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

Washington, D. C.

Tuesday, January 17, 1978.

The above-entitled matter came on for further argument at 10:07 o'clock a.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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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Attorney General.

ORAL ARGUMENT OF SLADE GORTON, ESQ.,

ON BEHALF OF THE PETITIONER - CONTINUED

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

The respondents challenge Washington's gross receipts tax on stevedoring under both the commerce clause and the import-export clause. Both are relevant, as the stevedores provide services for goods both to and from other states and to and from other nations.

Since Complete Auto Transit last year, the rules as to the validity under the commerc clause are easy to state. Labels attached to the tax are irrelevant. The tax is not invalid unless it discriminates against interstate or foreign commerce, is improperly apportioned, is unrelated to any services provided by the taxing state, or applies to business to which the taxing state has no substantial nexus. None of these objections can be fairly applied to this tax.

The import-export clause, on the other hand, is both more peremptory and more narrow, but a tax may run afoul of it for reasons which would also invalidate it under the commerce clause. A non-discriminatory property tax against goods in transit is an example which you used in Michelin Tire. Such a tax, of course, would also be improperly apportioned.

QUESTION: Could a tax violate the export-import clause without violating the commerc clause?

MR. GORTON: Precisely. That is my next point, Mr. Justice Rehnquist. The peremptory ban of the import-export clause itself, however, is directly only against imposts and duties on imports or exports. Such an import --

QUESTION: But unlike the commerce clause, it is a direct prohibition on the states?

MR. GORTON: It is a direct prohibition and in that sense it is much more peremptory and specific than is the commerce clause. Such an impost or duty is invalid even though it meets all of the commerce clause tests, but in fact there are relatively few such levies.

An example: If the State of Washington imposed a manufacturing tax on widgets and a compensating tax on widgets imported from Japan, the latter tax might well meet all of the tests of the commerce clause, but it would still be an impost or a duty on an import.

Another example is a tax on bills of lading, the documentary evidence of goods in commerce, and thus a tax on the goods themselves.

But Article I, section 10, does not apply to a tax which is not an impost or a duty on imports or exports. In Michelin Tire, you found the property tax there not to be an impost or a duty even though the tires might still be imports.

This case, we submit, is easier than Michelin Tire. Not only is our tax not an impost or a duty, it is not on imports or exports either. Canton Railroad points out that the effect of the import-export clause is narrower as to services related to imported goods than it is to the goods themselves, and that it does not extend to transportation services consisting of handling of goods at the port, which is exactly what the respondent stevedores do.

Our tax is on that local service only. It ignores both the goods and their value, deals with a subject which no other state can conceivably tax, and is designed to defray the fair share of the costs of government provided to those who are engaged in the stevedoring service. It ignores that large class of imports and exports which do not require stevedoring services; thus it does not impinge upon any of the purposes of the export-import clause which you outlined in Michelin Tire.

QUESTION: Mr. Attorney General, in Michelin those tires had come to rest. Does that amount to anything in this case?

MR. GORTON: It does not --

QUESTION: You agree that they really had come to rest?

MR. GORTON: You certainly could have decided Michelin Tire on that basis. The intriguing element of the decision was that you specifically declined to do so in order to --

QUESTION: So you don't see that that has any significance at all?

MR. GORTON: -- so I do not believe that that has any significance here.

Yesterday, Mr. Justice Blackmun noticed respondents' claim that Washington's gross receipts tax was not general because it did not apply to every single business occupation in the state. Under respondents' theory, no property tax is general because some property is always exempt. The federal income tax is not general because some categories of income are exempt.

As a matter of fact, we would be hard pressed to find under that theory a single general tax anywhere in the United States.

QUESTION: In that connection, General Gorton, is any service industry in the State of Washington taxed at a rate that is different from what is applied to stevedores?

MR. GORTON: Yes, railroads are higher, Mr. Justice Blackmun. But most services, the great bulk of services are taxed at this rate.

QUESTION: I have one other question and then I will stop. As I understand the state's power here, it was exercised through a revenue ruling?

MR. GORTON: Yes, but it is a revenue ruling which is totally consistent with the state statute. The only reason

that the state statute has not been applied to this activity previously is your decision in Puget Sound Stevedoring, which of course resulted in an injunction against our exercise of that statute.

QUESTION: And I take it, in any event, your opposition raises no question about the fact that it was applied by a revenue ruling as distinguished from something else?

MR. GORTON: I don't believe that it does, but I will have to leave that --

QUESTION: I didn't find it in the brief.

MR. GORTON: -- for Mr. Piper.

QUESTION: Under your theory that coastal states, whether East Coast, West Coast or Gulf Coast, would always have some taxing advantages that the inland states would not have, I take it, simply by virtue of the fact that stevedoring activities are conducted in those states and not in other states?

MR. GORTON: If one concentrates, Mr. Justice Rehnquist, only upon stevedoring services, I suppose some inland states would be able to do so. I would imagine St. Louis has stevedores. There would certainly have to be navigable waters in a state for a state to subject its --

QUESTION: Wyoming has coal mining.

MR. GORTON: That is exactly the answer. Wyoming can tax coal mining. California and Florida can tax the

production of oranges. These in a sense are advantages to those states because of their peculiar geographical nature, but they don't rise to constitutional significance.

QUESTION: Except to the extent that the tollgate mentality that your opponents mention and you criticized yesterday, does seem to have been on the minds of the framers, whereas the taxation of oranges and coal mines does not seem to have been.

MR. GORTON: Yes, but you have held as recently as Michelin Tire that the mere fact that a nondiscriminatory state tax which does not affect, which does not deal less favorably with imports than it does with domestic goods, does not violate the import-export clause because it doesn't meet any of the purposes of the import-export clause.

In other words, the mere fact that a tax or a service adds to the costs of goods or services in some other state, if the tax is a fair one and fairly apportioned, is not a ground for finding it to be invalid.

QUESTION: Only the coastal states could impose a tax on saltwater fishermen, which would presumably increase the cost of fish in the interior states.

MR. GORTON: Everywhere in the United States, but you would not void that on constitutional grounds.

QUESTION: Do the coastal states have some revenues that the orange states might not have?

MR. GORTON: Certainly. In this case, the coastal state has the burden of providing police services and fire services and every other governmental service for stevedores. The State of Wyoming has no such burden for stevedores.

QUESTION: In a more concentrated way on the water front, in other words?

MR. GORTON: Yes. We have to protect our waterfront. Wyoming has no waterfront which it has to protect. We are levying a nondiscriminatory tax against businesses on that waterfront.

QUESTION: You collect a sales or use tax on transactions involving imports, imports that are delivered into the State of Washington?

MR. GORTON: Only when they are sold in the State of Washington. We cannot levy a sales tax against an item which is sold in another state, whether it is an import or not.

QUESTION: Well, I suppose you levy use taxes?

MR. GORTON: We would not levy a use tax on an item which is in the process of commerce, no.

QUESTION: That is what I wanted to know, whether you would or not.

MR. GORTON: No.

QUESTION: Well, don't you levy a use tax on goods that bought over across the border in Oregon and brought back into Washington?

MR. GORTON: Yes, we do.

QUESTION: How about imports?

MR. GORTON: Yes, I believe that we would tax an import which came to rest in the State of Washington and was being utilized by a resident of the State of Washington, but not an import -- this would, of course, involve no burden on people in other states. We would not levy a sales or a use tax against an import which was on its way to Idaho.

QUESTION: You don't think Atlantic Richfield applies the other way then?

MR. GORTON: Atlantic Richfield, it seems to me, first you spoke of taxes rather than imposts or duties in Atlantic Richfield. Secondly, Atlantic Richfield's decision does not need to be reversed or overruled in this case. Atlantic Richfield --

QUESTION: Some other day?

MR. GORTON: I think not. Atlantic Richfield's tax was invalid under your long line of decisions to the effect that a sales tax can be levied only by the destination jurisdiction, which in that case California was not, and your current law has not threatened by any means the holding of the Atlantic Richfield case, and we do not challenge it.

One final point which is raised by these respondents is the implication that they are somehow politically powerless outsiders in a marginal business. Interstate and foreign

trade are vital to the economic health of the State of Washington. These private corporate respondents reside in and do business exclusively in the state; and the Public Ports Association respondent represents municipal corporations so politically powerful that they have obtained a special state constitutional exemption from property tax limitations applicable to every other governmental entity, including the state itself, save one.

In summary, Washington's gross receipts tax here at issue does not tax imports or exports at all. In fact, a large proportion of the imports and exports passing through the state are not even affected by the tax because they do not require stevedoring services.

The tax is levied on the handling of goods only and not on the goods themselves. Those services are performed entirely within the state and the tax is thus precisely apportioned. The tax does not discriminate against interstate or foreign commerce and is fairly related to governmental services provided by the state.

As Walter Hellerstein says in his masterful Michigan Law Review article of last June on Complete Auto Transit and Michalin Tire, "In each case, this Court's opinion can fairly be read as stressing a common doctrinal theme: So long as the state does not discriminate against or impose burdens upon the constitutionally protected interests, the tax will be sustained."

Perhaps the sole serious aberrations from this theme are Puget Sound Stevedoring and Carter & Weekes. We submit that it is time to put them to rest.

MR. CHIEF JUSTICE BURGER: Mr. Piper.

ORAL ARGUMENT OF JOHN T. PIPER, ESQ.,

IN BEHALF OF THE RESPONDENTS

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

The respondents are stevedoring companies of the State of Washington and also the Washington Public Ports Association, and to that extent and by their participation, they have one segment of the public contesting with another.

The respondents, by the record, load and unload ships between the first and last point of rest on the pier or dock and the ship's hold. We are here to defend, as you know, the validity of two of your decisions, the Puget Sound case, decided in 1937, the Carter & Weekes case, decided ten years later, in 1947. And we invoke two clauses of the Constitution commonly called the import-export clause and the commerce clause.

We see the clauses as different in force and effect. Until this morning, it was our impression from the briefs of the state that they saw the clauses as imposing substantially the same prohibitions on commerce, namely your tax is okay if it doesn't discriminate and if it apportions.

We hear today that the import-export clause does have more force. I must admit that I didn't catch the exact point on which it has more force. But we will, of course, say that it does and will try to be specific as to the additional force we think it has over the implied prohibition of the commerce clause.

We start therefore with what might be our best foot forward, with the import-export clause, which does contain an express prohibition. Our thesis under the import-export clause is this, that the express prohibition which in paraphrase says that no state shall lay duties on imports and exports, does cover in a literal plain-meaning sense loading and unloading because, we suggest, two reasons: loading and unloading is in a functional sense right at the heart of the import-export process.

We also invoke we think a kind of approach suggested by this Court in Michelin, where Michelin pointed out that the tax there, a tax on the mass of goods and the property in the state after they had come to rest, was avoidable by the importer. We say here that on analysis we think anyone would come to the conclusion that a tax fastened on the loading, on the unloading would not be avoidable by the importer-exporter, that if the state were given power over that link in the process, they would have effectively power over the process as a whole.

QUESTION: How would you distinguish the statute in one levied in terms of a charge on the use of the wharf or the dock by the -- on a publicly owned wharf or dock?

MR. PIPER: The wharfage kind of case, cases like that have been regarded as a kind of collateral, things that seem to be supplemental or an aid to the process, not integral to it, have been treated traditionally as collateral. I am not sure that I would say that it couldn't have been decided otherwise, but that is the law.

QUESTION: Well, I am wondering how you distinguish it from police and fire protection? Certainly when you are importing oil, you have a particularly high fire risk or at least something even more volatile, the risk goes up. How is that fundamentally different for constitutional constitutional purposes from police and fire protection, in the routine case of fire?

MR. PIPER: As we read your cases, this Court seems to have focused on the essential import process, bringing the goods in, getting them sold, and the things that are peripheral, in aid of, as a matter of first impression, perhaps they might have been protected, but they haven't been.

QUESTION: You can't bring them in without the vehicle, can you?

MR. PIPER: That's correct. I think the only answer I can give is that there has been a very bare bones kind of

protection. It has not included such things as wharfage, cranes, renting cranes. In the first stevedore case, for example, among the actitivites that the stevedoring company did was to make longshoremen available by hire. Tht was not protected, although it was in aid of process. So it is kind of a hardcore line, and I guess what we are saying here is that even the strictest definition would find the landing of the goods essential to import, the loading of the goods essential to the exporting.

There is a negative side to our thesis that we may have to deal with also. The state, it seems to us on brief at least, has attempted or suggested that they would graft onto the clause a kind of implied limitation which would be to the effect that it was -- a tax is all right if it doesn't discriminate and it is apportioned. We would resist that for reasons that I will state. We are not, of course, sure just how strongly they feel about that limitation after this morning, but we will deal with it anyway.

Returning to why we feel that we are covered by the express language, the language that is actually there in the clause, I turn against to the functional idea: If importing is bringing things into the country, what can be more central to that than putting it on the land.

This Court, in Brown v. Maryland, in fact, expressly said that a tax could be as effective to control importing and

exporting if it attached at the instant of landing as if it attached out at the entry of the harbor. Going in the other direction, what could be more central to getting the goods out of the country, exporting, than getting them aboard the ship?

Another test, as I have suggested, came out of your decision we think in Michelin. There you pointed out that the tax there could have been avoided by the importer just by keeping the goods moving. Now, the implication of that reasoning, it seems to us, is that if the function that is involved here is so fundamental to the process that the importer cannot avoid it, it is part of the process. In other words, if you give the state a power over this link in the chain, he has power over the whole process.

The Brown v. Maryland case is instructive there. That was the one that this Court relied on principally in Michelin. There the tax was a license to sell, and this Court reasoned that without the ability to sell the product, the act of importing was useless. So that by fastening on the ability to sell, they effectively taxed the process itself.

The Almy case, we've cited on brief, is another example. Ther, there was a otax not on the importer but on the carrier, or more precisely on the carrier's bill of lading, and this Court took notice of the fact that a bill of lading is really essential to commerce. Therefore, if you fasten on that bill of lading, you have fastened on the process itself.

In short, what we are saying is that we come under the literall, express language of the clause as written, that if you give the power, give the state the power to tax, this link in the process, they can effectively tax the process.

Now, I come to what I would call our negative part of our thesis under this clause, is there an implied limitation in the clause that says in effect that no state shall lay a duty on imports except that the state may do so if the tax is unapportioned and nondiscriminatory.

The clause, as you know, has one express exception, a state may tax in order to enforce or execute its inspection laws. But there is an imperative in that exception. It says it may tax to the extent absolutely necessary, so we are faced then with just one exception that is express, and a rather stringently restricted exception at that. May you graft on, should this Court graft onto the express clause an implied limitation that a tax is okay if it is unapportioned and nondiscriminatory.

Now, despite counsel's statement this morning that the import-export clause does have more force, we haven't in our minds at least detected what force it would have beyond approving taxes that are nondiscriminatory and apportioned. Certainly, there is no suggestion in their brief as to just why a tax would be struck down if it could meet those two requirements.

We give you three exceptions that we take to the idea that there is some kind of limitation here in the nature of taxes are okay if they are nondiscriminatory and apportioned.

Your decision in Richfield has dealt with this question at length, very carefully taken into account the history of the Constitution, the standards by which the Constitution should be expounded. I am not going to repeat it because we dealt with it at length in our own brief at pages 11 and 12.

I want to go as my second exception to the idea that we can impliedly limit this clause to the purposes of the clause. Counsel yesterday stated correctly that this Court in Michelin identified three purposes of the clause. One of the purposes we discussed on brief, which is the prevention of the transit fee: Michelin said that the clause was fashioned to prevent transit fees, and the experience under the Articles of Confederation had taught that the seaboard states were inclined to fasten on these transit fees on goods flowing to the inland states.

Throughout the decision in Michelin, there are repeated careful distinctions of the transit situation from the tax on the mass of the property involved there. For example, the holding of this Court in Michelin, as stated in the last paragraph of the opinion, begins, "Petitioner's tires in this case were no longer in transit."

There is at page 290 of the Michelin opinion a

statement or I think a very strong suggestion -- I am going to put it that way -- that even a nondiscriminatory property tax might have to exclude or would have to exclude goods in transit. So we think the transit idea has been carefully set aside and preserved in the Michelin decision.

Now, the state wants to do exactly what that purpose was intended to prevent. They want to have a transit fee. Now, to be sure, it is a kind of sanitized transit fee, because it is nondiscriminatory and apportioned, but it is a transit fee nonetheless. It enlarges their tax base by the increased volume of traffic at the expense of the inland states.

I address myself now to the other two purposes that you identified in Michelin that underly this clause. We did not address them as counsel correctly pointed out on brief, but I do now.

The federal government wished to avoid having the states share with it the revenues and the power of regulation over foreign commerce, and we say that the state's brief asserts the power to do exactly that. They say at page 32, in a title, "A state may, consistent with the Import-Export Clause, impose a tax on the act or privilege of engaging in the business of transporting goods moving in foreign commerce."

Now, that business would include the business of the foreign carriers themselves. Stevedoring or the loading and unloading is the issue here. But the business of transporting

goods moving in foreign commerce, that is a business that the foreign carriers are engaged in.

Suppose, for example, that they asserted that tax and the foreign carriers, perhaps not being accustomed to that kind of treatment, resisted payment. Zealous collection officers presumably would take the most practical means of collection, namely seizing the ship. That would have I think some impact on foreign relations.

Again on the regulation point, if the power to tax is the power to regulate, this Court has, as we have pointed out on brief, previously said that our state, which is a dairy state, may tax oleomargarine -- this is the 1930's -- without violating the rules against discrimination, which are very loose, we say very feeble rules. Well, why couldn't they if they were granted the power they ask here, to tax handling or tax loading and unloading, why couldn't they discriminate between what is being unloaded and loaded, like discriminate against oleo, against South American beef, why couldn't they, in other words, use the power to tax loading and unloading to erect wreck their own tariffs?

Now, this is speculation. I guess the point we would say is that the speculation or the concerns expressed here were considered by the framers of the Constitution, and it is not, we suggest, appropriate for them to be second-guessed. Those are the purposes that the framers thought merited this expressed

prohibition, and we suggest that they should be accepted and the language should be applied as it was written.

Now, I come to the last reason why we excepted the idea that there is some kind of implied limitation here, and it comes back again to the idea that we think there surely must be more force in an expressed clause than in an implied one, and therefore whatever you may decide is the rule in the commerce clause, we of course assert that the commerce clause has a stronger prohibition than the state does.

But whatever you may decided, surely there is some additional strength or force and effect in the import-export clause than you would find in the commerce clause.

In connection with this question about the greater force of the import-export clause, let me mention the Canton Railroad case discussed by counsel yesterday as being the case in which impliedly overruled the stevedoring cases. That was a case written by Mr. Justice DOuglas.

Now, the language of that opinion and its companion did in fact consist of the word "handling." But if you look at the facts carefully, "handling" covers things that are really not loading and unloading. It covered storage, wharfage, weighing of loaded freight cars, furnishing a crane -- these are the peripheral sort of things, Mr. Chief Justice, that, as I said, in tradition just have not received the protection, currently not being close enough to the core. This was in fact

a distinction made in the first stevedore case.

Perhaps the closest thing to transportation there was switching of cars from one point in Baltimore, that is from the piers to the trunkline railroads. Mr. Justice Douglas said that was more remote than stevedoring and he distinguished the stevedoring case.

Lest you think that that was a mere perfunctory distinguishment that Mr. Justice Douglas made, I call your attention to the fact that Mr. Justice Douglas participated in the second stevedore case in 1946, just four years before Canton, and there he voted to sustain the tax under the commerce clause. But under the import-export clause, he switched over to the majority and was joined by one other Justice so there was a 7-2 decision there, and he said to him the express prohibition of the import-export clause made the difference. And again it was Mr. Justice Douglas who wrote the Richfield opinion, which said lack of discrimination is not enough to save a tax that applies to import-exports.

I turn now to my argument on --

QUESTION: Just one observation there. What he says in Canton, because this is pretty close, he ends up his discussion by saying, "Hence, we need not decide whether the loading for export and unloading for import are immune from tax by reason of the import-export clause," and cites Carter & Weekes, when it would seem that Carter & Weekes had already

decided it. He said we need not decide whether or not to overrule Carter & Weekes. Isn't that a fair reading of that?

MR. PIPER: Yes, I believe it is. And if we had nothing more to go on, I would say that it would be fair to imply that perhaps he has some doubt in his mind because we need not decide this sort of language, and that is why I call your attention to the fact that just four years before he had purposely switched his decision.

QUESTION: He had been one of the two standards.

MR. PIPER: Yes.

QUESTION: One other question. He draws the line, they actually begin and end at the water's edge, he uses that language in the Canton case. This activity actually goes beyond the water's edge, doesn't it? It goes into the hold of the ship?

MR. PIPER: It overlaps. It is from point of rest, the last point of rest into the ship, from hold of the ship back to the first point of rest. That language is not precise. I think the distinction that he makes of the distinguishing of the stevedore cases, you just have to take as adding the precision that the language itself does not contain.

QUESTION: And why is an income tax on a stevedore, a state income on a stevedore, why would it be acceptable?

MR. PIPER: I think traditionally, with some real economic merit and force, this Court has regarded property

taxes, net income taxes as standing in somewhat better constitutional grounds as far as movement in commerce is concerned, because it tends to tax accumulated wealth and it --

QUESTION: Well, that may be but not for commerce. But you say the clause you've got here, it has a deeper bite.

MR. PIPER: Your question would be what would happen if you attempted to --

QUESTION: Why is an income tax valid under this clause, even if it wouldn't violate the commerce clause?

MR. PIPER: I am actually tr-ing to recall whether a decision has been made that says that an income tax is valid.

QUESTION: Well, whether a decision is made or not, you are cutting new ground now or you don't want to cut new ground, why wouldn't a -- what is your justification for sustaining an income tax?

MR. PIPER: If I had to predict what would occur and the rationale behind it, I would probably say that an income tax on the portion of the net income that might be traced to the import, let's say, would probably be --

QUESTION: Well, let's say he has got no income but stevedoring?

MR. PIPER: All right, then it would be -- the tracing would be easy in that case. I would be inclined to

predict a sustaining on the basis of the history where income taxes and property taxes have been considered sufficiently remote. Now, you get conceptually into difficulties in justifying this. Taxation being kind of practical, we say, well, it doesn't seem to have the same impact that excises do and we justify it on practical grounds, and conceptually we do get into difficulties, very much like --

QUESTION: Well, how about a gross receipts tax on the importer?

MR. PIPER: On the importer?

QUESTION: Yes.

MR. PIPER: I think that --

QUESTION: He is in the business of importing.

MR. PIPER: Yes.

QUESTION: And he is the fellow who goes and picks the goods up at the point of rest. Where the stevedore leaves it, he picks it up. He is the importer, and he picks it up and puts it on a common carrier headed for New York or headed for some other place.

MR. PIPER: Your decision in Brown v. Maryland would clearly protect the importer, if by that you mean the person who is responsible for the goods having been brought into the country, he was the --

QUESTION: He wouldn't have to pay the gross receipts tax?

MR. PIPER: That's correct, under Brown v. Maryland. That importer in Brown v. Maryland did not even have to pay the tax on his sale on the theory that by taxing his sale you ineffectively made it -- if he cou'dn't sell, his importing was useless. So I think that that decision has been made, if you are talking about the fellow who brings the goods, who causes the goods to be brought into the country.

QUESTION: What if all he is going to do with it is sell it interstate, does that make any difference?

MR. PIPER: He has to --

QUESTION: What if all he is going to do with it is to use it as a raw material to a manufacturer?

MR. PIPER: You can tax him, let's say, at the point of manufacture without any question.

I turn now to the commerce clause which as we have said is an implied prohibition, therefore it is weaker. It leaves large areas available for taxation. For example, under the commerce clause, the interstate sale itself is taxable. The state of the market may tax the production of the goods, the manufacture or extraction of the goods is taxable.

A good deal of transportation of interstate goods is taxable. Our thesis here is though that there remains and should remain in the law an area of protection of

transportation, of movement in commerce, and I propose to develop that thesis and draw the lines, referring to your decisions by some illustrations.

Assume first a journey from Alaska to Seattle, unloaded, let's say, by stevedores, to a local carrier and proceeding from Seattle to an inland city in Washington, let's say Walla Walla. Your decision in Complete Auto Transit permits a tax on the carrier that handles the transit from the port of Seattle to Walla Walla. That in fact is not a new rule, it was an old rule. The case of Philadelphia Railroad v. Knight, which was distinguished in the first stevedore case, involved a taxi service that the interstate carrier had set up, and that taxi service was considered local transit. So that may be, that segment of the carriage of the interstate goods may be taxed.

Going the other direction, Walla Walla to Seattle and then to Alaska, your decision in Interstate Oil would allow the local transit from Walla Walla to the port of Seattle to be taxed. Now, we come to the area where we say there should be some protection.

Assume a journey from Alaska through Washington to an inland state, Minnesota, Wisconsin, Illinois. Washington, under the stevedore line of cases cannot tax it.

QUESTION: With no stop in the state of Washington?

MR. PIPER: We will assume in this case that a

carrier from Alaska to Seattle, unloaded by stevedores, put aboard an interstate railroad and continuing on through, we would say no tax there, and we think that that not only reconciles your decisions but we suggest that it makes good economic sense, to emphasize the points or the rationale that you have made in Complete Auto Transit.

We point out to you that if the tax on the incoming goods, say from Seattle to Walla Walla, if there is a tax there, the people who are going to feel it are the consumers in Walla Walla. There is going to be operating the normal political restraints against taxes.

Likewise, if the goods are going from Walla Walla to Seattle, the people that are going to feel that tax are the producers in Walla Walla whose goods become somewhat less competitive. But on the through traffic, there really isn't any political restraint, and we have suggested to you that the rules that you have against discrimination just aren't quite enough. They just allow too much latitude.

For example, our tax I should think could be increased at least up to the railroads, which is 3.6 times what they are now. So we commend to the Court a consideration of retaining what we think is a reconciliation of the cases on their holdings to protect the through transit, the interstate carrier, which would include stevedoring on my hypothetical, because you don't have the political restraints,

you have the transit fee syndrome.

QUESTION: Isn't that as a practical matter though pretty much moot because your destination state is going to impose a use tax and so they will be able to show that there is in fact double taxation if Washington as well as, say, Minnesota, the state of destination, taxes?

MR. PIPER: Well, if excises of course can be taxed upon any number of different acts. Now, a use tax would be imposed by the destination state, let's say, on the use by the consumer in that state, but it would not I think -- I am suggesting that unless we are able to sustain the authority that we are defending here, I think we need the rule that the through states may not tax. I don't think I would invoke the use tax as a rationale.

QUESTION: But isn't your typical tax that you are opposing here, it is imposed on the privilege of doing business and then measured at a certain percentage, isn't it?

MR. PIPER: Yes, it is. We say though that to the extent that it fastens on to movement, which is a through-type movement, it has been struck down and should be because we see no -- again, we see the transit fee syndrome there. We don't see the political restraints that you have in the destination state or in the origin state.

We have pointed out in our brief why we think that the rule against discrimination just isn't enough of a

safeguard to protect against the transit fee syndrome. Now, we, of course, recognize that the transit fee is a purpose of the import-export clause. We suggest that the policy behind the transit fee is worthy of consideration as you weight, as you are allowed to do under the commerce clause, the various interests of the states for revenue and the interests of, let's say, a common market. We think that this protection of through goods against a transit fee is a good common market concept.

We in our state, for example, are making a distinction or we did make a distinction not long ago not only between butter and oleomargarine, but we tax billiards and pool and golf but not bowling. For a while there in our state, if you rolled balls along the grass or along a felt surface, you were taxable, but if you roll them on a wood surface you were not. Those distinctions are permitted. There is perfectly good law. The rules against discrimination give legislatures tremendous latitude, and they are just not an adequate safeguard we think against the transit fee syndrome.

Having said to you that we think the transit fee syndrome is worth considering, as you are allowed to do under the commerce clause, we return in summary to say under the import-export clause it has been considered, and the framers said we don't want it. They have said we don't want the

states sharing in the revenues, in the power to regulate commerce. That question is really not up for a reconsideration. It has been settled and there should be no implied limitation grafted onto the express prohibition.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Attorney General, do you have anything further?

ORAL ARGUMENT OF SLADE GORTON, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

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

You asked Mr. Piper to distinguish the tax in Canton Railroad from the one which the state proposes to impose here, and the answer was simply that wharfage was collateral or peripheral, I believe were the words used.

There is no direct answer to the question. The services in Canton Railroad, and even more graphically in Western Maryland Railway, which was a companion decision in the early 1950's, were clearly beyond per adventure of doubt taxes on transportation on the service of transportation, and they were upheld against charges that they violated the import-export clause because, as we have already discussed, while the import-export clause is peremptory and is an absolute bar, it is a very narrow absolute bar.

Mr. Piper keeps speaking of its application to

taxes. It does not mention taxes. It speaks of imposts or duties on imports or exports.

QUESTION: How about Brown v. Maryland, there the tax is on the sale, wasn't it?

MR. GORTON: There the tax was on the sale, and there in the early days, before this Court used the commerce clause and the built-up doctrines of discrimination and the like, that tax was determined to be a tax against imports because it was discriminatory. The only sellers who had to pay the tax in Brown v. Maryland were sellers of imports. The competing seller of local goods was not charged with those at all. It taxed an import, in other words, as an import, not as one of the goods that were commonly located in the state.

QUESTION: It is not your submission, is it, that in order for there to be a violation of the export-import clause, there must be a tax that discriminates against imports or exports __

MR. GORTON: No.

QUESTION: -- or any tax?

MR. GORTON: No, not aty tax --

QUESTION: Any impost?

MR. GORTON: -- any impost or duty which is

QUESTION: On imports or imports --

MR. GORTON: -- on imports or exports --

QUESTION: -- violates the constitutional rights of the state.

MR. GORTON: -- whether it discriminates or --

QUESTION: In other words, a state, at least in laying its impost, is constitutionally required to discriminate in favor of exports and imports?

MR. GORTON: Precisely. The rules on discrimination and apportionment do not apply if you have an impost or duty against an import or export. But as you have pointed out most recently in Michelin, that kind of language, imposts and duties, is much more narrow than the language imposts, duties and excises and taxes.

QUESTION: Well, can you think of a nondiscriminatory impost or duty? I guessyou can't.

MR. GORTON: A nondiscriminatory impost or duty? Perhaps a nondiscriminatory impost or duty would be one which was matched --

QUESTION: As long as you have something that is nondiscriminatory, it can never be an impost or duty, is that what you are saying?

MR. GORTON: Oh, no. No, no.

QUESTION: Well, give me an example of one then.

MR. GORTON: The example which I gave you earlier this morning, the tax on widgets. The State of Washington imposes a manufacturing tax on widgets and a compensating tax

on widgets from Japan.

QUESTION: Right.

MR. GORTON: I do not believe that to be nondiscriminatory because all widgets are subject to the same tax, but it would clearly be an impost or a duty on an import or an export and therefore would be invalid --

QUESTION: Well, how about the importer who imports and then he sells, does he pay the gross receipts tax?

MR. GORTON: No, not if he sells out of state.

QUESTION: How about interstate?

MR. GORTON: Intrastate, he does, but he pays the tax on the sale and because under those circumstances the domestic producer pays the same tax on sale --

QUESTION: Let's assume I am a food broker living in Seattle and I have my clients as supermarkets, I specialize in foreign foods and some manufacturers or processors of foreign foods have offices in Seattle and I deal with them, I order from them and tell them to send their goods to the supermarket I specify and all my transactions are right there in Seattle, but I buy the goods and I in effect resell them to the supermarkets, but I am an importer. Do I pay the gross receipts tax?

MR. GORTON: Yes, you do pay the gross receipts tax. If, however, you sell those goods in other states, you do not pay the gross receipts tax.

QUESTION: Is that because -- that isn't because of the --

MR. GORTON: That is because of the commerce clause.

QUESTION: Yes, it is not because of a --

MR. GORTON: Your long doctrine separates the sales type situation, tax on sales from the tax on --

QUESTION: That is why under another clause you don't do that?

MR. GORTON: In effect under another clause. You say the only state which can tax the sale is the destination state, and that of course is the rational ground of Richfield and the like. But unless --

QUESTION: Your position is that it is certainly not contrary to the export-import clause

MR. GORTON: No.

QUESTION: -- to tax the importer?--

MR. GORTON: To tax the importer's local sale as long as -- no, it isn't.

QUESTION: Or his foreign sales?

MR. GORTON: Or his foreign sales -- no, excuse me, it would be his foreign sales.

QUESTION: Not the export-import sales.

MR. GORTON: It would be, because that was the tax by the origin, the state of origin, which you simply don't

permit to tax sales. But in this case, of course, we aren't taxing goods at all. That is why it is an easier case --

QUESTION: General Gorton, on that point, supposing the tax were in the form of a specific transaction tax for each ship unloaded, $100 or something like that. What would you say about that?

MR. GORTON: I would say that that would be a tax directly on the goods. That would undoubtedly be the Brown v. Maryland situation, since you in effect then would -- that would be in effect a tax on --

QUESTION: If it is on the activity of unloading the ship, regardless of what the goods were or their value or anything like that, why is that any different than this tax on the income derived from the activity?

MR. GORTON: Because that tax would have no relationship to the services provided within the state. The mere fact that the goods were unloaded, it wouldn't matter how they were unloaded under those circumstances.

In this case, we are dealing with -- the tax is on the handling of the goods themselves. These employers have already been found to be subject to such a tax if all they do is supply the stevedores to the shipping company itself, even as far back as Puget Sound Stevedoring. That is really a distinction without a difference. In this case, we do not direct our tax against the goods at all. How many goods

there are, what goods there are, what they are worth is all irrelevant.

QUESTION: That is true of my example, too?

MR. GORTON: Yes, but we are not taxing, for example, the fact that ARCO tanker unloads goods without using any services within the state. When it unloads its petroleum at an in-state refinery, it is not subject to this tax because no service is occurring within the state. We are taxing a service. We are not taxing interstate commerce, for that matter, in this case directly at all. We are taxing solely a service which is entirely performed within the State of Washington, from the beginning to the end of that service.

QUESTION: You keep saying about goods. How about when you sling a container off, the goods are in the container?

MR. GORTON: Yes, that's right.

QUESTION: You swing a container off and put it right on a truck, it never touches Washington.

MR. GORTON: Well, generally speaking, it lands on the dock and is therefore --

QUESTION: Well, I am saying --

MR. GORTON: Well, let's say that it does that, Mr. Justice Marshall.

QUESTION: Right.

MR. GORTON: We are still --

QUESTION: What happens if it is on a conveyor belt straight into a boxcar?

MR. GORTON: Exactly the same thing. If that service of unloading were engaged in in Washington. This is what you decided in Canton Railroad. You looked to the import-export clause --

QUESTION: I didn't.

MR. GORTON: You, the Supreme Court of the United States looked to the import-export clause and said now this clause may have a great breadth when the tax is on the imports or exports themselves. At that time you might very well have extended it as far as Michelin Tire. In any event, you extended it until the imports were out of their original packages, wherever they eventually left. But even back in the 1950's, when Canton Railroad, you said the clause is much narrower when it is applied to services related to goods, specifically in that case the handling services. Those handling services were an integral part of the transportation of the goods, absolutely integral. They could not -- the imports could not get into the United States without getting off those ghips, and without being transported to the trunk-line railroads and then in Western Maryland transported by the railroads. They couldn't have done it at all; nonetheless you said it doesn't apply. Why didn't it apply? Because it wasn't a tax against goods or services.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:01 o'clock a.m., the case in the above-entitled matter was submitted.]

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