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North Carolina's Import-Export Property Taxation Classification Statute: A Question of Constitutionality

by Edmund Pickup, Jr.*

The North Carolina legislature has classified certain property for exemption from listing, appraisal, assessment, or taxation by the state. Among these classes of property are certain goods which are stored awaiting shipment to a foreign country, and certain goods which have been imported through a North Carolina seaport and which are stored and awaiting further shipment.[1] This article supports the position that this statute places a discriminatory ad valorem tax burden on goods that are imported through ports located outside of North Carolina and which are thereafter stored in North Carolina, or goods which have been stored in North Carolina and thereafter exported through parts of other states; therefore, the statute violates both the commerce clause[2] and the import-export clause[3] and is invalid. Additionally, the article will briefly explore actions which can be taken to challenge the statute, standing to bring these actions, and potential defendants in an action to invalidate the statute.

A. The Statute: Its Workings, History, and Interpretation

The selection and classification of property which will be taxed is a proper exercise of the taxing authority of the North Carolina General Assembly. In the case of N.C. Gen. Stat. § 105-275, the General

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[1] N.C. GEN. STAT. § 105-275 (1) & (2) (Cum. Supp. 1975) states: Property classified and excluded from the tax base. — The following classes of property are hereby designated special classes under authority of Article V, Sec. 2(2), of the North Carolina Constitution and shall not be listed, appraised, assessed, or taxed:

(1) Cotton, tobacco, other farm products, goods, wares, and merchandise held or stored for shipment to any foreign country, except any such products, goods, wares, and mechandise that have been so stored for more than 12 months on the date as of which property is listed for taxation. Such property shall be listed (by quantity only, and with a statement that it is being held for export) in the county in which it is located on the tax listing date, but shall not be assessed or taxed. On the next tax listing date, any such property which has not been exported shall be listed, assessed and taxed in the same manner as other taxable property. (The purpose of this classification is to encourage the development of the ports of North Carolina.)

(2) Tangible personal property that has been imported from a foreign country through a North Carolina seaport terminal and which is stored at such a terminal while awaiting further shipment — for the first 12 months of such storage. (The purpose of this classification is to encourage the development of the ports of this State.)

[2] U.S. CONST. art. I, §8, cl.3.

[3] U.S. CONST. art. I, §10, cl.2.

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Assembly "described the categories excluded from, rather than those included in, the [tax] base."[4] This power to classify taxable property was examined in *Rigby v. Clayton*[5] where the executrix of an estate claimed that the North Carolina inheritance tax violated her due process and equal protection rights since it classified a non-resident decedent's estate containing property located entirely outside of North Carolina differently from a non-resident decedent's estate containing property located both within and outside of the state. The court upheld the statute stating:

> The Legislature is given the widest latitude in making the distinctions which are bases for classification, and they will not be disturbed unless they are capricious, arbitrary, and unjustified by reason. [citation omitted] Nor will occasional inequalities and hardships resulting from the application of the statute defeat the law unless it be shown that they result from hostile discrimination.[6]

N.C. Gen. Stat. §105-275 must, therefore, be analyzed with the legislature's very broad classification powers in mind.

The first subsection of the statute classifies as non-taxable certain personal property held or stored for shipment to a foreign country for twelve months or less from the date that it is listed for taxation. Such property includes cotton, tobacco, farm products, goods, wares, and merchandise. This subsection has been subjected to much legislative tinkering since its conception as the second paragraph of the former §105-281.[7] That section was unsatisfactory because it had been phrased as an exemption to a general property tax rather than as a classification to a classified property tax.

Illustrative of the apparent difficulty that the legislature has had in redrafting the statute, the short-lived 1971 revision[8] provided that the purpose of the classification was to encourage the development of the ports of North Carolina. However, inconsistent with that purpose, Subsection (1) did not specify that the goods must be exported through a North Carolina port in order to obtain the non-taxable classification.

A 1973 amendment[9] required export through a North Carolina port, but never became effective because it would have been overly-complex to administer:

> It require[d] the owner of the property within the class to list it during the regular listing period, identifying it at that time for valuation separate from other property he may list. Thereafter, the property designated for

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[4] H. LEWIS, THE ANNOTATED MACHINERY ACT OF 1971 at 10 (1971).

[5] 274 N.C. 465, 164 S.E.2d 7 (1968).

[6] 274 N.C. at 470, 164 S.E.2d at 11.

[7] 1961 N.C. Sess. Laws, ch.1169, §8, *repealed by* 1973 N.C. Sess. Laws, ch.695, §10.

[8] 1971 N.C. Sess. Laws, ch.806, §1.

[9] 1973 N.C. Sess. Laws, ch.695, §1.

> export [was to be] treated for appraisal, billing and collection purposes as if it were taxable, but if it [was] in fact shipped in accordance with the statute's requirements, the owner [was to be] entitled . . . to a release of the taxing unit's claim for taxes levied on the exported property. If the tax [had] already been paid when the statute's requirements [were] met, the person who paid the tax [was] entitled to a refund.[10]

The present export statute[11] does not explicitly require export through a North Carolina port; however, it requires that the property be listed in the county in which it is located on tax date but not assessed or taxed. On the next tax listing date, if the property has not been exported, it is taxed like any other tangible personalty. Whether the subsection impliedly requires export through a North Carolina port may be determinative of its constitutionality.

The second subsection classifies tangible personal property imported from a foreign country through a North Carolina seaport terminal as non-taxable for the first twelve months of its storage in North Carolina. Although the wording of this subsection has been frequently changed since its conception,[12] the subsection has remained substantively constant.

B. *Commerce Clause: "The Congress shall have the Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."*[13]

Goods stored in a North Carolina warehouse are a part of the general mass of property within the state, and the commerce clause is not an obstacle to their taxation under a nondiscriminatory ad valorem property tax. Once the goods are stored, North Carolina's power to tax is not limited by the fact that the goods were imported through a port of another state. *Davenport v. Ralph N. Peters & Co.*[14] applied the above principle. There, the tax collector for the city of Charlotte and Mecklenburg County sued to recover ad valorem property taxes on cottonseed oil which had been brought into North Carolina from another state and which was stored in the taxing unit. The court found the broker liable for payment of the tax since he held the negotiable warehouse receipt and had failed to declare the oil. ". . . [I]nterstate movement was sufficiently interrupted when the oil was stored in Charlotte that it lost the immunity acquired by property in transit and became subject to state taxation."[15] The court cited *Minnesota v. Blasius:*

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[10] H. LEWIS, *supra* note 4 at 8 (1973 Supp.).

[11] N.C. GEN. STAT. §105-275(1) (Cum. Supp. 1975).

[12] 1961 N.C. Sess. Laws, ch. 1169, §8.

[13] U.S. CONST. art.I, §8, cl.3.

[14] 274 F. Supp. 99 (W.D.N.C.1966), *rev'd on other grounds,* 386 F.2d 199 (4th Cir.1967).

[15] *Id.* at 113.

> Where property has come to rest within a state, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the state, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the state and is thus subject to its taxing power.[16]

This statement reflects a policy that the commerce clause should not be applied to relieve those engaged in interstate commerce of their just share of state tax burdens merely because the tax increases their costs of doing business.[17]

In addition to the qualification that goods must have come to rest, the state's power to tax is limited under the commerce clause by a requirement that the tax not be discriminatory. As stated by the United States Supreme Court in *McGoldrick v. Berwind-White Coal Co.:*

> It is only when the [state] tax operates to regulate commerce between the states or with foreign nations to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations. [citations omitted] Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner...[18]

The decisions, despite formalistic distinctions between cases, incorporate a practical judgment of the likelihood that the tax might be used to place interstate commerce at a competitive disadvantage.[19]

Thus a *nondiscriminatory* ad valorem property tax could be placed on any property in storage in a North Carolina warehouse regardless of whether the property was imported or exported through a North Carolina port. The North Carolina General Assembly has chosen to classify property as non-taxable for one year if it has been imported through a North Carolina seaport. If it is imported through one of the seaports of a sister state, but stored in North Carolina, it is clearly outside of the classification and is taxable.

Although the statute does not so specify, this author contends that stored property held for *export* must be exported through a North Carolina port in order to receive the non-taxable classification. The self-proclaimed purpose of the statute is to promote the development of ports in North Carolina. If the statute were interpreted as affording

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[16] 290 U.S. 1, 9 (1933).

[17] McGoldrick v. Berwind-White Co., 309 U.S. 33, 46 (1940).

[18] *Id.* at 45. The McGoldrick case involved a challenge to a retail sales tax imposed by New York regardless of whether the items in question had traveled in interstate commerce. The Court upheld this tax as nondiscriminatory, and found no reason to distinguish between this type of sales tax and a tax on the property itself. *Id.* at 52. *See also* O'Kane v. New York, 283 N.Y. 439, 28 N.E.2d 905 (1940).

[19] 309 U.S. at 45 n.2.

the classification to stored goods exported through any port, the statute would not carry out that purpose. Secondly, the former statute[20] expressly required the property to be exported through a North Carolina port. Finally, the import subsection,[21] written in tandem with the export subsection, requires that the goods be imported through a North Carolina port; it also states that its purpose is to encourage the development of North Carolina ports. Prior to 1971, both the import and export subsections were combined in one paragraph of a former statute.[22] Thus, the two subsections are from the same source and have the same purpose; they should be similarly construed.

However, it is possible that the export subsection could be interpreted so as to afford the tax-free classification to all stored goods regardless of whether or not their anticipated port of departure is located in North Carolina. In *Nesbitt v. Gill*[23] the North Carolina Supreme Court construed a tax statute which the taxpayer claimed was in violation of the commerce clause. That statute placed a tax on every person, firm, or corporation in the business of purchasing horses or mules for resale. The tax was measured by the number of such animals that the dealer received in the state. The taxpayer claimed that since the tax did not become due until the dealer received the animals within the state, it discriminated against interstate commerce according to the origin of the animal. Construing the statute to apply with equal force to purchases made within the state, the court found the tax nondiscriminatory: "It simply means a dealer is not required to pay the tax when he purchases horses and/or mules for resale until such animals come into his possession within the state, regardless of the date of purchase or the origin of the shipment."[24] The court's holding was based on the rule of construction that if a statute is susceptible of two interpretations, one constitutional and the other unconstitutional, the former interpretation will be preferred.

In light of its stated purpose, prior wording, and close relationship with the import classification statute, it is difficult to maintain the construction that the present export classification statute does not require the stored goods to be exported through a North Carolina port in order to obtain the non-taxable classification. Moreover, even if the export classification subsection is given that construction, the corresponding import classification subsection specifies that it is to apply only to goods imported through North Carolina seaports.

Assuming that the effect of both subsections is *not* to tax stored goods imported or exported through a North Carolina port, but to tax

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[20] 1973 N.C. Sess. Laws, ch.695, §1.
[21] N.C. GEN. STAT. §105-275(2) (Cum. Supp. 1975).
[22] 1971 N.C. Sess. Laws, ch. 806, §1.
[23] 227 N.C. 174, 41 S.E.2d 646 (1947), *aff'd per curiam*, 332 U.S. 749 (1947).
[24] Nesbitt v. Gill, 227 N.C. 174, 180, 41 S.E.2d 646, 651 (1947).

similar goods which have been imported or will be exported through another port, then interstate commerce is placed at a competitive disadvantage with intrastate commerce. Thus, under the *McGoldrick* standards, discussed *supra,* the statute exceeds the state's constitutional limitations.

The United States Supreme Court in *Best & Co. v. Maxwell*[25] invalidated a North Carolina privilege tax on sellers who were not regular retail merchants in North Carolina, regardless of whether they were residents or non-residents, because of its discriminatory effect:

> The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.[26]

The practical operation of North Carolina's import-export classification statute on the businesses importing or exporting goods through ports of other states but storing them in North Carolina is difficult to determine. It should be noted that in *Best & Co.*, the Court analyzed the practical effect of the statute, looking beyond the fact that it was nondiscriminatory on its face. The Court assumed that "those North Carolina residents competing with appellant [a non-resident retail merchant] for the sale of similar merchandise will normally be regular retail merchants."[27] Without this assumption, there would be no discriminatory effect of the statute involved in *Best & Co.* It would be as difficult to obtain adequate numerical data on the effect of the import-export classification statute as it would have been to obtain such data on the effect of the statute in *Best & Co.* Perhaps, in light of the *Best & Co.* assumption, a court examing the constitutionality of the import-export classification statute would be willing to look to the probable practical effect without demanding exact numerical calculations as to the actual effect of the statute — at least if such calculations would be difficult to obtain.

A tax levied solely on property in interstate commerce and discriminatory on its face may be found non-discriminatory in effect if it is a substitute for an equivalent tax placed solely on intrastate commerce. For example, in *Gregg Dyeing Co. v. Query,*[28] South Carolina placed a license tax of six cents per gallon on petroleum products brought into and stored in the state. As the tax applied only to

[25] 311 U.S. 454 (1940).

[26] *Id.* at 455-56. *See* Nippert v. City of Richmond, 327 U.S. 416 (1946) (criminal conviction for engaging in business as a sales solicitor reversed as discriminatory against interstate commerce in effect rather than in language); *see* Memphis Steam Laundry Cleaner v. Stone, 342 U.S. 389 (Mississippi tax on person not licensed in state who solicits laundry in state with a lesser tax on in-state laundries invalid under commerce clause).

[27] 311 U.S. at 456.

[28] 286 U.S. 472 (1932).

petroleum purchased outside of the state and brought into the state, it appeared to be a discriminatory burden on interstate commerce. The United States Supreme Court held that the existence of a separate, similar tax levied upon persons buying or producing petroleum within the state made the statute nondiscriminatory. "There is no demand in the Constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power."[29]

Similarly, *Michigan Consolidated Gas Company v. Townships of Austin, Millbrook and Hinton*[30] held that an ad valorem personal property tax on natural gas brought into and stored in Michigan was not discriminatory even though it exempted Michigan gas. The court reasoned that since Michigan gas was subject to a severance tax which was not applicable to interstate gas, there was no discriminatory effect.[31]

The present import-export classification statute fails to meet the exculpating test. With respect to stored goods imported or exported through North Carolina ports, no tax exists in the North Carolina tax system to offset the tax burden borne by stored goods imported or exported through ports in other states.

The import-export statute is no less discriminatory because it is worded as an exemption from taxation for goods imported or exported through North Carolina ports, rather than as a tax only on stored goods previously imported or to be exported through other ports. In *Opinion of the Justices,*[32] the Supreme Court of New Hampshire responded to the questions of their legislature concerning a barrel tax on refined petroleum products produced in the state with an exemption for products produced for distribution in New Hampshire. The court held that any crude oil which came to rest in New Hampshire during the refining process could be taxed by the state without violation of the commerce clause. However, the court stated that whether the *exemption* would render the tax discriminatory was a question "within the jurisdiction of the federal courts in the last instance," and that it could not assure that the exemption would be permissible under the federal Constitution.[33] The Refined Petroleum Products Tax Act, as passed by the New Hampshire legislature, does not include the questioned exemption.[34]

The effect of the North Carolina import-export classification statute is very similar to the effect of the proposed exemption in *Opinion of*

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[29] *Id.* at 480.

[30] 373 Mich. 123, 128 N.W.2d 491 (1964).

[31] *Id.* at 144, 128 N.W.2d at 502.

[32] 114 N.H. 174, 317 A.2d 568 (1974).

[33] *Id.* at 179, 317 A.2d at 571.

[34] N.H. REV. STAT. ANN. §§78-C:1-:12 (Supp. 1975)

the Justices. The New Hampshire provision would have taxed barrels of petroleum to be distributed outside of New Hampshire's intrastate commerce on an ad valorem basis, while exempting identical barrels distributed in New Hampshire. North Carolina taxes stored goods imported or exported through out-of-state ports while, in effect, it exempts identical goods imported or exported using North Carolina's intrastate commerce. Both "exemptions" encourage the development of industries within their states at the expense of industries outside of their states.

C. *Import-Export Clause: "No State shall, without the consent of Congress, lay any Imports or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws . . ."*[35]

Since the North Carolina import-export classification statute applies only to stored goods imported from or exported to foreign countries, the import-export clause becomes relevant. Unlike the commerce clause, the import-export clause refers solely to goods brought from or carried to foreign countries, and not to goods transported from one state to another.[36]

> The Import-Export clause and the Commerce clause, while related, are not coterminous. There are two important differences between the two clauses. First, the Import-Export clause prohibits taxation by the states on the import or export, while the application of the Commerce clause has no relationship to whether an article was or ever has been, an import or export. Second, the Commerce clause is not cast in terms of a prohibition against taxes but in terms of power of the Congress to regulate commerce.[37]

C-1. Imports

Until January of 1976, the definitive case interpreting the import-export clause was *Low v. Austin*, decided by the United States Supreme Court in 1871.[38] In *Low*, the Court established the principle that the import-export clause clearly prohibited states from assessing any ad valorem property tax on imported goods until such time as the goods lost their import status and became part of the general mass of property in the state. However, in *Michelin Tire Corp. v. Wages*,[39] the United States Supreme Court dramatically changed its prior interpretation of the import-export clause from an absolute prohibition of taxes on imports to a prohibition of *discriminatory* taxation of imports.

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[35] U.S. CONST. art. I, § 10, cl. 2.

[36] Brown v. Houston, 114 U.S. 622, 628 (1885).

[37] City of Farmers Bank v. Am. Honda Motor Co., 527 S.W.2d 776, 782 (Tex. Civ. App. 1975).

[38] Low v. Austin, 80 U.S. (13 Wall.) 29 (1871).

[39] 96 S. Ct. 535 (1976).

In *Michelin*, the taxpayer manufactured tires and innertubes in France and Canada and imported the products into Georgia for warehousing and distribution. The tax commissioner of the county where the imported goods were held assessed ad valorem property taxes against the tires and tubes. The Supreme Court of Georgia held that those tubes which were still in the original packages in which they were imported were immunized from taxation by the import-export clause, but that the tires which had been mingled with other tires and whose sale had been arranged were part of the general mass of property in the state and thus were taxable by the state.

The United States Supreme Court held in *Michelin* that the purposes of the import-export clause were: to assure that the federal government had the exclusive right to regulate foreign commerce, to receive all of the revenue from duties, and to maintain the free flow of foreign goods among all the states by prohibiting the imposition of taxes by states through which imports and exports were likely to flow. The Court proceeded to hold that, as long as these purposes are fulfilled, the clause does not absolutely prohibit state taxation of imported goods:

> Nothing in the history of the Import-Export Clause even remotely suggests that a nondiscriminatory ad valorem property tax which is also imposed on imported goods that are no longer in import transit was the type of exaction that was regarded as objectionable by the Framers of the Constitution. For such an exaction, unlike discriminatory state taxation against imported goods as imports, was not regarded as an impediment that severly hampered commerce...[40]

Thus, the Court, per Justice Brennan, held that nondiscriminatory taxes on imports do not violate the purposes of the import-export clause. Admittedly, the Court was referring primarily to ad valorem property taxes which discriminate against all stored imports in favor of all stored non-imports. As shown in the commerce clause discussion, North Carolina's import classification statute discriminates against stored goods imported through ports outside of North Carolina and non-imported stored goods, in favor of stored goods imported through North Carolina ports. Since the *Michelin* decision is predicated on the policy for which the import-export clause was adopted, the question of whether *Michelin's* holding extends to North Carolina's import classification statute likewise depends on whether the effect of the stature violates the purposes of the import-export clause.

One of the purposes of the import-export clause examined in *Michelin* is that the free flow of imported goods among the states not be impeded.[41] This purpose is not offended simply because the impact of a tax is to increase the cost of imported goods purchased by consumers;

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[40] *Id.* at 541.
[41] *Id.* at 542.

the ultimate consumers should assume the burden of paying for the police and fire protection and similar services which benefitted the goods, just as they pay for the transportation costs associated with the goods.[42] Thus while goods may be taxed in order to compensate the state for its police services, the tax may not be imposed in a manner which would otherwise impede the flow of foreign commerce. Under the North Carolina tax, goods imported through ports in other states must bear costs not borne by goods imported through North Carolina ports. This inhibits the free flow of imported goods from the other states into North Carolina just as certainly as the pre-Constitution practice engaged in by port states (such as Virginia and South Carolina) of taxing imports sent to non-port states (like North Carolina)— a practice which, as the court points out, led to the inclusion of the import-export clause in the United States Constitution.[43] Thus, the import classification statute violates one of the purposes for the import-export clause and, consequently, violates the import-export clause itself.

The extent to which existing law concerning imports was changed by *Michelin* is open to question since there are no reported cases interpreting *Michelin* at this time. There is some question as to whether imported goods stored in warehouses retain their classification as imports. In *Hooven and Allison Co. v. Evatt*, the United States Supreme Court stated:

> [T]his Court has held, without a dissenting voice, that things imported are imports entitled to the immunity conferred by the Constitution; that the immunity survives their arrival in this country and continues until they are sold, removed from the original package, or put to the use for which they are imported.[44]

In *Youngstown Sheet and Tube Co. v. Bowers*, this pre-*Michelin* test was also stated to be applicable when imported goods are put to the use for which they were imported; at such time, they cease to be imports and their tax exemption is at an end.[45] The *Youngstown* Court found that the taxpayers had acted on the imported goods by irrevocably committing them to use in manufacturing after their journey had ended; although the goods were stored, they were available for the daily operational needs of the taxpayer's business. The Court distinguished cases where the goods were stored in a warehouse and intended for eventual use in manufacturing but were not essential to current operational needs. In

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[42] *Id.*

[43] *Id.* at 543.

[44] 324 U.S. 652, 657 (1945). (Imported hemp stored in original package by importer, and not used for the purpose for which it was imported, held immune from state taxation.)

[45] 358 U.S. 534, 542 (1959).

such a case, the goods would have still been imports[46] and, before *Michelin,* not taxable. The Court in *Youngstown* stated:

> Breaking the original package is only one of the ways by which packaged goods that have been imported . . . may lose their distinctive character as imports . . . That the package has not been broken is, therefore, only one of the several factors to be considered in factually determining whether the goods are being 'used for the purpose for which they were imported.' [citation omitted][47]

The protection of imported goods from discriminatory ad valorem property taxes, as announced in *Michelin,* may extend to situations where, formerly, taxation was permitted under the *Youngstown* and *Hooven* tests with respect to goods which were no longer classified as imports. The Court in *Michelin* pointed to a common characteristic shared by cases which met the *Youngstown* and *Hooven* tests and cases which met the *Michelin* test: "that they [taxes] cannot be selectively imposed and increased so as substantially to impair or prohibit importation."[48] The Court admitted, in a footnote, that discriminatory taxation could occur after the goods lost their protection as imports under the *Youngstown* and *Hooven* tests:

> For example, a State could pass a law which only taxed the retail sale of imported goods, while the retail sale of domestic goods was not taxed. Such a tax, even though operating after an 'initial sale' of the imports would, of course, be invalidated as a discriminatory imposition that was, in practical effect, an impost.[49]

Thus, a tax which is discriminatory under the rationale of *Michelin* is invalid even if the imported items had lost their classification as imports when taxed. Since the North Carolina import classification statute inhibits the free flow of imported goods among the states, it violates the purposes of the import-export clause regardless of whether the goods were removed from their original packages, were put to the use for which they were imported or were initially sold before they were stored in North Carolina.

The North Carolina case most relevant to this discussion is *Wilson v. County of Wake,*[50] decided in 1973. In *Wilson,* imported auto parts had been segregated from the entire shipment and subsequently repacked while still in their original containers. The North Carolina Court of Appeals held that the taxpayer, a wholesale distributor, had not broken the original package so as to make the parts taxable for ad valorem property tax purposes. The county claimed that the goods had been put to the use for which they were imported and that the

[46] *Id.* at 544.
[47] *Id.* at 548-49.
[48] 96 S. Ct. at 542.
[49] *Id.* at 542 n.7.
[50] 19 N.C. App. 536, 199 S.E.2d 665 (1973).

Youngstown test applied so as to permit taxation. However, the court distinguished *Youngstown* and other cases on the ground that they dealt with manufacturing importation, "and as such do not apply to the case at bar."[51] The *Wilson* case, insofar as it relied on *Low v. Austin*, supra, for the proposition that any import, as long as it retains the status of an import, is immune from state taxation, is clearly wrong, since *Michelin* explicitly overruled that proposition.

Further, the *Wilson* court seems to have distinguished the *Hooven-Youngstown* cases with a less than enlightening discussion. The stored goods in *Wilson* were available for filling orders (the purpose for which they were imported) in the same way that the ore in *Youngstown* was available for use in steel manufacture. The fact that one business dealt with manufacture and the other dealt with distribution would not seem to make their supplies any less a part of the general mass of property within the state.

C-2. Exports

Since *Michelin* involved only imports, there is presently no case which holds that a nondiscriminatory property tax on exports does not violate the import-export clause. Thus, there is a possibility that the law of exports is still governed by *Kosydar v. National Cash Register Co.*, where the United States Supreme Court stated:

> [T]he prohibition on taxation contained in the Import-Export Clause is absolute; no duties or imposts are allowed 'except what may be absolutely necessary for executing [a state's] inspection Laws.' Consequently, the essential question in cases involving the Clause is a narrow one: is the property upon which a tax has been sought to be imposed an 'export' and thus entitled to protection under the provision's literal terms?[52]

In *National Cash Register* the taxpayer had built data processing machines suitable for use only in foreign countries and had stored the component machines in anticipation of their shipment abroad. The Court held the machines taxable on the ground that the exemption from taxation in the import-export clause attached to exports and not to goods awaiting export. The Court cited *Empresa Siderurgica v. County of Merced*[53] for the criterion establishing when a good becomes an export:

> [I]t is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. . . . It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that

[51] *Id.* at 541, 199 S.E.2d at 668.
[52] 417 U.S. 62, 65-66 (1974).
[53] 337 U.S. 154, 156-157 (1949).

the goods are headed for their foreign destination and will not be diverted to domestic use.[54]

Leaving *Michelin* aside, it is clear that under *National Cash Register*, stored goods awaiting export are taxable under the import-export clause (regardless of whether the tax is discriminatory) simply because the stored goods are not exports. This result adheres even if, as in *National Cash Register*, the goods are totally unsuitable for domestic consumption. Thus, the North Carolina export classification statute would not violate the import-export clause.

Looking at *Michelin*, however, the *bases* for prohibiting discriminatory taxation of stored goods after importation are equally applicable to stored goods awaiting export: to allow Congress to control foreign commerce and the corresponding duties, and to assure that non-port states suffer a tax burden not in excess of that charged to port-state residents for use of the same ports. Thus, assuming that the North Carolina export classification statute classifies stored goods awaiting export as non-taxable only if they are to be exported through North Carolina ports, see discussion *supra*, the reasoning of *Michelin* logically extends to exports as well as to imports. In such case, the North Carolina export classification statute violates the import-export clause.

D. Procedural Problems in Bringing an Action Challenging the Classification Statute

D-1. Who may bring the suit – Standing

In *Appeal of Martin*[55] taxpayer shipped goods in sealed cartons marked "for transshipment" to a warehouse in Mecklenburg County. As purchase orders were received, taxpayer would instruct the warehouse to ship specified cartons to the ultimate consignee. The taxpayer claimed that the predecessor of N.C. Gen. Stat. §105-275(10) (Cum. Supp. 1975) exempted the stored cartons from taxation. The county claimed that the property was not held for transshipment and thus was not within the statute's classification, and that the statute was unconstitutional because it violated the constitutional requirement that property be taxed by a uniform rule. The Supreme Court of North Carolina held that the property fell within the classification statute[56] and that the county lacked standing to challenge the statute because it was not a member of the class subject to the alleged discrimination.

One recognized exception to this rule allows an affected party to allege discrimination when no member of a class subject to the alleged discrimination is in a position to raise the constitutional question. [citations

[54] 417 U.S. 62, 68 (1974).
[55] 286 N.C. 66, 209 S.E.2d 766 (1974).
[56] N.C. GEN. STAT. § 105-275(10) (Cum. Supp. 1975).

> omitted] The taxpayers of this State who are members of the class and subject to the alleged discrimination here asserted by Mecklenburg County are under no such disability. [citations omitted][57]

Thus, according to this case, any individual taxpayer in the county or city where the exemption is applicable has standing to challenge the constitutionality of the exemption since it has the effect of making him bear a greater portion of the tax burden.[58]

The federal courts are apparently not bound to follow state rules of standing and must reach their decision without regard to the state law on the matter.[59] A complete discussion of federal standing criteria, dealing with challenges to state taxation statutes, is beyond the scope of this article; however, it appears that the two most authoritative cases on taxpayer's standing, *Frothingham v. Mellon*[60] and *Flast v. Cohen*[61] have stated in dicta "... that state and municipal taxpayers have standing to sue to enjoin state officials from enforcing allegedly unconstitutional statutes."[62] In addition there must be actual monetary injury in order to have standing.[63] As the *Martin* case indicates, a tax burden which is relieved by an exemption must correspondingly be assumed by the taxpayers in the taxing unit.

D-2. Where must the suit be brought – Jurisdiction

The United States District Courts cannot "enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy, and efficient remedy may be had in the courts of such State."[64] In *Gulf Oil Corp. v. Clayton,* the Supreme Court of North Carolina held that the procedure set forth in N.C. Gen. Stat. §105-267 (1972) is the exclusive and appropriate method for testing the constitutionality of a statute, because the law does not contemplate administrative review of constitutional questions.[65] The United States Supreme Court also has held that the predecessor to the above North Carolina statute provided a plain, adequate, and complete remedy at law; a suit would not lie in the federal courts to enjoin the collection of a North Carolina state tax.[66]

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[57] In re Appeal of Martin, 286 N.C. 66, 75, 209 S.E.2d 766, 773 (1974).

[58] J. FERRELL, PROPERTY TAX BULLETIN No. 43 at 5-7 (Institute of Government, University of North Carolina at Chapel Hill, March 3, 1975).

[59] C. WRIGHT, HANDBOOK OF THE LAW OF THE FEDERAL COURTS § 13 (1970).

[60] 262 U.S. 447 (1923).

[61] 392 U.S. 83 (1968).

[62] Carlsbad Union School District of San Diego County v. Rafferty, 300 F.Supp. 434, 441 (S.D. Cal. 1969), *aff'd,* 429 F.2d 337 (9th Cir. 1970).

[63] *Id.*

[64] 28 U.S.C. § 1341 (1970).

[65] 267 N.C. 15, 20, 147 S.E.2d 522 (1966).

[66] Henrietta Mills v. Rutherford County, 281 U.S. 121 (1930); Catholic Society of Religious and Literary Education v. Madison County, 74 F.2d 848 (4th Cir. 1935).

N.C. Gen. Stat. §105-276 (1972) requires the taxpayer who asserts the invalidity of a tax charged against him to pay the tax and, within thirty days of payment, to seek a refund of the tax from the Commissioner of Revenue, if a state tax, or from the treasurer of a county or city, if a county or city tax. If the tax is not refunded within ninety days after demand, the taxpayer may sue either the Commissioner of Revenue, if a state tax, or the city, county, or town imposing the tax, if not a state tax. The case, once heard by the state court of last resort, is subject to review by the United States Supreme Court — by appeal, if the state court upholds the constitutionality of the statute, and by certiorari, if the state court finds the statute unconstitutional.[67] Thus, in challenging the import-export classification statute, the suit must be brought in state court against the county, city, or town imposing the tax.

D-3. What kind of relief is possible - Remedy

Common sense dictates that no plaintiff will sue to eliminate an exemption received by other taxpayers when the increase in plaintiff's tax burden is insignificant compared to the litigation costs of challenging the exemption. No plaintiff will bring a suit to eliminate an exemption from which he benefits, no matter how certain its unconstitutionality may be.

In *Richmond Food Stores v. Jones,*[68] plaintiff, a non-resident distributor of soft drinks, challenged an alternative method of paying the North Carolina Soft Drink Tax on the ground that this was available only to resident distributors. In essence, the resident distributors could pay the tax on a monthly basis — without affixing tax stamps or tax-paid crowns on the bottles — at one half cent per bottle for the first fifteen thousand bottles sold annually and one cent per bottle for all additional bottles with an eight percent rebate of the tax. Non-resident distributors were required to affix tax-paid stamps or crowns on all bottles and pay a tax of one cent per bottle. The Court of Appeals of North Carolina held that the alternative method available to resident distributors discriminated against interstate commerce; but, instead of holding the alternative method void, the court held that the word "resident" in the alternative method was void and of no effect. Thus, the non-resident distributor was entitled to use the alternative method and achieve a lesser tax burden.

The same type of remedy would be appropriate for an owner or warehouseman of goods stored in North Carolina and imported or exported through non-North Carolina ports. The words in the North Carolina import-export classification statute which indicate that the goods must be imported or exported through a North Carolina port

[67] 28 U.S.C. § 1257 (1970).

[68] 22 N.C. App. 272, 206 S.E.2d 346 (1974).

could be eliminated, leaving the statute completely nondiscriminatory under both the commerce clause and the import-export clause.

E. Summary

This article supports the contention that N.C. Gen. Stat. §105-275(1-2)(Cum. Supp. 1975) places a discriminatory ad valorem tax burden on goods that are imported or exported through ports other than those located in North Carolina. The statute therefore violates the commerce clause, the import-export clause as it applies to imports, and perhaps the import-export clause as it applies to exports. Any financially affected taxpayer within the same taxing unit as persons receiving the exemption classification has standing to bring the action. The action can be brought only in state court and only after following special statutory tax claim procedures. The action could recover, as a remedy, the same tax classification for stored property imported or exported through ports outside of North Carolina as similar property imported through North Carolina ports now receives.