. They are wrong on both counts. Our tax --

QUESTION: Mr. Attorney General, it is not your submission, is it, that this tax is the equivalent of a toll collected by a state for a specific service rendered such as the use of a state road, are you?

MR. GORTON: It is not. I am simply stating that to characterize it as a toll on the part of the respondents doesn't answer any of the questions which are before you. It is up to you to determine what it actually is.

QUESTION: But you don't say that it is a toll?

MR. GORTON: I don't claim that it is an equivalent of the toll, either. I just say the tollgate argument is irrelevant.

QUESTION: Mr. Gorton, now that you are interrupted, am I correct that your tax does not apply to farming or to insurance?

MR. GORTON: This specific tax does not apply to the occupation of farming or to insurance. Insurance is covered by another tax. There is an insurance premium tax

in the state and, of course, farmers pay a disproportionate real property tax because of their holdings.

QUESTION: At least they will say they do?

MR. GORTON: At least they will claim they do, successfully to the legislature. Our tax at least in this case, like the toll on the Chesapeake Bay Bridge, is not levied against imports or exports at all. For example, it does not apply to imports or exports by air or by rail or even by ship when no in-state stevedoring services are provided.

The table inserted at the end of respondents' own brief is perhaps the most graphic illustration of this point. Neither Washington's most important export, aircraft, nor its most important import, petroleum, requires the use of stevedoring services at all.

QUESTION: You told us not too long ago right where you were that apples was a pretty big one.

MR. GORTON: They were and they don't use stevedores, except on the rare occasion when they are being shipped overseas rather than to North Carolina, as in that case. Thus neither of these major exports and imports is subject to the tax.

On the other hand, our tax is applied to the analogous intrastate services of freight handlers, for example, whether the destination of the freight they handle is

inside the state, in another state, or in a foreign country. We, like Maryland in Canton Railroad, are not taxing goods at all but merely the handling of those goods at the port.

The respondents' bald decision that the two are identical is not only conceptually in error but repudiates directly your holding in Canton Railroad, which brings us to the analogous limitations of the commerce clause.

Last year, in Complete Auto Transit, you resolved that the test of the validity of a tax affecting commerce is "not the formal language of the tax statute but, rather, its practical effect." And that a tax is to be sustained when it "is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state."

The respondents here don't deny the substantial nexus, nor can they claim that the tax is other than precisely apportioned because all of their business is done wholly within the State of Washington. The tax does not discriminate against interstate commerce. It applies equally to stevedoring services and to all other services with respect to goods, to handling goods, whether the goods come from or are bound to other points in the State of Washington, Alaska, or Japan.

Finally, the tax is reasonably related to services provided by the state. For forty years, respondents have

avoided the principal business tax applied to other businesses in the state for the support of both state and local services. It is time to end their free ride.

The respondents claim that, even though the tax may not be discriminatory now, it might become so in the future. In both Complete Auto Transit and Michelin Tire, you found that assertion to be insufficient to invalidate a tax. The rationale for such a decision here is even stronger.

MR. CHIEF JUSTICE BURGER: We will resume at that point at 10:00 o'clock tomorrow morning, Mr. Attorney General.

MR. GORTON: Thank you, Mr. Chief Justice.

[Whereupon, at 3:00 o'clock p.m., argument in the above-entitled matter was recessed, to resume on Tuesday, January 17, 1978, at 10:00 o'clock a.m.]

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