IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC-02-2013
LT CASE NO. 4D00-3873

FLORIDA DEPARTMENT OF REVENUE,

Petitioner,

vs.

NEW SEAESCAPE CRUISES, LTD.,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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PREFACE

This is an appeal from a decision of the Fourth District Court of Appeal. The parties will be referred to by their proper names. The following symbol will be used:

(AB) - Appellant's Brief

STATEMENT OF THE CASE AND FACTS

Appellant Florida Department of Revenue ("DOR") conducted a sales and use tax audit of the business and operations of Appellee, New Sea Escape Cruises, Ltd. ("New SeaEscape" or "SeaEscape") for the period May 1, 1996 through April 30, 1998. During the audit period, New SeaEscape operated one or more day cruise ships from Port Everglades under the banner SeaEscape. New SeaEscape is a Bahamian corporation, and its vessels were flagged under the laws of the Commonwealth of the Bahamas.[1]

In addition to short gambling cruises which cruised into waters more than three miles off the coast of Florida, SeaEscape conducted overnight gambling cruises to Freeport, Bahamas. During all these cruises, gambling was conducted on SeaEscape only while the vessel was outside the territorial boundaries of Florida. These activities were conducted pursuant to the Gambling Ship Act, 18 U.S.C. §1081 *et. seq*., the Johnson Act, 15 U.S.C. §1171 *et. seq*., and §849.231, Fla. Stat. The federal government taxes the gambling revenues of the cruises. 26 U.S.C. §4472.

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[1]/The undersigned counsel took over representation of New SeaEscape after former counsel withdrew. The undersigned has been unable to obtain the file of former counsel. The file in the Fourth District was transferred to this Court before the undersigned became involved. Accordingly, the undersigned's Statement of the Case and Facts contains no page reference numbers. However, the undersigned does not believe the facts herein conflict with the facts set forth in the DOR's brief, or the opinion of the Fourth District.

The gambling equipment aboard the SeaEscape was owned by New SeaEscape Cruises, Ltd. New SeaEscape had agreements with two concessionaires to use a portion of SeaEscape. One agreement was a lease or licensee for operating the gambling concession (hereafter "gambling lease") and the other was a service agreement for operating the food and beverage concession (hereafter "food and beverage concession").

At the conclusion of its audit, DOR determined that New SeaEscape owed Florida sales and use tax in the amount of $718,725.25, plus penalties of $359,356.67 and interest through June 30, 1999 of $161,160.94, for a total of $1,239,248.86. The DOR determined that New SeaEscape was not engaged in foreign commerce on its cruises beyond the three mile limit; and that SeaEscape and its equipment were subject to Florida use tax under the apportionment formula contained in §212.08(8), Fla. Stat., by only excluding the mileage on its trips to the Bahamas; and that both the gambling lease, and the food and beverage concession, were subject to taxation.

New SeaEscape appealed to the Fourth District, which reversed in part and affirmed in part. NewSea Escape Cruise, Ltd. v. Florida Dept. of Rev ., 823 So.2d 161 (Fla. 4th DCA 2002). The court held that §212.08, Fla. Stat. applied to New SeaEscape and that it should be taxed only for the ratio of its intrastate mileage, as compared to its total intrastate and foreign mileage. (Id . at 162-63). The court ruled that the gambling equipment and the gambling lease were taxable, but not the food and

beverage concession. Id. at 164-65. The DOR seeks review of the Fourth District's ruling.

STANDARD OF REVIEW

New SeaEscape agrees that the standard of review is *de novo*.

POINT-ON-APPEAL

BECAUSE NEW SEAESCAPE IS CONTINUOUSLY ENGAGED IN FOREIGN COMMERCE, THE VESSEL, ITS EQUIPMENT AND CONCESSIONS ARE ENTIRELY EXEMPT FROM SALES AND USE TAXATION UNDER §212,08(8), FLA. STAT.; THE FOREIGN COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION ALSO PROHIBITS FLORIDA FROM IMPOSING SUCH TAXES

SUMMARY OF ARGUMENT

Since SeaEscape's vessel travels beyond the three-mile territorial limit of Florida into international waters on its "cruises to nowhere," and did so on its trips to Freeport as well, it is engaged in foreign commerce within the meaning of the United States Constitution. This conclusion is supported by a long line of federal and state decisions holding that vessels traveling into international waters, even between ports within the same state, are engaged in foreign commerce, and by the definition of

foreign commerce contained in the federal statute under which the SeaEscape cruises are conducted.

Since SeaEscape's vessel is engaged in foreign commerce, it is entitled to the protection of §212.08(8), Fla. Stat., and the regulations promulgated thereunder, which apportions Florida sales and use tax of a vessel engaged in foreign commerce based upon its mileage within and without Florida territorial waters. Under this statute and regulations, mileage from international waters to a Florida port, and from a port to international waters, is not considered mileage within Florida waters. Therefore, SeaEscape is not subject to Florida sales and use taxation to any extent under this apportionment formula. Furthermore, §212.08(8) must apply with equal force to the leased property, gambling lease and food and beverage concession aboard the SeaEscape vessel. Additionally, the Foreign Commerce Clause of the United States Constitution prohibits taxation of an instrumentality of foreign commerce.

ARGUMENT

I. SeaEscape Is Continuously Engaged in "Foreign Commerce" Within the Meaning of the Foreign Commerce Clause of the United States Constitution

SeaEscape agrees with the Department of Revenue's ("DOR") statement that the Fourth District "implicitly found that SeaEscape's cruises to nowhere engaged in 'foreign commerce'" (AB,p.23). The Fourth District's ruling was eminently correct.

The seminal decision regarding whether navigation in international waters is foreign commerce under the United States Constitution is Lord v. Steamship Company, 102 U.S. 541 (1880). The United States Supreme Court held that a vessel engaged in oceanic navigation is necessarily engaged in foreign commerce within the meaning of the Foreign Commerce Clause (Article I, §8 of the United States Constitution)[2] even when traveling between ports within the same state. In that case, the vessel Ventura was engaged in shipping between San Diego and San Francisco, California. The Supreme Court held that the vessel was engaged in foreign commerce under the Foreign Commerce Clause. The Court acknowledged that "foreign commerce" required some connection with other nations, stating (id. at 544):

> Commerce includes intercourse, navigation, and not traffic alone. This also was settled in Gibbons v. Ogden, supra.

However, the Court went on to state (id.):

> "Commerce with foreign nations," ...must signify commerce which, in some sense, is necessarily connected with these nations, transactions which either immediately or at some stage of their progress must be extra-territorial. (emphasis added)

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[2]/Throughout this brief, the "Foreign Commerce Clause" refers to the power of Congress under Article I, §8 to "regulate commerce with foreign nations" as opposed to interstate commerce, i.e., its power to regulate commerce "among the several states."

The Court concluded that navigating on the high seas, "among the vessels of other nations" was sufficient to constitute foreign commerce, even if the vessel embarked from and returned to the same state (id.):

> The Pacific Ocean belongs to no one nation, but is the common property of all. When, therefore, the Ventura went out from San Francisco or San Diego on her several voyages, she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. If in her navigation she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done. In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress. Navigation on the high seas is necessarily national in its character.

Thus, it is extra-territorial ocean navigation, of the type engaged in by SeaEscape on its "cruises to nowhere," that is "foreign commerce" under the Commerce Clause of the United States Constitution.

Similarly, in The Vessel Abby Dodge, 223 U.S. 166 (1912), the United States Supreme Court concluded that a sponge harvesting vessel sailing into international waters from Florida ports was engaged in foreign commerce (id. at 176):

> Undoubtedly, ...whether the Abby Dodge was a vessel of the United States or of a foreign nation, even although it be conceded that she was solely engaged in taking or gathering sponges in the waters which by the law of nations would be regarded as the common property of all and was transporting the sponges so gathered in the United States, the vessel was engaged in foreign commerce, and was therefore amenable to the regulating power of Congress over that subject.

Other appellate courts considering the issue have uniformly held that vessels traveling into international waters and returning to ports in the same state are engaged in foreign commerce under the United States Constitution. In Sales Tax District No. 1 v. Express Boat Company, 500 So.2d 364 (La. 1987), the Louisiana Supreme Court held that vessels sailing to and from Louisiana to supply and support offshore oil drilling platforms were engaged in foreign commerce and were exempt from Louisiana's sales and use tax. The Louisiana DOR argued that "foreign commerce" meant commerce between two foreign countries. Id. at 368. The Louisiana Supreme Court rejected that argument stating (id. at 368-69):

> ...The correct interpretation of the term "foreign...commerce...is that advanced by Express Boat Co. They urge that crossing the territorial boundaries of the

> State of Louisiana and the United States and venturing onto the Outer Continental Shelf is foreign commerce and that, despite the assertion by the taxing authorities, [foreign commerce] does not require that the terminus of a vessel's voyage be in another foreign state or country.
>
> * * *
>
> Activities similar to those carried out by the Cheramie vessels have consistently been characterized by the courts as "foreign commerce." The cases have held that **navigation of the high seas** is "foreign commerce."[3] (emphasis added)

The Louisiana Court of Appeal has also held that vessels operating beyond the 3-mile limit servicing the oil industry from Louisiana ports were engaged in foreign commerce and exempt from Louisiana ad valorem taxation. Moonmaid Marine, Inc. v. Larpenter, 599 So.2d 820 (La. 1992).

Finally, in Brent Leasing Co., Inc. v. State Tax Assessor, 773 A.2d 457 (Maine 2001), the Maine Supreme Court held that a vessel taking patrons on whale watching cruises in international waters from Maine ports and returning to those ports, were not entitled to a use tax exemption, but only because the Maine Legislature's exemption for foreign commerce carried a narrower meaning than the meaning in the Foreign Commerce Clause (id. at 460-461), stating:

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[3]/The "high seas" includes all water beyond the territorial seas of the United States or any foreign nation. The territorial seas of the United States extend from the coast three miles seaward. Express Boat, 500 So.2d at 369, fn. 6.

> If the Maine Legislature intended the phrase [foreign commerce] to have the same meaning and be coextensive with the Commerce Clause, then we would likely have to interpret §1760(41) as granting an exemption to watercraft carrying passengers onto international waters during its cruises. Precedent from the United States Supreme Court and other courts would dictate this result. When interpreting "foreign commerce" as it is used in the Commerce Clause, the Supreme Court has included within the meaning of that phrase a ship that carries passengers between ports in the same state but enters into international waters on its route. ...Because the Maine Legislature is obviously aware of Supreme Court precedent, if it intended "foreign commerce" to carry the same meaning that it has in the Commerce Clause, that meaning would include vessels carrying passengers from Bar Harbor, crossing into international waters and returning to Bar Harbor.

The above cases demonstrate that the appellate courts that have directly considered the issue have concluded that vessels traveling into international waters from ports of a state and returning to ports of the same state are engaged in foreign commerce . The extra-territorial oceanic navigation specified in Lord v. Steamship Company requires that a vessel be outside the territorial waters of a jurisdiction. The parties agree that Florida territorial waters extend for three miles off its coastline, Fla. Const., Art. II., and that SeaEscape travels beyond Florida's territorial waters on its cruises to nowhere. The territorial waters of the United States are generally

coextensive with Florida territorial waters.[4] U.S. v. Louisiana, 363 U.S. 1 (1960). Thus, the SeaEscape cruises to nowhere are conducted outside the territorial waters of the United States, in international waters.

This conclusion is not affected by President Reagan's Presidential Proclamation extending the territorial waters to 12 miles for purposes of international law. Presidential Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988). By its own terms, the Proclamation has no effect upon existing federal or state law. The Proclamation states:

> Nothing in this Proclamation: (a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom.

Nor is Florida's territorial limits affected by the fact that the Antiterrorism and Effective Death Penalty Act (AEDPA) expanded federal criminal jurisdiction from 3 to 12 nautical miles. The three-mile limit in the Gambling Ship Act, 18 U.S.C. §§1081-1084 applies to cruises to nowhere.[5] The AEDPA extended the territorial limits of the

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[4]/U.S. v. McRary, 665 F.2d 674 (5th Cir. 1982), "[T]he territorial jurisdiction of the United States extends only three miles from this country's shores."

[5]/This conclusion is not altered by the decision in Benson v. Norwegian Cruise Ltd., 834 So.2d 915 (Fla. 3d DCA 2003), since that decision cannot overcome federal law on the issue, see United States v. One Big Six Wheel, 166 F.3d 498 (2d Cir. 1999); see also Robert M. Jarvis, Case Note, *Territorial Waters: Florida's Eastern Coastal Boundary is the Greater of the Edge of the Gulf Stream or Three Geographic Miles*,
(continued...)

United States to 12 miles solely for purposes of the nation's criminal jurisdiction, but not otherwise. United States v. One Big Six Wheel, 166 F.3d 498 (2d Cir. 1998).

The DOR's brief does not mention any of the above cases. Nor has the DOR cited one case defining "foreign commerce" under the Foreign Commerce Clause as requiring contact with a foreign port. Instead, the DOR cites Gibbons v. Ogden, 9 Wheat 1, 189-190 (1824), for the proposition that foreign commerce is "commercial intercourse between nations" (AB, p.11). However, 50 years later in Lord v. Steamship, supra, the Supreme Court concluded that Gibbons v. Ogden's requirement of "commercial intercourse between nations" was met by a vessel's navigation on the high seas among vessels of other nations. That definition of foreign commerce is the controlling definition for purposes of the Foreign Commerce Clause.[6]

The other cases cited by the DOR are also not applicable: Great Lakes Dredge & Dock Company v. Dept. of Revenue, 381 So.2d 1078 (Fla. 1st DCA 1979) (concerned the imposition of a tax on property "for export"; Bob Lo Excursion Co.

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[5](...continued)
34 J. Mar.L. & Com., 351(2003). Moreover, the DOR never contended below that the boundary stated in the 1968 Florida Constitution should apply, nor did it try to establish the location of the gulf stream with respect to the route of the SeaEscape's vessel.

[6]/The DOR's cite to United States v. Morrison, 120 S.Ct. 1740 (2000) is to its dissenting opinion, which obviously is not controlling.

v. State of Michigan, 333 U.S. 28 (1948) (steamship transporting patrons from Michigan to a Canadian island is engaged in foreign commerce); Lynn v. Director of Revenue, 689 S.W.2d 45 (Mo. 1985); Branson Scenic Ry. v. Director of Revenue, 3 S.W.3d 788 (Mo. App. 1999); and LaCrosse Queen, Inc. v. Wisconsin Dept. of Revenue, 561 N.W.2d 686 (Wis. 1997) (concerned interstate commerce, not foreign commerce); U.S. v. One Colt Machine Gun, 625 F.Supp 1539 (SD Fla. 1986) (concerned the violation of a criminal statute where the court defined "foreign commerce" in that statute as requiring contact with a foreign state); U.S. v. Montford, 27 F.3d 137, 140 (5th Cir. 1994) (concerned the violation of a criminal statute, where the court held that Congress intended the definition of "foreign commerce" in that statute to mean travel to or from, or at least some form of contact with, a foreign state). None of these cases cited by the DOR comes close to holding that "foreign commerce" under the Commerce Clause means anything other than navigating into international waters.

In addition to the cases relied upon by SeaEscape, it operates its cruises pursuant to express authority granted by 15 U.S.C. §1171, *et. seq*., enacted in furtherance of Congress' power to regulate foreign commerce. 15 U.S.C. §1171(d) defines "interstate or foreign commerce" to include commerce "between points in the

same State...but through anyplace outside thereof."[7] Cruises to nowhere fall within this definition. Accordingly, the very statute under which SeaEscape conducts its cruises to nowhere defines such cruises as "foreign commerce."

Since the SeaEscape cruises to nowhere are partially conducted in international waters, outside the territorial limits of the United States, the decisions of the United States Supreme Court in Lord v. Steamship Company and The Vessel Abby Dodge require a determination that SeaEscape is continuously engaged in "foreign commerce" under Article I, §8, of the United States Constitution. If cargo ships, sponging vessels, oil industry supply vessels, and whale-watching cruises entering international waters during their cruises from ports within the same state are engaged in "foreign commerce" under the Foreign Commerce Clause of the United States Constitution, then SeaEscape is necessarily engaged in foreign commerce on its gambling cruises to nowhere.

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[7]/A number of other federal statutes define foreign commerce in the same way. See 7 U.S.C. §499a(3); 7 U.S.C. §610(j); 21 U.S.C. §61(b); 27 U.S.C. §211(a)(3). Congress derives its power to enact such statutes from the foreign commerce clause of the United States Constitution. Conversely, if this activity were not "foreign commerce" under the United States Constitution, the Congress would not possess the power to enact such legislation. This, of course, was the issue resolved in favor of the Congress in Lord v. Steamship Company.

II. Under Florida Statutes, §212.08(8), SeaEscape and its Gambling Equipment and Concessions are Exempt From Florida Sales and Use Taxation

Because, as established under Point I, SeaEscape is engaged in "foreign commerce," the vessel, its gambling equipment, gambling lease and food and beverage concession are exempt from Florida's sales and use tax. The imposition of Florida's sales and use taxation of a vessel engaged in foreign commerce in Florida waters is governed by §212.08(8), Fla. Stat., which provides in pertinent part as follows:

> (a) The sale or use of vessels and parts thereof used to transport persons or property in interstate or foreign commerce, ..., is subject to the taxes imposed in this chapter only to the extent provided herein. The basis of the tax shall be the ratio of intrastate mileage to interstate or foreign mileage traveled by the carrier's vessels which were used in interstate or foreign commerce and which had at least some Florida mileage during the previous fiscal year. The ratio would be determined at the close of the carrier's fiscal year....
>
> Items, appropriate to carry out the purposes for which a vessel is designed or equipped and used, purchased by the owner, operator, or agent of a vessel for use on board such vessel shall be deemed to be parts of the vessel upon which the same are used or consumed. Vessels and parts thereof used to transport persons or property in interstate and foreign commerce are hereby determined to be susceptible to a distinct and separate classification for taxation under the provisions of this chapter. Vessels and parts thereof used exclusively in intrastate commerce do not qualify for the proration of tax.

The §212.08(8) exemption extends not only to the vessel, but to items "appropriate to carry out the purposes for which a vessel is designed or equipped and used," and to all "accessories." Tropical Shipping & Construction Co., Ltd. v. Askew, 364 So.2d 433, 436 (Fla. 1978). Accordingly, the exemption extends to all gambling equipment, the gambling lease aboard SeaEscape, and its food and beverage concession, because they are all necessary and appropriate to carry out SeaEscape's purposes.

Under the above statute, Florida's sales and use tax imposed on the value of a vessel engaged in foreign commerce, and its equipment and concessions, is apportioned based upon the ratio of the vessel's mileage within Florida waters to its total mileage. This apportionment formula is designed to avoid imposing an unduly burdensome tax upon a vessel engaged in foreign commerce in violation of the Foreign Commerce Clause.[8] In Tropical Shipping & Construction, Ltd. v. Askew, 364 So.2d at 435, the Florida Supreme Court stated:

> ...we must construe the statute [§212.80] in accordance with the provisions of the United States Constitution. Section 212.21(3), Florida Statutes (1973); .... That is, we may not construe the statute so narrowly as to deny businesses

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[8]/Nevertheless, in Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979), the United States Supreme Court held that even an **apportioned** California ad valorem tax was unconstitutional under the Foreign Commerce Clause. Thus, apportionment as provided in §212.08(8) may not prevent the statute from violating the Foreign Commerce Clause.

> engaged in interstate or foreign commerce their right to be free from undue state interference.

Florida Administrative Code Rule 12A-1.064(5) provides detailed regulations for implementing the apportionment formula in §212.08(8). It provides in pertinent part:

> However, mileage of such vessels from the territorial limit to port dockside and return into international waters, foreign or coastwise, in the continuous movement of persons or property in interstate or foreign commerce, is not considered to be mileage in Florida.

Because SeaEscape is continuously engaged in foreign commerce within the meaning of the Commerce Clause, as established under Point I, supra, SeaEscape can have no mileage in Florida under the apportionment formula, and therefore it cannot be subject to Florida's sales and use tax to any extent.[9] Administrative Rule 12A-1,064(5) prevents an unconstitutional application of the Florida sales and use tax under Japan Line, supra, discussed, infra, pp. 19-20.

The DOR relies heavily upon Tropical Shipping & Construction Co., Ltd. v. Askew, supra. However, the result in that case differs because it involved a company involved in both intrastate and foreign commerce. Therefore, proration of taxes was appropriate under §212.08, Fla. Stat. Here, however, since SeaEscape was

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[9]/Obviously, the DOR is bound by its own administrative rule. See Florida Statutes §120.68(7)(e)2; Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So.2d 1231 (Fla. 5th DCA 1999).

continuously engaged in foreign commerce only, it is completely exempt from taxation under §212.08(8) and Administrative Rule 12 A-1.064(5).

The DOR concedes that SeaEscape is engaged in foreign commerce on its cruises to Freeport, Bahamas, but nevertheless claims that its cruises to nowhere in the Atlantic Ocean are solely intrastate under §212.08(8), which means that SeaEscape would not even be entitled to a partial exemption (AB,p.12). That claim is based upon the DOR's argument that SeaEscape was "Going just outside Florida's territorial limits but never leaving the United States territorial limits." (AB,p.14, fn.9). That argument fails to recognize, as discussed under Point I, that the territorial waters of the United States are coextensive with Florida's territorial waters. U.S. v. Louisiana, supra, and further ignores United States v. One Big Six Wheel, supra, which held that the territorial limit of the United States for purposes of "cruises to nowhere" under the Gambling Ship Act is three miles. Neither Presidential Proclamation 5928 or the AEDPA have changed that fact. Accordingly, once SeaEscape has gone beyond the three mile limit, it is no longer in Florida territorial waters or the United States territorial waters. It is on the high seas engaged in foreign commerce.

In this regard, it should be noted that a state does not possess the power to define "foreign commerce" under the Commerce Clause:

> If the states retained the power to define the nature of the "foreign commerce" over which the Federal government has unquestioned authority, the states could effectively

> curtail, if not nullify, the ostensible Federal authority over such matters. If U.S. Cons. Art. I, §8, clause 3, prohibits a state from taxing an item which is bound up in foreign commerce, surely that constitutional provision enjoins a state from taxing the same item under the guise that it is not, by the state's definition, concerned with "foreign commerce," ...[W]e conclude that the Federal government has preempted state power to define "foreign commerce."

Northwest Airlines. Inc. v. Comm'r, 247 N.W.2d 33, 36-37 (Minn. 1976). Effectively, by its position regarding the application of §212.08(8) in this case, DOR seeks to redefine "foreign commerce" for itself, in the Commerce Clause.

Since §212.08(8), Fla. Stat., must be construed in accordance with Article I, §8, of the United States Constitution, and ocean navigation constitutes foreign commerce under Article I, §8, SeaEscape is engaged in foreign commerce for purposes of §212.08(8). Under §212.08(8) and Florida Administrative Rule 12A-1.064(5), SeaEscape has **no** mileage within Florida waters, and therefore the vessel, its gambling equipment, gambling lease and food and beverage concession are not subject to Florida's sales and use tax to any extent. The Fourth District correctly ruled that SeaEscape was engaged in foreign commerce, but it incorrectly concluded SeaEscape was entitled to apportionment, rather than complete exemption.

III. The Foreign Commerce Clause Prohibits Florida From Imposing Its Sales and Use Tax Upon SeaEscape, Its Equipment and Concessions

Not only are SeaEscape and its equipment not taxable under the very language of §212.08(8) and Rule 12A-1.064(5), but the vessel, its equipment and its gambling lease and food and beverage concession cannot be taxed by Florida under the Foreign Commerce Clause. The purpose of §212.08(8) is to avoid an unconstitutional burden upon foreign commerce; to achieve that purpose, it must apply with equal force not only to a vessel, but also to its necessary and appropriate leases and concessions.

The DOR argues that Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) applies when the constitutionality of a tax is questioned under the Commerce Clause (AB p.21). However, Complete Auto only applies to interstate commerce, not foreign commerce. In Japan Line, Ltd. v. County of Los Angeles, supra, the United States Supreme Court analyzed the application of California's apportioned ad valorem tax to shipping containers whose "home port" was in Japan. In doing so, the Court held that the four-pronged test set forth in Complete Auto Transit, Inc. v. Brady, supra, for the application of a tax to interstate commerce was inadequate for testing a tax applied to foreign commerce. Japan Line, Ltd. v. County of Los Angeles, at 446-47. The Court established an additional two-pronged test for the validity of a state tax on instrumentalities of foreign commerce:

> Because California's ad valorem tax, as applied to appellant's containers, results in multiple taxation of the instrumentalities of foreign commerce, and because it prevents the Federal Government from "speaking with one voice" in international trade, the tax is inconsistent with

> Congress' power to regulate Commerce with foreign Nations. We hold the tax, as applied, unconstitutional under the Commerce Clause.

Id. at 453-54.

Regarding the risk of multiple taxation, the Court stated:

> ...neither this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign. If an instrumentality of commerce is domiciled abroad, the country of domicile may have the right, consistent with the custom of nations, to impose a tax on its full value. If a State should seek to tax the same instrumentality on an apportioned basis, multiple taxation inevitably results.... Due to the absence of an authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value, a state tax, even though fairly apportioned to reflect an instrumentality's presence within the State, may subject foreign commerce "to the risk of a double tax burden to which [domestic] commerce is not exposed and which the commerce clause forbids."

Id. at 447, 448.

The DOR cites TA Operating Corp. v. Dept. of Revenue, 767 So.2d 1270 (Fla. 1st DCA 2000). However, that case involved the application of Complete Auto Transit's four-pronged test. Even if that four-pronged test is satisfied here, the two-pronged test in Japan Line is not satisfied.

Since SeaEscape is continuously engaged in foreign commerce, the DOR's application of Florida's sales and use tax must satisfy Japan Lines' additional two-pronged test. DOR cannot demonstrate that imposition of Florida's sales and use

tax upon SeaEscape does not present the multiple taxation proscribed by Japan Line. SeaEscape's "home port" is the Bahamas (AB,p.2). As acknowledged by the Supreme Court in Japan Lines, 441 U.S. at 447, a vessel's home port has the power under international law to tax the full value of SeaEscape, including the vessel, leases and concessions. Florida's imposition of sales and use taxes would constitute the multiple taxation squarely proscribed by Japan Line.

Case law holds that multiple taxation is not present if the tax is imposed on a discrete transaction occurring only in one jurisdiction, Wardair Canada, Inc. v. Florida Department of Revenue, 477 U.S. 1, 9 (1986),[10] or if the state tax applies a credit for the tax paid in a foreign jurisdiction. Itel Containers v. Huddleston, 507 U.S. 60, 74 (1993).[11] In this case, SeaEscape and its leases and concessions are not a discrete transaction occurring in one jurisdiction, which is not susceptible of taxation by a foreign jurisdiction, i.e., its home port of Nassau, in the Bahamas. Furthermore, Florida does not provide a credit against its sales and use tax for tax paid to a foreign jurisdiction - the credit only extends to a "like tax" paid to another state, territory of

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[10]/In Wardair, the Supreme Court upheld a sales tax upon fuel used in foreign commerce, pointing out that the home port of the aircraft could not also impose a tax on the sale of the fuel.

[11]/In Itel, the Supreme Court upheld a sales tax imposed by Tennessee upon containers used in foreign commerce. There was no risk of multiple taxation because the Tennessee statute provided for a credit for a tax imposed upon the containers by a foreign jurisdiction.

the United States or the District of Columbia. §212.06(7), Fla. Stat. Therefore, multiple taxation is clearly present as proscribed by the Supreme Court decisions, discussed supra, herein.

Second, such a tax also prevents the United States from "speaking with one voice" with respect to foreign commerce. That is, it impedes federal regulation of foreign trade, which requires uniformity on a national basis. If Florida seeks to impose a tax upon a Bahamian vessel engaged in foreign commerce, Florida-based vessels may be taxed in the Bahamas in retaliation. Japan Line prevents Florida from imposing its sales and use tax in a manner that may frustrate national foreign policy, as in this case.

Thus, in accordance with Japan Line, the Foreign Commerce Clause totally preempts Florida's power to impose a tax upon SeaEscape, and its ancillary operations such as equipment, and its leases and concessions, because of multiple taxation by several jurisdictions and because imposition of the tax would prevent the United States from "speaking with one voice" on a foreign issue.

IV. Dream Boat Should Not Be Followed

In Dream Boat, Inc. v. Dept. of Revenue, 28 Fla.L.Weekly D837 (Fla. 1st DCA March 27, 2003), the First District ruled that in the AEDPA Congress adopted Presidential Proclamation 5928, which extended the United States territorial waters to

twelve nautical miles. It concluded that since Dream Boat only went beyond the three mile limit, it never left United States territorial waters, and therefore it could not have been engaged in foreign commerce. The court distinguished Lord v. Steamship, supra, by stating that in that case the vessel had traveled on the "high seas," and therefore it had left United States territorial waters, unlike Dream Boat's cruises to nowhere.

The First District in Dream Boat overlooked the following. The Presidential Proclamation was made only for international purposes. The AEDPA expanded the United States territorial limits for purposes of federal criminal jurisdiction only. Pub. L. No. 104-132, §901(a), 110 Stat. 1214, 1317 (1996) reprinted in 18 U.S.C.A. §7. Neither of these affect the fact that United States territorial limits is defined as three miles under the Gambling Ship Act, 18 U.S.C. §1081-83, which makes gambling on ships on the "high seas" illegal. [See discussion in United States v. One Big Six Wheel, supra.

The Gambling Ship Act, in a 1994 Amendment, exempted vessels with gambling aboard if they were beyond the "territorial limits" of the United States during a "covered voyage, (as defined in §4472 of the Internal Revenue Code of 1986)." A "covered voyage" is defined in 26 U.S.C. §4472 as a "commercial vessel transporting passengers engaged in gambling aboard the vessel beyond the territorial waters of the United States during which the passengers embark and disembark the vessel in the

United States." 26 C.F.R. §43.4472-1 defines United States territorial waters for purposes of §4472 as three nautical miles. Therefore, under the Gambling Ship Act, once a cruise to nowhere passes the three mile limit, it is no longer in the United States territorial waters. It is on the high seas and is accordingly engaged in foreign commerce.

The bottom line is that under the Gambling Ship Act, gambling ships are permitted to operate on the high seas so long as they embark and disembark passengers in the United States. And for purposes of the Gambling Ship Act, the high seas begins and United States territorial seas end, three miles from land. Accordingly, how far cruises to nowhere must sail in order to leave the United States territorial waters and reach the high seas, so that gambling can begin, is determined by the Gambling Ship Act as three miles from the coastline. At that point the cruises to nowhere, which are out of United States territorial waters, are engaging in foreign commerce since they are navigating on the high seas.

Accordingly, the First District in Dream Boat erroneously concluded that cruises to nowhere never leave the territorial waters of the United States when they pass the three mile limit. Pursuant to the above reasons, once cruises to nowhere pass the three mile limit, they are beyond both Florida's and the United States' territorial waters, and are on the high seas engaged in foreign commerce.

CONCLUSION

Based upon the foregoing, the Court should rule that SeaEscape and its vessels are engaged in continuous foreign commerce, and therefore it is exempt from Florida's sales and use tax.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to: NICHOLAS BYKOWSKY, ESQ. and MARTHA F. BARRERA, ESQ., Assistant Attorneys General, Office of the Attorney General, The Capitol - Tax Section, Tallahassee, FL 32399-1050, by mail October 1, 2003.

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CERTIFICATE OF TYPE SIZE & STYLE

Respondent hereby certifies that the type size and style of the Brief of Respondent is Times New Roman 14pt.

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