NECESSARY OPERATING INVENTORY: AN INROAD INTO THE ORIGINAL PACKAGE DOCTRINE

United States Plywood Corp. v. City of Algoma,

2 Wis.2d 567, 87 N.W.2d 481, cert. granted, 356 U.S. 957 (1958)

Plaintiff, a manufacturer, brought an action against defendant city to recover taxes paid under protest. The goods included under the general property tax were lumber and veneers imported from foreign countries. The former had been sent unbound in railroad cars, and the latter in bundles secured by metal bands and in wooden crates. When received, the lumber was piled in plaintiff's yards to facilitate drying, and the veneers were stored, unopened, in plaintiff's warehouse until needed for manufacturing veneered products. Defendant city taxed one half the lumber and one half the veneers, these portions being taxed on the basis of the tax assessor's determination that such amounts were required to be on hand because reasonably necessary to meet plaintiff's current operational needs as a manufacturer. The Supreme Court of Wisconsin upheld the taxation[1] over plaintiff's contention that the tax violated article I, section 10 of the Constitution of the United States, the relevant part of which states:

> 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. . . .

The framers of the Constitution appear to have had a dual purpose in including this clause—to prevent discrimination against foreign imports by means of taxation by the states, and to prevent the seaport states, through which most foreign imports came, from burdening the commerce of non-seaport states by taxing foreign imports destined for those states.[2] Thus in *Brown v. Maryland*,[3] a license fee imposed by a state on the right to sell foreign imports was held to be in effect a tax on the foreign goods themselves and was therefore declared unconstitutional by the Supreme Court of the United States, Chief Justice Marshall stating that the prohibition applied so long as goods retained their character as foreign imports and until this character had been lost by the goods having become mixed up with the general mass of property of the state. In so deciding, he laid down the general proposition that the character of goods as imports continued while the goods remained "the property of the importer, in his warehouse, in the original form or

[1] 2 Wis.2d 567, 87 N.W.2d 481 (1958), *cert. granted*, 356 U.S. 957 (1958).

[2] MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION (August 28, 1787) (Scott ed.) 622; Brown v. Maryland, 25 U.S. 266, 278-79 (1827).

[3] 25 U.S. 266 (1827).

package in which it was imported,"[4] or until used by the importer.[5]

This "original package doctrine" has been held to forbid state taxation even when the tax was non-discriminatory,[6] or when the taxed goods were being held for use in manufacture.[7] The doctrine has been held not to apply after the foreign imports have been sold by the importer,[8] or when they have been physically subjected to the manufacturing process.[9]

The instant decision holding that the tax on the lumber was constitutional was unanimous. This holding is substantiated by the United States Supreme Court in *Hooven & Allison Co. v. Evatt*,[10] and was a basis for the decision in *Gulf Fisheries Company v. MacInerney*.[11] Aside from physical subjection to the manufacturing process through drying, the majority in the instant case pointed out that individual pieces of lumber are not necessarily original packages;[12] and that if the railroad cars in which the lumber was shipped could be considered an original package,[13] removal from the cars would be equivalent to opening an original package,[14] thereby causing the original package doctrine immunity to cease.[15]

In the instant case, the upholding of the tax on the veneers was not unanimous. The majority based its decision on the finding made by the trial court and unchallenged on appeal that

> The purpose for which the veneers were imported was to meet the requirements of a going manufacturing concern; and one of such requirements was the presence of a stockpile equal to minimum current manufacturing requirements.[16]

The Supreme Court of the United States has never ruled on this precise point; but in the *Hooven & Allison Co.* case, the Court reserved judgon such a hypothetical set of facts.[17]

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[4] *Id.* at 280.

[5] *Id.* at 281.

[6] Low v. Austin, 80 U.S. 29 (1871).

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

[8] Waring v. Mayor, 75 U.S. 110 (1868).

[9] *Supra* note 7; Gulf Fisheries Company v. MacInerney, 276 U.S. 124 (1928).

[10] *Supra* note 7.

[11] *Supra* note 9.

[12] E. J. Stanton & Sons v. Los Angeles County, 78 Cal. App. 2d 181; 177 P.2d 804, 808 (1947), *cert. denied,* 332 U.S. 766.

[13] Texas Co. v. Brown, 258 U.S. 466 (1922).

[14] Mexican Petroleum Corp. v. South Portland, 121 Me. 128; 115 Atl. 900 (1922).

[15] May v. New Orleans, 178 U.S. 496 (1900).

[16] *Supra* note 1, 87 N.W.2d at 487.

[17] In that case the majority said: "Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process,

On the basis of the dual purpose of the constitutional provision, it is arguable that in the instant case the tax on the veneers should be upheld; the tax is non-discriminatory and its effect as a burden on the commerce of other states for which plaintiff's goods may be destined, is remote.[18] This argument at first appears to justify taxation by showing the original package doctrine to be too rigid if applied literally to the facts in the instant case. The very usefulness of the original package doctrine is, however, that it is easy to apply, justifying its rigidity. Any solution to the problem of deciding when constitutional immunity from taxation ends is certain to be, like the original package doctrine, somewhat artificial because the determination of the point at which foreign goods have lost their character as imports is highly conceptual. This was implied in the *Hooven & Allison Co.* case where it was said that the constitutional immunity must end at a point which is "capable of practical determination."[19]

A new exception to the original package doctrine, though it may mitigate the artificiality of its application in a specific case, greatly increases the impracticality of determining which goods are taxable. The exception created in the instant case suggests that the assessor will have to make a complex determination as to which goods in the original packages are absolutely necessary to the manufacturer as minimum current manufacturing requirements. Furthermore, this complex determination (the basis for the exception created in the instant case) would, if the exception is to be followed in the future, appear to be equally applicable to foreign goods in the original packages in the hands of retailers and wholesalers.

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the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question." *Supra* note 7, at 667.

[18] Thomas Reed Powell, commenting on the original package doctrine and state taxation of foreign goods, said: "But it does not follow that subjection to a general property tax would defeat the constitutional prohibition, unless one takes a very literal view of the language of the clause and forgets the circumstances which led to the aversion to local power to impose discriminatory barriers against other products than those grown or produced in the consuming state." *State Taxation of Imports—When Does an Import Cease to be an Import?*, 58 HARV. L. REV. 858, 875 n. 62 (1945).

[19] In that case the majority said: "[T]he immunity [must], if it is to be preserved at all, survive the landing of the merchandise in the United States and continue until a point is reached, capable of practical determination, when it can fairly be said that it has become a part of the mass of taxable property within a state. . . ." *Supra* note 7, at 667.