IN THE SUPREME COURT OF FLORIDA

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, AND OFFICE OF THE COMPTROLLER, STATE OF FLORIDA; JACQUIN-FLORIDA DISTILLING CO., INC.; and TODHUNTER INTERNATIONAL, INC.,

Appellants,

v. NO. 70,368

McKESSON CORPORATION, et al.,

Appellees.

On Appeal from the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida

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REPLY BRIEF OF APPELLANTS JACQUIN-FLORIDA DISTILLING CO., INC. AND TODHUNTER INTERNATIONAL, INC.

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ARGUMENT

I. The Florida Provisions Are Not Discriminatory

The issue in this case is "discrimination." Do the Florida statutes on their face discriminate by treating Florida products differently than non-Florida products? If the Florida statutes do not favor Florida products, they are not unconstitutional. Since Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), every law but one which was invalidated under the Commerce Clause involved statutes which were avowedly or explicitly discriminatory. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091, 1269 (1986) (the cases surveyed by the author include all those Supreme Court cases cited by the Appellees).[1] The Florida provisions do not discriminate.

Without question, Florida may encourage local industry as long as it does not ". . . impose a discriminatory burden upon the business of other states . . ." Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984) (emphasis supplied).

Brown-Forman is plainly wrong when it says that conceding a statutory purpose to aid Florida interests concedes a discri-

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1 The one noted exception, Edgar v. MITE Corp. 457 U.S. 624, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982), is inapposite and was not cited by the Appellees.

minatory purpose and presents an "identical argument advanced and rejected" in Bacchus. Brown-Forman Brief at 13. In Bacchus, Hawaii bestowed a commercial advantage "only to locally produced beverages." 104 S.Ct. at 3056. The Hawaii statute explicitly discriminated against the products of other states and countries by favoring only Hawaii products. The Florida provisions in issue here do not do that.

The Florida provisions grant tax preferences to all manufacturers using the designated agricultural products, by-products and concentrates.[2] There is no dispute that these products are grown and growable in many places outside of Florida. There is also no dispute that the beverages manufactured from these products can be produced both within and outside of Florida. There is no dispute that the designated products, by-products and concentrates are and can be shipped to any location to be manufactured into alcoholic beverages. Neither the locale of agricultural production nor the locale of beverage manufacturing is decisive.

Recent Supreme Court decisions underscore the positive reception accorded to non-discriminatory legislation. In CTS Corporation v. Dynamics Corporation of America, ____ U.S. ____, 55 U.S.L.W. 4478 (April 21, 1987), the Supreme Court upheld an

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2 Subject to the provisions relating to the benefits given to manufacturers in their home states, territories or countries. We discuss those provisions infra.

Indiana statute regulating attempted takeovers of Indiana corporations. The foreign corporation's unsuccessful discrimination argument resembled McKesson's:

> Dynamics nevertheless contends that the statute is discriminatory because it will apply most often to out-of-state entities. This argument rests on the contention that, as a practical matter, most hostile tender offers are launched by offerors outside Indiana. But this argument avails Dynamics little. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 126 (1978).

Id. at 4483.[3] The Supreme Court held:

> The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce. See, e.g., Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 36-37

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3 Exxon Corp. permitted the elimination of interstate dealers, producers and refiners from competition with Maryland independent station owners who did not refine or produce gasoline, and it allowed a restructuring of the market. Indeed, the burden imposed by the Maryland statute "fell solely on interstate companies." 437 U.S. at 125. In sustaining the statute, the Supreme Court did not even cite Pike v. Bruce Church, Inc., supra, making it clear that because the flow of interstate goods was not prohibited and out-of-state companies were not distinguished from in-state business, there was no Commerce Clause violation:

> [I]nterstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another.

437 U.S. at 127.

Exxon emphasizes that non-discrimination is the touchstone for Commerce Clause purposes.

> (1980); Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). See generally Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986). The Indiana Act is not such a statute. It has the same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana.

Id. at 4483.

The Florida provisions are analogous. They have the same effect on alcoholic beverage manufacturers whether or not they are residents of Florida. Florida alcoholic beverage manufacturers who do not use the designated products pay the higher taxes. All alcoholic beverage manufacturers, regardless of residency, who use the designated products may qualify for the lower rates. The Florida provisions simply do not discriminate.

The cases relied on by the Appellees actually support what we have been saying. In each case, the offending statute explicitly protected only the local products.[4]

Delta Airlines, a foreign corporation, successfully challenged a statute which provided a corporate income tax credit only for Florida based air carriers. Delta Airlines, Inc. v. Department of Revenue, 455 So.2d 317, 319 (Fla. 1984).

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[4] At pp. 39-40 of its brief, McKesson argues that there are less discriminatory alternatives to the Florida approach. Its argument is based on the false premise that the Florida provisions are discriminatory. McKesson's suggestion that Florida utilize property tax relief, direct cash subsidies, state-sponsored research, or state-sponsored promotional campaigns for Florida products (McKesson Brief at 40) would create discrimination. Most importantly, absent a finding of discrimination, the less restrictive alternative argument is not applicable.

Metropolitan Life Insurance Co., a foreign corporation, successfully challenged an Alabama statute that taxed "out of state insurance companies at a higher rate than domestic insurance companies." Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 105 S.Ct. 1676, 1678, 84 L.Ed.2d 751 (1985) (although an equal protection case, it was cited by McKesson and its principles support our contention of what constitutes unconstitutional discrimination).

The Atlantic Pacific Tea Co., which had spent over a million dollars for a Louisiana dairy processing plant, successfully challenged Mississippi's refusal to allow the sale of Louisiana milk in Mississippi. Great Atlantic & Pacific Tea Co., Inc. v. Cottrell, 424 U.S. 366, 96 S.Ct. 923, 47 L.Ed.2d 55 (1976).

Philadelphia successfully challenged New Jersey's effort to close New Jersey landfills to out-of-state waste. City of Philadelphia v. New Jersey, 437 U.S. 617, 98 S.Ct 2531, 57 L.Ed.2d 475 (1978).

We have already addressed Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977); Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980); Dean Milk Co. v. Madison, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951); and Miller v. Publicker Industries, Inc., 457 So.2d 1374 (Fla. 1984).[5] Those cases are

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[5] See n.2, page 7, Initial Brief of Appellant Jacquin-Florida Distilling Co., Inc.

all of the same ilk -- suits brought by parties actually disadvantaged by statutes which explicitly kept them from doing business in the defendant state or city, or which imposed a higher tax on the foreigner than on domestic producers. The Florida provisions do neither. They do not discriminate.[6]

II. Because The Florida Provisions Do Not Discriminate, "Legislative Motivation" Is Irrelevant

All of the Appellees have invoked "legislative history" in an effort to portray a discriminatory purpose in enacting the Florida provisions. They ignore the Supreme Court's admonition that the question in constitutional cases is whether legislation violates a discrete constitutional provision, "not whether its

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6 Mapco, Inc. v. Grunder, 470 F.Supp. 401 (N.D. Ohio 1979), is not different. The higher tax was an excise duty on coal which could only come from another state or country.

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), fits the discrimination description too. By "expressly prohibit[ing]" state grades of apples shipped in closed containers, North Carolina "strip[ped] away" Washington's competitive and economic advantage earned through its grading system. 432 U.S. at 337, 351. Since Washington's apples accounted for "30% of all apples grown domestically and nearly half of all apples shipped in closed containers in interstate commerce," id. at 336, the advantage given to North Carolina apple growers by downgrading Washington apples "discriminate[d]" against Washington products. Id. at 340, 354. Here, no Appellee can claim similar discrimination.

supporters may have endorsed it for reasons no longer generally accepted." In Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 472 n.7, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981), the Court stated:

> It is a familiar practice of constitutional law that this court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.

Id., quoting United States v. O'Brien, 391 U.S. 367, 383, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

The Supreme Court has not deviated from that precept in the Commerce Clause cases. Where the Court has mentioned legislative intent, it has had facially discriminatory statutes. See Boston Stock Exchange, supra, and Bacchus, supra, where the Hawaii legislature's plainly protectionist motivation was evidenced by its Senate Standing Committee Reports and acknowledged by the Hawaii Supreme Court. Bacchus, 104 S.Ct. at 3055. In Hunt v. Washington State Apple Advertising Commission, supra, Chief Justice Burger disclaimed any reliance on improper motivation: "[W]e need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case . . . ." 432 U.S. at 352. And in Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978), Justice Blackmun dissented in part noting that there was legislative testimony suggesting protectionism; nevertheless the Court was not concerned and the opinion upheld a Maryland statute which prohibited gasoline producers and refiners from operating their own gasoline stations.

In any event, there is no real legislative history of the Florida provisions. Florida does not have committee reports which reflect the considered views of the members. What the Appellees rely on are isolated statements by individual legislators who make it clear they want to help Florida. It would be surprising if they said something different.

Because of these few statements, Appellees would have the court conclude that the Legislature was motivated by mere protectionism. However there is ample testimony by legislators and others that the proposed statutes were designed to solve the apparent constitutional problems with the existing law and open Florida to out-of-state products. Secretary Burroughs of the Department of Business Regulation, discussing a proposed amendment, stated:

> this [amendment] will enhance the potential of opening up the Florida market at a reduced tax rate to manufacturers outside of the State of Florida, because it would have to do that in order to comply with the Supreme Court ruling.

A-393.

Secretary Burroughs further distinguished the proposed legislation from the then existing Florida products exemption:

> This bill does not say Florida grapes, it says grapes, and lists the different types of grapes on the wine list. On this particular one it doesn't say Florida citrus, they removed the Florida grown trying to comply with the Florida Supreme Court, or rather the United States Supreme Court decision. This means they could make the product [beverage] with other [non-Florida] products.

A-395.

Indeed, if any legislators were initially motivated by only protectionism, testimony before the Committee clearly indicated that this proposed statute would not accomplish such a goal:

> [A] lot of your big distilling states don't have preferential treatment and if there is no preferential treatment in Kentucky, a big distilling state, and they decide to come down and use some of the products or the by-products that are enumerated in the bill and take advantage of Florida's cheaper tax, there is nothing Florida can do.

A-437-438. (Emphasis supplied.)

The clearest evidence that the Legislature both realized and intended the new statutes to apply to qualifying beverages wherever produced is the existence of the sliding scale tax rate under which the lower tax rate is gradually eliminated as the volume of the qualifying beverages increases. Since the proposed legislation made the lower tax rate available to all manufacturers no matter where located, legislators and Department officials were understandably concerned about the potential loss of tax revenues. Howard Rasmussen, Director of the Division of Alcoholic Beverages and Tobacco, stated this concern explicitly:

> For example, the bill opens the can of worms to a number of products from other states and those products and their manufacturers and distillers could be exempt from Florida taxes at the same rate as people using Florida products and that could open a potential can of worms for us and cause a problem in terms of the decline of state revenues based on that tax.

A-438-439.

In response to this concern, the sliding scale placed a limit on the total cost of the preference to the state but it did not in any way limit the preference to only Florida producers of Florida products. The sliding scale therefore affirms that non-Florida manufacturers were expected to qualify for the exemption and cause the level of sales of the preferred beverages to rise. The level of sales required to end the preference is nowhere reached by current production of preferred beverages by Florida manufacturers. In fact, such sales are well below the lowest end of the sliding scale.

The legislative history simply does not show illicit legislative purpose. To the contrary, there is ample evidence to show that the Legislature was primarily motivated by drafting a statute which would meet the constitutional test of Bacchus and which was fiscally responsible.

III. The Appellees Are Making An As Applied Attack On The Disqualification Provisions

The Appellees' attack upon the disqualification provisions of the new statutes is an as applied attack, not an attack on their facial constitutionality, and is devoid of record support for the contentions.

The Appellees posit hypotheticals suggesting unfairness if a

manufacturer did "not benefit from the discriminatory tax" of its home state, territory or country or if a manufacturer specifically "renounce[d] and refuse[d] to accept the benefits of such provisions." Tampa Crown Brief at 15, 23. The Brown-Forman Brief opines, "if California provided only a slight economic advantage to California manufacturers, these manufacturers would not qualify for the more substantial tax break received by Florida manufacturers." Id. at 23.[7]

Those "ifs" are not the stuff of a facial constitutional Commerce Clause challenge.[8] The record does not reflect what, if any, advantages are supplied by the laws of other states, territories or countries. McKesson hypothesizes that "[t]he most

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7 The reference to "Florida manufacturers" exhibits a common mischaracterization continuously made in all the Appellees' briefs. There are repeated references to use of Florida agricultural products, or benefits accorded to Florida businesses. The statutes make no distinction favoring Florida products or manufacturers; rather, they refer to generic products, by products and concentrates which are admittedly produced in many states, territories and countries, including Florida, and are available worldwide in the normal course of business.

8 Tampa Crown makes the naked assertion that the disqualification provisions are facially unconstitutional, premised on a statement that "the exemption denying provisions by creating a test in which tax preference is denied solely on the basis of the point of origin of the product renders such statutes per se unconstitutional." Tampa Crown Brief at 44-45 (emphasis supplied). No explanation is given, nor authority cited, for this statement that Florida's disqualification provisions are based on origin. The disqualification provisions do not pretend to turn on origin, rather they turn on the existence of economic incentives wherever they may be.

trivial 'economic incentive' provided by an out-of-state firm's home state might preclude the firm's tax break, whether the particular firm ever benefited from the incentive or not." McKesson Brief at 34 (emphasis supplied). But the only factual example offered by McKesson involves a previously denied exemption requested by a New York wine maker (Cananadaigua) which was refused because of New York's statutory benefits accorded exclusively to its manufacturers. McKesson points out the federal court invalidation of the disqualifying discriminatory New York provision. Id. at 33. Therefore, it would appear that New York wine makers could now qualify for the Florida exemption, if any apply.

The Appellees are inviting the Court to declare unconstitutional a presumptively valid legislative enactment in the absence of any record addressing their point of attack. Their focus below was upon the agricultural product designations in the Florida provisions. No evidence was submitted regarding what states accord which benefits, the amount and duration of those benefits, and the effect of those benefits upon a manufacturer's costs, with its concomitant ability to competitively price its cane, citrus and grape products without a second benefit from Florida.

This Court should decline Appellees' invitation. An as applied challenge should be based upon a fully developed record that addresses the existence of an alleged non-receipt,

trivialness, or renunciation of home state benefits by a particular applicant seeking to qualify for the tax preference. See Glendale Federal Savings and Loan Association v. Department of Insurance, 485 So.2d 1321 (Fla. 1st DCA 1986); Askew v. Hargrave, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971).[9] On such a record, a court could then decide the issues in light of its duty to apply the legislation in a manner which renders it constitutional. See Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815, 820 (Fla. 1983); Wilkerson v. State, 401 So.2d 1110, 1112 (Fla. 1982); Smith v. Department of Insurance, 12 F.L.W. 189, 196 (Fla. April 24, 1987) (J. Erlich concurring in part) ("[W]hen faced with consitutional challenges, courts should indulge in every reasonable interpretation of the statute in order to uphold it.").

The Appellees have posited varying interpretations of the statutory provisions. Even if they are subjected to varying interpretations, this does not render them facially unconstitutional. See Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d at 820. This is especially so where

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9 Tampa Crown's invalid delegation, equal protection and vagueness arguments are unavailing under any circumstances. See State Department of Citrus v. Griffin, 239 So.2d 577 (Fla. 1970) (a valid delegation); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 339, 72 S.Ct. 329, 96 L.Ed. 367 (1952) (regulation requiring carriers to "avoid, so far as practicable" "congested [routes]" not void for vagueness); Clements v. Fashing, 457 U.S. 957, 963, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982) (wide leeway given to state legislation under the Equal Protection Clause).

the claimed varying interpretations are based upon unproven hypotheticals. Given the legislative history reflecting a desire to avoid a manufacturer receiving a "double benefit," we suggest that receipt by an out-of-state manufacturer of a "de minimis" benefit would not be viewed as sufficient reason to deny the tax preference.

IV. The Florida Provisions Do Not Interfere With Foreign Commerce

A. The Import-Export Clause

Florida does not deny a tax exemption to alcoholic beverages merely because of the "place of origin" of the beverages. An otherwise exempt product will be denied a preferential tax rate in Florida only if the product has already received a benefit in the jurisdiction where it is manufactured. Alcoholic beverages imported from Italy or Barbados will not be denied a tax exemption in Florida merely because they have been manufactured in a foreign country. Rather, under the plain meaning of the new Florida provisions, such alcoholic beverages will be denied an exemption only if they received a competitive economic advantage in the state, territory or country where they are manufactured through such specified techniques as discriminatory taxation, agricultural price supports, export subsidies or other economic incentives and advantages.

In Michelin Tire Corporation v. Wages, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976), the Supreme Court held that a state ad valorem tax on the inventory of a wholesale distributor (which included imported tires) did not constitute the laying of "imposts or duties on imports or exports." See also R.J. Reynolds Tobacco Company v. Durham County, North Carolina, ____ U.S. ____, 107 S.Ct. 499, 93 L.Ed.2d 449 (1986). The application of the Florida excise tax on alcoholic beverages is analogous to the operation of Georgia's ad valorem tax in Michelin Tire. The excise tax is imposed upon the distributor (the wholesaler) which sells alcoholic beverages within the state. The tax is not tied to the foreign nature of the goods.

In Michelin Tire, the Court held:

> The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods, 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. . . . It may be that such taxation could diminish federal impost revenues to the extent its economic burden may discourage purchase or importation of foreign goods. The prevention or avoidance of this incidental effect was not, however, even remotely an objective of the Framers in enacting the prohibition. Certainly the Court in Brown did not think so. See 12 Wheat., at 443-444. 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.

423 U.S. at 287 (citations omitted).

Both Miller v. Publicker Industries, Inc., 457 So.2d 1374

(Fla. 1984) and Department of Revenue v. James B. Beam Distilling Company, 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362 (1964), are distinguishable from this case. In Miller and Beam, imported products were disadvantaged solely because the products were imports. In Miller, Florida denied a tax exemption to gasohol if the ingredient (ethyl alcohol) was distilled from non-U.S. agricultural products. The sole basis for the denial of the exemption was the foreign origin of the agricultural product. Similarly in Beam, Kentucky required the importer to pay a tax on each proof gallon of whiskey imported from Scotland. "[T]he incidence of the tax is the act of transporting or shipping the distilled spirits . . . into this state." 377 U.S. at 343.

Florida's tax is not an impost or a duty. It is not levied upon the act of importation. It is not based upon the foreign origin of the product. It is not violative of the Import-Export Clause.

B. The Foreign Affairs Powers

The Appellees rely on Zschernig v. Miller, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968) for their argument:

> By authorizing its courts to inquire into foreign governments' policies and by attempting to change those policies that Florida finds distasteful, Florida has intruded impermissibly into the exclusively federal area of foreign affairs.

McKesson Brief at 41.

First, the Florida statutes do not attempt to change any

nation's policies. Every country (or state) is free to provide whatever benefit it pleases to its citizenry. Having received that benefit, the manufacturer is free to send its product to Florida and market it at the established uniform tax rates. If it has been subsidized at home, the manufacturer will not receive the preferential tax rate for its cane, citrus or grape alcoholic beverage from Florida because it already has an economic incentive allowing it to compete in marketing those products. Florida's approach asks nothing of the foreign state, and the statutory inquiry only seeks to determine whether there has been a privilege accorded to the manufacturer.

Zschernig does not condemn Florida's approach. There, an Oregon probate statute provided for escheat unless a non-resident alien could demonstrate that a United States probate claimant would be able to inherit property in the non-resident alien's country. It was held unconstitutional because Oregon courts had critically analyzed foreign laws and the credibility of their officials:

> As one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the "cold war," and the like are the real desiderata. Yet they of course are matters for the Federal Government, not for local probate courts.

389 U.S. at 437-438.

Florida's desiderata is protecting its revenue base while encouraging specific commerce. There is no attempt to influence foreign conduct; rather, there is simply an attempt to determine

the practices of the foreign country in order to determine whether the preferential tax rate need be accorded. The Supreme Court facially approved a probate foreign reciprocity statute in Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633 (1947), because there was no attempt to influence, but merely to apply foreign law. See Zschernig, 389 U.S. at 433 n.5. The Florida provisions perform a similar function and thus do not intrude upon foreign relations. See also Wardair Canada, Inc. v. Florida Department of Revenue, 455 So.2d 326 (Fla. 1984), aff'd, _____ U.S. ____, 106 S.Ct. 2369, 91 L.Ed.2d 1 (1986) (Florida's sales tax was not preempted by Federal Aviation Act or U.S. - Canadian Agreement, and no violation of the foreign Commerce Clause occurred).

C. The Trade Acts

The Appellees have listed a variety of federal legislation which they contend preempt Florida's excise tax laws. See McKesson Brief at 44-54.

Stripped of rhetoric, the assertion is that Florida has intruded upon foreign relations by imposing excise taxes upon products which are regulated by the Trade Act of 1974, the Tariff Act of 1930, the Caribbean Basin Recovery Act, the Wine Equity and Export Expansion Act of 1984 and the General Agreement on Tariffs and Trade. The Appellees' rationale for these arguments rests almost exclusively on Zschernig v. Miller, supra.

The foregoing discussion of Zschernig lays to rest the "intrusion" argument, and the following discussion responds to all the Appellees' concerns.

The Florida provisions are concerned with state revenues; they are not designed to, nor do they, interfere with foreign trade. The Appellees claim some speculative foreign relations reverberations are caused by the Florida tax laws, but that is not enough. In Container Corp. v. Franchise Tax Board, 463 U.S. 159, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983), the Supreme Court rejected an international trade interference challenge to California's unitary tax laws, commenting, "We must keep in mind that if a state tax merely has foreign resonances, but does not implicate foreign affairs," it is not unconstitutional unless the law violates "some explicit directives from Congress." Id. at 194. The various acts cited by the Appellees do not provide any explicit directive precluding Florida's exercise of its alcoholic beverage excise tax powers.

The Trade Act of 1974, 19 U.S.C. §2411, the Tariff Act of 1930, 19 U.S.C. §1301, and the Wine Equity and Export Expansion Act of 1984, 19 U.S.C. §2801, are not impeded by Florida's potential denial of an excise tax preference to a manufacturer in a foreign country (or another state) which has already received subsidization. The Trade Act gives general power to the President to enforce United States rights under trade agreements and to respond to acts which restrict United States commerce.

Similarly, the Tariff Act of 1930 authorizes the imposition of an equal countervailing duty on any product which has been given a "bounty or grant" by a foreign country. The Wine Equity and Export Expansion Act merely authorizes the U.S. trade representative to consult with wine trading countries to seek a reduction of any barriers to trade in United States wines. It is clear that each of these acts focuses on foreign trade and techniques for protecting or increasing American export trade. The Florida provisions, which only regulate the tax paid by a licensed wholesaler within the state, simply do not reach into international relations.

The General Agreement on Tariffs and Trade (GATT) requires that imported products shall not be subject to greater domestic taxes than like products of national origin. GATT, pt. II, Article III, §1, 61 Stat. (1947). Of course the Florida provisions do not distinguish between products of national origin and products of foreign origin, so there is no offense to GATT. A product which receives a competitive advantage in a foreign country receives exactly the same tax treatment as a similar product within the United States. Also, an exempt product from a foreign country will receive the tax preference as would a like product within the United States.

Absent discrimination, and there is none here, a GATT interference argument is "frivolous." Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 439, 99 S.Ct. 1813, 60 L.Ed.2d 336

(1979).

Under the Caribbean Basin Economic Recovery Act, 19 U.S.C. §2702, the President may grant duty-free treatment to eligible articles from certain designated beneficiary countries in the Caribbean region. Again, Florida's excise tax on alcoholic beverages is totally distinct from and in no way interferes with Presidential authority to assist Caribbean nations through exemption from duties. Appellees argue that if an eligible article, such as rum from Barbados,[10] is not granted a preferential excise tax rate in Florida, this would frustrate the federal policies expressed in CBERA. But clearly, federal duties and a state excise tax are distinct, and properly exist in independent realms of authority. Surely Florida, under the Twenty-first Amendment, may impose an extremely high excise tax on rum or may ban the sale of rum altogether even though such state legislation might frustrate federal attempts for economic development in the Caribbean region. If Florida may ban rum, certainly it may tax it and not run afoul of the Caribbean Basic Economic Recovery Act.

Finally, the Florida excise tax is completely different from the "buy American" legislation invalidated in Bethlehem Steel Corp. v. Board of Commissioners, 80 Cal. Rptr. 800 (Cal. Ct. App.

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10 The record does not establish that rum manufactured in Barbados has been designated an eligible article under 19 U.S.C. §2703, nor does it establish that Barbados offers preferential treatment to its resident rum manufacturers.

1969), and the ad valorem tax on goods destined for export which are stored in bonded customs warehouses nullified in Xerox Corp. v. County of Harris, Texas, 459 U.S. 145, 103 S.Ct. 523, 74 L.Ed.2d 323 (1982). In both of those cases it was clear that the foreign policy of the United States was "seriously threatened," Container Corp., 463 U.S. at 196, by the total embargo on the purchase of foreign manufactured articles by state government and by the direct interference with Congress' comprehensive regulation of customs. Florida's tax preference system does not resonate in comparison to these activities. Absent such an interference, there is no violation of any foreign commerce power.

Conclusion

The Circuit Court judgments should be reversed, and this Court should declare Sections 565.12(1)(b) and 2(b), and 564.06(2), (3) and (4), Florida Statutes, to be constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant Jacquin-Florida Distilling Co., Inc. and Todhunter International, Inc. has been furnished by Federal Express to Barry R. Davidson, Esquire, Steel, Hector & Davis, 4000 Southeast Financial Center, Miami, FL 33131; Charles A. Wachter, Esquire, Fowler, White, et al., Suite 1700, 501 East Kennedy Boulevard, Tampa, FL 33602, David G. Robertson, Esquire, Morrison & Forstner, California Center, 345 California Street, San Francisco, California 94104-2105, and by hand delivery to Daniel C. Brown, Esquire, Department of Legal Affairs, Tax Section, Capitol Building, Tallahassee, FL 32301; Harold F. X. Purnell, Oertel & Hoffman, 2700 Blairstone Road, Suite C, Tallahassee, FL 32301 this 22nd day of May, 1987.