BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of	)	
	)	
NORTH PACIFIC FISHING, INC., and U.S. FISHING, LLC	)	
	)	
	)	OAH No. 16-1194-TAX
Fishery Resource Landing Tax	)	
Tax Years Ended 12/31/2012 – 12/31/2015	)	

DECISION ON SUMMARY ADJUDICATION

I. Introduction

North Pacific Fishing, Inc. and U.S. Fishing, LLC (Taxpayers) are Washington-based corporations that own vessels that catch and process fish in the Exclusive Economic Zone (EEZ) adjacent to Alaska's territorial waters. Taxpayers avail themselves of Alaskan ports to land and transload processed fish for export to foreign buyers. As such, Taxpayers are subject to the Alaska Fishery Resource Landing Tax, AS 43.77.010 - .200 (Landing Tax).

In June 2016, Taxpayers filed protested and proposed 2015 Landing Tax returns, as well as amended returns for tax years 2012, 2013 and 2014, requesting refunds for all taxes previously paid. With their filings, Taxpayers requested an informal conference. Taxpayers argued that application of the Landing Tax, as applied to their businesses, violated the Import-Export and Tonnage clauses of the United States Constitution.[1] The Department of Revenue, Tax Division (Department) rejected Taxpayers' arguments and denied their request to accept the protested 2015 returns, as well as their request for refunds for tax years 2012 – 2014. Taxpayers appealed, requesting this formal hearing.

On appeal, Taxpayers reiterate their arguments that the Landing Tax is unconstitutional under the Import-Export and Tonnage clauses. They further claim that if the Landing Tax does not violate one or both of these provisions, Alaska's imposition of the tax on their business violates the Due Process Clause of the United States Constitution[2] as an attempt to tax activities that take place outside the state's jurisdiction. Finally, Taxpayers claim application of the Landing Tax violates Title 33 U.S.C. §5(b) because it amounts to a tax on the use of navigable

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[1] U.S. Const. Art. I, § 10, cl. 2 and 3. Taxpayers also protested the method for calculating the value of fisheries resources for purposes of the tax. However, Taxpayers have dropped that claim in this appeal.

[2] U.S. Const. Amend. XIV, §1.

waters of the United States. The parties have submitted a Joint Stipulation of Facts, and both parties filed briefing on the issues raised. Therefore, the matter is ripe for summary adjudication.[3]

The Landing Tax is intended to compensate state and local communities for burdens catcher/processors who operate in the EEZ impose on the state and local communities as well as the benefits they receive. It is also designed to complement the Fisheries Business and License taxes applicable to companies engaged in fisheries businesses within the state.[4] The application of the Landing Tax to Taxpayers does not undermine any of the purposes of the Framers of the Constitution in enacting the Import-Export and Tonnage clauses. It is applied on the first landing of the fisheries resources, and, as such, is not a direct tax on goods in export process.[5] Nor does the Landing Tax operate to "impose a charge for the privilege of entering, trading or lying in a port".[6] Therefore, imposition of the Landing Tax on Taxpayers does not violate the Import-Export or Tonnage clauses. Nor does the tax violate the Due Process Clause, as Taxpayers' actions have sufficient nexus to Alaska to permit taxation, and the tax is not properly characterized as a tax on the catching and processing activities that take place outside Alaska's jurisdiction. Finally, the tax does not fall afoul of Title 33 U.S.C. §5(b) as it is not a charge on a vessel or crew for use of navigable waters.[7] The decision of the Division is affirmed.

II. Facts

A. Taxpayers' Business Operations[8]

North Pacific Fishing, Inc., is a Washington-based corporation authorized to do business in Alaska. North Pacific owns the vessel *American No. 1*. U.S. Fishing, LLC is a Washington-based limited liability company authorized to do business in Alaska. U.S. Fishing owns the vessel *U.S. Intrepid*. Both vessels have registered home ports in Seattle, Washington. Both are managed by Fisherman's Finest, Inc., (FFI) a Washington-based corporation located in Kirkland,

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3 2 AAC 64.250 (A party may request summary adjudication in an administrative proceeding: "if a genuine dispute does not exist between the parties on an issue of material fact.").

4 AS 43.75.011-.290, 15 AAC 77.005.

5 *Richfield Oil Corporation v. State Board of Equalization*, 67 S.Ct. 156 (1946).

6 *Polar Tankers, Inc. v. City of Valdez*, 129 S.Ct. 2277, 2283 (2009) citing *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n, 56 S.Ct. 194 (1935).*

7 *See State of Alaska, Dep't of Natural Resources v. Alaska Riverways, Inc.*, 232 P.3d 1203 (Alaska 2010).

8 The facts below are taken from the Joint Stipulation of Facts filed by the parties, and statements of party representatives at the oral argument held on December 5, 2017.

Washington. Both vessels participate in the federally-managed fisheries in the North Pacific and Bering Sea in the Exclusive Economic Zone (EEZ) of the United States.[9]

Alaska's territorial waters extend three miles offshore. The EEZ is an area in international waters that extends 200 miles offshore. Fisheries in the EEZ offshore of Alaska are managed by the United States Department of Commerce through the National Marine Fisheries Service and its advisory board, the North Pacific Fishery Management Council.

Taxpayers' vessels participate in the federally-managed fishery as part of the "Amendment 80" fleet. They also participate in the federal Gulf of Alaska Rockfish Program. Although the federal government, through these programs, regulates access to the fisheries and fishing limits, among other things, it does not impose any taxes on the Taxpayers' catching and processing activities or the fisheries resources taken under these programs.[10]

Taxpayers' vessels harvest and process fish with the same vessel, commonly referred to as catcher/processors. Taxpayers' vessels harvest and process the various species of groundfish permitted by the two programs listed above. The final step in processing involves freezing the processed fish product in twenty-kilogram blocks that are individually bagged, labelled and stored in the vessels' refrigerated holds. All of this activity, harvesting, processing and freezing, takes place solely in the EEZ and solely outside the territorial waters of Alaska.[11]

When the vessels' holds are full, the vessels begin the process of transporting the cargo to foreign buyers. The vessels leave the EEZ and travel to sheltered ports within Alaska's territorial limits. These ports are closer to federal fishing grounds than any other state, and are also closer to Asia, where most of Taxpayers' fish buyers are located. Upon arrival in Alaska's ports, the vessels transfer the fish cargo to cargo vessels in a process known as "transloading". The transloading occurs in three different forms. The catcher/processor vessels may transload their cargo to refrigerated shipping containers located on the docks, which are then later loaded onto foreign-bound cargo ships. The catcher/processors may transload the cargo directly into the holds of foreign-bound bulk freighters called "trampers." Or, on rare occasions, the catcher/processors may transload their cargo to a cold storage warehouse located on the docks, where the cargo is held for a few days before being loaded aboard a tramper or container ship.[12]

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9 Stip. ¶¶1 and 2.
10 Stip. ¶¶3-5. 50 CFR §§ 679.90-95 (Subpart H) and 679.80-85 (Subpart G).
11 Stip. ¶5.
12 Stip. ¶¶6-8.

After loading cargo into a tramper, either directly or from a cold storage warehouse, the tramper remains in port, receiving processed fish from other sources until it is fully loaded. After the transfer of cargo to a refrigerated container, either directly or from a cold storage warehouse, the containers sit at the dock awaiting the arrival of a scheduled container ship. When such a ship arrives, the containers are loaded aboard for transit to foreign ports and buyers. All of the fish products transloaded by Taxpayers is bound, on foreign vessels, for sale to foreign buyers.[13]

Taxpayers sell their fish products to foreign buyers as follows. After the catcher/processors transfer the fish product to a cargo vessel or tramper in Alaskan waters, the tramper issues a bill of landing and a mate's receipt. If the product was transloaded to a refrigerated container, the shipping company using the container issues shipping documents to the Taxpayers. These documents are then sent to the office of FFI in Kirkland, Washington. FFI works with potential foreign buyers to sell the fish product that is in the cargo vessel. Sometimes the buyer is identified at the time the product is offloaded to the cargo vessel. Sometimes the buyer is located while the cargo vessel is in route, and sometimes the buyers are not located until the cargo is offloaded into storage in a foreign port.

When the buyer is known prior to transloading to the cargo vessel, the shipping documents are used to generate invoices which are due upon receipt, and are generally paid by wire transfer to FFI's Seattle bank before the cargo vessel arrives in the foreign port. Once the funds are received FFI, notifies the shipping company that the invoice has been paid and the cargo may then be released to the foreign buyers in the foreign port. If no buyer is identified before the cargo vessel arrives in a foreign port, the fish product is stored in a warehouse until a foreign buyer is located and pays the invoice.[14]

During the years at issue in this appeal, Taxpayers' vessels landed and transloaded fish products to cargo vessels located in the ports near Kodiak; St. Paul; Sand Point; Seward; Togiak or Unalaska, Alaska; or to containers (or dockside cold storage for later loading into containers) at Unalaska; Kodiak; and Bellingham, Washington. All of the fish product was then shipped to foreign buyers at ports in China, Japan, Portugal, South Korea and Vietnam. [15]

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13 Stip. ¶9.
14 Stip. ¶14.
15 Stp. ¶¶15-16. Transfer at Bellingham is not subject to the Landing Tax.

During the tax years at issue in this appeal, all of the Taxpayers' processed fish product was harvested and processed in the EEZ. All of it was then landed in Alaskan ports and transferred as described above to foreign-flagged cargo vessels for delivery to foreign buyers at foreign ports.[16] These landings were taxable events under the Landing Tax. Taxpayers filed Landing Tax returns and paid the indicated amounts for each of the relevant years: 2012 – 2015.[17]

B. Alaska's Fisheries Resource Taxes

The Fishery Resource Landing Tax was enacted by the Alaska Legislature in 1993.[18] It imposes a tax on fishery resources brought into the jurisdiction of, and first landed, in the State of Alaska. It provides:

> AS 43.77.010. LANDING TAX. A person who engages or attempts to engage in a floating fisheries business in the state and who owns a fishery resource that is not subject to AS 43.75 but that is brought into the jurisdiction of, and first landed in, this state is liable for and shall pay a landing tax on the value of the fishery resource. The amount of the landing tax is
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> (1) for a developing commercial fish species, as defined under AS 43.75.290, one percent of the value of the fishery resource at the place of landing;
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> (2) for a fish species other than a developing commercial fish species, three percent of the value of the fishery resource at the place of landing.

AS 43.77.200 sets out the applicable definitions; it provides in pertinent part:

> (2) "engages or attempts to engage in a floating fishery business in the state" means conducting in the state an activity as part of an integrated mobile business involving the harvesting or taking, processing, transportation, or delivery of a fishery resource including transfer of fishery resources or processed products, taking on and disembarking crew, taking on fuel or supplies, obtaining vessel or gear repairs, discharging wastes, seeking protection in sheltered waters, and any other related activity that makes a claim on the resources of the state;...
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> (4) "landing" means the act of unloading or transferring a fishery resource;...
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> (7) "value" means the unprocessed value of the fishery resource based on the statewide average price paid for the fisheries resource as reported during the year to the Department of Fish and Game under AS 16.05.690.

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16 A small amount of fish product was shipped to the Seattle area and an occasional transloading occurred in Washington, but neither is of moment for this appeal. Stip. ¶18.

17 For tax year 2015, Taxpayers filed a protest return in addition to a proposed return, and paid the amounts indicated in the latter. Stip. ¶18, 22.

18 Chapter 67, SLA 1993, effective January 1, 1994.

As Taxpayers acknowledge, they engage in a floating fisheries business in Alaska as that that term is defined in AS 43.77.200(2). They also own fishery resources that are first landed in Alaska. Therefore, they are subject to the Landing Tax.

AS 43.75, referred to in AS 43.77.010, imposes a fisheries business tax on fisheries businesses that catch and process fisheries resources within Alaska waters. The purpose and intent of the Landing Tax was to complement the tax set forth in AS 43.75 that is applicable to fisheries resources that are harvested or processed in the state. 15 AAC 77.005 states the findings, purpose and intent of the tax; it provides:

> (a) The fishery resource landing tax is both designed and intended to be a compensatory tax to complement the fisheries business tax under AS 43.75. The landing tax is intended to compensate the state for the burdens that fish catcher/processors operating in the Exclusive Economic Zone ("EEZ") imposes upon the state and local communities, as well as for the benefits the EEZ catcher/processors receive from the state and local communities.
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> (b) The state has various research, management and enforcement responsibilities in connection with the offshore fisheries. The EEZ catcher/processors have a significant presence in the state, including transferring of the processed fisheries resource product, taking on and disembarking of crew, taking on of fuel and supplies, obtaining repairs, discharging waste, and making use of sheltered waters. Additional burdens resulting from the fleet presence impact the state and local communities through increased demands on educational systems, road maintenance, public safety, airport, docks, hospitals, and other programs provided or financed by the state and local communities.
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> (c) Fisheries businesses operating in the state pay for benefits and burdens described in (b) of this section through the fisheries business tax which applies to fisheries resources harvested or processed in the state. The landing tax is a substantially equivalent levy designed to impose a comparable burden on interstate commerce. The EEZ catcher/processors are conducting fisheries business in the state to no less a degree than in-state operators, subject to the fisheries business tax. The landing tax is not a fee on fisheries resources simply moving through the state. Instead the landing tax is a payment for the services and benefits conferred upon this segment of the industry under which they pay their own way. The landing tax achieves an equality of treatment between local and interstate commerce conducting fisheries businesses in the state.

As stated in 15 AAC 77.005, the state imposes a substantially equivalent levy to instate and out of state fisheries businesses—taxing the value of the resources harvested in equivalent amounts. The two sections also provide equivalent credits for various activities conducted by the

fisheries businesses.[19] In order to avoid double taxation, the Landing Tax grants a credit to fisheries businesses subject to §77.010 for any similar taxes paid to any other jurisdiction "in which the fishery resource was either caught, processed, or sold." AS 43.77.030.

Taxes collected under the Landing Tax are paid into a separate account in the State of Alaska's general fund. Approximately fifty percent of the taxes collected are shared, in various amounts, with the localities where the fisheries resources are landed.[20]

III. Discussion

A. Summary of Taxpayers' Challenges

Taxpayers challenge the constitutionality of the Landing Tax to their fishing activities under two complementary clauses of the United States Constitution, contained in Article I section 10: the Import-Export Clause, U.S. Const. Art. I §10, cl. 2 and the Tonnage Clause, U.S. Const. Art. I §10, cl. 3. Taxpayers do not argue that their contacts with Alaska are insufficient to support any form of taxation. They do not raise a Commerce Clause challenge, and any such claim would be unavailing.[21] However, they make a residual claim that, if the tax does not violate the Import-Export or Tonnage clauses, then it violates the Due Process Clause[22] as a tax imposed by Alaska for actions that take place outside Alaska's jurisdiction. The Department disputes that the Landing Tax violates any constitutional principles and argues that it is well within Alaska's taxing power to apply this non-discriminatory tax to the unique circumstance of previously untaxed resources brought into Alaska as the first potential taxing jurisdiction.[23]

The parties base their opposing positions, in part, on their differing characterizations of how the Landing Tax functions and how it is applied to Taxpayers' businesses. Thus, Taxpayers claim that, because all of their fish products are caught and processed outside of Alaskan waters and then exported on foreign vessels to foreign ports, the tax operates as a tax on goods in the stream of export commerce in violation of the Import-Export Clause. They also claim, that, if not a tax on goods in export commerce, the Landing Tax is a tax on the privilege of entering and trading in Alaskan ports in violation of the Tonnage Clause. Finally, they claim, if neither, the

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19 *Compare* AS 43.77.010 and 43.77.030 – .045 *with* AS 43.75.015 and 43.75.018 and .032.

20 AS 43.77.060.

21 *See Sjong v. State Dep't of Revenue*, 622 P.2d 967 (Alaska 1981) (State of Alaska's imposition of net income tax on nonresident crab fisherman did not violate due process).

22 U.S. Const. Amend. XIV, §1. U.S. Const. Art. I, § 8, cl. 3.

23 Dep't. Open. Br., Statements at OA.

tax is a tax on the business of catching and processing of fish which occurs in the EEZ, and is therefore outside of Alaska's taxing jurisdiction.

The Department argues the Landing Tax is unique in that it is the first tax imposed on the bringing of previously untaxed fisheries resources into Alaska where Taxpayers then engage in economic activities within the state by selling the products to foreign buyers and transloading the product for export to foreign countries.[24] The Department analogizes the tax to use and severance taxes previously upheld against constitutional challenges.[25]

Under the relevant Supreme Court authorities, I find the appropriate approach is to analyze the Landing Tax through the prism of the Framers' intent as defined by the applicable precedents. Reviewing the tax in this light leads to the conclusion that the application of the Landing Tax to Taxpayers' activities does not violate the United States Constitution.

B. Jurisdiction

As a preliminary matter, the Department challenges the Office of Administrative Hearing's authority to rule on the issues raised by the Taxpayers. The Department cites two legal principles in support of its argument: 1) an administrative law judge does not have the authority to invalidate a statute or regulation; and 2) an administrative law judge may not rule on constitutional questions. Relying on these arguments, the Department claims that this tribunal is limited to making factual findings that may affect a constitutional issue. Taxpayers disagree, pointing to the many administrative decisions addressing constitutional issues and the Alaska Supreme Court jurisprudence regarding exhaustion of administrative remedies.[26] The Department's first argument is a correct statement of legal principle. However, it does not apply to the issues raised here. The second argument is an overbroad statement of the law.

The Department is correct that an administrative law judge does not have the authority to invalidate a state law or find that a state statue is unconstitutional.[27] However, there is a difference between whether a statute is challenged on its face or as applied to a set of circumstances in a particular case. "A statute is facially unconstitutional if 'no set of circumstances exists under which the act would be valid.'"[28] "A holding that a statute is

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24 Dep't Open. Br. at 19

25 Dep't. Open. Br. at 9-10.

26 TP Reply Br. at 17-19.

27 Dep't Open. Br. at 7, citing *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36-37.

28 *State, Dept. of Revenue, Child Enforcement Div. v. Beans*, 965 P.2d 725, 728 (Alaska 1998) (citations omitted).

unconstitutional as applied simply means that under the facts of the case application of the statute is unconstitutional."[29] A successful facial challenge invalidates the statute. A successful as-applied challenge only invalidates its application to those in the position of the challenger. The latter is what Taxpayers are asking in this proceeding.[30]

The Department's second argument is an overbroad statement of the law. As a practical and historical matter, administrative law judges, in Alaska and elsewhere, routinely rule on constitutional "as applied" challenges. For example, in a previous constitutional challenge to this same statute, the Department took the position that taxpayers could not bring their constitutional challenges directly to superior court. *In the Matter of Taxpayer 1 Taxpayer 2 Taxpayer 3 Taxpayer 4.*[31] In that case, the Alaska Supreme Court agreed with the Department and remanded the matter, requiring the taxpayers to exhaust their administrative remedies by bringing their claims first to the agency hearing officer.[32] Moreover, the Department's authorities do not stand for the broad proposition claimed. None state that as-applied constitutional challenges may not be considered in administrative proceedings.[33]

Because Taxpayers raise "as-applied" challenges to the statute at issue here, the Office of Administrative Hearings has jurisdiction to address their claims.

C. The Import-Export Clause

The Import-Export Clause of the United States Constitution states that: "[n]o State shall…lay any Imposts or Duties on Imports or Exports."[34]

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29 *State of Alaska v. American Civil Liberties Union of Alaska*, 204 P.3d 364, 372 (Alaska 2009).

30 In response to questions at the oral argument, both parties acknowledged examples of situations in which the Landing Tax would apply under different facts, without the alleged constitutional infirmaties raised by Taxpayers here. Thus, reaffirming that the Taxpayer's constitutional challenges in this case are "as applied."

31 Alaska Department of Revenue Decision No. 97-001, 1997 WL 897297 (1997).

32 When the taxpayers later withdrew their appeal, the tax division filed a motion requesting the Department to issue a decision on the merits, which the Commissioner did. Id. *See also Sjong v. State, Department of Revenue*, 622 P.2d 967, 969-70(Alaska 1981) (upholding due process challenge to net income tax first ruled on by DOR hearing officer); *Tesoro Corporation v. State Department of Revenue*, 3312 P.3d 830, 836-38 (Alaska 2013) (decision upholding appeal from ALJ ruling addressing constitutional issues). *In re Baker*, OAH No., 08-0025-AEL at 11-12 (addressing separation of Powers); *In re Cezar*, OAH No. 06-0255-PHA at 14, n. 17 (addressing full faith and credit and privileges and immunities clause arguments). Other courts have similarly ruled that administrative proceedings may address "as applied" constitutional challenges. *See Richardson v. Tennessee Board of Dentistry*, 913 S.W.2d 446, 453 - 55 (Tenn. 1995); *Prester v. Baltimore County Md.*, 157 A.3d 301; *John Doe v. CFPB*, 849 F.3d 1129; *Strau v. Reed*, 2017 WL 5077061,_S.E.2d____(W.Va. 2017).

33 *See e.g., Ben Lomond, v. Municipality of Anchorage*, 761 P.2d 119,122 (Alaska 1982) (Dep't Open. Br. at 8 n. 26) (permitting the plaintiff to bring up a constitutional issue not raised in the administrative proceeding against an exhaustion of remedies claim, but nowhere stating that constitutional questions cannot be addressed in administrative proceedings).

34 U.S. Const. Art. 1 §10, cl. 2.

There is no mystery about the purpose the Framers sought to address by the enactment of this clause:

> One of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased. Before 1787 it was commonplace for seaboard States with port facilities to derive revenue to defray the costs of state and local governments by imposing taxes on imported goods destined for customers in other States. At the same time there was no source of revenue for the central government....
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> The other source of dissatisfaction was the peculiar situation of some of the States, which, having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, thro whose ports, their commerce was caryed on....
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> The Framers of the Constitution thus sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power, import revenues were to be the major source of revenue for the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.[35]

Thus, the Import-Export Clause was enacted to prevent states with convenient ports form placing other states at an economic disadvantage. But probably the most important purpose of the clause's prohibition is to prohibit the states from invading the Federal Government's exclusive regulation of foreign commerce.[36]

1. *Michelin Tire and Richfield Oil*

Taxpayers claim that the Landing Tax violates the Import-Export Clause because it is a tax imposed on "goods in transit," and the Supreme Court, they argue, has never permitted a tax on goods in transit. In support, they rely primarily on the analysis set forth in *Richfield Oil.*[37] Significantly, Taxpayers *do not* claim that the Landing Tax violates the test set forth in *Michelin*

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35 *Michelin Tire Corp. v. Wages,* 96 S.Ct. 535 at 540-41 (internal citations omitted).
36 Id. at 541.
37 67 S.Ct. 156 (1946).

Tire. They argue, instead, that the test set forth in *Michelin Tire* does not apply in this circumstance, and the principles set forth in *Richfield Oil* control the analysis.

In *Richfield Oil*, the Supreme Court invalidated a California retail sales tax imposed on the producer and seller of oil products. The tax was calculated on the gross receipts of the sale of oil that was sold directly under contract to the Navy of New Zealand. The oil was carried by pipeline from Richfield's oil refinery and delivered to storage tanks in the harbor, and then pumped into the foreign vessel for delivery to Auckland for use by the Navy of New Zealand. The Court identified two questions as central to the decision: whether the oil when taxed was an export, and whether the tax imposed was then an "impost" on the export.[38] As to the first question, the Court found that the commencement of the export occurred when the oil was delivered into the hold of the vessel from the tanks at the dock. At this point the oil passed into control of a foreign purchaser, and therefore, it was clear that that the oil "had started upon its export journey" at this point.[39] Because this was the taxable incident, the Court held the incident which gave rise to the accrual of the tax was "a step in the export process".[40] The Court also found that the tax, measured by the gross receipts of retail sales, was a direct tax on goods in the export process, since the tax was imposed on the sale of the goods at the point which occurred after the goods were loaded on the vessels.[41]

In *Michelin Tire*[42], the Court took a different approach to determining whether a state tax violated the Import-Export Clause. *Michelin Tire* involved a challenge to the State of Georgia's assessment of a non-discriminatory ad valorem property tax against an inventory of tire and tubes maintained at taxpayers' wholesale distribution warehouse. The tires and tubes were imported by the taxpayer from foreign countries. Once they arrived in the United States at a port of entry, the cargo containers were hauled to the taxpayer's warehouse where they were stacked in pallets with other tires ready for sale. The Georgia Supreme Court held that the tax on the tires violated the Import-Export Clause because, it found, no tax on goods could be imposed until the goods lost their character as imports and "become incorporated into the mass of property in

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38 Id. at 161.
39 Id. at 163-4.
40 Id. at 164.
41 Id.
42 96 S.Ct. 535 (1976).

the State." [43] The Supreme Court reversed, taking a different approach to the questions of the constitutionality of the tax under the Import-Export Clause.

The Court looked to the intent of the Framers and identified three main concerns the clause was enacted to address, as discussed above (p. 10). The Court then looked to see if application of the tax implicated any of the concerns the clause was meant to address. Applying this three-part test identified above, the Court found that nothing in the history of the Import-Export Clause suggested that a non-discriminatory ad valorem property tax imposed on goods no longer in import transit was the type of tax that would have been found objectionable by the Framers. In its determination, the Court focused, in part, on the non-discriminatory nature of the tax. Because the tax was also imposed on goods that were not in the import process, the Court found it was not an impediment that severely hampered commerce or constituted a tribute by a seaboard state to the disadvantage of other states. That being the case, the tax had no impact on the Federal Government's exclusive regulation of foreign commerce, and therefore did not fall afoul of the Import-Export Clause.[44] In focusing on the purposes of the Framers and the non-discriminatory nature of the tax, the Court distinguished taxes that are essentially taxes on the commercial privilege of bringing goods into a country from taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth. The Court noted that importers should bear their fair share of these costs along with competitors handing only domestic goods.[45] Thus, the Court noted, that while the Import-Export Clause prohibits state taxation based on the foreign origin of imported goods: "it cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies."[46]

Thus, while *Richfield Oil* focused primarily on the export process, in *Michelin Tire* the Court focused on the definition of impost or duty in the clause, stating:

> In any event, since the prohibition of nondiscriminatory ad valorem property taxation would not further the objectives of the Import-Export Clause, only the clearest constitutional mandate should lead us to condemn such taxation. The terminology employed in the Clause "Imposts or Duties" is sufficiently

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43 Id. at 539.
44 Id. at 541-2.
45 Id. at 541.
46 Id.

ambiguous that we decline to presume it was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate.[47]

The *Michelin Tire* three-part test, focusing on the purposes behind the clause, parallels, in its first and third components, the Supreme Court's Commerce Clause jurisprudence.[48] Thus, a tax puts no restraint on the federal government's ability to conduct foreign policy – the first component – where no foreign business or vessel is taxed.[49] The third component "is vindicated if the tax falls upon a taxpayer with reasonable nexus to the State, is properly apportioned, does not discriminate, and relates reasonably to services provided by the State."[50]

Taxpayers have not made a commerce clause challenge to the Landing Tax, and a previous such challenge was rejected by the Department in a published decision issued after a hearing held before a Department hearing officer.[51]

2. *Application of the Cases to the Parties' Arguments*

There appears to be no dispute between the parties that the Landing Tax does not run afoul of the three-part test set forth in *Michelin Tire*. The Department argues this explicitly, and neither in their briefing nor at oral argument did Taxpayers dispute this point.[52] The Department is correct on this point. The Landing Tax clearly does not affect the federal government's right to "speak with one voice when regulating relations with foreign governments,"[53] as it does not impact foreign governments in any way. The landed fisheries resources are not taxed anywhere else, nor is the fisheries business. Similarly, no federal revenues are diverted to Alaska by imposition of the tax. Nor is "harmony among the states disturbed."[54] The Landing Tax is applied to the first instance the fisheries resources could be taxed by any entity, and, to further protect against any double taxation, the Taxpayers may be credited for any taxes paid to any other jurisdiction "in which the fishery resource was caught, processed or sold."[55] Moreover, the

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47 Id. at 544.

48 *Itel Containers Intern. Corp. v. Huddleston*, 113 S.Ct. 1095, 1105-6 (1993).

49 *Dep't of Revenue of Washington v. Ass'n of Washington Stevedoring*, 98 S.Ct. 1388, 1401 (1978).

50 Id.

51 *Taxpayer 1, Taxpayer 2, Taxpayer 3, Taxpayer 4*, Decision No. 97-001, 1997 WL 897297 (1997). (Taxpayers correctly point out that this decision, issued before the creation of the Office of Tax Appeals or the Office of Administrative Hearings, does not have precedential effect. However, a de novo reading of the decision and the precedents cited therein supports its analysis which is corroborated, in limited part, by Taxpayers' decision not to raise a commerce clause challenge.

52 Dep't. Open. Br. at 12-14. TP Open. Br. at 19-23.

53 *Michelin Tire*, 96 S.Ct. at 540.

54 Id. at 540.

55 AS 43.77.030.

Landing Tax operates in a complementary manner with the Fisheries Business Tax applicable to businesses that catch and/or process fish in Alaskan waters. As such, it is non-discriminatory as that term is used in *Michelin Tire*. Invalidating the Landing Tax would grant Taxpayers "preferential treatment that [would permit] them to escape from uniform taxes imposed without regard to foreign origin for services which the State supplies."[56]

This finding, however, does not end the inquiry. Taxpayers argue that, regardless of the *Michelin Tire* test, the Landing Tax violates the Import-Export Clause under the rule of *Richfield Oil* which, they claim, still applies where the argument is that the tax is a direct tax on goods in export transit.[57] As Taxpayers correctly note, *Richfield Oil* stated a rule applying the Import-Export Clause to a state tax that was directly assessed on goods in import or export transit. They argue that under *Richfield Oil*, the state may not tax goods in export transit. Thus, they claim, regardless of what the tax is called, if the incident giving rise to the tax is a step in the export process, the tax is invalid under the Import-Export Clause regardless if the tax would be an "Impost or Duty" as that term was defined in *Michelin Tire*.[58] In support of this claim that a limited *Richfield Oil* test still exists post-*Michelin Tire*, Taxpayers cite *Dulles Duty Free v. County of Loudoun*.[59] In that case, the Virginia Court invalidated a business, professional and occupational license tax on gross receipts of international export sales imposed on a retailer of duty free merchandise for sale at Dulles International airport. In *Dulles*, the question was whether the rule of *Richfield Oil* applied after *Michelin*, to invalidate a nondiscriminatory tax that fell, without question, directly on goods in transit. The Virginia Court found that it did and invalidated the tax. Other courts have found that *Richfield Oil* does not survive *Michelin* in the case of nondiscriminatory taxes.[60] This issue does not have to be resolved here, because the Landing Tax is not such a tax.

At oral argument, Taxpayers claimed, in response to a question, that because the fisheries resources are intended by the company to be loaded to foreign vessels for foreign sales, the export process begins as soon as the catcher/processor vessels begin the trip into port. Therefore, they argue, the Landing Tax would be imposed on goods in export transit in violation of the

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56 Id. at 54.
57 TP Open. Br. at 19.
58 TP Open. Br. at 14-23.
59 803 S.E.2d 454 (Virginia 2017).
60 See e.g. *P.J. Lumber Company, Inc. v. City of Prichard*, 2017 WL 4214170 (Ct of Civil Appeals of Alabama 2017).

clause regardless of the taxing incident since the fisheries resources are in export transit as soon as they enter Alaska waters. The case law, however, does not support this broad view of when goods "are in the export process."

In *Richfield Oil* itself, the taxing incident that was found to be a step in the export process was the actual transfer of the goods to either the common carrier or purchaser, an act that occurs, in this case, after the Landing Tax applies.[61] Other courts have applied a similar bright line rule.[62] Taxpayers' argument to move the application of the clause to an earlier point in the transit process would have the rule turn on the intent of the Taxpayer. That position, however, has been explicitly rejected by the Supreme Court. Intent to export is simply not relevant to the determination.[63]

In *Kosyndar*, the Court upheld the State of Ohio's assessment of an ad valorem personal property tax on certain cash registers and other machines that an Ohio manufacturer had built to foreign buyers' specifications, and that were warehoused in Ohio awaiting shipment abroad. The Court held that the protections of the Import-Export Clause do not apply until the article as issue begins its physical entry into the stream of exportation. The Court noted that not every preliminary movement of goods toward eventual exportation is sufficient to invoke the clause. Citing its earlier decision in *Coe v. Errol*,[64] the Court noted that the owner's state of mind is not relevant to the inquiry: "the exemption from taxation in the Import-Export Clause attaches to the export and not to the article before its exportation." Thus, goods do not cease to be subject to state jurisdiction "until they have been shipped or entered with a common carrier for transportation to another State [or country] or have been started upon such transportation in a continuous route or journey."[65]

Under AS 43.77.010, the taxing incident for application of the Landing Tax is when the fisheries resources are brought into the jurisdiction of Alaska and first landed. Under AS 43.77.200(4), the first landing is the act of unloading or transferring a fisheries resource. Since

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61 Dep't Supp. Br. at 3-4; *Richfield*, 67 S.Ct. at 84.

62 *See U.S. Steel Mining Co.*, 631 S.E.2d 559 (W.Va. 2005) (Import-Export Clause not violated under *Richfield Oil* test where state coal severance tax applied when coal was extracted from state and before loaded for export); *Sumitomo Forestry Co. Ltd of Japan v. Thurston Country, Washington*, 504 F.2d 604 (9th Cir. 1974) (Logs stored in port of Washington for arrival of ships for export properly subject to local taxation because they had not yet begun the export process until committed to the common carrier for export).

63 *Kosyndar v. National Cash Register Co.*, 94 S.Ct. 2108 (1974).

64 6 S.Ct. 475 (1886).

65 *Kosyndar* 94 S.Ct. at 67-68 (citations omitted).

the taxing incident occurs before the goods are actually committed irrevocably to export, the goods are not yet in export transit when the tax is applied.[66]

Moreover, even if this were not the case, the Landing Tax is not a direct tax on the goods actually being exported. The tax is levied on those "who engage or attempt to engage in a floating fisheries business in the state."[67] The fact that the tax is computed on the value of the raw fish "is the measure of the tax, not the taxable event."[68] Thus, in *Arctic Maid*, the Court considered a due process challenge to an Alaska Fisheries License tax which, like the present Fisheries Business License Tax, imposed on tax on those "prosecuting or attempting to prosecute...lines of business in connection with Alaska's commercial fisheries." The tax, like the Landing Tax here, was computed on the value of fish bought or otherwise obtained for processing. The Court distinguished lines of authorities involving the Import-Export Clause and taxes implicating the movement of goods in commerce because "[t]he taxable event is 'prosecuting the business of Freezer ships and other floating cold storages.'"[69] The computation of the tax based on the value of the fish, the Court found, was simply the measure of the tax and not the taxing event.[70]

In sum, the Landing Tax does not, in any way, run afoul of the Framers' purposes in enacting the Import-Export Clause as described by the three-part test of *Michelin Tire*. Assuming arguendo that the "export transit" test of *Richfield Oil* applies to prohibit a non-discriminatory tax after *Michelin Tire*, the Landing Tax does not run afoul of that test. The tax is neither applied directly to goods, nor is it a tax on goods in export transit as the cases have defined the latter. For these reasons, the Landing Tax as applied to Taxpayers' activities in Alaska does not violate the Import-Export Clause.

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66 *See Taxpayer 1, Taxpayer 2, Taxpayer 3, Taxpayer 4*, at 34 ("the fish first landed are simply fish removed from a vessel. This is not an act of export transit.").

67 AS 43.77.010.

68 *See Alaska v. Arctic Maid*, 81 S.Ct 929, 931 (1961). *See also In re: Taxpayer 1, Taxpayer 2, Taxpayer 3, Taxpayer 4*, Department of Revenue Decision 97-001, 1997 WL 897297. The Department of Revenue Hearing Office heard a similar challenge to the tax.[68] In that decision, the Department rejected the Import-Export challenge on the grounds that the landing of the fish is not an act of export transit, and further rejected the taxpayers' claims that the tax was on the value of goods transported, since the tax is based on the raw value of the fishery resource, which is significantly less than the value of the processed fish, and therefore is not measured by the value of the landed goods. The decision also found no violation of the three-part test set forth in *Michelin Tire*.

69 Id. at 931.

70 Id.

D. The Tonnage Clause

The Tonnage Clause of the United States Constitution provides simply that: '[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage."[71] The Tonnage Clause was originally added to the Constitution to close a loophole in the application of the Import-Export Clause to prevent a state from circumventing the prohibition on import and export duties by taxing the vessels that carried the goods in and out of the state.[72] At the time of adoption of the Constitution, tonnage was a commercial term signifying the capacity of the vessel, and duties of tonnage were seen as levies on the privilege of access to ports.[73] Such levies were further seen as distinct from charges for services rendered to and enjoyed by vessels, even if determined by vessel capacity.[74] Both the Import-Export Clause and the Tonnage Clause were enacted to restrain the states themselves "from the exercise of the taxing power injurious to the interests of each other."[75]

Relying on the Supreme Court's most recent case interpreting the Tonnage Clause, Taxpayers argue that the Landing Tax violates the Tonnage clause because, in practice, it is a tax that "operates to impose a charge for the privilege of entering, trading in, or lying in a port".[76] The Department responds that the Landing Tax does not fall under the definition of "duty" under the Tonnage Clause because it is not a tax imposed on cargo, but instead presents a unique circumstance: a tax levied for the creation, manufacture or sale of a product that is not subject to tax in any other jurisdiction.

1. Polar Tankers

The Tonnage Clause has not had much exposure in modern jurisprudence, with little attention from the Supreme Court after the 19th century. In *Polar Tankers*, decided in 2009, the Supreme Court took up consideration of the Tonnage Clause for the first time since 1935.[77] *Polar Tankers* involved a challenge by oil vessel owners to an ordinance imposing a personal

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71 U.S. Const. Art 1, § 10, cl. 3.

72 *See Clyde Mallory Lines v. State of Alabama ex rel State Docks Comm'n., 56 S.Ct. 194, 195 (1935)* ("[T]he prohibition against the imposition of any duty of tonnage was due to the desire of the Framers to supplement article 1, section 10, cl. 2.").

73 Id. at 265 (citations omitted).

74 Id.

75 Polar Tankers, 129 S.Ct. at 2282, *quoting* J. Story, Commentaries on the Constitution of the United States sec. 497, p. 354 (1833).

76 *Polar Tankers, Inc. v. City of Valdez*, 129 S.Ct. 2277, 2283 (2009) citing *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261 (1935). TP Open. Br. at 9-14.

77 *See* Clyde Mallory Lines, 56 S.Ct. 194.

property tax on "boats and vessels of at least 95 feet in length that regularly travel to [the City of Valdez], are kept or used within the City, or which annually take on at least $1 million worth of cargo or engage in other business transactions of comparable value in the City."[78] As drafted, the tax applied only to ships, and, in practice, almost exclusively to oil tankers.[79] The purpose of the tax was to fund general revenues of the City of Valdez. In a series of splintered opinions, the Court held the tax unconstitutional as a violation of the Tonnage Clause.

The majority opinion, joined by 5 justices, begins with a background discussion of the historical purpose of the Tonnage Clause (§11 A). As the Court described, the clause was historically interpreted by the courts to mirror the intent of other constitutional provisions designed to "restrain the states themselves" from the exercise of taxing power "injuriously to the interests of each other."[80] The Court noted that the Framers' purpose in writing the clause was to prohibit the states from circumventing the Import-Export clause by taxing the vessels transporting merchandise instead of the merchandise itself. The Supreme Court over the years also understood the Clause as "reflecting an effort to diminish a State's ability to obtain certain geographical vessel-related tax advantages...."[81] The Court noted that cases have taken a practical look at the operation of tax statutes. For example, cases involving taxing a vessel by the number of masts, mariners, passengers, or the size and power of the engines were found to violate the clause where they simply did indirectly what the clause directly forbids.[82]

Finally, the majority opinion described when the clause should and should not apply. First, citing *Clyde Mallory Lines*, the Court reiterated that the "prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in or lying in a port."[83] This is the rule Taxpayers argue is violated by the Landing Tax.

However, the Court next undercut the sweep of this statement, noting that nothing in the purpose, history or Supreme Court authorities "suggests that [the Tonnage Clause] operates as a ban on *any* and *all* taxes which fall on vessels that use a State's port, harbor or other waterways."

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78 Valdez Ordinance No. 99-17 (1999) described in *Polar Tankers*, 129 S.Ct. at 2281.
79 Id. at 2283.
80 Id. at 2282 quoting J. Story, Commentaries on the Constitution of the United States §497 p. 354 (1833).
81 Id.
82 Id. (citations omitted).
83 Id. Quoting Clyde Mallory, at 265-66.

(emphasis in original). Because: "Such a radical proposition would transform the Tonnage Clause from one that protects vessels, and their owners, from discrimination by seaboard States, to one that gives vessels preferential treatment vis-à-vis all other property, and its owners in a seaboard State. The Tonnage Clause cannot be read to give vessels such 'preferential treatment.'"[84]

Applying these two competing principles, the majority opinion found the Valdez ordinance violated the Tonnage Clause, citing as the deciding factors, that: the ordinance applied almost exclusively to oil tankers, the tax on the value of such vessels was closely related to tonnage and the tonnage-based tax was not for services rendered.[85]

In section II B of the decision, a plurality of four justices agreed that the Valdez ordinance was unconstitutional, but on a different theory. The plurality opinion viewed the discriminatory nature of the tax as central to the analysis. That plurality opinion, relying on earlier cases, noted that the prohibition of the Clause comes into play: "[w]here vessels are not taxed *in the same manner* as other property of the citizens."[86]

2. Application of Polar Tankers to the Landing Tax

Taxpayers rely on the first part of *Polar Tankers*. They argue that the Landing Tax targets a "floating fisheries business," which, necessarily involves vessels and that their activities that take place in Alaska involve only transporting fish to be unloaded and transferred for export. Therefore, they claim, in practice, the Landing Tax falls squarely within the prohibition against a State charge for the privilege of entering and trading in Alaskan ports.[87]

The Department responds that the Tonnage Clause must be construed in line with its purpose of preventing states with convenient ports from exacting an advantage over states that lack such geographic advantages, and that the analysis is similar to the third prong of *Michelin Tire*. The Department also argues that the Landing Tax is not a duty as that term has been defined and applied under the Tonnage Clause precedents because the fisheries resources that are taxed are not merchandise or cargo imported from another jurisdiction but are created or

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84 Id. at 2283, citing *Michelin Tire*, 96 S.Ct. 1541.

85 Id. at 2284.

86 Id. (emphasis added). The plurality opinion also noted that this nondiscriminatory tax requirement would allow a political check on a State's taxing power – a check that was not available in the *Polar Tankers* case, both because the tax was discriminatory and because the tax was a city tax, not imposed by the State, and therefore not subject to "any electorate-related check." *Polar Tankers* at 2286-7.

87 TP Open. Br. at 9 – 11.

harvested in a location not subject to taxation by any authority. The Department argues that the tax operates more in the form of use taxes that are imposed by numerous states.[88] The Department claims that this unique circumstance distinguishes the Landing Tax from the authorities relied on by Taxpayers.

The decision as to the Tonnage Clause falls, in some part, along the same lines as the analysis under the Import-Export Clause. First, as with the Import-Export Clause analysis, the imposition of the Landing Tax does not undermine the purpose of the clause as described by the Framers and explained in *Polar Tankers*. The tax does not operate in any manner "injurious to other states or to foreign commerce."[89]

Moreover, The Landing Tax is clearly distinguishable from the tax invalidated in *Polar Tankers*. The Landing Tax grants credits for any other taxes paid, and operates as a complement to the Fisheries Business Tax, equating the tax burden for catcher/processors who use Alaskan port resources whether they catch fish in state or in the EEZ. Thus, it is a nondiscriminatory tax. Far from singling out the taxpayer for higher levies, it avoids preferential treatment for those, like Taxpayers, who use Alaska's local and state resources, but would not otherwise be subject to the Fisheries Business Tax. The Landing Tax is calculated by the raw value of product carried by the vessel and varies based on the species of fish. Thus, it is not a tax on vessel capacity couched in other terms. It is specifically designed so that the fisheries businesses that use the services of Alaska's ports and obtain the benefits of State and local services pay their fair share.[90] The tax, while not a direct payment of fees for services, also is not a general tax that goes wholly to fund state services. The tax is shared on a 50% basis with the communities that service the businesses taxed.[91] Finally, the tax is imposed by the State of Alaska, not a locality, and thus, has the political protections that the Court noted in *Polar Tankers*, but that did not exist with the municipal tax at issue there.

The Landing Tax is not a tax on the privilege of entering or trading in a port. It is a tax on the activities of Taxpayers that take place in Alaska and measured by the value of raw fish.[92] It neither undermines the purpose of the Tonnage clause, nor is it similar in terms or practice to

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88 Dep't. Open. Br. at 19.

89 Indeed, Taxpayers implicitly concede this point, as they do not challenge the tax as a violation of the Commerce Clause.

90 15 AAC 77.005.

91 AS 43.77.060.

92 *See* Arctic Maid, 81 S.Ct. at 931.

the property tax struck down in *Polar Tankers*. Thus, The Landing Tax as applied to Taxpayers does not violate the Tonnage Clause.

E. Taxpayers' Due Process Challenge

Taxpayers do not claim that they have insufficient contacts with Alaska so that subjecting them to any taxation would violate the Due Process Clause of the 14th Amendment.[93] Their due process claim is basically a residual challenge. They claim that if the Landing Tax does not violate the Import-Export Clause or the Tonnage Clause, then it is an attempt to tax the business of catching and processing – all of which takes place outside of Alaska and is therefore beyond Alaska's jurisdiction to tax. Taxpayers are correct that Alaska cannot tax activities that take place beyond its borders.[94] But they do not dispute that Alaska may, consistent with the Due Process Clause, tax their activities that take place within Alaska.[95] Their due process argument relies on "Catch-22" reasoning: Although Alaska could constitutionally tax their activities in Alaska, if the tax does not violate one of the two clauses above, then it must be a tax on activities that take place outside of Alaska and is thus, still constitutionally invalid. Here, the Department has the better argument. The Landing Tax operates, in practice, as a tax on the business activities that take place in Alaska as measured by the raw value of product brought into the state. The Landing Tax does not violate the Due Process Clause because it falls on a business that operates in Alaska, has a substantial nexus to Alaska, and that avails itself of opportunities and benefits given by the state.[96]

F. Taxpayers' Challenge Under Title 33.U.S.C. §5(b)

Relying on *State of Alaska, Department of Natural Resources v. Alaska Riverways, Inc.*,[97] Taxpayers argue that the Landing Tax violates Title 33 U.S.C. §5(b) as a tax on the use of navigable waters. The Department responds that the Landing Tax is not a tax on the use of navigable waters. Neither party argued this issue at the oral argument, and the argument itself is derivative of earlier arguments.

Section 5(b) provides:

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93 TP Open. Br. at 6-8.

94 *See Arctic Maid*, 81 S.Ct. 929 (addressing Alaska's jurisdiction in a commerce clause challenge, but addressing Alaska's taxing jurisdiction); *Sjong*, 622 P.2d at 967-70.

95 *Sjong*, 622 P.2d 967 (upholding Alaska net income tax to nonresident crab fisherman).

96 *Sjong*, 622 P.2d at 969.

97 232 P.3d 1203 (Alaska 2010).

b) No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for

(1) fees charged under section 2236 of this title;

(2) reasonable fees charged on a fair and equitable basis that--

(A) are used solely to pay the cost of a service to the vessel or water craft;

(B) enhance the safety and efficiency of interstate and foreign commerce; and

(C) do not impose more than a small burden on interstate or foreign commerce; or

(3) property taxes on vessels or watercraft, other than vessels or watercraft that are primarily engaged in foreign commerce if those taxes are permissible under the United States Constitution.

In *Alaska Riverways*, the Supreme Court of Alaska found that an assessment by the Department of Natural Resources of a lease fee imposed on a tour boat operator for use of land the operator used for docks violated 33. U.S.C. §5(b). The fee was charged on a per passenger basis. The Court found that, because it was charged per passenger, it was not, in practice, a rental fee for use of the docks, but a charge on the use of navigable waters in violation of the statute.

As noted above, the Landing Tax is not a charge on a vessel or watercraft, or its passengers or crew. It is a charge on the activities of a fisheries business that uses Alaskan ports and communities to conduct its business. The tax does not violate §5(b).

IV. Conclusion

The Landing Tax, as applied to Taxpayers' activities in the State of Alaska, does not violate the Import-Export, Tonnage or Due Process clauses of the United States Constitution. Nor does it violate Title 33 U.S.C. §5(b). The Department's motion for summary adjudication is granted and the Taxpayers' motion for summary adjudication is denied. The Department's informal decision denying Taxpayers' request to refund Landing Taxes paid for the tax years 2012 – 2015 is AFFIRMED.

DATED this 13th day of March 2018.

By: Karen L. Loeffler
Karen L. Loeffler
Administrative Law Judge

NOTICE

This is the hearing decision of the Administrative Law Judge under Alaska Statute 43.05.465(a). Unless reconsideration is ordered, this decision will become the final administrative decision 60 days from the date of service of this decision.[98]

A party may request reconsideration in accordance with Alaska Statute 43.05.465(b) within 30 days of the date of service of this decision.

When the decision becomes final, the decision and the record in this appeal become public records unless the Administrative Law Judge has issued a protective order requiring that specified parts of the record be kept confidential.[99] A party may file a motion for a protective order, showing good cause why specific information in the record should remain confidential, within 30 days of the date of service of this decision.[100]

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Statute 43.05.480 within 30 days of the date this decision becomes final.[101]

Certificate of Service: The undersigned certifies that on the 13 day of March 2018, a true and correct copy of this document was distributed to the following: Leon Vance, counsel for Taxpayers; AAG Christopher Peloso. A courtesy copy was emailed to: Hollie Kovach, Chief of Appeals, Tax Division.

Office of Administrative Hearings

98 AS 43.05.465(f)(1).
99 AS 43.05.470.
100 AS 43.05.470(b).
101 AS 43.05.465 sets out the timelines for when this decision will become final.