

HOUSE BILL REPORT

SB 5434

As Reported by House Committee On:
Finance

Title: An act relating to the excise taxation of sales of tangible personal property originating from or destined to foreign countries.

Brief Description: Regarding excise taxation of sales of tangible personal property originating from or destined to foreign countries.

Sponsors: Senators Poulsen, Schoesler, Kastama, Zarelli, Prentice, Regala, Benton and Rasmussen; by request of Department of Revenue.

Brief History:

Committee Activity:

Finance: 4/17/07 [DP].

Brief Summary of Bill

- Codifies the Department of Revenue's tax policies regarding the Business and Occupation and retail sales taxation of products in import and export commerce.

HOUSE COMMITTEE ON FINANCE

Majority Report: Do pass. Signed by 8 members: Representatives Hunter, Chair; Orcutt, Ranking Minority Member; Condotta, Assistant Ranking Minority Member; Conway, Ericks, McIntire, Roach and Santos.

Minority Report: Do not pass. Signed by 1 member: Representative Hasegawa, Vice Chair.

Staff: Jeff Mitchell (786-7139).

Background:

The Import-Export Clause (IEC) of the United States Constitution contains an explicit limitation on the taxing powers of the states. The IEC prohibits any imposts or duties from being levied on imports or exports. The IEC applies to goods inbound from, or outbound to, a foreign country. Two issues need to be considered to properly analyze a tax under the IEC:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

(1) does the tax constitute a duty or impost; and (2) is the tax levied on a product in the process of importation or exportation?

In 1976, in *Michelin Tire Corp. v. Wages*, the U.S. Supreme Court dramatically shifted its analysis of the IEC. Prior to *Michelin*, any tax levied on imports or exports was considered an impost or duty. The bulk of the analysis in pre-*Michelin* cases addressed whether the products were still in transit, and therefore considered products in the process of importation or exportation. The Court in *Michelin* identified the three principal concerns of the Constitutional framers with respect to the IEC: (1) the federal government must speak with one voice when conducting foreign policy, and a state tax could interfere in these efforts; (2) import revenues are to be the major source of revenue for 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, are prohibited from imposing taxes on goods transported to inland states. After *Michelin*, if a tax does not offend any of these elements, it is not considered an impost or duty. This analysis limits the scope of the IEC.

The Department of Revenue's (DOR) tax policies regarding goods in import and export commerce are implemented in Rule 193C (WAC 458-20-193C). Rule 193C provides business and occupation (B&O) and retail sales exemptions for goods in the process of being imported or exported from this state. The rule has not been amended in more than 20 years, and has been generally administered in the same manner since at least the 1950s. As described above, the U.S. Supreme Court in recent decades has narrowed the scope of the IEC. Furthermore, Washington State Supreme Court decisions have cast doubt on the DOR's ability to implement any rule that expands tax immunity beyond that found in statute.

Summary of Bill:

The tax policies under Rule 193C are codified in statute. Tangible personal property (TPP) in import or export commerce is exempted from B&O and retail sales taxation.

The TPP is in the process of import commerce if the TPP is moving through this state to a destination outside the state or the TPP is in the process of being delivered to a buyer in this state. The TPP is no longer in the process of import transportation if the property is:

- (1) put to actual use;
- (2) resold after the property has arrived in this state or any other state; or
- (3) processed in any way not related to shipping.

The TPP is in export commerce when the seller delivers the property to:

- (1) the buyer at a destination in a foreign country;
- (2) a carrier for transportation to a foreign country;
- (3) the buyer at shipside or aboard the buyer's vessel, or any other vehicle of transportation, where it is clear that the process of exportation of the property has begun; or

- (4) the buyer in this state if the property is capable of being transported to a foreign destination under its own power, the seller files a shipper's export declaration, and the property is directly transported to a destination in a foreign country.
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Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) This is a Department of Revenue (DOR) request bill. This is the most important bill in the DOR's request package. The bill attempts to codify current practice. The rule was originally adopted to implement decisions of the U.S. Supreme Court in implementing the import-export clause. The Attorney General has indicated that the current rule provides an exemption broader than what the federal Constitution requires. If the rule were to go away, and we taxed the activities to the full extent permitted by the Constitution, we estimate the resulting tax revenue to be approximately \$60 million per year. This would lead to three results that we wish to avoid: it could affect the perception of Washington as a leader in international trade; it would potentially force businesses to use ports in other states; and it could increase costs to Washington businesses and consumers. For example, the aluminum uses bauxite that can only be acquired from outside the country. The importer bringing the ore to the smelters would be subject to B&O tax if the rule were to go away. This bill would prevent a tax increase and maintain Washington's business competitiveness. The DOR has made it very clear that they will begin rulemaking to repeal Rule 193C if this bill does not pass. The revised rule could be in place by October. Many retailers import goods from all over the world. If this bill does not pass it could have a negative impact on the retail industry.

(Opposed) None.

Persons Testifying: Gil Brewer, Department of Labor; Amber Carter, Association of Washington Business; Randy Ray, Pacific Seafood Processors Association; Gordon Baxter, International Longshore and Warehouse Union; and Mark Johnson, Washington Retail Association.

Persons Signed In To Testify But Not Testifying: None.