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Constitutional Law—Export-Import Clause—State's Power to Tax Exports— Sales Tax.—Gough Industries, Inc. v. State Board of Equalization.

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The Uniform Commercial Code draftsmen apparently were aware that conditional sales statutes in many states were outmoded and that business practices were changing so rapidly it seemed more desirable to draft laws having the free flow of commercial transactions as an objective. The Code provisions reducing formalities to a minimum[12] seems to be sound practice, in that courts will be free to interpret and apply flexible rather than rigid standards to conditional sales contracts.

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Constitutional Law—Export-Import Clause—State's Power to Tax Exports—Sales Tax.—***Gough Industries, Inc. v. State Board of Equalization.***[1]—The defendant, a California manufacturer of electrical supplies, sold goods in California to a purchaser for direct export to Saudi Arabia. Because the defendant could not meet the specified packaging requirements, the agreement provided that the defendant should deliver the goods to a California export packer to be designated by the purchaser. When the goods were ready for packaging, the defendant delivered them to the packer who specially packed and crated them for shipment overseas. The packer then delivered them to an ocean carrier for transportation to Saudi Arabia. Pursuant to the sales contract title passed from the defendant to the purchaser upon delivery of the goods to the packer. Under the California sales tax statute, the state levied an assessment on the defendant as the seller of these goods. The tax was paid under protest and proceedings were brought to recover the payment. The Superior Court of Sacramento County, California, held the tax to have been improperly assessed because the goods were in foreign commerce immediately upon leaving the defendant's hands and, therefore, constitutionally could not be taxed by California. The District Court of Appeal, for the Third District reversed,[2] holding that nothing had occurred prior to or at the time of assessment to take the goods out of the general mass of property in the state and that they were not in export until after the packer had completed his packaging pursuant to the purchaser's orders and had turned them over to the motor carrier for delivery to the ocean carrier. On appeal the Supreme Court of California affirmed the judgment of the Superior Court and reversed that of the District Court of Appeal.[3]

The decision of the California Supreme Court seems at variance with the authorities establishing the rule that goods do not cease to be part of the general mass of property within the state subject to nondiscriminatory state taxation 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.[4] This rule, although for-

[12] UCC §§ 9-110, 9-402.

[1] 51 Cal. 2d 746, 336 P.2d 161 (1959), cert. den. 359 U.S. 1011 (1959).

[2] 332 P.2d 378 (1958).

[3] Note 1 supra.

[4] Coe v. Eroll, 116 U.S. 517 (1886); Turpin v. Burges, 117 U.S. 504 (1886);

mulated to determine the validity under the commerce clause of a nondiscriminatory state tax, is equally applicable to cases arising either under Art. I, § 10, cl. 2, which restricts the states in taxing imports or exports, or under Art. I, § 9, cl. 5, which prohibits Congress from laying any tax upon "articles exported from any state."[5] The rule is equally applicable to ad valorem property taxes and sales taxes—the issue in each situation being whether the goods are in the "stream of exports" at the moment they are taxed. If the articles have not on tax day entered foreign commerce, even though they are destined for export, they are subject to state ad valorem property taxes.[6] And the United States Supreme Court has held in *Empresa Siderugica S.A. v. County of Merced*,[7] that this is so even though the goods are being packed, or, after having been packed, are awaiting the carrier.

In *Empresa*, a property tax levied on the purchaser on various parts of a cement plant which had been sold and dismantled for shipping to South America was upheld on parts that were (1) crated and ready for shipment, (2) dismantled but not yet packed, and (3) not yet dismantled. The United States Supreme Court held that none of the goods in the three categories had entered the "stream of exports" even though the dismantler was a carrier. In the instant case, none of the goods were packed at the moment of taxation and therefore *Empresa* should have controlled, especially since the packer was not a carrier.

In *Joy Oil Co., Ltd. v. State Tax Commission*,[8] a Canadian purchaser bought in Michigan 1,500,000 gallons of gasoline, certified that it was purchased for export and shipped it to Detroit under bills of lading marked "For Export to Canada." Because of the shortage of shipping space, the purchaser held a large portion of the gasoline in storage at Dearborn, Michigan for eighteen months. The Supreme Court held the goods properly subject to state taxation pointing out that while in storage the gasoline might have been diverted to domestic markets. Therefore, the gasoline did not fall within the protection of the Export-Import Clause which meant to confer immunity from local taxation upon property being exported, and was not meant to relieve property eventually to be exported from its share of the cost of local services. The applicability of this argument to the principal case is obvious.

Nevertheless, the California Supreme Court held that "where an article is manufactured and sold in one of the states for export to a foreign country,

Cornell v. Coyne, 192 U.S. 418 (1904); Spalding & Bros. v. Edwards, 262 U.S. 66 (1923); Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946); Empresa Siderugica S.A. v. County of Merced, 337 U.S. 154 (1949).

[5] Richfield Oil Corp. v. State Board of Equalization, supra note 4. Empresa Siderugica S.A. v. County of Merced, supra note 4.

[6] Coe v. Eroll, 116 U.S. 517 (1886); Turpin v. Burges, 117 U.S. 504 (1886); Thompson v. United States, 142 U.S. 471 (1891); Cornell v. Coyne, 192 U.S. 418 (1904); Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469 (1926); Empresa Siderugica S.A. v. County of Merced, 337 U.S. 154 (1949); Joy Oil Co., Ltd. v. State Tax Commission, 337 U.S. 286 (1949).

[7] 337 U.S. 154 (1949).

[8] 337 U.S. 286 (1949).

it is free from state sales tax under the import-export [sic] clause of the United States if at the time title passed the certainty of the foreign destination was plain."[9] The validity of this statement is even more dubious in light of the repeated assertions of the Supreme Court that the intent to export does not make articles exports.[10]

Of course, the Supreme Court has denied certiorari, but that fact is not indicative of any change of doctrine on the part of the Court.[11] In any event, the problem in the instant case could easily have been avoided. If title to the goods had not passed from the manufacturer to the purchaser at the time they were delivered to the packer, but had been retained by the seller until delivery to the ocean carrier, the transaction would clearly not have been subject to the state sales tax because the act sought to be taxed would then be the act committing the goods to export.[12] Less clear, however, is the tax position of the seller who turns over title under the contract at the time of delivery of the goods to a domestic carrier for transshipment to the ocean carrier. *Hughes Bros. Timber Co. v. Minnesota*,[13] held under the Commerce Clause, that an ad valorem property tax may not be levied by the state while the goods were in transit, but prior to their having been received by the interstate carrier. While goods in foreign commerce have been recognized as being entitled to greater immunity from taxation under Art. I, § 9, cl. 5 and Art. I, § 10, cl. 2, than goods in interstate commerce under the Commerce Clause,[14] the Supreme Court has in *Empresa* left open the extent of the applicability of the *Hughes rule* to foreign commerce situations.

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Constitutional Law—Off-Street Parking Provision in Municipal Zoning Ordinance Held Invalid As a Delegation of Legislative Power.—***State ex rel. Associated Land and Investment Corp. v. The City of Lyndhurst.***[1]—A landowner brought an action for mandamus in the Ohio Court of Appeals to compel a building inspector to issue a permit for the alteration of an office building. The inspector had previously denied the permit because of non-compliance with off-street parking provisions in the local zoning ordinance. The Court of Appeals granted the writ and, on appeal, the Ohio Supreme Court affirmed. HELD: Provisions of the zoning ordinance which (1) required that all buildings other than dwellings have off-street parking

[9] 51 Cal. 2d 746, 749, 336 P.2d 161, 163.

[10] See cases note 6 supra.

[11] See separate opinion of Frankfurter, J., in Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950).

[12] Spalding & Bros. v. Edwards, 262 U.S. 66 (1923).

[13] 272 U.S. 469 (1926).

[14] See Fairbanks v. United States, 181 U.S. 283 (1901); United States v. Hvoslef, 237 U.S. 1 (1914); and Thames & Mersey Ins. Co. v. United States, 237 U.S. 19 (1914).

[1] 154 N.E.2d 435 (Ohio St. 1958).