IN THE SUPREME COURT OF FLORIDA

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RANDY MILLER, Executive Director,
Department of Revenue, State of Florida,

Appellant,

vs.

PUBLICKER INDUSTRIES, INC., and
PUBLICKER CHEMICAL CORPORATION,

Appellees.
______________________________/

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

CASE NO. 65,839

Appellant,

vs.

JUAN GRANADOS,

Appellee.
______________________________/

RANDY MILLER, Executive Director,
Department of Revenue, State of Florida,

Appellant,

vs.

INTERNOOR TRADE, INC.,

Appellee.
______________________________/

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STATEMENT OF THE CASE AND FACTS

Appellee Internoor Trade, Inc. (hereinafter "Internoor"), as the United States subsidiary of Petrobas, a refiner, shipper and producer of ethyl alcohol in Brazil, markets the fuel-grade ethyl alcohol imported from Brazil to gasohol producers in Florida. This ethyl alcohol is initially imported into Mobile, Alabama, and then shipped to Florida for subsequent sale to gasohol manufacturers throughout the state (R 513, 640-641). The ethyl alcohol marketed by Internoor is produced in Brazil from raw sugarcane (R 274, 640). Brazil is the leading producer of ethyl alcohol, accounting for approximately two-thirds of the worldwide output (R 640). In March through December of last year, Internoor imported from Brazil 15 million gallons of ethyl alcohol for sale in Florida (R 640-641).

Gasohol is manufactured by blending fuel-grade ethyl alcohol with unleaded gasoline to create a mixture of at least one part alcohol to nine parts gasoline (R 512). Gasohol functions as a fuel extender and its production has increased in recent years (R 273, 640).

Several states, including Florida, have passed statutes encouraging the production and use of gasohol through exemptions or rebates on state gasoline taxes to gasohol blenders (R 512). In 1980 and 1983, the State of Florida exempted all gasohol from the general taxes levied on motor fuel sales at a rate

of $.04 per gallon through June 30, 1985, and $.02 per gallon from July 1, 1985, through June 30, 1987 (R 512). Section 212.63, Florida Statutes.

In 1984 the Florida Legislature enacted Chapter 84-353, Laws of Florida, effective July 1, 1984, which amended the definition of gasohol and restricted that exemption to gasohol created from ethyl alcohol

> which is distilled from U.S. agricultural products or byproducts. (Emphasis supplied.)

This new legislation repealed the tax exemption previously afforded gasohol created by use of imported ethyl alcohol. This effectively imposed a tax of $.04 per gallon on such gasohol. Since one gallon of imported ethyl alcohol makes ten gallons of gasohol, the $.04 tax on each gallon of gasohol amounts to a $.40 tax on each gallon of imported ethyl alcohol. Because imported ethyl alcohol currently sells for approximately $1.20 per gallon, this represents over a 30% increase in its market price.

The patent and severe competitive disadvantage imposed by Florida on imported ethyl alcohol by the challenged Florida amendment is cumulative to, and aggravated by, the current federal imposition of a $.50 per gallon tariff on imported ethyl alcohol (R 277), which tariff will increase to $.60 per gallon on January 1, 1985.

As a result of the $.40 per gallon Florida tax on imported ethyl alcohol, Internoor is rendered unable to sell its non-exempt imported ethyl alcohol at a price competitive

with domestically produced ethyl alcohol (R 642). Buyers of ethyl alcohol imported by Internoor are now forced to seek untaxed suppliers of domestic-source ethyl alcohol so that they may sell their gasohol products at a competitive price (R 642). Once Internoor's Florida customers are lost, it will be unable to replace them and will be forced out of its business of selling imported ethyl alcohol in Florida (R 514, 642).

Internoor filed a declaratory judgment action in circuit court pursuant to Chapter 86, Florida Statutes, challenging the constitutionality of the above-described amendment (R 640-644). On its motion, Internoor secured a preliminary injunction and consolidation of its case with two other pending cases raising similar issues, Publicker Industries, Inc. vs. Randy Miller, Case No. 84-1882, and Juan Granados vs. State of Florida Department of Revenue, Case No. 84-1895 (R 504-507).

The trial court entered its final judgment striking the amended definition of gasohol as violative of the Import-Export Clause and Commerce Clause of the United States Constitution (R 511, 524). The State appealed the decision to the First District Court of Appeal (R 530-531). Upon motion by appellees, the First District court, pursuant to Rule 9.125, Florida Rules of Appellate Procedure, certified the case directly to the Florida Supreme Court as one passing upon a question of great public importance and requiring immediate resolution by the Florida

Supreme Court (R 536). On September 17, 1984, this Court entered its order accepting jurisdiction.

ARGUMENT

POINT I

THE LOWER COURT CORRECTLY HELD THAT APPELLEES HAD STANDING TO CHALLENGE THE CONSTITUTIONALITY OF CHAPTER 84-353, LAWS OF FLORIDA.

Appellant contends that Internoor has no standing to challenge the constitutionality of Chapter 84-353, which effectively provides a $.40 per gallon price advantage to its domestic competitors in the ethyl alcohol industry. As the court below found, however, an importer whose product is purposefully targeted by a discriminatory state statute clearly has standing to attack the legality of that statute under the Import-Export Clause and Commerce Clause of the United States Constitution.

The effect of the challenged law on Internoor and other importers is clear. Appellee is an importer-distributor of foreign ethyl alcohol, from which gasohol is made by blending one part ethyl alcohol with nine parts gasoline. Prior to the enactment of Chapter 84-353, Laws of Florida, all gasohol was accorded a $.04 per gallon exemption from the Florida sales tax on motor fuels. Since one gallon of ethyl alcohol was sufficient quantity for the blending of ten gallons of gasohol, the effective tax savings or benefit from purchase and use of one gallon of ethyl alcohol was $.40.

The intended and actual effect of Chapter 84-353, Laws of Florida, is to impose an additional $.40 per gallon of tax on _foreign_-source ethyl alcohol used in production of gasohol, while applying no such imposition on _domestic_-source ethyl alcohol used for the same purpose. Appellees' product

would bear the inevitable economic impact of an additional $.40 per gallon tax solely because it was of imported, rather than domestic, origin.

The gravamen of appellees' action below was that this disparate and discriminatory system of taxation and exemption violated both the Import-Export Clause and the Commerce Clause of the United States Constitution. The lower court properly rejected appellant's contention and held that appellees possessed the requisite standing to make such constitutional challenges. As to this issue, the court held in pertinent part:

> The state's argument on this point is not persuasive. Plaintiffs do not assert that they are required to pay a tax on gasohol. They do not contest the right of the state to tax gasohol or to exempt gasohol from taxation. The gravamen of their complaint is that their very stock in trade . . . foreign source ethyl alcohol, up until July 1, 1984, the ohol in almost 95% of the gasohol marketed in Florida is no longer included in Florida's definition of that particular motor fuel thereby disqualifying gasohol blended with ethyl alcohol imported from out-of-country from the advantageous tax treatment previously accorded to all gasohol without regard to the source of the ethyl alcohol component.
>
> It is this disparate treatment of the ethyl alcohol component in gasohol based upon origin of source that portends a profound and devastating effect on their livelihood of which they complain. Based upon testimony at final hearing it would be difficult to imagine plaintiffs who would have greater standing to challenge the constitutionality of the amendment to Sec. 212.63, F.S. They have demonstrated that they will be adversely affected, to say the least, by this statutory change. The Court thus holds as a matter of fact and law that Plaintiffs have standing to maintain this suit. (See Gaulden v. Kirk, 47 So 2nd at 572; Lykes Bros., Inc. v. Board of Comm'rs of Everglades Drainage District, 41 So 2nd at 900; Hodges v. Buckeye Cellulose Corporation, 174 So 2nd at 568; In re Estate of Humphreys, 229 So 2nd at 597 Gladstone Realtors v. Village of Bellwood, 99 S. Ct. at 1607-08.

The evidence before the lower court fully supported the finding of standing because of adverse impact. Testimony before the court showed that in the two months of statutory operation (July - August, 1984) appellees Publicker and Granados had effectively been put out of business as importers of foreign ethyl alcohol by Chapter 84-353 (R 287, R 320). Evidence before the court demonstrated that the effect of the tax was to devalue the price at which purchasers would be willing to buy imported ethyl alcohol by $.40 per gallon (R 314-315) and that suppliers of ethyl alcohol at a marketable price are unavailable due to the operation of Chapter 84-353, Laws of Florida (R 286-287).

This evidence was more than sufficient to enable and authorize the trial court to find that plaintiffs' business and constitutional rights would be "injuriously affected" by the statute's operation, Lykes Bros. v. Board of Com'rs of Everglades Drainage District, 41 So.2d 898, 900 (Fla. 1949), and that the statute "adversely affects" plaintiffs. Gaulden v. Kirk, 47 So.2d 567, 572 (Fla. 1950). This, without more, was sufficient to establish appellees' entitlement to maintain a constitutional challenge to the validity of Chapter 84-353, Laws of Florida.

Appellant and amicus curiae have cited a number of inapposite cases in challenging the trial court's finding of standing. Primary among appellant's Florida authorities are State of Florida, Department of Revenue v. Swinscoe, 376 So.2d 1 (Fla. 1979), and State ex rel. Szabo Food Service, Inc., of North Carolina v. Dickinson, 286 So.2d 529 (Fla. 1973). Upon

proper analysis it is clear that these cases do not support appellant's contention.

In the Swinscoe decision, supra, the trial court held, and this Court agreed, that the taxing statute in question should not be retroactively applied to a transaction completed prior to the statute's effective date. This Court held that, because the plaintiffs' transactions occurred prior to the taxing statute's effective date, the prospective application of the statute had no effect on plaintiffs and they they were, therefore, without standing to challenge its prospective operation. No such situation is presented in the instant case where the lower court had before it competent evidence of the devastating, ongoing effect of Chapter 84-353, Laws of Florida, on appellees' ability to even conduct business.

The Szabo decision, supra, is equally inapplicable and unsupportive of appellant's contention. Contrary to appellant's interpretation, in Szabo, supra, this Court did not hold that only the person who actually paid a tax could ever challenge the tax. This Court, rather, held that one who did not himself bear the financial burden of the tax was without standing to demand a refund. The instant case does not turn upon entitlement to any refund. It turns, rather, upon the devastating impact upon appellees in violation of protected federal constitutional rights. Appellees sought no refund below. They sought declaratory and injunctive relief, which was properly granted.

The decisions that appellants do not discuss demonstrate that standing was properly found. In Data Processing Service

v. Camp, 397 U.S. 150, 25 L.Ed.2d 184, 90 S.Ct. 127 (1970), the United States Supreme Court enunciated a two-step test for standing. In the instant context, the test may be described as follows: first, the plaintiff must show that the challenged action, in this case the law, has caused him injury in fact, economic or otherwise; second, the plaintiff must show that the interest sought to be protected is arguably within the zone of interests to be protected by the constitutional guarantee in question. As shown above, this test is clearly met in the instant case.

Two more recent Supreme Court decisions make it clear that standing exists in the present case. In Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 50 L.Ed.2d 514, 97 S.Ct. 599 (1977), certain "regional" stock exchanges filed an action in state court challenging a New York statute which (by exemption) imposed a higher state tax on in-state transfers of securities resulting from out-of-state sales than those resulting from in-state sales.

The court, in holding the state act unconstitutional, addressed the standing issue, and held in pertinent part:

> We also agree that the Exchanges have standing under the two-part test of Data Processing Service v. Camp, 397 US 150, 25 L Ed 2d 184, 90 S Ct 827 (1970). Appellants' complaint alleged that a substantial portion of the transactions on their exchanges involved securities that are subject to the New York transfer tax, and that the higher tax on out-of-state sales of such securities diverted business from their facilities to exchanges in New York. This diversion was the express purpose of the challenged statute. See infra. at 325-328, 50 L Ed 2d 522-523, and nn 7, 10. The allegation establishes that the statute has caused them 'injury in fact,' and that a case or controversy exists . 397 US, at 151-152, 25 L Ed 2d 184, 90 S Ct 827.

The Exchanges are asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they allege that the transfer tax indirectly infringes on that right. Thus, they are 'arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question.' Id., at 153, 25 L Ed 2d 184. 90 S Ct 827. . . .

Thus, Boston Stock Exchange v. State Tax Commission, supra, makes clear that a business has standing to challenge the constitutionality of a state tax which it alleges diverts business to its competitors and infringes on its constitutional right to engage in interstate commerce free from discriminatory taxes.

The Supreme Court's reasoning in Bacchus Imports, Ltd., et al. v. Dias, Director of Taxation of Hawaii, 104 S.Ct. 309 (1984), also strongly supports the holding of standing. In Bacchus, certain liquor wholesalers challenged on Commerce Clause grounds a state tax which taxed retail sales of liquor generally, but exempted from the tax Okolehao (a brandy distilled from an indigenous Hawaiian shrub) and fruit wine manufactured in the state.

The court rejected the state's contention, made herein, that plaintiff wholesalers could not maintain the action because they did not bear the burden of the tax which was passed on to the ultimate consumer. As to this contention, the court held in pertinent part:

> Furthermore, even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages, and the wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business. The wholesalers plainly have standing to challenge the tax in this Court.

Thus, in Bacchus, supra, standing was found where the effect of the tax was to increase the price of plaintiffs' wholesalers products at the retail level and, by the alleged discrimination, have an adverse competitive impact on plaintiffs' business.

A finding of standing where the state's exercise of statutory power is challenged on constitutional grounds is likewise required by Florida case law. In Florida Medical Association, Inc. v. Department of Professional Regulation, 426 So.2d 1112 (Fla. 1st DCA 1983), the court expressly approved and applied the federal two-step standing analysis of Data Processing Service v. Camp, supra, in finding that a physician had standing to maintain his challenge. As shown, that test has been met in the instant case.

Other Florida authority also establishes the propriety of standing in the instant case. Ordinarily, under Florida law, a citizen or taxpayer must show "special" injury, separate and apart from other taxpayers, to have standing to maintain an action against tax officials. Rickman v. Whitehurst, 73 Fla. 152, 74 So. 205 (1917). There is, however, under Florida law, a well recognized and applicable exception where the exercise of taxing power is challenged on constitutional grounds. Department of Education v. Lewis, 416 So.2d 455 (Fla. 1982); Brown v. Firestone, 382 So.2d 654 (Fla. 1980); Department of Administration v. Horne, 269 So.2d 659 (Fla. 1972).

In Paul v. Blake, 376 So.2d 256 (Fla. 3d DCA 1979), this exception was applied and standing granted where plaintiffs alleged that certain county tax exemptions granted to other

taxpayers exceeded county authority under the Florida Constitution. In finding standing, and in explanation of the basis for the exception, the court held at page 259 in pertinent part:

> [W]e perceive this exception to be based on our fundamental belief that such an unconstitutional exercise of the taxing and spending power is intolerable in our system of government and that the courts should be readily available to immediately restrain such excesses of authority. See: City of Naples v. Conboy, 182 So.2d 412 (Fla. 1965); State ex rel. Burbridge v. St. John, 143 Fla. 544, 197 So. 131 (1940); State ex rel. Miller v. Doss, 141 Fla. 233, 192 So. 870 (1940).

From the foregoing it is clear that even if the harm to appellees was less severe than has been established, appellees would have standing to maintain this action.

In sum, the United States Supreme Court and this Court have made clear that a business has standing to challenge the constitutionality of the state statute that provides an effective price advantage to its competitors and that is aimed at reducing or eliminating its sales. The evidence presented below and common sense lead to the conclusion that Chapter 84-353 will accomplish this objective. Yet even if the extent of damage to Internoor's business were less clear, this challenge to a discriminatory tax designed to curb imports could not be precluded merely because the prohibited legislative purpose may not be fully achieved.

A denial of standing in the instant case would avoid the merits entirely and constitute a license to appellant to continue to enforce a statute, and exercise authority, prohibited by both the Commerce Clause and the Import-Export Clause of the United States Constitution. It would not serve the necessity

recognized by the District Court of Appeal, First District, for immediate resolution of this appeal of great public importance. It would allow continuing destruction of appellees' ability to conduct their lawful business.

It is respectfully submitted that the trial court properly held that appellees have standing to maintain this action. The finding and holding of standing should be affirmed.

POINT II

THE LOWER COURT PROPERLY HELD THAT, IN IMPOSING A TAX ON GASOHOL MADE FROM FOREIGN-SOURCE ETHYL ALCOHOL, CHAPTER 84-353, LAWS OF FLORIDA, VIOLATES THE IMPORT-EXPORT CLAUSE OF THE UNITED STATES CONSTITUTION.

The lower court held that, in imposing a tax upon gasohol made from foreign-source ethyl alcohol, while exempting gasohol made from domestic alcohol, Chapter 84-353, Laws of Florida, contravened Article I, Section 10, of the United States Constitution, which commands in pertinent part:

> No state shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports . . .

Appellant has failed to demonstrate error in the holding of the court below, for no error is present. Appellant contends that the tax in question is not an impost on any import, but merely a tax upon the privilege of selling at retail motor fuel. Appellant further contends that since the tax is on the sale of gasohol to the retail consumer it does not occur until the foreign ethyl alcohol has lost its distinctive character as an import and becomes a part of the mass of property subject to taxation by the State.

This Court, like the court below, should reject the appellant's illogical claim that a statute that taxes gasohol on the basis of the origin of ethyl alcohol from which it is derived, and has the conceded purpose of restricting the importation of foreign-produced ethyl alcohol, is not a tax on imports.

As the trial court properly recognized and held, appellant's contentions are wholly without merit. The controlling authority in the instant case, as recognized by the lower court, is Michelin Tire Corp. vs. Wages, 423 U.S. 276, 46 L.Ed.2d 495, 96 S.Ct. 535 (1976). Appellant has wholly ignored this authority in its point regarding the Import-Export Clause, and amicus curiae has treated it in a fashion that must be described as less than informative or candid.

In Michelin Tire Corp. vs. Wages, supra, the United States Supreme Court held that the Import-Export Clause analysis should focus not on whether an item has lost its status as an import, but on whether the tax imposed is an "impost or duty." The court recognized three main concerns or considerations to be applied in such a determination. Those were stated as follows:

> 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 of 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 inland States not situated as favorably geographically. (Emphasis supplied.)

Michelin Tire Corp. vs. Wages, supra, 423 U.S. 276, 285. See also Washington Revenue Dept. vs. Association of Wash. Stevedoring Cos., 435 U.S. 734, 55 L.Ed.2d 682, 98 S.Ct. 1388 (1978), and Limbach vs. Hooven, ____ U.S. ____, 80 L.Ed.2d 356, 104 S.Ct. _____ (1984); Western Oil and Gas Association vs. Cory, 726 F.2d 1340, 1345 (9th CCA 1983).

The trial court properly recognized and applied each of these considerations. As to the "one voice" consideration, the court noted the opinion of Ambassador William E. Brock, the presidentially appointed United States Trade Representative, that such a provision would undermine U.S. efforts to encourage other countries to open up their markets to American products. Appellant's brief, at page 4, reflects that, while the federal government imposes a $.50 gallon tariff on imported ethyl alcohol (which will rise to $.60 per gallon effective January 1, 1985), the federal excise tax on gasoline provides a $.05 per gallon exemption for gasohol without distinction as to the domestic or foreign source of the included ethyl alcohol.

Thus, Florida's attempted discriminatory tax directly conflicts with the "one voice" consideration. Even if the "one voice" test is stretched to include harmony, Florida is singing off key, as the lower court properly recognized.

The other import-export considerations equally support the judgment of unconstitutionality. The evidence demonstrated that the effect of the new law would be to substantially diminish

or eliminate the importation of foreign-source ethyl alcohol. This will deprive the United States of its tariff revenue. Further, the evidence showed that the effect of elimination or reduction of Florida consumption could serve to reduce regional import quantities below a level of economic feasibility and thereby deprive other states of a source of ethyl alcohol for use as gasohol.

Essentially, appellant and amicus curiae have ignored both the Michelin Tire Corp. vs. Wages, supra, considerations and the trial court's proper analysis and application. Instead, they have sought safe harbor in such earlier decisions as Brown vs. Maryland, 12 Wheat 419, 6 L.Ed.2d 678 (1827), and Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534, 3 L.Ed.2d 490, 79 S.Ct. 383 (1959). Even these cases, however, give appellant no comfort, for they approve state taxation of imported goods only where that taxation is nondiscriminatory as to domestic or foreign origin, and cannot be selectively increased and imposed "so as substantially to impair or prohibit importation." Michelin Tire Corp. vs. Wages, supra, 423 U.S. 276, 288.

In the instant case, however, the Florida law itself precludes the foreign source from ever "losing its character as import" (Brief of Appellant, p. 26). To the contrary, the Florida law indelibly brands the ethyl alcohol as import and then unrelentingly pursues it through all steps of transition to the ultimate event of taxation, at which time gasohol containing

it is taxed solely because the ethyl alcohol component is of foreign origin. Gasohol with domestic alcohol content is simultaneously set aside for exemption.

The commands of Michelin Tire Corp. v. Wages, supra, do not allow the Import-Export Clause of the United States Constitution to be so thwarted or ignored. In setting forth the nature and limit of permissible tax, the court held in pertinent part:

> Taxes imposed after an initial sale, after the breakup of the shipping packages, or the moment goods imported for use are committed to current operational needs are also all likely to have an incidental effect on the volume of goods imported; yet all are permissible. See, e.g., Waring v The Mayor, 8 Wall 110, 19 L Ed 342 (1869) (taxation after initial sale); May v New Orleans, 178 US 496, 44 L Ed 1165, 20 S Ct 976 (1900) (taxation after breakup of shipping packages); Youngstown Sheet & Tube Co. v. Bowers, 358 US 534, 3 L Ed 2d 490, 79 S Ct 383, 9 Ohio Ops 2d 438, 82 Ohio L Abs 261 (1959) (taxation of goods committed to current operational needs by manufacturer). What those taxes and nondiscriminatory ad valorem property taxes share, it should be emphasized, is the characteristic that they cannot be selectively imposed and increased so as substantially to impair or prohibit importation. (Emphasis supplied.)

Michelin Tire Corp. vs. Wages, supra, 423 U.S. 276, 287.

The attempted Florida tax patently shares no such characteristic, for, by its own terms and definitions, it is selectively increased and imposed to reach only gasohol containing ethyl alcohol of imported origin.

Lest there be any uncertainty as to the teachings of Michelin, supra, one needs to look to the Court's admonition at page 287 of its opinion.

> <u>The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods</u>, but 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. (Emphasis supplied.)

The court was speaking of imported goods which had cleared customs after the payment of customs duty. The <u>Michelin</u> opinion, at pages 279-280, states:

> We affirm without addressing the question whether the Georgia Supreme Court was correct in holding that the tires had lost their status as imports.

The law as pronounced in <u>Michelin</u>, simply stated, is that the Import-Export Clause proscribes disparate state taxation bottomed on the foreign origin of imported goods.

With vision bordering on prescience, the court, in <u>Michelin Tire Corp. vs. Wages</u>, <u>supra</u>, in footnote 7, anticipated and disapproved any attempt by a state to avoid the effect of the Import-Export Clause by moving the taxing occurrence beyond an initial sale and affixing it to a subsequent domestic transaction. The court held in pertinent part at 423 U.S. 288:

> 7. Of course, discriminatory taxation, in such circumstances is not inconceivable. For example, a State could pass a law which only taxed the <u>retail</u> sale of imported goods, while the retail sale of domestic goods was not taxed. <u>Such a tax, even though operating after an 'initial sale' of the imports would, of course, be invalidated as a discriminatory imposition that was, in practical effect, an impost</u>. . . . (Emphasis supplied.)

By like measure, the attempt by Florida to tax gasohol with imported alcohol, while exempting domestic alcohol, was, "in practical effect, an impost" and properly invalidated.

Moreover, appellant's contention that its additional "tariff" comports with federal restrictions on the importation of ethyl alcohol is ludicrous. The imposition of a $.40 per gallon tax on imported ethyl alcohol by Florida directly interferes with tariff schedules for ethyl alcohol set by Congress after full debate and a compromise between the House and the Senate.

Appellee will not further belabor the contention of appellants that the label "privilege tax" is pertinent. It is clear that the foregoing authorities which preclude a discriminatory impost on imports by Florida would likewise preclude a discriminatory impost based on the "privilege" of selling imports. See Michelin Tire Corp. vs. Wade, supra. To paraphrase aptly, an impost is an impost, by any name.

It should be noted that under appellant's own characterization of Chapter 84-353, it must be invalidated as a tax on imports. Its avowed purpose is "to reduce dependence on foreign sources of fuel" and "diminish [] reliance on imported fuel" (Appellant's Brief at 2) through the imposition of a $.40 per gallon tax on imported ethyl alcohol. By providing a competitive price advantage through the tax system to domestic fuel producers, it seeks to keep out foreign products. This is precisely the type of exaction the Import-Export Clause was designed to prevent.

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A final note is appropriate as to the Import-Export Clause and the detriment of the Florida law to the federal government's ability to speak with one voice as to foreign commercial

relations. Appellant has urged at page 16 of its brief that the tax may not effectively prohibit further import of foreign Brazilian alcohol, arguing that:

> Here, gasohol is merely taxed, not banned, and it is entirely possible that Brazilian producers of ethyl alcohol may cut their prices enough to prevent any harm to plaintiffs.

A more apt, albeit inadvertent, demonstration that this matter falls within the Import-Export Clause is difficult to imagine. If policy placing foreign producers at a competitive disadvantage with domestic products so as to force foreign price reductions is to be adopted, such policy is clearly the exclusive province of the federal government, not Florida.

It is clear that such a state policy of taxation discriminating against foreign product and in favor of domestic will serve to "impair" importation and thereby violate the import-export clause. As recognized in Michelin Tire Corp. vs. Wages, supra, 423 U.S. 276, 287, impairment is wholly sufficient to invoke the operation of the Import-Export Clause. Prohibition is not required.

It is respectfully submitted that the attempted amendment set forth in Chapter 84-353, Laws of Florida, adding the words "which is distilled from U.S. agricultural products or byproducts," and thereby discriminatorily taxing imports, was properly held invalid under the Import-Export Clause of the United States Constitution. The judgment of the trial court so holding and striking said phrase must be affirmed.

POINT III

THE LOWER COURT PROPERLY HELD THAT IN IMPOSING A TAX ON GASOHOL MADE FROM FOREIGN-SOURCE ETHYL ALCOHOL CHAPTER 84-353, LAWS OF FLORIDA, VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides Congress with broad authority to regulate interstate and foreign commerce:

> The Congress shall have . . . [t]o regulate commerce with Foreign Nations, and among the several states . . .

In addition to this affirmative grant of power, "the Clause has long been recognized as a self-executing limitation on the power of the states to enact laws imposing substantial burdens on such commerce." South Central Timber Development vs. Wunnicke, 52 U.S.L.W. 4631, 4632 (May 22, 1984).

To pass muster under the Commerce Clause, a state tax affecting interstate commerce must satisfy four elements:

1. Be applied to an activity with a substantial nexus with the taxing state;

2. Be fairly apportioned;

3. Not discriminate against interstate commerce; and

4. Be fairly related to the services provided by the state.

Delta Airlines vs. Department of Revenue, No. 63, 915 (Fla. June 14, 1984), citing Complete Auto Transit vs. Brady, 430 U.S. 274, 279 (1977).

In addition, if the state tax purports to burden foreign commerce, as the instant tax does, it is subjected to a "more rigorous and searching scrutiny" and two additional elements must be satisfied. Those elements are:

1. Multiple tax burdens must not be imposed on the product; and

2. The federal government must not be prevented from "speaking with one voice" in international trade.

South Central Timber Development, Inc. vs. Wunnicke, 52 U.S.L.W. 4631, 4635-6 (May 22, 1984); Japan Lines vs. County of Los Angeles, 441 U.S. 434, 451, 60 L.Ed.2d 336, 99 S.Ct. 1813 (1979).

As the Florida Supreme Court stated in Department of Revenue vs. Ward Air, No. 64,036 (Fla. June 14, 1984):

> [A]n inquiry more elaborate than that mandated by Complete Auto is necessary when a State seeks to tax the instrumentalities of foreign, rather than interstate commerce. In addition to answering the nexus, apportionment, and nondiscrimination questions posed in Complete Auto, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second whether the tax prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.' If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.

Department of Revenue vs. Ward, No. 64,036 (Fla. June 14, 1984), quoting Japan Lines vs. County of Los Angeles, 441 U.S. 434, at 451 (1979).

As demonstrated in preceding Point II, the amendment effected by Chapter 84-353, Laws of Florida, interferes with the ability of the federal government to speak with one voice in international trade. Therefore, it must be stricken as violative of the Commerce Clause.

To the extent that additional consideration of the four elements of the Complete Auto test may be required, the amendment also is found wanting in that it is discriminatory and not fairly related to services provided by Florida.

There can be no question that the challenged amendment discriminates against interstate and foreign commerce by providing a direct commercial advantage to local producers of ethyl alcohol. As such, the amendment violates the cardinal rule of Commerce Clause jurisprudence that:

> [n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'

Boston Stock Exchange vs. State Tax Commission, 429 U.S. 318, 329 (1977) (quoting Northwestern States Portland Cement Co. vs. Minnesota, 358 U.S. 450, 457 (1959); Bacchus Imports, Ltd. vs. Dias, 52 U.S.L.W. at 4981 (June 19, 1984).

As this Court has recently observed, "[t]his principle follows from the basic purpose of the Commerce Clause which is to prohibit preferential trade areas destructive of the free commerce anticipated by the United States Constitution." Delta Airlines, Inc. vs. Department of Revenue, No. 64,915 (Fla. June 14, 1984). (Citations omitted.)

Indeed, since the imported ethyl alcohol tax is essentially protective in nature and will succeed in shutting off the flow of that product to Florida, it is virtually *per se* illegal. South Central Trailer Development vs. Wunnicke, 52 U.S.L.W. 4631, 4635-6 (May 22, 1984); *see also*, Bacchus Imports, Ltd. vs. Dias, 62 U.S.L.W. at 4981.

The Supreme Court has stated that a finding that state legislation constitutes "economic protectionism" may be made on the basis of either discriminatory purpose, or discriminatory effect. Bacchus Imports, Ltd. vs. Dias, 52 U.S.L.W. at 4981. Even a cursory review of the imported ethyl alcohol tax reveals either basis for such a finding here.

The discriminatory purpose of the amendment is plain on its face. The amendment repealed an exemption provided to all gasohol and replaced it with language providing an exemption only to gasohol made from ethyl alcohol "which is distilled from U.S. agricultural products or byproducts." Such economic protectionism providing "a direct commercial advantage to local business," is a direct violation of the Commerce Clause." Boston Stock Exchange vs. State Tax Commission, 429 U.S. at 329.

The State's contention that there is no discriminatory intent because the purpose of the statute is to promote and benefit local industry, including the tourist industry, rather than discriminate against foreign products, is without merit.

As the Supreme Court stated in a similar context:

> If we were to accept that justification, we would have little occasion ever to find a statute unconstitutionally discriminatory. Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other.

Bacchus Imports, Ltd. vs. Dias, 52 U.S.L.W. at 4981.

The discriminatory effect of the legislation is equally apparent. Ethyl alcohol used in the production of gasohol derived from domestic agriculture will be effectively taxed at a lower rate than imported ethyl alcohol used for that purpose. Domestic producers and distributors will have a substantial competitive advantage. There was competent evidence before the trial court that the use of imported ethyl alcohol will be eliminated.

Florida cannot justify, under the Commerce Clause, a statute that is discriminatory on its face by arguing that the small Florida alcohol producers supported by this exemption do not pose a "competitive threat" to foreign producers of fuel-grade alcohol. The small size of these producers goes only to the extent of competition and not the critical question of "whether competition exists." Bacchus Imports, Ltd. vs. Dias, 52 U.S.L.W. at 4981. In light of the favoritism in the law, as long as there is some competition, there is a discriminatory effect. Id. Domestic and imported ethyl alcohol, of course, directly compete for sales in Florida.

The Supreme Court has declared that there is

> no principle of Commerce Clause jurisprudence supporting a distinction between thriving and struggling enterprises under these circumstances, and the State cites no authority for its proposed distinction. In either event, the legislation constitutes 'economic protectionism' in every sense of the phrase. It has long been the law that States may not 'build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other states.

Guy vs. Baltimore, 100 U.S. 434, 443 (1880); Bacchus Imports, Ltd. vs. Dias, 52 U.S.L.W. at 4981.

In a case constitutionally indistinguishable from the instant case, Archer Daniels Midland Co. vs. State, 315 N.W.2d 597 (Minn. 1982), the Supreme Court of Minnesota struck down an analogous state statute as violative of the Commerce Clause. At issue was a Minnesota statute which provided a tax exemption only for gasohol distilled in Minnesota from Minnesota farm products. The Archer Court ruled that the statute violated the Commerce Clause because there was "facial discrimination which openly places a more onerous tax burden upon out-of-state gasohol simple 'because of its origin in another state.'" Id. Although the court noted that a virtually per se rule of invalidity applied in light of the protectionist nature of the statute, it stated that even under the more flexible balancing of interests test, Pike vs. Bruce Church, Inc., 397 U.S. 137 (1970), such a gasohol tax exemption was unconstitutional under the Commerce Clause since it fails to regulate evenhandedly and does not serve legitimate local interests such as public safety which may justify state regulations of interstate or foreign commerce.

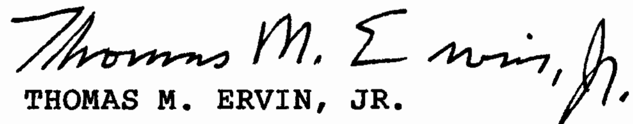
"Rather the Act attempts to unfairly preserve local markets for local interests under the State's taxing power." Archer Daniels Midland Co. vs. State, 315 N.W.2d 597 (Minn. 1982).

The above-cited Minnesota decision was cited with approval by this Court in Delta Airlines, Inc. vs. Department of Revenue, Case No. 64,915 (Fla. June 14, 1984). While the Minnesota decision dealt with discrimination against Commerce between states, the Commerce Clause requirements are indistinguishable as applied to foreign commerce, save and except for the additional federal "one voice" requirement where commerce of foreign origin is impacted.

CONCLUSION

Chapter 84-353, Laws of Florida, which would effectively impose a state tax on foreign-origin ethyl alcohol, while exempting domestic ethyl alcohol, is clearly violative of both the Import-Export Clause and the Commerce Clause of the United States Constitution. The trial court's judgment so holding is clearly correct and should be affirmed.

ROBERT M. ERVIN



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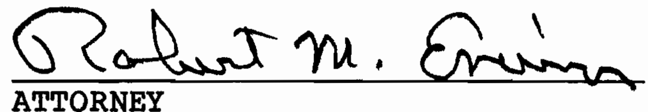

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