IN THE SUPREME COURT OF THE STATE OF FLORIDA

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, AND OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

Defendants/Appellants/
Cross-Appellees,

v.

MCKESSON CORPORATION, ET. AL.,

Plaintiff/Appellee/
Cross-Appellant
_____/

CASE NO. 70,368

REPLY BRIEF OF THE DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION

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I
THE PRODUCT CLASSIFICATIONS OF THE STATUTES UNDER SCRUTINY DO NOT VIOLATIVE THE COMMERCE CLAUSE

In analyzing the statutes for consistency with the Commerce Clause, it is abundantly clear that the decision by the Florida Legislature to classify alcoholic beverages manufactured from sugarcane, citrus and selected grape species does not violate the Commerce Clause.

Appellees' laborious arguments to the contrary, the United States Supreme Court has been careful to point out that holdings finding discrimination with regard to taxation do not "prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry". Boston Stock Exchange v. State Tax Commission, 97 S.Ct. 599, 610, (1977); See also, Bacchus Imports Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed. 2d 200 (1984). The central thesis of Appellees' argument that the product classifications - as distinguished from the disqualification provisions of the statutes - discriminate against interstate commerce is stated in page 37 of McKesson's Answer Brief:

> Florida's desire to nurture local industry represents an attempt to further a purely economic purpose that - whether the implementation is non-discriminatory or not - is constitutionally suspect under the Commerce Clause.

That premise is the direct antithesis of the Supreme Court's

caveat quoted above. It is clear, upon a moment's reflection, that the product classifications themselves do not in any way discriminate, within the meaning of Commerce Clause cases. The classification of those products for favorable tax treatment are thus clearly valid under cases such as Exxon Corp. v. Governor of Maryland, 98 S.Ct. 2207, 57 L.Ed. 2d.91 (1978). That the operation of the classifications may "cause business to shift from one interstate supplier [for example grain based alcoholic beverages] to another interstate supplier [sugarcane based or citrus based alcoholic beverages] does not violate the Commerce Clause". That clause "protects the interstate market, not particular interstate firms..." Exxon Corp. v. Governor of Maryland, supra, 98 S.Ct. 2214-2215. Indeed, if the Appellees' were correct that the State of Florida may not classify alcoholic beverages according to product base for different tax treatment, then the entire tax structure of Chapter 565 and Chapter 564, Florida Statutes - and that of virtually every other state in the Union - is invalid. If the mere classification of beverages for different tax treatment according to the type of beverages is unlawful because it somehow disadvantages agricultural producers of various base materials, then the State may not tax beer at a rate different from the rate at which it taxes distilled liquors. To do so would, according to Appellees' analysis, discriminate against the producers of raw agricultural crops in those states and nations which, because of climatic conditions, are not suited

to the commercial growth of hops and malt, the preferred ingredients for the making of beer. Likewise, if Appellees' analysis is correct, neither the State of Florida nor any other state of the Union could impose a different tax rate on wines than on beer and distilled liquors, for the same reasons. Appellees' argument that the product classifications themselves result in prohibited discrimination under the Commerce Clause is clearly erroneous, constitutes a perversion of Commerce Clause precedents, and ought not be adopted by this Court.

II

THE APPELLEES DID NOT DEMONSTRATE BELOW THAT THE DISQUALIFICATION PROVISIONS OF THE STATUTES RESULT IN A COMMERCE CLAUSE VIOLATION

The Appellees argue that the disqualification provisions contained in §564.06(9) and §565.12(1)(c), (2)(c), Florida Statutes (1985) are discriminatory in purpose and, on that ground alone, are in violation of the Commerce Clause. In essence Appellees argue for a pure motive analysis, the contention that the motives of the Legislature alone, if discriminatory, are sufficient to invalidate the statutes.

However, although pure motive analysis has been argued by some scholars, the United States Supreme Court has not adopted a pure motive standard for the invalidation of a statute under the Commerce Clause. Indeed in Henneford v. Silas Mason Co., 300 U.S. 577, 57 S.Ct. 524, 528(1937) the Court held that: "motives alone will seldom, if ever, invalidate a tax that apart from its

motives would be recognized as lawful". In the years ensuing the Supreme Court has not retreated from that position. There is dictum in the Bacchus case which indicates that motives could be a sufficient basis for invalidation of a statute. However, the holding in Bacchus is as follows:

> We therefore conclude that the Hawaii liquor tax exemption for okolehao and pineapple wine violated the Commerce Clause because it had both the purpose and effect of discriminating in favor of local products.

104 S.Ct. 3049, 3057 (emphasis supplied).

Whatever the United States Supreme Court has said in dicta, it has not striken a statute purely on the basis of motivations of legislators in its enactment. In each case there was either facial discrimination de jure or discrimination in practical effect, demonstrated by evidence adduced in the record.

In this case there is simply no evidence in the record which demonstrates that the disqualification provisions of these statutes in practical effect discriminate against manufacturers of alcoholic beverages produced from sugarcane, citrus or the grape species in states and jurisdictions other than Florida. There is no allegation, nor any evidence, that any manufacturer would be denied an exemptive license based upon the disqualification provisions. Indeed, there is evidence in this record that the Division of Alocholic Beverages and Tobacco would have granted such a license to an alcoholic beverage manufacturer

outside the State of Florida had the application not been withdrawn by that manufacturer. Thus, upon the tests adopted in the holdings of Commerce Clause precedents, this record is wholly inadequate to determine that the disqualification provisons of these statutes render them discriminatory in practical effect.

Let us assume, however, for the purposes of argument that the Appellees "motivation only" analysis is appropriate. Even if that proposition were true, this record is insufficient to justify the trial court's granting of summary judgment based upon such an analysis. Appellees cite the comments of Senator McPherson and Representative Jones before legislative committees for the proposition that the motivation of the Legislature as a whole in enacting the disqualification provisions was discriminatory. What Appellees failed to bring to the Court's attention, however, is that even the most dedicated proponents of pure motivation analysis under the Commerce Clause concede that disciminatory motivation on the part of a few legislators is insufficient to establish discriminatory motivations on the part of the legislature as a body. E.g., Regan, D. H. "The Supreme Court And State Protectionism: Making Sense Of The Dormant Commerce Clause", 87 Mich. L. Rev. 1091, 1149 (1986).

For every statement by Senator McPherson and Representative Jones which evinces discriminatory intent on their parts, this record contains statements by other members of the legislature evincing clearly non-discriminatory intent. For instance in the

hearings on May 14, 1985 before the Senate Finance and Taxation Committee of the Florida Legislature the chairman of that committee indicated his desire to modify Florida's tax preference to meet the constitutional requirements announced in Bacchus. He recognized, however that in doing so, a formula was needed to prevent an errosion of the beverages excise tax base which would follow on expansion of the tax preference to meet Bacchus concerns.[1]

The discussion between the Chairman of the House Finance and Taxation Committee and Representative Jones at the May 8, 1985 Committee hearing demonstrates the clear belief of the Chairman that the statute, as amended, would open the tax exemption to non-Florida manufacturers, thus triggering the Chairman's concern that a formula be adopted which would limit the erosion of the tax base by creating a sliding scale tax. R. Vol. 1, pp. 149-153.

Indeed, the clearest indication that the Florida Legislature, as a whole, believed that the new Acts would expand

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[1] THE CHAIRMAN: "What I'm trying to do is keep the exemption for distillers in effect. And what has happened in the Supreme Court in the Bacchus case is that has made the ruling that would tend to jepordize our existing language...What this attempts to do would be to redraw it, the same basic dollar amount, the same concept, but make it so that its constitutional". R. Vol. I, p. 179.

See also, the statement of the Chairman of the Senate Commerce Committee at R. Vol. I, p. 177-178.

the availability of exemption to non-Florida manufacturers is found on the face of the statutes themselves. §564.06(10) and §565.12(5),(6), Florida Statutes, (1985) contain lengthy and carefully drafted sliding scale tax rates designed to place a floor under the erosion of the tax base which would be occasioned by the unchecked growth of manufacturers selling exempt products in the state. Those provisions constitute, in fact, the bulk of the statutory language of §§564.06 and 565.12 as amended. A comparison of §§564.06 and 565.12, Florida Statutes, (1985) with the pre-existing statutes reveals that the earlier statutes contain no such formula capping the amount of taxes which would be lost as a result of the exemptions. The ineluctable reason for the existance of the sliding scale tax in the new statutes and its non-existance in the prior statutes is a legislative perception that the new statutes would, indeed, expand the availability of the exemption to manufacturers outside the State of Florida who theretofore had been denied that exemption. On the face of the statutes, then, the clear inference is that the motivation of the legislature in enacting these statutes was not discriminatory.

Thus, even if one fully accepts the "motivation" analysis put forward by Appellees, the inferences in this record are wholly in conflict. The cases are not capable of resolution by summary judgment. The proponents of motivation analysis concede that the courts must look to a statute's practical effect in many

cases for evidence of discriminatory motivation on the part of the legislature as a whole. E.g., Regan D. H. "The Supreme Court And State Protectionism: Making Sense Of The Dormant Commerce Clause", supra at 1137. On this record, conflicting inferences as to the motivation of the legislative body as a whole exist. To resolve that conflict, the trial court was required to look into the statutes' practical effect. This record is wholly lacking in evidence which would demonstrate that the practical effect of these laws is to operate in a discriminatory fashion against beverages manufactured in foreign jurisdictions. The trial court's final orders in these cases indicate a belief that the motivation of the legislature in enacting the 1985 amendments was not discriminatory. The following paragraph appears identically in each of the court's final orders:

> These amendments were an effort by the Legislature to overcome the constitutional problems in the Florida alcoholic beverage laws resulting from the Bacchus decision. This Court, having reviewed the challenged amendments finds, however, that this legislation failed to surmount the constitutional violations addressed in Bacchus.

Final order on Summary Judgment. R. Vol. 8, p. 1458.

Reflection upon that passage demonstrates no hint that the trial court made a factual finding of discriminatory motivation on the part of the Florida Legislature in adopting the 1985 amendments to these statutes. Without such a finding of the trial court,

with conflicting inferences in this record, and with the dearth of information about the statutes' practical effect, judgment for Appellees is wholly inappropriate.

III

SUMMARY JUDGMENT ON THIS RECORD IS INAPPROPRIATE

Before addressing the remaining issues presented in Appellees answer briefs DABT believes it would be instructive to explain its general position that the trial court erred in granting summary judgment. The state of this record has implications not only for standing, with respect to challenge of the disqualification provisions by McKesson Corporation, Florida Beverage Corporation and Tampa Crown, but also with respect to discrimination analysis under the Commerce Clause. Further, the lack of proof and opportunity for inquiry as to the practical effect of these statutes in the record precludes the grant of summary judgment on any theory advanced by Appellees. At bottom, Appellees' theories, other than the facial challenges fall into two general categories: (1)that the disqualification provisions intrude into areas of foreign policy (2) that the disqualification provisions have been preempted by positive Federal enactments. Those challenges must proceed upon an as-applied analysis of the sphere of operation of the disqualification provisions, their true effects in practice, and the intent of Congress and the Federal Government. They depend upon the facts asserted to exist in Appellees briefs, but which

find no support from admissible evidence in the record below, as does the standing of Appellees.

For instance at page 12 to 13 of McKesson's Answer Brief at footnote 1 there is a discussion by McKesson of factual grounds which McKesson asserts would operate to deny exemption to Mt. Gay Rum which McKesson imports from Barbados. In support of its position, McKesson asserts as follows:

> Mt. Gay Rum, a sugarcane product, would qualify for the tax preference under section 565.12(1)(b), Florida Statutes (1985), but for the Take Back Provisons...In addition, a Barbados government agency, the Barbados Export Promotion Corporation, provides economic advantages to Barbados rum manufacturers. Therefore, under the Take Back Provisions, McKesson's [rum]... is ineligible to receive Florida's unconstitutional tax break.

There is no reference whatsoever in the record below to the existence of the Barbados Export Promotion Corporation or any description of the alleged economic advantages which it grants to Barbados rum manufacturers. There is no proof in the record below that Barbados offers to its manfacturers the sort of economic incentives or other direct or indirect subsidies which would disqualify that rum from receiving tax preferred treatment in the State of Florida. Florida Statutes §90.202 (3) and §90.204 establish the procedure whereby these Appellees might have established the existence of foreign law. There was no

request for judical notice as to the laws of Barbados put forward by Appellees pursuant to those provisions of Florida's evidence code and the Court did not in its final order take judicial notice of the provisions of the laws of Barbados or any other foreign nation. The Peck affidavit, R. Vol. I, pp. 103 - 110, does not establish that affiant's expertise in and qualifications to render an opinion as to the provisions of Barbados law. Therefore, the factual assertion which underpins McKesson's assertion to this Court that it has standing to challenge disqualification provisions is wholly without support in the record below.

Appellees' assertion that the disqualification provisions of the statutes constitute discrimination under the Commerce Clause, under the Import/Export Clause, and result in impermissible intrusion into foreign affairs all depend in part upon a finding that the practical effect of the statutes is to discriminate against foreign commerce or to clearly create a foreign affairs problem. E.g., Department of Revenue v. Association of Washington Stevedoring Co's., 435 U.S. 734, 98 S.Ct. 1388 (1978); Container Corp. of America v. Franchise Tax Bd., 103 S.Ct. 2933 (1983). Appellees repeatedly assert that, in fact the practical effect of these statutes is to create such discrimination. At page 22 of its brief McKesson asserts that the exemptions "favor Florida producers". Again at page 28 McKesson asserts as a factual matter:

> Florida's overriding purpose for its alcoholic tax scheme is to encourage the sale of Florida products at the expense of non-Florida products.

Again, at page 36, McKesson asserts as a factual matter that the effect of the statutes is to impose a barrier against out-of-state producers by imposing additional taxes on every producer who does not produce Florida's products.

As demonstrated above, there is absolutely no proof that the practical effect of the statutes are as Appellees assert them to be. The central underpinning of Appellees' theories before this Court is thus without factual support in the record below and summary judgment based thereon is clearly inappropriate.

As pointed out in the initial brief filed by DABT, there is in this case a ripeness problem. It becomes evident when one examines the arguments of Appellees. At page 48 of McKesson's answer brief McKesson makes an interesting statement:

> Florida's potential denial of these preferences to Caribbean rum would frustrate federal policies expressed in CBERA.

The use of the word "potential" was not mistaken; it was deliberate. McKesson uses that word in its brief because it must concede that there is no proof in this record that the Florida statutes would deny tax preferences to manufacturers in any Caribbean Basin nation. Nor is there any proof in this record that the disqualification provisions would operate to deny tax preference to a manufacturer in any foreign nation.

Therefore the record is insufficient to support that critical finding.

The prematurity of summary judgment based upon the inability of Defendants to complete discovery and the lack of a complete factual record is apparent. That error by the trial court infected the proceedings in their entirety.

Tampa Crown and Florida Beverage argue that, as to them, entertaining a motion for summary judgment was not premature. DABT would agree that if the Tampa Crown case had been handled in isolation, entertaining the motion in that case might not have been premature. However, as DABT noted in its initial brief, the trial court did not treat these cases separately. Instead DABT was required to meet not only the contentions raised by Tampa Crown at the summary judgment hearing, but the contentions of McKesson Corporation was well and, shortly thereafter, of Brown-Forman Corporation. The time and resources of DABT available to adequately prepare its defense in each case was thus divided by three. Moreover, although Tampa Crown argues that its case is purely a facial challenge to the statutes, it in fact engages in speculation as to what effect the statutes might have, without the benefit of any administrative or judicial interpretation of the statutes as applied to a concrete circumstance.

McKesson's argument that DABT was required to file an affidavit in order to demonstrate the need for more time to complete discovery is the exaltation of form over substance. The

lack of response to the majority of DABT's discovery was apparent in the record and was before the trial court on the date of the summary judgment hearing, at which time DABT made its need for additional time known to the trial court. When it is apparent on the record that discovery has not been completed, summary judgment is premature.

Moreover, DABT's discovery did not address only the standing McKesson's standing, as implied by McKesson. The record reflects that Florida Beverage Corporation deals in the products exempted by these statutes and is therefore estopped to challenge the constitutionality of the very exemptions it has enjoyed. R. Vol. 7, pp. 1170 - 1195, 1209 - 1211. Hess v. Mullaney, 213 F.2d. 635 (9th Cir. 1954); In Re Chicago, Milwaukee, St. Paul & Pac. R. Co., 713 F.2d. 274, 279 - 280 (7th Cir. 1983); Wolfe v. Merrill Nat'l Lab., Inc., 433 F.Supp. 231 (M.D. Tenn. 1977); McNulty v. Blackburn, 42 So.2d. 445 (Fla. 1949). The record further reflects that Tampa Crown chooses not to deal in exempt products because it regards them as inferior. R. Vol. 7, pp. 1209 - 1211. Thus, Tampa Crown can not assert that its interests as a distributor are harmed in manner fairly traceable to the operation of the exemptions. E.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed. 2d. 700 (1982).

DABT propounded discovery to McKesson aimed at unearthing facts which would show that McKesson dealt in exempt products in

the past, voluntarily discontinued such business, and had access to the distribution of exemption products currently, but chose not to distribute them. R. Vol. 1, pp. 8 - 10, 18 - 28. R. Vol. 2, pp. 229 - 248. Had DABT been permitted sufficient time to inquire into those areas, McKesson's complaint might, too, have been found to subject to estoppel. Still further, DABT's discovery inquired into whether McKesson had passed the financial burden of the taxes to its customers and therefore not suffered the burden of the tax itself. If so, McKesson would be barred from seeking a refund. State ex. rel. Szabo Food Services, Inc. v. Dickinson, 286 So.2d. 529 (Fla. 1973). Further, such facts would favor the trial court's prospective-only ruling, which is the subject of McKesson's cross-appeal. Metropolitan Life Ins. Co. v. Commissioner of Ins., 373 N.W. 2d. 399, 408 - 411 (N.D. 1985).

IV

SUMMARY JUDGMENT BASED UPON ALLEGED INTRUSION INTO FOREIGN AFFAIRS UNDER DORMANT COMMERCE CLAUSE ANALYSIS WAS PREMATURE

As the court indicated in Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, (1979), a case involving a Foreign Commerce Clause challenge to the California ad valorem tax on shipping containers, the basic analysis under the Foreign Commerce Clause tracks the four-prong inquiry used in the interstate context. The court identified two other factors that must be considered: "The enhanced risk of multiple taxation" in

the international context (441 U.S. 446), and the possiblity that state tax "may impair federal uniformity in an area where federal uniformity is essential" (Id. 448). There is no risk of multiple taxation in this case. The only inquiries then are whether there is discrimination against foreign commerce, which, as demonstrated above, cannot be shown on this record, or whether the Florida law somehow impairs federal uniformity in an essential area.

In actually applying the "one voice" notion, the Supreme Court has recognized that the principal inquiry to be made is whether the federal government has chosen to mark out an area for uniform treatment through the exercise of its powers of preemption. However, where the federal government has not preempted state action, the courts should be hesitant to fashion their own version of preemption based solely upon the idea of "one voice" over foreign commerce. The decision in Japan Lines says nothing to the contrary on that issue.

It should be noted that the "one voice" standard suffers from the same central defect as the concept of "uniformity": it speaks only to one side of the balance at stake. As is the case in the field of interstate commerce, virtually any tax affecting foreign commerce can be said to affect uniform federal treatment and thus, under a rigid application of the "one voice" principle, be impermissible. But that analysis ultimately does nothing more

than restate the essential question, which is whether the tax so interferes with the need for one dominate power that it cannot stand. The answer to that question depends upon a sensitive balancing of the interests involved.

The Supreme Court, in fact, has recognized as much in Container Corp. v. Franchise Tax Board, 103 S.Ct. 2933 (1983). There the Court stated that, even absent preemption, the uniformity principal would be violated if the state tax "implicates foreign policy issues which must be left to the Federal Government." 103 S.Ct. 2955. However, the Court expressly cautioned that such foreign policy concerns had to balanced against the "sovereign right of the United States as a whole to let States tax as they please". Ibid. The court in Container Corp. concluded that the balance in that case must be struck in favor of permitting the state to exercise its taxing power. The Supreme Court has also acknowledged that the "one voice" doctrine, if applied as strictly as Appellees urge, will lead the courts into difficult and uncertain inquiries. Thus, the court noted in Container Corp., supra, that it has no special competence "in determining precisely when foreign nations will be offended by particular acts, and .... in deciding how to balance"...foreign policy concerns against state taxing power. 103 S.Ct. at 2955. The problem is even more difficult when the issue arises, as it does here, in the context of garden variety commercial litigation. In cases like this one, the foreign

policy concerns of the United States will often be presented by a taxpayer simply seeking to avoid a tax or to achieve a tax advantage rather than by the United States on its own behalf. The line between private economic concerns and foreign public policy concerns is thus particulary troublesome to discern. In the usual order of analysis, as is the case here, the courts will be faced with the argument that a state tax conflicts with "one voice" principle only after the parties have exhausted an attempt to show that the tax is discriminatory or not fairly apportioned. In such circumstances, it would be a rare case where the impact of the tax is so harmful to federal foreign policy on its face that it can not be said to co-exist with that foreign policy.

Thus, to hold that the Dormant Commerce Clause of its own force prohibits a state tax under the "one voice" analysis, the court should require, at a minimum, proof in a concrete context of how the tax truly interferes with important federal policy and, if so, why Congress or the Executive Branch has not taken steps to preempt the State's policy.

This case involves the exercise of the taxing power of the State of Florida on a subject over which the Twenty-first Amendment to the United States Constitution gives it broad latitude. Appellees therefore ought to be at least required to prove in a concrete circumstance their claim that the tax, as it operates, intrudes into an area where federal uniformity is "essential". There is nothing in this record of a concrete

nature showing that the tax policy of the State of Florida cannot co-exist with Federal policy or causes any concrete threat of retaliation from foreign governments, which is the core concern behind the "one voice" doctrine. That analysis must be made on an as-applied basis. There is no proof in this record that the product of any foreign nation is or will be denied tax perferred status by reason of the disqualification provisions. If there is a specific circumstance in which the internal tax policy of Florida impinges upon federal foreign policy or Congressional acts regulating trade relations with foreign nations, then the issues are properly adjudicated in a proceeding which presents such concrete facts. The Court should not accept appellees' invitation to speculate upon them here.

V

APPELLEES MAY NOT RELY UPON THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT) NOR DO THE FLORIDA STATUTES CONTRAVENE GATT

The United States Congress has never ratified GATT. U.S. v. Yoshida International, Inc., 526 F.2d 560, 575, n. 22(C.C.P.A. 1975). GATT is therefore not a treaty of the United States. See Republic of Argentina v. City of New York, 250 N.E. 2d 698 (NY 1969). Further, GATT does not by its terms confer a private right of action on nationals of the United States. Thus, even if one assumes that GATT creates a private right of action for its enforcement, such right would be available only to foreign nationals. Appellees are "not in the position to invoke the

rights of other governments or the nationals of other countries" under GATT. Skiriotes v. Florida, 313 U.S. 69, 74 (1941); Hjelle v. Brooks, 377 F.Supp. 430 (D. Alaska 1974).

Further a treaty or international agreement may confer rights capable of enforcement by private parties, but this is not the general rule. Mannington Mills, Inc. v. Congoleum Corp., 595 F. 2d. 1287, 1298 (3rd Cir. 1979). Unless a treaty or international agreement is self executing it must be implemented by legislation before it can give rise to a private cause by action. Dreyfus v. Von Finck, 534 F.2d. 24, 29 (2d Cir. 1976), cert. den. 429 U.S. 835 (1976). Article XXIV, section 6 of GATT, TAIS 1700, provides:

> Each contracting party shall make such reasonable measures as may be available to it to assure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory.

That is exactly the same kind of provision, contemplating legislative action to implement the international agreement, that was held to be non-self-executing in Mannington Mills, Inc. v. Congoleum Corp., supra.

Therefore these Plaintiffs may not rely upon GATT in support of their position.

Moreover Article III; section 2 of GATT provides:

> The products of the territory of any contracting party imported into the territory of any other

> contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.

On their face the provisions of Florida's disqualification provisions impose no more stringent rules or regulations upon the receiving of a tax preference with regard to the articles of foreign commerce that are applied to the articles of national commerce and, accordingly, do not violate GATT.

VI

THE RECORD IS INSUFFICIENT TO SHOW THAT THE STATUTES' PRACTICAL OPERATION IS REPUGNANT TO THE POLICIES OF THE SPECIFIC ACTS AS CITED BY APPELLEES

In order to Appellees to successfully argue that the disqualification provisions of Florida Statutes violate federal policy under the Tarrif Act of 1930 or the Trade Act of 1974, they must establish that the tax constitutes a protective trade barrier or, as Appellees phrase it, "an additional tax". McKesson answer brief at page 47. The statutes do not impose an additional tax on foreign commerce. They lay down conditions for the receipt of tax preference on the sale of beverages in Florida. For Appellees to sucessfully prove that the tax is a protective barrier, it must be demonstrated that the tax in practical effect discriminates in favor of Florida products over foreign manufactured beverages. As demonstrated above, there is

no proof of that in this record sufficient to warrant summary judgment.

There is no "irreconcilable conflict with federal regulation" under the Trade Act Of 1974 or the Tariff Act Of 1930 in Florida's taxation of beverages sold locally within its boundaries. There is no positive repugnancy between the policy embodied in those federal acts and Florida's decision to extend favorable tax treatment to beverages only if not being advantaged already. There is no express mandate in those Federal Acts that Congress intended to oust the powers of the states over the tax policy with respect to alcoholic beverages under the Twenty-first Amendment. E.g. Florida Lime and Avacoda Growers, Inc. v. Paul, 373 U.S. 81, 83 S.Ct. 1210(1963). Moreover, had the trial court determined that there was a preemption of the State's taxing policy insofar as matters of foreign trade are regulated by the Caribbean Basin Recovery Act or the Wine Equity And Export Expansion Act of 1984, such a determination would be insufficient to declare the statute unconstitutional on its face. Rather such a holding would have been an as-applied ruling, holding the disqualification provisions to be inapplicable in the case of

trade covered by those Federal Acts. The trial court made no such determination. Instead the Court ruled the exemptions unconstitutional across the board.

Clearly, even if Plaintiffs had built a sufficient record to allow summary judgment on the pre-emption issues, such would be insufficient to support summary judgment striking the exemptions on their face and across the board.

VII

THE DISQUALIFICATION PROVISIONS SHOULD BE CONSTRUED TO AVOID POINT-OF-ORIGIN DISCRIMINATION

Tampa Crown labors to establish that the disqualification provisions of §§564.06(9), 565.12(1)(c), (2)(c), Florida Statutes (1985) result in facial "point-of-origin" discrimination. Tampa Crown's argument proceeds however upon its unstated assumption that those provisions are capable of only one construction - i.e. the interpretation put forward by Tampa Crown. Tampa Crown merely sets up a strawman so it can knock it down. Instead of the suspect interpretation put forward by Tampa Crown, the Court should adopt any construction which avoids constitutional problems. Biscayne Kennel Club, Inc. v. Florida State Racing Comm'n (165 So.2d. 762 (Fla. 1964); Tyson v. Lanier, 156 So. 2d. 833 (Fla. 1963).

The provisions of the disqualification provisions reflect the reasonable inference that if direct or indirect subsidies are made available in a given jurisdiction, manufacturers will

avail themselves of such benefits. A manufacturer making rum in a jurisdiction which offers export subsidies to rum made from local sugarcane is not likely to choose, instead, to import sugarcane from elsewhere and pay a higher price plus shipping costs. Thus, the language of the disqualification provisions is readily capable of the intrepretation which does not hinge the Florida tax preference soley upon the policies of the manufacturing jurisdiction without regard to whether the manufacturer actually receives the benefit of those policies. One of the disqualifying criteria is applied to beverages from jurisdictions "which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced with their boundaries". §564.06(9)(b), Fla. Stat. (1985). It is reasonable to construe that language to mean that such advantages must actually be provided to the manufacturer seeking Florida's preference in order for the disqualification to operate. Given that construction, the disqualification is not based upon some general policy of the other jurisdiction, but upon provision of financial benefits directly to a specific manufacturer which is seeking further tax encouragement here. The provisions of §564.06(9)(c), Fla. Stat. (1985) are equally amenable to the same interpretation. The provisions of §564.09(a) can also be interpreted as operating not just upon a point-of-origin basis, but upon the actual receipt of financial incentives elsewhere. If a jurisdiction provides home

territory trade protection to its manufacturers, all of those manufacturers necessarily enjoy a financial encouragement in the home market which allows them to compete more effectively elsewhere; they may export that incentive by lowering prices on products they export, since products they sell locally can be priced higher due to protection from outside competition. Thus, the disqualification operates not on the point-of-origin, but upon the actual receipt of financial encouragement by the manufacturer.

Similarly, when one bears in mind the duty to seek a constitutional interpretation of legislative enactments, Tampa Crown is incorrect in stating that a de minimis benefit elsewhere would operate to deny Florida tax preference. Clearly the foreign benefit must be substantial to deny tax preference here. That the statute does not contain a formula for mathematical equivalence is not surprising. The value of a price support or an export subsidy (or a tax barrier in another local market) fluctuates depending upon overall market conditions. No formula is available to cover such constant fluctuations. The inability to create symmetry and balance, or a precise formula does render the statute unconstitutional. See Straughn v. K & K Land Mgt., Inc., 326 So. 2d. 421 (Fla. 1976); Askew v. Cross Key Waterways, 372 So.2d. 913, 919 (Fla. 1979).

The decision in Askew v. Cross Key Waterways, is also instructive with regard to Appellees' assertion that the language

of the disqualification provisions is too broad and therefore constitutes an invalid delegation of legislative power:

> We emphasize that it is not the legislature's use of the phrases "containing, or having a significant impact upon, environmental, historical, natural, or archaeological resources of regional impact" nor "significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment" which faults the legislation. Although the Court in Sarasota County v. Barg, supra, invalidated an act which utilized the terms "undue or unreasonable" dredging or filling and "unreasonable" destruction of natural vegetation in a manner which would be "harmful or significantly constribute" to air and water pollution, such quantitative assessments by an administrative agency are not necessarily prohibited. As suggested by the district court of appeal such "approximations of the threshold of legislative concern" are not only a practical necessity in legislation, but they are now amenable to articulation and refinement by policy statements adopted as rules under the 1974 Administrative Procedure Act, Chapter 120, Florida Statutes. The benefits of the current version of Chapter 120 were not available at the time of the Barg decision. The deficiency in the legislation here considered is the absence of legislative delineation of priorities among competing areas and resources which require protection in the State interest.

Id. at 919. See also, Straughn v. K & K Land Mgt., Inc., supra

(upholding provision for denying agricultural tax break under certain circumstances unless the property owner can show "special circumstances demonstrating that the land is to be continued in bona fide agriculture.")

Under the analysis of those cases, the provisions of the instant statutes relating to disqualifying criteria are sufficient "approximations of the threshold legislative concern": to limit the loss of tax revenue where the manufacturer of an otherwise qualifying beverage has already received financial encouragment to market it. As the Court noted in Askew v. Cross Key Waterways, that threshold standard may be fleshed out in administrative regulations and §120.57 proceedings. Those mechanisms are adequate to determine whether a manufacturer has in fact benefitted from financial advantages elsewhere and, if so, whether that benefit is substantial or insubstantial. Administrative Agencies and the courts, see §120.68, Fla. Stat., are as equally equipped to make those determinations as they are to decide the degree of contributory fault in a tort case or "The probable economies and improvements in service that may be derived from operation of joint or shared health care resources.", §381.494(6)(c) 5., Fla. Stat. (1985).

VIII

ASSUMING THE TRIAL COURT'S CONSTITUTIONAL RULING TO BE CORRECT THE TRIAL COURT PROPERLY GAVE ITS RULING ONLY PROSPECTIVE OPERATION

The arguments DABT is about to make will demonstrate that the reasoning and the precedents relied upon in McKesson's cross-

appeal as to the prospective-only ruling below are inapposite. Before doing so, however, DABT wishes to point out that the argument over whether the trial court's ruling should or should not be given only prospective effect is largely academic, because even if the trial court had not expressly made its ruling prospective, McKesson would not be entitled to a refund of beverage excise taxes. McKesson has not challenged the imposition of the flat beverage tax, but rather only the alleged discriminatory effect of the tax preference provisions of §564.06 and §565.12. Thus, if the trial court's constitutional analysis were correct, only the exemption provisions are invalid and those exemptions were properly severed from the statute, as the trial court did. Delta Airlines, Inc. v. Deparment of Revenue, 455 So.2d. 317, 321 (Fla. 1984), Presbyterian Homes of Synod of Florida v. Wood, 297 So.2d. 556, 559 (Fla. 1974). With the exemptions removed, all beverage distributors are responsible for collecting and remitting the beverage excise taxes at the higher rate. McKesson cannot assert the exemptions to be unconstitutional and at the same time demand their benefit by demanding a refund of taxes paid in excess of the exempt rate. See, e.g. Daniel v. Canterbury Towers, Inc., 462 So.2d. 497 (Fla. 2d. DCA 1985). McKesson cannot avoid that obvious inconsistancy by characterizing the refund claim as one for damages against the state for alleged injury to its business. A damage claim will

not lie for fundamental acts of governance, including the enactment of legislation, Trianon Park Condominium Ass'n v. City of Hialeah, 468 So.2d. 912, 918 - 919 (Fla. 1985), and a tax refund claim cannot be made on such a theory, since it flies in the face of sovereign immunity. Shannon v. Hughes & Co., 270 Ky. 530, 109 S.W. 2d. 1174 (1937).

Having said that, DABT asserts that the trial court was amply justified in giving prospective-only effect to its judgment, assuming that judgment to be correct.

The decision in Great Northern Ry. Co. v. Sunburst Oil Co., 287 U.S. 358 (1932), laid to rest the debate over the power of the courts to fashion their decrees on the constitutionality of statutes in such a manner that those decrees operate only prospectively. Since the advent of the Sunburst doctrine, scores of decisions, both in the Federal courts and in the courts of the several States, have been given only prospective operation, thus denying retroactive relief such as a refund of monies paid to a State's treasury under statutes found to have a constitutional defect. E.g., Lemon v. Kurtzman, 411 U.S. 192, 93 S.Ct. 1463 (1973); Gulesian v. Dade Cty. Sch. Bd., 281 So.2d. 325 (Fla. 1973); International Studio Apt. Ass'n v. Lockwood, 421 So.2d. 1119 (Fla. 3d DCA 1982) pet. for rev. den. 430 So.2d. 451 (Fla. 1983), cert. den. 464 U.S. 895 (1983); Metropolitan Life Ins. Co. v. Commissioner Of Ins., 373 N.W. 2d. 399 (N.D. 1985). This Court has done so. E.g., Gulesian v. Dade County Sch. Bd.,

supra. Of the numerous cases which have discussed and applied the Sunburst doctrine, the most succinct analysis of the rationale for it and the circumstances conducive to its application can be found in Lemon v. Kurtzman, supra, and in Metropolitan Life Insurance Company v. Commissioner of Insurance, supra.

In Lemon v. Kurztman, the court struck down a statute allowing public funds to be paid to sectarian schools to reimburse them for the expense of providing non-sectarian education. Nevertheless, the court gave its decision only prospective application, thus denying the plaintiffs' demand for a refund of monies paid under the unconstitutional scheme. The Court's reasoning is instructive here:

> Appellants ask, in effect, that we hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional. Appellants would have state officials stay their hands until newly enacted state programs are 'ratified' by the federal courts or risk draconian, retrospective decrees should the legislation fall. In our view appellants' position would seriously undermine the initiative of state legislators and executive officials alike. Until judges say otherwise , state officers...have the power to carry forward the directives of the state legislature...[W]henthere are no fixed and clear constitutional

> precedents, the choice is essentially one of political discretion and one this Court has never conceived as an incident of judicial review. We do not engage lightly in the post hoc evaulation of such political judgment, founded as it is on one of the first principles of constitutional adjudication - the basic presumption of the constituional validity of a duly enacted state of federal law.

Lemon v. Kurtzman, supra, 411 U.S. 207 - 208, 93 S.Ct. 1473, 36 L.Ed. 165-166.

In Metropolitan Life Insurance Co. v. Commissioner of Insurance, supra, the Court held unconstitutional North Dakota's tax preference for domestic insurance companies. However, the Court refused to give retrospective application to its ruling, and denied the plaintiffs' demands for refunds of taxes previously paid under the statute. The decision in that case is nearly "on all fours" with this case. The North Dakota court denied tax refunds to the plaintiffs because: (1) the decision of the United States Supreme Court in Metropolitan Life Insurance Co. v. Ward, 105 S.Ct. 1676 (1985), which occasioned the North Dakota decision, constituted a newly announced principle of constitutional law and the state therefore was justified in relying upon the presumed constitutionality of the statute in question; (2) the State acted to address the constitutional defect announced in the Ward decision; (3) the prior statute had long been in effect without protest before the Ward decision; (4)

serious economic dislocation for the state would have occurred by the imposition of retroactive relief; and (5) the plaintiffs had not shown real injury as taxpayers because they had shifted all or most of the financial burden of the tax to their customers in the form of higher prices and thus would receive and unjustified windfall by the granting of refunds.

Each of those considerations applies with equal, if not more compelling, force here.

A.

BACCHUS IMPORTS, LTD. v. DIAS WAS A NEW PRINCIPLE OF LAW

The majority holding in Bacchus was accompanied by a strong dissent which characterized the majority's decision as a clear departure from prior decisions and a "totally novel approach to the Twenty-first Amendment". Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 3064, 82 L.Ed. 2d. 200 (1984). That characterization is well supported. For decades prior to the Bacchus case, the United States Supreme Court had rebuffed Commerce Clause challenges to the States' taxation and regulatory laws which favored local alcoholic beverage industries, and did so on the express ground that the Twenty-first Amendment removed Commerce Clause strictures on the States in regard to the regulation of the sale and distribution of alcoholic beverages. State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936); Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938); Indianapolis Brewing Co. v. Liquor Control

Comm'n, 305 U.S. 390 (1939). Thus, the Bacchus decision decision constituted a new principle of law. See, Metropolitan Life Ins. Co. v. Commissioner of Insurance, supra; Gulesian v. Dade County Sch. Bd., supra, International Studio Ap't. Ass'n v. Lockwood, supra.

B.

THE STATE JUSTIFIABLY RELIED UPON THE VALIDITY OF ITS TAX STATUTES

Just as North Dakota justifiably relied upon the long and unprotested existence of its tax format, Metropolitan Life Ins. Co. v. Commissioner of Ins., supra, Florida justifiably relied upon the taxation format for alcoholic beverage prior to Bacchus. Until the advent of Bacchus the general wisdom was that the Twenty-first Amendment removed Commerce Clause restrictions on the States' taxation and regulation of alcoholic beverages imported into the States for consumption.

C.

THE STATE ACTED PROMPTLY AND REASONABLY IN RESPONSE TO BACCHUS

In the next ensuing legislative session after Bacchus the Legislature substantially amended the statutes to address what it perceived to be the Commerce Clause defect announced in Bacchus - the granting of an exclusively local tax preference to alcoholic beverages. In making that statement, DABT does not ignore the possibility of protectionist motives on the part of some legislators with regard to the 1985 amendments. However, as discussed above in point I, such motivations on the part of some

cannot be said to be true of the body corporate. Nor does DABT ignore the fact that reasonable men may differ as to whether the 1985 amendments cured the constitutional defects announced in Bacchus and as to whether other constitutional problems may inhere in those amendments. What may not be disputed, however, is that the trial court, with the benefit of the record and exhaustive arguments of counsel, made a finding that the 1985 amendments "were an effort by the Legislature to overcome the constitutional problems in the Florida alcoholic beverage laws resulting from the Bacchus decision". Whether the Legislature succeeded or not, the trial court's finding, supported by ample evidence, establishes the bona fides of the State in making the attempt. The State has thus satisfied the prompt action component of the prospective-only calculus.

It goes without saying that the pre-1985 statutes were not subject to any protest regarding their constitutionality and prior precedents amply supported the constitutional presumption for those laws. Nor did these plaintiffs act with any alacrity is asserting the new statutes to be unconstitutional. The 1985 amendments became effective July 1, 1985. McKesson - the only appellee to cross-appeal the prospective-only ruling - did not file suit until September, 1986. By way of a comparative bench-mark, the Court need only look to the current cases filed regarding the constitutionality of Florida's new sales tax on services.

D.

SERIOUS DISLOCATION WOULD OCCUR BY GRANTING RETROSPECTIVE RELIEF

There can be no dispute that the refund of millions of dollars from state revenues at a time when the State is struggling to find revenues to pay for billions of dollars in infrastructure needs would be a serious financial hardship. Record support for that conclusion is evident in the elaborate sliding scale tax for beverage tax exemptions designed to check erosion of the beverage excise tax base.

E.

MCKESSON MAY NOT ASSERT HERE THAT IT DID NOT PASS THE FINANCIAL BURDEN OF THE TAX TO ITS CUSTOMERS

The only piece of the calculus for prospectivity at all in question is whether McKesson passed the financial burden of the tax on and thus would receive a windfall by receiving a refund. Before addressing that issue, however, DABT wishes to note that such a finding, while sufficient to justify a prospective ruling, is not necessary to support the trial court's exercise if equitable discretion in granting prospective-only relief. Indeed, in International Studio Apartment Ass'n v. Lockwood, supra, the plaintiffs' financial loss was deemed insufficient reason to justify a retrospective ruling on constitutionality. See also City of Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978).

Let us turn, now, to the financial burden of this tax. DABT

propounded discovery to McKesson aimed at proving that McKesson had, indeed, passed the financial burden of the excise tax to its customers. R. Vol. 1, pp. 229 - 248. McKesson refused to respond to that discovery, despite the fact that it was clearly relevant to McKesson's claim of refund. State ex. rel. Szabo Food Services, Inc. v. Dickinson, 286 So.2d 529 (Fla. 1974). If that missing piece were error (it is not, as demonstrated above), McKesson, having invited it, may not now rely upon it for reversal of the trial court's prospective-only decision. See, e.g., Stossel v. Gulf Life Ins. Co. of Jacksonville, 123 Fla. 227, 166 So. 821 (1936).

Even without McKesson's response to that discovery, there is adequate support for the trial court's prospective ruling. The Legislature clearly contemplated that, although the legal incidence of the excise tax falls upon distributors such as McKesson, the distributors would be mere collection conduits for the tax. See, §561.50, Fla. Stat. (1985)(tax not due until sale); §561.506, Fla. Stat. (1985)(Wholesaler deductions from tax collection payments); §565.13 Fla. Stat. (1985)(tax not due until 10th of month following month of sale). Indeed, since a price given to one customer by a distributor must be given equally to all under Florida's regulatory scheme, Rule 7A - 4.471, F.A.C., and since the amount of the tax is large in relation to the relatively low unit price of alcoholic beverages ($9.53 per gallon on distilled spirits with more than 48%

alcohol), economic necessity virtually compels a pass-through of the financial burden of the tax.

The cases McKesson relies on are inapposite. The Court in Bacchus made clear that the Bacchus decision did not consider the demand for refunds. 104 S.Ct. 3049, 3059. The case of State ex. rel. Nuveen v. Greer, 89 Fla. 249, 102 So. 739 (Fla. 1924) predates the decision in Great Northern Ry. Co. v. Sunburst Oil Co., supra. The Sunburst case eschewed the precedents relied upon in the Nuveen case. Nuveen is directly contrary to modern precedents on the prospective-only application of judicial decisions, both in Florida and in the Federal Courts. Compare Lemon v. Kurtzman, supra; City of Los Angeles Dep't. of Water & Power v. Manhardt, supra; Gulesian v. Dade Cty. Sch. Bd., supra. Modern Florida cases have allowed litigants to recover refunds only when the applicants bore the financial burden of the tax as end-consumers or property owners, in the case of ad valorem taxes.[2] In contrast, this Court held the no refund is due in cases where the taxpayer, although being the one upon whom the legal incidence of the tax falls, is not the party who bears its financial burden. State ex. rel. Szabo Food Service, Inc. v. Dickinson, supra. Accord, Shannon v. Hughes & Co., 270

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[2] Ostendorf v. Turner, 426 So.2d. 539 (Fla. 1982); Interlachen Lakes Estates, Inc. v. Brooks, 341 So.2d. 993 (Fla. 1976); Colding v. Herzog, 467 So.2d. 980 (Fla. 1985); City of Tampa v. Birdsong Motor, Inc., 261 So.2d. 1 (Fla. 1972); City of Tampa v. Thatcher Glass Corp., 445 So.2d. 578 (Fla. 1984).

Ky. 530, 109 S.W. 2d. 1174 (Ky. 1937). As demonstrated above, that is precisely the circumstance of McKesson.

CONCLUSION

DABT urges the Court to hold that the 1985 amendments to §§564.06 and 565.12, Florida Statutes, do not violate the Commerce Clause, either facially or in practical effect; and to reverse the trial court's summary judgment. Further, DABT urges the Court to hold that the record does not support summary judgment on any alternative ground advanced by Appellees. In the alternative, DABT urges the Court to sustain the trial court's decision to grant prospective-only effect to its ruling.

Respectfully submitted,

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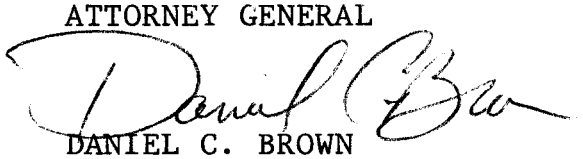

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