Michigan Law Review

Volume 48 | Issue 7

1950

CONSTITUTIONAL LAW-EXPORTS-IMMUNITY FROM STATE TAXATION

Paul E. Anderson S.Ed.
University of Michigan Law School

CONSTITUTIONAL LAW—EXPORTS—IMMUNITY FROM STATE TAXATION—Article 1, section 10 of the Constitution provides, "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports. . . ." This clause places a limitation on state taxing power. The basic problem is to determine at what point goods in the process of being manufactured and prepared for foreign shipment become exports. If the goods are found to be exports, they are immune to state taxation. Two recent Supreme Court decisions have dealt with this question in an attempt to lay down a general rule applicable to future situations. Because two aspects of the export limitation are involved in these decisions, each will be treated individually in this comment.

I. *When Does Exporting Begin?*

It was early laid down that "goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey."[1] This rule was announced in *Coe v. Errol,* a case involving state taxation of interstate commerce. However the Supreme Court has indicated that the test there established is applicable as well to questions arising under the Export-Import Clauses.[2] Under *Coe v. Errol,* a product is immune from state taxation (1) if it is delivered to a common carrier for shipment out of the country, or (2) if it is started upon a continuous journey out of the country. Several specific applications of this doctrine have been made. Thus mere "interior movement" of goods within a state preparatory to their transportation out of the country does not make them exports.[3] Nor does the owner's intent to ship the goods abroad control the question.[4] There must be some definite action on the part of the owner of the goods, such as delivery to a common carrier, to show that the goods are on their final

1 Coe v. Errol, 116 U.S. 517 at 527, 6 S.Ct. 475 (1886).

2 In Turpin v. Burgess, 117 U.S. 504, 6 S.Ct. 835 (1886) it was applied to a case arising under the Federal Export Clause (Art. 1, §9 of the Constitution). In Richfield Oil Co. v. State Board of Equalization, 329 U.S. 69, 67 S.Ct. 156 (1946) the Supreme Court indicated that the test applied equally to the State Export-Import Clause.

3 "But this movement does not begin until the articles have been shipped or started for transportation from one state to another. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation." Coe v. Errol, 116 U.S. 517 at 528, 6 S.Ct. 475 (1886). Followed in Diamond Match Co. v. Ontonagon, 188 U.S. 82, 23 S.Ct. 266 (1903) which also dealt with the Commerce Clause.

4 Thus manufacturing taxes on goods intended for export are valid: Cornell v. Coyne, 192 U.S. 418, 24 S.Ct. 383 (1904); Reynolds Tobacco Co. v. Robertson, (C.C.A. 4th, 1938) 94 F. (2d) 167, cert. den. 304 U.S. 563, 58 S.Ct. 944 (1938), reh. den. 304 U.S. 589, 58 S.Ct. 1045 (1938). Both cases involved the Federal Export Clause.

movement out of the country.[5] Thus the transfer of title to a common carrier cannot be taxed.[6] It has also been held that getting an export bill of lading is equivalent to putting the goods aboard ship.[7] It is clear that the owner is not required to begin physical shipment of the goods in order to be entitled to the export immunity. An action on the part of the owner with respect to an intangible interest in the goods, such as the transfer of title, is sufficient to make the goods tax immune if that action initiates the final journey of the goods out of the country.[8] Relevant considerations for determining whether that final journey has commenced are (1) the nearness of the product to its final form and place of ultimate shipment[9] and (2) the certainty that the product will depart to the foreign country.[10]

In the recent *Empressa Siderurgica*[11] case, the Supreme Court seriously undermines this analysis. In that case, a corporation of Colombia purchased a cement plant located in Merced County, California. After having obtained an export license and title to the plant, the Colombian corporation took possession of it. The purchaser then hired a common carrier to dismantle and package the plant for shipment to an ocean port where it was to be loaded on board vessels bound for Colombia. As each part of the plant was dismantled, it was key-marked, packaged and delivered to a rail carrier. On March 5, 1945, Merced County levied a personal property tax on the plant. Twelve percent of the plant had been shipped out of the country, but

[5] In the absence of an overt act by the owner which objectively shows that the goods are exports, goods in the process of preparation for exporting are subject to local taxing authority. Even where the goods are manufactured only for export with specific reference to foreign wants no immunity can be claimed until some further action is taken. Cornell v. Coyne, 192 U.S. 418, 24 S.Ct. 383 (1904) permitted the federal government to tax a quantity of filled cheese made for export under contract. Accord under the Commerce Clause, Heisler v. Thomas Colliery Co., 260 U.S. 245, 43 S.Ct. 83 (1922).

[6] Richfield Oil Co. v. State Board of Equalization, 329 U.S. 69, 67 S.Ct. 156 (1946).

[7] Spaulding and Bros. v. Edwards, 262 U.S. 66, 43 S.Ct. 485 (1923).

[8] That this general rule bears no reasonable relationship to the economic incidence of the tax is given little heed by the courts. For them, it is merely a matter of determining on which side of a line the given situation falls. As Mr. Justice Holmes put it, "To answer it with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary." Spaulding and Bros. v. Edwards, 262 U.S. 66 at 69, 43 S.Ct. 485 (1923).

[9] Cornell v. Coyne, 192 U.S. 418, 24 S.Ct. 383 (1904) (Federal Export-Import Clause); Heisler v. Thomas Colliery Co., 260 U.S. 245, 43 S.Ct. 83 (1922) and Kidd v. Pearson, 128 U.S. 1, 9 S.Ct. 6 (1888) accord under the Commerce Clause.

[10] Turpin v. Burgess, 117 U.S. 504, 6 S.Ct. 835 (1886) (Federal Export-Import Clause); Coe v. Errol, 116 U.S. 517, 6 S.Ct. 475 (1886) (Commerce Clause).

[11] Empressa Siderurgica, S.A. v. County of Merced, 337 U.S. 154, 69 S.Ct. 995 (1949).

the remaining eighty-eight percent was either standing in place, or packaged and awaiting delivery to the rail carrier. The Colombia corporation paid, under protest, the tax on the eighty-eight percent in the county, but brought suit to recover the payment. The trial court awarded judgment to the taxpayer, but the Supreme Court of California reversed. On appeal to the United States Supreme Court, the imposition of the tax was upheld.

In writing the majority opinion, Justice Douglas found that the parts of the cement plant within the county were not exports. He pointed out that the parts taxed had not been started on their final journey out of the country because they had not been delivered to a carrier for export, nor had they undergone physical transportation. It is clear that the goods had not been subjected to actual movement but the previous line of authority had not required physical shipment.[12] Thus he applied the test of *Coe v. Errol* to the facts of this case in a literal manner without due regard for the refinements added to that test by later decisions. Evidently one does not begin his journey if he is merely on the train platform, packed and ticketed; he must be on the moving train.

The dissent[13] realized that a serious constitutional problem was involved if the cement plant were an integrated whole rather than an aggregate of separable parts. If the former were true, then the tests previously adopted in refinement of *Coe v. Errol* would be met. The cement plant was in its final form and at its place of final departure. Assuming that the plant was an integrated whole, the eighty-eight percent in Merced County would most certainly be shipped to Colombia. Because the minority could not judge from the record whether or not the parts of the plant held in Merced County were interchangeable with parts in a domestic cement plant, it voted to send the case back to the California courts for a determination of that issue.

II. What Interruptions Will Terminate Exporting?

Assuming that a product has once entered the export stream, an interruption of its journey to a foreign land will or will not permit local taxation depending upon the circumstances. To determine what factors will terminate the exporting process, the Supreme Court first emphasized the purpose of the delay. If the interruption were for the

[12] See notes 6 and 7 above.

[13] By Justice Frankfurter, 337 U.S. 154 at 157, 69 S.Ct. 995 (1949).

benefit of the owner, then local taxes could be imposed.[14] If, however, the delay were caused by forces beyond the control of the owner, then the goods could not be subjected to local taxation.[15] This distinction did not stand the test of time.[16] The Supreme Court turned from the criterion based on purpose to an examination of the likelihood that the product could be diverted to domestic markets during the time the journey was suspended. Thus if the goods could not be sold locally, any delay in transshipment did not interrupt the export process because it was still certain that the articles would be shipped abroad.[17] Even where the delay was for the benefit of the owner, if the product could not be sold locally, it remained immune to state taxation.[18] On the other hand if there were a possibility of diverting the goods to domestic consumers during the interruption, the protection of the Export Clause was withdrawn.[19]

[14] Several older Commerce Clause decisions support this statement: General Oil Co. v. Crain, 209 U.S. 211, 28 S.Ct. 475 (1908); Southern Pacific Terminal Co. v. Interstate Commerce Comm., 219 U.S. 498, 31 S.Ct. 279 (1911); Arkadelphia Milling Co. v. St. Louis Ry. Co., 249 U.S. 134, 39 S.Ct. 237 (1919).

[15] Coe v. Errol, 116 U.S. 517, 6 S.Ct. 475 (1886) involved local taxation of logs floating down river which were collected at a point by booms "to await higher water"; because the delay was due to forces beyond the owner's control, interstate commerce was not broken. Interruption in water shipment of logs because of high water did not end interstate commerce in Champlain Realty Co. v. Town of Brattleboro, 260 U.S. 366, 43 S.Ct. 146, 25 A.L.R. 1195 (1933). See also Kelley v. Rhoads, 188 U.S. 1, 23 S.Ct. 259 (1931) and Carson Petroleum v. Vial, 279 U.S. 95, 49 S.Ct. 292 (1929).

[16] Cases in which the continuity of journey was broken for the benefit of the owner, but the Court held that the articles were not subject to local taxation: In Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469, 47 S.Ct. 170 (1926), the interruption was to gather logs to load aboard vessels; the delay did not terminate interstate commerce. In Southern Pacific Terminal Co. v. Interstate Commerce Comm., 219 U.S. 498, 31 S.Ct. 279 (1911), it was held that goods shipped to a wharfage company for export and final processing were still in foreign commerce.

[17] Because there was no local market for certain goods shipped in foreign commerce, it was held that those goods did not lose their immunity because they had to be transhipped and consigned upon arrival at their port of embarkation: Texas & N.O.R. Co. v. Sabine Tram Co., 227 U.S. 111, 33 S.Ct. 229 (1913). Where goods were shipped under contract, interruption did not terminate foreign commerce, because the goods could not be diverted to domestic buyers without breach of contract: United States v. Erie Ry. Co., 280 U.S. 98, 50 S.Ct. 51 (1929).

[18] Supra, note 16.

[19] Cattle shipped in interstate commerce acquired a situs for local taxation when held in a stockyard because they were "held there at the pleasure of the owner for disposal or use, so that he may dispose of [them] either within the State or for shipment elsewhere as his interest dictates. . . ." Minnesota v. Blasius, 290 U.S. 1 at 10, 54 S.Ct. 34 (1933). Where an agent withdrew grain from a carrier for the purpose of inspecting, weighing, grading and mixing, but not for the purpose of changing the ultimate consignee, the Supreme Court stated, "The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported and it was not held by carriers for transportation. . . . He had the privilege of continuing the transportation under the shipping contracts but of this he might avail himself or not as he chose. He might sell the grain in

This doctrine was recently affirmed by the Supreme Court. In the case of *Joy Oil Co., Ltd. v. State Tax Commission,*[20] the Joy Oil Company, a Canadian corporation, purchased 1,500,000 gallons of gasoline from a Michigan vendor. In order to get the benefits of lower freight rates and to be exempt from federal transportation and manufacturing taxes, the Oil Company filed forms certifying that the gasoline was purchased for export. The gasoline was shipped to Detroit under bills of lading marked, "For Export to Canada." While awaiting shipment to Canada, the gasoline was stored in tanks at Dearborn, Michigan. From Dearborn 50,000 gallons were shipped to Canada by truck until the Federal Government closed the Ambassador Bridge to the transportation of inflammables. The Oil Company decided not to use rail transportation but to await until cheaper water carriage became available. After fifteen months of storage, Dearborn assessed an ad valorem property tax upon all the gasoline not shipped. The Oil Company challenged the validity of the assessment, but the Michigan Tax Commission ruled against it. The Michigan Supreme Court affirmed the Commission. On certiorari, the Supreme Court affirmed.

Justice Frankfurter wrote the majority opinion.[21] Consistent with his position in the *Empressa Siderurgica* case, he again based his opinion on the certainty-to-export test. Because the gasoline could readily be diverted to domestic consumers without breach of contract for sale or shipment, he found that the delay in reshipping the goods broke the process of exporting. This decision, reaffirming the doctrine of previous cases,[22] is a reflection of sound policy. If exporters were assured of tax immunity for goods being stored at transshipment points, there would be a temptation to dump products into the export channels and to hold them in storage at the point of shipment abroad. If market conditions within the country were to change, then it would be possible to sell the "exports" locally after a period of tax free storage. By re-

Illinois or forward it as he saw fit." Bacon v. Illinois, 227 U.S. 504 at 516, 33 S.Ct. 299 (1913). In Brown v. Huston, 114 U.S. 622, 5 S.Ct. 1091 (1885) coal shipped to New Orleans was subject to local taxation because the owner could sell it in either local or foreign markets. A factor which bears on the salability of products in local markets is the characteristic of fungibility. This was a consideration that led the Court to find that coal shipped to distributing points was taxable by local authorities, although most of the coal was subsequently distributed to out-of-state consumers. The Court stated, "It is also significant that invariably the goods are fungibles. . . . The goods which are sent initially into the interstate commerce stream are not the identical goods which finally arrive at the place of consumption." Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 at 82, 67 S.Ct. 1062 (1947).

[20] 337 U.S. 286, 69 S.Ct. 1075 (1949).

[21] Dissenting: Chief Justice Vinson, Justices Douglas and Jackson.

[22] Supra notes 17, 18, and 19.

quiring that the goods be of a character that necessitates sale abroad, or be delivered to a common carrier for final shipment, Justice Frankfurter ensures that the export immunity will not be abused in this manner.

III. Conclusion

As recognized by Justice Frankfurter, the certainty-to-export test had validity in deciding whether goods are in the export stream for the purposes of either problem considered. Whether it can be used that broadly is subject to question. It would appear that the certainty-to-export test is giving ground to the criterion of actual initiation of movement in reaching a conclusion as to whether or not the exporting process has begun.

Paul E. Anderson, S. Ed.