

October 17, 1994

The Honorable Richard F. Kahle, Jr.
Director of Taxation
State of Hawaii
830 Punchbowl Street, Room 221
Honolulu, Hawaii 96813

Dear Mr. Kahle:

Re: Original Package Doctrine

By request dated June 1, 1994, you inquired whether Attorney General Opinion No. 64-38, which advised that general excise and use taxes could not be applied to imports in their original package, should be overruled, in light of certain United States Supreme Court opinions that have abandoned the "original package" doctrine.

I. BRIEF ANSWER

It is our opinion that Attorney General Opinion No. 64-38 is no longer valid. The original package doctrine has been abandoned as a test to determine whether a state tax on an imported good violates the Import-Export Clause of the United States Constitution. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 495, reh'g denied, 424 U.S. 935, 96 S. Ct. 1151, 47 L. Ed. 2d 344 (1976); *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 104 S. Ct. 1837, 80 L. Ed. 2d 356 (1984). Although *Michelin* involved an ad valorem property tax, the test enunciated in *Michelin* is applicable to all state taxes challenged on the basis of the Import-Export Clause. Applying the *Michelin* test to Hawaii's general excise and use taxes, it is our opinion that general excise and use taxes may be applied to imported goods, no longer in transit, regardless of whether the imported goods are in their original packages. Therefore, Attorney General Opinion No. 64-38 is overruled to the extent that it is inconsistent with this opinion.

II. DISCUSSION

A. Hawaii's General Excise and Use Taxes

By sections 238-2 and 237-13, Hawaii Revised Statutes (HRS), Hawaii imposes a use tax on the use of both foreign and U.S. imported goods and a general excise tax on the sale of those goods.¹ Under the general excise and use tax statutes, when goods are imported and sold at retail by the importer, the use tax is imposed on the importer-retailer at one-half of one percent of the purchase price pursuant to HRS § 238-2(2).² The importer-retailer is also charged a four percent general excise tax on the retail sale pursuant to HRS § § 237-13(2) and 237- 16(b).³ ([top](#))

If the goods are to be resold by the importer at wholesale or as part of a manufactured product, pursuant to HRS § 238-2(1),⁴ no use tax is imposed. The importer-wholesaler/ manufacturer, however, is subject to the one-half of one percent general excise tax upon the wholesale sale of the goods or products pursuant to HRS § 237-13(1)⁵ and (2).⁶ Furthermore, the subsequent retail sale of the goods or products, by the retailer who purchased from the importer-wholesaler/manufacturer, is subject to the general excise tax at four percent pursuant to HRS §§ 237-13(2) and 237-16(b).⁷

Thus, in either case, the total tax collected on the importation and sale of goods is four and one-half percent of the purchase price.

B. The Import-Export Clause

Generally, the Import-Export Clause of the United States Constitution prohibits individual states from taxing imports. The Import-Export Clause provides as follows:

No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's 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.

U.S. Const. art. I, 10, cl. 2. ([top](#))

1. The Original Package Doctrine

In *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), the United States Supreme Court established the "original package doctrine" to determine whether a state tax on a foreign import violated the Import-Export Clause. Under the original package doctrine, foreign imports were not subject to state taxation while remaining in their original packages. *Id.* at 442. The original package doctrine was premised on the theory that any tax on a foreign import constituted an impost or duty prohibited by the Import-Export Clause, and any foreign goods that remained in their original package were presumably foreign imports. See *Low v. Austin*, 80 U.S. (13 Wall.) 29, 33 (1872).

In subsequent cases, however, the United States Supreme Court began identifying certain other points at which imports lose their character as imports for purposes of the import-export clause. See *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534, 79 S. Ct. 383, 3 L. Ed. 2d 490 (1959) (Court held that the Import-Export Clause was not violated by state taxation of materials that are imported for use in manufacturing and which have been put to their intended use, since such goods have ceased to be imports); *Gulf Fisheries Co. v. MacInerney*, 276 U.S. 124, 48 S. Ct. 227, 72 L. Ed. 495 (1928) (Court held that imported goods can lose their character as imports, and thus their immunity from taxation under the Import-Export Clause, by a change in the form of the goods through processing). ([top](#))

The use of various tests to determine when an imported good loses its import status and, thus, becomes subject to state taxation, led to inconsistent court decisions regarding the taxing of imported goods. Scott L. David, *The "Original Package" Doctrine on the Ropes: Limbach v. Hooven & Allison Co.*, 38 *Tax Lawyer* 535, 538 (1985).

2. Michelin Tire Corp. v. Wages

As a result of these inconsistent court decisions, the Supreme Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 495, reh'g denied, 424 U.S. 935, 96 S. Ct. 1151, 47 L. Ed. 2d 344 (1976), reexamined the tests to be applied under the Import-Export Clause. In *Michelin*, an importer challenged the assessment of Georgia's nondiscriminatory ad valorem property tax upon an inventory of imported tires and tubes maintained at a wholesale distribution warehouse. The importer argued that the tax violated the Import-Export Clause of the United States Constitution. 423 U.S. at 278. ([top](#))

Overruling *Low v. Austin*, 80 U.S. (13 Wall.) 29, 33 (1972), the Supreme Court held that assessment of Georgia's nondiscriminatory ad valorem property tax against the imported goods that were no longer in import transit did not violate the Import-Export Clause, regardless of whether the goods had lost their status as imports by being mingled with other goods of the importer. 423 U.S. at 279, 286-88.

In reaching this conclusion, the Supreme Court ignored the simple question whether the tires and tubes were imports, i.e. the original package analysis. Instead, the Court analyzed the nature of the tax to determine whether it was an "Impost or Duty." 423 U.S. at 279. Specifically, the Court examined whether the tax at issue offended any of the three policy considerations underlying the Import-Export Clause. The Court explained as follows: ([top](#))

The Framers of the Constitution thus sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: [1] the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; [2] import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and [3] harmony among the States might be disturbed unless seaboard States with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.

423 U.S. at 285-86 (footnotes omitted). ([top](#))

Evaluating Georgia's nondiscriminatory ad valorem property tax in light of these policy considerations, the Supreme Court concluded that the tax at issue was not the kind of tax prohibited by the Import-Export Clause, inasmuch as it did not offend the policies behind the clause. 423 U.S. at 285-86.

Although the Supreme Court in *Michelin* did not specifically overrule the original package test devised in *Brown v. Maryland*, it declared that the original package test "was an illustration, rather than a formula, and that its application [was] evidentiary, and not substantive." 423 U.S. at 297 (quoting *Galveston v. Mexican Petroleum Corp.*, 15 F.2d 208 (S.D. Tex. 1926)). The *Michelin* Court also stated that the Court in *Brown* "clearly implied that the prohibition [of the Import-Export Clause] would not apply to a state tax that treated imported goods in their original packages no differently from the common mass of property in the country[,] that is, treated [the goods] in a manner that did not depend on the foreign origins of the goods." *Id.* at 298 (internal quotations omitted). ([top](#))

Any doubt that the Court abandoned the original package doctrine in *Michelin* was put to rest by the Supreme Court's opinion in *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 104 S. Ct. 1837, 80 L. Ed. 2d 356 (1984). In *Limbach*, the Supreme Court, relying on *Michelin*, upheld Ohio's nondiscriminatory ad valorem tax and explicitly overruled the original package doctrine which had been applied in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 65 S. Ct. 870, 89 L. Ed. 1252 (1945). *Limbach*, 466 U.S. at 361.

3. The Applicability of *Michelin*

Although *Michelin* involved ad valorem taxes, the analysis in *Michelin* is applicable to all state taxes that are challenged as violating the Import-Export Clause. The United States Supreme Court has stated that its decision in *Michelin* "adopted a fundamentally different approach to cases claiming the protection of the Import-Export Clause." *Limbach*, 466 U.S. at 359. The Supreme Court explained this approach, and its distinction from the Court's pre-*Michelin* analysis:

To repeat: we think it clear that this Court in *Michelin* specifically abandoned the concept that the Import- Export Clause constituted a broad prohibition against all forms of state taxation that fell on imports. *Michelin* changed the focus of Import-Export Clause cases from the nature of the goods as imports to the nature of the tax at issue. The new focus is not on whether the goods have lost their status as imports but is, instead, on whether the tax sought to be imposed is an "Impost or Duty."

466 U.S. at 360 (emphasis added). ([top](#))

Accordingly, in *Department of Revenue of Wash. v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978), the Supreme Court applied the *Michelin* test to uphold the imposition of Washington's business and occupation tax on stevedoring activities. See also *Itel Containers Int'l Corp. v. Huddleston*, U.S. , 113 S. Ct. 1095, 122 L. Ed. 2d 421 (1993).

The Supreme Court held that Washington's business and occupation tax, as applied to in-state stevedoring activities, was not an "impost or duty" and thus did not violate the import- export clause, since none of the policies of the Import-Export Clause were threatened. 435 U.S. at 754-55.

C. Hawaii's General Excise and Use Taxes Under the Michelin Test

Hawaii's general excise and use taxes are both general uniform taxes, reasonably imposed as compensation for services provided by the State, and are not directed at foreign imports solely because of their character as foreign imports. In *re Grayco Land Escrow, Ltd.*, 57 Haw. 436, 447-49, 559 P.2d 264, 272- 73, cert. denied, 433 U.S. 910, 97 S. Ct. 2976, 53 L. Ed. 2d 1094 (1977). ([top](#))

Applying the Michelin test to Hawaii's general excise and use taxes, demonstrates that the policy considerations enunciated in Michelin are not offended. First, the general excise and use taxes do not interfere with the federal government's regulation of foreign commerce. The general excise and use taxes apply to virtually all businesses in the State and do not single out imported goods for unfavorable treatment or create special protective tariffs. See Michelin, 423 U.S. at 286. Second, the general excise and use taxes do not deprive the federal government of its exclusive right to revenues from imposts and duties. Rather, the general excise and use taxes are nothing more than a means "by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth." *Id.* at 287; see *In re Grayco Land Escrow, Ltd.*, 57 Haw. 436, 559 P.2d 264, cert. denied, 433 U.S. 910, 97 S. Ct. 2976, 53 L. Ed. 2d 1094 (1977). As the Supreme Court explained in Michelin:

[T]here is no reason why an importer should not bear his share of these costs along with his competitors handling only domestic goods. The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods, but it cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies.

423 U.S. at 287. ([top](#))

Finally, the general excise and uses taxes, if applied to imported goods that are no longer in transit as imports, do not interfere with the free flow of commerce, favoring the "port" state over other destination states, since the goods are not destined for other states. See *id.* at 288-90.

Under the analysis of Michelin, then, the application of Hawaii's general excise and use taxes to imported goods, does not violate the policy considerations underlying the Import-Export Clause and therefore, should not qualify as an "Impost or Duty" subject to the absolute ban of the Import-Export Clause. Accordingly, Hawaii's general excise and uses taxes may be applied to imported goods, no longer in transit, regardless of whether the imported goods are in their original package.

III. CONCLUSION

Before *Michelin Tire Corp v. Wages*, 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 692 (1976), the primary consideration under the Import-Export Clause was whether the state tax under view was assessed upon imports or exports. With respect to imports, the analysis applied the original package doctrine of *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827). Under this doctrine, as long as the goods retained their status as imports by remaining in their original packages, they enjoyed immunity from state taxation.

Michelin, however, abandoned the original package doctrine. Instead of analyzing the nature of the goods as imports, it examined the nature of the tax to determine whether it was an "Impost or Duty." This analysis centered on whether the tax offended any of the three enumerated policy

considerations underlying the Import-Export Clause. ([top](#))

Because Hawaii's general excise and use taxes do not offend any of the policy considerations underlying the Import-Export Clause, the taxes do not constitute an improper "Impost or Duty" under the Import-Export Clause. Therefore, general excise and use taxes may be applied to imported goods, no longer in transit, regardless of whether the imported goods are in their original package. Accordingly, Attorney General Opinion No. 64-38, which advised that general excise and use taxes could not be applied to imports in their original package, is overruled to the extent that it is inconsistent with this opinion.

Very truly yours,

Iris M. Kitamura
Deputy Attorney General

APPROVED:

Robert A. Marks
Attorney General

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1 HRS § 238-1 (1985) provides in relevant part that "import" "includes importation into the State from any other part of the United States or its possessions or from any foreign country, whether in interstate or foreign commerce, or both."

HRS § 238-2 (1985) provides in relevant part as follows:

There is hereby levied an excise tax on the use in this State of tangible personal property which is imported, or purchased from an unlicensed seller, for use in this State. The tax imposed by this chapter shall accrue when the property is acquired by the importer or purchaser and becomes subject to the taxing jurisdiction of the State.

HRS § 237-13 (Supp. 1992 and Comp. 1993) provides in relevant part as follows:

There is hereby levied and shall be assessed and collected annually privilege taxes against persons on account of their business and other activities in the State measured by the application of rates against values of products, gross proceeds of sales, or gross income, whichever is specified, as follows [BACK TO DOCUMENT](#) ([top](#))

2 HRS § 238-2(2)(1985) provides as follows:

If the importer or purchaser is licensed under chapter 237 and is (A) a retailer or other person importing or purchasing for purposes of resale, not exempted by paragraph (1), or (B) a manufacturer importing or purchasing material or commodities which are to be incorporated by the manufacturer into a finished or saleable product (including the container or package in which the product is contained) wherein it will remain in such form as to be perceptible to the senses, and which finished or saleable product is to be sold at retail in this State, in such manner as to result in a further tax on the activity of the manufacturer in selling such products at retail, or (C) a contractor importing or purchasing material or commodities which are to be incorporated by the contractor into the finished work or project required by the contract and which will remain in such finished work or project in such form as to be perceptible to the senses,

the tax shall be one-half of one per cent of the purchase price of the property, if the purchase and sale are consummated in Hawaii; or, if there is no purchase price applicable thereto, or if the purchase or sale is consummated outside of Hawaii, then one-half of one per cent of the value of such property. [BACK TO DOCUMENT \(top\)](#)

3 HRS § 237-13(2)(A) provides in relevant part as follows:

Upon every person engaging or continuing in the business of selling any tangible personal property whatsoever (not including, however, bonds or other evidence of indebtedness, or stocks), there is likewise hereby levied, and shall be assessed and collected, a tax equivalent to four per cent of the gross proceeds of sales of the business; provided that insofar as certain retailing is taxed by section 237-16, the tax shall be that levied by section 237-16, and in the case of a wholesaler, the tax shall be equal to one-half of one per cent of the gross proceeds of sales of the business.

HRS § 237-16(b) (Supp. 1992) provides in relevant part as follow:

There is hereby levied, and shall be assessed and collected annually, a privilege tax against persons engaging or continuing within the State in the retailing to which this section relates, on account of such retailing activities, as set forth in subsection (a), equal to four per cent of the gross proceeds of sale or gross income received or derived from such retailing. Persons on whom a tax is imposed by this section hereinafter are called "retailers." [BACK TO DOCUMENT \(top\)](#)

4 HRS § 238-2(1) provides in relevant part as follows:

If the importer or purchaser is licensed under chapter 237 and is (A) a wholesaler or jobber importing or purchasing for purposes of resale, or (B) a manufacturer importing or purchasing material or commodities which are to be incorporated by the manufacturer into a finished or saleable product (including the container or package in which the product is contained) wherein it will remain in such form as to be perceptible to the senses, and which finished or saleable product is to be sold in such manner as to result in a further tax on the activity of the manufacturer as the manufacturer or as a wholesaler, and not as a retailer, there shall be no tax, provided that if the wholesaler, jobber, or manufacturer is also engaged in business as a retailer (so classed under chapter 237), paragraph (2) [see note 3] shall apply to the wholesaler, jobber, or manufacturer, but the director of taxation shall refund to the wholesaler, jobber, or manufacturer, in the manner provided under section 231-23(d) such amount of tax as the wholesaler, jobber, or manufacturer shall, to the satisfaction of the director, establish to have been paid by the wholesaler, jobber, or manufacturer to the director with respect to property which has been used by the wholesaler, jobber, or manufacturer for the purposes stated in this paragraph. [BACK TO DOCUMENT \(top\)](#)

5 HRS § 237-13(1)(A) provides as follows:

Upon every person engaging or continuing within the State in the business of manufacturing, including compounding, canning, preserving, packing, printing, publishing, milling, processing, refining, or preparing for sale, profit, or commercial use, either directly or through the activity of others, in whole or in part, any article or articles, substance or substances, commodity or commodities, the amount of the tax to be equal to the value of the articles, substances, or commodities, manufactured, compounded, canned, preserved, packed, printed, milled, processed, refined, or prepared, for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding, preparing, or printing them, multiplied by one-half of one per cent. [BACK TO DOCUMENT \(top\)](#)

6 See supra note 3. [BACK TO DOCUMENT](#) ([top](#))

7 See supra note 3. [BACK TO DOCUMENT](#) ([top](#))