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STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

July 21, 1964

Mr. Edward J. Burns
Director of Taxation
State of Hawaii
Honolulu, Hawaii

Attention: Mr. Alan G. White
Chief of Operations

Dear Mr. Burns:

This is in reply to your inquiry based on the following facts:

A local importer imports from Canada bottled liquor packed in cases. The local importer sells these cases of liquor to buyers in Hawaii. On these sales, is the local importer subject to the Hawaii general excise tax? We reply in the negative.

The question calls for an examination of the original package doctrine, and the following two questions related to the original package doctrine need to be discussed:

(1) What is an "original package"?

(2) When is there a "breaking" of the "original package"?

I. WHAT IS AN "ORIGINAL PACKAGE"?

The original package doctrine was first enunciated in Brown v. Maryland, 25 U.S. 419 (1827). In this case, the state of Maryland required all importers of foreign goods to pay a license fee of $50.00. At issue in this case was the

export-import clause of the United States Constitution.[1/] The Court in its discussion of what an import was, stated at page 441:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution." (Emphasis added.)

This clause in the Brown case has seen the demise of many state taxing statutes. The innumerable cases that followed, both in the state taxing and regulatory sphere and in the cases involving interstate commerce and foreign commerce, have mentioned the original package doctrine. In Annot., What is "Original Package" within Interstate and Foreign Commerce, 26 A.L.R. 971 (1923), the annotator discusses the definition of "original package" as found in the many cases cited therein and gives as a general definition, the following:

> ". . . an original package is that package which, according to custom respecting the particular articles shipped, is usually delivered by the vendor to the carrier for transportation, and delivered as a unit to the consignee."

In the case of liquor shipped in cases, the original package would usually be the case in which the bottled liquor is packed. See Annot., 26 A.L.R. 971 (1923). The placing of marks or stamps upon the container, as required by customs regulations, does not necessarily make such a container an original package. In Territory of Hawaii v.

1/ Art. I, § 10: "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. . . ."

Lam Yip Kee, 19 Haw. 565 (1909), there was a consignment of five wooden cases each containing five tins, each of the latter in turn containing twenty 5 tael tins of opium. Each of the 5 tael tins of opium had the customs stamps of the original importation from Hong Kong. The court held that the wooden cases and not the 5 tael tins were the original packages. The same rationale would probably have been used by the court with reference to bottled liquor imported in cases. A shipment of bottled liquor in cases would seem to be the customary method of shipment, and tax evasion or fraudulent intent to evade local laws does not seem evident from such method of shipment. If the intent to evade local laws by methods of packaging can be shown, the courts will not recognize such packaging methods in defining the original package. For example, in May v. New Orleans, 178 U.S. 496 (1899), the foreign seller shipped goods in cases within which were many separately wrapped packages ready for resale. The court held that the cases and not the separately wrapped parcels were the original packages. In Cook v. Marshall County, 196 U.S. 261, 270 (1905), furthermore, the Court made it clear that the test propounded by Chief Justice Marshall in the Brown case was not to be used to evade the laws of the states:

> "The term original package . . . is simply a convenient form of expression adopted by Chief Justice Marshall in Brown v. Maryland, to indicate that a license tax could not be exacted of an importer of goods from a foreign country who disposes of such goods in the form in which they were imported . . . whatever the form or size employed there must be a recognition of the fact that the transaction is a bona fide one, and that the usual methods of interstate shipment have not been departed from for the purpose of evading the police laws of the States."

The physical properties of the goods shipped would have a bearing as to the most convenient and the safest methods of shipping. In the case of shipments of goods in bulk, the definition of the original package has been expansive in that the entire shipment may be considered to be in the original package. In Re Taxes, Pacific Guano & Fertilizer Co., 32 Haw. 431 (1932), the Hawaii Supreme Court held that where there is no package, as that term

is commonly understood the "original form" would serve as the test to determine whether an import is still an import. Thus, in that case, the court held, at page 440, that "If the thing imported is still in its 'original form,' in the ownership and the warehouse of the importer, and not yet sold by the importer, it still retains its distinctive character as an import and is immune from local taxation." The entire shipment of oil and live cattle has been held to constitute the original package just as the Hawaii Supreme Court held the shipment of fertilizer in bulk to constitute the original package. See cases cited in Annot., 26 A.L.R. 971 (1923).

In conclusion, where bottled liquor is shipped in cases, such cases should be considered the original packages unless it can be clearly shown that the cases are designed merely to escape the taxing statutes of Hawaii.

II. WHEN IS THERE A "BREAKING" OF THE "ORIGINAL PACKAGE"?

To restate the question: When does an import cease to be an import? It is clear that once an import ceases to to be an import and has "become incorporated and mixed up with the mass of property in the country" it loses its characterization as an import and becomes "subject to the taxing power of the state". Brown v. Maryland, supra, at 441.

The original package doctrine, as enunciated in the Brown case, was applicable to imports for sale by the importer and not applicable to imports for use by the importer in manufacturing. The right to sell goods in the original package tax-free was couched in terms of a quid pro quo. At page 441, the Court in the Brown case said:

> "The counsel for the plaintiffs in error contend, that the importer purchases, by payment of the duty of the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying

> the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which-the duty is paid, every principle of fair-dealing requires, that they should be understood to confer it. The practice of the most commercial nations conforms to this idea." (Emphasis added.)

That the importer of goods from a foreign country has the right to sell these same goods in the original package without being subjected to the burden of taxation has been recognized. Waring v. Mobile, 75 U.S. 110 (1868). But the tax exemption is not extended to the purchaser of the goods in the original package. Ibid.

It should be noted that the original package doctrine has lost its impact with reference to goods shipped in interstate commerce. This distinction between the commerce clause and the export-import clause is stated in Sonneborn Bros. v. Cureton, 262 U.S. 506, 510 (1923):

> "The distinction is that the immunity attaches to the import itself before sale [export-import clause], while the immunity in case of an article because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce."

It should also be noted that an importer who uses imports in manufacturing may have such imports subjected to tax if such imports are committed to current operating need even though stored in the original package. Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959).

The rationale of Youngstown was used in several cases so as to subject imports in their original package to local taxation where the importer held such original packaged goods in inventory for resale, but the state courts have made a distinction between imports in the original package held for use and those held for sale. State ex rel. H. A. Morton Co. v. City of Milwaukee, 112 N.W.2d 914, 916 (Wis. 1962):

> ". . . the United States supreme court has to the present recognized, as must we, a distinction between goods imported for sale

> and goods imported for use in manufacturing."

In Tricon. Inc. v. King County, 374 P.2d 174, 176 (Wash. 1962), cert. denied, 372 U.S. 227 (1963), the court discussed the application of the rationale of the Youngstown case to the situation of an importer stocking current inventory for purposes of sale, and by implication suggested that possibly there was no logical reason for making a distinction between imports committed to inventory for use and imports committed to inventory for sale:

> "We do not think the Supreme Court has indicated by implication that goods imported for resale, and which remain in their original containers, lose their character as imports immune from state taxation when they become a part of the importer's current inventory of goods held for sale. See Miehle Printing Press & Mfg. Co. v. Department of Revenue, 18 Ill.2d 445, 164 N.E.2d 1 (1960); State ex rel. H. A. Morton Co. v. Board of Review, 15 Wis.2d 330, 112 N.W. 2d 914 (1962). Whatever may be our thoughts as to any fundamental inconsistency in distinguishing between goods imported for one's own use which become a part of current inventory in the manufacturing process and goods imported for resale which become a part of the importer's current inventory in the selling process, we are bound, as heretofore stated, to accept the rationale of the decisions of the Supreme Court of the United States."

In James B. Beam Distilling Co. v. Department of Revenue, 367 S.W. 2d 267 (Ky. 1963), the Kentucky court held that the storage of imported whisky in the original packages to be sold in the domestic market did not cause the whisky to lose its character as an import. Upon appeal to the United States Supreme Court, the Court affirmed the lower court. The United States Supreme Court discussed primarily whether the Twenty-First Amendment of the United States Constitution had superseded the export-import clause of the Constitution and held that it had not. However, the Court did summarily state in Department of Revenue v. James B. Beam Distilling Co.,

_____ U.S. _____ (1964), U.S. Supreme Court No. 389, June 1, 1964, 32 Law Week 4437, that:

> "The tax here in question is clearly of a kind prohibited by the Export-Import Clause. Brown v. Maryland, 12 Wheat. 419. As this Court stated almost a century ago in Low v. Austin, 13 Wall. 29, a case involving a California ad valorem tax on wine imported from France and stored in original cases in a San Francisco warehouse, '[t]he goods imported do not lose their character as imports, . . . until they have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibitions Id., at 34. See Hooven & Allison Co. v. Evatt, 324 U.S. 652."

It would seem that from this recent pronouncement of the United States Supreme Court that the distinction between imports for use and imports for sale is still maintained. Although the Court turned the decision primarily on the issue of the export-import clause's relationship to the Twenty-First Amendment, the Court did make the statement quoted above. Furthermore, the original package doctrine was discussed in the lower court decision and the United States Supreme Court's affirmance of the lower court's ruling, no matter how briefly treated, would for the present seem to be the last word of the Court. In the James B. Beam Distilling Co. case, the Court's reliance on Brown v. Maryland, Low v. Austin, and Hooven & Allison Co. v. Evatt indicates that the Court is not as yet modifying the original package doctrine nor applying the current operational need test of the Youngstown Sheet & Tube Co. case with reference to imports held for sale by the importer.

On the basis of the above analysis of the United States Supreme Court's position, it is our view that the original package doctrine is still applicable to imports held for sale. Thus, imported liquor sold in the original package is not subject to local taxation. The nomenclature of the tax is not important if the ultimate result of the tax is "a duty on the thing imported". Brown v. Maryland,

supra. More aptly put are the words of the court in James B. Beam Distilling Co. v. Department of Revenue, supra, at 268:

> "Even though the tax is denominated as something else, such as an occupational tax . . . an excise tax . . . or an ad valorem tax . . . if, in fact, it is a tax on imports . . . the levy is invalid."

It is our view, therefore, that the importer selling imported liquor in the original package is not subject to the Hawaii general excise tax for the sale thereof.

Logical arguments have been made by writers that the current operating need test as applied to imports in the original packages committed to manufacturing (Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1939)) should be equally applicable to imports in the original packages committed to operating inventory for sale purposes. See Note, Taxation of Liquor Imports: Effect of Youngstown and the Twenty-First Amendment, 14 Stan. Law Rev. 876 (1962); Note, Applicability of the "Original Package" Doctrine to Prohibit State Taxation of Goods Imported for Sale, 30 Fordham Law Rev. 797 (1962). However, until such time as the United States Supreme Court indicates that a new inquiry of its present position is justified, our view is that the distinction between imports for sale and imports for manufacturing must be maintained.

CONCLUSION:

(1) The original packages, under the facts presented in the instant case, are the cases in which are contained the bottled liquor.

(2) The goods in the original packages lose their characterization as imports after the first sale by the importer of the goods in their original packages or after the original packages are broken.

Very truly yours,

/S/ Clifford I. Arinaga

CLIFFORD I. ARINAGA
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General