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1. TAXATION—GOODS IMPORTED IN BULK INTO STATE BY A MANUFACTURER—IMMUNE FROM STATE TAXATION—ARTICLE I, SECTION 10, CLAUSE 2, CONSTITUTION OF UNITED STATES—REQUIREMENT, SO LONG AS GOODS REMAIN PROPERTY OF IMPORTER, ARE HELD BY HIM UNUSED AND IN INTACT UNITS AS IMPORTED.

2. IF IMPORTER USES ANY PORTION OF AN IMPORTED UNIT IN HIS MANUFACTURING PROCESS OR FOR A SALE, REMAINDER OF UNIT IMMEDIATELY SUBJECT TO STATE TAXATION.

3. IF IMPORTER MINGLES OTHERWISE IMMUNE UNIT WITH OTHER PROPERTY TAXABLE BY ANY STATE, SUCH UNIT IMMEDIATELY FREED FROM CONSTITUTIONAL IMMUNITYY AND THEREAFTER A PROPER SUBJECT OF STATE TAXATION.

SYLLABUS:

When goods are imported in bulk into this state by a manufacturer they are immune from state taxation by reason of the provisions of Article I, Section 10, Clause 2, of the Constitution of the United States, so long as they remain property of the importer and are held by him unused and in intact units as imported. If the importer uses any portion of an imported unit in his manufacturing process or for a sale, all that remains of such unit immediately becomes subject to state taxation. Furthermore, if the importer mingles an otherwise immune unit with other property which is taxable by any state, such imported unit is immediately freed from the constitutional immunity and is thereafter a proper subject of state taxation.

Columbus, Ohio, February 26, 1946

Hon. C. Emory Glander, Tax Commissioner
Department of Taxation
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

> "This Department, in the administration of the personal property tax law, is presently confronted with the question of immunity of 'imports' from state taxation under the provisions of Section 10, Paragraph 2, of Article I of the United States Constitution. The specific question is with respect to goods which are imported into this state in bulk and then stored by the importer for immediate or subsequent use.
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> Your attention is directed to Attorney General's Opinion No. 1597 of 1928, Volume I, Page 141, and which held:
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> > 'Flaxseed, or a like commodity, imported in bulk from a foreign country, for use by the importing company in the manufacture of finished products, which flaxseed is drawn from the hold of the ship in which it is imported by elevator and stored in large bins, from which the company takes sufficient flaxseed to supply its needs from time to time as production requires, has lost its distinctive character as an import and is property subject to taxation by the state of Ohio.'
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> It occurs to us that recent United States Supreme Court decisions relating to the tax immunity of 'imports' may be contrary in whole or in part to the foregoing Attorney General's Opinion. For this reason, I hereby respectfully request your present opinion on this question."

Article I, Section 10, Clause 2, of the Constitution of the United States provides that:

> "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; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

The solution of any question concerning the taxability of imported goods must start with a consideration of Brown v. Maryland, 12 Wheat., 419, 6 L Ed., 678. In that opinion, which has been consistently followed, Mr. Chief Justice Marshall laid down the rule that under the protection of Article I, Section 10, Clause 2, imports are immune from taxation by the states so long as they remain the property of the importer in original, unbroken packages and are not otherwise mingled with the mass of domestic property so as to cause them to lose their identity as imports. Nathan v. Louisiana, 8 How., 73, 81, 12 L. Ed., 992; Low v. Austin, 13 Wall., 29, 20 L. Ed., 517; and Hooven & Allison Company v. Evatt, 324 U. S., 652, 89 L. Ed. Advance Opinions, 852.

I assume that in all cases with which you are now concerned the manufacturer is the importer. A person will be regarded as the importer if he acquires title to the goods before entry into this country, Waring v. Mayor, etc., of Mobile, 8 Wall., 110, 19 L. Ed., 342; Pervear v. Commonwealth, 5 Wall., 479, 72 U. S., 609, or even if he acquired an interest in the goods and was the efficient cause of having them shipped into this country, Hooven & Allison Company v. Evatt, supra.

We come then to the question of what is meant by the original package. The Attorney General's opinion reported in Opinions of the Attorney General for 1928, Volume I, page 141, the syllabus of which you have copied in your letter, seems to regard the ship or car in which grains, liquids and like substances are imported as being the original package. It is said in the opinion:

> "There is no original package to protect this flaxseed from taxation by the state, for if there ever was any original package it was the hold of the ship and it has been removed from that."

Although not mentioned in the foregoing opinion, a like conclusion was reached in 1922 by the Supreme Judicial Court of Maine in Mexican Petroleum Corporation v. City of South Portland, 121 Me., 128, 115 Atl., 900. In this case, bulk oil was imported in tank steamers and pumped into receiving tanks belonging to the importer. The oil in such tanks was pumped into tank trucks and from time to time delivered to purchasers in the vicinity of South Portland. Some was used by the importer to generate heat and power. The Maine court held that the original package had been broken and that the oil had become mingled with domestic property making it a subject of local taxation. In the process of arriving at this determination, the court review the original package doctrine and then came to the following conclusion:

> "In our opinion, therefore, where the oil was stored and shipped in the steamer tank, the oil and the tank together may be considered as the original package. Had there been several movable containers, as casks or barrels, there would be no contention on this point. If the importer sees fit to ship the oil in one large container instead of several small ones, the principle remains unchanged. Oil in tank cars has been treated by the Supreme Court of the United States as in the original packages, when considering the provisions of the Interstate Commerce Act (Askren v. Continental Oil Co. 252 U. S. 444, 64 L. Ed. 654, 40 Sup. Ct. Rep. 355,) and by parity of reasoning oil in tank steamers may be similarly regarded."

An examination of the case of Askren v. Continental Oil Company, supra, will show that it furnishes but slight support for such conclusion. In that case it was held that when oil was shipped into New Mexico in tank cars where the whole of the contents of each car was sold to a single customer the original package doctrine was not violated, for the oil was "sold and delivered to such customers in precisely the same form and condition as when received in the state of New Mexico." To reach this conclusion, the court was not required nor do I believe it attempted to hold that the tank car was in fact the original package. Since the oil remained in the car with its contents undisturbed, it is obvious that the original package, whatever that might be, was unbroken. What the decision would have been if the oil had been pumped from the tank cars into some other container before sale and thereafter sold to a single customer is a matter of speculation.

When presented with the question of what is an original package, other courts have been quite critical of the decision in the case of Mexican Petroleum Corporation v. City of South Portland, supra. In City of Galveston v. Mexican Petroleum Corporation, 15 Fed. (2d), 208, it was contended that:

> "The goods were not in the original package in which imported, and therefore had become part of the general mass of property in the state. It is a matter of hornbook knowledge that the original package statement of Justice Marshall was an illustration, rather than a formula, and that its application is evidentiary, and not substantive, and I cannot give my assent to the view, expressed in the opinion of the Supreme Court of Maine in Mexican Petroleum Co. v. Portland, 121 Me. 128, 115 A. 900, 26 A. L. R. 965, that the tanker which brought the oil from Mexico is the original package in the sense of the constitutional construction, whether it is physically so or not. I am therefore of the opinion that the oil, when pumped into the tanks, still retained its state as an import, and would only lose it when, and if, it was maintained in tanks for the purpose of general and indiscriminate sale."

In Tres Ritos Ranch Co. v. Abbott, 44 N. Mex., 566, 105 Pac. (2d), 1070, Mexican Petroleum Corporation v. City of South Portland, supra, was studied and the definitions of the terms "package" and "original package" were quoted in full, following which the court said:

> "To fit a single cow or even a herd of cattle into this description of an original package puts too great a strain on judicial indulgence. Taking a single cow, on the original package theory, there is no clearcut manner in which to differentiate the cow as the receptacle from the cow as to its contents."

In Mexican Petroleum Corporation v. Louisiana Tax Commission, 173 La., 604, 138 So., 117, it was said:

> "The case excepted is that of Mexican Petroleum Corporation v. City of South Portland, 121 Me. 128, 115 A. 900, 26 A. L. R. 965. That case is directly pertinent to the case at bar, but we are not in accord with it. It was there held, which we regard as erroneous, that the tank steamer and the oil constituted the original package, and that the withdrawal of the oil from the steamer, caused the oil to lose its character as an import. The package and the carrier cannot be the same, for then a delivery of the oil would involve a delivery of the carrier."

Ordinarily the term "original package" means the package delivered to the carrier at the initial place of shipment in the exact condition in which it was shipped. May & Co. v. City of New Orleans, 178 U. S., 496, 44 L. Ed., 1165; Guckenheimer v. Sellers, 81 Fed., 997; McGregor v. Cone, 141 Ia., 465, 73 N. W., 1041; Austin v. State, 101 Tenn., 563, 48 S. W., 305. As has already been suggested, there are many articles of commerce which it would be impracticable, if not impossible, to place in a package, crate, bundle or container; for example, large animals, heavy machinery, solid bulky materials, liquids, fungible goods and the like. In the case of Dant & Russell, Inc., v. Board of Supervisors, 128 Pac. (2d), 389, a District Court of Appeals in California had before it the taxability of a quantity of lumber which had been shipped into the state. The conclusion was reached that "the original package was each individual piece of lumber, since the lumber was not bundled or in any manner bound together and was the identical thing delivered by the consignor to the carrier at the initial point of shipment." Although this case was subsequently reversed, Dant & Russell, Inc., v. Board of Supervisors, 133 Pac. (2d), 817, its reversal was on entirely different grounds, not helpful in solving our present question. A somewhat similar criticism was leveled at the so-called unbroken package doctrine by Mr. Justice Daniel in his opinion in the Licenses Cases, 5 How., 504, 612, 12 L. Ed., 256, 305.

It seems probable that too much stress has been placed on the necessity of imports being contained in a package of some sort. A reference to the original package is not a reference to an ultimate principle, but is in reality only an illustration of a principle. City of Galveston v. Mexican Petroleum Corporation, 15 Fed. (2d), 208; Baldwin v Seelig, 294 U. S., 511, 79 L. Ed., 1032; and Penna Gas Co. v. Public Service Commission, 225 N. Y., 397. Actually, it is not the breaking of the original packages that causes imported goods to lose their immunity, for it has frequently been held that original packages may be broken by accident or for the purpose of inspecting or testing the contents without the privilege of immunity being lost. Hawaii v. Lam Yip Kee, 19 Haw., 565; Re McAllister, 51 Fed., 282; United States v. Five Boxes of Asafoetida, 161 Fed., 561; United States v. Nine Boxes of Asafoetida, 181 Fed., 568; Wind v. Iler, 93 Ia., 316, 61 N. W., 1001; Greek-American Sponge Co. v. Richardson Drug Co., 124 Wis., 469, 102 N. W., 888; and Vermont Farm Machine Co. v. Hall, 80 Ore., 308, 156 Pac., 1073.

Any examination of Article I, Section 10, Clause 2, of the Constitution must impel the conclusion that no discrimination was intended between imports that came into this country wrapped in packages, bales, crates or other containers, and those that were not readily susceptible of such packaging. The immunity should adhere with equal tenacity to each so long as it continued to be an import. Whether goods shall be shipped in a container and, if so, the amount to be placed therein seems to be a matter left entirely to the discretion and convenience of the parties. A package may contain only a single unit, Leisy v. Hardin, 135 U. S., 100, 34 L. Ed., 128; Schollenberger v. Pennsylvania, 171 U. S., 1, 43 L. Ed., 49; and Adams Express Company v. Kentucky, 206 U. S., 129, 51 L. Ed., 987, or it may house any number of units, Leisy v. Hardin, supra; May v. New Orleans, 178 U. S., 496 44 L. Ed., 1165; and Purity Extract & Tonic Company v. Lynch, 226 U. S., 192, 57 L. Ed., 184. It may be large or small. State, ex rel. Cochran v. Winters, 44 Kan. 723, 25 Pac., 235; Schollenberger v. Pennsylvania, supra. The importer should enjoy tax immunity for his imported goods so long as he retains them as undisturbed units. In Hooven & Allison Company v. Evatt, 324 U. S., 652, 89 L. Ed. Advance Opinions, 852, Mr. Chief Justice Stone in his opinion said:

> "Plainly if and when removed from the package in which they are imported, or when used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end."

If the imports be packaged goods, the package is the unit which must remain unbroken and unused. If they be unpackaged, then the rule should remain the same with respect to each unit. In the case of fungible goods shipped in bulk, the better rule would seem to be that we regard the entire quantity of each person's importation or any separated unit thereof as the unit that must not be divided, mingled or otherwise used if tax immunity is to be retained. The vital factor seems not to be the breaking of a package, but the breaking up of an imported unit, the mingling of the whole or any part thereof with domestic property, or the use of the whole or any part of a unit. Hooven & Allison Company v. Evatt, supra.

If this test be applied to the 1928 Attorney General's opinion, the conclusion reached therein is sustained, for the form of the import is changed by using parts of the imported units from time to time in manufacturing. The above test is also in accord with the conclusion reached

in Mexican Petroleum Corporation v. City of South Portland, supra, for there the imported unit, to wit, a tanker of oil, upon arrival was stored in tanks. Thereafter, portions thereof were used from time to time in making local retail sales and other portions were used by the importer to generate heat and power.

I must therefore conclude and it is my opinion that when goods are imported in bulk into this state by a manufacturer they are immune from state taxation by reason of the provisions of Article I, Section 10, Clause 2 of the Constitution of the United States, so long as they remain property of the importer and are held by him unused and in intact units as imported. If the importer uses any portion of an imported unit in his manufacturing process or for a sale, all that remains of such unit immediately becomes subject to state taxation. Furthermore, if the importer mingles an otherwise immune unit with other property which is taxable by any state, such imported unit is immediately freed from the constitutional immunity and is thereafter a proper subject of state taxation.

Respectfully,

HUGH S. JENKINS,
Attorney General.