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6-1-1974

## Immunity from State Taxation: Who is an Importer: Volkswagen Pacific, Inc. v. City of Los Angeles

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### Recommended Citation

Ferdie F. Franklin, *Immunity from State Taxation: Who is an Importer: Volkswagen Pacific, Inc. v. City of Los Angeles*, 7 Loy. L.A. L. Rev. 350 (1974).

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**IMMUNITY FROM STATE TAXATION: WHO IS AN  
IMPORTER? VOLKSWAGEN PACIFIC, INC.  
v. CITY OF LOS ANGELES<sup>1</sup>**

The application of the constitutional prohibition against state taxation of imports<sup>2</sup> involves two considerations: whether or not the party involved is an "importer" in the constitutional sense,<sup>3</sup> and, if this be the case, whether or not the importer has acted in a fashion which has caused the goods to lose their "import" status.<sup>4</sup> It is clear that imports lose tax immunity after the first sale by an "importer."<sup>5</sup> Therefore, a judicial determination that a party contesting imposition of a local tax has purchased the goods from an "importer" would make superfluous any inquiry as to the purchaser's subsequent disposition of the goods. If the party contesting a local tax is not a constitutional "importer," the constitutional proscription of taxes on imports simply has no application.<sup>6</sup> The constitutional status of the contesting party is thus the threshold question in import taxation adjudication.

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1. 7 Cal. 3d 48, 496 P.2d 1237, 101 Cal. Rptr. 869 (1972).

2. "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." U.S. CONST. art. I, § 10, cl. 2.

The term "import" applies to articles from foreign countries, but not to goods shipped from one state to another. *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1868). The prohibition applies as long as the goods can be characterized as "imports": "Whilst retaining their character as imports, a tax upon them [imported goods] in any shape, is within the constitutional prohibition." *Low v. Austin*, 80 U.S. (13 Wall.) 29, 34 (1871). Such prohibition includes taxing the occupation of importer, *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827); a tax on the sale of imported goods, *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218 (1932); *Cook v. Pennsylvania*, 97 U.S. 566, 573 (1878); an ad valorem tax on imported goods, *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945); a license tax levied on an agent for steamship lines operating solely in foreign commerce, *Tax Review Bd. v. Norton, Lilly, & Co.*, 157 A.2d 60 (Pa. 1959); cf. *Matson Navigation Co. v. State Bd.*, 297 U.S. 441 (1936), where a state's corporate franchise tax on the privilege of doing business within the state, which included profits from foreign commerce in its measure, was upheld.

The purpose of the prohibition was to prevent the great importing states from benefiting at the expense of the non-importing states by imposing their own tax on imported goods eventually destined for the latter. *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534, 545 (1959); *Brown v. Maryland*, *supra* at 440.

3. *Hooven & Allison Co. v. Evatt*, 324 U.S. at 658.

4. *Id.*

5. *Id.* at 656-57.

6. See *Hooven & Allison Co. v. Evatt*, 324 U.S. at 657-58; *Waring v. Mayor of Mobile*, 75 U.S. (8 Wall.) 110, 122-23 (1868); 20 WORDS & PHRASES *Imports* 440 (1955).

Cases attempting to determine the identity of an importer for tax immunity purposes have employed two principal criteria for deciding the question: (1) Was the party in question the "inducing and efficient cause of . . . importation?"<sup>7</sup> (*i.e.*, did his order of goods set in motion the importation process?) and (2) did he bear the risk of loss during the shipping process?<sup>8</sup>

Although the question of the identity of the importer has generated less litigation than the issue of whether or not goods have lost their status as imports through the actions of an importer,<sup>9</sup> the recent Califor-

7. *Hooven & Allison Co. v. Evatt*, 324 U.S. at 661. See also *American Smelting & Refining Co. v. County of Contra Costa*, 271 Cal. App. 2d 437, 446-47, 77 Cal. Rptr. 570, 575-76 (1969); *City of Detroit v. Kenwal Prods. Inc.*, 165 N.W.2d 875, 876-77 (Mich. Ct. App. 1968).

8. See *Waring v. Mayor of Mobile*, 75 U.S. at 119-20. Cf. *Hooven & Allison Co. v. Evatt*, 324 U.S. at 662-63, 663 n.4; *American Smelting & Refining Co. v. County of Contra Costa*, 271 Cal. App. 2d 437, 446-47, 77 Cal. Rptr. 570, 575-76 (1969).

9. This Note will discuss the problem of identifying the importer for tax immunity purposes. The other problem, deciding when an article ceases to be an import, is one which has generated much litigation and commentary, and will not be discussed fully here. Generally, however, the problem is whether or not the goods in question have lost their character as imports. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), the seminal case on state taxation of imports, is the starting point for any consideration of this problem. In that case, Chief Justice Marshall noted that it was not possible to lay down a strict rule specifying when goods lose their character as imports, but suggested that

[w]hen 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.

*Id.* at 441-42. This statement has produced the so-called "package doctrine," as one way of determining whether or not an article is still to be considered an import. Essentially, when an article is shipped in a package, it retains its immunity from state taxation while still in the hands of the importer and in the original package: "[G]oods 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." *Low v. Austin*, 80 U.S. (13 Wall.) 29, 34 (1871). Though the package doctrine is meant as a test and not as an absolute indicator of the presence or absence of tax immunity (*Baldwin v. Seelig*, 294 U.S. 511, 526-27 (1935)), it has been decisive in many cases. *E.g.*, *Low v. Austin*, *supra*; *F. May & Co. v. New Orleans*, 178 U.S. 496 (1900).

Since the package doctrine is only one indicator, the more general inquiry becomes whether or not "the importer has so acted upon the thing imported, that it has . . . lost its distinctive character as an import." *Brown v. Maryland*, *supra* at 441-42. When the package doctrine does not apply, the test becomes whether or not the goods have been sold by the original importer or put to the use for which they were imported:

[T]hings imported are imports entitled to the immunity conferred by the Constitution; that . . . immunity survives . . . until they are sold, removed from the original package, or put to the use for which they are imported.

nia Supreme Court case of *Volkswagen Pacific, Inc. v. City of Los Angeles*<sup>10</sup> should give rise to new concern over the problem. In a holding noticeably lacking in supportive facts, the court found that a party who bore risk of loss, but was not, from all appearances, the "inducing and efficient cause" of the importation was nevertheless the importer.<sup>11</sup> In so doing, the California court limited the latter criterion to a "broker," or agency, situation. This Note will evaluate the significance of such distinctions in light of prior decisions and will also attempt to illuminate the possible bases of the court's decision.

## I. THE SUPREME COURT CASES

Only two United States Supreme Court cases have extensively discussed the identity of an importer for purposes of the import-export clause.<sup>12</sup> In the first of these, *Waring v. Mayor of Mobile*,<sup>13</sup> the plaintiff was a salt merchant, buying large quantities of that commodity from overseas suppliers. Waring's purchase contracts were usually made before the salt arrived in this country, but often after it had left the foreign port.<sup>14</sup> When the salt reached the port of Mobile,

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Hooven & Allison Co. v. Evatt, 324 U.S. at 657. As the above quote indicates, the mere fact that an article is in its original package does not insure tax exemption. See *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534, 548 (1959). For example, it has been held that the second sale of an imported article within this country is taxable, even though the article may be in the original package. *Waring v. Mayor of Mobile*, 75 U.S. at 122-23.

The "put to the use for which imported" test is another complex aspect of import tax immunity. In *Youngstown Sheet & Tube Co. v. Bowers*, *supra*, it was held that goods stored by petitioners prior to their use in manufacturing had been put to the use for which they were imported, in a situation where they were *essential* to current manufacturing needs. See note 26 *infra*. For more on the problem of when goods lose their tax immunity, see Bradley, *State Taxing Power: An Accommodation of State and Federal Powers*, 34 NOTRE DAME LAW. 593 (1960); Glander, *Practical Approach to the Tax Immunity of Imports For Use in Manufacturing*, 18 NAT'L TAX J. 328 (1965); Powell, *When Does an Import Cease to Be an Import?*, 58 HARV. L. REV. 858 (1945); Annot., 26 A.L.R. 971 (1923).

10. 7 Cal. 3d 48, 496 P.2d 1237, 101 Cal. Rptr. 869 (1972).

11. The basis for the court's holding that the petitioner was not an importer is unclear; even risk of loss was not expressly or impliedly mentioned as a basis of decision. See text accompanying notes 100-02 *infra*.

12. Though some cases have discussed the concept of importer in the context of interstate commerce as if the problem were the same for foreign commerce in the import-export clause (see, e.g., *State v. Fidelity & Deposit Co.*, 78 P.2d 1090 (Wash. 1938)), the situation is not the same. *American Steel & Wire Co. v. Speed*, 192 U.S. 500, 519-21 (1904); *Washington Chocolate Co. v. King County*, 152 P.2d 981, 990-91 (Wash. 1944); see note 2 *supra*.

13. 75 U.S. (8 Wall.) 110 (1868).

14. *Id.* at 110-11.

Waring's own lighters removed it from the ships and carried it to shore.<sup>15</sup> The shippers, however, paid the customs duties, satisfied other formal requirements,<sup>16</sup> and assumed the risk of loss throughout the journey until the cargo was delivered to Waring's boats.<sup>17</sup> The city levied a tax on local merchants, measured by the amount of gross sales,<sup>18</sup> which Waring refused to pay. He challenged the constitutionality of the tax, asserting that his sales were entitled to the protection of the import-export clause because they involved imported goods.<sup>19</sup> The Supreme Court, emphasizing the fact that risk of loss remained with the shipper until delivery to Waring,<sup>20</sup> found that Waring was not the "importer" of the goods.<sup>21</sup> Therefore, he was compelled to pay the tax:

Importers selling the imported articles in the original packages are shielded from any such State tax, but the privilege of exemption is not extended to the purchaser [from the importer], as the merchandise, by the sale and delivery, loses its distinctive character as an import.<sup>22</sup>

Though the Court emphasized the risk of loss as the determinative factor, the facts of the case also reveal that Waring often did not contract for the salt until it had already been shipped.<sup>23</sup> Thus either the shipper or his consignee necessarily assumed the risk of loss during shipment, since no other party was yet involved at the time the goods began their journey. It is clear, therefore, that Waring not only failed to assume the risk of loss, but also was not the cause of importation.<sup>24</sup> The *Waring* court explicitly refrained from relying upon this consideration, however, explaining that:

[W]hether the contracts to purchase were made before or after the vessel arrived in the bay is quite immaterial, as the agreement was, that the risk should continue to be in the owner or consignees until

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15. *Id.* at 116. Because of the nature of the harbor it was necessary for shallow draft vessels to carry cargo from sea-going ships to shore. *Id.* at 115.

16. *Id.* at 119.

17. *Id.*

18. *Id.* at 111.

19. *Id.*

20. *Id.* at 119-20.

21. *Id.* at 120.

22. *Id.* at 123.

23. *Id.* at 116, 119-20.

24. After mentioning risk of loss, the Court discussed passage of title (*id.* at 119-20), and it noted that the consignees entered the goods at the customs house and paid the duties. *Id.* at 116. Under the customs law of that time, this tended to indicate ownership of the goods. *Id.* at 116-19. This treatment of the two factors of risk of loss and passage of title reflects traditional sales law. See note 48 *infra*.

they delivered the salt into the complainant's lighters, alongside of the vessel.<sup>25</sup>

The emphasis shifted in *Hooven & Allison Co. v. Evatt*,<sup>26</sup> the only other Supreme Court case to discuss the identity of the importer for tax immunity purposes. There, the plaintiff company ordered hemp and other fibers from foreign producers through the medium of independent brokers.<sup>27</sup> After delivery, the fibers were stored in their original packages in the plaintiff's warehouse until he used them in the manufacture of cordage.<sup>28</sup> The state of Ohio imposed an ad valorem tax<sup>29</sup> on the stored fibers, which the plaintiff claimed was in violation of the constitutional ban on state taxation of imports.<sup>30</sup> The Ohio Supreme Court, believing that the facts were analogous to those in *Waring*, concluded that the foreign producers or their agents were the importers, not the company, and that the "sale" to Hooven & Allison destroyed the "import" character of the goods.<sup>31</sup> Consequently, the state tax was valid.<sup>32</sup>

The United States Supreme Court, in its own examination of the

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25. *Id.* at 119.

26. 324 U.S. 652 (1945). The case also involved the contention that the goods had, since their arrival in the country, lost their immunity from state taxation by being put to the use for which they were imported. See note 9 *supra*. The Court held that they had not. 324 U.S. at 667. Subsequently, in *Youngstown Sheet and Tube Co. v. Bowers*, 358 U.S. 534 (1959), the Court held that certain imported articles stored in the manufacturer's warehouse prior to their use in the manufacturing process had been put to the use for which they were imported and had consequently lost their tax immunity. *Id.* at 548. The majority distinguished *Hooven & Allison* by saying that the goods in that case had not been essential to the current manufacturing needs of the petitioner. *Id.* at 544-47. A strong dissent in *Youngstown* claimed that the majority had not sufficiently distinguished *Hooven & Allison* and "the situation there involved so precisely parallels the circumstances now before us as to control these cases, unless *Hooven & Allison* is to be overruled." *Id.* at 561. *Youngstown* did not, however, involve the problem of identifying the importer, for which *Hooven & Allison* has been cited here, and the latter case is still the latest Supreme Court decision on this issue.

27. 324 U.S. at 659.

28. *Id.* at 654.

29. "The phrase 'ad valorem' means literally 'according to the value,' and is used in taxation to designate an assessment of taxes against property at a certain rate upon its value." 2A WORDS & PHRASES *Ad Valorem* 105 (1955).

30. 324 U.S. at 655.

31. *Id.*

32. *Id.* The Ohio Supreme Court also felt that even if the petitioner were the importer, the goods had lost their immunity when they were stored in petitioner's warehouse awaiting manufacture. 51 N.E.2d 723, 727 (Ohio 1943). The United States Supreme Court found that the goods had not lost their immunity. 324 U.S. at 666-67. See notes 9 & 26 *supra*.

facts,<sup>33</sup> found that the petitioner, Hooven & Allison, contracted for its requirements through independent corporate brokers, who signed the contracts as "agent for" the foreign producer.<sup>34</sup> The price included the cost of the goods, freight charges, the cost of insurance, and customs duties.<sup>35</sup> Payment was made to the broker after delivery to the petitioner.<sup>36</sup> The sales were on the unsecured credit of the company, and neither the brokers nor the producers retained a security interest in the goods, although the producer did retain the right to stop the goods in transit.<sup>37</sup> On the arrival of the merchandise, the broker would enter it at the customs house in its own name and arrange for shipment to the company's plant.<sup>38</sup> The Court felt that, considering this process as a whole, it was the petitioner-company which generated the importation:

From all this it is clear that from the beginning, after the contract of purchase is signed, the foreign producer is obligated to sell the merchandise . . . ship it to an American port and to deliver it to petitioner . . . . Performance of the contract calls for, and necessarily results in, importation of the merchandise . . . . *Petitioner's contracts of purchase are the inducing and efficient cause of bringing the merchandise into the country, which is importation.*<sup>39</sup>

Clearly, the nature of the transaction in *Hooven & Allison* allowed the plaintiff company to resell the goods while in transit and required it to bear risk of loss, at least as to changes in market value.<sup>40</sup> But the fact that certain contingencies might have prevented the plaintiff from taking possession<sup>41</sup> was regarded as a factor common to most importation transactions and not inconsistent with a conclusion that the plaintiff company was an importer.<sup>42</sup> The lack of formal passage of title in the goods prior to shipment also was deemed irrelevant.<sup>43</sup> No difference was perceived between credit transactions, whether secured

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33. The Supreme Court declared that the state authorities had given insufficient consideration to the facts of the transactions, and that since "the existence of an asserted federal right or immunity" depended on these facts, the Court should examine the facts on its own. 324 U.S. at 659.

34. *Id.*

35. *Id.* at 660.

36. *Id.* at 661.

37. *Id.* at 661-62.

38. *Id.* at 661.

39. *Id.* (emphasis added).

40. *Id.* See note 99 *infra*.

41. 324 U.S. at 662.

42. *Id.*

43. *Id.* at 662-63, 663 n.4.

by purchasers' liens or unsecured, and situations in which a company actually completed the purchase in the foreign country and thereafter shipped the goods to the United States.<sup>44</sup> Because the company was the "efficient cause"<sup>45</sup> of importation, and because the "extent of . . . immunity from state taxation turns on the essential nature of the transaction . . . and not on the formalities . . . or on the technical procedures"<sup>46</sup> followed, the company was classified as an "importer."

Thus, the two principal cases discussing the definition of the term "importer" proceeded from significantly different perspectives. *Waring* emphasized risk of loss; *Hooven & Allison* subordinated the risk of loss factor to a more general test: whether or not the involved party was the inducing and efficient cause of importation.<sup>47</sup> Consequently, after *Hooven & Allison*, risk of loss was at best a factor relevant to determining the inducing and efficient cause of importation, *i.e.*, the importer.<sup>48</sup>

## II. STATE CASES

Since *Hooven & Allison*, only four reported cases from state courts<sup>49</sup>

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44. *Id.* at 663-64.

45. *Id.* at 661.

46. *Id.* at 663.

47. *Id.* at 662-63, 663 n.4.

48. Although risk of loss is traditionally related to passage of title, they do not necessarily go hand in hand, for parties to a transaction can vary the risk according to their needs and desires. See G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* §§ 3-6, 3-7 (1957); 2 S. WILLISTON, *THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT* §§ 301-02 (rev. ed. 1948). The Uniform Commercial Code replaces the traditional passage of title approach with a contractual approach emphasizing the intent of the parties. The parties to a sales agreement may still modify the allocation of risk of loss between themselves in any way they desire. 1 R. ANDERSON, *ANDERSON'S UNIFORM COMMERCIAL CODE* §§ 2-502:2-:3 (1961).

49. The problem of identifying the importer also arises in the federal context. The prohibition on taxing imports, U.S. CONST. art. I, § 10, cl. 2, plainly applies only to the states, and not the federal government. But, U.S. CONST. art. I, § 8, cl. 3 gives the federal government the power to "regulate Commerce with foreign Nations," which enables it to tax imports, and levy an excise tax on the first sale of goods made by an importer. See *Indian Motorcycle Co. v. United States*, 283 U.S. 570, 574 (1931).

For federal tax purposes, the leading case on the subject defines the importer as "the first purchaser resident in the United States who arranges (as principal and not as an agent) for the goods to be brought into the United States." *Handley Motor Co. v. United States*, 338 F.2d 361, 364 (Ct. Cl. 1964). If this definition were employed in a situation such as *Waring* (where for purposes of the state tax the shippers or their consignees were held to be the importers (75 U.S. at 120)), a United States resident, not the importer for state tax immunity purposes, might nevertheless be liable for the federal tax on his first sale of the imports. In such a case, the citizen would probably have to pay both taxes. The federal government may control foreign com-



have discussed the identity of the importer for state tax immunity purposes.<sup>50</sup> Two of these cases, involving similar facts, were decided by state courts in Michigan.

In *City of Detroit v. Kenwal Products, Inc.*,<sup>51</sup> eleven Detroit steel

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merce, but the power of the states to tax persons and property within their boundaries is an inherent power, limited only by what is constitutionally prohibited. *Thomson v. Pacific R.R.*, 76 U.S. (9 Wall.) 579, 591 (1869); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 361, 429 (1819). As a result, if a party is not an importer within the import-export clause ban on state taxes, it would appear that the imposition of a federal tax on the first sale of an imported article by the same party would not prohibit the state from exercising its power to tax.

In the case of an excise tax, there is no question, assuming there is going to be a sale in this country, that a tax will be imposed; the only question is who is liable for it. This is in contrast to some import-export situations where a finding of immunity might avoid the tax entirely; for example, if an ad valorem tax (*see note 29 supra*) is invalid as a tax on imports, the party could avoid the tax entirely, and it would not be passed on. In any event, the fact that one party pays the excise tax does not seem to influence the decision of who the importer is for state purposes, and the courts have not discussed the problem.

As the quotation from *Handley, supra*, indicates, federal courts seek to identify the actual importer, rather than a mere agent, and the federal cases often cite *Hooven & Allison* when making this determination. *See, e.g., Import Wholesalers Corp. v. United States*, 368 F.2d 577, 584 (Ct. Cl. 1966). Nevertheless, the issue is, as indicated, different for federal purposes, and *Hooven & Allison* is not directly applicable. At least one recent federal case which determined the identity of the importer did not even cite *Hooven & Allison* (*Sony Corp. of America v. United States*, 428 F.2d 1258 (Ct. Cl. 1970)), and another, which paid lip service to *Hooven & Allison*, actually turned on interpretation of federal statutes and technical passage of title. *Weiner v. United States*, 261 F. Supp. 413 (C.D. Cal. 1966).

50. There were likewise few cases between *Waring* and *Hooven & Allison*, and nothing of analytical import. In *Johnson v. Los Angeles County*, 3 Cal. App. 2d 579, 88 P.2d 725 (1939), the basis for upholding the plaintiff's claim that he was the importer, although not clearly enunciated, appeared to be based on the fact that it obtained title upon shipment of the goods by the foreign supplier and still retained title and possession at the time the tax was imposed.

There is one other post-*Hooven & Allison* case which discussed the importer question. In *Cominco Prods., Inc. v. State Tax Comm'n*, 411 P.2d 85 (Ore. 1966), the court stated that "the person who makes the entry, pays the duty, etc. . . . is the importer." *Id.* at 88. Aside from the fact that such a simplified approach ignored *Hooven & Allison*, the Oregon court did not cite authority to support this statement. The pivotal issue in the case was not the identity of the importer, for it was conceded that the plaintiff was the importer; the question was whether or not goods retain their immunity from state taxation when the importer transfers them on consignment to retail dealers. *Id.* at 85. The statement, therefore, is not a conclusion of law and amounts to no more than dicta. It may have resulted from a misinterpretation of certain Supreme Court cases which said that payment of duties gives the *right* to sell imported goods free from state taxation. *E.g., May v. New Orleans*, 178 U.S. 496, 507 (1900); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 442 (1827). However, these cases did not consider the problem of identifying the importer, and they do not presume that the one who pays the duties is the importer.

51. 165 N.W.2d 875 (Mich. Ct. App. 1968), *cert. denied*, 396 U.S. 833 (1969).

warehousing companies appealed the assessment of property taxes on imported steel stored prior to sale.<sup>52</sup> The city claimed that the domestic corporate intermediaries, through which the companies had ordered the steel, and not the petitioners, were the importers.<sup>53</sup> The Michigan court, after citing extensively from *Hooven & Allison*, noted several similarities in the two cases: both ordered through domestic intermediaries, a comprehensive purchase price was involved, and the goods were marked as belonging to the petitioner companies prior to shipment.<sup>54</sup>

In contrast to *Hooven & Allison*, the intermediaries here signed contracts with the foreign producers, not as "agent for" the company, but in their own corporate name.<sup>55</sup> The petitioner companies entered into contracts directly with the domestic intermediaries, paying them and not the foreign producer.<sup>56</sup> The Michigan court, however, relied on the Supreme Court's instruction that where performance of a contract necessarily resulted in importation, the contracting party is the "efficient cause" thereof, and is thus the importer.<sup>57</sup> Not only did it ignore the attribution of risk of loss, but the court also did not discuss any aspects of physical control of the goods by the importer. The party who effectively caused the order and subsequent importation was declared to be the importer.<sup>58</sup>

Further evidence of the willingness of a Michigan court to look past formalities in determining the identity of an importer came in 1971, in *Socomet v. City of Detroit*.<sup>59</sup> Socomet ordered foreign-made steel either through a sister corporation or through a company acting as its agent.<sup>60</sup> The court concluded that these two corporate intermediaries were in fact agents of Socomet and not themselves the importers, relying on factors indicating Socomet was the inducing cause of the importation. It specified the types of steel to be imported, dictated the timing and quantity of the orders, and generally exercised control over the goods and their handling.<sup>61</sup> This included control of the title

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52. 165 N.W.2d at 876.

53. *Id.*

54. *Id.* at 877.

55. Compare 165 N.W.2d at 877 with 324 U.S. at 661. Note that the *Kenwal* court said that in *Hooven & Allison* payment was made directly to the foreign producer, but the Supreme Court opinion indicates otherwise.

56. See note 55 *supra*.

57. 165 N.W.2d at 877.

58. *Id.*

59. 190 N.W.2d 551 (Mich. Ct. App.), *cert. denied*, 404 U.S. 1024 (1971).

60. 190 N.W.2d at 552-53.

61. *Id.* at 552-54.

documents, in contrast with *Kenwal* where such control was not always present.<sup>62</sup> The risk of loss aspect was not mentioned, but the fact that either Socomet or its corporate parent financed the transactions, and that the intermediaries never claimed any title in the merchandise, indicate that the risk probably rested with Socomet.<sup>63</sup>

The third state case discussing the importer question, *American Smelting and Refining Co. v. County of Contra Costa*,<sup>64</sup> is a California appellate decision which predates *Volkswagen* by three years but was not cited in that case. The company there protested a county tax on imported ore which it had stored prior to smelting.<sup>65</sup> Its general practice was to process the ore before selling the refined metals to domestic manufacturers.<sup>66</sup> The county apparently argued that since "possession and risk of loss" (not "ownership") passed to American Smelting only when the ore arrived at its California facility, the foreign producer was really the importer.<sup>67</sup> *Waring* was the county's most direct authority for this proposition.<sup>68</sup> The court answered simply by quoting the *Hooven & Allison* admonition that if performance of a contract necessarily results in importation, then the contracting party is the "inducing and efficient cause" thereof, and hence the importer.<sup>69</sup>

Once again, a court looked beyond the technical form of the contract and formulated its decision in light of the essential nature of the transaction.<sup>70</sup> "Risk of loss" was clearly regarded as subordinate to the determination of "efficient cause."

### III. THE VOLKSWAGEN CASE

#### A. *Background and Facts*<sup>71</sup>

Volkswagen Pacific, Inc. (hereinafter VW) and Porsche Car Dis-

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62. Compare 190 N.W.2d at 552 with 165 N.W.2d at 877.

63. 190 N.W.2d at 552-53.

64. 271 Cal. App. 2d 437, 77 Cal. Rptr. 570 (1969), *appeal dismissed*, 396 U.S. 273 (1970).

65. 271 Cal. App. 2d at 442, 77 Cal. Rptr. at 576.

66. *Id.*

67. *Id.* at 446, 77 Cal. Rptr. at 579.

68. *Id.*

69. *Id.* at 446-47, 77 Cal. Rptr. at 579. The identity of the importer was not, however, the only issue bearing on the plaintiff's tax liability in this complex and lengthy decision, and most of the goods in question were eventually found subject to the tax. *Id.* at 440-41, 488, 77 Cal. Rptr. at 575-76, 605.

70. See 271 Cal. App. 2d at 443-44 & nn.5-6, 77 Cal. Rptr. at 576-77 & nn.5-6.

71. There were actually two intermediate appellate court opinions, only one of which was published. The trial court verdict was affirmed in an opinion appearing at 90

tributors, Inc. (hereinafter Porsche) are related, but separate, corporations which distribute Volkswagen and Porsche automobiles and parts in the Los Angeles area.<sup>72</sup> VW ordered its cars and parts from Volkswagen of America, a New Jersey corporation which was the wholly owned subsidiary and "franchised sales agent" of the German manufacturer.<sup>73</sup> VW and Volkswagen of America had a franchise agreement which granted VW an exclusive territory for distribution. The agreement dictated a process for ordering automobiles as follows: VW, after receiving order cards from its dealers in turn placed the order for these cars and for autos for its own inventory with Volkswagen of America; Volkswagen of America then ordered the necessary cars from the manufacturer.<sup>74</sup> When the shipment left Germany, Volkswagen of America notified VW. When it arrived at the port of Los Angeles, an agent of Volkswagen of America accomplished the necessary processing and only at this time did VW pay Volkswagen of America for the goods.<sup>75</sup>

The importation of Porsche automobiles differed in a fairly significant fashion. Porsche ordered directly from the German manufacturer and paid for the automobiles and parts prior to shipment, which relieved the manufacturer of any risk of loss during the shipping process.<sup>76</sup> Interestingly, VW was the "importer of record" and *it* actually paid the manufacturer and attended to other details of delivery.<sup>77</sup> Porsche reimbursed VW for its actual expenses, in addition to a \$75 per car service fee, after the automobiles arrived.<sup>78</sup>

### B. *The California Supreme Court Opinion*

The suit arose as the result of the levy of a City of Los Angeles business license tax,<sup>79</sup> measured by gross sales receipts. VW and

Cal. Rptr. 902 (1970), an opinion vacated when the state supreme court granted a hearing. See note 87 *infra*. The supreme court subsequently transferred the case back to the appellate court for a redetermination of the apportionment of the tax assessment. Respondent's Petition for Hearing at 5, Volkswagen Pac., Inc. v. City of Los Angeles, 7 Cal. 3d 48, 496 P.2d 1237, 101 Cal. Rptr. 869 (1972). The opinion for this second appellate decision was adopted in large part by the supreme court as its opinion. 7 Cal. 3d at 51, 496 P.2d at 1239, 101 Cal. Rptr. at 871. For the purposes of this Note, the first appellate opinion (90 Cal. Rptr. 902) is that to which reference is made when the "court of appeal opinion" is cited.

72. 7 Cal. 3d at 52, 496 P.2d at 1240, 101 Cal. Rptr. at 872.

73. *Id.*

74. *Id.*

75. *Id.* at 52-53, 496 P.2d at 1240-41, 101 Cal. Rptr. at 872-73.

76. 90 Cal. Rptr. at 908.

77. *Id.*

78. *Id.*

79. The tax in question was imposed under § 21.167 of the L.A., CAL., MUN.

Porsche paid the tax<sup>80</sup> and then sued to have it declared invalid, claiming that they were the "inducing and efficient cause" of the importation,<sup>81</sup> and were therefore protected by the constitutional prohibition of state or local taxation of imports.<sup>82</sup> This argument was summarily dismissed by the supreme court:

[VW's] reliance [on this rationale] is misplaced. The brokerage situation [in *Hooven & Allison*] is distinguishable from the case at bench. In the case of a purchase through a broker, there is no local sale . . . . Here there is. Volkswagen of America acts for its own account as a seller to VW and not as an intermediary in a transaction between the German manufacturer and VW.<sup>83</sup>

The supreme court, primarily resting on the trial court's finding and the stipulation of facts on which the case was tried, concluded that Volkswagen of America, and not VW, was the importer.<sup>84</sup> VW's claimed immunity ceased, in the court's opinion, following a "sale" between Volkswagen of America and VW,<sup>85</sup> and thus VW's sales to dealers in Los Angeles were properly taxed.

Prior to any discussion of the wisdom of this conclusion, two prelim-

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CODE (1936), *as amended*, (Ord. 140,833, Jan. 1, 1971). This section imposes a "business tax" measured by gross receipts from sales within the city. VW and Porsche claimed refunds for taxes paid in 1963 through 1967, amounting to \$44,404.50 for VW and \$4,157.20 for Porsche. Appellants' Brief at 12-16, *Volkswagen Pac., Inc. v. City of Los Angeles*, 7 Cal. 3d 48, 496 P.2d 1237, 101 Cal. Rptr. 869 (1972).

80. 7 Cal. 3d at 54, 496 P.2d at 1241-42, 101 Cal. Rptr. at 873-74. The fact that such a tax would be invalid if VW were the importer and if the goods had retained their character as imports was not challenged. A tax measured by the amount of imported goods sold is a tax on the sale, and the first sale by an importer may not be taxed. *See note 2 supra*.

81. 7 Cal. 3d at 56-57, 496 P.2d at 1243-44, 101 Cal. Rptr. at 875-76.

82. *Id.* at 54, 496 P.2d at 1241-42, 101 Cal. Rptr. at 873-74.

83. *Id.* at 57, 496 P.2d at 1244, 101 Cal. Rptr. at 876 (footnote omitted).

84. *Id.* at 56, 496 P.2d at 1243, 101 Cal. Rptr. at 875.

85. *Id.* This is of course true only if Volkswagen of America was an importer in the constitutional sense. The court was not specific as to the effect on the auto parts, but presumably the same analysis applies.

The case also involved the argument that even if the plaintiffs were the importers, the goods had nevertheless lost their immunity. The court held that when the sea vans containing the parts were opened with the intent to sell the parts, and when the aggregate of imported automobiles was broken up by removing automobiles from it, the goods lost their tax immunity. *Id.* at 55-56, 496 P.2d at 1242-43, 101 Cal. Rptr. at 874-75. The holding in regard to the sea vans represents an expansion of the package doctrine (*see note 9 supra*) which may have a significant effect on California importers using this type of container. *See Auerbach, State Importers to Get Tax Prize in Every Box*, L.A. Times, Apr. 1, 1973, § 9, at 1, col. 1. For a Michigan case with a different result on similar facts, *see Tax Comm'n v. Garment Corp. of America*, 189 N.W.2d 72 (Mich. Ct. App.), *cert. denied*, 404 U.S. 992 (1971).

inary observations should be noted. First, the court of appeal previously had concluded that Porsche was in fact the importer of Porsche automobiles and parts;<sup>86</sup> the supreme court did not discuss this issue of Porsche-as-importer and thus impliedly accepted this conclusion.<sup>87</sup> Second, the court erred in its analytical approach to the entire question of immunity from state taxation. Instead of resolving identity of the importer as the *prerequisite* before considering the issue of why the goods were no longer "imports," the court first determined that the automobiles were no longer in their "original packages" and thus were subject to the state tax.<sup>88</sup> The "importer" aspects were seemingly used as added support for sustaining the tax, whereas logically, and according to *Hooven & Allison*, an initial focus on the importer issue and a subsequent determination that VW was not the "importer" would have obviated any need to consider the "original package" question.<sup>89</sup>

Since neither the Michigan cases nor *American Smelting* bind the California Supreme Court<sup>90</sup> and since they apparently were not even considered, the validity of the court's determination of importer identity rests on whether or not the facts and analysis can be reconciled with *Hooven & Allison*. In both *Hooven & Allison* and *Volkswagen*, there was an intermediary who forwarded the orders of a domestic corporation to a foreign supplier. VW ordered the automobiles and parts of the German manufacturer for its business of selling these items through individual dealers, just as the Hooven & Allison company ordered raw materials for its business of manufacturing.<sup>91</sup> It was VW and not Volkswagen of America which maintained an inventory of automobiles to supply its individual dealers,<sup>92</sup> just as Hooven & Allison

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86. 90 Cal. Rptr. at 910-11. The court of appeal felt that if Porsche alone had been involved in the transaction, its activities clearly supported a conclusion that it was the importer. The activities of its sister corporation, VW, as "importer of record," did not alter this conclusion because examination of the realities of VW's and Porsche's operation disclosed that VW had no connection with Porsche products other than performing the "importer of record" services. *Id.* at 909. See text accompanying notes 77-78 *supra*. Consequently, the court determined that VW was merely an "agent" of Porsche. 90 Cal. Rptr. at 909.

87. This is not meant to imply that the appellate court's decision is still "good law"—it is not. When a case is transferred from a district court of appeal to the supreme court, the decision of the court of appeal is vacated and considered a nullity. *Ponce v. Marr*, 47 Cal. 2d 159, 301 P.2d 837 (1956). See note 101 *infra* and accompanying text.

88. 7 Cal. 3d at 56, 496 P.2d at 1243, 101 Cal. Rptr. at 875. See note 85 *supra*.

89. 324 U.S. at 657-58. The court of appeal in *Volkswagen* did use the correct approach, at least in regard to Porsche. See 90 Cal. Rptr. at 908-10.

90. See note 101 *infra* and accompanying text.

91. See text accompanying notes 27-29 and 72-75 *supra*.

92. See text accompanying note 74 *supra*.

maintained an inventory of fibers for its manufacturing needs. Both VW and Hooven & Allison made their contracts of purchase with the intermediary in the ordinary course of their business.<sup>93</sup> According to the theory expressed by the Supreme Court in *Hooven & Allison* and in the subsequent state cases, it would appear that VW (or in many cases the dealers) was the party who "induced" the importation of Volkswagen products—Volkswagen of America would not have acted to forward the orders if VW had not placed them. Nevertheless, the California court decided differently, but provided no precise enumeration of facts to support its conclusion that Volkswagen of America instead of VW was the importer.<sup>94</sup> There is one fact, however, unexpressed in the supreme court decision, which arguably could have been employed as the basis for the opinion: the "risk of loss" factor.

The record indicated that risk of loss did not transfer from Volkswagen of America to VW until the goods had arrived and a "marine insurance survey" was conducted to determine the extent of any damage claimed by VW.<sup>95</sup> As stated previously, *Hooven & Allison* acknowledged that risk of loss was *one* factor to be considered in resolving the central question, namely, who caused the goods to be shipped into the country.<sup>96</sup> As the *Kenwal* court recognized, *Hooven & Allison* emphasized the fact that the Hooven & Allison company's orders generated the importation transactions, even in a situation where the "agent" was ostensibly an independent corporation acting as principal.<sup>97</sup> Though risk of loss could have been used in an attempt to distinguish the *Volkswagen* case from *Hooven & Allison*, even that difference could not be justified. Subsequent to *Waring*, both *Hooven & Allison* and *American Smelting* involved situations where the purchaser who placed the order did not bear the risk of loss which might ensue from physical destruction of the goods while in transit. The Supreme Court in *Hooven & Allison* apparently dismissed the risk of loss in *Waring* as a mere technicality of passage of title<sup>98</sup> and did not discuss or emphasize the fact that Hooven & Allison bore only the risk of

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93. See text accompanying notes 27-28 and 74 *supra*. The United States Supreme Court in *Hooven & Allison* placed some emphasis on this factor. 324 U.S. at 661.

94. 7 Cal. 3d at 57, 496 P.2d at 1243, 101 Cal. Rptr. at 875. See note 118 *supra* and text accompanying notes 27-29 and 72-75 *supra*.

95. Record, Volkswagen Pac., Inc. v. City of Los Angeles, Docket # 29842, Exhibit A at 29-30 [hereinafter cited as Record].

96. See text accompanying notes 47-48 *supra*.

97. See text accompanying notes 55-58 *supra*.

98. See note 47 *supra* and accompanying text.

a change of market value in the goods it had ordered.<sup>99</sup> The *American Smelting* court distinguished *Waring* on the ground that the purchaser's orders there had not induced the importation and concluded that the source of the order was a more important consideration than risk of loss.<sup>100</sup> *American Smelting* was not discussed in *Volkswagen*, and since it was a district court of appeal decision, there obviously was no necessity to do so.<sup>101</sup> The facts in the case differed in that the purchaser apparently ordered directly from the owners of the goods, rather than through intermediaries.<sup>102</sup> Nevertheless, the case demonstrated an understanding of the principles of *Hooven & Allison* and put risk of loss in the proper perspective.

From a practical standpoint, risk of loss is a poor indicator for deciding who caused the importation. It is obviously a matter which can be bargained for between the parties to an import transaction and, therefore, might not reflect the actual source of the order.<sup>103</sup> For example, in the transactions of the *Volkswagen* case, VW paid the insurance premiums for Porsche's goods as well as for those which it ordered for itself. In the event of loss the proceeds would go to VW, who would then distribute the funds.<sup>104</sup> Yet, the court of appeal made clear that Porsche bore risk of loss.<sup>105</sup> It was also specified that in the case of cars ordered by dealers, VW was to pay the insurance proceeds to the dealer, indicating that in such cases the dealer may have borne the risk of loss.<sup>106</sup> These considerations suggest the inadvisability of basing tax liability on technical aspects of the import transactions, be they risk of loss or passage of title, and indicate the wisdom of the court in *Hooven & Allison* when it looked past the technicalities of the transactions to identify the "inducing and efficient cause" of the importation.

But the California Supreme Court did not attempt to rely on a risk of loss analysis, nor did it find *Hooven & Allison* to be controlling.

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99. 324 U.S. at 662. The Ohio court clearly stated that *Hooven & Allison* bore no risk attendant to physical destruction of the goods. 51 N.E.2d at 724.

100. See text accompanying notes 68-69 *supra*.

101. See, e.g., *Worthley v. Worthley*, 44 Cal. 2d 465, 472, 283 P.2d 19, 24 (1955); *Shelton v. City of Los Angeles*, 206 Cal. 544, 550, 275 P. 421, 425 (1929). The law pronounced by a district court of appeal is not binding on the supreme court, even if the supreme court had denied a petition for hearing on the matter. 6 B. WITKIN, CALIFORNIA PROCEDURE 4580-84 (2d ed. 1971).

102. 271 Cal. App. 2d at 442-43, 77 Cal. Rptr. at 576-77.

103. See note 48 *supra*.

104. Record, *supra* note 95, at 123.

105. 90 Cal. Rptr. at 908.

106. Record, *supra* note 95, at 123.



Instead, it distinguished *Hooven & Allison* on the basis that a "sale" was present in *Volkswagen*, with Volkswagen of America characterized as the "seller."<sup>107</sup> Additionally, the court impliedly restricted the "inducing and efficient cause" test to what it termed the "broker" situation, that is, where an intermediary acting as agent is interposed between the claimed importer and the foreign producer.<sup>108</sup> By making such distinctions, the supreme court has misconstrued the United States Supreme Court's clearly manifested intent that the formal aspects of an importation transaction, especially "technical questions of passage of title,"<sup>109</sup> should not be controlling when determining the issue of importer identity for tax immunity purposes.<sup>110</sup>

### 1. "Sale"

While imported goods lose their tax immunity after the first sale by an importer,<sup>111</sup> a distinction based on the intermediary in the transaction acting as a "seller" avoids the main issue: identity of the importer. Only a sale by an importer terminates the tax immunity of imported goods.<sup>112</sup> The mere fact that an intermediary "sells" goods to the party which placed the order does not in itself identify the seller as the importer. The Court in *Hooven & Allison* easily could have found a "sales" transaction but declined to attach any importance to the question.

In *Hooven & Allison*, the broker who acted as the intermediary between the company and the foreign producer received the contract price only upon delivery to the purchaser's plant.<sup>113</sup> Also, the brokers received payment for the goods directly from the purchaser<sup>114</sup> and derived a profit from the transaction.<sup>115</sup> Title to the goods did not pass to *Hooven & Allison* until they were actually delivered by the broker.<sup>116</sup> The Supreme Court had additional facts before it, not included in its opinion, which were even more persuasive of a sale between the broker and *Hooven & Allison*.<sup>117</sup> Yet, the Court apparently

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107. See text accompanying note 83 *supra*.

108. *Id.*

109. 324 U.S. at 662-63.

110. *Id.* at 663.

111. See text accompanying note 22 *supra*.

112. *Id.*

113. 324 U.S. at 661.

114. *Id.* at 661; 51 N.E.2d at 725.

115. The brokers received commissions from the foreign producers (51 N.E.2d at 726) and nothing from *Hooven & Allison*. *Id.* at 724.

116. See 324 U.S. at 662-63.

117. In the Ohio Supreme Court's opinion (51 N.E.2d 723 (Ohio 1943)), it was

did not deem such facts important, as evidenced by the lack of discussion of these factors. This appears to be a salutary approach because for purposes of the import-export clause, the quest is only for the party whose actions set in motion the process which results in goods entering the United States. The formal, legal capacity which this "importer" adopts is largely irrelevant if there exist factors which clearly demonstrate that without his demand for a product, the importation process would not have occurred.<sup>118</sup>

noted that one of the brokers with whom Hooven & Allison had dealings testified that prior to 1941, it had signed its contracts with the company as principal and not as agent. *Id.* at 726. The Ohio court inferred from this fact that, since the taxable years in question, 1938-40, included these "principal" contracts, Hooven & Allison was not the importer but rather the first purchaser from the true importer, the broker. *Id.* at 725. The United States Supreme Court had these facts before it (324 U.S. at 659), but did not feel bound by such a general statement of technical factors in ascertaining who was the "inducing and efficient cause" of the importation.

The California Supreme Court's language to the effect that "Volkswagen of America acts for its own account as a seller to VW" (7 Cal. 3d at 57, 496 P.2d at 1244, 101 Cal. Rptr. at 876), appears to be derived from the vacated court of appeal opinion (90 Cal. Rptr. 902 (1970)), and the Record, *supra* note 95, Exhibit A at 29. The lower court noted that the foreign supplier itself became obligated to Hooven & Allison, because the broker there signed "for account of" the supplier, whereas Volkswagen of America signed as "seller." 90 Cal. Rptr. at 910. Whether or not the Supreme Court used the terminology of the foreign producer's "obligation" to the Hooven & Allison company (324 U.S. at 661) as one of the definitive criteria for a finding that a party is an importer is unclear. Existence of an obligation between parties to a contract gives them legal rights in case of a breach (*see* BLACK'S LAW DICTIONARY 1223-24, 1226 (4th ed. 1951)), and this seemed to be the prime concern of the court of appeal. 90 Cal. Rptr. at 910-11. The Supreme Court, however, spoke only in terms of performance of the contract as resulting in importation. 324 U.S. at 661. Whether or not the existence of a remedy for non-performance against the foreign producer was necessary was not stated.

In view of the Court's extensive analysis of the other aspects of the importation transactions in *Hooven & Allison*, it is questionable that the lack of a remedy against the foreign supplier would have prevented the Court from concluding that the company was the importer. The Court had before it facts indicating that the brokers in the case had at one time signed as principals not "for account of" their suppliers (*supra*), but did not comment thereon. This lack of concern over the formal contract aspects would appear to negate the importance attached by the court of appeal.

One other feature of the court of appeal's discussion of the contract aspects is puzzling. The court stated, in support of its contention that Volkswagen of America's signing as "seller" and becoming "obligated" to VW is a significant fact, that should the former not forward the order of VW, the automobiles and parts would not be shipped. 90 Cal. Rptr. at 910. Whether Volkswagen of America acts as a principal-seller or merely as an agent, its failure to forward an order has the same result: No goods are shipped. Such a failure says nothing about the party's status as principal-seller, agent, or purchaser. In addition, VW would have a breach of contract action against Volkswagen of America in this situation, irrespective of the capacity in which it acted, because of the existence of the franchise agreement between VW and Volkswagen of America.

118. This analysis does not mean, as the appellate court thought, that the customers

Even if it were assumed that an intermediary's signing as "seller" could be significant, to attach controlling importance to this factor seems wholly misplaced. Volkswagen of America was stipulated to be a subsidiary of the German manufacturer and was its franchised sales agent.<sup>119</sup> The fact that it signed as "seller" would appear unimportant if a court were to recognize the reality of such a corporation's function, namely, to coordinate a foreign manufacturer's United States operation and to serve as a central domestic clearing house for orders.<sup>120</sup> The existence of extensive sales of foreign-made consumer goods, such as Volkswagen automobiles, was most likely non-existent in 1945 when the Supreme Court decided *Hooven & Allison*, but the test set forth by the Court has continued validity even in these changed circumstances. The purpose of the test, to prevent the coastal importing states from burdening the interior states with increased prices due to the imposition of state taxes,<sup>121</sup> could be thwarted if it is said that only one corporation, Volkswagen of America, is the "importer." If the California court's theory were followed, the result would be that states in which franchise holders other than VW are located could also impose their own taxes. In a time when the American people commonly rely on the efforts of foreign manufacturers for goods and materials,<sup>122</sup> the contravention of the intent of the import-export clause

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are the source of the order because they are part of the demand for the product. According to the court of appeal, the customer who orders a Volkswagen automobile from a dealer could be considered the "inducing and efficient cause" of importation by the following analysis: The dealer who orders from VW is VW's "sales agent," and VW, which orders from Volkswagen of America, again is a "sales agent" of that firm. The result would be, according to the court, an automobile reaching the customer free of any local taxes, presumably because the customer would be the importer, shielded from the tax by the many "sales agents" involved. 90 Cal. Rptr. at 911.

Obviously, someone bought rope from the Hooven & Allison company, and someone bought steel from the warehouses in *Socomet* and *Kenwal*. In those cases, however, the "inducing and efficient cause" test was applied only to the parties immediately involved in the importation transactions, and in all three cases the party which compiled and placed the order, not the one who forwarded it to the supplier, was held to be the importer. See text accompanying notes 39, 56-57 and 60-61 *supra*. The court's parade of horrors regarding the consequences of finding Volkswagen of America a mere agent is not persuasive. If a case such as the court posited arose, the customer's claim could be rejected summarily. The *Hooven & Allison* analysis was clearly intended to apply to the parties actively involved in the immediate importation process, in a "normal course of business," and not an individual customer not involved in the original transaction.

119. See text accompanying note 73 *supra*.

120. *Id.* See generally Hadari, *The Structure of the Private Multinational Enterprise*, 71 MICH. L. REV. 729, 748-51 (1973).

121. See note 2 *supra*; cf. 324 U.S. at 664.

122. A recent government publication lists over 600 foreign owned subsidiaries and

may assume proportions undreamed of by the framers of the constitution.<sup>123</sup> Such a result seems likely when a court overlooks the essence of the "inducing and efficient cause" test by ignoring the fact that Volkswagen of America ordered goods only *in response* to requests of its various franchise holders and, therefore, could not have initiated the importation process. Thus, even assuming that the presence of a sale between the intermediary and the purchaser is sometimes important, the California court's exclusive reliance on this form of transaction, in *this* case, demonstrates even more clearly the wisdom of the Supreme Court in disregarding such factors.<sup>124</sup>

## 2. Are "sellers" importers?

By failing to state the reasoning for its conclusion that Volkswagen of America was the importer, aside from the unilluminating fact that it acted as a "seller,"<sup>125</sup> and by failing to apply the *Hooven & Allison* test with respect to Volkswagen of America's activity, the California Supreme Court has confused the method by which importer identity is determined. If the risk of loss played no part in the court's rationale (and nothing in the opinion suggests it did),<sup>126</sup> the effect of the supreme court's summary dismissal of VW's *Hooven & Allison* argument is that all "sellers" are importers, regardless of whether such designation is a mere form. Even the most restricted reading of *Hooven & Allison* could not support such a mechanical conclusion. The Court did not state or imply that the "broker" situation was the *sole* instance where the "inducing and efficient cause" test was applicable. That of course was the situation in *Hooven & Allison*. However, the opinion made clear that it was the totality of the transaction which influenced its decision that the purchaser's contract was the cause of importation.<sup>127</sup> The respective legal statuses in which the parties act to cause the importation should not have any bearing if the object of the analysis is to determine who, in practical terms, without regard to the formalities or technical procedures followed, caused goods to enter the country.<sup>128</sup>

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affiliates in this country, not counting those in finance or established solely for sales and service. BUREAU OF INTERNATIONAL COMMERCE, U.S. DEPARTMENT OF COMMERCE, FOREIGN DIRECT INVESTORS IN THE UNITED STATES: LIST OF FOREIGN FIRMS WITH SOME INTEREST/CONTROL IN AMERICAN MANUFACTURING AND PETROLEUM COMPANIES IN THE UNITED STATES (1972).

123. See note 2 *supra*.

124. 324 U.S. at 663.

125. See text accompanying note 83 *supra*.

126. See text accompanying notes 95-105 *supra*.

127. See text accompanying notes 45-48 *supra*.

128. 324 U.S. at 663.

As the Court concluded:

It is enough . . . that the merchandise in this case was imported; and that petitioner [Hooven & Allison] was the efficient cause of its importation, the purpose and effect of which was petitioner's acquisition of the merchandise for its manufacture into finished goods.<sup>129</sup>

#### IV. CONCLUSION

For importers using any but the most fundamental middle-man arrangements, the *Volkswagen* decision confuses rather than clarifies possible tax liability. If one were to take the court literally, importers could evade the impact of the court's reasoning by simply arranging the transaction so that intermediaries not sign as "sellers."<sup>130</sup> Permitting the interpretation of the import-export clause to turn on such a narrow, technical approach seems extremely unsatisfactory. An informed and modernized use of the "inducing and efficient cause" test of *Hooven & Allison* would clearly be the more appropriate method of insuring uniformity of decision and providing a workable guide for those engaged in international commerce.

*Ferdie F. Franklin*

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129. *Id.* at 664. The court of appeal's determination that Porsche was an importer, and the supreme court's apparent acquiescence therein (see note 86 *supra*), seems in conflict with the major portion of the importer identity holding. VW performed services for Porsche similar to those Volkswagen of America performed for VW. See text accompanying notes 75-78 *supra*. The only essential difference was the lack of a formal franchise relationship between Porsche and VW because of the former's *direct* dealings with the manufacturer in making contracts. 90 Cal. Rptr. at 908-09. Porsche was VW's sister corporation, and appeared subordinate to VW. It occupied the same building as VW, and in other respects the two were very close. 7 Cal. 3d at 53-54, 496 P.2d at 1241, 101 Cal. Rptr. at 873. Despite this evidence of a much closer relationship between VW and Porsche than between VW and Volkswagen of America, the court still concluded there is an agency relationship and based its importer identity analysis on this conclusion. There is some consistency, though, because by deciding the two relationships in this fashion, the court of appeal followed the formalistic corporate structures involved, something the *Kenwal*, *Socomet*, and *American Smelting* courts all refused to do in their interpretations of *Hooven & Allison*.

130. Interviews with attorneys for both sides in *Volkswagen* indicated that Volkswagen of America had taken over the distribution of Volkswagen and Porsche automobiles and parts in the territory formerly given to VW and Porsche. This appears to be part of a general nationwide policy on the part of the Volkswagen company, motivated by general business considerations rather than in response to this particular case. Interviews with Thomas Bonaventura, Assistant City Attorney, in Los Angeles, July 23, 1973, and Gerald Wolfson, attorney for VW, in Los Angeles, July 25, 1973.